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801. Robbery in Concert

The defendant[s] [_____ *<insert name[s] if not all defendants in trial charged with this count>***] (is/are) charged [in Count __] with robbery by acting in concert [with _____** *<insert name[s] or description[s] of uncharged participant[s]>***].**

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

1. **The defendant personally committed or aided and abetted a robbery.**

2. **When (he/ [or] she) did so, the defendant voluntarily acted with two or more other people who also committed or aided and abetted the commission of the robbery.**

AND

3. **The robbery was committed in an inhabited (dwelling/vessel/floating home/trailer coach/part of a building). A (dwelling/vessel/floating home/trailer coach/part of a building) is inhabited if someone lives there and is present or has left and intends to return.**

[To prove the crime of robbery, the People must prove that:

*<INSERT ELEMENTS AND ANY APPLICABLE PARAGRAPHS FROM INSTRUCTION 800, ROBBERY.>***]**

Someone *aids and abets* a crime if he or she:

1. **Knows of the perpetrator's unlawful purpose.**

AND

2. **Before or during the crime, intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.**

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[To prove the crime of robbery in concert, the People do not have to prove a prearranged plan or scheme to commit robbery.]

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 robbery and the jury has already been instructed on that crime, do not instruct on the elements of robbery again. If the defendant is only charged with robbery in concert, instruct on the elements of robbery by inserting where indicated the elements and any relevant paragraphs from Instruction 800, Robbery.

If supported by the evidence, give on request the final bracketed paragraph regarding the lack of a prearranged plan. (See *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342.)

Related Instructions
Instruction 500, Aiding and Abetting: General Principles.
Instruction 501, Aiding and Abetting: Intended Crimes.

AUTHORITY

Elements ▸ Pen. Code, § 213(a)(1)(A).
Acting in Concert ▸ *People v. Adams* (1993) 19 Cal.App.4th 412, 429, 444–446; *People v. Caldwell* (1984) 153 Cal.App.3d 947, 951–952; *People v. Calimee* (1975) 49 Cal.App.3d 337, 341–342 [in context of sodomy in concert].
Inhabited ▸ *People v. Jackson* (1992) 6 Cal.App.4th 1185, 1188.

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STAFF COMMENTS

Pen. Code, § 213, "Punishment for robbery":

(a) Robbery is punishable as follows:

(1) Robbery of the first degree is punishable as follows:

(A) If the defendant, voluntarily acting in concert with two or more other persons, commits the robbery within an inhabited dwelling house, a vessel as defined in Section 21 of the Harbors and Navigation Code, which is inhabited and designed for habitation, an inhabited floating home as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, a trailer coach as defined in the Vehicle Code, which is inhabited, or the inhabited portion of any other building, by imprisonment in the state prison for three, six, or nine years.

The language of this instruction is modeled on 1102, Rape in Concert, and 1122, Oral Copulation in Concert. Staff Notes from Instruction 1102 follow:

Aider and Abettor Does Need to Plan or Be Present

"Acting in concert" does not require proof that the perpetrators planned or arranged beforehand to commit the rape. Nor does the person assisting have to be personally present when the rape occurs. All that is required is that, by his actions, he assists or aids in the commission of the crime. (*People* v. *Barnett* (1976) 54 Cal.App.3d 1046, 1049; *People* v. *Ross* (1995) 9 Cal.4th 879, 933 [co-defendants assisted perpetrator by holding victim's family at gun point in another room of the house while the rape was committed].) Note, however, that the Supreme Court has not resolved whether a rapist acts in concert when his accomplice assists in the commission of the crime, but is not present at the scene (*People v. Champion* (1995) 9 Cal.4th 879, 933, fn. 22):

> FN22 We do not address whether a rapist acts "in concert" when his accomplice assists in the commission of the crime, but is not present at the scene (for example, when the accomplice provides the rapist with information about the victim, or pays the rapist to commit the act).

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Voluntarily Acting in Concert

Two early cases addressed the significance of the "acting in concert" language. Both concluded that the phrase was used to ensure that the crime applied to both the aider and abettor and the actual perpetrator. (*People* v. *Calimee* (1975) 49 Cal.App.3d 337, 341; *People* v. *Lopez* (1981) 116 Cal.App.3d 882, 886.) Both courts rejected arguments that "in concert" meant something beyond aiding and abetting. The defendant in *Calimee* unsuccessfully argued that inclusion of the phrase meant the state must also show evidence of planning or prearrangement. (*People* v. *Calimee, supra*, 49 Cal.App.3d at pp. 340–41.)

The court held that "in concert" was used to ensure that culpability for this crime extend to both parties (*Id.* at p. 341):

> The obvious purpose of the section [264.1] is to provide increased punishment where there is a gang sexual assault and to insure that those who participate in such assaults, either by personally engaging in the ultimate sexual act or by voluntarily helping others to accomplish it, receive the enhanced punishment. While the terms "concert" and "concerted" sometimes imply a prearranged plan or design, it does not follow that the words are always used with that meaning. Webster's Third International Dictionary (1971) defines the specific term "in concert" as "together," giving as an example "he acted in concert [together] with the others." Moreover, the wording of the section itself makes it clear that the words "voluntarily acting in concert" are intended to include both those who personally engage in the forcible sexual act and those who aid and abet that person in accomplishing it. In the sense that the term "acting in concert" includes the principal actor as well as those who aid and abet, the court's statement that the term was synonymous with aiding and abetting is not entirely accurate. Here, however, there was neither evidence nor claim that Calimee actually committed sodomy upon the victim, and the definition given by the court was wholly accurate when applied to the facts of the case.

Calimee, therefore, finds that "acting in concert" simply means two or more parties acted together. Subsequent courts, however, have taken the *Calimee* language to mean that "in concert" may not always equal aiding and abetting, and assumed that *Calimee* meant that there may be a factual situation where it means something else. (*People* v. *Adams* (1993) 19 Cal.App.4th 412, 446; *People* v.

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Wheeler (1977) 71 Cal.App.3d 902, 906; *People* v. *Champion* (1995) 9 Cal.4th 879, 933.)

At least one case has suggested that "in concert" does not require a showing of aiding and abetting: it is enough if the participants "act together." In *People* v. *Jones* (1989) 212 Cal.App.3d 966, 969–70, the defendant and another man entered the victim's apartment and threatened her. The defendant then had intercourse with her while the second man watched. The second man then had intercourse with the victim, after which both men left the apartment. At trial, the defendant was acquitted of aiding and abetting the second man but convicted of rape in concert based on his act of intercourse. On appeal, he argued that the rape-in-concert charge could not be sustained because he was acquitted of aiding and abetting the co-perpetrator and the latter's mere presence was insufficient to constitute aiding and abetting his own act of intercourse as required by the statute.

The court held that they were only concerned with whether evidence supported the "in concert" finding. Citing *Calimee*, the court held that "in concert" only requires that the participants act together and that aiding and abetting does not need to be separately shown. Even if accomplice liability must be established there was substantial evidence that the co-perpetrator aided and abetted defendant. (*People* v. *Jones, supra,* at pp. 969–70.)

In *People* v. *Champion* (1995) 9 Cal.4th 879 and *People* v. *Gutierrez* (1978) 80 Cal.App.3d 829, defendants unsuccessfully argued that insufficient evidence existed to support their 'in concert' convictions, because no gang-type assault was shown. *Champion* held that the defendant's presence in the home and acts that facilitated the rape were sufficient evidence for the "in concert" charge. (*People* v. *Champion, supra,* 9 Cal.4th at p. 933.) *Gutierrez* simply stated that the evidence established the defendant's participation in the crimes both personally and as an aider and abettor; therefore, the conviction was proper. (*People* v. *Gutierrez, supra,* 80 Cal.App.3d at p. 839.)

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806. Robbery: Intent of Aider and Abettor

To be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid, facilitate, promote, encourage, or instigate commission of the robbery before or while the perpetrator[s] carried away the property to a place of temporary safety.

The perpetrator[s] (has/have) reached a place of temporary safety if (he/she/they) (has/have) successfully escaped from the scene, (is/are) no longer being pursued, and (has/have) unchallenged possession of the property.

BENCH NOTES

Instructional Duty
Give this instruction when the defendant is charged with aiding and abetting a robbery and an issue exists about when the defendant allegedly formed the intent to aid and abet. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165–1166 [defendant who drove get-away car asserted he did not intend to aid an abet at time of robbery].) This instruction **must** be given with Instruction 501, Aiding and Abetting: Intended Crimes.

Do not give this instruction if the defendant is charged with felony murder. Give Instruction 738, Felony Murder: During Commission of Felony—Defined.

AUTHORITY

Aider and Abettor to Robbery—When Intent Formed ▸ *People v. Cooper* (1991) 53 Cal.3d 1158, 1165–1166.
Place of Temporary Safety ▸ *People v. Fields* (1983) 35 Cal.3d 329, 364–368; *People v. Johnson* (1992) 5 Cal.App.4th 552, 560.

RELATED ISSUES

Place of Temporary Safety Based on Objective Standard
Whether the defendant had reached a place of temporary safety is judged on an objective standard. The "issue to be resolved is whether a robber had actually reached a place of temporary safety, not whether the defendant thought that he or

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she had reached such a location." (*People v. Johnson* (1992) 5 Cal.App.4th 552, 560.)

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Aider and Abettor—When Intent Formed

> Although, for purposes of establishing guilt, the asportation requirement is initially *satisfied* by evidence of slight movement (see *People* v. *Clark* (1945) 70 Cal.App.2d 132, 133, asportation is not confined to a fixed point in time. The asportation continues thereafter as long as the loot is being carried away to a place of temporary safety. Therefore, in order to fulfill the requirements of *Beeman, supra*, 35 Cal.3d 547, for conviction of the more serious offense of aiding and abetting a robbery, a getaway driver must form the intent to facilitate or encourage commission of the robbery *prior to or during the carrying away of the loot to a place of temporary safety*.
>
> In determining the duration of the asportation, we reject the argument that commission of the robbery necessarily ends once the loot is removed from the "immediate presence" of the victim. Although the "immediate presence" language comes directly from section 211, this language does not pertain to the *duration* of robbery. Section 211 defines robbery as "the felonious taking of personal property in the possession of another, *from his person or immediate presence* . . . ." (Italics added.) Taking from the "person" and from the "immediate presence" are alternatives. These terms are spatially, rather than temporally, descriptive. They refer to the area *from which* the property is taken, not *how far* it is taken. [Citations.] Put another way, these limitations on the scope of the robbery statute relate to the "gaining possession" component of the taking as distinct from the "carrying away" component.
>
> We also reject the argument for our purposes here that commission of the robbery continues through *the escape* to a place of temporary safety, regardless of whether or not the loot is being carried away simultaneously. In the context of certain statutes concerning ancillary consequences of robbery, robbery is said to continue through the escape to a place of temporary safety, whether or not the asportation of the loot coincides with the escape (hereafter, the escape rule). [Citations.]

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(*People v. Cooper* (1991) 53 Cal.3d 1158, 1165–1166 [footnotes and citations omitted, italics in original].)

Temporary Place of Safety

In the context of felony murder, the Supreme Court has held that the felony continues until the defendant reaches a temporary place of safety. (*People v. Fields* (1983) 35 Cal.3d 329, 364-368.) In *People v. Fields, supra*, the defendant forced the victim to write a check then kept the victim in his home while a codefendant cashed the check and returned with money. The court observed that, although the defendant has in his own home with the proceeds of the robbery,

> That residence, however, was not a place of safety so long as [the victim] was held prisoner. [Citation.] In an unguarded moment, she might escape, notify the police, and render the Fields residence quite unsafe for defendant. In order to complete a successful escape with the robbery proceeds, defendant either had to dispose of her, which he did, or flee to some other place which she could not identify for the police.

(*Id.* at pp. 367-368; see also *People v. Ainsworth* (1988) 45 Cal.3d 984, 1025-1026; *People v. Silva* (1988) 45 Cal.3d 604, 632 [kidnapping continued while victim detained].)

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956. Kidnapping: For Robbery, Rape, or Other Sex Offenses

The defendant is charged [in Count __] with kidnapping for the purpose of (robbery/rape/spousal rape/oral copulation/sodomy/sexual penetration).

