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INVITATION TO COMMENT

Title
Criminal Jury Instructions (CALCRIM) Revisions

Action Requested
Review and submit comments by Tuesday, June 30, 2015

Proposed Revisions and Additions
Revise and Draft Jury Instructions

Proposed Effective Date
August 2015

Recommended by
Advisory Committee on Criminal Jury Instructions
Hon. Sandy R. Kriegler, Chair

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Summary

New, revised, and withdrawn jury instructions reflecting recent developments in the law.

CALCRIM Invitation to Comment

May – June 2015

Instruction Number	Instruction Title
1700, 1703, 1750, 1801, 1802, 1850, 1900, 1957, 1970, 1971, 2304, 2377	Theft, Burglary, and Drug Crime Instructions Affected by Proposition 47
219, 221, 3453	Reasonable Doubt Series, Extension of Commitment as Sexually Violent Predator
358	Evidence of Defendant's Statements
521	First Degree Murder
570, 603	Voluntary Manslaughter: Heat of Passion—Lesser Included Offense, Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense
800	Aggravated Mayhem
1017, 1018	Oral Copulation of an Intoxicated Person
1170	Failure to Register as Sex Offender
1180	Incest
1252	Defense to Child Abduction: Protection from Immediate Injury
1500	Aggravated Arson
1863	Defense to Theft or Robbery: Claim of Right
2100, 2101, 2110, 2111, 2113	Vehicle Offenses, DUI
2410, 2411	Possession of Controlled Substance Paraphernalia, Possession of Hypodermic Needle or Syringe
2902	Damaging Phone or Electrical Line
2980	Contributing to Delinquency of Minor

Instruction Number	Instruction Title
3413	Compassionate Use Defense, Collective/Cooperative Defense
3450	Insanity: Determination, Effect of Verdict

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>***).**

<If the evidence supports a defense theory that the crime was shoplifting as defined by Penal Code section 459.5, give the following paragraph and appropriate following optional language>

[AND]

[3A. The value of the property taken or intended to be taken was more than $950.00](;/.)]

[OR]

[3B. The structure that the defendant entered was a noncommercial establishment(;/,)]

[OR]

[3C. The structure was a commercial establishment that the defendant entered during non- business hours.]]

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.] [An attached balcony designed to be entered only from inside of a private, residential apartment on the second or higher floor of a building is inside a building's *outer boundary*.]

[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; Revised October 2010, February 2012, February 2013[insert date of council approval]

BENCH NOTES

Instructional Duty

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

If the crime charged is shoplifting, give CALCRIM No. 1703 instead of this instruction.

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision(c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial.*

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].)

Whenever a private, residential apartment and its balcony are on the second or higher floor of a building, and the balcony is designed to be entered only from inside the apartment, that balcony is part of the apartment and its railing constitutes the apartment's "outer boundary." (*People v. Yarbrough* (2012) 54 Cal.4th 889, 894 [144 Cal.Rptr.3d 164, 281 P.3d 68].)

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, 459.5.
- 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].
- Burden for Consent Defense Is to Raise Reasonable Doubt ▸ *People v. Sherow* (2011) 196 Cal.App.4th 1296, 1308–1309 [128 Cal.Rptr.3d 255].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (~~3d~~ 4th ed. ~~2000~~2012) Crimes Against Property, §§ 128-129~~13, 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.)

Attached Residential Balconies

An attached residential balcony is part of an inhabited dwelling. (*People v. Jackson* (2010) 190 Cal.App.4th 918, 924-–925 [118 Cal.Rptr.3d 623] [balcony was "functionally interconnected to and immediately contiguous to . . . [part of] the apartment . . . used for 'residential activities'"]; but see dictum in *People v. Valencia* (2002) 28 Cal.4th 1, 11, fn. 5 [120 Cal.Rptr.2d 131, 46 P.3d 920] ["unenclosed balcony" is not structure satisfying "reasonable belief test"].)

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. Sherow* (2011) 196 Cal.App.4th 1296, 1302 [128 Cal.Rptr.3d 255]; *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].) The defense of consent is established when the evidence raises a reasonable doubt of consent by the owner or occupant. (*People v. Sherow* (2011) 196 Cal.App.4th 1296, 1309 [128 Cal.Rptr.3d 255]).

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].)

1703. Shoplifting (Pen. Code, § 459.5)

The defendant is charged [in Count __] with shoplifting [in violation of Penal Code section 459.5].

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

1. **The defendant entered a commercial establishment;**

2. **When the defendant entered the commercial establishment, it was open during regular business hours;**

AND

3. **When (he/she) entered the commercial establishment, (he/she) intended to commit theft.**

To decide whether the defendant intended to commit theft, please refer to the separate instructions that I (will give/have given) you on that crime.

The defendant does not need to have actually committed theft as long as (he/she) entered with the intent to do so.

[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.]

New [insert date of council approval]

BENCH NOTES

Instructional Duty

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

To instruct on the necessary intent to commit theft, see CALCRIM No. 1800, *Theft by Larceny*.

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision(c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements ▸ Pen. Code, § 459.5.
- Burden for Consent Defense Is to Raise Reasonable Doubt ▸ *People v. Sherow* (2011) 196 Cal.App.4th 1296, 1308–1309 [128 Cal.Rptr.3d 255].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2015 Supp.) Crimes Against Property, §14.

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.]

[If you find the defendant guilty of receiving stolen property, you must then decide whether the value of the property received was more than $950.]

New January 2006; Revised August 2006, June 2007, October 2010, 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.

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, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited; see* Pen. Code, § 496(a); *People v. Ceja* (2010) 49 Cal.4th 1, 6–7 [108 Cal.Rptr.3d 568, 229 P.3d 995]; *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.

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision(c) of section 290, give CALCRIM No. 3100, *Prior*

Conviction: Nonbifurcated Trial or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial.*

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~~ 4th ed. ~~2000~~2012) 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 29.4(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).)

1801. ~~Theft: Degrees~~Grand and Petty Theft (Pen. Code, §§ 486, 487–488, 490.2, 491)

If you conclude that the defendant committed a theft, you must decide whether the crime was grand theft or petty theft.

[The defendant committed petty theft if (he/she) stole property [or services] worth $950 or less.]

[The defendant committed grand theft if the value of the property [or services] is more than $950.]

[Theft of property from the person is grand theft ~~-~~if the value of the property is more than $950.~~no matter what the property is worth.~~ Theft is *from the person* if the property taken was in the clothing of, on the body of, or in a container held or carried by, that person.]

[Theft of (an automobile/a firearm/a horse/_____<*insert other item listed in statute*>**) is grand theft if the value of the property is more than $950.]**

[Theft of (fruit/nuts/_____<*insert other item listed in statute*>**) worth more than $~~250~~ 950 is grand theft.]**

[Theft of (fish/shellfish/aquacultural products/_____<*insert other item listed in statute*>**) worth more than $~~250~~ 950 is grand theft if (it/they) (is/are) taken from a (commercial fishery/research operation).]**

[The value of _____ <*insert relevant item enumerated in Pen. Code, § 487(b)(1)(B)*>**may be established by evidence proving that on the day of the theft, the same items of the same variety and weight as those stolen had a wholesale value of more than $92~~2~~50.]**

[The value of (property/services) is the fair (market value of the property/market wage for the services performed).]

<*Fair Market Value—Generally*>
[*Fair market value* is the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft.]

<*Fair Market Value—Urgent Sale*>

[*Fair market value* is the price a reasonable buyer and seller would agree on if the buyer wanted to buy the property and the seller wanted to sell it, but neither was under an urgent need to buy or sell.]

~~**All other theft is petty theft.**~~

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

New January 2006; Revised February 2012[insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction if grand theft has been charged.

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision(c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If the evidence raises an issue that the value of the property may be inflated or deflated because of some urgency on the part of either the buyer or seller, the second bracketed paragraph on fair market value should be given.

AUTHORITY

- Determination of ~~Degrees~~Grand vs. Petty Theft ▸ Pen. Code, §§ 486, 487–488, 490.2, 491.
- Value/Nature of Property/Theft from the Person ▸ Pen. Code, §§ 487(b)-(d), 486a(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (~~3d~~ 4th ed. ~~2000~~2012) Crimes Against Property §§ 4, 8.
2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §§4, 8

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

RELATED ISSUES

Proposition 47 (Penal Code Section 490.2)

After the passage of Proposition 47, theft is defined in Penal Code section 487 as a misdemeanor unless the value of the property taken exceeds $950. Pen. Code, § 490.2. This represents a change from the way grand theft was defined under Penal Code section 487(b)-(d) before the enactment of Proposition 47.

Taking From the Person

To constitute a taking from the person, the property must, in some way, be physically attached to the person. (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1472 [12 Cal.Rptr.2d 243].) Applying this rule, the court in *Williams* held that a purse taken from the passenger seat next to the driver was not a taking from the person. (*Ibid.* [see generally for court's discussion of origins of this rule].) *Williams* was distinguished by the court in *People v. Huggins* (1997) 51 Cal.App.4th 1654, 1656–1657 [60 Cal.Rptr.2d 177], where evidence that the defendant took a purse placed on the floor next to and touching the victim's foot was held sufficient to establish a taking from the person. The victim intentionally placed her foot next to her purse, physically touching it and thereby maintaining dominion and control over it.

Theft of Fish, Shellfish, or Aquacultural Products

~~If fish, shellfish, mollusks, crustaceans, kelp, algae, or other aquacultural products are taken from a commercial or research operation producing such products, it is grand theft if the value of the fish or other products exceeds $250. (Pen. Code, § 487(b)(2).)~~ Fish taken from public waters are not "property of another" within the meaning of Penal Code section 484 and 487; only the Fish and Game Code applies to such takings. (*People v. Brady* (1991) 234 Cal.App.3d 954, 959, 961–962 [286 Cal.Rptr. 19]; see, e.g., Fish & Game Code, § 12006.6 [unlawful taking of abalone].) ~~If the fish are taken from any other private waters or from someone else's possession, the taking falls within the general theft provisions and must exceed $950 in value to be grand theft. (See Pen. Code, § 487(a).)~~

Value of Written Instrument

If the thing stolen is evidence of a debt or some other written instrument, its value is (1) the amount due or secured that is unpaid, or that might be collected in any contingency, (2) the value of the property, title to which is shown in the instrument, or (3) or the sum that might be recovered in the instrument's absence.

(Pen. Code, § 492; see *Buck v. Superior Court* (1966) 245 Cal.App.2d 431, 438 [54 Cal.Rptr. 282] [trust deed securing debt]; *People v. Frankfort* (1952) 114 Cal.App.2d 680, 703 [251 P.2d 401] [promissory notes and contracts securing debt]; *People v. Quiel* (1945) 68 Cal.App.2d 674, 678 [157 P.2d 446] [unpaid bank checks]; see also Pen. Code, §§ 493 [value of stolen passage tickets], 494 [completed written instrument need not be issued or delivered].) If evidence of a debt or right of action is embezzled, its value is the sum due on or secured by the instrument. (Pen. Code, § 514.) Section 492 only applies if the written instrument has value and is taken from a victim. (See *People v. Sanders* (1998) 67 Cal.App.4th 1403, 1414, fn. 16 [79 Cal.Rptr.2d 806].)

1802. Theft: As Part of Overall Plan

If you conclude that the defendant committed more than one theft, you must then decide if the defendant committed multiple petty thefts or a single grand theft. To prove that the defendant is guilty of a single grand theft, the People must prove that:

1. **The defendant committed theft of property from the same owner or possessor on more than one occasion;**

2. **The combined value of the property was over ~~(~~$950~~/$250)~~;**

AND

3. **The defendant obtained the property as part of a single, overall plan or objective.**

If you conclude that the People have failed to prove grand theft, any multiple thefts you have found proven are petty thefts.

New January 2006; Revised February 2012[insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on aggregating the value of the property or services taken if grand theft is charged on that theory.

The total value of the property taken ~~usually~~ must exceed $950 to be grand theft. (See Pen. Code, § ~~487(a)~~490.2.) ~~For some types of property, however, the property taken need only exceed $250 in value to constitute grand theft. (See, e.g., Pen. Code, § 487(b)(1) [farm products] & (2) [commercially grown fish, shellfish, or aquacultural products] i~~

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision(c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

~~In element 2, select the appropriate value depending on what type of property was taken.~~

AUTHORITY

- Aggregating Value of Property Taken According to Overall Plan or General Intent ▸ *People v. Bailey* (1961) 55 Cal.2d 514, 518–519 [11 Cal.Rptr. 543, 360 P.2d 39].
- Grand Theft of Property or Services ▸ Pen. Code, § 487(a) [property or services exceeding $950 in value].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (~~3d~~ 4th ed. ~~2000~~2012) Crimes Against Property, §§ ~~11, 12~~12, 13.

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

RELATED ISSUES

Multiple Victims

Where multiple victims are involved, there is disagreement about applying the *Bailey* doctrine and cumulating the charges even if a single plan or intent is demonstrated. (See *People v. Brooks* (1985) 166 Cal.App.3d 24, 30 [210 Cal.Rptr. 90] [auctioneer stole proceeds from property belonging to several people during a single auction; conviction for multiple counts of theft was error]; *People v. Columbia Research Corp.* (1980) 103 Cal.App.3d Supp. 33 [163 Cal.Rptr. 455] [series of petty thefts from numerous victims occurring over 10-month period properly consolidated into single grand theft conviction where defendant employed same scheme to defraud victims of money]; but see *People v. Garcia* (1990) 224 Cal.App.3d 297, 307–309 [273 Cal.Rptr. 666] [defendant filed fraudulent bonds at different times involving different victims; multiple convictions proper]; *In re David D.* (1997) 52 Cal.App.4th 304, 309 [60 Cal.Rptr.2d 552] [stating that *Garcia* "articulately criticized" *Brooks* and *Columbia Research*; declined to apply *Bailey* to multiple acts of vandalism].)

