JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

CALCRIM-2018-02

Title
Criminal Jury Instructions: Revisions

Proposed Rules, Forms, Standards, or Statutes
Revise and draft jury instructions

Proposed by
Advisory Committee on Criminal Jury Instructions
Hon. Peter J. Siggins, Chair

Action Requested
Review and submit comments by Friday, November 30, 2018

Proposed Effective Date
March 15, 2019

Contact
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Summary

New and revised jury instructions reflecting user suggestions and recent developments in the law.

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. It is circulated for comment purposes only.

CALCRIM Invitation to Comment

October 29 - November 30, 2018

Instruction Number	Instruction Title
104, 202, 222	Evidence, Note-Taking and Read Back of Evidence
301, 334, 335	Single Witness's Testimony, Accomplice Testimony
520	Murder: First and Second Degree
625, 3426	Voluntary Intoxication
707, 708	Special Circumstances: Accomplice Testimony
NEW 1145	Possession of Matter Depicting Minor Engaged in Sexual Conduct
1244	Causing Minor to Engage in Commercial Sex Act
1650	Carjacking
1900, 1901, 1902, 1904, 1905, 1930, 1932 & 1935	Forgery
2140	Failure to Perform Duty Following Accident
2300	Sale, Transportation for Sale, etc., of Controlled Substance
2500	Possession of Illegal or Deadly Weapon
2530 (984, 1161, 1162, 2966)	Carrying Loaded Firearm (& Brandishing, Lewd Conduct in Public, Disorderly Conduct)
3181	Sex Offenses: Sentencing Factors – Multiple Victims
3412 & 3413	Compassionate Use; Collective or Cooperative Cultivation Defense
3454	Initial Commitment as Sexually Violent Predator

104. Evidence

You must decide what the facts are in this case. You must use only the evidence that is presented in the courtroom [or during a jury view]. "Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence. The fact that the defendant was arrested, charged with a crime, or brought to trial is not evidence of guilt.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they help you understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asks a question that suggests it is true.

During the trial, the attorneys may object to questions asked of a witness. I will rule on the objections according to the law. If I sustain an objection, the witness will not be permitted to answer, and you must ignore the question. If the witness does not answer, do not guess what the answer might have been or why I ruled as I did. If I order testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you see or hear when the court is not in session, even if it is done or said by one of the parties or witnesses.

The court [reporter] is making a (record/recording) of everything that was said during the trial. If you decide that it is necessary, you may ask that the (court reporter's record be read to/court's recording be played for) you. You must accept the (court reporter's record/court's recording) as accurate.

New January 2006; Revised April 2008, August 2009, March 2019

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these principles has been approved. (See *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750]; *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2]; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].)

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AUTHORITY

- Evidence Defined ▸ Evid. Code, § 140.
- Arguments Not Evidence ▸ *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750].
- Questions Not Evidence ▸ *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2].
- Striking Testimony ▸ *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].
- This Instruction Upheld ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1183 [67 Cal.Rptr.3d 871].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 636.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, §§ 83.01[1], 83.02[2] (Matthew Bender).

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202. Note-Taking and Reading Back of Testimony

[You have been given notebooks and may have taken notes during the trial. You may use your notes during deliberations.] Your notes are for your own individual use to help you remember what happened during the trial. Please keep in mind that your notes may be inaccurate or incomplete.

If there is a disagreement about the testimony [and stipulations] at trial, you may ask that the (court reporter's record be read to/court's recording be played for) you. It is the record that must guide your deliberations, not your notes. You must accept the (court reporter's record/court's recording) as accurate.

Please do not remove your notes from the jury room.

At the end of the trial, your notes will be (collected and destroyed/collected and retained by the court but not as a part of the case record/_____<*specify other disposition*>**).**

New January 2006; Revised June 2007, April 2008, August 2009, February 2012, March 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the members of the jury that they may take notes. California Rules of Court, Rule 2.1031.

The court may specify its preferred disposition of the notes after trial. No statute or rule of court requires any particular disposition.

AUTHORITY

- Jurors' Use of Notes ▸ California Rules of Court, Rule 2.1031.

Secondary Sources

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4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.05[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[2], [3], Ch. 87, *Death Penalty*, §§ 87.20, 87.24 (Matthew Bender).

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222. Evidence

"Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true.

During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses.

[During the trial, you were told that the People and the defense agreed, or stipulated, to certain facts. This means that they both accept those facts as true. Because there is no dispute about those facts you must also accept them as true.]

The court (reporter has made a record of/has recorded) everything that was said during the trial. If you decide that it is necessary, you may ask that the (court reporter's record be read to/court's recording be played for) you. You must accept the (court reporter's record/court's recording) as accurate.

New January 2006; Revised June 2007, August 2009, February 2012, March 2019

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these topics has been approved. (*People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750]; *People v. Samayoa* (1997) 15 Cal.4th

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795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2]; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].)

If the parties stipulated to one or more facts, give the bracketed paragraph that begins with "During the trial, you were told."

AUTHORITY

- Evidence Defined ▸ Evid. Code, § 140.
- Arguments Not Evidence ▸ *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750].
- Questions Not Evidence ▸ *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400].
- Stipulations ▸ *Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].
- Striking Testimony ▸ *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), Criminal Trial, §§ 636, 643.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, §§ 83.01[1], 83.02[2] (Matthew Bender).

RELATED ISSUES

Non-Testifying Courtroom Conduct

There is authority for an instruction informing the jury to disregard defendant's in-court, but non-testifying behavior. (*People v. Garcia* (1984) 160 Cal.App.3d 82, 90 [206 Cal.Rptr. 468] [defendant was disruptive in court; court instructed jurors they should not consider this behavior in deciding guilt or innocence].) However, if the defendant has put his or her character in issue or another basis for relevance exists, such an instruction should not be given. (*People v. Garcia, supra,* 160 Cal.App.3d at p. 91, fn. 7; *People v. Foster* (1988) 201 Cal.App.3d 20, 25 [246 Cal.Rptr. 855].)

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301. Single Witness's Testimony

[Unless I instruct you otherwise,] (T/the) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.

New January 2006; Revised April 2010, February 2012, February 2014, September 2017, March 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction on this issue in every case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 [123 Cal.Rptr. 119, 538 P.2d 247].) Insert the bracketed language if the testimony of an accomplice or other witness requires corroboration. (*People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].)

Give the bracketed phrase if any testimony requires corroboration. See: Cal. Const., art. I, § 18 [treason]; Pen. Code, §§ 1111 [accomplice testimony]; 1111.5 [in-custody informant]; 653f [solicitation of felony]; 118 [perjury]; 1108 [abortion and seduction of minor]; 532 [obtaining property by false pretenses].

Give the bracketed phrase "if you decide (he/she) is an accomplice" and CALCRIM No. 334 if the jury must determine whether a witness is an accomplice.

AUTHORITY

- Instructional Requirements ▸ Evid. Code, § 411; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885 [123 Cal.Rptr. 119, 538 P.2d 247].
- Corroboration Required ▸ *People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].
- No Corroboration Requirement for Exculpatory Accomplice Testimony ▸ *People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892].

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 125.

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

RELATED ISSUES

Uncorroborated Testimony of Defendant

The cautionary admonition regarding a single witness's testimony applies with equal force to uncorroborated testimony by a defendant. (*People v. Turner* (1990) 50 Cal.3d 668, 696, fn. 14 [268 Cal.Rptr. 706, 789 P.2d 887].)

Uncorroborated Testimony in Sex Offense Cases

In a prosecution for forcible rape, an instruction that the testimony of a single witness is sufficient may be given in conjunction with an instruction that there is no legal corroboration requirement in a sex offense case. Both instructions correctly state the law and because each focuses on a different legal point, there is no implication that the victim's testimony is more credible than the defendant's testimony. (*People v. Gammage* (1992) 2 Cal.4th 693, 700–702 [7 Cal.Rptr.2d 541, 828 P.2d 682] [resolving split of authority on whether the two instructions can be given together].)

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

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

1. **He or she personally committed the crime;**

OR

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

AND

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

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

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

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

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

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

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

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

AND

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

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

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

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

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

AND

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

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

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

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

New January 2006; Revised June 2007, April 2010, April 2011, February 2016, March 2019

BENCH NOTES

Instructional Duty

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

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

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

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the

testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

Do not give this instruction if accomplice testimony is solely exculpatory or neutral. (*People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892] [telling jurors that corroboration is required to support neutral or exonerating accomplice testimony was prejudicial error].)

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

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

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

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

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

AUTHORITY

• Instructional Requirements. Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].

• Accomplice May Not Provide Sole Basis for Admission of Other Evidence. *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].

• Consideration of Incriminating Testimony. *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].

• Defendant's Burden of Proof. *People v. Belton* (1979) 23 Cal.3d 516, 523 [153 Cal.Rptr. 195, 591 P.2d 485].

• Defense Admissions May Provide Necessary Corroboration. *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].

• Accomplice Includes Co-perpetrator. *People v. Felton* (2004) 122 Cal.App.4th 260, 268 [18 Cal.Rptr.3d 626].

• Definition of Accomplice as Aider and Abettor. *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

• Extent of Corroboration Required. *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].

• One Accomplice May Not Corroborate Another. *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].

• Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].

• Testimony of Feigned Accomplice Need Not Be Corroborated. *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].

• Uncorroborated Accomplice Testimony May Establish Corpus Delicti. *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rtpr. 834, 756 P.2d 221].

• Witness an Accomplice as a Matter of Law. *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

• In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other ‣ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].

• No Corroboration Requirement for Exculpatory Accomplice Testimony ‣ *People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892].

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 110, 111, 118, 122.
4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b], [d], Ch. 87, *Death Penalty*, § 87.23[4][b] (Matthew Bender).
6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[5][b] (Matthew Bender).

RELATED ISSUES

Out-of-Court Statements

The out-of court statement of a witness *may* constitute "testimony" within the meaning of Penal Code section 1111, and may require corroboration. (*People v. Williams* (1997) 16 Cal.4th 153, 245 [66 Cal.Rptr.2d 123, 940 P.2d 710]; *People v. Belton* (1979) 23 Cal.3d 516, 526 [153 Cal.Rptr. 195, 591 P.2d 485].) The Supreme Court has quoted with approval the following summary of the corroboration requirement for out-of-court statements:

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

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

Incest With a Minor

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

Liable to Prosecution When Crime Committed

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

he or she is an accomplice. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90 [270 Cal.Rptr. 817, 793 P.2d 23].)

Threats and Fear of Bodily Harm

A person who is induced by threats and fear of bodily harm to participate in a crime, other than murder, is not an accomplice. (*People v. Brown* (1970) 6 Cal.App.3d 619, 624 [86 Cal.Rptr. 149]; *People v. Perez* (1973) 9 Cal.3d 651, 659–660 [108 Cal.Rptr. 474, 510 P.2d 1026].)