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

1. **The defendant intended to commit (robbery/rape/spousal rape/oral copulation/sodomy/sexual penetration).**

2. **For that purpose, the defendant used force or instilled a reasonable fear to (take/hold/detain/arrest/steal/carry away) another person and to move or make that person move a substantial distance.**

AND

3. **The other person was moved or made to move a distance beyond that merely incidental to the commission of a (robbery/rape/ spousal rape/oral copulation/sodomy/sexual penetration).**

Substantial distance **means more than a slight or trivial distance. The movement must have substantially increased the risk of harm to the person beyond that necessarily present in the (robbery/rape/spousal rape/oral copulation/sodomy/sexual penetration). In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.**

[The defendant must have intended to commit (robbery/rape/spousal rape/oral copulation/sodomy/sexual penetration) at the time of the kidnapping, but (he/she) does not actually have to commit the (robbery/rape/spousal rape/oral copulation/sodomy/sexual penetration).]

<Alternative A—robbery>
[The defendant intended to commit robbery if (he/she) intended to use force or fear to take property that was not (his/hers) from another person's possession and immediate presence, against that other person's will, and to permanently deprive the owner of the property [or to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property].]

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<Alternative B—rape by force, fear, or threat>
[The defendant intended to commit rape if he intended to have sexual intercourse with a woman who was not his wife, without her consent, by (using force, duress, menace, or fear of immediate and unlawful bodily injury to her or to another person/threatening to retaliate against her or against a third person, with a reasonable possibility that the threat would be carried out/threatening to have her or a third person incarcerated, arrested, or deported).]

<Alternative C—spousal rape by force, fear, or threat>
[The defendant intended to commit spousal rape if he intended to have sexual intercourse with his wife, without her consent, by (using force, duress, menace, or fear of immediate and unlawful bodily injury to her or to another person/threatening to retaliate against her or against a third person, with a reasonable possibility that the threat would be carried out/threatening to have her or a third person incarcerated, arrested, or deported).]

<Alternative D—oral copulation by force, fear, or threat>
[The defendant intended to commit forcible oral copulation if (he/she) intended to accomplish an act of oral copulation with another person, without that person's consent, by (using force, duress, menace, or fear of immediate and unlawful bodily injury to that person or to a third person/threatening to retaliate against that person or against a third person, with a reasonable possibility that the threat would be carried out/threatening to have that person or a third person incarcerated, arrested, or deported). *Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.]

<Alternative E—sodomy by force, fear, or threat>
[The defendant intended to commit forcible sodomy if he intended to accomplish an act of sodomy with another person, without that person's consent, by (using force, duress, menace, or fear of immediate and unlawful bodily injury to that person or to a third person/threatening to retaliate against that person or against a third person, with a reasonable possibility that the threat would be carried out/threatening to have that person or a third person incarcerated, arrested, or deported). *Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]]

<Alternative F—sexual penetration by force, fear, or threat>
[The defendant intended to commit forcible sexual penetration if (he/she) intended to accomplish an act of sexual penetration with another person,

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without that person's consent, by (using force, duress, menace, or fear of immediate and unlawful bodily injury to that person or to a third person/threatening to retaliate against that person or against a third person, with a reasonable possibility that the threat would be carried out/threatening to have that person or a third person incarcerated, arrested, or deported). *Sexual penetration* means (penetration, however slight, of the genital or anal openings of any person/ [or] causing someone else to penetrate, however slightly, the defendant's or another person's genital or anal openings) for the purpose of sexual abuse, arousal, or gratification.]

BENCH NOTES

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

The elements of robbery, and of rape, spousal rape, oral copulation, sodomy, and sexual penetration by force, fear, or threat, are provided in alternative paragraphs A–F. (See Pen. Code, § 209(b)(1).) If the prosecutor relies on a different intended aggravating sex offense, such as rape of an intoxicated woman, the court should tailor the elements of that felony for use in this instruction. For complete robbery instructions, see series 800, Robbery and Carjacking. For complete sex offense instructions, see series 1100, Sex Offenses Against Adults.

To have the requisite intent for theft, the thief must intend to either deprive the owner permanently or deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58.) Select the appropriate language in alternative A—robbery.

If the intended crime is actually committed and charged, give the full instruction for that crime.

The victim's consent to go with the defendant may be a defense. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298, 375; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].) For paragraphs instructing on actual consent or a reasonable, good faith belief in consent, see Instruction 950, Kidnapping.

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Related Instructions
Kidnapping a child for the purpose of committing a lewd or lascivious act is a separate crime under Penal Code section 207(b). See Instruction 951, Kidnapping: For Child Molestation.

AUTHORITY

Elements ▸ Pen. Code, § 209(b); *People v. Rayford* (1994) 9 Cal.4th 1, 12–14, 22 [following modified two-prong *Daniels* test for movement necessary for aggravated kidnapping]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1139; *People v. Shadden* (2001) 93 Cal.App.4th 164, 168.

Robbery Defined ▸ Pen. Code, § 211.

Rape Defined ▸ Pen. Code, § 261.

Other Sex Offenses Defined ▸ Pen. Code, §§ 262 [spousal rape], 286 [sodomy], 288a [oral copulation], 289 [sexual penetration].

Asportation Requirement ▸ *People v. Martinez* (1999) 20 Cal.4th 225, 232, fn. 4 [Pen. Code, § 209(b)(2) codifies *Rayford* and modified *Daniels* asportation standard]; see *People v. Earley* (1975) 14 Cal.3d 122, 127–128; *People v. Thornton* (1974) 11 Cal.3d 738, 767–769.

Intent to Commit Robbery Must Exist at Time of Original Taking ▸ *People v. Tribble* (1971) 4 Cal.3d 826, 830–832; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699; see *People v. Thornton* (1974) 11 Cal.3d 738, 769–770.

Intent to Deprive Owner of Main Value for Robbery ▸ See *People v. Avery* (2002) 27 Cal.4th 49, 57–59 [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [same].

Kidnapping to Effect Escape From Robbery ▸ *People v. Laursen* (1972) 8 Cal.3d 192, 199–200 [violation of section 209 even though intent to kidnap formed after robbery commenced].

Kidnapping Victim Need Not Be Robbery Victim ▸ *People v. Laursen* (1972) 8 Cal.3d 192, 200, fn. 7.

Use of Force or Fear ▸ See *People v. Martinez* (1984) 150 Cal.App.3d 579, 599–600; *People v. Jones* (1997) 58 Cal.App.4th 693, 713–714.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, §§ 257–265, 274, 275.

COMMENTARY

The instruction states that the movement must “substantially” increase the risk of harm to the victim beyond that necessarily included in the underlying robbery, rape, or sex offense. In *People v. Martinez* (1999) 20 Cal.4th 225, the court

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observed that "[u]nlike our decisional authority, [section 209(b)(2)] does not require that the movement 'substantially' increase the risk of harm to the victim." (*Id.* at p. 232, fn. 4 [dictum, discussing 1997 amendment to section 209(b)(2)].) One appellate court has followed the *Martinez* dictum in holding that kidnapping for carjacking does not require that the physical movement of the victim *substantially* increase the risk of harm. (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 415.) Nevertheless, a recent Supreme Court case repeats the "substantial" increase in harm element without discussing the *Martinez* footnote. (See *People v. Nguyen* (2000) 22 Cal.4th 872, 885–886.) Until this issued is clarified, the committee decided to retain the word "substantial." For an extended discussion of this issue, see *People v. Dominguez* (May 14, 12004) 6th App. Dist., No. H022727, 04 C.D.O.S. 4125, 4128–4132.

LESSER INCLUDED OFFENSES

Kidnapping ▸ Pen. Code, § 207; *People v. Bailey* (1974) 38 Cal.App.3d 693, 699; see *People v. Jackson* (1998) 66 Cal.App.4th 182, 189.

Attempted Kidnapping ▸ Pen. Code, §§ 664, 207.

False Imprisonment ▸ Pen. Code, §§ 236, 237; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547; *People v. Shadden* (2001) 93 Cal.App.4th 164, 171.

RELATED ISSUES

Psychological Harm

Psychological harm may be sufficient to support conviction for aggravated kidnapping under Penal Code section 209(b). An increased risk of harm is not limited to a risk of bodily harm. (*People v. Nguyen* (2000) 22 Cal.4th 872, 885–886 [substantial movement of robbery victim that posed substantial increase in risk of psychological trauma beyond that expected from stationary robbery].)

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STAFF NOTES

Elements

Elements 1 and 2 and their introductory sentence regarding intent and the use of force and fear are supported by Penal Code section 209(b)(1) [as amended effective Jan. 1, 2001, substituting "sexual penetration" for "rape by instrument"]:

> Any person who kidnaps or carries away any individual to commit robbery, rape, spousal rape, oral copulation, sodomy, or sexual penetration in violation of Section 289, shall be punished by imprisonment in the state prison for life with possibility of parole.

[Former section 208(d) proscribed kidnapping to commit rape, oral copulation, sodomy, and rape by instrument. Former section 209, and later section 209(b), proscribed kidnapping to commit robbery. Former section 208(d) was merged into section 209(b), effective January 1, 1998. The Legislature declared its intent that the *Daniels* two-prong asportation test apply to all kidnapping under section 209(b), pursuant to *Rayford*. (See Stats. 1997, ch. 817, § 17.)]

Aggravated kidnapping includes simple kidnapping plus the additional element of the intent to rob [or rape, orally copulate, sodomize, or sexually penetrate]. (*People v. Bailey* (1974) 38 Cal.App.3d 693, 699.) Section 209 fails to define the term "kidnaps"; the Legislature must have intended the term to have the same meaning as the word "kidnaping" used in section 207. (*People v. Stanworth* (1974) 11 Cal.3d 588, 600; *People v. Daniels* (1969) 71 Cal.2d 1119, 1131.) The instruction incorporates the "force and fear" elements from instruction 950. It also incorporates "take and detain" and "moved a substantial distance" from instruction 950.

The use of force or fear is also discussed in *People v. Martinez* (1984) 150 Cal.App.3d 579, 599–600, in the context of kidnapping for extortion, but the court summarizes the requirements for kidnapping for robbery:

> First, it is clear that a person can be seized and confined without any use of force, if he submits to confinement under the compulsion of fear and if that fear is not unreasonable under the circumstances. As stated in *People v. Gomez* . . ., a kidnaping for robbery case, "the gravamen of the offense of kidnaping is some form of compulsion, and . . . the requisite force or compulsion need not consist of the use of actual physical force or express threats. The essence of the crime is that the victim feels compelled to obey because he fears harm or

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> injury from the accused, and his apprehension is not unreasonable under the circumstances."

The intent to rob must exist at the time of the original movement, as stated in *People v. Tribble* (1971) 4 Cal.3d 826, 830–832:

> The 1951 amendment did more than make asportation an element of the crime of kidnaping to commit robbery. It also abrogated the rule of the *Brown* case. A person could not kidnap and carry away his victim to commit robbery if the intent to rob was not formed until after the kidnaping had occurred. As the court stated in *People v. Smith* . . ., both the *Brown* case and the *Knowles* case "preceded the 1951 amendment when detention alone was sufficient to constitute kidnapping for purpose of robbery and no asportation was required. . . . [T]he trier of fact [must] determine whether the kidnaper intended to commit robbery at the time of the original seizing."

Tribble does not mean that kidnapping, as well as robbery, must be simultaneously premeditated as a part of a single course of criminal conduct, as explained in *People v. Laursen* (1972) 8 Cal.3d 192, 199:

> [T]he carrying away of the victim or some other individual during the commission of a robbery, even though motivated by events occurring after the commencement of a robbery still in progress, most certainly increases the risk that he will be injured or killed and is specifically the type of conduct made punishable by section 209. . . . In sum, we are of the view that where a kidnaping is in furtherance of a robbery during which the kidnaping occurs, a violation of section 209 is committed even though the intent to kidnap was formulated after the robbery commenced.

It is sufficient if the kidnapping occurred after the robbery but during the robber's escape to a place of safety, as also discussed in *People v. Laursen, supra,* 8 Cal.3d at p. 199–200:

> [W]e are confronted by [the defendant's second] claim that the kidnaping and the robbery are separate, divisible crimes because the kidnaping was not committed until after the robbery, that is, the taking of the money, had been accomplished. . . . The assault of the victim, the seizure of his property and the robber's escape to a location of temporary safety are all phases in the commission of the crime of robbery linked not only by a proximity of time and

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> distance, but a single-mindness of the culprit's purpose as well. Accordingly, we conclude that when . . . the finder of fact may have reasonably inferred and accordingly have found that the kidnaping of an individual was to effect a robber's escape[,] such kidnaping is proscribed by the provisions of section 209.