Combining Grand Thefts

The *Bailey* doctrine can be asserted by the *defendant* to combine multiple grand thefts committed as part of an overall scheme into a single offense. (See *People v.*

Brooks (1985) 166 Cal.App.3d 24, 31 [210 Cal.Rptr. 90] [multiple grand thefts from single auction fund]; *People v. Gardner* (1979) 90 Cal.App.3d 42, 47–48 [153 Cal.Rptr. 160] [multiple grand theft of hog carcasses]; *People v. Richardson* (1978) 83 Cal.App.3d 853, 866 [148 Cal.Rptr. 120] [multiple attempted grand thefts], disapproved on other grounds in *People v. Saddler* (1979) 24 Cal.3d 671, 682, fn. 8 [156 Cal.Rptr. 871, 597 P.2d 130]; see also *People v. Sullivan* (1978) 80 Cal.App.3d 16, 19 [145 Cal.Rptr. 313] [error to refuse defense instruction about aggregating thefts].)

Theft Enhancement

If there are multiple charges of theft, whether grand or petty theft, the aggregate loss exceeds any of the statutory minimums in Penal Code section 12022.6(a), and the thefts arise from a common scheme or plan, an additional prison term may be imposed. (Pen. Code, § 12022.6(b).) If the aggregate loss exceeds statutory amounts ranging from $50,000 to $2.5 million, an additional term of one to four years may be imposed. (Pen. Code, § 12022.6(a)(1)–(4); see *People v. Daniel* (1983) 145 Cal.App.3d 168, 174–175 [193 Cal.Rptr. 277] [no error in refusing to give unanimity instruction].)

1850. Petty Theft With Prior Conviction (Pen. Code, § 666)

If you find the defendant guilty of petty theft, you must then decide whether the People have proved the additional allegation that the defendant has been convicted of a theft offense before and served a term in a penal institution as a result of that conviction. It has already been determined that the defendant is the person named in exhibits _____ <*insert numbers or descriptions of exhibits*>**. You must decide whether the evidence proves that the defendant was previously convicted of the alleged crime[s].**

To prove this allegation, the People must prove that:

1. **The defendant was previously convicted of a theft offense;**

   AND

2. **The defendant served a term in a penal institution for that conviction.**

The People allege that the defendant was previously convicted of:

[1.] A violation of _____ <*insert code section violated*>**, on _____** <*insert date of conviction*>**, in the _____** <*insert name of court*>**, in Case Number _____** <*insert docket or case number*>**(;/.)**

[AND <*Repeat for each prior conviction alleged*>**.]**

[_____ <*insert name of penal institution*> **is a *penal institution*.]**

[A *penal institution* includes [a] (city jail/county jail/state prison/any facility, camp, hospital, or institution operated to confine, treat, employ, train, and discipline persons in the legal custody of the Department of Corrections/federal prison/_____ <*specify other institution*>**).]**

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of _____ <*insert other permitted purpose, e.g., assessing credibility of the defendant*>**]. Do not consider this evidence for any other purpose.]**

[You must consider each alleged conviction separately.] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006[insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on proof of the alleged prior conviction. (See Pen. Code, § 1025 [on defendant's denial, jury must decide issue of prior convictions]; *People v. Barre* (1992) 11 Cal.App.4th 961, 965 [14 Cal.Rptr.2d 307].)

The prior conviction and incarceration requirement of Penal Code section 666 is a sentencing factor for the trial court and not an element of a section 666 offense. (*People v. Bouzas* (1991) 53 Cal.3d 467, 478–480 [279 Cal.Rptr. 847, 807 P.2d 1076]; *People v. Stevens* (1996) 48 Cal.App.4th 982, 987 [56 Cal.Rptr.2d 13].) Thus, the defendant may stipulate to the convictions. (*People v. Bouzas, supra*, 53 Cal.3d at pp. 478–480; *People v. Stevens, supra*, 48 Cal.App.4th at p. 987; *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].)

Give this instruction only if the defendant does not stipulate and the court does not grant a 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. (Pen. Code, §§ 1025, 1093; see *People v. Bouzas, supra*, 53 Cal.3d at pp. 471–472, 480.)

~~If the court grants a bifurcated trial, give CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial.*~~

To be convicted of a violation of Penal Code section 666, defendant must have been previously convicted of a crime listed in Penal Code section 667(e)(2)(c), or previously convicted under Penal Code section 368(d) or (e); or be required to register under the Sex Offender Registration Act. If applicable, give CALCRIM No. 3100, *Prior Conviction: NonBifurcated Trial.*

If the court grants a bifurcated trial, on either the offenses described in the paragraph above or a qualifying prior theft conviction, give CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial.*

AUTHORITY

- Enhancement ▸ Pen. Code, § 666; *People v. Bruno* (1987) 191 Cal.App.3d 1102, 1105 [237 Cal.Rptr. 31]; *People v. Bean* (1989) 213 Cal.App.3d 639, 642 [261 Cal.Rptr. 784].
- Convictions From Other States ▸ Pen. Code, § 668; *People v. Perry* (1962) 204 Cal.App.2d 201, 204 [22 Cal.Rptr. 54].
- Prior Incarceration Requirement ▸ *People v. James* (1957) 155 Cal.App.2d 604, 612 [318 P.2d 175] [service of partial term is sufficient]; *People v. Valenzuela* (1981) 116 Cal.App.3d 798, 803 [172 Cal.Rptr. 284] [custody resulting from credit for time served is sufficient]; but see *People v. Cortez* (1994) 24 Cal.App.4th 510, 513–514 [29 Cal.Rptr.2d 445] [participation in work release program alone is insufficient].
- Penal Institution Defined ▸ *Ex parte Wolfson* (1947) 30 Cal.2d 20, 26 [180 P.2d 326] [includes county jail]; *People v. Valenzuela* (1981) 116 Cal.App.3d 798, 803, 804, 807–808 [172 Cal.Rptr. 284] [includes California Rehabilitation Center]; see Pen. Code, §§ 667.5(h) [defining state prison or federal penal institution for purposes of prior prison term enhancement], 969b [prima facie evidence of prior conviction and term served in any state or federal penitentiary, reformatory, or county or city jail], 6081, 6082 [prison defined]; Welf. & Inst. Code, § 851 [excludes juvenile hall].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (~~3d~~ 4th ed. ~~2000~~2012) Crimes Against Property, § ~~7~~9.

3 Witkin & Epstein, California Criminal Law (~~3d~~ 4th ed. ~~2000~~2012) Punishment, § ~~334~~417.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.01[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with felony petty theft based on a prior conviction, 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 conviction has been proved. If the jury finds that the prior conviction has not been proved, then the offense should be set at a misdemeanor.

There is no crime of attempted petty theft with a prior conviction. None of the elements of Penal Code section 666 may be attempted. (*People v. Bean* (1989) 213 Cal.App.3d 639, 642, fn. 4 [261 Cal.Rptr. 784].)

RELATED ISSUES

Jury Findings on Prior Convictions
The jury must determine the truth of the prior conviction unless jury trial is waived or the defendant admits to the prior conviction. If more than one prior conviction is charged, the jury must make a separate finding on each charged prior. (Pen. Code, § 1158; *People v. Barre* (1992) 11 Cal.App.4th 961, 965–966 [14 Cal.Rptr.2d 307].)

Judicial Notice of Prior Conviction
It is error for a trial court to take judicial notice of a defendant's alleged prior conviction when a reasonable juror could only understand the notice to mean that the court conclusively determined the prior-conviction allegation to be true. (*People v. Barre* (1992) 11 Cal.App.4th 961, 965–966 [14 Cal.Rptr.2d 307] .)

1851–1859. Reserved for Future Use

1900. Forgery by False Signature (Pen. Code, § 470(a))

The defendant is charged [in Count __] with forgery committed by signing a false signature [in violation of Penal Code section 470(a)].

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

1. **The defendant signed (someone else's name/ [or] a false name) to [a/an]_____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>***;**

2. **The defendant did not have authority to sign that name;**

3. **The defendant knew that (he/she) did not have that authority;**

AND

4. **When the defendant signed the document, (he/she) intended to defraud.**

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

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

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

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

[If you find the defendant guilty of forgery by false signature, you must then decide whether the value of _____ <*insert description of document that was object of the fraud*> was more than $950.]

New January 2006[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.

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

If the charged crime involves an instrument listed in Penal Code section 473(b), use the bracketed language beginning "If you find the defendant guilty . . ."

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision(c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements ▸ Pen. Code, § 470(a).
- Signature Not Authorized—Element of Offense ▸ *People v. Hidalgo* (1933) 128 Cal.App. 703, 707 [18 P.2d 391]; *People v. Maioli* (1933) 135 Cal.App. 205, 207 [26 P.2d 871].
- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.
- Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Required Additional Findings ▸ Pen. Code, § 473(b).

Secondary Sources

~~2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168~~.
2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §§165, 168-177

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. 143, *Crimes Against Property,* § 143.04[1][a], [d][2][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery ▸ Pen. Code, §§ 664, 470.

RELATED ISSUES

Documents Not Specifically Listed in Penal Code Section 470(d)
A document not specifically listed in Penal Code section 470(d) may still come within the scope of the forgery statute if the defendant "forges the . . . handwriting of another." (Pen. Code, § 470(b).) "[A] writing not within those listed may fall under the part of section 470 covering a person who 'counterfeits or forges the . . . handwriting of another' if, on its face, the writing could possibly defraud anyone. [Citations.] The false writing must be something which will have the effect of defrauding one who acts upon it as genuine." (*People v. Gaul-Alexander* (1995) 32

Cal.App.4th 735, 741–742 [38 Cal.Rptr.2d 176].) The document must affect an identifiable legal, monetary, or property right. (*Id.* at p. 743; *Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 398–399 [265 Cal.Rptr. 855] [campaign letter with false signature of President Reagan could not be basis of forgery charge].) See CALCRIM No. 1902, *Forgery of Handwriting or Seal*.

Check Fraud

A defendant who forges the name of another on a check may be charged under either Penal Code section 470 or section 476, or both. (*People v. Hawkins* (1961) 196 Cal.App.2d 832, 838 [17 Cal.Rptr. 66]; *People v. Pearson* (1957) 151 Cal.App.2d 583, 586 [311 P.2d 927].) However, the defendant may not be convicted of and sentenced on both charges for the same conduct. (Pen. Code, § 654; *People v. Hawkins, supra,* 196 Cal.App.2d at pp. 839–840 [one count ordered dismissed]; see also CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*.)

Credit Card Fraud

A defendant who forges the name of another on a credit card sales slip may be charged under either Penal Code section 470 or section 484f, or both. (*People v. Cobb* (1971) 15 Cal.App.3d 1, 4.) However, the defendant may not be convicted and sentenced on both charges for the same conduct. (Pen. Code, § 654; see also CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*.)

Return of Property

Two cases have held that the defendant may present evidence that he or she returned some or all of the property in an effort to demonstrate that he or she did not originally intend to defraud. (*People v. Katzman* (1968) 258 Cal.App.2d 777, 790 [66 Cal.Rptr. 319], disapproved on other grounds in *Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 780 fn. 11 [200 Cal.Rptr. 916, 677 P.2d 1206]; *People v. Braver* (1964) 229 Cal.App.2d 303, 307–308 [40 Cal.Rptr. 142].) However, other cases have held, based on the particular facts of the cases, that such evidence was not admissible. (*People v. Parker* (1970) 11 Cal.App.3d 500, 510 [89 Cal.Rptr. 815] [evidence that the defendant made full restitution following arrest not relevant]; *People v. Wing* (1973) 32 Cal.App.3d 197, 202 [107 Cal.Rptr. 836] [evidence of restitution not relevant where defendant falsely signed the name of another to a check knowing he had no authority to do so].) If such evidence is presented, the court may give CALCRIM No. 1862, *Return of Property Not a Defense to Theft*. (*People v. Katzman, supra,* 258 Cal.App.2d at p. 791.) In addition, in *People v. Katzman, supra,* 258 Cal.App.2d at p. 792, the court held that, on request, the defense may be entitled to a pinpoint instruction that evidence of restitution may be relevant to determining if the defendant intended to defraud.

If the court concludes that such an instruction is appropriate, the court may add the following language to the beginning of CALCRIM No. 1862:

> If the defendant returned or offered to return [some or all of the] property obtained, that conduct may show (he/she) did not intend to defraud. If you conclude that the defendant returned or offered to return [some or all of the] property, it is up to you to decide the meaning and importance of that conduct.

Inducing Mentally Ill Person to Sign Document

In *People v. Looney* (2004) 125 Cal.App.4th 242, 248 [22 Cal.Rptr.3d 502], the court held that the defendants could not be prosecuted for forgery where the evidence showed that the defendants induced a mentally ill person to sign legal documents transferring property to them. The court concluded that, because the defendants had accurately represented the nature of the documents to the mentally ill person and had not altered the documents after he signed, they did not commit forgery. *(Ibid.)*

1957. Obtaining Money, etc., by Representing Self as Holder of Access Card (Pen. Code, § 484g(b))

The defendant is charged [in Count __] with obtaining something of value by fraudulently representing (himself/herself) as the holder of an access card [in violation of Penal Code section 484g(b)].

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

1. **The defendant obtained (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value) by representing that (he/she) was the holder of an access card;**

2. **The access card had not, in fact, been issued;**

3. **The defendant obtained (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value) without the consent of the cardholder;**

AND

4. **When the defendant obtained (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), (he/she) intended to defraud.**

An *access card* is a card, plate, code, account number, or other means of account access that can be used, alone or with another access card, to obtain (money[,]/ [or] goods[,]/ [or] services[,]/ [or] anything of value), or that can be used to begin a transfer of funds[, other than a transfer originated solely by a paper document].

[(A/An) _____ *<insert description, e.g., ATM card, credit card>* **is an access card.]**

A *cardholder* is someone who has been issued an access card [or who has agreed with a card issuer to pay debts arising from the issuance of an access card to someone else].

A *card issuer* is a company [or person] [or the agent of a company or person] that issues an access card to a cardholder.

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

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

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

[If you find the defendant guilty of obtaining money by access card, you must then decide whether the value of the (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value) obtained in any 6-month period was more than $950.]

New January 2006[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.

In the definition of "access card," the court may give the bracketed portion that begins with "other than a transfer" at its discretion. This statement is included in the statutory definition of access card. (Pen. Code, § 484d(2).) However, the committee believes it would rarely be relevant.