Defense Witness

"[A]lthough an accomplice witness instruction must be properly formulated … , there is no error in giving such an instruction when the accomplice's testimony favors the defendant." (*United States v. Tirouda* (9th Cir. 2005) 394 F.3d 683, 688.)

335. Accomplice Testimony: No Dispute Whether Witness Is Accomplice

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

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

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

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

AND

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

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

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

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

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New January 2006; Revised June 2007, April 2010, August 2012, February 2016, March 2019

BENCH NOTES

Instructional Duty

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

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

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

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

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caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

Do not give this instruction if accomplice testimony is solely exculpatory or neutral. (*People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892] [telling jurors that corroboration is required to support neutral or exonerating accomplice testimony was prejudicial error].)

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

AUTHORITY

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

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Brocklehurst (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].

- Uncorroborated Accomplice Testimony May Establish Corpus Delicti ‣ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law ‣ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- This Instruction Upheld ‣ *People v. Tuggles* (2009) 179 Cal.App.4th 339, 363-367 [100 Cal.Rptr.3d 820].
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other ‣ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].
- No Corroboration Requirement for Exculpatory Accomplice Testimony ‣ *People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892].

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 108, 109, 118, 122.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, §§ 686, 738, 739.

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

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

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

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

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

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

[OR]

[1B. The defendant had a legal duty to (help/care for/rescue/warn/maintain the property of/ _____ <*insert other required action[s]*>) _____ <*insert description of decedent/person to whom duty is owed*> and the defendant failed to perform that duty and that failure caused the death of (another person/ [or] a fetus);]

[AND]

2. When the defendant (acted/[or] failed to act), (he/she) had a state of mind called malice aforethought(;/.)

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

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

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

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

The defendant ~~acted with~~had *implied malice* if:

1. (He/She) intentionally (committed ~~an~~ the act/[or] failed to act);

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2. **The natural and probable consequences of the (act/[or] failure to act) were dangerous to human life;**

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

AND

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

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

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

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

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

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

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

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

<Give the following bracketed paragraph if the second degree is the only possible degree of the crime for which the jury may return a verdict>

[If you find the defendant guilty of murder, it is murder of the second degree.]

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

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

New January 2006; Revised August 2009, October 2010, February 2013, August 2013, September 2017, March 2019

BENCH NOTES

Instructional Duty

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

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction and definition in the second bracketed causation paragraph. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].) If there is an issue regarding a superseding or intervening cause, give the appropriate portion of CALCRIM No. 620, *Causation: Special Issues*.

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If the prosecution's theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may give element 1B. ~~the bracketed portion that begins, "(A/An) _____ <insert description of person owing duty> has a legal duty to."~~ Review the Bench Notes to CALCRIM No. 582, *Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged*.

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

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

AUTHORITY

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

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 96-101, 112-113.

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

LESSER INCLUDED OFFENSES

- Voluntary Manslaughter ▸ Pen. Code, § 192(a).
- Involuntary Manslaughter ▸ Pen. Code, § 192(b).
- Attempted Murder ▸ Pen. Code, §§ 663, 189.
- Sentence Enhancements and Special Circumstances Not Considered in Lesser Included Offense Analysis ▸ *People v. Boswell* (2016) 4 Cal.App.5th 55, 59-60 [208 Cal.Rptr.3d 244].

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

RELATED ISSUES

Causation—Foreseeability

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

Second Degree Murder of a Fetus

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

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or otherwise, and hence is liable for all deaths caused by his conduct." (*Id.* at p. 870.)

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625. Voluntary Intoxication: Effects on Homicide Crimes (Pen. Code, § 29.4)

You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] [[or] the defendant was unconscious when (he/she) acted[,]] [or the defendant _____ *<insert other specific intent required in a homicide charge or other charged offense>***.]**

A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

You may not consider evidence of voluntary intoxication for any other purpose.

New January 2006; Revised August 2014, February 2016, March 2019

BENCH NOTES

Instructional Duty

With the statutory elimination of diminished capacity as a defense, there is no sua sponte duty to instruct on the effect of voluntary intoxication on the mental states required for homicide. (Pen. Code, § 28(b); *People v. Saille* (1991) 54 Cal.3d 1103, 1119–1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].) However, subsequent cases affirm that voluntary intoxication can be used to negate an element of the crime that must be proven by the prosecution. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 982 [61 Cal.Rptr.2d 39]; *People v. Visciotti* (1992) 2 Cal.4th 1, 56–57 [5 Cal.Rptr.2d 495, 825 P.2d 388].) Such an instruction is a "pinpoint" instruction, which must be given on request when there is sufficient evidence supporting the theory. (*People v. Saille, supra,* 54 Cal.3d at p. 1120.)

Include the bracketed language regarding unconsciousness if the court also gives CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

If the defendant is charged with a homicide crime that has as an element an additional specific intent requirement other than intent to kill, include the required

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intent in the last bracketed portion of the second sentence. For example, if the defendant is charged with torture murder, include "whether the defendant intended to inflict extreme and prolonged pain." Or, if the defendant is charged with felony-murder, insert intent to commit the felony where indicated. Similarly, if the defendant is also charged with a nonhomicide crime with a specific intent requirement, include that intent requirement. For example, if the defendant is charged with murder and robbery, include "whether the defendant intended to permanently deprive the owner of the property."

Evidence of voluntary intoxication is inadmissible on the question of whether a defendant believed it necessary to act in self-defense. (*People v. Soto* (2018) 4 Cal.5th 968, 970 [231 Cal.Rptr.3rd 732, 415 P.3d 789].)

AUTHORITY

- Voluntary Intoxication Defined. ▸ Pen. Code, § 29.4(c).
- Unconsciousness Not Required. ▸ *People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- No Sua Sponte Duty to Instruct. ▸ *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].
- Evidence of Intoxication Inapplicable to Implied Malice. ▸ Pen. Code, § 29.4(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].
- Applies to Attempted Murder. ▸ *People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [68 Cal.Rptr.2d 648, 945 P.2d 1197].
- Voluntary Intoxication Relevant to Knowledge. ▸ *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39].
- This Instruction Upheld. ▸ *People v. Turk* (2008) 164 Cal.App.4th 1361, 1381 [80 Cal.Rptr.3d 473]; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298 [60 Cal.Rptr.3d 677].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 30–34.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.01[4], 73.04 (Matthew Bender).

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

RELATED ISSUES

General Instruction on Voluntary Intoxication
This instruction is a specific application of CALCRIM No. 3426, *Voluntary Intoxication*, to homicide.

Unconsciousness
Unconsciousness (as defined in CALCRIM No. 3425, *Unconsciousness*) is not required. (*People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

Not Applicable in Murder Cases Based Exclusively on Implied Malice
This instruction is inapplicable to cases where the murder charge is exclusively based on a theory of *implied* malice~~,~~ because voluntary intoxication can only negate *express* malice. (Pen. Code, § 29.4(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].) Drunk-driving second degree murder is one type of case that is typically based exclusively on an implied malice theory.

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3426. Voluntary Intoxication (Pen. Code, § 29.4)

You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with _____ <*insert specific intent or mental state required, e.g.,"the intent to permanently deprive the owner of his or her property" or "knowledge that . . . " or "the intent to do the act required"***>.**

A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

In connection with the charge of _____ *<insert first charged offense requiring specific intent or mental state>* **the People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with _____<***insert specific intent or mental state required, e.g.,"the intent to permanently deprive the owner of his or her property" or "knowledge that . . ."***>. If the People have not met this burden, you must find the defendant not guilty of _____** *<insert first charged offense requiring specific intent or mental state>***.**

<Repeat this paragraph for each offense requiring specific intent or a specific mental state.>

You may not consider evidence of voluntary intoxication for any other purpose. [Voluntary intoxication is not a defense to _____ *<insert general intent offense[s]>***.]**

New January 2006; Revised August 2012, August 2013, February 2015, March 2019

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on voluntary intoxication; however, the trial court must give this instruction on request. (*People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364]; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].) Although voluntary intoxication is not an affirmative defense to a crime, the jury may consider evidence of voluntary

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intoxication and its effect on the defendant's required mental state. (Pen. Code, § 29.4; *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39] [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735] [relevant to mental state in aiding and abetting].)

Voluntary intoxication may not be considered for general intent crimes. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1127–1128 [77 Cal.Rptr.2d 428, 959 P.2d 735]; *People v. Atkins* (2001) 25 Cal.4th 76, 81 [104 Cal.Rptr.2d 738, 18 P.3d 660]; see also *People v. Hood* (1969) 1 Cal.3d 444, 451 [82 Cal.Rptr. 618, 462 P.2d 370] [applying specific vs. general intent analysis and holding that assault type crimes are general intent; subsequently superseded by amendments to former Penal Code Section 22 [now Penal Code section 29.4] on a different point].)

If both specific and general intent crimes are charged, the court must specify the general intent crimes in the bracketed portion of the last sentence and instruct the jury that voluntary intoxication is not a defense to those crimes. (*People v. Aguirre* (1995) 31 Cal.App.4th 391, 399–402 [37 Cal.Rptr.2d 48]; *People v. Rivera* (1984) 162 Cal.App.3d 141, 145–146 [207 Cal.Rptr. 756].)

If the defendant claims unconsciousness due to involuntary intoxication as a defense to driving under the influence, see *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1317-1323 [149 Cal.Rptr.3d 167].

The court may need to modify this instruction if given with CALCRIM No. 362, *Consciousness of Guilt*. (*People v. Wiidanen* (2011) 201 Cal.App.4th 526, 528, 533 [135 Cal.Rptr.3d 736].)

Evidence of voluntary intoxication is inadmissible on the question of whether a defendant believed it necessary to act in self-defense. (*People v. Soto* (2018) 4 Cal.5th 968, 970 [231 Cal.Rptr.3rd 732, 415 P.3d 789].)

Related Instructions

CALCRIM No. 3427, *Involuntary Intoxication*.

CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.

CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

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AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 29.4; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].
- Effect of Prescription Drugs ▸ *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1328, fn. 32 [149 Cal.Rptr.3d 167].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 32-39.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.04 (Matthew Bender).

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

RELATED ISSUES

Implied Malice
"[E]vidence of voluntary intoxication is no longer admissible on the issue of implied malice aforethought." (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433], quoting *People v. Reyes* (1997) 52 Cal.App.4th 975, 984, fn. 6 [61 Cal.Rptr.2d 39].)

Intoxication Based on Mistake of Fact Is Involuntary
Intoxication resulting from trickery is not "voluntary." (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–833 [194 Cal.Rptr. 633] [defendant drank punch not knowing it contained hallucinogens; court held his intoxication was result of trickery and mistake and involuntary].)

Premeditation and Deliberation
"[T]he trial court has no sua sponte duty to instruct that voluntary intoxication may be considered in determining the existence of premeditation and deliberation." (*People v. Hughes* (2002) 27 Cal.4th 287, 342 [116 Cal.Rptr.2d 401, 39 P.3d 432], citing *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see *People v. Castillo* (1997) 16 Cal.4th 1009, 1018 [68 Cal.Rptr.2d 648, 945 P.2d 1197] [counsel not ineffective for failing to request instruction specifically relating voluntary intoxication to premeditation and deliberation].)