Movement Substantial in Character

The requirement that the movement be "substantial in character" is codified in section 209(b)(2):

> This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.

People v. Daniels (1969) 71 Cal.2d 1119, 1139 set forth the two-prong asportation test for kidnapping to commit robbery:

> Rather, we hold that the intent of the Legislature in amending Penal Code section 209 in 1951 was to exclude from its reach not only "standstill" robberies [citation] but also those in which the movements of the victim are merely incidental to the commission of the robbery and do not substantially increase the risk of harm over and above that necessarily present in the crime of robbery itself.

People v. Rayford (1994) 9 Cal.4th 1, 12-14, 22 applied the same test to kidnapping for rape:

> [W]e conclude that the asportation standard for kidnapping for rape is that applied to aggravated kidnapping. . . . Thus, the standard of asportation for [former] section 208(d) kidnapping requires that the movement of the victim be for a distance which is more than that which is merely incidental to the commission or attempted commission of rape, oral copulation, sodomy, or rape by instrument, and that this movement substantially increase the risk of harm to the victim over and above that necessarily present in the commission or attempted commission of these crimes.

There is disagreement on the meaning of "incidental." In *People v. Salazar* (1995) 33 Cal.App.4th 341, 347, the court found that movement of the victim was not necessary to commit the rape, thus it was not incidental. Stated affirmatively, necessary movement is incidental movement. *People v. Shadden* (2001) 93

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Cal.App.4th 164, 169, adopted *Salazar's* reasoning that rape does not necessarily require movement and therefore movement was more than incidental. *People v. Hoard* (2002) 103 Cal.App.4th 599 disagreed with this reasoning, stating that "the accepted definitions of incidental" is "secondary, minor, subordinate, or nonessential." (*Id.* at pp. 605–606.) The court stated at pp. 606–607:

> In our view, incidental and necessary do not mean the same thing. . . . Instead, we decline to apply the reasoning used in *Salazar* and *Shadden* and analyze the facts of this case under *Daniels*, *Earley*, and *Rayford*. . . . Defendant's movement of the two women served only to facilitate the crime with no other apparent purpose. [Footnote omitted.] Considering the particular circumstances of this crime, we conclude it was "merely incidental" to the robbery to confine the women in the back of the store.

Rayford explains what the jury may consider in deciding whether the movement was not merely incidental to a robbery [the first prong], and whether the movement substantially increased the risk of harm over and above that necessarily present in the robbery [the second prong] (*Rayford, supra,* 9 Cal.4th at pp. 12–14):

> As for the first prong, . . . the jury considers the 'scope and nature' of the movement. . . . This includes the actual distance a victim is moved. . . . In addition, we have . . . analyzed the question of whether the movement was incidental to the commission of the underlying crime by considering the context of the environment in which the movement occurred. . . . The second prong . . . includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes.

See also *Hoard, supra,* at p. 605 [quoting *Rayford*].

Psychological Harm

The risk of harm required to elevate kidnapping to aggravated kidnapping may be a risk of psychological harm. Under *Daniels*, the asportation of the victim must substantially increase the "risk of harm" to the victim. (*People v. Nguyen* (2000) 22 Cal.4th 872, 877, 881.) The Legislature's failure, in its 1976 amendment of section 209(b), to retain the concept of "bodily harm" in connection with the required asportation seems deliberate. (*Id.* at p. 885.) Having expressly recognized that the word "harm," standing alone, could include mental suffering, the *Daniels* court, in requiring a substantially increased risk of harm for the asportation element of kidnapping for the purpose of robbery, logically must have intended that requirement to be satisfied by a substantially increased risk of either physical

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or mental harm. Viewed in this light, substantial movement of a victim, by force or fear, that poses a substantial increase in the risk of psychological trauma to the victim beyond that to be expected from a stationary robbery, seems an entirely legitimate basis for finding a separate offense. Thus, it is reasonable to conclude that the word "harm," as used in section 209(b), includes psychological harm. (*Id.* at pp. 885–86.)

"Substantial" Increase in Harm

In *People v. Martinez* (1999) 20 Cal.4th 225, the court observed that "[u]nlike our decisional authority, [section 209(b)(2)] does not require that the movement 'substantially' increase the risk of harm to the victim." (*Id.* at p. 232, fn. 4 [dictum, discussing 1997 amendment to section 209(b)(2)].) The court in *People v. Ortiz* (2002) 100 Cal.App.4th 410, 414–415 followed this language from *Martinez*:

> In 1997, the Legislature added to the aggravated kidnapping statute *Rayford's* and *Daniels's* requirement of an "increase of risk of harm." (See § 209, subd. (b)(2).) As the Supreme Court in *Martinez* noted, "[the aggravated kidnapping statute] thus codifies both *Rayford* ... and a modified version of the *People v. Daniels* ... asportation standard." (*Martinez, supra,* 20 Cal.4th at p. 232, fn. 4.) As such, the movement of the victim in an aggravated kidnapping must increase the risk of harm beyond that inherent to the underlying crime, but "does not require that the movement 'substantially' increase the risk of harm to the victim." (*Ibid.*) When the Legislature added the risk-of-harm element to section 209, it tracked identical language employed four years earlier when it enacted the kidnapping for carjacking statute. (§ 209.5, subd. (b).) It follows that the Legislature intended that the risk of harm element have the same meaning in both statutes, and it follows that the *Martinez* rule applies with equal force here. Accordingly, we hold that kidnapping for carjacking (§ 209.5), like aggravated kidnapping (§ 209), does not require that the physical movement of the victim *substantially* increase the risk of harm; it is enough that commission of the offense creates a risk of harm greater than that incidental to simple carjacking.

A more recent Supreme Court case construing section 209(b) repeats the "substantial" increase in harm element but does not discuss the *Martinez* footnote. (See, e.g., *People v. Nguyen* (2000) 22 Cal.4th 872, 885–886.) The Committee decided it was more prudent to keep the word "substantial" in brackets until the issue is clarified.

Lesser Included Offenses

See *People v. Bailey* (1974) 38 Cal.App.3d 693, 699:

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> Simple kidnaping is a lesser offense included within the crime of kidnaping with the intent to commit robbery. [Citation.] The aggravated offense requires the additional element of an intent to rob, an intent which must be formed before the kidnaping commences.

People v. Jackson (1998) 66 Cal.App.4th 182, 189:

> The People concede that kidnapping is a lesser offense included within the offenses of kidnapping to commit robbery and kidnapping to commit sodomy or oral copulation.

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960. Defense to Kidnapping: Protecting Child From Imminent Harm

---

The defendant is not guilty of kidnapping if (he/she) (took/stole/enticed away/detained/concealed/harbored) a child under the age of 14 years to protect that child from danger of imminent harm.

An *imminent harm* is an immediate and present threat of harm. Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed that the child was in immediate danger.

The People must prove beyond a reasonable doubt that the defendant did not act to protect the child from the danger of imminent harm. If the People have not met this burden, you must find the defendant not guilty of kidnapping.

BENCH NOTES

Instructional Duty

No reported cases specifically discuss the court's duty to instruct on the prevention of imminent harm to a child. Generally, an instruction on a defense must be given **sua sponte** if there is substantial evidence supporting the defense and the defendant is relying on the defense or the defense is not inconsistent with the defendant's theory of the case. (*People v. Sedeno* (1974) 10 Cal.3d 703, 716–717; *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1139, fn. 3.)

The prevention of imminent harm may be asserted against the following forms of kidnapping (Pen. Code, § 207(e)):

1. Simple kidnapping by force or fear. (Pen. Code, § 207(a).)

2. Kidnapping for the purpose of committing a lewd or lascivious act with a child. (Pen. Code, § 207(b).)

3. Kidnapping by force or fear for the purpose of selling the victim into slavery or involuntary servitude. (Pen. Code, § 207(c).)

4. Kidnapping by bringing a person unlawfully abducted out of state into California. (Pen. Code, § 207(d).)

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Related Instructions
Instruction 615, Necessity.
Instruction 610, Duress or Threats.

AUTHORITY

Instructional Requirements ▸ Pen. Code, § 207(e)(1).
Imminent Harm Defined ▸ See *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1269 [defining "imminent" for purposes of imperfect self-defense to murder charge]; *In re Eichorn* (1998) 69 Cal.App.4th 382, 389 [citing with approval definition of necessity that includes physical harm].

COMMENTARY

Burden of Proof
A person is guilty of kidnapping a minor only if the taking is done for an illegal purpose or with an illegal intent. (*People v. Oliver* (1961) 55 Cal.2d 761, 768.) The People must prove an illegal purpose or illegal intent beyond a reasonable doubt. (See *People v. Ojeda-Parra* (1992) 7 Cal.App.4th 46, 50; *People v. Oliver, supra,* 55 Cal.2d at p. 768.) Following this reasoning, it appears that the defendant need only raise a reasonable doubt regarding his or her intention when taking the child.

Whether Belief Must Be Reasonable
Penal Code section 207(e)(1) does not appear to require that the defendant "reasonably" believe that the child was in danger of harm. The section does not contain this requirement and was enacted after *People v. Beach* (1987) 194 Cal.App.3d 955, 972, which held that a defendant could not rely on the defense of necessity when his or her belief was not objectively reasonable.

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STAFF NOTES

Elements
Items 1 and 2 are supported by Penal Code section 207(e), which provides:

> (e) Subdivisions (a) to (d), inclusive, do not apply to any of the following:
> (1) To any person who steals, takes, entices away, detains, conceals, or harbors any child under the age of 14 years, if that act is taken to protect the child from danger of imminent harm.

Imminent Harm
The instruction borrows from the necessity and duress instructions in defining "imminent harm." *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1269 defines "imminent" for purposes of an imperfect self-defense to a murder charge:

> [The *Flannel* defense] requires without exception that the defendant must have had an *actual* belief in the need for self-defense. We also emphasize what should be obvious. Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. ' "[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*" . . .' [Original italics.]

In re Eichorn (1998) 69 Cal.App.4th 382, 389, cites with approval the definition of necessity that includes some physical harm:

> The defense of necessity is "founded upon public policy and provides a justification distinct from the elements required to prove the crime. [Citation.] The situation presented to the defendant must be of an emergency nature, threatening physical harm, and lacking an alternative, legal course of action.

Reasonable Doubt
The People must prove an illegal purpose or illegal intent beyond a reasonable doubt. (See People v. Ojeda-Parra (1992) 7 Cal.App.4th 46, 50; People v. Oliver (1961) 55 Cal.2d 761, 768.) Similarly, for a mistake of fact regarding consent, a defendant need only raise a reasonable doubt whether he or she had the requisite belief. (People v. Mayberry (1975) 15 Cal.3d 143, 157 ["burden was on defendant to prove that he had a bona fide and reasonable belief that the prosecutrix consented to the movement and to sexual intercourse[;] . . . he was only required to raise a reasonable doubt as to whether he had such a belief"].) Arguably, then, a

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defendant asserting imminent harm need only raise a reasonable doubt regarding his or her intention when taking the child.

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1015. Trespass After Making Credible Threat

The defendant is charged [in Count __] with trespass after making a credible threat.

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

1. **The defendant made a credible threat to cause serious bodily injury to another person.**

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

AND

<Alternative 3A—entered home>

[3. Within 30 days of making the threat, the defendant unlawfully entered the threatened person's residence[, or the property or land next to the residence,] without a lawful purpose and with the intent to carry out the threat.]

<Alternative 3B—entered workplace>

[3. Within 30 days of making the threat, the defendant unlawfully entered the workplace of the threatened person, knowing that the place (he/she) entered was the threatened person's workplace, and tried to locate that person without a lawful purpose and with the intent to carry out the threat.]

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

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

A *serious bodily injury* means a serious impairment of physical condition, including[, but not limited to, the following:] (loss of consciousness[,]/ concussion[,]/ bone fracture[,]/ protracted loss or impairment of function of

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any bodily member or organ[,]/ a wound requiring extensive suturing[,]/ [and] serious disfigurement).