The court may also give the bracketed sentence stating "(A/An) _____ is an access card" if the parties agree on that point.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration

pursuant to subdivision(c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements ▸ Pen. Code, § 484g(b).
- Definitions ▸ Pen. Code, § 484d.
- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §218~~2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 193.~~

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

COMMENTARY

The committee has written this instruction based on the language of the statute, Penal Code section 484g(b). However, the committee notes that the requirements of the statute appear to be internally inconsistent.

LESSER INCLUDED OFFENSES

- Attempted Use of Access Card ▸ Pen. Code, §§ 664, 484g.

RELATED ISSUES

See the Related Issues sections in CALCRIM No. 1900, *Forgery by False Signature*, and CALCRIM No. 1950, *Sale or Transfer of Access Card or Account Number*.

1958–1969. Reserved for Future Use

1970. Making, Using, etc., Check Knowing Funds Insufficient (Pen. Code, § 476a)

The defendant is charged [in Count __] with (making[,]/ [or] drawing[,]/ [or] delivering[,]/ [or] using[,]/ [or] attempting to use) (a/an) (check[,]/ [or] draft[,]/ [or] order) knowing that there were insufficient funds for payment of the (check[,]/ [or] draft[,]/ [or] order) [in violation of Penal Code section 476a].

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

1. **The defendant willfully (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) (a/an) (check[,]/ [or] draft[,]/ [or] order) on a (bank or depositary[,]/ [or] person[,]/ [or] firm[,]/ [or] corporation) for the payment of money;**

2. **The defendant acted (for (himself/herself)[,]/ [or] as an agent or representative of someone else[,]/ [or] as an officer of a corporation);**

3. **When the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) the (check[,]/ [or] draft[,]/ [or] order), there (were/was) insufficient (funds in/ [or] credit with) the (bank or depositary[,]/ [or] person[,]/ [or] firm[,]/ [or] corporation) to cover full payment of the (check[,]/ [or] draft[,]/ [or] order) and all other outstanding (checks[,]/ [or] drafts[,]/ [or] orders) on that account;**

4. **The defendant knew that there (were/was) insufficient (funds/ [or] credit) available in that account;**

AND

5. **When the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) the (check[,]/ [or] draft[,]/ [or] order), (he/she) intended to defraud.**

(A/An) *(check[,]/* [or] *draft[,]/* [or] *order)* is a written document directing a (bank or depositary[,]/ [or] person[,]/ [or] firm[,]/ [or] corporation) to pay the indicated amount to a person named as payee or to someone designated by that person.

A person *makes or draws* (a/an) (check[,]/ [or] draft[,]/ [or] order) when he or she writes it [or causes it to be written] and signs it to authorize payment.

[*Credit,* as used here, is an arrangement or understanding with a (bank or depositary[,]/ [or] person[,]/ [or] firm[,]/ [or] corporation) for payment of money authorized by (check[,]/ [or] draft[,]/ [or] order).]

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

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

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

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

[A person *(uses/* [or] *attempts to use)* (a/an) (check[,]/ [or] draft[,]/ [or] order) if he or she represents to someone that the instrument is genuine. The representation may be made by words or conduct and may be either direct or indirect.]

[The People allege that the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) the following items: _____ *<insert description of each instrument when multiple items alleged>*. **You may not find the defendant guilty unless you all agree that the People have proved that the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) at least one of these items and you all agree on which item (he/she) (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use).]**

[If you find the defendant guilty of (making[,]/ [or] drawing[,]/ [or] delivering[,]/ [or] using[,]/ [or] attempting to use) (a/an) (check[,]/ [or] draft[,]/ [or] order) knowing that there were insufficient funds for payment of the (check[,]/ [or] draft[,]/ [or] order) you must also determine whether the defendant was previously convicted of the crimes of _____ *<insert theft crimes specified in Penal Code section 476a(b)>.*]

<Defense: Reasonable Expectation of Payment>
[Even if the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) (a/an) (check[,]/ draft[,]/ [or] order) knowing that there were insufficient funds for payment of the (check[,]/ draft[,]/ [or] order), the defendant did not intend to defraud if, at the time (he/she) acted, (he/she) reasonably and actually believed that the (check[,]/ draft[,]/ [or] order) would be paid by the (bank or depositary[,]/ [or] person[,]/ [or] firm[,]/ [or] corporation) when presented for payment.

The People have the burden of proving beyond a reasonable doubt that the defendant intended to defraud. If the People have not met this burden, you must find the defendant not guilty of this crime.]

<Defense: Defendant Informed Payee About Insufficient Funds>
[If, when the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) the (check[,]/ draft[,]/ [or] order), (he/she) told the person designated to receive payment on the (check[,]/ draft[,]/ [or] order) that there were insufficient funds to allow the (check[,]/ draft[,]/ [or] order) to be paid, then the defendant is not guilty of this crime.

The People have the burden of proving beyond a reasonable doubt that when the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) the (check[,]/ draft[,]/ [or] order), (he/she) did not tell the person designated to receive payment that there were insufficient funds to allow the (check[,]/ draft[,]/ [or] order) to be paid. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006[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.

If the prosecution alleges under a single count that the defendant made or used multiple checks, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the bracketed paragraph that begins with "The People allege that the defendant," inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

If the prosecution alleges that the defendant made or attempted to use, etc., more than $~~200~~ 950 in checks, give CALCRIM No. 1971, *Making, Using, etc., Check Knowing Funds Insufficient: Total Value of Checks*. If the prosecution alleges that the defendant has a prior forgery-related conviction, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision(c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt that the defendant expected the check to be paid, the court has a **sua sponte** duty to give the bracketed option headed "Defense: Reasonable Expectation of Payment." (*People v. Pugh* (2002) 104 Cal.App.4th 66, 73 [127 Cal.Rptr.2d 770].)

If there is sufficient evidence to raise a reasonable doubt that the defendant informed the payee that there were insufficient funds to cash the check, the court has a **sua sponte** duty to give the bracketed option headed "Defense: Defendant Informed Payee About Insufficient Funds." (*People v. Poyet* (1972) 6 Cal.3d 530, 535–537 [99 Cal.Rptr. 758, 492 P.2d 1150]; *People v. Pugh, supra,* 104 Cal.App.4th at p. 73.)

AUTHORITY

- Elements ▸ Pen. Code, § 476a.

- Intent to Defraud ‣ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ‣ Pen. Code, § 8.
- Use or Attempt to Use ‣ *People v. Pugh* (2002) 104 Cal.App.4th 66, 73 [127 Cal.Rptr.2d 770]; *People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [155 Cal.Rptr. 89], overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Informed Payee About Insufficient Funds ‣ *People v. Poyet* (1972) 6 Cal.3d 530, 535–537 [99 Cal.Rptr. 758, 492 P.2d 1150]; *People v. Pugh* (2002) 104 Cal.App.4th 66, 73 [127 Cal.Rptr.2d 770].
- Reasonable Expectation of Payment ‣ *People v. Pugh* (2002) 104 Cal.App.4th 66, 73 [127 Cal.Rptr.2d 770].
- Unanimity Instruction If Multiple Documents ‣ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §§180-187~~2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 140–147.~~

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. 143, *Crimes Against Property*, § 143.01[1], [3] (Matthew Bender).

LESSER INCLUDED OFFENSES

This offense is a misdemeanor if the total amount of the checks does not exceed $~~200~~ 950, unless the defendant has been previously convicted of a specified theft offense. (Pen. Code, § 476(b).) If the defendant is charged with a felony, 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 total amount of the checks exceeds $~~200~~ 950 or if the prior conviction has or has not been proved. If the jury finds that the amount did not exceed $~~200~~ 950 or the prior conviction was not proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Multiple Checks Totaling Over $~~200~~ 950—Number of Counts

Under Penal Code section 476a(b), the offense is a felony-misdemeanor if the total amount of the checks made or issued exceeds $~~200~~ 950. In general, the prosecution may charge a separate count for each check. However, if the individual checks do not meet the statutory amount and the offense is charged as a felony based only on the aggregate value, the prosecution can only charge a single felony count covering all of the checks that total more than $~~200~~ 950. (*In re Watkins* (1966) 64 Cal.2d 866, 868–869 [51 Cal.Rptr. 917, 415 P.2d 805].) If, on the other hand, the defendant is charged with felony offenses based on a prior forgery-related conviction, the prosecution may charge each check as a separate felony count. (*People v. Pettit* (1964) 230 Cal.App.2d 397, 398 [41 Cal.Rptr. 42].)

Grand Theft

A defendant who uses a check with insufficient funds to obtain property may be charged under either Penal Code section 476a or section 487, or both. (*People v. Martin* (1962) 208 Cal.App.2d 867, 876–878 [25 Cal.Rptr. 610].) However, the defendant may not be sentenced on both charges for the same conduct. (*Ibid.*; Pen. Code, § 654.)

Return of Property

Two cases have held that the defendant may present evidence that he or she returned some or all of the property in an effort to demonstrate that he or she did not originally intend to defraud. (*People v. Katzman* (1968) 258 Cal.App.2d 777, 790 [66 Cal.Rptr. 319], disapproved on other grounds in *Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 780, fn. 11 [200 Cal.Rptr.916, 677 P.2d 1206]; *People v. Braver* (1964) 229 Cal.App.2d 303, 307–308 [40 Cal.Rptr. 142].) However, other cases have held that, based on the facts of the particular cases, such evidence was not admissible. (*People v. Parker* (1970) 11 Cal.App.3d 500, 510 [89 Cal.Rptr. 815] [evidence of defendant's offer to repay following arrest not relevant]; *People v. Wing* (1973) 32 Cal.App.3d 197, 202 [107 Cal.Rptr. 836] [evidence of restitution not relevant where defendant falsely signed the name of another to a check knowing he had no authority to do so].) If such evidence is presented, the court may give CALCRIM No. 1862, *Return of Property Not a Defense to Theft*. (*People v. Katzman, supra*, 258 Cal.App.2d at p. 791.) In addition, in *People v. Katzman, supra*, 258 Cal.App.2d at p. 792, the court held that, on request, the defense may be entitled to a pinpoint instruction that evidence of restitution may be relevant to determining if the defendant intended to defraud. If the court concludes that such an instruction is appropriate, the court may add the following to the beginning of CALCRIM No. 1862:

If the defendant returned or offered to return [some or all of] the property obtained, that conduct may show (he/she) did not intend to defraud. If you conclude that the defendant returned or offered to return [some or all of] the property, it is up to you to decide the meaning and importance of that conduct.

1971. Making, Using, etc., Check Knowing Funds Insufficient: Total Value of Checks (Pen. Code, § 476a(b))

If you find the defendant guilty of (making[,]/ [or] drawing[,]/ [or] delivering[,]/ [or] using[,]/ [or] attempting to use) (a/an) (check[,]/ draft[,]/ [or] order) knowing that there were insufficient funds to cover it, you must then decide whether the People have proved either of the following:

1. **That at least one (check[,]/ draft[,]/ [or] order) that the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) knowing that there were insufficient funds to cover it was for more than $~~200~~ 950;**

   OR

2. **That the total value of the (checks[,]/ [or] drafts[,]/ [or] orders) charged in Count __ that the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) knowing that there were insufficient funds to cover them was more than $~~200~~ 950.**

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

New January 2006[insert date of council approval]

BENCH NOTES

Instructional Duty

If the defendant is charged with a felony based on the value of the checks, the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with the appropriate instruction on the other elements of the offense, CALCRIM No. 1970, *Making, Using, etc., Check Knowing Funds Insufficient*.

The court must provide the jury with a verdict form on which the jury will indicate ~~if~~ whether the prosecution has or has not been proved that the value of the checks exceeds $~~200~~ 950. See Penal Code section 476a(b).

AUTHORITY

- Elements ▸ Pen. Code, § 476a(b).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §180~~2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 140~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.04[3] (Matthew Bender).

RELATED ISSUES

Multiple Checks Totaling Over $~~200~~ 950—Number of Counts

Under Penal Code section 476a(b), the offense is a felony-misdemeanor if the total amount of the checks made or issued exceeds $~~200~~ 950. In general, the prosecution may charge a separate count for each check. However, if the individual checks do not meet the statutory amount and the offense is charged as a felony based only on the aggregate value, the prosecution can only charge a single felony count covering all of the checks that total more than $~~200~~950. (*In re Watkins* (1966) 64 Cal.2d 866, 868–869 [51 Cal.Rptr. 917, 415 P.2d 805].) If, on the other hand, the defendant is charged with felony offenses based on a prior forgery-related conviction, the prosecution may charge each separate check as a separate felony count. (*People v. Pettit* (1964) 230 Cal.App.2d 397, 398 [41 Cal.Rptr. 42].)

1972–1999. Reserved for Future Use

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;**

<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 paragraph 4A.>

4A. The controlled substance was _____ *<insert type of controlled substance>***;**

4B. The controlled substance was an analog of _____ *<insert type of controlled substance>***;**

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;**

OR

2. **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.]**

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.]

[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, October 2010, 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.

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration

pursuant to subdivision(c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

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.
- Definition of Analog Controlled Substance ▸ *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 (4th ed. 2012) Crimes Against Public Peace and Welfare §§97-1142 ~~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).

2377. Simple Possession of Concentrated Cannabis (Health & Saf. Code, § 11357(a))

The defendant is charged [in Count ___] with possessing concentrated cannabis, a controlled substance [in violation of Health and Safety Code section 11357(a)].

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

1. **The defendant [unlawfully] possessed concentrated cannabis;**

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

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

AND

4. **The concentrated cannabis 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.

***Concentrated cannabis* means the separated resin, whether crude or purified, from the cannabis plant.**

[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 concentrated cannabis does not, by itself, mean that a person has control over that substance.]

<Defense: Compassionate Use>
[Possession of concentrated cannabis is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to

apply, the defendant must produce evidence tending to show that (his/her) possession or cultivation of concentrated cannabis was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of concentrated cannabis possessed must be reasonably related to the patient's current medical needs. If you have a reasonable doubt about whether the defendant's possession or cultivation of concentrated cannabis was unlawful under the Compassionate Use Act, you must find the defendant not guilty.]

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

New January 2006; Revised June 2007[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.