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Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense
Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness caused by voluntary intoxication is governed by former Penal Code section 22 [now Penal Code section 29.4], rather than by section 26 and is only a partial defense to a crime. (*People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [18 Cal.Rptr.2d 431] [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime]; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 423 [79 Cal.Rptr.2d 408, 966 P.2d 442] ["if the intoxication is voluntarily induced, it can never excuse homicide. Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication [citation]."].)

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707. Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice (Pen. Code, § 1111)

In order to prove the special circumstance[s] of _____ *<insert special circumstance[s] requiring proof of additional crime>***, the People must prove that the defendant committed _____** *<insert crime[s] (other than murder) that must be proved>***. The People have presented the (statement[s]/ [or] testimony) of _____** *<insert name[s] of witness[es]>* **on this issue. Before you may consider the (statement[s]/ [or] testimony) of _____** *<insert name[s] of witness[es]>* **on the question of whether the special circumstance[s] (was/were) proved, you must decide whether (he/she/they) (was/were) [an] accomplice[s]. A person is an *accomplice* if he or she is subject to prosecution for the identical offense alleged against the defendant. Someone is subject to prosecution if he or she personally committed the offense or if:**

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

AND

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

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

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

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

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

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

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

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

AND

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

If you find that _____ *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s], then you may not find that the special circumstance[s] of _____** *<insert special circumstance[s] requiring proof of additional crime>* **(is/are) true based on (his/her/their) (statement[s]/ [or] testimony) alone. You may use the (statement[s]/ [or] testimony) of an accomplice to find the special circumstance true only if:**

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

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

AND

3. **That supporting evidence tends to connect the defendant to the commission of _____** *<insert crime[s] (other than murder) that must be proved>***.**

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

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

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

If you decide that _____ *<insert name[s] of witness[es]>* **(was/were) not [an] accomplice[s], you should evaluate (his/her/their) (statement[s]/ [or] testimony) as you would that of any other witness.**

New January 2006, Revised March 2019

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct that testimony by an accomplice must be corroborated if that testimony is used to prove a special circumstance based on a crime other than the murder charged in the case. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730].) "When the special circumstance requires proof of some other crime [besides the charged murder], that crime cannot be proved by the uncorroborated testimony of an accomplice. But when . . . it requires only proof of the motive for the murder for which defendant has already been convicted, the corroboration requirement . . . does not apply." (*Ibid.*~~)~~; see also *People v. Rices* (2017) 4 Cal.5th 49, 85-86 [226 Cal.Rptr.3d 118, 406 P.3d 788].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710 96 P.3d 30].) When the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, do not give this instruction. Give CALCRIM No. 708, *Special Circumstances: Accomplice Testimony Must Be Corroborated— No Dispute Whether Witness Is Accomplice*.

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the

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court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the nontestifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103–106 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

When the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, give CALCRIM No. 708, *Special Circumstances: Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice*.

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

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

Related Instructions
CALCRIM No. 708, *Special Circumstances: Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice*.
CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.
CALCRIM No. 335, *Accomplice Testimony: No Dispute Whether Witness Is Accomplice*.

AUTHORITY

- Duty to Instruct ▸ Pen. Code, § 1111; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].

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- Defendant's Burden of Proof ‣ *People v. Belton* (1979) 23 Cal.3d 516, 523 [153 Cal.Rptr. 195, 591 P.2d 485].
- Defense Admissions May Provide Necessary Corroboration ‣ *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor ‣ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Extent of Corroboration Required ‣ *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another ‣ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697], and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 301 fn.11 [124 Cal.Rptr. 204, 540 P.2d 44].
- Presence or Knowledge Insufficient ‣ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated ‣ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti ‣ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law ‣ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

Secondary Sources

3 Witkin & Epstein, California Evidence (4th ed. 2000) Presentation, § 98, p. 134 [wrongdoers who are not accomplices]; § 99, p. 136 ["accomplices" who appear to be victims]; § 105, p. 142.

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 461.

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

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708. Special Circumstances: Accomplice Testimony Must Be Corroborated— No Dispute Whether Witness Is Accomplice (Pen. Code, § 1111)

In order to prove the special circumstance[s] of _____ *<insert special circumstance[s] requiring proof of additional crime>***, the People must prove that the defendant committed _____** *<insert crime[s] (other than murder) that must be proved>***. The People have presented the (statement[s]/ [or] testimony) of _____** *<insert name[s] of witness[es]>* **on this issue.**

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

You may not find that the special circumstance[s] of _____ *<insert special circumstance[s] requiring proof of additional crime>* **is true based on the (statement[s]/ [or] testimony) of an accomplice alone. You may use the (statement[s]/ [or] testimony) of an accomplice to find the special circumstance true only if:**

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

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

AND

3. **That supporting evidence tends to connect the defendant to the commission of _____** *<insert crime[s] (other than murder) that must be proved>***.**

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

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

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

New January 2006, Revised March 2019

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct that testimony by an accomplice must be corroborated if that testimony is used to prove a special circumstance based on a crime other than the murder charged in the case. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730].) "When the special circumstance requires proof of some other crime [besides the charged murder], that crime cannot be proved by the uncorroborated testimony of an accomplice. But when . . . it requires only proof of the motive for the murder for which defendant has already been convicted, the corroboration requirement . . . does not apply." (*Ibid.*~~;~~, see also *People v. Rices* (2017) 4 Cal.5th 49, 85-86 [226 Cal.Rptr.3d 118, 406 P.3d 788].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) Give this instruction only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161 [123 Cal.Rptr.2d 322] [only give instruction " 'if undisputed evidence established the complicity' "].) If there is a dispute about whether the witness is an accomplice, give CALCRIM No. 707, *Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice*.

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the

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court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the nontestifying codefendant, the testimony must be corroborated and should be viewed with caution.

Related Instructions
CALCRIM No. 707, *Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice*.
CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.
CALCRIM No. 335, *Accomplice Testimony; No Dispute Whether Witness Is Accomplice*.

AUTHORITY

- Duty to Instruct ▸ Pen. Code, § 1111; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defense Admissions May Provide Necessary Corroboration ▸ *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor ▸ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Extent of Corroboration Required ▸ *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697], and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 301 fn.11 [124 Cal.Rptr. 204, 540 P.2d 44].
- Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].

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- Testimony of Feigned Accomplice Need Not Be Corroborated ‣ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti ‣ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law ‣ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

Secondary Sources

3 Witkin & Epstein, California Evidence (4th ed. 2000) Presentation, § 98, p. 134 [wrongdoers who are not accomplices]; § 99, p. 136 ["accomplices" who appear to be victims]; § 105, p. 142.

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 461.

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

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1145. Possession of Matter Depicting Minor Engaged in Sexual Conduct (Pen. Code, § 311.11(a))

The defendant is charged [in Count __] with possessing matter that shows a minor engaged in or simulating sexual conduct [in violation of Penal Code section 311.11(a).]

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

1. **The defendant possessed or controlled matter that contained [an] image[s] of a minor personally engaging in or simulating sexual conduct;**

2. **The defendant knew that (he/she) possessed or controlled the matter;**

   [AND]

3. **The defendant knew that the matter contained [an] image[s] of a minor personally engaging in or simulating sexual conduct.**

Matter,* as used in this instruction, means any visual work[s], including any (film/filmstrip/photograph/negative/slide/photocopy/video recording/computer-generated media[,]/[or] _____** *<insert other item listed in Pen. Code § 311.11(a)>).**

[*Matter* does not include drawings, figurines, or statues.]

[*Matter* does not include any film rated by the Motion Picture Association of America.]

[The *matter* does not have to be obscene.] *<For a definition of obscene, see CALCRIM 1141>*

[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.

[Two or more people may possess something at the same time.]

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A *minor* is anyone under the age of 18. [Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

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

<*Sentencing Factors*>
[If you find the defendant guilty of this crime [as charged in Count[s] __], you must then decide whether the People have proved the additional allegation[s]. [You must decide whether the People have proved (this/these) allegation[s] for each crime beyond a reasonable doubt and return a separate finding for each crime.]

<*Give the following paragraph if the defendant is charged with the felony enhancement under Penal Code section 311.11(b)*>

[To prove the prior conviction allegation, the People must prove that the defendant has at least one prior conviction for violating or attempting to violate Penal Code section 311.11(a) or for committing or attempting to commit (_____) <*insert description of offense requiring registration pursuant to Penal Code section 290*>*(./;)*]

<*Give the following four paragraphs if the defendant is charged with the felony enhancement under Penal Code section 311.11(c)(1)*>

[To prove the multiple images allegation, the People must prove that:

The *matter* the defendant knowingly possessed or controlled contained more than 600 images all of which the defendant knew showed a minor engaged in or simulating sexual conduct;

AND

The *matter* contained at least ten or more images involving a prepubescent minor or a minor under 12 years of age(./;)

Each photograph, picture, computer or computer-generated image, or any similar visual depiction counts as *one image*.

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Each video, video-clip, movie, or similar visual depiction counts as *50 images*(./;)]

<Give the following three paragraphs if the defendant is charged under Penal Code section 311.11(c)(2)>

[To prove the sexual sadism or sexual masochism allegation, the People must prove that the *matter* showed sexual sadism or sexual masochism involving a minor.

***Sexual sadism* means intentionally causing pain for purposes of sexual gratification or stimulation.**

***Sexual masochism* means intentionally experiencing pain for purposes of sexual gratification or stimulation.]**

New March 2019

BENCH NOTES

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

AUTHORITY

- Elements ▸ Pen. Code, § 311.11(a)-(c).
- Sexual Conduct Defined ▸ Pen. Code, § 311.4(d)(1); see *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130–1131 [8 Cal.Rptr.3d 372].
- Person Defined ▸ Pen. Code, § 311(c).
- Knowingly Defined ▸ Pen. Code, § 311(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Personally Defined ▸ *People v. Gerber* (2011) 196 Cal.App.4th 368, 386 [126 Cal.Rptr.3d 688].
- Possession or Control of Computer Image ▸ *Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402, 1418-1419 [87 Cal.Rptr.3d 460].

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- Simultaneous Possession of Materials at Same Location is One Offense ▸ *People v. Manfredi* (2008) 169 Cal.App.4th 622, 624 [86 Cal.Rptr.3d 810].

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1244. Causing Minor to Engage in Commercial Sex Act (Pen. Code, § 236.1(c))

The defendant is charged [in Count __] with (causing, inducing, or persuading / (and/or) attempting to cause, induce, or persuade) a minor to engage in a commercial sex act [in violation of Penal Code section 236.1(c)].