Unlawful entry **means:**

> **[Entering a dwelling house, apartment, or residence without the consent of the owner, the owner's agent, or a person in lawful possession.]**
>
> **[Entering and occupying any real property or structures without the consent of the owner, the owner's agent, or a person in lawful possession.]**
>
> **[Entering any lands or buildings with the intent to injure property or property rights, or to interfere with or injure a lawful business or occupation carried on by the owner, the owner's agent, or a person in lawful possession.]**

[*Immediate family* means (a) a spouse, parent, or child; (b) a grandchild, grandparent, brother, or sister related by blood or marriage; and (c) a person who regularly lives in the defendant's household [or who regularly lived there within the six months before the alleged incident].]

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

BENCH NOTES

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

Give alternative 3A or 3B depending on whether the evidence indicates that the defendant entered the threatened person's residence or property next to that residence, or entered the threatened person's workplace. (Pen. Code, § 601(a)(1) & (2).)

To be credible, the threat must be made with the apparent ability to carry it out. (See Pen. Code, § 646.9(g) [defining "credible threat" in context of stalking].) Thus, always give the definition of "credible threat."

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Give any of the three, bracketed definitions of unlawful entry depending on the evidence in the case. (See, e.g., Pen. Code, §§ 602(j) & (*l*) [trespass on lands, real property, or structures], 602.5(a) [unlawful entry of residence].)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, give on request the bracketed phrases in element 2 and in the definition of "credible threat," as well as the bracketed paragraph defining "immediate family." (Pen. Code, §§ 601(a), 646.9(*l*); see Fam. Code, § 6205 ["affinity" defined]; Prob. Code, §§ 6401, 6402 [degrees for purposes of intestate succession].)

If there is evidence that a threat was communicated through an "electronic communication device," give on request the final bracketed paragraph listing the different means of electronically communicating a threat. (See Pen. Code, § 646.9(h) [in context of stalking]; 18 U.S.C. § 2510(12).)

Related Instruction
Instruction 1010, Stalking.

AUTHORITY

Elements ▸ Pen. Code, § 601(a).
Credible Threat Defined ▸ See Pen. Code, § 646.9(g); *People v. Falck* (1997) 52 Cal.App.4th 287, 295, 297–298 [both in context of stalking].
Immediate Family Defined ▸ Pen. Code, §§ 601(a), 646.9(*l*).
Serious Bodily Injury Defined ▸ Pen. Code, §§ 417.6(b), 601(a).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 252.

RELATED ISSUES

Labor Union Activities
Penal Code section 601 does not apply to any person who is engaged in labor union activities that are permitted by the California Agricultural Labor Relations Act (see Lab. Code, § 1140 et seq.) or by the National Labor Relations Act (29 U.S.C. § 151 et seq.). (Pen. Code, § 601(c).)

Personal Residence, Real Property, or Workplace
Penal Code section 601 does not apply if the person making the threat enters his or her own residence, real property, or workplace. (Pen. Code, § 601(b).)

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STAFF NOTES

Elements

Penal Code section 601(a) defines the crime known as trespass after making a credible threat:

> (a) Any person is guilty of trespass who makes a credible threat to cause serious bodily injury, as defined in subdivision (a) of Section 417.6, to another person with the intent to place that other person in reasonable fear for his or her safety, or the safety of his or her immediate family, as defined in subdivision (i) of Section 646.9 [now see subdivision (*l*)], and who does any of the following:
>
> (1) Within 30 days of the threat, unlawfully enters into the residence or real property contiguous to the residence of the person threatened without lawful purpose, and with the intent to execute the threat against the target of the threat.
>
> (2) Within 30 days of the threat, knowing that the place is the threatened person's workplace, unlawfully enters into the workplace of the person threatened and carries out an act or acts to locate the threatened person within the workplace premises without lawful purpose, and with the intent to execute the threat against the target of the threat.
>
> . . .
>
> (d) A violation of this section shall be punishable by imprisonment in the state prison, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars ($ 2,000), or by both a fine and imprisonment.

Credible Threat

Section 601(a) requires that the credible threat be made with the intent "to place that other person in reasonable fear for his or her safety, or the safety of his or her immediate family." This is similar to the definition of "credible threat" for stalking set forth in Penal Code section 646.9(g), which provides:

> For the purposes of this section, "credible threat" means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. . . .

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The target apparently must actually and reasonably fear for his or her safety or that of his or her family, as stated in *People v. Falck* (1997) 52 Cal.App.4th 287, 295, 297–298:

> Section 646.9 does not require that the defendant actually intend to carry out the threat. It is enough that the threat causes the victim reasonably to fear for her safety or the safety of her family, and that the accused makes the threat with the intent to cause the victim to feel that fear. . . . [T]he evidence not just slightly, but overwhelmingly, supports the finding that the victim not only actually feared appellant, but had cause to fear him.

Serious Bodily Injury Defined
Penal Code section 601(a) incorporates the definition of "serious bodily injury" from Penal Code section 417.6(b), which provides:

> (b) As used in this section, "serious bodily injury" means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

[Section 601(a) refers to Penal Code section 417.6(a), but subdivision (a) was relettered to subdivision (b) by 2000 legislation.]

The bracketed definition in the instruction is copied from instruction 851, Battery Causing Serious Bodily Injury.

Immediate Family Defined
Penal Code section 601(a) incorporates the definition of "immediate family" from Penal Code section 646.9(i) [now see section 646.9(*l*)], which states:

> For purposes of this section, "immediate family" means any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

[Section 601(a) refers to Penal Code section 646.9(i), but subdivision (i) was relettered to subdivision (*l*) by 1995 and 1998 legislation.]

The same definition of "immediate family" is used in instruction 1000, Criminal Threats.

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Unlawful Entry
Penal Code section 602 prohibits different forms of trespass, including trespass on lands or in real property or structures:

> Except as provided in Section 602.8, every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:
> . . .
> (j) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession.
> . . .
> (*l*) Entering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession.

See *People v. Harris* (1961) 191 Cal.App.2d 754, 758, fn. 3 [“purpose” synonymous with “intent”]; *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 919 [“lands” includes buildings and fixtures and is synonymous with real property].

Penal Code section 602.5(a) prohibits unlawful entry of residences:

> (a) Every person other than a public officer or employee acting within the course and scope of his or her employment in performance of a duty imposed by law, who enters or remains in any noncommercial dwelling house, apartment, or other residential place without consent of the owner, his or her agent, or the person in lawful possession thereof, is guilty of a misdemeanor.

Exclusions
Penal Code section 601(b) and (c) provides that it does not apply to the following:

> (b) Subdivision (a) shall not apply if the residence, real property, or workplace described in paragraph (1) or (2) that is entered is the residence, real property, or workplace of the person making the threat.
> (c) This section shall not apply to any person who is engaged in labor union activities which are permitted to be carried out on the property by the California Agricultural Labor Relations Act, Part 3.5 (commencing with Section 1140) of Division 2 of the Labor Code, or by the National Labor

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1015. Trespass After Making Credible Threat

The defendant is charged [in Count __] with trespass after making a credible threat.

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

1. **The defendant made a credible threat to cause serious bodily injury to another person.**

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

AND

<Alternative 3A—entered home>

[3. Within 30 days of making the threat, the defendant unlawfully entered the threatened person's residence[, or the property or land next to the residence,] without a lawful purpose and with the intent to carry out the threat.]

<Alternative 3B—entered workplace>

[3. Within 30 days of making the threat, the defendant unlawfully entered the workplace of the threatened person, knowing that the place (he/she) entered was the threatened person's workplace, and tried to locate that person without a lawful purpose and with the intent to carry out the threat.]

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

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

A *serious bodily injury* means a serious impairment of physical condition, including[, but not limited to, the following:] (loss of consciousness[,]/ concussion[,]/ bone fracture[,]/ protracted loss or impairment of function of

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any bodily member or organ[,]/ a wound requiring extensive suturing[,]/ [and] serious disfigurement).

Unlawful entry **means:**

> **[Entering a dwelling house, apartment, or residence without the consent of the owner, the owner's agent, or a person in lawful possession.]**
>
> **[Entering and occupying any real property or structures without the consent of the owner, the owner's agent, or a person in lawful possession.]**
>
> **[Entering any lands or buildings with the intent to injure property or property rights, or to interfere with or injure a lawful business or occupation carried on by the owner, the owner's agent, or a person in lawful possession.]**

[*Immediate family* means (a) a spouse, parent, or child; (b) a grandchild, grandparent, brother, or sister related by blood or marriage; and (c) a person who regularly lives in the defendant's household [or who regularly lived there within the six months before the alleged incident].]

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

BENCH NOTES

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

Give alternative 3A or 3B depending on whether the evidence indicates that the defendant entered the threatened person's residence or property next to that residence, or entered the threatened person's workplace. (Pen. Code, § 601(a)(1) & (2).)

To be credible, the threat must be made with the apparent ability to carry it out. (See Pen. Code, § 646.9(g) [defining "credible threat" in context of stalking].) Thus, always give the definition of "credible threat."

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Give any of the three, bracketed definitions of unlawful entry depending on the evidence in the case. (See, e.g., Pen. Code, §§ 602(j) & (*l*) [trespass on lands, real property, or structures], 602.5(a) [unlawful entry of residence].)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, give on request the bracketed phrases in element 2 and in the definition of "credible threat," as well as the bracketed paragraph defining "immediate family." (Pen. Code, §§ 601(a), 646.9(*l*); see Fam. Code, § 6205 ["affinity" defined]; Prob. Code, §§ 6401, 6402 [degrees for purposes of intestate succession].)

If there is evidence that a threat was communicated through an "electronic communication device," give on request the final bracketed paragraph listing the different means of electronically communicating a threat. (See Pen. Code, § 646.9(h) [in context of stalking]; 18 U.S.C. § 2510(12).)

Related Instruction
Instruction 1010, Stalking.

AUTHORITY

Elements ▸ Pen. Code, § 601(a).
Credible Threat Defined ▸ See Pen. Code, § 646.9(g); *People v. Falck* (1997) 52 Cal.App.4th 287, 295, 297–298 [both in context of stalking].
Immediate Family Defined ▸ Pen. Code, §§ 601(a), 646.9(*l*).
Serious Bodily Injury Defined ▸ Pen. Code, §§ 417.6(b), 601(a).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 252.

RELATED ISSUES

Labor Union Activities
Penal Code section 601 does not apply to any person who is engaged in labor union activities that are permitted by the California Agricultural Labor Relations Act (see Lab. Code, § 1140 et seq.) or by the National Labor Relations Act (29 U.S.C. § 151 et seq.). (Pen. Code, § 601(c).)

Personal Residence, Real Property, or Workplace
Penal Code section 601 does not apply if the person making the threat enters his or her own residence, real property, or workplace. (Pen. Code, § 601(b).)

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STAFF NOTES

Elements

Penal Code section 601(a) defines the crime known as trespass after making a credible threat:

> (a) Any person is guilty of trespass who makes a credible threat to cause serious bodily injury, as defined in subdivision (a) of Section 417.6, to another person with the intent to place that other person in reasonable fear for his or her safety, or the safety of his or her immediate family, as defined in subdivision (i) of Section 646.9 [now see subdivision (*l*)], and who does any of the following:
>
> (1) Within 30 days of the threat, unlawfully enters into the residence or real property contiguous to the residence of the person threatened without lawful purpose, and with the intent to execute the threat against the target of the threat.
>
> (2) Within 30 days of the threat, knowing that the place is the threatened person's workplace, unlawfully enters into the workplace of the person threatened and carries out an act or acts to locate the threatened person within the workplace premises without lawful purpose, and with the intent to execute the threat against the target of the threat.
>
> . . .
>
> (d) A violation of this section shall be punishable by imprisonment in the state prison, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars ($ 2,000), or by both a fine and imprisonment.

Credible Threat

Section 601(a) requires that the credible threat be made with the intent "to place that other person in reasonable fear for his or her safety, or the safety of his or her immediate family." This is similar to the definition of "credible threat" for stalking set forth in Penal Code section 646.9(g), which provides:

> For the purposes of this section, "credible threat" means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. . . .

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The target apparently must actually and reasonably fear for his or her safety or that of his or her family, as stated in *People v. Falck* (1997) 52 Cal.App.4th 287, 295, 297–298:

> Section 646.9 does not require that the defendant actually intend to carry out the threat. It is enough that the threat causes the victim reasonably to fear for her safety or the safety of her family, and that the accused makes the threat with the intent to cause the victim to feel that fear. . . . [T]he evidence not just slightly, but overwhelmingly, supports the finding that the victim not only actually feared appellant, but had cause to fear him.