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision(c) of section 290, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial.*

Defenses—Instructional Duty

"Concentrated cannabis or hashish is included within the meaning of 'marijuana' as the term is used in the Compassionate Use Act of 1996." (86 Ops.Cal.Atty.Gen. 180, 194 (2003).) 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(a); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- "Concentrated Cannabis" Defined ▸ Health & Saf. Code, § 11006.5.
- 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 (4th ed. 2012) Crimes Against Public Peace and Welfare §§85-113, 136-151
~~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).

219. Reasonable Doubt in Civil Commitment Proceedings

The fact that a petition to (declare respondent a sexually violent predator/declare respondent a mentally disordered offender/extend respondent's commitment) has been filed is not evidence that the petition is true. You must not be biased against the respondent just because the petition has been filed and this matter has been brought to trial. The Petitioner is required to prove the allegations of the petition are true beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the allegations of the petition are true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the Petitioner has proved the allegations of the petition are true beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the Respondent _____<*insert what must be proved in this proceeding, e.g., "is a sexually violent predator"*>**beyond a reasonable doubt, you must find the petition is not true.**

New August 2009[insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct jurors on the reasonable doubt standard in civil commitment proceedings relating to sexually violent predators (Welf. & Inst. Code, §§ 6604, 6605) and mentally disordered offenders (Pen. Code, §§ 2966, 2972) as well as extended commitment proceedings for persons found not guilty by reason of insanity (Pen. Code, § 1026.5(b)) and juveniles committed to the Division of Juvenile Facilities (Welf. & Inst. Code, §§ 1800 et seq.). ~~in the reasonable doubt standard, but not in the presumption of innocence. *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1401 [122 Cal.Rptr.2d 384]. That duty extends to not guilty by reason of insanity extended commitment (Pen. Code, § 1026.5(b)) and juvenile delinquency extended commitment (Welf. & Inst. Code, §§ 1800 et seq.) proceedings as well~~

In People v. Beeson (2002) 99 Cal.App.4th 1393, 1411 [122 Cal.Rptr.2d 384], the Court concluded that neither the federal nor the state Constitution compelled an instruction on a presumption that the allegations of a mentally disordered offender (MDO) extension petition are not true. However, no court has addressed whether the respondents in extended insanity commitment and extended juvenile commitment proceedings are entitled to an instruction on the presumption. (Pen. Code, § 1026.5(b)(7); Welf. & Inst. Code, § 1801.5; see also *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 826 [339 P.3d 998, 1004] ["section 1026.5(b)(7) provides respondents in commitment extension hearings the rights constitutionally enjoyed by criminal defendants"] and *In re Luis C.* (2004) 116 Cal.App.4th 1397, 1402-1403 [11 Cal.Rptr.3d 429] [same for Welfare and Institutions Code section 1801.5 juvenile proceedings].)

AUTHORITY

Instructional Requirements ▸ *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1401 [122 Cal.Rptr.2d 384]; Pen. Code, § 1026.5(b)(7); Welf. & Inst. Code, § 1801.5~~]~~.

Related Instructions

CALCRIM No. 220, *Reasonable Doubt.*
CALCRIM No. 3453, *Extension of Commitment.*
CALCRIM No. 3454, *Commitment as Sexually Violent Predator.*
CALCRIM No. 3454A, Hearing to Determine Current Status Under Sexually Violent Predator Act.
CALCRIM No. 3456, *Initial Commitment of Mentally Disordered Offender As Condition of Parole*.
CALCRIM No. 3457, *Extension of Commitment as Mentally Disordered Offender*.
CALCRIM No. 3458, *Extension of Commitment to Division of Juvenile Facilities.*

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment §774
~~3 Witkin & Epstein, California Criminal Law (3d ed. 2008 supp.) Punishment, § 640A~~.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 104, *Parole*, § 104.06 (Matthew Bender).

221. Reasonable Doubt: Bifurcated Trial

The People are required to prove the allegations beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the allegation is true. The evidence does not need to eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved (an/the) allegation beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received during this [phase of the] trial. Unless the evidence proves (an/the) allegation beyond a reasonable doubt, you must find that the allegation has not been proved [and disregard it completely].

New January 2006[insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on reasonable doubt in any proceeding in which that standard of proof applies.

This instruction is provided for the court to use **only** in bifurcated trials or special proceedings where the court is required to instruct on reasonable doubt but neither CALCRIM No. 219, *Reasonable Doubt in Civil Commitment Proceedings*, nor CALCRIM No. 220, *Reasonable Doubt*, would apply. **Do not** use this instruction in place of CALCRIM No. 220 in a trial on the substantive crimes charged.

Use this instruction **only** if: (1) the court has granted a bifurcated trial on a prior conviction or a sentencing factor (see CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial* and CALCRIM No. 3251, *Enhancement, Sentencing Factor, or Specific Factual Issue: Template—Bifurcated Trial*); or (2) in the penalty phase of a capital trial when the court is instructing on other violent criminal activity or prior felony convictions offered as aggravation (see CALCRIM No. 764, *Death Penalty: Evidence of Other Violent Crimes* and CALCRIM No. 765, *Death Penalty: Conviction for Other Felony Crimes*).

In the first sentence, the court, at its discretion, may wish to insert a description of the specific allegations that the People must prove.

In the final paragraph, give the bracketed phrase "and disregard it completely" when using this instruction in the penalty phase of a capital trial.

AUTHORITY

- Instructional Requirements ▸ Pen. Code, §§ 1096, 1096a; *People v. Freeman* (1994) 8 Cal.4th 450, 503–504 [34 Cal.Rptr.2d 558, 882 P.2d 249]~~; *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [122 Cal.Rptr.2d 384] [regarding lack of need to instruct on presumption of innocence for mentally disordered offenders in non-criminal proceedings]~~.

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.03[1], Ch. 85, *Submission to Jury and Verdict*, § 85.02[1A][a], [2][a][i] (Matthew Bender).

3453. Extension of Commitment (Pen. Code, § 1026.5(b)(1))

_____ *<insert name of respondent>* **has been committed to a mental health facility. You must decide whether (he/she) currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder. That is the only purpose of this proceeding. You are not being asked to decide _____** *<insert name of respondent>***'s mental condition at any other time or whether (he/she) is guilty of any crime.**

To prove that _____ *<insert name of respondent>* **currently poses a substantial danger of physical harm to others as a result of a mental disease, defect, or disorder, the People must prove beyond a reasonable doubt that:**

1. **(He/She) suffers from a mental disease, defect, or disorder;**

AND

2. **As a result of (his/her) mental disease, defect, or disorder, (he/she) now:**

    a. **Poses a substantial danger of physical harm to others;**

AND

    b. **Has serious difficulty in controlling (his/her) dangerous behavior.**

[Control of a mental condition through medication is a defense to a petition to extend commitment. To establish this defense, _____ *<insert name of respondent>* **must prove by a preponderance of the evidence that:**

1. **(He/She) no longer poses a substantial danger of physical harm to others because (he/she) is now taking medicine that controls (his/her) mental condition;**

AND

2. **(He/She) will continue to take that medicine in an unsupervised environment.**

Proof by *a preponderance of the evidence* is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.]

New January 2006; Revised June 2007, December 2008[insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the standard for extending commitment, including the constitutional requirement that the person be found to have a disorder that seriously impairs the ability to control his or her dangerous behavior. (*People v. Sudar* (2007) 158 Cal.App.4th 655, 663 [70 Cal.Rptr.3d 190].).

Give CALCRIM No. 2~~21~~19, *Reasonable Doubt~~: Bifurcated Trial~~ in Civil Commitment Proceedings*, and CALCRIM No. 3550, *Pre-Deliberation Instructions*, as well as any other relevant post-trial instructions, such as CALCRIM No. 222, *Evidence*, or CALCRIM No. 226, *Witnesses*.

The constitutional requirement for an involuntary civil commitment is that the person be found to have a disorder that seriously impairs the ability to control his or her dangerous behavior. (*Kansas v. Crane* (2002) 534 U.S. 407, 412–413 [122 S.Ct. 867, 151 L.Ed.2d 856]; *In re Howard N.* (2005) 35 Cal.4th 117, 128 [24 Cal.Rptr.3d 866, 106 P.3d 305].) This requirement applies to an extension of a commitment after a finding of not guilty by reason of insanity. (*People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1159–1165 [54 Cal.Rptr.3d 873]; *People v. Bowers* (2006) 145 Cal.App.4th 870, 878 [52 Cal.Rptr.3d 74]; *People v. Galindo* (2006) 142 Cal.App.4th 531 [48 Cal.Rptr.3d 241].)

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 1026.5(b)(1).
- Unanimous Verdict, Burden of Proof ▸ *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Affirmative Defense of Medication ▸ *People v. Bolden* (1990) 217 Cal.App.3d 1591, 1600–1602 [266 Cal.Rptr. 724].

- Serious Difficulty Controlling Behavior ▸ *People v. Sudar* (2007) 158 Cal.App.4th 655, 662–663 [70 Cal.Rptr.3d 190] [applying the principles of *Kansas v. Crane* and *In re Howard N.*].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial §§816-819

~~5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 693~~.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 86, *Insanity Trial*, § 86.10[7] (Matthew Bender).

RELATED ISSUES

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 [217 Cal.Rptr. 685, 704 P.2d 752.) In contrast, the standard for recommitment under Penal Code section 1026.5(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; see *People v. Wilder* (1995) 33 Cal.App.4th 90, 99 [39 Cal.Rptr. 2d 247].)

358. Evidence of Defendant's Statements

You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s].

[Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]

New January 2006; Revised June 2007, December 2008, February 2014[insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when there is evidence of an out-of-court oral statement by the defendant.

~~In addition, the court has a **sua sponte** duty to give~~Give the bracketed cautionary instruction on request ~~when~~ if there is evidence of an incriminating out-of-court oral statement made by the defendant. (*People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62].)~~. (*People v. Beagle* (1972) 6 Cal.3d 441, 455-456 [99 Cal.Rptr. 313, 492 P.2d 1].) An exception is that in~~In the penalty phase of a capital trial, the bracketed paragraph should be given only if the defense requests it. (*People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].)

The bracketed cautionary instruction is not required when the defendant's incriminating statements are written or tape-recorded. (*People v. Gardner* (1961) 195 Cal.App.2d 829, 833 [16 Cal.Rptr. 256]; *People v. Hines* (1964) 61 Cal.2d 164, 173 [37 Cal.Rptr. 622, 390 P.2d 398], disapproved on other grounds in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40 [175 Cal.Rptr. 738, 631 P.2d 446]; *People v. Scherr* (1969) 272 Cal.App.2d 165, 172 [77 Cal.Rptr. 35]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 [120 Cal.Rptr.2d 477, 47 P.3d 262] [admonition to view non-recorded statements with caution applies only to a

defendant's incriminating statements].) If the jury heard both inculpatory and exculpatory, or only inculpatory, statements attributed to the defendant, give the bracketed paragraph. If the jury heard only exculpatory statements by the defendant, do not give the bracketed paragraph.
If the defendant was a minor suspected of murder who made a statement in a custodial interview that did not comply with Penal Code section 859.5, give the following additional instruction:

Consider with caution any statement tending to show defendant's guilt made by (him/her) during _____<*insert description of interview, e.g., interview with Officer Smith of October 15, 2013*.>

When a defendant's statement is a verbal act, as in conspiracy cases, this instruction applies. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224 [249 Cal.Rptr. 71, 756 P.2d 795]; *People v. Ramirez* (1974) 40 Cal.App.3d 347, 352 [114 Cal.Rptr. 916]; see also, e.g., *Peabody v. Phelps* (1858) 9 Cal. 213, 229 [similar, in civil cases.]; but see *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 [13 Cal.Rptr.3d 509] [no sua sponte duty to instruct with CALJIC 2.71 in criminal threat case because "truth" of substance of the threat was not relevant and instructing jury to view defendant's statement with caution could suggest that exercise of "caution" supplanted need for finding guilt beyond a reasonable doubt].)

When a defendant's statement is an element of the crime, as in conspiracy or criminal threats (Pen. Code, § 422), this instruction does not applystill applies. (*People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62], overruling *People v. Zichko* (2004) 118 Cal.App.4th 1055, 1057 [13 Cal.Rptr.3d509].)

Related Instructions
If out-of-court oral statements made by the defendant are prominent pieces of evidence in the trial, then CALCRIM No. 359, *Corpus Delicti: Independent Evidence of a Charged Crime*, may also have to be given together with the bracketed cautionary instruction.

AUTHORITY

- Instructional Requirements *People v. Diaz* (2015) 60 Cal.4th 1176 [185 Cal.Rptr.3d 431, 345 P.3d 62] *People v. Beagle* (1972) 6 Cal.3d 441, 455–456 [99 Cal.Rptr. 313, 492 P.2d 1];; *People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297].

- Custodial Statements by Minors Suspected of Murder ▸ Pen. Code, § 859.5, effective 1/1/2014.

Secondary Sources

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial §§683-686, 723, 724, 733.

1 Witkin, California Evidence (5th ed. 2012), Hearsay §52.

3 Witkin, California Evidence (5th ed. 2012), Presentation at Trial §127~~5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, §§ 614, 641, 650.~~

~~1 Witkin, California Evidence (4th ed. 2000) Hearsay, § 51.~~

~~3 Witkin, California Evidence (4th ed. 2000) Presentation, § 113~~.

2 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 30, *Confessions and Admissions*, § 30.57 (Matthew Bender).

521. First Degree Murder (Pen. Code, § 189)

<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.
The defendant *acted with premeditation* if (he/she) decided to kill before completing the act[s] that caused death.]

[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, § 16460>***.]**

[_____ *<insert type of destructive device from Pen. Code, § 16460>* **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*.]

[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 and the murder is second degree murder.

New January 2006; Revised August 2006, June 2007, April 2010, October 2010, February 2012, February 2013, February 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. 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 paragraph 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].)