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

1. **The defendant (caused/ [or] induced/ [or] persuaded) [or] attempted to (cause/ [or] induce/ [or] persuade)] another person to engage in a commercial sex act;**

2. **When the defendant acted, (he/she) intended to (commit/ [or] maintain) a [felony] violation of _____ <***insert appropriate code section[s]***>;**

AND

3. **When the defendant did so, the other person was under 18 years of age.**

A *commercial sex act* is sexual conduct that takes place in exchange for anything of value.

When you decide whether the defendant (caused/ [or] induced/ [or] persuaded) the other person to engage in a commercial sex act, consider all of the circumstances, including the age of the other person, (his/her) relationship to the defendant [or defendant's agent[s]], and the other person's handicap or disability, if any.

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

[The other person's consent is not a defense to this crime.]

[Being mistaken about the other person's age is not a defense to this crime.]

New February 2014; Revised March 2019

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BENCH NOTES

Instructional Duty

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

Insert the correct Penal Code section into the blank provided in element 2 and give the corresponding instruction or instructions.

This instruction is based on the language of the statute effective November 7, 2012, and applies only to crimes committed on or after that date.

If the charged crime is a Penal Code section 21a attempt to violate Penal Code section 236.1(c) (*e.g.* when the intended victim is an undercover officer), also give CALCRIM No. 460, Attempt Other Than Attempted Murder. If the charged crime includes a violation of the attempt provision of Penal Code section 236.1(c) (e.g., when the victim is a minor), do not give CALCRIM No. 460, Attempt Other Than Attempted Murder. *People v. Shields* (2018) 23 Cal.App.5th 1242, 1257 [233 Cal.Rptr.3d 701] ["the attempt prong of the statute is distinct from the separate crime of attempt because a completed violation of the statute requires a person under the age of 18 while an attempt to violate the statute does not."]

AUTHORITY

- Elements and Definitions ▸ Pen. Code, § 236.1.
- Menace Defined [in context of false imprisonment] ▸ *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Actual Minor Required ▸ *People v. Shields* (2018) 23 Cal.App.5th 1242, 1256-1257 [233 Cal.Rptr.3d 701].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 278.

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

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1650. Carjacking (Pen. Code, § 215)

The defendant is charged [in Count __] with carjacking [in violation of Penal Code section 215].

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

1. **The defendant took a motor vehicle ~~that was not (his/her) own~~;**

2. **The vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger;**

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

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

AND

5. **When the defendant used force or fear to take the vehicle, (he/she) intended to deprive the other person of possession of the vehicle either temporarily or permanently.**

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

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

[The term *motor vehicle* is defined in another instruction to which you should refer.]

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

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

[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.]

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

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

New January 2006; Revised March 2017, March 2019

BENCH NOTES

Instructional Duty

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

There is no sua sponte duty to define the terms "possession," "fear," and "immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [414 P.2d 366, 51 Cal.Rptr. 238] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary to CALCRIM No. 1600, *Robbery*.

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

AUTHORITY

- Elements ▸ Pen. Code, § 215.
- Fear Defined ▸ Pen. Code, § 212.
- Motor Vehicle Defined ▸ Veh. Code, § 415.

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- Immediate Presence Defined ▸ *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Medina* (1995) 39 Cal.App.4th 643, 650 [46 Cal.Rptr.2d 112].
- Possession Defined ▸ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13-14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143–1144 [47 Cal.Rptr.2d 343].
- Carjacking Crime Against Possession, not Ownership, of Vehicle ▸ *People v. Cabrera* (2007) 152 Cal.App.4th 695, 701–702 [61 Cal.Rptr.3d 373].
- Sufficient Force ▸ *People v. Hudson* (2017) 11 Cal.App.5th 831, 837 [217 Cal.Rptr.3d 775]; *People v. Lopez* (2017) 8 Cal.App.5th 1230, 1237 [214 Cal.Rptr.3d 618].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 116.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.10[2][b], 142.10A (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Carjacking ▸ Pen. Code, §§ 663, 215; see *People v. Jones* (1999) 75 Cal.App.4th 616, 628 [89 Cal.Rptr.2d 485].

Neither theft or robbery is a necessarily included offense of carjacking. (*People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48] [theft]; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 419 [45 Cal.Rptr.2d 153] [robbery].) Vehicle theft (Veh. Code, § 10851(a)) is not a lesser included offense of carjacking. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035 [16 Cal.Rptr.3d 902, 94 P.3d 1098].)

Attempted grand theft auto is not a lesser included offense of attempted carjacking. *People v. Marquez* (2007) 152 Cal.App.4th 1064, 1066 [62 Cal.Rptr.3d 31].

RELATED ISSUES

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Force—Timing

Force or fear must be used against the victim to gain possession of the vehicle. The timing, however, "in no way depends on whether the confrontation and use of force or fear occurs before, while, or after the defendant initially takes possession of the vehicle." (*People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1133 [66 Cal.Rptr.2d 72].)

Asportation—Felonious Taking

"Felonious taking" has the same meaning in carjacking as in robbery. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1062 [6 Cal.Rptr.3d 432, 79 P.3d 548]) "To satisfy the asportation requirement for robbery, no great movement is required, and it is not necessary that the property be taken out of the physical presence of the victim. [S]light movement is enough to satisfy the asportation requirement. (*Id.* at p. 1061 [internal quotation marks and citations omitted].) The taking can occur whether or not the victim remains with the car. (*People v. Duran* (2001) 88 Cal.App.4th 1371, 1375–1377 [106 Cal.Rptr.2d 812].) Carjacking can also occur when a defendant forcibly takes a victim's car keys, not just when a defendant takes a car from the victim's presence. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 608–609 [126 Cal.Rptr.2d 855] [although victim was not physically present in the parking lot when defendant drove the car away, she had been forced to relinquish her car keys].)

1651–1699. Reserved for Future Use

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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.]**

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<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of forgery by false signature, you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) ~~*<insert description of document that was object of the fraud>*~~ **was more than $950. If you have a reasonable doubt whether the value of the** _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) ~~*<insert description of document that was object of the fraud>*~~ **has a value of more than $950, you must find this allegation has not been proved.]**

New January 2006; Revised August 2015, March 2019

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give ~~this~~ an 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*

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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).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

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)

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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

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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, *Return of Property Not a Defense to Theft*:

> 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.)*

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1901. Forgery by Endorsement (Pen. Code, § 470(a))

The defendant is charged [in Count __] with forgery committed by endorsement [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 (the back of a check/(a/an) _____ <*insert type of negotiable instrument*>) with (the name of the payee of that (check/_____ <*insert type of negotiable instrument*>)/ [or] the name of another person whose signature was required to (cash that check/negotiate that instrument));**

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.]

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<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of forgery by endorsement, you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]

New January 2006; Revised March 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give ~~this~~ an 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*.

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].

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- 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.
- Forgery by Endorsement ▸ *People v. Maldonado* (1963) 221 Cal.App.2d 128, 133–134 [34 Cal.Rptr. 168]; *In re Valencia* (1927) 84 Cal.App. 26, 26 [259 P. 116].
- 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).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

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][b], [c], [d] (Matthew Bender).

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

See the Related Issues section of the Bench Notes for CALCRIM No.1900, *Forgery by False Signature*.

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1902. Forgery of Handwriting or Seal (Pen. Code, § 470(b))

The defendant is charged [in Count __] with forging [or counterfeiting] the (handwriting/seal) of another person [in violation of Penal Code section 470(b)].

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

1. **The defendant forged [or counterfeited] the (handwriting/seal) of another person on _____** *<insert type[s] of document[s] that could defraud; see discussion in Related Issues>***;**

AND

2. **When the defendant did that act, (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 [or counterfeited] 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 [or counterfeited] at least one of these documents and you all agree on which document (he/she) forged [or counterfeited].]**

<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of forging [or counterfeiting] the (handwriting/seal) of another person, you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's

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check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]

New January 2006; Revised March 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give ~~this~~ an 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*.

AUTHORITY

- Elements ▸ Pen. Code, § 470(b).
- Applies to Document Not Listed in Penal Code Section 470(d) ▸ *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741–742 [38 Cal.Rptr.2d 176].
- 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.

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- 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).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

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] (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 statute if the defendant "forges the . . . handwriting of another." (Pen. Code, 470(b).) However, not all writings are included within the scope of this provision. (*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].) "[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; see also *Lewis v. Superior Court, supra,* 217 Cal.App.3d at pp. 398–399.)

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1904. Forgery by Falsifying, Altering, or Counterfeiting Document (Pen. Code, § 470(d))

The defendant is charged [in Count __] with forgery committed by (falsely making[,]/ [or] altering[,]/ [or] forging[,]/ [or] counterfeiting) a document [in violation of Penal Code section 470(d)].

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

1. **The defendant (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) (a/an) _____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>***;**

AND

2. **When the defendant did that act, (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.]

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

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

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<*Sentencing factor for instruments specified in Penal Code section 473(b)*>
[If you find the defendant guilty of forgery by (falsifying[,]/[or] altering[,]/[or] counterfeiting), you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]

New January 2006; Revised March 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give ~~this~~ an 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*.

AUTHORITY

- Elements ▸ Pen. Code, § 470(d).

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- 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.
- Alteration Defined ▸ *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- 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).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

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], [2] (Matthew Bender).

LESSER INCLUDED OFFENSES

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

COMMENTARY

Penal Code section 470(d) provides that every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the items specified in subdivision (d), knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery. Penal Code section 470(d), as amended by Statutes 2005, ch. 295 (A.B. 361), became effective January 1, 2006. The amendment added "or falsifies the acknowledgment of any notary public or any notary public who issues an acknowledgment knowing it to be false" after the list of specified items. The committee believes that the added language has introduced ambiguities. The phrase "falsifies the acknowledgment of any notary public" seems to refer back to

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"person" at the beginning of subdivision (d), but it's not clear whether this falsification must also be done with the intent to defraud in order to be forgery. If so, why was "acknowledgement of a notary public," which is parallel in kind to the other documents and instruments listed in subdivision (d), not simply added to the list of items in subdivision (d)? With respect to the provisions regarding a notary public who issues an acknowledgment knowing it to be false, it could be that the Legislature intended the meaning to be that "[e]very person who . . . falsifies the acknowledgment of . . . any notary public who issues an acknowledgment knowing it to be false" is guilty of forgery. However, this interpretation makes the provision superfluous, as the amendment separately makes it forgery to falsify the acknowledgment of any notary public. Also, if a notary issues a false acknowledgment, it seems unlikely that it would be further falsified by a defendant who is not the notary, but who presumably sought and obtained the false acknowledgement. Alternatively, the Legislature could have intended to make a notary's issuance of false acknowledgment an act of forgery on the part of the notary. The Legislative Counsel's Digest of Assembly Bill 361 states that the bill makes it a "misdemeanor for a notary public to willfully fail to perform the required duties of a notary public" and makes "other related changes." The bill amended a number of sections of the Civil Code and the Government Code as well as Penal Code section 470. The committee awaits clarification by the Legislature or the courts to enable judges to better interpret the newly-added provisions to Penal Code section 470(d).