Serious Bodily Injury Defined
Penal Code section 601(a) incorporates the definition of "serious bodily injury" from Penal Code section 417.6(b), which provides:

> (b) As used in this section, "serious bodily injury" means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

[Section 601(a) refers to Penal Code section 417.6(a), but subdivision (a) was relettered to subdivision (b) by 2000 legislation.]

The bracketed definition in the instruction is copied from instruction 851, Battery Causing Serious Bodily Injury.

Immediate Family Defined
Penal Code section 601(a) incorporates the definition of "immediate family" from Penal Code section 646.9(i) [now see section 646.9(*l*)], which states:

> For purposes of this section, "immediate family" means any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

[Section 601(a) refers to Penal Code section 646.9(i), but subdivision (i) was relettered to subdivision (*l*) by 1995 and 1998 legislation.]

The same definition of "immediate family" is used in instruction 1000, Criminal Threats.

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Unlawful Entry
Penal Code section 602 prohibits different forms of trespass, including trespass on lands or in real property or structures:

> Except as provided in Section 602.8, every person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor:
> . . .
> (j) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession.
> . . .
> (*l*) Entering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession.

See *People v. Harris* (1961) 191 Cal.App.2d 754, 758, fn. 3 [“purpose” synonymous with “intent”]; *People v. Brown* (1965) 236 Cal.App.2d Supp. 915, 919 [“lands” includes buildings and fixtures and is synonymous with real property].

Penal Code section 602.5(a) prohibits unlawful entry of residences:

> (a) Every person other than a public officer or employee acting within the course and scope of his or her employment in performance of a duty imposed by law, who enters or remains in any noncommercial dwelling house, apartment, or other residential place without consent of the owner, his or her agent, or the person in lawful possession thereof, is guilty of a misdemeanor.

Exclusions
Penal Code section 601(b) and (c) provides that it does not apply to the following:

> (b) Subdivision (a) shall not apply if the residence, real property, or workplace described in paragraph (1) or (2) that is entered is the residence, real property, or workplace of the person making the threat.
> (c) This section shall not apply to any person who is engaged in labor union activities which are permitted to be carried out on the property by the California Agricultural Labor Relations Act, Part 3.5 (commencing with Section 1140) of Division 2 of the Labor Code, or by the National Labor

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1220. Lewd or Lascivious Act: Child Under 14 Years

The defendant is charged [in Count __] with committing a lewd or lascivious act on a child under the age of 14 years.

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

<Alternative 1A—defendant touched child>

[1. The defendant willfully touched any part of a child's body either on the bare skin or through the clothing.

<Alternative 1B—child touched defendant>

[1. The defendant caused a child to touch (his/her) own body, the defendant's body, or the body of someone else, either on the bare skin or through the clothing.]

2. The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the child.

AND

3. The child was under the age of 14 years at the time of the act.

The touching need not be done in a lewd or sexual manner.

[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.]

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required.]

[It is not a defense that the child may have consented to the act.]

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

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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 in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322.) The court must determine whether it is appropriate to give the standard unanimity instruction, Instruction 160, Unanimity on Specific Act or Acts, or the modified unanimity instruction, Instruction 161, Unanimity—When Generic Testimony Of Offense Presented. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

In element 1, give alternative 1A if the prosecution alleges that the defendant touched the child. Also give the bracketed definition of "willfully." Give alternative 1B if the prosecution alleges that the defendant cause the child to do the touching.

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502.)

Give the second to the last bracketed paragraph on request if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51.)

Give the final bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Pen. Code, § 288(a).
Actual Arousal Not Required ▸ *People v. McCurdy* (1923) 60 Cal.App. 499, 502.
Any Touching of Child With Intent to Arouse ▸ *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [list of examples].
Child's Consent Not a Defense ▸ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [dicta].

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Child Touching Own Body Parts at Defendant's Instigation ▸ *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115.

Lewd Defined ▸ *In re Smith* (1972) 7 Cal.3d 362, 365 [in context of indecent exposure]; see *People v. Babb* (1951) 103 Cal.App.2d 326, 330.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 37–40, 44–46.

LESSER INCLUDED OFFENSES

Attempted Lewd Act With Child Under 14 ▸ Pen. Code, §§ 664, 288(a); *People v. Imler* (1992) 9 Cal.App.4th 1178, 1181–1182.

Annoying or molesting a child under the age of 18 (Pen. Code, § 647.6) is not a lesser included offense of section 288(a). (*People v. Lopez* (1998) 19 Cal.4th 282, 290, 292.)

RELATED ISSUES

Any Act That Constitutes Crime

A lewd or lascivious act includes any act that constitutes a crime as provided in part 1 of the Penal Code (Pen. Code, §§ 26–679.04). (Pen. Code, § 288(a).) For example, unlawful sexual intercourse on the body of a child under 14 can be charged as a lewd act under section 288 and as a separate offense under section 261.5. However, these charges are in the alternative and, in such cases, the court has a **sua sponte** duty to give Instruction 164, Multiple Counts—Alternative Charges For One Event. (See Pen. Code, § 654(a); *People v. Nicholson* (1979) 98 Cal.App.3d 617, 625.)

Calculating Age

The "birthday rule" of former Civil Code section 26 (now see Fam. Code, § 6500) applies so that a person attains a given age as soon as the first minute of his or her birthday has begun, not on the day before the birthday. (See *In re Harris* (1993) 5 Cal.4th 813, 844–845, 849.)

Minor Perpetrator

A minor under age 14 may be convicted for violating Penal Code section 288(a) on clear proof of the minor's knowledge of wrongfulness and the minor's intent to arouse his or her own sexual desires. (See Pen. Code, § 26; *In re Randy S.* (1999)

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76 Cal.App.4th 400, 406–408; see also *In re Paul C.* (1990) 221 Cal.App.3d 43, 49 [in context of oral copulation].)

Mistaken Belief About Victim's Age
A defendant charged with a lewd act on a child under Penal Code section 288(a) is not entitled to a mistake of fact instruction regarding the victim's age. (*People v. Olsen* (1984) 36 Cal.3d 638, 647 [adult defendant]; *In re Donald R.* (1993) 14 Cal.App.4th 1627, 1629–1630 [minor defendant].)

Multiple Lewd Acts
Each individual act that meets the requirements of section 288 can result in a new and separate statutory violation. (*People v. Scott* (1994) 9 Cal.4th 331, 346–347 [following *Harrison*]; see *People v. Harrison* (1989) 48 Cal.3d 321, 329, 334 [in context of sexual penetration].) For example, if a defendant fondles one area of a victim's body with the requisite intent and then moves on to fondle a different area, one offense has ceased and another has begun. There is no requirement that the two be separated by a hiatus or period of reflection. (*People v. Jimenez* (2002) 99 Cal.App.4th 450, 456.)

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STAFF NOTES

Elements
Penal Code section 288(a) provides:

> (a) Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

Any Touching
In *People v. Martinez* (1995) 11 Cal.4th 434, 444, the California Supreme Court adhered to the weight of authority that section 288 is violated by "any touching" of an underage child committed with the intent to sexually arouse either the defendant or child:

> [T]he the "gist" of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. (Citation.) . . . "If [the] intent of the act, although it may have the outward appearance of innocence, is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute . . .." (Citation.) [*Id.* at p. 444.] . . . [T]he only way to determine whether a particular touching is permitted or prohibited is by reference to the actor's intent as inferred from all the circumstances. As *Wallace* appears to concede, any other construction could exempt a potentially broad range of sexually motivated and harmful contact from the statute's reach. [*Id.* at p. 450.] . . . For all the foregoing reasons, we adhere to the long-standing rule that section 288 is violated by "any touching" of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child. [*Id.* at p. 452, disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 and its progeny.]

Despite the statute's language, the instruction uses the phrase "willfully committed a lewd or lascivious act upon a child" in paragraph 1 instead of saying "willfully *and lewdly* committed a lewd or lascivious act upon *or with the body of* a child" to conform to *Martinez* and to more broadly convey the different types of touching encompassed by the cases discussed below.

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Other than the required intent at the time of the touching, the "form, manner, or nature of the offending act is not otherwise restricted. Conviction . . . has never depended upon contact with the bare skin or 'private parts' of the defendant or the victim. . . . [A] lewd act can occur through the victim's clothing and can involve 'any part' of the victim's body." (*Id.* at p. 444; see *People v. Hobbs* (1952) 109 Cal.App.2d 189, 192; *People v. Carpenter* (1955) 137 Cal.App.2d 792, 793.) Ordering a child to pull down her pants or compelling a child to disrobe has been found to be lewd touchings. Having a child touch a fully clothed defendant between his legs or requiring a child to drink urine have also been found to be lewd touchings. (See *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [list of examples]; *People v. Mickle* (1991) 54 Cal.3d 140, 176 [disrobing instruction]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 887–890 [compelling child to drink urine].)

The manner of touching is not irrelevant. The jury looks to all the circumstances, including the charged act, to determine whether it was performed with the required specific intent. "Other relevant facts can include the defendant's extrajudicial statements . . ., other acts of lewd conduct admitted or charged in the case . . ., the relationship of the parties . . ., and any coercion, bribery, or deceit used to obtain the victim's cooperation or to avoid detection . . .." (*People v. Martinez, supra,* 11 Cal.4th at p. 445.)

Lewd and Lascivious Defined

The Supreme Court does not ascribe separate meanings to the distinct requirements that the act be done "willfully and lewdly" and "with [sexual] intent." Both phrases overlap and refer to a single phenomenon–"sexual motivation." (*In re Smith* (1972) 7 Cal.3d 362, 366.) "[T]he meaning of 'lewd' is 'sexually unchaste or licentious,' 'dissolute, lascivious,' 'suggestive of or tending to moral looseness,' 'inciting to sensual desire or imagination,' 'indecent, obscene, salacious.' (Webster's New Internat. Dict. (3d ed. 1961) p. 1301.)" (*In re Smith, supra,* 7 Cal.3d at p. 365.) "Similarly, the word 'lascivious' means 'tending to arouse sexual desire'; it is synonymous with 'lewd, lustful,' 'libidinous, salacious.'" (*People v. Martinez, supra,* 11 Cal.4th at p. 449, fn. 15, quoting Webster's New Internat. Dict., *supra,* at p. 1274; see also *People v. Pitts* (1990) 223 Cal.App.3d 606, 887.) Justice Mosk simply read section 288(a) to impliedly define "a lewd or lascivious act" as any conduct committed "with the intent of arousing, appealing to, or gratifying" the "lust," "passions," or "sexual desires" of either the perpetrator or the underage victim. (*People v. Martinez, supra,* 11 Cal.4th at p. 453 (conc. opn. of Mosk, J.).)

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Willfully Defined
The definition of willfully is taken from instruction 1050, Arson.

Subject Matter Jurisdiction
Subject matter jurisdiction under Penal Code section 778a(a) is a matter for the trial court to determine, not the jury, when the jurisdictional facts are controverted. (*People v. Betts* (2002, E029720) __ Cal.App.4th __ [non de minimus preparatory acts to commit molestations were done in California].)

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1221. Lewd or Lascivious Act: By Force or Fear

The defendant is charged [in Count __] with a lewd or lascivious act by force or fear on a child under the age of 14 years.

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

1. **The defendant willfully committed a lewd or lascivious act on a child.**

2. **In committing the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the child or someone else.**

3. **The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the child.**

AND

4. **The child was under the age of 14 years at the time of the act.**

A *lewd or lascivious act* is any touching of a child with the intent to sexually arouse either the perpetrator or the child. The touching need not be done in a lewd or sexual manner. Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched. [A *lewd or lascivious act* includes causing a child to touch his or her own body or someone else's body at the instigation of a perpetrator who has the required intent.]

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.

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required.]

[An act is accomplished by *force* if a person uses enough physical force to overcome the child's will.] [The force must be substantially different from or substantially greater than the force needed to accomplish the act itself.]

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[*Duress* means a direct or implied threat of force, violence, danger, or retribution that causes a reasonable person to do [or submit to] something that he or she would not otherwise do [or submit to]. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the child and (his/her) relationship to the defendant.] [*Retribution* is a form of payback or revenge.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is accomplished by *fear* if the child is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]

[It is not a defense that the child may have consented to the act.]

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

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 in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322.) The court must determine whether it is appropriate to give the standard unanimity instruction, Instruction 160, Unanimity on Specific Act or Acts, or the modified unanimity instruction, Instruction 161, Unanimity—When Generic Testimony Of Offense Presented. Review the discussion in the bench notes to these two instructions and *People v. Jones*, *supra*, 51 Cal.3d at pp. 321–322.