Do **not** modify this instruction to include the factors set forth in *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 [73 Cal.Rptr. 550, 447 P.2d 942]. Although those factors may assist in appellate review of the sufficiency of the evidence to support findings of premeditation and deliberation, they neither define the

elements of first degree murder nor guide a jury's determination of the degree of the offense. (*People v. Moon* (2005) 37 Cal.4th 1, 31 [32 Cal.Rptr.3d 894, 117 P.3d 591]; *People v. Steele* (2002) 27 Cal.4th 1230, 1254 [120 Cal.Rptr.2d 432, 47 P.3d 225]; *People v. Lucero* (1988) 44 Cal.3d 1006, 1020 [245 Cal.Rptr. 185, 750 P.2d 1342].)

AUTHORITY

- Types of Statutory First Degree Murder ▸ Pen. Code, § 189.
- Armor Piercing Ammunition Defined ▸ Pen. Code, § 16660.
- Destructive Device Defined ▸ Pen. Code, § 16460.
- 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. Pearson* (2013) 56 Cal.4th 393, 443–444 [154 Cal.Rptr.3d 541, 297 P.3d 793]; *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 (4th ed. 2012) Crimes Against the Person, § 117..

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].)

570. Voluntary Manslaughter: Heat of Passion—Lesser Included Offense (Pen. Code, § 192(a))

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

The defendant killed someone because of a sudden quarrel or in the heat of passion if:

1. **The defendant was provoked;**

2. **As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment;**

AND

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

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

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

It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.

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

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

New January 2006; Revised December 2008, February 2014[insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on 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. (*People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

If the victim's gender identity or sexual orientation raises specific issues concerning whether provocation was objectively reasonable, give an instruction tailored to those issues on request. (Pen. Code, § 192(f), amended effective January 1, 2015).

Related Instructions

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

AUTHORITY

- Elements ▸ Pen. Code, § 192(a).
- Heat of Passion Defined ▸ *People v. Beltran* (2013) 56 Cal.4th 935, 938, 942, 957 [157 Cal.Rptr. 3d 503, 301 P.3d 1120]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Valentine* (1946) 28 Cal.2d 121, 139 [169 P.2d 1]; *People v. Lee* (1999) 20 Cal.4th 47, 59 [82 Cal.Rptr.2d 625, 971 P.2d 1001].
- "Average Person" Need Not Have Been Provoked to Kill, Just to Act Rashly and Without Deliberation ▸ (*People v. Beltran* (2013) 56 Cal.4th 935, 938, 942, 957 [157 Cal.Rptr. 3d 503, 301 P.3d 1120]); *People v. Najera* (2006) 138 Cal.App.4th 212, 223 [41 Cal.Rptr.3d 244].

- Gender Identity and Sexual Orientation Not Proper Basis for Finding Provocation Objectively Reasonable ▸ Pen. Code, § 192(f), amended effective January 1, 2015.

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person §§111, 224, 226-245~~1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 207–219~~.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict,* §§ 85.03[2][g], 85.04[1][c] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][e], 142.02[1][a], [e], [f], [2][a], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- 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].

Involuntary manslaughter is *not* a lesser included offense of voluntary manslaughter. (*People v. Orr* (1994) 22 Cal.App.4th 780, 784 [27 Cal.Rtpr.2d 553].)

RELATED ISSUES

Heat of Passion: Sufficiency of Provocation—Examples

In *People v. Breverman*, sufficient evidence of provocation existed where a mob of young men trespassed onto defendant's yard and attacked defendant's car with weapons. (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164 [77 Cal.Rptr.2d 870, 960 P.2d 1094].) Provocation has also been found sufficient based on the murder of a family member (*People v. Brooks* (1986) 185 Cal.App.3d 687, 694 [230 Cal.Rptr. 86]); a sudden and violent quarrel (*People v. Elmore* (1914) 167 Cal. 205, 211 [138 P. 989]); verbal taunts by an unfaithful wife (*People v. Berry* (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 556 P.2d 777]); and the infidelity of a lover (*People v. Borchers* (1958) 50 Cal.2d 321, 328–329 [325 P.2d 97]).

In the following cases, evidence has been found inadequate to warrant instruction on provocation: evidence of name calling, smirking, or staring and looking stone-

faced (*People v. Lucas* (1997) 55 Cal.App.4th 721, 739 [64 Cal.Rptr.2d 282]); calling someone a particular epithet (*People v. Manriquez* (2005) 37 Cal.4th 547, 585-586 [36 Cal.Rptr.3d 340, 123 P.3d 614]); refusing to have sex in exchange for drugs (*People v. Michael Sims Dixon* (1995) 32 Cal.App.4th 1547, 1555–1556 [38 Cal.Rptr.2d 859]); a victim's resistance against a rape attempt (*People v. Rich* (1988) 45 Cal.3d 1036, 1112 [248 Cal.Rptr. 510, 755 P.2d 960]); the desire for revenge (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704 [54 Cal.Rptr.2d 608]); and a long history of criticism, reproach and ridicule where the defendant had not seen the victims for over two weeks prior to the killings (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1246–1247 [7 Cal.Rptr.3d 401]). In addition the Supreme Court has suggested that mere vandalism of an automobile is insufficient for provocation. (See *People v. Breverman* (1998) 19 Cal.4th 142, 164, fn. 11 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *In re Christian S.* (1994) 7 Cal.4th 768, 779, fn. 3 [30 Cal.Rptr.2d 33, 872 P.2d 574].)

Heat of Passion: Types of Provocation

Heat of passion does not require anger or rage. It can be "any violent, intense, high-wrought or enthusiastic emotion." (*People v. Breverman* (1998) 19 Cal.4th 142, 163–164 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Heat of Passion: Verbal Provocation Sufficient

The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (*People v. Lee* (1999) 20 Cal.4th 47, 59 [82 Cal.Rptr.2d 625, 971 P.2d 1001]; *People v. Valentine* (1946) 28 Cal.2d 121, 138–139 [169 P.2d 1].)

Heat of Passion: Defendant Initial Aggressor

"[A] defendant who provokes a physical encounter by rude challenges to another person to fight, coupled with threats of violence and death to that person and his entire family, is not entitled to claim that he was provoked into using deadly force when the challenged person responds without apparent (or actual) use of such force." (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303, 1312–1313 [7 Cal.Rptr.3d 161].)

Heat of Passion: Defendant's Own Standard

Unrestrained and unprovoked rage does not constitute heat of passion and a person of extremely violent temperament cannot substitute his or her own subjective standard for heat of passion. (*People v. Valentine* (1946) 28 Cal.2d 121, 139 [169 P.2d 1] [court approved admonishing jury on this point]; *People v. Danielly* (1949) 33 Cal.2d 362, 377 [202 P.2d 18]; *People v. Berry* (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 556 P.2d 777].) The objective element of this form of voluntary manslaughter is not satisfied by evidence of a defendant's "extraordinary character

and environmental deficiencies." (*People v. Steele* (2002) 27 Cal.4th 1230, 1253 [120 Cal.Rptr.2d 432, 47 P.3d 225] [evidence of intoxication, mental deficiencies, and psychological dysfunction due to traumatic experiences in Vietnam are not provocation by the victim].)

Premeditation and Deliberation—Heat of Passion Provocation

Provocation and heat of passion that is insufficient to reduce a murder to manslaughter may nonetheless 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 the idea of premeditation or deliberation].) There is, however, no sua sponte duty to instruct the jury on this issue because provocation in this context is a defense to the element of deliberation, not an element of the crime, as it is in the manslaughter context. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 32–33 [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*.

Fetus

Manslaughter does not apply to the death of a fetus. (*People v. Carlson* (1974) 37 Cal.App.3d 349, 355 [112 Cal.Rptr. 321].) While the Legislature has included the killing of a fetus, as well as a human being, within the definition of murder under Penal Code section 187, it has "left untouched the provisions of section 192, defining manslaughter [as] the 'unlawful killing of a human being.' " (*Ibid*.)

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

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

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

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

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

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

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

AND

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

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

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

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

deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than judgment.

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

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

New January 2006; Revised August 2009, April 2010, April 2011[insert date of council approval]

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].)

If the victim's gender identity or sexual orientation raises specific issues concerning whether provocation was objectively reasonable, give an instruction tailored to those issues on request. (Pen. Code, § 192(f), amended effective January 1, 2015).

Related Instructions

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

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

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

AUTHORITY

- Attempt Defined ▸ Pen. Code, §§ 21a, 664.
- Manslaughter Defined ▸ Pen. Code, § 192.
- Attempted Voluntary Manslaughter ▸ *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824–825 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].
- Gender Identity and Sexual Orientation Not Proper Basis for Finding Provocation Objectively Reasonable ▸ Pen. Code, § 192(f), amended effective January 1, 2015..

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person §224~~1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 208~~.

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

RELATED ISSUES

Specific Intent to Kill Required

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

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

No Attempted Involuntary Manslaughter

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

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

800. Aggravated Mayhem (Pen. Code, § 205)

The defendant is charged [in Count __] with aggravated mayhem [in violation of Penal Code section 205].

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

1. **The defendant unlawfully and maliciously (disabled or disfigured someone permanently/ [or] deprived someone else of a limb, organ, or part of (his/her) body);**

2. **When the defendant acted, (he/she) intended to (permanently disable or disfigure the other person/ [or] deprive the other person of a limb, organ, or part of (his/her) body);**

AND

3. **Under the circumstances, the defendant's act showed extreme indifference to the physical or psychological well-being of the other person.**

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

[A disfiguring injury may be *permanent* even if it can be repaired by medical procedures.]

[The People do not have to prove that the defendant intended to kill.]

New January 2006[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.

In element 1, give the first option if the defendant was prosecuted for permanently disabling or disfiguring the victim. Give the second option if the defendant was

prosecuted for depriving someone of a limb, organ, or body part. (See Pen. Code, § 205.)

The bracketed sentence regarding "permanent injury" may be given on request if there is evidence that the injury may be repaired by medical procedures. (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1574–1575 [28 Cal.Rptr.2d 783] [not error to instruct that an injury may be permanent even though cosmetic repair may be medically feasible].)

The bracketed sentence stating that "The People do not have to prove that the defendant intended to kill," may be given on request if there is no evidence or conflicting evidence that the defendant intended to kill someone. (See Pen. Code, § 205.)

AUTHORITY

- Elements ▸ Pen. Code, § 205.
- Malicious Defined ▸ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Permanent Disability ▸ See, e.g., *People v. Thomas* (1979) 96 Cal.App.3d 507, 512 [158 Cal.Rptr. 120] [serious ankle injury lasting over six months], overruled on other grounds *People v. Kimble* (1988) 44 Cal.3d 480, 498 [244 Cal.Rptr. 148, 749 P.2d 803].
- Permanent Disfigurement ▸ See *People v. Hill* (1994) 23 Cal.App.4th 1566, 1571 [28 Cal.Rptr.2d 783]; see also *People v. Newble* (1981) 120 Cal.App.3d 444, 451 [174 Cal.Rptr. 637] [head is member of body for purposes of disfigurement].
- Specific Intent to Cause Maiming Injury ▸ *People v. Ferrell* (1990) 218 Cal.App.3d 828, 833 [267 Cal.Rptr. 283]; *People v. Lee* (1990) 220 Cal.App.3d 320, 324–325 [269 Cal.Rptr. 434].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person §§89-91~~1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 87~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.16 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Mayhem ‣ *People v. Robinson* (2015) 232 Cal.App.4th 69, 77-80 [180 Cal.Rptr.3d 796].
- Attempted Aggravated Mayhem ‣ Pen. Code, §§ 205, 663.
- Assault ‣ Pen. Code, § 240.
- Battery with Serious Bodily Injury ‣ Pen. Code, § 243(d); *People v. Ausbie* (2004) 123 Cal.App.4th 855 [20 Cal.Rptr.3d 371].
- Battery ‣ Pen. Code, § 242.

Assault with force likely to produce great bodily injury (Pen. Code, § 245(a)(1)) is not a lesser included offense to mayhem. (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 862-863 [20 Cal.Rptr.3d 371].

RELATED ISSUES

Victim Must Be Alive

A victim of mayhem must be alive at the time of the act. (*People v. Kraft* (2000) 23 Cal.4th 978, 1058 [99 Cal.Rptr.2d 1, 5 P.3d 68]; see *People v. Jentry* (1977) 69 Cal.App.3d 615, 629 [138 Cal.Rptr. 250].)

Evidence of Indiscriminate Attack or Actual Injury Constituting Mayhem Insufficient to Show Specific Intent

"Aggravated mayhem . . . requires the specific intent to cause the maiming injury. [Citation.] Evidence that shows no more than an 'indiscriminate attack' is insufficient to prove the required specific intent. [Citation.] Furthermore, specific intent to maim may not be inferred solely from evidence that the injury inflicted actually constitutes mayhem; instead, there must be other facts and circumstances which support an inference of intent to maim rather than to attack indiscriminately. [Citation.]" (*People v. Park* (2000) 112 Cal.App.4th 61, 64 [4 Cal.Rptr.3d 815].)

1017. Oral Copulation of an Intoxicated Person (Pen. Code, § 288a(a), (i))

The defendant is charged [in Count __] with oral copulation of a person while that person was intoxicated [in violation of Penal Code section 288a(i)].

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

1. **The defendant committed an act of oral copulation with another person;**

2. **An (intoxicating/anesthetic/controlled) substance prevented the other person from resisting;**

AND

3. **The defendant knew or reasonably should have known that the effect of an (intoxicating/anesthetic/controlled) substance prevented the other person from resisting.**

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

A person is *prevented from resisting* **if he or she is so intoxicated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.**

[_____ *<If appropriate, insert controlled substance>* **(is/are) [a] controlled substance[s].]**

<Defense: Reasonable Belief Capable of Consent>
[The defendant is not guilty of this crime if (he/she) actually and reasonably believed that the person was capable of consenting to oral copulation, even if the defendant's belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman was capable of consenting. If the People have not met this burden, you must find the defendant not guilty.]

New January 2006[insert date of council approval]

BENCH NOTES

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

A space is provided to identify controlled substances if the parties agree that there is no issue of fact.

Defenses—Instructional Duty
The court has a **sua sponte** duty to instruct on the defense of reasonable belief the person was capable of consent if there is sufficient evidence to support the defense. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 472 [98 Cal.Rptr.2d 315].)