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1905. Forgery by Passing or Attempting to Use Forged Document (Pen. Code, § 470(d))

The defendant is charged [in Count __] with forgery committed by (passing[,]/ [or] using[,]/ [or] (attempting/ [or] offering) to use) a forged document [in violation of Penal Code section 470(d)].

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

1. **The defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) [a/an] (false[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) _____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>***;**

2. **The defendant knew that the _____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>***(was/were) (false[,]/ altered[,]/ [or] forged[,]/ [or] counterfeited);**

   AND

3. **When the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) the _____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>***, (he/she) intended that (it/they) be accepted as genuine and (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.]

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

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[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

[The People allege that the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) the following documents: _____ <*insert description of each document when multiple items alleged*>**. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) at least one document that was (false[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) and you all agree on which document (he/she) (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use).]**

<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of forgery by (passing[,]/[or] using[,]/[or] attempting[,]/[or] offering to use) a forged document, you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]

New January 2006; Revised March 2019

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant passed or attempted to use multiple forged 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 CalRptr.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.)

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."

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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 forged the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

AUTHORITY

- Elements ▸ Pen. Code, § 470(d).
- 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.
- Pass or Attempt to Use Defined ▸ *People v. Tomlinson* (1868) 35 Cal. 503, 509; *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].
- 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).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 169.

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], [2] (Matthew Bender).

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COMMENTARY

The committee was unable to locate any authority for what constitutes "offering to pass" a forged document. In *People v. Compton* (1899) 123 Cal. 403, 409–411 [56 P. 44], the court held that attempting to pass a forged document requires, at a minimum, that the defendant present the document to an innocent party, with an assertion that the document is genuine. (*Ibid.*; see also *People v. Fork* (1965) 233 Cal.App.2d 725, 730–731 [43 Cal.Rptr. 804] [discussing sufficiency of the evidence for attempting to pass].) In light of this holding, it is unclear if any act less than this would be sufficient for a conviction for "offering to pass." The committee urges caution when considering whether to instruct the jury with the phrase "offering to pass."

Penal Code section 470(d) provides that every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the items specified in subdivision (d), knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery. Penal Code section 470(d), as amended by Statutes 2005, ch. 295 (A.B. 361), became effective January 1, 2006. The amendment added "or falsifies the acknowledgment of any notary public or any notary public who issues an acknowledgment knowing it to be false" after the list of specified items. The committee believes that the added language has introduced ambiguities. The phrase "falsifies the acknowledgment of any notary public" seems to refer back to "person" at the beginning of subdivision (d), but it's not clear whether this falsification must also be done with the intent to defraud in order to be forgery. If so, why was "acknowledgement of a notary public," which is parallel in kind to the other documents and instruments listed in subdivision (d), not simply added to the list of items in subdivision (d)? With respect to the provisions regarding a notary public who issues an acknowledgment knowing it to be false, it could be that the Legislature intended the meaning to be that "[e]very person who . . . falsifies the acknowledgment of . . . any notary public who issues an acknowledgment knowing it to be false" is guilty of forgery. However, this interpretation makes the provision superfluous, as the amendment separately makes it forgery to falsify the acknowledgment of any notary public. Also, if a notary issues a false acknowledgment, it seems unlikely that it would be further falsified by a defendant who is not the notary, but who presumably sought and obtained the false acknowledgement. Alternatively, the Legislature could have intended to make a notary's issuance of false acknowledgment an act of forgery on the part of the notary. The Legislative Counsel's Digest of Assembly Bill 361 states that the bill makes it a "misdemeanor for a notary public to willfully fail to perform the required duties of a notary public" and makes "other related changes."

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The bill amended a number of sections of the Civil Code and the Government Code as well as Penal Code section 470. The committee awaits clarification by the Legislature or the courts to enable judges to better interpret the newly-added provisions to Penal Code section 470(d).

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1930. Possession of Forged Document (Pen. Code, § 475(a))

The defendant is charged [in Count __] with (possessing/ [or] receiving) (a/an) (forged[,]/ [or] altered[,]/ [or] counterfeit) document [in violation of Penal Code section 475(a)].

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

1. **The defendant (possessed/ [or] received) (a/an) (forged[,]/ [or] altered[,]/ [or] counterfeit) _____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>*;

2. **The defendant knew that the document was (forged[,]/ [or] altered[,]/ [or] counterfeit);**

3. **The defendant intended to (pass[,]/ [or] use[,]/ [or] aid the passage or use of) the document as genuine;**

AND

4. **When the defendant (possessed/ [or] received) 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.]

A person *(passes/* [or] *uses)* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

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[The People allege that the defendant possessed the following documents: _____ <*insert description of each document 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 documents and you all agree on which document (he/she) possessed.]

<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of **(possessing/ [or] receiving) (a/an) (forged[,]/ [or] altered[,]/[or] counterfeit) document**, you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved

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New January 2006; Revised March 2019

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant possessed multiple forged items, 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.)

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."

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.)

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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].)

AUTHORITY

- Elements ▸ Pen. Code, § 475(a).
- 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.
- Pass or Attempt to Use Defined ▸ *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 562 [155 Cal.Rptr. 89], disapproved on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1123 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Alteration Defined ▸ *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Required Additional Findings ▸ Pen. Code, § 473(b).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 173.

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], [2] (Matthew Bender).

RELATED ISSUES

Possession and Uttering

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The defendant cannot be convicted of possessing and uttering the same document. (*People v. Reisdorff* (1971) 17 Cal.App.3d 675, 679 [95 Cal.Rptr.224].)

Possession of Multiple Documents Only One Offense
Even if the defendant possessed multiple forged documents at the same time, only one violation of Penal Code section 475 may be charged. (*People v. Bowie* (1977) 72 Cal.App.3d 143, 156–157 [140 Cal.Rptr.49] [11 checks supported 1 count, not 11].)

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1932. Possession of Completed Check: With Intent to Defraud (Pen. Code, § 475(c))

The defendant is charged [in Count __] with possessing a completed (check[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] warrant or county order) with intent to defraud [in violation of Penal Code section 475(c)].

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

1. **The defendant possessed a completed (check[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] warrant or county order);**

AND

2. **When the defendant possessed the document, (he/she) intended to (pass[,]/ [or] use[,]/ [or] aid the passage or use of) the document in order 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).]

A person *(passes/* [or] *uses)* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

[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 (check[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] warrant or county order) may be real or false.]

[The People allege that the defendant possessed the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People

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have proved that the defendant possessed at least one of these documents and you all agree on which document (he/she) possessed.]

<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of possessing a completed (check[,]/ [or] money order[,]/ [or] traveler's check) with intent to defraud**, you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]**

New January 2006; Revised March 2019

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give ~~this~~ an 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. 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.)

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."

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].)

AUTHORITY

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- Elements ▸ Pen. Code, § 475(c).
- 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 Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Required Additional Findings ▸ Pen. Code, § 473(b).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 173.

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], [2] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No.1930, *Possession of Forged Document*.

1933–1934. Reserved for Future Use

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1935. Making, Passing, etc., Fictitious Check or Bill (Pen. Code, § 476)

The defendant is charged [in Count _____] with (possessing[,]/ [or] making[,]/ [or] passing[,]/ [or] using[,]/ [or] attempting to pass or use) (a/an) (false/ [or] altered) (check[,]/ [or] bill[,]/ [or] note[,]/ [or other] legal writing for the payment of money or property) [in violation of Penal Code section 476].

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

1. **The defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) (a/an) (false/ [or] altered) (check[,]/ [or] bill[,]/ [or] note[,]/ [or other] legal writing for the payment of money or property);**

2. **The defendant knew that the document was (false/ [or] altered);**

[AND]

3. **When the defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) the document, (he/she) intended to defraud(;/.)**

<Give element 4 only when possession charged.>
[AND

4. **When the defendant possessed the document, (he/she) intended to pass or use the document as genuine.]**

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.]

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[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

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

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

<*Sentencing factor for instruments specified in Penal Code section 473(b)*>
[If you find the defendant guilty of (possessing[,]/[or] making[,]/ [or] passing [,]/ [or] using[,]/ [or] attempting to pass or use) a fictitious (check/bill/note/legal writing), you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]

New January 2006; Revised April 2011, March 2019

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under a single count that the defendant passed or possessed multiple forged 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.)

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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 possessed the document, give element 4. Do not give element 4 if the prosecution alleges that the defendant made, passed, used, or attempted to pass or use the document.

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].)

AUTHORITY

- Elements ▸ Pen. Code, § 476.
- 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.
- Pass or Attempt to Use Defined ▸ *People v. Tomlinson* (1868) 35 Cal. 503, 509; *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].
- Alteration Defined ▸ *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Explanation of "Fictitious." *People v. Mathers* (2010) 183 Cal.App.4th 1464, 1467-1468 [108 Cal.Rptr.3d 720].
- Required Additional Findings ▸ Pen. Code, § 473(b).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

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Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 150, 169, 173.

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], [2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Making, etc., of Fictitious Check ▸ Pen. Code, §§ 664, 476.

RELATED ISSUES

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. (*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; see also CALCRIM No. 3516, *Multiple Counts—Alternative Charges for One Event—Dual Conviction Prohibited*.)

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

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

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

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

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

AND

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

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

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

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

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

   [AND]

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

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

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

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

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

[AND]

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

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

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

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

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

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

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unnecessary or that is already being provided by someone else. However, the requirement that the driver provide assistance is not excused merely because bystanders are on the scene or could provide assistance.]

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

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

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

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

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

[An accident causes (death/ [or] [permanent, serious] injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the accident and the (death/ [or] injury) would not have happened without the accident. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (death/ [or] [permanent, serious] injury). An accident causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/ [or] injury).]

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

New January 2006; Revised August 2006, October 2010, February 2012, March 2019

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BENCH NOTES

Instructional Duty

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

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death or injury, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death or injury, the court should also give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

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

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

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

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

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

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

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

AUTHORITY

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

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

Secondary Sources

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

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

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Constructive Knowledge of Injury

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

Accusatory Pleading Alleged Property Damage

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

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Reasonable Assistance

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

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

The defendant is charged [in Count __] with (selling/furnishing/administering/giving away/transporting for sale/importing) _____ <*insert type of controlled substance*>, a controlled substance [in violation of _____ <*insert appropriate code section[s]*>].

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

1. **The defendant (sold/furnished/administered/gave away/transported for sale/imported into California) a controlled substance;**

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

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

<When instructing on transportation for sale, give element 4>

[AND]

[4. When the defendant transported the controlled substance, (he/she) intended (to sell it/[or] that someone else sell it);]

[AND]

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 4/5B and the definition of analog substance below instead of 4/5A.>

(4/5)A. The controlled substance was _____ *<insert type of controlled substance>***(;/.)**

(4/5)B. The controlled substance was an analog of _____ *<insert type of controlled substance>***(;/.)**

<Give element 4/5/6 when instructing on usable amount; see Bench Notes.>

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[AND

(4/5/6). 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]

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

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

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

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

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away/transported for sale/imported).]