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502.)

There is disagreement whether knowing consent by a minor is an affirmative defense to a lewd act accomplished by force. (See *People v. Cicero* (1984) 157 Cal.App.3d 465, 484–485 [when no physical harm, knowing consent of minor is an affirmative defense]; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158

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[lewd act need not be against will of victim, following dissent in *Cicero, supra,* 157 Cal.App.3d at pp. 487–488, dis. opn. of Regan, Acting P.J.]; *People v. Bolander* (1994) 23 Cal.App.4th 155, 162–163 [lack of consent not an element of § 288(b)]; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [dicta].) The penultimate bracketed paragraph may be given on request if the court agrees that consent is not a defense to a charge under section 288(b)(1).

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Pen. Code, § 288(b)(1).

Duress Defined ▸ Pen. Code, § 261(b) [in context of rape]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14; *People v. Minsky* (2003) 105 Cal.App.4th 774 [duress based on danger to loved ones if incarcerated; "retribution" defined, REVIEW GRANTED & DEPUBLISHED, Apr. 12, 2003, S113966]; but see *People v. Edmonton* (2002) 103 Cal.App.4th 557, 564 [rape statutes define "duress" for those statutes only; "duress" for forcible lewd conduct includes "threat of hardship," REVIEW GRANTED & DEPUBLISHED, Jan. 22, 2003, S112168]; *People v. Leal* (2003) 105 Cal.App.4th 833, REVIEW GRANTED & DEPUBLISHED, Apr. 23, 2003, S114399.

Menace Defined ▸ Pen. Code, § 261(c) [in context of rape].

Actual Arousal Not Required ▸ *People v. McCurdy* (1923) 60 Cal.App. 499, 502.

Any Touching of Child With Intent to Arouse ▸ *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [list of examples].

Child Touching Own Body Parts at Defendant's Instigation ▸ *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115.

Fear Defined ▸ *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940; *People v. Iniguez* (1994) 7 Cal.4th 847 [in context of rape].

Force Defined ▸ *People v. Bolander* (1994) 23 Cal.App.4th 155, 160–161; contra, *People v. Senior* (1992) 3 Cal.App.4th 765, 774; see *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1306–1307 [error to suggest force can be applied by psychological coercion without any touching].

Lewd Defined ▸ *In re Smith* (1972) 7 Cal.3d 362, 365 [in context of indecent exposure]; see *People v. Babb* (1951) 103 Cal.App.2d 326, 330.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 37–38, 42–46.

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COMMENTARY

The instruction includes definitions of "force" and "fear" because those terms have meanings in the context of forcible sex offenses that are technical and may not be readily apparent to jurors. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [force]; see *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [fear in context of rape].)

There is a split in authority over the meaning of "force." *People v. Senior* (1992) 3 Cal.App.4th 765, 774, requires that the force be substantially different from or substantially exceed the force necessary to accomplish the act, but in dicta states that "a modicum of holding and even restraining cannot be regarded as substantially different or excessive 'force.'" *People v. Bolander* (1994) 23 Cal.App.4th 155, 160–161, on the other hand, expressly disagrees with this language in *Senior* and holds that the force requirement simply means that the defendant acted without the victim's consent. Note that *Bolander* was construing Penal Code section 288(b), which is unique because it does not include the phrase "against the victim's will." Until this issue is resolved, the court should use its discretion in choosing the most appropriate language.

Penal Code section 288 does not define duress or menace. The definitions of these terms used in the instruction are based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [using rape definition in case involving forcible lewd acts].) When describing rape and lewd acts by force, sections 261 and 288 use the same language requiring that the act be accomplished by means "of force, violence, duress, menace, or fear of immediate and unlawful bodily injury" on the victim or another person. (See *People v. Pitmon, supra,* 170 Cal.App.3d at p. 50 [applying definition in context of § 288(b)]; see also *Frediani v. Ota* (1963) 215 Cal.App.2d 127, 133 [when interpreting a term used in several similar statutes, reference to those other statutes may provide guidance in interpreting the term in the instant statute]; contra, *People v. Edmonton* (2002) 103 Cal.App.4th 557, 564 [rape statutes define "duress" for those statutes only; "duress" for forcible lewd conduct includes "threat of hardship," REVIEW GRANTED & DEPUBLISHED, Jan. 22, 2003, S112168.]) Although the court is not required sua sponte to instruct on the definition of "duress" or "menace" (*People v. Pitmon, supra,* 170 Cal.App.3d at p. 52 [duress]), optional definitions are provided that may be given on request.

In looking at the totality of the circumstances to determine if duress was used to commit forcible lewd acts on a child, "relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing

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the family. . . . The fact that the victim testifies the defendant did not use force or threats does not require a finding of no duress; the victim's testimony must be considered in light of her age and her relationship to the defendant." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 14.)

LESSER INCLUDED OFFENSES

Attempted Lewd Act by Force With Child Under 14 ▸ Pen. Code, §§ 663, 288(b).

RELATED ISSUES

See the Related Issues section of the Bench Notes for Instruction 1220, Lewd or Lascivious Act: Child Under 14 Years.

Solicitation to Violate Section 288
Asking a minor to engage in lewd conduct with the person making the request is not punishable as solicitation of a minor to commit a violation of Penal Code section 288. (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1379 [conviction for solicitation under Penal Code section 653f(c) reversed].) "[A] minor cannot violate section 288 by engaging in lewd conduct with an adult." (*Id.* at p. 1379.)

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STAFF NOTES

See the Staff Notes to instruction 1220, Lewd or Lascivious Acts: Child Under 14, for discussion of what constitutes touching, and of the definitions of lewd, lascivious, and willfully.

Elements

Penal Code section 288(b)(1) provides:

> (b)(1) Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

In applying section 288(b)(1), courts have read the phrase "an act described in subdivision (a)" to mean a lewd or lascivious act on a child under the age of 14. (See, e.g., *People v. Pitmon* (1985) 170 Cal.App.3d 38, 45–46; *People v. Neel* (1993) 19 Cal.App.4th 1784, 1786–1787.)

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1222. Lewd or Lascivious Act: Child 14 or 15 Years

The defendant is charged [in Count __] with a lewd or lascivious act on a 14- or 15-year-old child who was at least 10 years younger than the defendant.

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

1. **The defendant willfully committed a lewd or lascivious act on a child.**

2. **The defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the child.**

3. **The child was (14/15) years old at the time of the act.**

AND

4. **When the defendant acted, the child was at least 10 years younger than the defendant.**

A *lewd or lascivious act* is any touching of a child with the intent to sexually arouse either the perpetrator or the child. The touching need not be done in a lewd or sexual manner. Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched. [A *lewd or lascivious act* includes causing a child to touch his or her own body or someone else's body at the instigation of a perpetrator who has the required intent.]

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.

[In determining whether a person is at least 10 years older than a child, measure from the person's birthdate to the child's birthdate.]

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or the child is not required.]

[It is not a defense that the child may have consented to the act.]

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

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 in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322.) The court must determine whether it is appropriate to give the standard unanimity instruction, Instruction 160, Unanimity on Specific Act or Acts, or the modified unanimity instruction, Instruction 161, Unanimity—When Generic Testimony Of Offense Presented. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502.)

Give the second to the last bracketed paragraph on request if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51.)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Pen. Code, § 288(c)(1).
Actual Arousal Not Required ▸ *People v. McCurdy* (1923) 60 Cal.App. 499, 502.
Any Touching of Child With Intent to Arouse ▸ *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [list of examples].
Child Touching Own Body Parts at Defendant's Instigation ▸ *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115.
Lewd Defined ▸ *In re Smith* (1972) 7 Cal.3d 362, 365 [in context of indecent exposure]; see *People v. Babb* (1951) 103 Cal.App.2d 326, 330.

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Minor's Consent Not a Defense ▸ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [dicta].

Mistaken Belief About Victim's Age Not a Defense ▸ *People v. Paz* (2000) 80 Cal.App.4th 293, 298.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 37–40, 44–46, pp. 346–351, 355–359.

LESSER INCLUDED OFFENSES

Attempted Lewd Act With Child Under 14 ▸ Pen. Code, §§ 663, 288(c)(1); *People v. Herman* (2002) 97 Cal.App.4th 1369, 1389–1390.

RELATED ISSUES

See the Related Issues section of the Bench Notes for Instruction 1220, Lewd or Lascivious Act: Child Under 14 Years.

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STAFF NOTES

See the Staff Notes to instruction 1220, Lewd or Lascivious Acts: Child Under 14.

Elements

Penal Code section 288(c)(1) provides:

> (c)(1) Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child.

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1223. Lewd or Lascivious Act: Dependent Adult

The defendant is charged [in Count __] with a lewd or lascivious act on a dependent adult [by force or fear].

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

1. **The defendant was a caretaker of a dependent adult.**

2. **The defendant, while serving as a caretaker, willfully (committed/conspired to commit/aided and abetted/facilitated) a lewd or lascivious act on the dependent adult.**

[AND]

3. **The defendant (committed/conspired to commit/aided and abetted/facilitated) the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of (himself/herself) or the dependent adult.**

[AND

4. **In (committing/conspiring to commit/aiding and abetting/facilitating) the act, the defendant used force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the dependent adult or someone else.]**

A *lewd or lascivious act* is any touching of a dependent adult with the intent to sexually arouse the perpetrator or the dependent adult. The touching need not be done in a lewd or sexual manner. Contact with the dependent adult's bare skin or private parts is not required. Any part of the dependent adult's body or the clothes the dependent adult is wearing may be touched. [A *lewd or lascivious act* includes causing someone to touch his or her own body or someone else's body at the instigation of the perpetrator who has the required intent.]

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.

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A *caretaker* is an owner, operator, administrator, employee, independent contractor, agent, or volunteer of a public or private facility, including (a/an) _____ <*insert specific facility from Pen. Code, § 288(f)(1)*>, that provides care for dependent adults or for those aged 65 or older.

A *dependent adult* is any person age 18 or older who has a mental disability or disorder that restricts his or her ability to carry out normal activities or to protect his or her rights. This definition includes, but is not limited to, those who have developmental disabilities or whose mental abilities have significantly diminished because of age.

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or dependent adult is not required.]

[An act is accomplished by *force* if a person uses enough physical force to overcome the dependent adult's will.] [The force must be substantially different from or substantially greater than the force needed to accomplish the act itself.]

[*Duress* is a direct or implied threat of force, violence, danger, or retribution that causes a reasonable person to do [or submit to] something that he or she would not do [or submit to] otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the dependent adult and (his/her) relationship to the defendant.]

[*Menace* means a threat, statement, or act showing an intent to injure someone.]

[An act is accomplished by *fear* if the dependent adult is actually and reasonably afraid [or (he/she) is actually but unreasonably afraid and the defendant knows of (his/her) fear and takes advantage of it].]

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 in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322.) The court must determine whether it is appropriate to give the standard unanimity instruction, Instruction 160, Unanimity on Specific Act or

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Acts, or the modified unanimity instruction, Instruction 161, Unanimity—When Generic Testimony Of Offense Presented. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

If the defendant is charged with using force or fear in committing the lewd act on a dependent adult, include bracketed element 4. Depending on the facts of the case, any of the bracketed definitions of force, duress, menace, or fear in the last four bracketed paragraphs may be given on request.

In the paragraph defining "caretaker," insert applicable caretaker facilities listed in Penal Code section 288(f)(1), such as a 24-hour health facility, a home health agency, or a community care or respite care facility, depending on the facts of the case.

Penal Code section 288(b)(2) or (c)(2) does not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent adult. (Pen. Code, § 288(h).)

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502.)

Related Instructions
If the caretaker is charged with aiding and abetting the act, also give Instructions 500, Aiding and Abetting: General Principles, and 501, Aiding and Abetting: Intended Crimes. If the caretaker is charged with conspiring to commit the act, also give Instruction 550, Conspiracy.