Related Instructions
CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements ▸ Pen. Code, § 288a(a), (i).
- Consent Defined ▸ Pen. Code, § 261.6.
- Controlled Substances ▸ Health & Safety Code, §§ 11054–11058; see *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].
- Anesthetic Effect ▸ See *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651] [in context of sodomy].
- Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- "Prevented From Resisting" Defined ▸ See *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–466 [98 Cal.Rptr.2d 315] [rape of intoxicated woman].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency §§35-37, 39, 178~~2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33, 35~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [5] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation ▸ Pen. Code, §§ 663, 288a.

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

A defendant may be convicted of both oral copulation of an intoxicated person and oral copulation of an unconscious person. (*People v. Gonzalez* (2014) 60 Cal.4th 533, [179 Cal.Rptr.3d 1, 335 P.3d 1083]; Pen. Code, §§ 288a(f), (i).)

1018. Oral Copulation of an Unconscious Person (Pen. Code, § 288a(a), (f))

The defendant is charged [in Count __] with oral copulation of a person who was unconscious of the nature of the act [in violation of Penal Code section 288a(f)].

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

1. **The defendant committed an act of oral copulation with another person;**

2. **The other person was unable to resist because (he/she) was unconscious of the nature of the act;**

AND

3. **The defendant knew that the other person was unable to resist because (he/she) was unconscious of the nature of the act.**

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

A person is *unconscious of the nature of the act* if he or she is (unconscious or asleep/ [or] not aware that the act is occurring/ [or] not aware of the essential characteristics of the act because the perpetrator tricked, lied to, or concealed information from the person/ [or] not aware of the essential characteristics of the act because the perpetrator fraudulently represented that the oral copulation served a professional purpose when it served no professional purpose).

New January 2006[insert date of council approval]

BENCH NOTES

Instructional Duty

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

Related Instructions
CALCRIM No. 1016, *Oral Copulation in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements ▸ Pen. Code, § 288a(a), (f).
- Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency §§35-37, 39, 178~~2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 31–33, 35~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][c], [5] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

COMMENTARY

The statutory language describing unconsciousness includes "was not aware, knowing, perceiving, or cognizant that the act occurred." (See Pen. Code, § 288a(f)(2)–(4).) The committee did not discern any difference among the statutory terms and therefore used "aware" in the instruction. If there is an issue over a particular term, that term should be inserted in the instruction.

LESSER INCLUDED OFFENSES

- Attempted Oral Copulation ▸ Pen. Code, §§ 663, 288a.

RELATED ISSUES

See the Related Issues Section to CALCRIM No. 1015, *Oral Copulation by Force, Fear, or Threats*.

A defendant may be convicted of both oral copulation of an intoxicated person and oral copulation of an unconscious person. (*People v. Gonzalez* (2014) 60 Cal.4th 533, [179 Cal.Rptr.3d 1, 335 P.3d 1083]; Pen. Code, §§ 288a(f), (i).)

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, April 2010, October 2010, February 2013, 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. This instruction is based on the language of the statute effective January 1, 2006. The instruction may not be appropriate for offenses that occurred before 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 1, if the specific offense triggering the registration requirement is spousal rape, the instruction must include the requirement that the offense involved the use of "force or violence." (*People v. Mason* (2013) 218 Cal.App.4th 818, 822-827 [160 Cal.Rptr.3d 516].)

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].
- Spousal Rape Not Registerable Offense Absent Force or Violence. ‣ *People v. Mason* (2013) 218 Cal.App.4th 818, 825-826 [160 Cal.Rptr.3d 516].
- Definition of Residence. ‣ Pen. Code, § 290.011(g); *People v. Gonzales* (2010) 183 Cal.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. Aragon* (2012) 207 Cal.App.4th 504, 510 [143 Cal.Rptr.3d 476]; *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1067-1070 [135 Cal.Rptr.2d 775].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (4th ed. 2012) Punishment §§136-149~~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).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

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~~ does not deny equal protection of laws. (*People v. Johnson* (2015) 60 Cal.4th 871[183 Cal.Rptr.3d 96, 341 P.3d 1075][overruling ~~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~~ _____ <*insert description of relationship from Family Code section 2200*>).**

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, October 2010, February 2012[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.

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 (4th ed. 2012) Sex Offenses and Crimes Against Decency §§140-143, 178~~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).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

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,* 25 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].)

1252. Defense to Child Abduction: Protection From Immediate Injury (Pen. Code, § 278.7(a) and (b))

The defendant did not maliciously deprive a (lawful custodian of a right to custody/ [or] person of a right to visitation) if the defendant:

1. **Had a right to custody of the child when (he/she) abducted the child;**

2. **Had a good faith and reasonable belief when abducting the child that the child would suffer immediate bodily injury or emotional harm if left with the other person;**

3. **Made a report to the district attorney's office in the county where the child lived within a reasonable time after the abduction;**

4. **Began a custody proceeding in an appropriate court within a reasonable time after the abduction;**

AND

5. **Informed the district attorney's office of any change of address or telephone number for (himself/herself) and the child.**

To *abduct* means to take, entice away, keep, withhold, or conceal.

The *right to custody* means the right to physical care, custody, and control of the child because of a court order or under the law.

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

[One way a child may suffer *emotional harm* is if he or she has a parent who has committed domestic violence against the parent accused of abducting the child. Acts of "domestic violence" include, but are not limited to (1) sexual assault; (2) causing or attempting to cause bodily injury, either intentionally or recklessly; or (3) causing a person to reasonably fear imminent serious bodily injury to himself or herself or another.]

[The report to the district attorney must include the defendant's name, the defendant's or child's current address and telephone number, and the reasons the child was abducted.]

[A reasonable time within which to make a report to the district attorney's office is at least 10 days from when the defendant took the child.]

[A reasonable time to begin a custody proceeding is at least 30 days from the time the defendant took the child.]

The People have the burden of proving beyond a reasonable doubt that the defendant maliciously deprived a (lawful custodian of a right to custody/ [or] person of a right to visitation). If the People have not met this burden, you must find the defendant not guilty of _____<*insert crime charged*>**.**

New January 2006[insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on this defense if the defendant is relying on it, or if there is substantial evidence supporting the defense and the defense is not inconsistent with the defendant's theory of the case. (See *People v. Neidinger* (2006) 40 Cal.4th 67, 75, 79 [51 Cal.Rptr.3d 45][defendant must raise a reasonable doubt]; *People v. Mehaisin* (2002) 101 Cal.App.4th 958, 965 [124 Cal.Rptr.2d 683]; *People v. Sedeno* (1974) 10 Cal.3d 703, 715–716 [112 Cal.Rptr. 1, 518 P.2d 913] [duty to instruct on defenses], disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1] and in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10, 164–178 [77 Cal.Rptr.2d 870, 960 P.2d 1094].) ~~The defendant need only raise a reasonable doubt as to the facts supporting the statutory defense under Penal Code section 278.7, subdivision (a). (*People v. Neidinger* (2006) 40 Cal.4th 67, 75, 79 [51 Cal.Rptr.3d 45].)~~

People v. Mehaisin (2002) 101 Cal.App.4th 958, 965 holds that the "defendant was not entitled to a section 278.7 defense because he did not report the taking to the Sacramento District Attorney and did not a commence custody proceeding"] *People v. Neidinger* (2006) 40 Cal.4th 67, 73 fn.4, 79 explains that "the section 278.7(a) defense provides a specific example of when the person does not act maliciously. "

Give on request the bracketed paragraph regarding "emotional harm" and "domestic violence" if there is evidence that the defendant had been a victim of

domestic violence committed by the other parent. (See Pen. Code, §§ 278.7(b), 277(j); Fam. Code, §§ 6203, 6211.)

AUTHORITY

- Elements of Defense ▸ Pen. Code, § 278.7.
- Abduct Defined ▸ Pen. Code, § 277(k).
- Court Order or Custody Order Defined ▸ Pen. Code, § 277(b).
- Domestic Violence Defined ▸ Pen. Code, § 277(j); see Fam. Code, §§ 6203, 6211.
- Person Defined ▸ Pen. Code, § 277(i) [includes parent or parent's agent].
- Right to Custody Defined ▸ Pen. Code, § 277(e); see *People v. Mehaisin* (2002) 101 Cal.App.4th 958, 964 [124 Cal.Rptr.2d 683] [liberal visitation period does not constitute right to custody].
- Pen. Code § 278.7, subdivision (a), Is Specific Example of Proving Absence of Malice. (*People v. Neidinger* (2006) 40 Cal.4th 67, 79 [51 Cal.Rptr.3rd 45].)

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person §331~~1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 292~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14[2][a] (Matthew Bender).

1253–1299. Reserved for Future Use

1500. Aggravated Arson (Pen. Code, § 451.5)

If you find the defendant guilty of arson [as charged in Count[s] __], you must then decide whether[, for each crime of arson,] the People have proved the additional allegation that the arson was aggravated. [You must decide whether the People have proved this allegation for each crime of arson and return a separate finding for each crime of arson.]

To prove this allegation, the People must prove that:

1. **The defendant acted willfully, maliciously, deliberately, and with premeditation;**

[AND]

2. **The defendant acted with intent to injure one or more persons, or to damage property under circumstances likely to injure one or more persons, or to damage one or more structures or inhabited dwellings(;/.)**

[AND

<Alternative 3A—loss exceeding $~~5.65~~7 million>
[3A. The fire caused property damage and other losses exceeding $~~5.65~~7 million[, including the cost of fire suppression].]

[OR]

<Alternative 3B—destroyed five or more inhabited structures>
[3B. The fire damaged or destroyed five or more inhabited structures.]]

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

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

The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the

consequences, decided to commit the arson. The defendant acted with *premeditation* if (he/she) decided to commit the arson before committing the act that caused the arson.

[The length of time the person spends considering whether to commit arson does not alone determine whether the arson 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 commit arson made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to commit arson can be reached quickly. The test is the extent of the reflection, not the length of time.]

[A (dwelling/ [or] structure) is *inhabited* if someone lives there and either is present or has left but intends to return.]

[A (dwelling/ [or] structure) is *inhabited* if someone used it as a dwelling and left only because a natural or other disaster caused him or her to leave.]

[A (dwelling/ [or] structure) is not *inhabited* if the former residents have moved out and do not intend to return, even if some personal property remains inside.]

[A *dwelling* includes any (structure/garage/office/_____) that is attached to the house and functionally connected with it.]

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

New January 2006[insert date of council approval]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the sentencing factor if the defendant is charged with aggravated arson.

If the prosecution alleges that the fire caused more than ~~5.65~~7 million dollars in damage, give alternative A in element 3. If the prosecution alleges that the fire damaged five or more inhabited structures, give alternative B in element 3.

If the prosecution alleges that the defendant was previously convicted of arson within ten years of the current offense, give elements 1 and 2 only. The court must also give either 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.

The definitions of "deliberation" and "premeditation" and the bracketed paragraph that begins with "The length of time" are derived from the first degree murder instruction because no recorded case construes their meaning in the context of Penal Code section 451.5. (See CALCRIM No. 521, *Murder: Degrees*.)

Give the bracketed definitions of inhabited dwelling or structure if relevant.

If there is an issue as to whether the fire *caused* the property damage, give CALCRIM No. 240, *Causation*.

AUTHORITY

- Enhancement. ▸ Pen. Code, § 451.5.
- Inhabitation Defined. ▸ Pen. Code, § 459.
- House Not Inhabited Means Former Residents Not Returning ▸ *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [191 Cal.Rptr. 109].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §§268-273
~~2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 239~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property*, § 143.11 (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No. 1515, *Arson*.

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; Revised October 2010[insert date of council approval]

BENCH NOTES

Instructional Duty

There is a split in authority about whether the trial court must instruct **sua sponte** on the defense of claim of right. (See ~~When a claim of right is supported by substantial evidence, the trial court must instruct **sua sponte** on the defense. (~~*People v. Russell* (2006) 144 Cal.App.4th 1415, 1429 [51 Cal.Rptr.3d 263]; ~~*People v. Creath (1995) 31 Cal.App.4th 312, 319 [37 Cal.Rptr.2d 336*~~][sua sponte

duty when claim of right supported]; ~~*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].)*~~but see *People v. Hussain* (2014) 231 Cal.App.4th 261, 268-269 [179 Cal.Rptr.3d 679][no sua sponte duty to instruct on claim of right], following *People v. Anderson* (2011) 51 Cal.4th 989, 998 [125 Cal.Rptr.3d 408, 252 P.3d 968][no sua sponte duty to instruct on accident].)

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 (4th ed. 2012) Crimes Against Property §§36, 38~~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

2100. Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury (Veh. Code, § 23153(a))

The defendant is charged [in Count __] with causing injury to another person while (driving a vehicle/operating a vessel) 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 23153(a)].

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

1. **The defendant (drove a vehicle/operated a vessel);**

2. **When (he/she) (drove a vehicle/operated a vessel), 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].**

3. **While (driving a vehicle/operating a vessel) under the influence, the defendant also (committed an illegal act/ [or] neglected to perform a legal duty);**

AND

4. **The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.**

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/operate a vessel) with the caution of a sober person, using ordinary care, under similar circumstances.

[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 a vehicle/operate a vessel) as an ordinarily cautious person, in full possession of his or her faculties and using

reasonable care, would (drive a vehicle/operate a vessel) 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 ~~Health Services~~Public Health.

[The People allege that the defendant committed the following illegal act[s]: _____ *<list name[s] of offense[s]>***.**

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

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while (driving the vehicle/operating the vessel): (the duty to exercise ordinary care at all times and to maintain proper control of the (vehicle/vessel)/_____ *<insert other duty or duties 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 illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>
[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>
[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care 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).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have

happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

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

[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 a vehicle/operate a vessel).]

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra,* 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of "ordinary care."

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 injury, the court should give the first bracketed paragraph on causation, which includes the "direct, natural, and probable" language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the "substantial factor" definition. (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, failure to give harmless error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

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 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.

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].)

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

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2101, *Driving With 0.08 Percent Blood Alcohol Causing Injury*.