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

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New January 2006; Revised October 2010, February 2014, August 2014, February 2016, September 2017, March 2019

BENCH NOTES

Instructional Duty

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

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

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

AUTHORITY

- Elements. ▸ Health & Saf. Code, §§ 11352, 11379.
- Administering. ▸ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering. ▸ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Knowledge. ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Transportation: Usable Amount. ▸ *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].

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- Usable Amount. ‣ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Definition of Analog Controlled Substance. ‣ Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. ‣ *People v. Davis*, *supra,* 57 Cal.4th at p. 362, fn 5.
- Intent Requirement for Transportation for Sale ‣ *People v. Lua* (2017) 10 Cal.App.5th 1004, 1014-1016 [217 Cal.Rptr.3d 23].

Secondary Sources

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

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

LESSER INCLUDED OFFENSES

- Simple Possession Is Not a Lesser Included Offense of This Crime. (*People v. Murphy* (2007) 154 Cal.App.4th 979, 983-984 [64 Cal.Rptr.3d 926]; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)
- Possession for Sale Is Not a Lesser Included Offense of This Crime. (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)

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

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RELATED ISSUES

Transportation

Transportation does not require personal possession by the defendant. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129] [abrogated in part by statute on other grounds].) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved "from one location to another," but the movement may be minimal. (*Id.* at p. 684.)

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2500. Illegal Possession, etc., of Weapon

The defendant is charged [in Count __] with unlawfully (possessing/manufacturing/causing to be manufactured/importing/keeping for sale/offering or exposing for sale/giving/lending/buying/receiving) a weapon, specifically (a/an) _____ *<insert type of weapon >* **[in violation of Penal Code section[s] _____***<insert appropriate code section[s]>***].**

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

1. **The defendant (possessed/manufactured/caused to be manufactured/imported into California/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) _____** *<insert type of weapon>***;**

2. **The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the _____** *<insert type of weapon>***;**

[AND]

<Alternative 3A—object capable of innocent uses>

[3. The defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object as a weapon (;/.)]

<Alternative 3B—object designed solely for use as weapon>

[3. The defendant knew that the object (was (a/an) _____ *<insert characteristics of weapon, e.g., "unusually short shotgun, penknife containing stabbing instrument">*/**could be used _____** *<insert description of weapon, e.g., "as a stabbing weapon," or "for purposes of offense or defense">***).]**

<Give element 4 only if defendant is charged with offering or exposing for sale.>

[AND

4. The defendant intended to sell it.]

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[The People do not have to prove that the defendant intended to use the object as a weapon.]

*<Give only if alternative 3A is given.>***[When deciding whether the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object *as a weapon*, consider all the surrounding circumstances relating to that question, including when and where the object was (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received)[,] [and] [where the defendant was going][,] [and] [whether the object was changed from its standard form][,] and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]**

<Give only if alternative 3B is given.>
~~**[The People do not have to prove that the defendant intended to use the object as a weapon.]**~~

(A/An) _____ *<insert type of weapon>* **means** _____ *<insert appropriate definition)>***.**

<Give only if the weapon used has specific characteristics of which the defendant must have been aware.>
[A _____*<insert type of weapon specified in element 3B>* **is** _____*<insert defining characteristics of weapon>.*

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]]

[(A/An) _____ *<insert prohibited firearm>* **does not need to be in working order if it was designed to shoot and appears capable of shooting.]**

[Two or more people may possess something at the same time.]

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

[The People allege that the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the following weapons: _____ *<insert description of each weapon when multiple items alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the**

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defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) at least one of these weapons and you all agree on which weapon (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received).]

<Defense: Statutory Exemptions>
[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/import/keep for sale/offer or expose for sale/give/lend/buy/receive) (a/an) _____ *<insert type of weapon>* **if _____** *<insert exception>***. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) _____** *<insert type of weapon>***. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

New January 2006; Revised August 2006, April 2008, February 2012, February 2015, March 2017, March 2019

BENCH NOTES

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

Penal Code section 12020 has been repealed. In its place, the legislature enacted numerous new statutes that became effective January 1, 2012. Whenever a blank in the instruction calls for inserting a type of weapon, an exception, or a definition, refer to the appropriate new Penal Code section.

Element 3 contains the requirement that the defendant know that the object is a weapon. A more complete discussion of this issue is provided in the Commentary section below. Select alternative 3A if the object is capable of innocent uses. In such cases, the court has a **sua sponte** duty to instruct on when an object is possessed "as a weapon." (*People v. Fannin, supra,* 91 Cal.App.4th at p. 1404; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].)

Select alternative 3B if the object "has no conceivable innocent function" (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1405 [111 Cal.Rptr.2d 496]), or when the

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item is specifically designed to be one of the weapons defined in the Penal Code (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]).

Give element 4 only if the defendant is charged with offering or exposing for sale. (See *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].)

For any of the weapons not defined in the Penal Code, use an appropriate definition from the case law, where available.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was "fragmented as to time . . . [or] space," 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].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following weapons," inserting the items alleged. Also make the appropriate adjustments to the language of the instruction to refer to multiple weapons or objects.

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt about the existence of one of the statutory exemptions, the court has a **sua sponte** duty to give the bracketed instruction on that defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, "The defendant did not unlawfully . . . .".

AUTHORITY

- Elements. ▸ Pen. Code, §§ 19200, 20310, 20410, 20510, 20610, 20710, 20910, 21110, 21810, 22010, 22210, 24310, 24410, 24510, 24610, 24710, 30210, 31500, 32310, 32311, 32900, 33215, 33600.

- Need Not Prove Intent to Use. ▸ *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].
- Knowledge Required. ▸ *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Specific Intent Required for Offer to Sell. ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].

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- Specific Intent Includes Knowledge of Forbidden Characteristics of Weapon. ▸ *People v. King* (2006) 38 Cal.4th 617, 627–628 [42 Cal.Rptr.3d 743, 133 P.3d 636].
- Innocent Object—Must Prove Possessed as Weapon. ▸ *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100]; *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].
- Definition of Blackjack, etc. ▸ *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].
- Firearm Need Not Be Operable. ▸ *People v. Favalora* (1974) 42 Cal.App.3d 988, 991 [117 Cal.Rptr. 291].
- Measurement of Sawed-Off Shotgun. ▸ *People v. Rooney* (1993) 17 Cal.App.4th 1207, 1211–1213 [21 Cal.Rptr.2d 900]; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500 [87 Cal.Rptr. 537].
- Measurement of Fléchette Dart. ▸ *People v. Olmsted* (2000) 84 Cal.App.4th 270, 275 [100 Cal.Rptr.2d 755].
- Constructive vs. Actual Possession. ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Knowledge of Specific Characteristics of Weapon. ▸ *People v. King* (2006) 38 Cal.4th 617, 628 [42 Cal.Rptr.3d 743, 133 P.3d 636].
- Intent to Use as a Weapon. ▸ *People v. Baugh* (2018) 20 Cal.App.5th 438, 446 [228 Cal.Rptr.3d 898].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 211-212.

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. 144, *Crimes Against Order,* § 144.01 (Matthew Bender).

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COMMENTARY

Element 3—Knowledge

"Intent to use a weapon is not an element of the crime of weapon possession." (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].) However, interpreting now-repealed Penal Code section 12020(a)(4), possession of a concealed dirk or dagger, the Supreme Court stated that "[a] defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is . . . not guilty of violating section 12020." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].) Applying this holding to possession of other weapons prohibited under now-repealed Penal Code section 12020(a), the courts have concluded that the defendant must know that the object is a weapon or may be used as a weapon, or must possess the object "as a weapon." (*People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]; *People v. Taylor* (2001) 93 Cal.App.4th 933, 941 [114 Cal.Rptr.2d 23]; *People v. Fannin, supra,* 91 Cal.App.4th at p. 1404.)

In *People v. Gaitan, supra,* 92 Cal.App.4th at p. 547, for example, the court considered the possession of "metal knuckles," defined in now-repealed Penal Code section 12020(c)(7) as an object "worn for purposes of offense or defense." The court held that the prosecution does not have to prove that the defendant *intended* to use the object for offense or defense but must prove that the defendant *knew* that "the instrument may be used for purposes of offense or defense." (*Id.* at p. 547.)

Similarly, in *People v. Taylor, supra,* 93 Cal.App.4th at p. 941, involving possession of a cane sword, the court held that "[i]n order to protect against the significant possibility of punishing innocent possession by one who believes he or she simply has an ordinary cane, we infer the Legislature intended a scienter requirement of actual knowledge that the cane conceals a sword."

Finally, *People v. Fannin, supra,* 91 Cal.App.4th at p. 1404, considered whether a bicycle chain with a lock at the end met the definition of a "slungshot." The court held that "if the object is not a weapon per se, but an instrument with ordinary innocent uses, the prosecution must prove that the object was possessed *as a weapon*." (*Ibid.* [emphasis in original]; see also *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100] [possession of modified baseball bat].)

In element 3 of the instruction, the court should give alternative 3B if the object has no innocent uses, inserting the appropriate description of the weapon. If the object has innocent uses, the court should give alternative 3A. The court may

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choose not to give element 3 if the court concludes that a previous case holding that the prosecution does not need to prove knowledge is still valid authority. However, the committee would caution against this approach in light of *Rubalcava* and *In re Jorge M*. (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 904–905 [13 Cal.Rptr.3d 442] [observing that, since *In re Jorge M.*, it is unclear if the prosecution must prove that the defendant knew shotgun was "sawed off" but that failure to give instruction was harmless if error].)

It is not unlawful to possess a large-capacity magazine or large-capacity conversion kit. It is unlawful, however, to receive or buy these items after January 1, 2014, the effective date of Penal Code sections 32310 and 32311.

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2530. Carrying Loaded Firearm (Pen. Code, § 25850(a))

The defendant is charged [in Count __] with unlawfully carrying a loaded firearm (on (his/her) person/in a vehicle) [in violation of Penal Code section 25850(a)].

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

1. **The defendant carried a loaded firearm (on (his/her) person/in a vehicle);**

2. **The defendant knew that (he/she) was carrying a firearm;**

AND

3. **At that time, the defendant was in a public place or on a public street in (an incorporated city/in an unincorporated area where it was unlawful to discharge a firearm).**

[A *public place* is a place that is open and accessible to anyone who wishes to go there.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of any explosion or other form of combustion. [A *firearm* also includes any rocket, rocket-propelled projectile launcher, or similar device containing any explosive or incendiary material, whether or not the device is designed for emergency or distress signaling purposes.]]

[The term *firearm* is defined in another instruction.]