AUTHORITY

Elements ▸ Pen. Code, § 288(b)(2) & (c)(2).
Caretaker Defined ▸ Pen. Code, § 288(f)(1) & (g).
Dependent Adult Defined ▸ Pen. Code, § 288(f)(3).
Duress Defined ▸ See Pen. Code, § 261(b) [in context of rape]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50; but see *People v. Edmonton* (2002) 103 Cal.App.4th 557, 564 [rape statutes define "duress" for those statutes only; "duress" for forcible lewd conduct includes "threat of hardship," REVIEW GRANTED & DEPUBLISHED, Jan. 22, 2003, S112168**]**.
Elder Defined ▸ See Pen. Code, § 368(g).
Menace Defined ▸ See Pen. Code, § 261(c) [in context of rape].
Actual Arousal Not Required ▸ See *People v. McCurdy* (1923) 60 Cal.App. 499, 502.

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Any Touching With Intent to Arouse ▸ See *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [list of examples].

Dependent Adult Touching Own Body Parts at Defendant's Instigation ▸ See *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 ["constructive" touching; approving *Austin* instruction]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115.

Fear Defined ▸ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940; *People v. Iniguez* (1994) 7 Cal.4th 847 [in context of rape].

Force Defined ▸ See *People v. Bolander* (1994) 23 Cal.App.4th 155, 160–161; contra, *People v. Senior* (1992) 3 Cal.App.4th 765, 774.

Lewd Defined ▸ See *In re Smith* (1972) 7 Cal.3d 362, 365 [in context of indecent exposure]; *People v. Babb* (1951) 103 Cal.App.2d 326, 330.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 37, 41–46, pp. 346–348, 351–359.

COMMENTARY

The instruction includes definitions of "force" and "fear" because those terms have meanings in the context of forcible sex offenses that are technical and may not be readily apparent to jurors. (See *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [force]; *People v. Cardenas* (1994) 21 Cal.App.4th 927, 939–940 [fear]; *People v. Iniguez* (1994) 7 Cal.4th 847, 856–857 [fear in context of rape].)

There is a split in authority regarding the meaning of "force." *People v. Senior* (1992) 3 Cal.App.4th 765, 774, requires that the force be substantially different from or substantially exceed the force necessary to accomplish the act, but goes on in dicta to state that "a modicum of holding and even restraining cannot be regarded as substantially different or excessive 'force.' " *People v. Bolander* (1994) 23 Cal.App.4th 155, 160–161, on the other hand, expressly disagrees with this language in *Senior* and holds that the force requirement simply means that the defendant acted without the victim's consent. Note that *Bolander* was construing Penal Code section 288(b), which is unique because it does not include the phrase "against the victim's will." Until this issue is resolved, the court should use its discretion in choosing the most appropriate language.

Penal Code section 288 does not define duress or menace. The definitions of these terms are based on the statutory definitions contained in Penal Code sections 261 and 262 [rape]. When describing rape and lewd acts by force, sections 261 and 288 use the same language requiring that the act be accomplished by means "of force, violence, duress, menace, or fear of immediate and unlawful bodily injury"

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on the victim or another person. (See *People v. Pitmon, supra*, 170 Cal.App.3d at p. 50 [applying definition in context of § 288(b)]; see also *Frediani v. Ota* (1963) 215 Cal.App.2d 127, 133 [when interpreting a term used in several similar statutes, reference to those other statutes may provide guidance in interpreting the term in the instant statute]; contra, *People v. Edmonton* (2002) 103 Cal.App.4th 557, 564 [rape statutes define "duress" for those statutes only; "duress" for forcible lewd conduct includes "threat of hardship," REVIEW GRANTED & DEPUBLISHED, Jan. 22, 2003, S112168**]**.) Although the court is not required sua sponte to instruct on the definition of "duress" or "menace" (*People v. Pitmon, supra*, 170 Cal.App.3d at p. 52 [duress]), optional definitions are provided that may be given on request.

LESSER INCLUDED OFFENSES

Attempted Lewd Act With Dependent Adult ▸ Pen. Code, §§ 663, 288(c)(2).
Attempted Lewd Act by Force With Dependent Adult ▸ Pen. Code, §§ 663, 288(b)(2).

RELATED ISSUES

Developmental Disability
If the dependent adult has a developmental disability, arguably there is no sua sponte duty to define "developmental disability" under Welfare and Institutions Code section 4512(a) or 1370.1(a)(1). The Legislature did not intend to limit this phrase in other code sections to such technical medical or legal definitions, although a pinpoint instruction may be requested if it helps the jury in any particular case. (See *People v. Mobley* (1999) 72 Cal.App.4th 761, 781–783 [in context of oral copulation of disabled person].)

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STAFF NOTES

See the Staff Notes to instruction 1220, Lewd or Lascivious Acts: Child Under 14.

Elements
Penal Code section 288(b)(2), (c)(2), and (f)–(h) provides:

> (b)(2) Any person who is a caretaker and commits an act described in subdivision (a) upon a dependent adult by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, with the intent described in subdivision (a), is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.
>
> (c)(2) Any person who is a caretaker and commits an act described in subdivision (a) upon a dependent adult, with the intent described in subdivision (a), is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year.
>
> (f) For purposes of paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c), the following definitions apply:
>
> (1) "Caretaker" means an owner, operator, administrator, employee, independent contractor, agent, or volunteer of any of the following public or private facilities when the facilities provide care for elder or dependent adults:
> (A) Twenty-four hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.
> (B) Clinics.
> (C) Home health agencies.
> (D) Adult day health care centers.
> (E) Secondary schools that serve dependent adults ages 18 to 22 years and postsecondary educational institutions that serve dependent adults or elders.
> (F) Sheltered workshops.
> (G) Camps.
> (H) Community care facilities, as defined by Section 1402 of the Health and Safety Code, and residential care facilities for the elderly, as defined in Section 1569.2 of the Health and Safety Code.
> (I) Respite care facilities.
> (J) Foster homes.
> (K) Regional centers for persons with developmental disabilities.
> (L) A home health agency licensed in accordance with Chapter 8

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(commencing with Section 1725) of Division 2 of the Health and Safety Code.
(M) An agency that supplies in-home supportive services.
(N) Board and care facilities.
(O) Any other protective or public assistance agency that provides health services or social services to elder or dependent adults, including, but not limited to, in-home supportive services, as defined in Section 14005.14 of the Welfare and Institutions Code.
(P) Private residences.

(2) "Board and care facilities" means licensed or unlicensed facilities that provide assistance with one or more of the following activities:
(A) Bathing.
(B) Dressing.
(C) Grooming.
(D) Medication storage.
(E) Medical dispensation.
(F) Money management.

(3) "Dependent adult" means any person 18 years of age or older who has a mental disability or disorder that restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have developmental disabilities, persons whose mental abilities have significantly diminished because of age.

(g) Paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c) apply to the owners, operators, administrators, employees, independent contractors, agents, or volunteers working at these public or private facilities and only to the extent that the individuals personally commit, conspire, aid, abet, or facilitate any act prohibited by paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c).

(h) Paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c) do not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent adult under care.

Section 288(g) requires that the caretaker “personally commit, conspire, aid, abet, or facilitate any [prohibited] act” but nowhere defines what “facilitating” requires. For now, the Bench Notes refer to the related aiding and abetting and conspiracy instructions. Perhaps when staff drafts the conspiracy instructions, some authority will shed light on the “facilitation” language.

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1225. Continuous Sexual Abuse

The defendant is charged [in Count __] with continuous sexual abuse of a child under the age of 14 years.

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

1. **The defendant (lived in the same home with/ [or] had recurring access to) a minor child.**

2. **The defendant engaged in three or more acts of (substantial sexual conduct/ [or] lewd or lascivious conduct) with the child.**

3. **Three or more months passed between the first and last acts.**

AND

4. **The child was under the age of 14 years at the time of the acts.**

[*Substantial sexual conduct* means oral copulation or masturbation of either the child or the perpetrator, or penetration of the child's or perpetrator's vagina or rectum by (the other person's penis/ [or] any foreign object).]

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

[*Lewd or lascivious conduct* is any willful touching of a child accomplished with the intent to sexually arouse the perpetrator or the child. The touching need not be done in a lewd or sexual manner. Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched.]

[*Lewd or lascivious conduct* [also] includes causing a child to touch his or her own body or someone else's body at the instigation of a perpetrator who has the required intent.]

[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.]

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You cannot convict the defendant unless all of you agree that (he/she) committed three or more acts over a period of at least three months, but you do not all need to agree on which three acts were committed.

[Actually arousing, appealing to, or gratifying the lust, passions, or sexual desires of the perpetrator or child is not required for lewd or lascivious conduct.]

[It is not a defense that the child may have consented to the act.]

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

BENCH NOTES

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

If the court gives the definition of "lewd and lascivious conduct," the definition of "willfully" must also be given.

Give the bracketed sentence that begins, "Actually arousing, appealing to," on request. (*People v. McCurdy* (1923) 60 Cal.App. 499, 502.)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Pen. Code, § 288.5(a); *People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1284–1285, 1287.
Substantial Sexual Conduct Defined ▸ Pen. Code, § 1203.066(b).
Unanimity on Specific Acts Not Required ▸ Pen. Code, § 288.5(b); *People v. Adames* (1997) 54 Cal.App.4th 198, 208.
Actual Arousal Not Required ▸ *People v. McCurdy* (1923) 60 Cal.App. 499, 502.
Any Touching of Child With Intent to Arouse ▸ *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [list of examples].

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Child Touching Own Body Parts at Defendant's Instigation ▸ *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115.
Minor's Consent Not a Defense ▸ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [dicta in context of lewd or lascivious act].
Oral Copulation Defined ▸ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243; see Pen. Code, § 288a(a).
"Recurring Access" Is Commonly Understand Term Not Requiring Sua Sponte Definitional Instruction ▸ *People v. Rodriguez* (2002) 28 Cal.4th 543, *** [disapproving *People v. Gohdes* (1997) 58 Cal.App.4th 1520, 1529].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 51–53, pp. 363–366.

COMMENTARY

Penal Code section 288.5 does not require that the defendant reside with, or have access to, the child continuously for three consecutive months. It only requires that a period of at least three months passes between the first and last acts of molestation. (*People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1284–1285, 1287.)

Section 288.5 validly defines a prohibited offense as a continuous course of conduct and does not unconstitutionally deprive a defendant of a unanimous jury verdict. (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309–1312.)

LESSER INCLUDED OFFENSES

Simple Assault ▸ Pen. Code, § 240.
Simple Battery ▸ Pen. Code, § 242.

Since a conviction under Penal Code section 288.5 could be based on a course of substantial sexual conduct without necessarily violating section 288 (lewd or lascivious conduct), the latter is not necessarily included within the former and no sua sponte instruction is required. (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1313–1314; see *People v. Palmer* (2001) 86 Cal.App.4th 440, 444–445.)

RELATED ISSUES

Alternative Charges
Under Penal Code section 288.5(c), continuous sexual abuse and specific sexual offenses pertaining to the same victim over the same time period may only be charged in the alternative. In these circumstances, multiple convictions are precluded. (*People v. Johnson* (2002) 28 Cal.4th 240, 245, 248 [exception to

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general rule in Pen. Code, § 954 permitting joinder of related charges].) In such cases, the court has a **sua sponte** duty to give Instruction 164, Multiple Counts—Alternative Charges For One Event. If a defendant is erroneously convicted of both continuous sexual abuse and specific sexual offenses, but a greater aggregate sentence is imposed for the specific offenses, the appropriate remedy is to reverse the conviction for continuous sexual abuse. (*People v. Torres* (2002) 102 Cal.App.4th 1054, 1060.)

Masturbation

For a discussion of the term masturbation, see *People v. Chambless* (1999) 74 Cal.App.4th 773, 783–784, 786–787 [construing term for purposes of finding defendant committed sexually violent offenses under the Sexually Violent Predatory Act].

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STAFF NOTES

Elements

Penal Code section 288.5 provides:

> (a) Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct under Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.
>
> (b) To convict under this section the trier of fact, if a jury, need unanimously agree only that the requisite number of acts occurred not on which acts constitute the requisite number.
>
> (c) No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved in which case a separate count may be charged for each victim.

Penal Code section 1203.066(b) provides:

> (b) "Substantial sexual conduct" means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender.

People v. Vasquez (1996) 51 Cal.App.4th 1277, 1287, summarized the elements of section 288.5 as follows:

> [T]he language of section 288.5 indicates the statute is violated if the defendant (1) resided with, or had recurring access to, a child under fourteen, and (2) committed three or more acts of sexual molestation of the child, and (3) three or more months passed between the first and the last act of molestation, regardless of whether the defendant resided with or had access to the child continuously throughout the three-or-more-month

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> period. This interpretation of the statute is more consistent with the language of the statute and with the statute's underlying policies than an interpretation which requires three continuous months of access.