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.*

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined.*

AUTHORITY

- Elements ▸ Veh. Code, § 23153(a); *People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641].
- Alcoholic Beverage Defined ▸ Veh. Code, § 109, Bus. & Prof. Code, § 23004.
- Drug Defined ▸ Veh. Code, § 312.
- Presumptions ▸ Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- 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].
- Must Instruct on Elements of Predicate Offense ▸ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care ▸ Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243] [ordinary negligence standard applies to driving under the influence causing injury].
- Causation ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Entitlement to Use Drug Not a Defense ▸ Veh. Code, § 23630.
- 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].
- 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.~~2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.~~

~~2 Witkin, California Evidence (4th ed. 2000) Demonstrative Evidence, § 54~~.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

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

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent ‣ Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

- Driving Under the Influence Causing Injury is not a lesser included offense of vehicular manslaughter without gross negligence ‣ *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1148–1149 [66 Cal.Rptr.3d 675].

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act
"[T]he evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence." (*People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641] [italics in original]; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 668 [219 Cal.Rptr. 243].)

Act Forbidden by Law
The term " 'any act forbidden by law' . . . refers to acts forbidden by the Vehicle Code . . . ." (*People v. Clenney* (1958) 165 Cal.App.2d 241, 253 [331 P.2d 696].) The defendant must commit the act when driving the vehicle. (*People v. Capetillo* (1990) 220 Cal.App.3d 211, 217 [269 Cal.Rptr. 250] [violation of Veh. Code, § 10851 not sufficient because offense not committed "when" defendant was driving the vehicle but by mere fact that defendant was driving the vehicle].)

Neglect of Duty Imposed by Law
"In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of [the Vehicle Code] was violated." (Veh. Code, § 23153(c); *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243].) "[The] neglect of duty element . . . is satisfied by evidence which establishes that the defendant's conduct amounts to no more than

ordinary negligence." (*People v. Oyaas, supra,* 173 Cal.App.3d at p. 669.) "[T]he law imposes on any driver [the duty] to exercise ordinary care at all times and to maintain a proper control of his or her vehicle." (*Id.* at p. 670.)

Multiple Victims to One Drunk Driving Accident

"In *Wilkoff v. Superior Court* [(1985) 38 Cal.3d 345, 352 [211 Cal.Rptr. 742, 696 P.2d 134]] we held that a defendant cannot be charged with multiple counts of felony drunk driving under Vehicle Code section 23153, subdivision (a), where injuries to several people result from one act of drunk driving." (*People v. McFarland* (1989) 47 Cal.3d 798, 802 [254 Cal.Rptr. 331, 765 P.2d 493].) However, when "a defendant commits vehicular manslaughter with gross negligence[,] . . . he may properly be punished for [both the vehicular manslaughter and] injury to a separate individual that results from the same incident." (*Id.* at p. 804.) The prosecution may also charge an enhancement for multiple victims under Vehicle Code section 23558.

See also the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

2101. Driving With 0.08 Percent Blood Alcohol Causing Injury (Veh. Code, § 23153(b))

The defendant is charged [in Count __] with causing injury to another person while driving with a blood alcohol level of 0.08 percent or more [in violation of Vehicle Code section 23153(b)].

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

1. **The defendant drove a vehicle;**

2. **When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight;**

3. **When the defendant was driving with that blood alcohol level, (he/she) also (committed an illegal act/ [or] neglected to perform a legal duty);**

AND

4. **The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.**

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more 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~~Health Services~~.]

[The People allege that the defendant committed the following illegal act[s]: _____ *<list name[s] of offense[s]>*.

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

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/_____ <*insert other duty or duties 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 illegal act/[or] failed to perform [at least] one duty).

<*Alternative A—unanimity required; see Bench Notes*>
[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<*Alternative B—unanimity not required; see Bench Notes*>
[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care 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).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury 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 injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

New January 2006; Revised August 2006, April2008[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.

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra,* 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of "ordinary care."

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 injury, the court should give the first bracketed paragraph on causation, which includes the "direct, natural, and probable" language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the "substantial factor" definition. (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, failure to give harmless error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); 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 a sample of" if there is evidence that the defendant's blood alcohol level was below 0.08 percent at the time of the test.

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].)

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. 2110, *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 [78 Cal.Rptr.2d 809].)

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

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions
CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury.*

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.*

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined.*

AUTHORITY

- Elements ▸ Veh. Code, § 23153(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 149, 673 P.2d 732].
- Partition Ratio ▸ Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions ▸ Veh. Code, § 23153(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Must Instruct on Elements of Predicate Offense ▸ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care ▸ Pen. Code, § 7(2); Restatement Second of Torts, § 282.
- Causation ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- 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].

- Statute Constitutional ▸ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- 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 & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210~~.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

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

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent ▸ Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol* and CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury*.

2102–2109. Reserved for Future Use

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

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)].

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 HealthHealth Services.]

[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.]

New January 2006; Revised June 2007, April 2008[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 [78 Cal.Rptr.2d 809].)

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).
- 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 [252 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 [252 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 §562 ~~Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.~~

~~2 Witkin, California Evidence (4th ed. 2000) Demonstrative Evidence, § 54~~.

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

2111. Driving With 0.08 Percent Blood Alcohol (Veh. Code, § 23152(b))

The defendant is charged [in Count __] with driving with a blood alcohol level of 0.08 percent or more [in violation of Vehicle Code section 23152(b)].

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's blood alcohol level was 0.08 percent or more by weight.**

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more 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 HealthHealth Services.]

New January 2006; Revised August 2006, June 2007, April 2008[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 [78 Cal.Rptr.2d 809].)

The bracketed paragraph that begins with "If the People have proved beyond a reasonable doubt that a sample of" explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); 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 a sample of" 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.

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].)

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

Related Instructions
CALCRIM No. 2110, *Driving Under the Influence*.

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(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio ▸ Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions ▸ Veh. Code, §§ 23152(b), 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Statute Constitutional ▸ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- 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 & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.02 (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.

RELATED ISSUES

Partition Ratio

In 1990, the Legislature amended Vehicle Code section 23152(b) to state that the "percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath." Following this amendment, the Supreme Court held that evidence of variability of breath-alcohol partition ratios was not relevant and properly excluded. (*People v. Bransford* (1994) 8 Cal.4th 885, 890–893 [35 Cal.Rptr.2d 613, 884 P.2d 70].) See the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

2113. Driving With 0.05 Percent Blood Alcohol When Under 21 (Veh. Code, § 23140(a))

The defendant is charged [in Count __] with driving when under the age of 21 years with a blood alcohol level of 0.05 percent or more [in violation of Vehicle Code section 23140(a)].

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

1. **The defendant drove a vehicle;**

2. **When (he/she) drove, the defendant's blood alcohol level was 0.05 percent or more by weight;**

   AND

3. **At that time, the defendant was under 21 years old.**

[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~~Health Services~~.]

[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[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. Note that this offense is an infraction. (Veh. Code, §§ 40000.1, 40000.15.) However, this instruction has been included because this offense may serve as a predicate offense for gross vehicular manslaughter while intoxicated or vehicular manslaughter while intoxicated. (Pen. Code, §§ 191.5, 192(c)(3); see *People v. Goslar* (1999) 70 Cal.App.4th 270, 275–276 [82 Cal.Rptr.2d 558].)

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 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].)

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

AUTHORITY

- Elements ▸ Veh. Code, § 23140(a); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Statute Constitutional ▸ See *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732]; *People v. Goslar* (1999) 70 Cal.App.4th 270, 275–276 [82 Cal.Rptr.2d 558].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare §§272-277
~~2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210~~.

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

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol*.

2114–2124. Reserved for Future Use

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 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 used for unlawfully injecting or smoking a controlled substance;**

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

   AND

3. **The defendant knew it to be an object used for unlawfully injecting or smoking 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~~ _____ <*insert source authorized by Health & Safety Code section 11364(c)*> ~~(;/.)~~]**

~~[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; Revised October 2010, April 2011 [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.

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).)~~ Section 11364 does not apply to possession of hypodermic needles or syringes for personal use if acquired from an authorized

source. 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~~Authorized Possession Defense ▸ Health & Saf. Code, § 11364(c).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare §155~~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].)

Controlled Substances B & P Section 4140 Repealed! Instruction Withdrawn!

2411. Possession of Hypodermic Needle or Syringe (Bus. & Prof. Code, § 4140)

The defendant is charged [in Count __] with possessing [a] hypodermic (needle[s]/ [or] syringe[s]) [in violation of Business and Professions Code section 4140].

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

1. **The defendant [unlawfully] possessed [a] hypodermic (needle[s]/ [or] syringe[s]);**

2. **The defendant knew of (its/their) presence;**

AND

3. **The defendant knew that the object[s] (was/were) [a] hypodermic (needle[s]/ [or] syringe[s]).**

[Two or more persons 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.]

<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 defense must produce evidence tending to show that (his/her) possession of [a] (needle[s]/ [or] syringe[s]) was lawful. If you have a reasonable doubt about whether the defendant's possession of [a] (needle[s]/ [or] syringe[s]) was unlawful, you must find the defendant not guilty.]

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.

Defenses—Instructional Duty

Business and Professions Code section 4140 allows for the lawful possession of a hypodermic needle or hypodermic syringe when "acquired in accordance with this article." (*People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17] [authorized possession affirmative defense].) 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 the defense. (See *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. See also *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821 [27 Cal.Rptr.3d 336].

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).) If there is sufficient evidence that the defendant acquired the hypodermic needle or syringe in accordance with this project, the court has a **sua sponte** duty to instruct on the defense. Give the bracketed word "unlawfully" in element 1 and the bracketed paragraph on the defense of authorized possession.

AUTHORITY

- Elements ▸ Bus. & Prof. Code, § 4140.
- Authorized Possession Defense ▸ *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17]; *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Disease Prevention Demonstration Project ▸ Health & Saf. Code, § 121285; Bus. & Prof. Code, § 4145(a)(2).

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 381.

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. 144, *Crimes Against Order,* § 144.02; Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1][a], [b] (Matthew Bender).

2902. Damaging Phone or Electrical Line (Pen. Code, § 591)

The defendant is charged [in Count __] with (taking down[,]/ [or] removing [,]/ [or] damaging[,]/ [or] disconnecting/ [or] cutting/[or] obstructing/severing/making an unauthorized connection to) a (telegraph/telephone/cable television/electrical) line [in violation of Penal Code section 591].

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

<Alternative 1A—removed, damaged, or obstructed>

[1. The defendant unlawfully (took down[,]/ [or] removed[,]/ [or] damaged[,]/ [or] obstructed/ [or] disconnected/ [or] cut) [part of] a (telegraph/telephone/cable television/electrical) line [or mechanical equipment connected to the line];]

<Alternative 1B—severed>

[1. The defendant unlawfully severed a wire of a (telegraph/telephone/cable television/electrical) line;]

<Alternative 1C—unauthorized connection>

[1. The defendant unlawfully made an unauthorized connection with [part of] a line used to conduct electricity [or mechanical equipment connected to the line];]

AND

2. The defendant did so maliciously.

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

[As used here, *mechanical equipment* includes a telephone.]

New January 2006[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 statute uses the term "injure." (Pen. Code, § 591.) The committee has replaced the word "injure" with the word "damage" because the word "injure" generally refers to harm to a person rather than to property.

The statute uses the phrase "appurtenances or apparatus." (Pen. Code, § 591.) The committee has chosen to use the more understandable "mechanical equipment" in place of this phrase.

Give the bracketed sentence that states "*mechanical equipment* includes a telephone" on request. (*People v. Tafoya* (2001) 92 Cal.App.4th 220, 227 [111 Cal.Rptr.2d 681]; *People v. Kreiling* (1968) 259 Cal.App.2d 699, 704 [66 Cal.Rptr. 582].)

AUTHORITY

- Elements ▸ Pen. Code, § 591.
- Maliciously Defined ▸ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550 [222 Cal.Rptr. 101].
- Applies to Damage to Telephone ▸ *People v. Tafoya* (2001) 92 Cal.App.4th 220, 227; *People v. Kreiling* (1968) 259 Cal.App.2d 699, 704 [66 Cal.Rptr. 582].
- "Obstruct" Not Unconstitutionally Vague ▸ *Kreiling v. Field* (9th Cir. 1970) 431 F.2d 502, 504.
- Applies to Theft of Service ▸ *People v. Trieber* (1946) 28 Cal.2d 657, 661 [171 P.2d 1].

Seconday Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §§304, 305~~2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 258~~.

2903–2914. Reserved for Future Use

2980. Contributing to Delinquency of Minor (Pen. Code, § 272)

The defendant is charged [in Count __] with contributing to the delinquency of a minor [in violation of Penal Code section 272].

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

<Alternative A—caused or encouraged minor to come under jurisdiction of juvenile court>

[1. The defendant (committed an act/ [or] failed to perform a duty);

AND

2. In (doing so/ [or] failing to do so)[,] the defendant (caused[,]/ [or] encouraged[,]/ [or] contributed to (causing/ [or] encouraging)) a minor to become [or continue to be] a (dependent /delinquent) child of the juvenile court.]

<Alternative B—induced minor to come or remain under jurisdiction of juvenile court or not to follow court order>

[The defendant by (act[,]/ [or] failure to act[,]/ [or] threat[,]/ [or] command[,]/ [or] persuasion) induced or tried to induce a (minor/delinquent child of the juvenile court/dependent child of the juvenile court) to do either of the following:

1. Fail or refuse to conform to a lawful order of the juvenile court;

OR

2. (Do any act/Follow any course of conduct/Live in a way) that would cause or obviously tend to cause that person to become or remain a (dependent /delinquent) child of the juvenile court.]

In order to commit this crime, a person must act with [either] (general criminal intent/ [or] criminal negligence).

[In order to act with *general criminal intent,* a person must not only commit the prohibited act [or fail to do the required act], but must do so intentionally

or on purpose. However, it is not required that he or she intend to break the law.]

[*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 injury;**

AND

2. **A reasonable person would have known that acting in that way would 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 *minor* is a person under 18 years old.

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

[A parent [or legal guardian] has a duty to exercise reasonable care, supervision, protection, and control over his or her minor child.]

[A *guardian* means the legal guardian of a child.]