As used here, a firearm is *loaded* if there is an unexpended cartridge or shell in the firing chamber or in either a magazine or clip attached to the firearm. An *unexpended cartridge or shell* consists of a case that holds a charge of powder and a bullet or shot. [A *muzzle-loader firearm is loaded* when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

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[_____ *<insert location>* **is (an incorporated city/in an unincorporated area where it is unlawful to discharge a firearm).]**

<Defense: Statutory Exemption>
[The defendant did not unlawfully carry a loaded firearm if _____ *<insert defense from Pen Code, §§ 25900, 26000 et seq.>***. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully carried a loaded firearm. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

New January 2006; Revised February 2012, March 2019

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If the defendant is charged with any of the sentencing factors in Penal Code section 25850, the court must also give the appropriate instruction from CALCRIM Nos. 2540–2546. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Defenses—Instructional Duty
If the defense presents sufficient evidence to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, "The defendant did not unlawfully . . . ."

Related Instructions
CALCRIM No. 2540, *Carrying Firearm: Specified Convictions*.
CALCRIM No. 2541, *Carrying Firearm: Stolen Firearm*.
CALCRIM No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*.
CALCRIM No. 2543, *Carrying Firearm: Not in Lawful Possession*.
CALCRIM No. 2544, *Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness*.

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CALCRIM No. 2545, *Carrying Firearm: Not Registered Owner*.
CALCRIM No. 2546, *Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded*.

AUTHORITY

- Elements. ▸ Pen. Code, § 25850(a).
- Firearm Defined. ▸ Pen. Code, § 16520.
- Knowledge of Presence of Weapon Required. ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Dillard* (1984) 154 Cal.App.3d 261, 267 [201 Cal.Rptr. 136].
- Knowledge Firearm Loaded Not Required. ▸ *People v. Dillard* (1984) 154 Cal.App.3d 261, 266 [201 Cal.Rptr. 136]; *People v. Harrison* (1969) 1 Cal.App.3d 115, 120 [81 Cal.Rptr. 396].
- Factors in Pen. Code, § 25400(c) Sentencing Factors, Not Elements. ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].
- Justifications and Exemptions. ▸ Pen. Code, § 25900, 26000 et seq..
- Need Not Be Operable. ▸ *People v. Taylor* (1984) 151 Cal.App.3d 432, 437 [199 Cal.Rptr. 6].
- "Loaded" Firearm. ▸ *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].
- Must Be in Incorporated City or Prohibited Area of Unincorporated Territory. ▸ *People v. Knight* (2004) 121 Cal.App.4th 1568, 1575 [18 Cal.Rptr.3d 384].
- Public Place Defined. ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Strider* (2009) 177 Cal.App.4th 1393, 1401 [100 Cal.Rptr. 3d 66]. ~~*People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].~~
- Loaded Firearm in Backpack is "On the Person." ▸ *People v. Wade* (2016) 63 Cal.4th 137, 140 [201 Cal.Rptr.3d 876].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 185–186.

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

LESSER INCLUDED OFFENSES

If the defendant is charged with one of the sentencing factors that makes this offense a felony, then the misdemeanor offense is a lesser included offense. The statute defines as a misdemeanor all violations of the statute not covered by the specified sentencing factors. (Pen. Code, § 25850(c)(7).) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved. If the jury finds that the sentencing factor has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Loaded Firearm

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

Location—Court May Take Judicial Notice

"The location of local streets within city boundaries is properly a matter of judicial notice [citation omitted], as is the fact that a particular jurisdiction is an incorporated city." (*People v. Vega* (1971) 18 Cal.App.3d 954, 958 [96 Cal.Rptr. 391] [footnote and citation omitted].)

~~***Taser***~~

~~"[A] Taser is a firearm and can be a loaded firearm within [now-repealed] section 12031." (*People v. Heffner* (1977) 70 Cal.App.3d 643, 652 [139 Cal.Rptr. 45].)~~

2531–2539. Reserved for Future Use

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984. Brandishing Firearm: Misdemeanor—Public Place (Pen. Code, § 417(a)(2)(A))

If you find the defendant guilty of brandishing a firearm, you must then decide whether the People have proved the additional allegation that the defendant brandished a firearm that was capable of being concealed on the person while in a public place [in violation of Penal Code section 417(a)(2)(A)].

To prove this allegation, the People must prove that:

1. **The defendant drew or exhibited a firearm that was capable of being concealed on the person;**

AND

2. **When the defendant did so, (he/she) was (in a public place in an incorporated city/ [or] on a public street).**

A firearm *capable of being concealed on the person* is a firearm that has a barrel less than 16 inches in length. [A firearm *capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.]

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

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; Revised February 2012, March 2019

BENCH NOTES

Instructional Duty

If the defendant is charged under Penal Code section 417(a)(2)(A), the court has a **sua sponte** duty to instruct on this sentencing factor.

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This instruction **must** be given with CALCRIM No. 983, *Brandishing Firearm or Deadly Weapon: Misdemeanor*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved this allegation.

Penal Code section 417(a)(2)(A) applies to a firearm that "is a pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code section 12001(a)(1) provides a single definition for this class of weapons. Thus, the committee has chosen to use solely the all-inclusive phrase "firearm capable of being concealed on the person."

AUTHORITY

- Elements. ▸ Pen. Code, § 417(a)(2)(A).
- Firearm Capable of Being Concealed Defined. ▸ Pen. Code, § 16530.
- Public Place Defined. ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Strider* (2009) 177 Cal.App.4th 1393, 1401 [100 Cal.Rptr. 3d 66]. ~~*People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].~~

Secondary Sources

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

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

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1161. Lewd Conduct in Public (Pen. Code, § 647(a))

The defendant is charged [in Count __] with engaging in lewd conduct in public [in violation of Penal Code section 647(a)].

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

1. **The defendant willfully engaged in the touching of ((his/her) own/ [or] another person's) (genitals[,]/ [or] buttocks[,]/ [or] female breast);**

2. **The defendant did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;**

3. **At the time the defendant engaged in the conduct, (he/she) was in (a public place/ [or] a place open to the public [or to public view]);**

4. **At the time the defendant engaged in the conduct, someone else who might have been offended was present;**

AND

5. **The defendant knew or reasonably should have known that another person who might have been offended by (his/her) conduct was present.**

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

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

New January 2006; Revised September 2017, March 2019

BENCH NOTES

Instructional Duty

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

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AUTHORITY

- Elements. ▸ Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [158 Cal.Rptr. 330, 599 P.2d 636]; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 3–4 [181 Cal.Rptr. 723].
- Willfully Defined. ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Lewd" and "Dissolute" Synonymous. ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Lewd Conduct Defined. ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v.* Strider (2009) 177 Cal.App.4th 1393, 1401 [100 Cal.Rptr. 3d 66]. ~~*People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].~~

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 67-68.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.20 (Matthew Bender).

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

RELATED ISSUES

Need Not Prove Someone Was Offended

"It is not the burden of the prosecution to prove that the observer was in fact offended by the conduct but only that the conduct was such that defendant should know that the observer 'may be offended.'" (*People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 11 [181 Cal.Rptr. 723].)

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Does Not Apply to Live Theater Performance

"It seems evident from the foregoing that the vagrancy law, [Penal Code] section 647, subdivision (a), was not intended to apply to live performances in a theater before an audience." (*Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 827–828 [83 Cal.Rptr. 819, 464 P.2d 483].)

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1162. Soliciting Lewd Conduct in Public (Pen. Code, § 647(a))

The defendant is charged [in Count __] with soliciting another person to engage in lewd conduct in public [in violation of Penal Code section 647(a)].

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

1. **The defendant requested [or _____** *<insert other synonyms for "solicit," as appropriate>***] that another person engage in the touching of ((his/her) own/ [or] another person's) (genitals[,]/ [or] buttocks[,]/ [or] female breast);**

2. **The defendant requested that the other person engage in the requested conduct in (a public place/ [or] a place open to the public [or in public view]);**

3. **When the defendant made the request, (he/she) was in (a public place/ [or] a place open to the public [or in public view]);**

4. **The defendant intended for the conduct to occur in (a public place/ [or] a place open to the public [or in public view]);**

5. When the defendant made the request, (he/she) did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;

[AND]

6. The defendant knew or reasonably should have known that someone was likely to be present who could be offended by the requested conduct(;/.)

<Give element 7 when instructing that person solicited must receive message; see Bench Notes.>
[AND

7. The other person received the communication containing the request.]

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

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

New January 2006; Revised August 2006, December 2008, September 2017, March 2019

BENCH NOTES

Instructional Duty

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

One court has held that the person solicited must actually receive the solicitous communication. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].) In *Saephanh*, the defendant mailed a letter from prison containing a solicitation to harm the fetus of his girlfriend. (*Id.* at p. 453.) The letter was intercepted by prison authorities and, thus, never received by the intended person. *(Ibid.)* If there is an issue over whether the intended person actually received the communication, give bracketed element 7.

AUTHORITY

- Elements. ▸ Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [158 Cal.Rptr. 330, 599 P.2d 636]; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 8–9 [181 Cal.Rptr. 723].
- Willfully Defined. ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Likely Defined. ▸ *People v. Lake* (2007) 156 Cal.App.4th Supp. 1 [67 Cal.Rptr.3d 452].
- Solicitation Requires Specific Intent. ▸ *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38 [152 Cal.Rptr. 134].
- Solicitation Defined. ▸ *People v. Superior Court* (1977) 19 Cal.3d 338, 345–346 [138 Cal.Rptr. 66, 562 P.2d 1315].
- Person Solicited Must Receive Communication. ▸ *People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].
- "Lewd" and "Dissolute" Synonymous. ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].

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- Lewd Conduct Defined. ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Strider* (2009) 177 Cal.App.4th 1393, 1401 [100 Cal.Rptr. 3d 66]. ~~*People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].~~

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 67-68.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order* § 144.20 (Matthew Bender).

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

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 1161, *Lewd Conduct in Public* and CALCRIM No. 441, *Solicitation: Elements*.

1163–1169. Reserved for Future Use

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2966. Disorderly Conduct: Under the Influence in Public (Pen. Code, § 647(f))

The defendant is charged [in Count __] with being under the influence of (alcohol/ [and/or] a drug) in public [in violation of Penal Code section 647(f)].

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

1. **The defendant was willfully under the influence of (alcohol[,]/ [and/or] a drug[,]/ [and/or] a controlled substance[,]/ [and/or] toluene);**

2. **When the defendant was under the influence, (he/she) was in a public place;**

AND

<Alternative 3A—unable to care for self>

[3. The defendant was unable to exercise care for (his/her) own safety [or the safety of others].]

<Alternative 3B—obstructed public way>

[3. Because the defendant was under the influence, (he/she) interfered with, obstructed, or prevented the free use of a street, sidewalk, or other public way.]

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

As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.

New January 2006; Revised March 2019

BENCH NOTES

Instructional Duty

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

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AUTHORITY

- Elements. ▸ Pen. Code, § 647(f).
- Public Place Defined. ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Strider* (2009) 177 Cal.App.4th 1393, 1401 [100 Cal.Rptr. 3d 66]. ~~*People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338].~~
- Statute Constitutional. ▸ *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1119–1121 [232 Cal.Rptr. 814, 729 P.2d 80]; *In re Joseph G.* (1970) 7 Cal.App.3d 695, 703–704 [87 Cal.Rptr. 25]; *In re Spinks* (1967) 253 Cal.App.2d 748, 752 [61 Cal.Rptr. 743].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 55–58.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.20 (Matthew Bender).