<A. Dependent Child Defined: Physical Abuse>

[A minor may become a *dependent child* if his or her parent [or guardian] has intentionally inflicted serious physical harm on him or her, or there is a substantial risk that the parent [or guardian] will do so.]

[The manner in which a less serious injury, if any, was inflicted, any history of repeated infliction of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian may be relevant to whether the child is at substantial risk of serious physical harm.]

[*Serious physical harm* does not include reasonable and age-appropriate spanking of the buttocks when there is no evidence of serious physical injury.]

<B. Dependent Child Defined: Neglect>

[A minor may become a *dependent child* if he or she has suffered, or is at substantial risk of suffering, serious physical harm or illness as a result of [one of the following]:

[1.] [The failure or inability of his or her parent [or guardian] to adequately supervise or protect the child(;/.)]

[OR]

[(1/2).] [The willful or negligent failure of his or her parent [or guardian] to provide the child with adequate food, clothing, shelter, or medical treatment(;/.)]

[OR]

[(1/2/3).] [The inability of his or her parent [or guardian] to provide regular care for the child due to the parent's [or guardian's] (mental illness[,]/ [or] developmental disability[,]/ [or] substance abuse).]

[A minor cannot become a dependent child based only on the fact that there is a lack of emergency shelter for the minor's family.]

[Deference must be given to a parent's [or guardian's] decision to give medical treatment, nontreatment, or spiritual treatment through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by one of its accredited practitioners. A minor cannot be found to be a dependent child unless such a finding is necessary to protect the minor from suffering serious physical harm or illness. The following factors may bear on such a determination:

1. **The nature of the treatment proposed by the parent [or guardian];**

2. **The risks, if any, to the child posed by the course of treatment or nontreatment proposed by the parent [or guardian];**

3. **The risks, if any, of any alternative course of treatment being proposed for the child by someone other than the parent [or guardian];**

AND

4. **The likely success of the course of treatment or nontreatment proposed by the parent [or guardian].]**

[A minor may be a dependent child only as long as necessary to protect him or her from the risk of suffering serious physical harm or illness.]]

<C. Dependent Child Defined: Serious Emotional Damage>

[A minor may become a *dependent child* if (his or her parent's [or guardian's] conduct[,]/ [or] the lack of a parent [or guardian] who is capable of providing appropriate care[,]) has caused the minor to suffer serious emotional damage or to face a substantial risk of suffering serious emotional damage. *Serious emotional damage* may be shown by severe anxiety, depression, withdrawal, or unruly, aggressive behavior toward himself, herself, or others. [However, a minor cannot become a *dependent child* on this basis if the parent [or guardian] willfully fails to provide mental health treatment to the minor based on a sincerely held religious belief and a less-intrusive intervention is available.]]

<D. Dependent Child Defined: Sexually Abused>

[A minor may become a *dependent child* if he or she:

1. **Has been sexually abused;**

2. **Faces a substantial risk of being sexually abused by (his or her (parent/ [or] guardian)/ [or] a member of his or her household);**

OR

3. **Has a parent [or guardian] who has failed to adequately protect him or her from sexual abuse when the parent [or guardian] knew or reasonably should have known that the child was in danger of sexual abuse.]**

<E. Dependent Child Defined: Severe Physical Abuse Under Age Five>

[A minor may become a *dependent child* if he or she is under five years old and has suffered severe physical abuse by a parent or by any person known by the parent if the parent knew or reasonably should have known that the person was physically abusing the child.

As used here, the term *severe physical abuse* means any of the following:

1. **A single act of abuse that causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death;**

2. **A single act of sexual abuse that causes significant bleeding, deep bruising, or significant external or internal swelling;**

3. **More than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness;**

OR

4. **The willful, prolonged failure to provide adequate food.]**

<F. Dependent Child Defined: Parent or Guardian Caused Death>
[A minor may become a *dependent child* if his or her parent [or guardian] caused the death of another child through abuse or neglect.]

<G. Dependent Child Defined: Left Without Support>
[A minor may become a *dependent child* if he or she has been left without any provision for support.]

[A minor may become a *dependent child* if he or she has been voluntarily surrendered according to law and has not been reclaimed within the 14-day period following that surrender.]

[A minor may become a *dependent child* if his or her parent [or guardian] has been incarcerated or institutionalized and cannot arrange for the child's care.]

[A minor may become a *dependent child* if his or her relative or other adult custodian with whom he or she resides or has been left is unwilling or unable to provide care or support for the child, the parent's whereabouts are unknown, and reasonable efforts to locate the parent have been unsuccessful.]

<H. Dependent Child Defined: Freed for Adoption>
[A minor may become a *dependent child* if he or she has been freed for adoption by one or both parents for 12 months by either relinquishment or termination of parental rights, or an adoption petition has not been granted.]

<I. Dependent Child Defined: Acts of Cruelty>

[A minor may become a *dependent child* if he or she has been subjected to an act or acts of cruelty by (his or her (parent/ [or] guardian)/ [or] a member of his or her household), or the parent [or guardian] has failed to adequately protect the child from an act or acts of cruelty when the parent [or guardian] knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty.]

<J. Dependent Child Defined: Sibling Abused>

[A minor may become a *dependent child* if his or her sibling has been abused or neglected, as explained above, and there is a substantial risk that the child will be abused or neglected in the same way. The circumstances surrounding the abuse or neglect of the sibling, the mental condition of the parent [or guardian], and other factors may bear on whether there is a substantial risk to the child.]

<Delinquent Child Defined>

[A *delinquent child* is a minor whom a court has found to have committed a crime.]

[A *delinquent child* is [also] a minor who has violated a curfew based solely on age.]

[A *delinquent child* is [also] a minor who persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parent [or guardian or custodian], or who is beyond the control of that person.]

[A *delinquent child* is [also] a minor who _____ *<insert other grounds for delinquency from Welf. & Inst. Code, § 601>***.]**

<Sexual Abuse Defined>

[*Sexual abuse* includes (rape[,]/ [and] statutory rape[,]/ [and] rape in concert[,]/ [and] incest[,]/ [and] sodomy[,]/ [and] lewd or lascivious acts on a child[,]/ [and] oral copulation[,]/ [and] sexual penetration [,]/ [and] child molestation[,]/ [and] employing a minor to perform obscene acts[,]/ [and] preparing, selling, or distributing obscene matter depicting a minor).]

To decide whether the (parent/guardian/_____ *<insert description of person alleged to have committed abuse>***) committed (that/one of those) crime[s], please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].**

[*Sexual abuse* also includes, but is not limited to, the following:

- **[Any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not semen is emitted(;/.)]**

- **[Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person(;/.)]**

- **[Any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose[, unless it is done for a valid medical purpose](;/.)]**

- **[The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks), or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification(;/.) [However, *sexual abuse* does not include touching that may be reasonably construed as normal caretaker responsibilities, interactions with, or demonstrations of affection for the child, or acts performed for a valid medical purpose(;/.)]]**

- **[The intentional masturbation of the perpetrator's genitals in the child's presence(;/.)]**

- **[Conduct by (someone who knows that he or she is aiding, assisting, employing, using, persuading, inducing, or coercing/a person responsible for a child's welfare who knows that he or she is permitting or encouraging) a child to engage in[, or assist others to engage in,] (prostitution[,]/ [or] a live performance involving obscene sexual conduct[,]/ [or] posing or modeling, alone or with others, for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction involving obscene sexual conduct)(;/.) [A *person responsible for a child's welfare* is a (parent[,]/ [or] guardian[,]/ [or] foster parent[,]/ [or] licensed administrator or employee of a public or private residential home, residential school, or other residential institution)(;/.)]]**

- **[~~Photographing~~(Depicting a child in/[,] [or] developing/[,] duplicating/[,] printing/[,] downloading/[,] streaming/[,] accessing through electronic or digital media/[,] ~~depicting,~~ [or] exchanging,) any (film/[,] photograph/[,] videotape/[,] video recording/[,]**

negative/[,] [or] slide) knowing that it shows a child engaged in an act of obscene sexual conduct. [However, *sexual abuse* does not include (conduct by a person engaged in legitimate medical, scientific, or educational activities[;]/ [or] lawful conduct between spouses[;]/ conduct by a person engaged in law enforcement activities[;]/ [or] conduct by an employee engaged in work for a commercial film developer while acting within the scope of his or her employment and as instructed by his or her employer, provided that the employee has no financial interest in the commercial developer who employs him or her).]]]

New January 2006[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.

If more than one act is alleged as a basis for the charge, the court has a **sua sponte** duty to give a unanimity instruction. (*People v. Madden* (1981) 116 Cal.App.3d 212, 215–216 [171 Cal.Rptr. 897].) Give CALCRIM No. 3500, *Unanimity*. A unanimity instruction is not required if the acts "constitute a continuing course of conduct." *(Ibid.)* See the discussion in the Bench Notes for CALCRIM No. 3500. (See also *People v. Schoonderwood* (1945) 72 Cal.App.2d 125, 127 [164 P.2d 69] [continuous course of conduct exception applied to charge of contributing to delinquency of a minor]; *People v. Dutra* (1946) 75 Cal.App.2d 311, 321–322 [171 P.2d 41] [exception did not apply].)

If the case involves allegations of child molestation and the evidence has been presented in the form of "generic testimony" about recurring events without specific dates and times, the court should determine whether it is more appropriate to give CALCRIM No. 3501, *Unanimity: When Generic Testimony of Offense Presented*. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322 [270 Cal.Rptr. 611, 792 P.2d 643].) See discussion in the Related Issues section of CALCRIM No. 3500, *Unanimity*.

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].)

The remaining bracketed paragraphs should be given on request if relevant.

AUTHORITY

- Elements and Definitions ▸ Pen. Code, § 272.
- Willfully Defined ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Sexual Abuse Defined ▸ Pen. Code, § 11165.1.
- Delinquent/Ward of Court Defined ▸ Welf. & Inst. Code, §§ 601–602.
- Dependent Child Defined ▸ Welf. & Inst. Code, § 300.
- Minor Defined ▸ Pen. Code, § 270e; Fam. Code, § 6500.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency §154~~2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Crimes and Crimes Against Decency, § 153~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[8], Ch. 144, *Crimes Against Order*, § 144.10[1] (Matthew Bender).

RELATED ISSUES

Lesser Offense of Rape or Lewd Acts

There is disagreement regarding whether a violation of Penal Code section 272 is a necessarily lesser included offense of rape or lewd and lascivious acts. The Supreme Court concluded that it was in *People v. Greer* (1947) 30 Cal.2d 589, 597–598 [184 P.2d 512], overruled on other grounds in *People v. Fields* (1996) 13 Cal.4th 289, 308, fn. 6 [52 Cal.Rptr.2d 282, 914 P.2d 832]. However, in *People v. Bobb* (1989) 207 Cal.App.3d 88, 92 [254 Cal.Rptr. 707], disapproved on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7 [47 Cal.Rptr.2d 569, 906 P.2d 531], the Court of Appeal expressly declined to follow *Greer*, concluding that "the calculus has been altered" by an intervening amendment to Welfare and Institutions Code section 601 and further faulting *Greer* for failing to analyze the elements of the lesser included offenses.

3413. Collective or Cooperative Cultivation Defense (Health & Saf. Code, § 11362.775)

(Planting[,] [or]/ cultivating[,] [or]/ harvesting[,] [or]/ drying[,] [or]/ processing) marijuana is lawful if authorized by the Medical Marijuana Program Act. The Medical Marijuana Program Act allows qualified patients [and their designated primary caregivers] to associate within the State of California to collectively or cooperatively cultivate marijuana for medical purposes, for the benefit of its members, but not for profit.

In deciding whether a collective meets these legal requirements, consider the following factors:

1. **The size of the collective's membership;**
2. **The volume of purchases from the collective;**
3. **The level of members' participation in the operation and governance of the collective;**
4. **Whether the collective was formally established as a nonprofit organization;**
5. **Presence or absence of financial records;**
6. **Accountability of the collective to its members;**
7. **Evidence of profit or loss.**

There is no limit on the number of persons who may be members of a collective.

Every member of the collective does not need to actively participate in the cultivation process. It is enough if a member provides financial support by purchasing marijuana from the collective.

A *qualified patient* is someone for whom a physician has previously recommended or approved the use of marijuana for medical purposes. [¶]

***Collectively* means involving united action or cooperative effort of all members of a group.**

***Cooperatively* means working together or using joint effort toward a common end.**

***Cultivate* means to foster the growth of a plant.**

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

The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to (plant[,] [or]/ cultivate[,] [or]/ harvest[,] [or]/ dry[,] [or]/ process) marijuana for medium purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New February 2015 [insert date of council approval]

BENCH NOTES

Instructional Duty

A collective or cooperative cultivation defense under the Medical Marijuana Program Act may be raised to certain marijuana charges. (See Health & Saf. Code, § 11362.775) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 538-539 [148 Cal.Rptr.3d 375].

AUTHORITY

- Elements ▸ Health & Saf. Code, § 11362.775.
- ~~Size of Collective and Member's Role in Cultivation Not~~ Factors To Consider ▸ *People v. Jackson* (2012) 210 Cal.App.4th 525 [148 Cal.Rptr.3d 375].~~[192 Cal.Rptr. 674]~~.
- Primary Caregiver ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061]; *People v. Mitchell* (2014) 225 Cal.App.4th 1189, 1205-1206 [170 Cal.Rptr.3d 825].
- Defendant's Burden of Proof on Medical Marijuana Program Act Defense ▸ *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 538-539 [148 Cal.Rptr.3d 375].
- All Members Need Not Participate in Cultivation ▸ *People v. Anderson* (2015) 232 Cal.App.4th 1259 [182 Cal.Rptr.3d 276].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 147.

3414–3424. Reserved for Future Use

3450. Insanity: Determination, Effect of Verdict (Pen. Code, §§ 25, 29.8)

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 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.**

Do not base a finding of not guilty by reason of insanity solely on the basis of ~~None of the following qualify as a mental disease or defect for purposes of an insanity defense:~~ a 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, October 2010, August 2014[insert date of council approval]

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, § 29.8; *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 post-trial 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, 29.8; *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, § 29.8.
- 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 (4th ed. 2012) Defenses, §§9-16, 18-201 ~~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].)