RELATED ISSUES

Defendant in Parked Car

In *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660], the court held that the defendant was in a public place when he was found sitting in a parked car on a public street.

2967–2979. Reserved for Future Use

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3181. Sex Offenses: Sentencing Factors—Multiple Victims (Pen. Code, § 667.61(e)(4))

If you find the defendant guilty of two or more sex offenses, as charged in Counts __ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether the People have proved the additional allegation that those crimes were committed against more than one victim in this case.

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, Revised March 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

This sentencing factor must be pleaded, proved, and found true by the trier of fact. (*People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].) The court may not impose a sentence using this factor unless the jury has specifically made a finding that the factor has been proved, even if the defendant is convicted in the proceeding of qualifying offenses against more than one person. *(Ibid.)*

AUTHORITY

- One-Strike Sex Offense Statute—Multiple Victims Factor. ▸ Pen. Code, § 667.61(e)(4).
- Factors Must Be Pleaded and Proved. ▸ Pen. Code, § 667.61(j); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

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5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.102[2][a][ii], [3] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 13:9 (The Rutter Group).

RELATED ISSUES

"Present Case or Cases"

This sentencing factor applies when the "offenses are prosecuted 'in the present case or cases.'" (*People v. Stewart* (2004) 119 Cal.App.4th 163, 171 [14 Cal.Rptr.3d 353].) There is no requirement that the offenses be committed on the same date or in the course of the same transaction, so long as the offenses are tried together. (*Id.* at p. 172.)

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3412. Compassionate Use (Health & Saf. Code, § 11362.5)

Possession or cultivation of cannabis is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate cannabis (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of cannabis possessed or cultivated must be reasonably related to the patient's current medical needs.

The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate cannabis for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

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

New February 2015; Revised September 2018, March 2019

BENCH NOTES

Instructional Duty

Pursuant to Health & Saf. Code, § 11362.5, defendants may raise a medical cannabis defense in appropriate cases. 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, 470 [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 evidence shows that a physician may have "approved" but not "recommended" the cannabis use, give the bracketed phrase "or approved" in the first paragraph of this instruction. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

A local ordinance prohibiting cannabis dispensaries does not nullify a defense under the Medical Marijuana Program Act or the Compassionate Use Act. *People v. Ahmed* (2018) 25 Cal.App.5th 136, 142-143 [235 Cal.Rptr.3d 472].

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AUTHORITY

- Elements. ▸ Health & Saf. Code, § 11362.5; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].
- Burden of Proof for Defense of Medical Use. ▸ *People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Amount Must Be Reasonably Related to Patient's Medical Needs. ▸ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].
- Primary Caregiver. ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense. ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).

Secondary Sources

7 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §136.

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

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

(Planting[,] [or]/ cultivating[,] [or]/ harvesting[,] [or]/ drying[,] [or]/ processing) cannabis 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 cannabis 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 cannabis from the collective.

A *qualified patient* is someone for whom a physician has previously recommended or approved the use of cannabis 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.**

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[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 cannabis.]

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) cannabis for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New February 2015; Revised August 2015, September 2018, March 2019

BENCH NOTES

Instructional Duty

A collective or cooperative cultivation defense under the Medical Marijuana Program Act may be raised to certain cannabis 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].

A local ordinance prohibiting cannabis dispensaries does not nullify a defense under the Medical Marijuana Program Act or the Compassionate Use Act. *People v. Ahmed* (2018) 25 Cal.App.5th 136, 142-143 [235 Cal.Rptr.3d 472].

AUTHORITY

- Elements. ▸ Health & Saf. Code, § 11362.775.
- Factors To Consider. ▸ *People v. Jackson* (2012) 210 Cal.App.4th 525 [148 Cal.Rptr.3d 375].
- 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

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

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

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3454. Initial Commitment as Sexually Violent Predator (Welf. & Inst. Code, §§ 6600, 6600.1)

The petition alleges that _____ <*insert name of respondent*> is a sexually violent predator.

To prove this allegation, the People must prove beyond a reasonable doubt that:

1. **(He/She) has been convicted of committing a sexually violent offense~~s against one or more victims~~;**

2. **(He/She) has a diagnosed mental disorder;**

[AND]

3. **As a result of that diagnosed mental disorder, (he/she) is a danger to the health and safety of others because it is likely that (he/she) will engage in sexually violent predatory criminal behavior(;/.)**

<Give element 4 when evidence has been introduced at trial on the issue of amenability to voluntary treatment in the community.>

[AND

4. **It is necessary to keep (him/her) in custody in a secure facility to ensure the health and safety of others.]**

The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

A person is *likely to engage in sexually violent predatory criminal behavior* if there is a substantial danger, that is, a serious and well-founded risk that the person will engage in such conduct if released in the community.
The likelihood that the person will engage in such conduct does not have to be greater than 50 percent.

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Sexually violent criminal behavior is *predatory* if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

_____ *<Insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)>* **(is/are) [a] *sexually violent offense[s]* when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person or threatening to retaliate in the future against the victim or any other person.**

[_____ *<Insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)>* **(is/are) also [a] *sexually violent offense[s]* when the offense[s] (is/are) committed on a child under 14 years old.]**

As used here, a *conviction* for committing a sexually violent offense is one of the following:

<Give the appropriate bracketed description[s] below.>

<A. Conviction With Fixed Sentence>
[A prior [or current] conviction for one of the offenses I have just described to you that resulted in a prison sentence for a fixed period of time.]

<B. Conviction With Indeterminate Sentence>
[A conviction for an offense that I have just described to you that resulted in an indeterminate sentence.]

<C. Conviction in Another Jurisdiction>
[A prior conviction in another jurisdiction for an offense that includes all of the same elements of one of the offenses that I have just described to you.]

<D. Conviction Under Previous Statute>
[A conviction for an offense under a previous statute that includes all of the elements of one of the offenses that I have just described to you.]

<E. Conviction With Probation>
[A prior conviction for one of the offenses that I have just described to you for which the respondent received probation.]

<F. Acquittal Based on Insanity Defense>

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[A prior finding of not guilty by reason of insanity for one of the offenses that I have just described to you.]

<G. Conviction as Mentally Disordered Sex Offender>
[A conviction resulting in a finding that the respondent was a mentally disordered sex offender.]

<*H. Conviction Resulting in Commitment to Department of Youth Authority Pursuant to Welfare and Institutions Code section 1731.5* **>**
[A prior conviction for one of the offenses that I have just described to you for which the respondent was committed to the Department of Youth Authority pursuant to Welfare and Institutions Code section 1731.5.]

You may not conclude that _____ *<insert name of respondent>* **is a sexually violent predator based solely on (his/her) alleged prior conviction[s] without additional evidence that (he/she) currently has such a diagnosed mental disorder.**

In order to prove that _____ *<insert name of respondent>* **is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while (he/she) was in custody. A *recent overt act* is a criminal act that shows a likelihood that the actor may engage in sexually violent predatory criminal behavior.**

New January 2006; Revised August 2006, June 2007, August 2009, April 2011, February 2012, March 2019

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a sexually violent predator.

Do not use this instruction for extension or status proceedings. Use instead CALCRIM No. 3454A, *Hearing to Determine Current Status Under Sexually Violent Predator Act.*

If evidence is presented about amenability to voluntary treatment, the court has a **sua sponte** duty to give bracketed element 4. (*People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662]; *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [21 Cal.Rptr.3d 92].) Evidence of involuntary treatment in the

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community is inadmissible at trial because it is not relevant to any of the SVP requirements. (*People v. Calderon, supra,* 124 Cal.App.4th at 93.)

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant post-trial instructions. These instructions may need to be modified.

Jurors instructed in these terms must necessarily understand that one is not eligible for commitment under the SVPA unless his or her capacity or ability to control violent criminal sexual behavior is seriously and dangerously impaired. No additional instructions or findings are necessary. *People v. Williams* (2003) 31 Cal.4th 757, 776–777 [3 Cal.Rptr.3d 684, 74 P.3d 779] (interpreting Welfare and Institutions Code section 6600, the same statute at issue here).

But see *In re Howard N.* (2005) 35 Cal.4th 117, 137-138 [24 Cal.Rptr.3d 866, 106 P.3d 305], which found in a commitment proceeding under a different code section, i.e., Welfare and Institutions Code section 1800, that when evidence of inability to control behavior was insufficient, the absence of a specific "control" instruction was not harmless beyond a reasonable doubt. Moreover, *In re Howard N.* discusses *Williams* extensively without suggesting that it intended to overrule *Williams*. *Williams* therefore appears to be good law in proceedings under section 6600.

AUTHORITY

- Elements and Definitions. ▸ Welf. & Inst. Code, §§ 6600, 6600.1.
- 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].
- Likely Defined. ▸ *People v. Roberge* (2003) 29 Cal.4th 979, 988 [129 Cal.Rptr.2d 861, 62 P.3d 97].
- Predatory Acts Defined. ▸ *People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 [124 Cal.Rptr.2d 186, 52 P.3d 116].
- Must Instruct on Necessity for Confinement in Secure Facility. ▸ *People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662].
- Determinate Sentence Defined. ▸ Pen. Code, § 1170.

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- Impairment of Control. ‣ *In re Howard N.* (2005) 35 Cal.4th 117, 128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].
- Amenability to Voluntary Treatment. ‣ *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256 [127 Cal.Rptr.2d 177, 57 P.3d 654].
- Need for Treatment and Need for Custody Not the Same. ‣ *People v. Ghilotti* (2002) 27 Cal.4th 888, 927 [119 Cal.Rptr.2d 1, 44 P.3d 949].
- Substantial Danger. ‣ *People v. Ghilotti* (2002) 27 Cal.4th 888, 922 [119 Cal.Rptr.2d 1, 44 P.3d 949].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 154, 172.

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

RELATED ISSUES

Different Proof Requirements at Different Stages of the Proceedings
Even though two concurring experts must testify to commence the petition process under Welfare and Institutions Code section 6001, the same requirement does not apply to the trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1064 [123 Cal.Rptr.2d 253].)

Masturbation Does Not Require Skin-to-Skin Contact
Substantial sexual conduct with a child under 14 years old includes masturbation when the touching of the minor's genitals is accomplished through his or her clothing. (*People v. Lopez* (2004) 123 Cal.App.4th 1306, 1312 [20 Cal.Rptr.3d 801]; *People v. Whitlock* (2003) 113 Cal.App.4th 456, 463 [6 Cal.Rptr.3d 389].) "[T]he trial court properly instructed the jury when it told the jury that '[t]o constitute masturbation, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.' " (*People v. Lopez, supra,* 123 Cal.App.4th at p. 1312.)

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