The instruction uses “perpetrator” instead of “offender” to be consistent with another paragraph in the instruction, and inverts the order of the three types of conduct to improve comprehension when read aloud.

Section 288.5 was enacted in response to *People v. Van Hoek* (1988) 200 Cal.App.3d 811 [failure to allege and prove specific acts of molestation violated defendant’s right to due process by depriving him of a fair opportunity to prepare an adequate defense; also impossible for jury to unanimously agree on specific acts]. (*People v. Cortes* (1999) 71 Cal.App.4th 62, 74.)

Substantial Sexual Conduct
Penal Code section 1203.066(b) defines substantial sexual conduct to be “penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object,” “oral copulation,” or “masturbation of either the victim or the offender.”

Section 288.5(a) incorporates “lewd or lascivious conduct under Section 288.” Section 288 requires a “willful” lewd or lascivious act. Thus, this instruction includes “willful” in the optional definition of lewd or lascivious act.

Recurring Access
Penal Code section 288.5(a) requires that the defendant either reside in the same house as the minor or have “recurring” access to the child. This instruction uses the statutory term “recurring,” but could use “repeated” or “reoccurring” as a plainer English term.

The statute is not “aimed . . . at the stranger who happens to encounter the same victim three times, but at the molester, often a relative, family friend or lodger, who subjects a child to an extended course of repetitious abuse.” (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1311.)

The Supreme Court held in *People v. Rodriquez* (2002, S098821) __ Cal.4th __, that the term “recurring access” does not require a sua sponte definitional instruction:

> We discern no meaning, technical or otherwise, of the term “recurring access” other than its commonly understood meaning as an ongoing ability to approach and contact someone time after time. . . . [S]ection 288.5 was enacted to broaden, not narrow, the reach of this state’s child molestation

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> laws. To the extent inconsistent with our opinion, we disapprove *Gohdes, supra*, 58 Cal.App.4th 1520. . . . We conclude that "recurring access" is a commonly understood term requiring no sua sponte definitional instructions.

The *Rodriguez* court rejected the argument that "to avoid rendering the term surplusage, 'recurring access' must mean more than mere repeated contact wholly by chance." Quoting *People v. Avina* (1993) 14 Cal.App.4th 1303, 1311, the court said that the "three-act requirement merely sets a 'baseline' for measuring the course of conduct." The court reserved "the 'wholly by chance contact with strangers' issue for another case," and stated without elaboration that "not every person who manages to molest a child three times during the requisite period necessarily would have an ongoing ability to approach and contact the child time after time." (*Rodriquez, supra*, __ Cal.4th at pp. __.)

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1226. Annoying or Molesting a Child

The defendant is charged [in Count __] with annoying or molesting a child.

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

1. **The defendant engaged in conduct directed at a child.**

2. **A normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct.**

3. **The defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child.**

[AND]

4. **The child was under the age of 18 years at the time of the conduct.**

[AND

5. **The defendant had previously been convicted of _____** *<insert crime>* **under Penal Code section _____** *<insert section number>***.]**

[It is not necessary that the child actually be irritated or disturbed.] [It is [also] not necessary that the child actually be touched.]

[It is not a defense that the child may have consented to the act.]

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

BENCH NOTES

Instructional Duty

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

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If the defendant is charged in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322; *People v. Epps* (1981) 122 Cal.App.3d 691, 703–704.) However, child annoyance or molestation may be committed by a single act or a repetitive course of conduct. There is no sua sponte duty to give a unanimity instruction when a defendant's conduct clearly constituted a single course of conduct. (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1014–1016.) The court must determine if a unanimity instruction is required and whether it is appropriate to give the standard unanimity instruction, Instruction 160, Unanimity on Specific Act or Acts, or the modified unanimity instruction, Instruction 161, Unanimity—When Generic Testimony Of Offense Presented. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

If the defendant is charged with a prior conviction under Penal Code section 647.6 or any other specified sexual offense (see Pen. Code, § 647.6(c)), the defendant may stipulate to the conviction. (*People v. Merkley* (1996) 51 Cal.App.4th 472, 476; see *People v. Bouzas* (1991) 53 Cal.3d 467, 477–480; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90.) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give element 5. Specified sexual offenses include any conviction under Penal Code section 288 (lewd or lascivious act); a felony conviction involving a minor under the age of 16 under Penal Code section 261 (rape), 264.1 (unlawful sexual intercourse), 269 (aggravated sexual assault), 285 (incest), 286 (sodomy), 288a (oral copulation), 288.5 (continuous sexual abuse), or 289 (sexual penetration); or a felony conviction under Penal Code section 311.4 (employing minor to perform sexual conduct in films) involving a minor under the age of 14. (Pen. Code, § 647.6(c)(2).)

If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135.) If the court grants a bifurcated trial, give Instruction 201, Prior Conviction: Bifurcated Trial. See Bench Notes to Instruction 200, Prior Conviction on the standard for granting a bifurcated trail.

If a defendant charged with prior convictions either stipulates or requests a bifurcated trial on the priors, give only elements 1 through 4.

If the defendant us charged with a misdemeanor, give only elements 1 through 4.

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Give the second to the last bracketed paragraph on request if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51.)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

If the defendant was charged with annoying or molesting a child after entering an inhabited house, building, or trailer coach, do not give this instruction. Give Instruction 1227, Annoying or Molesting a Child in a Dwelling.

Do not give instruction 309, Motive, with this instruction because motive is an element of the crime. (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1227.)

AUTHORITY

Elements ▸ Pen. Code, § 647.6(a)–(c).
Acts Motivated by Unnatural or Abnormal Sexual Interest ▸ *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1227; *In re Gladys R.* (1970) 1 Cal.3d 855, 867.
Annoy and Molest Defined; Objective Standard ▸ *People v. Lopez* (1998) 19 Cal.4th 282, 289–290; *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1749–1750; *People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901–902; see *People v. Martinez* (2001) 93 Cal.App.4th 481, 494–501.
Lewd Act Not Required ▸ *People v. Thompson* (1988) 206 Cal.App.3d 459, 465–466.
Minor's Consent Not a Defense ▸ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [dicta, in context of lewd act].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 59, 60.

COMMENTARY

"Annoy" and "molest" are synonymous and generally refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person. (*People v. Lopez* (1998) 19 Cal.4th 282, 289; *People v. Carskaddon* (1957) 49 Cal.2d 423, 426.) "Annoy means to disturb or irritate, especially by continued or repeated acts . . . . [¶] '[M]olest' [means] . . . 'to interfere with or meddle with unwarrantably so as to injure or disturb.'" (*People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901.) A photographer can "annoy" a minor by taking the minor's photograph in a

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public place in an offensive and irritating manner. (See *Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal.App.4th 1320, 1325.)

LESSER INCLUDED OFFENSES

Attempted Annoying or Molesting of Minor ▸ Pen. Code, §§ 663, 647.6(b).

Annoying or Molesting a minor is a misdemeanor unless the defendant is charged with one of the specified prior convictions. (Pen. Code, § 647.6(a).) If the defendant is charged with a felony based on a qualifying prior conviction, the misdemeanor is a lesser included offense.

Neither simple assault (*People v. Greene* (1973) 34 Cal.App.3d 622, 654–655) or contributing to the delinquency of a minor (*People v. Romero* (1975) 48 Cal.App.3d 752, 757 [construing former versions of Pen. Code, §§ 272 and 647.6]) is a necessarily included lesser offense of annoying or molesting a child.

RELATED ISSUES

Minor Perpetrator
A minor under age 14 may be convicted for violating Penal Code section 647.6 on clear proof of the minor's knowledge of wrongfulness. (See Pen. Code, § 26; *In re Gladys R.* (1970) 1 Cal.3d 855, 862, 869 [12-year-old may be declared ward of court for annoying or molesting another minor].)

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STAFF NOTES

Elements
Penal Code section 647.6(a)–(c) provides:

> (a) Every person who annoys or molests any child under the age of 18 shall be punished by a fine not exceeding one thousand dollars ($1,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.
>
> (c)(1) Every person who violates this section shall be punished upon the second and each subsequent conviction by imprisonment in the state prison.
> (2) Every person who violates this section after a previous felony conviction under Section 261, 264.1, 269, 285, 286, 288a, 288.5, or 289, any of which involved a minor under the age of 16 years, or a previous felony conviction under this section, a conviction under Section 288, or a felony conviction under Section 311.4 involving a minor under the age of 14 years shall be punished by imprisonment in the state prison for two, four, or six years.

Annoy or Molest
People v. Lopez (1998) 19 Cal.4th 282, 289 states:

> [S]ection 647.6, subdivision (a), does not require a touching (citation) but does require (1) conduct a " 'normal person would unhesitatingly be irritated by' " (citations), and (2) conduct " 'motivated by an unnatural or abnormal sexual interest' " in the victim (citations).

People v. Kongs (1994) 30 Cal.App.4th 1741, 1749 states:

> "Annoy and molest" are synonymous and mean to disturb or irritate, especially by continued or repeated acts; to vex, to trouble; to irk; or to offend.

Motivated by Unnatural or Abnormal Sexual Interest
Section 647.6 applies only to offenders motivated by an unnatural or abnormal sexual interest in children, as discussed in *In re Gladys R.* (1970) 1 Cal.3d 855, 867–868:

> We point out, however, the comparatively narrow province of [former] section 647a; it applies only to offenders who are motivated by an unnatural or abnormal sexual interest or intent. *People v. Pallares* . . . stated in part: "When [the words 'annoy' or 'molest'] are used in reference to offenses

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> against children, there is a connotation of abnormal sexual motivation on the part of the offender. Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in light of the evident purpose of this and similar legislation enacted in this state indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children."

See also *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127 ["offense of section 647.6 is a strange beast"; prosecution must show that the acts or conduct were motivated by an unnatural or abnormal sexual interest].

Objective Test

People v. Lopez (1998) 19 Cal.4th 282, 290 states:

> The forbidden annoyance or molestation is not concerned with the child's state of mind, but rather refers to the defendant's objectionable acts that constitute the offense. (Citation.) Accordingly, to determine whether the defendant's conduct would unhesitatingly irritate or disturb a normal person, we employ an objective test not dependent on whether the child was in fact irritated or disturbed.

Lopez implies that a normal "person" would have been disturbed by the defendant's conduct. In contrast, one case has held in dictum that the proper test is whether a defendant's conduct would offend a normal "child," not a normal adult. (*Parrish v. Superior Court* (2002, C039165, as modified April 23, 2002) __ Cal.App.4th __, __, fn. 2 [italics in original]):

> The statute . . . makes it unlawful to annoy or molest a *child*. This direction of the statute cannot be ignored. There is in fact lewd conduct that would offend a normal child that would not phase a normal adult. Thus, we think the proper focus of the statute is whether, viewed objectively, defendant's conduct would offend a normal child.

Lewd Act Not Required

People v. Thompson (1988) 206 Cal.App.3d 459, 465–466 states:

> [Section 647.6] did not require the specific act of annoying to be lewd or obscene. [The] section only requires proof of articulable, objective acts which would cause a normal person to be unhesitatingly irritated, provided the acts are motivated by an abnormal or unnatural sexual interest in the child victim. . . . [We] have concluded [that] the annoying or molesting act need not, in and of itself, be lewd . . ..

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Unanimity

People v. Epps (1981) 122 Cal.App.3d 691 declined to apply the continuous-course-of-conduct exception to the general rule of unanimity regarding the acts committed:

> [T]he touching and kissing episodes occurred over a period of two months, not minutes, and each act of touching or kissing could have been charged as a separate annoyance or molestation crime under [former] section 647a. This conclusion flows from the fact the words "annoy" and "molest" are synonymously used in section 647a; and, while the conduct designed to disturb or irritate, or to offend, may consist of continued or repeated acts, it is " 'the objectionable acts of defendant which constitute the offense.' " (Citation.) The proof in this case shows the child was not "molested" by a series of acts, but by a single act on each occurrence. . . . [T]he multiple occurrences of annoyance or molestation here cannot properly be deemed a single annoyance or molestation. The jury must unanimously agree on which act or acts constitute the offense. (*Id.* at p. 703.)

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1227. Annoying or Molesting a Child in a Dwelling

The defendant is charged [in Count __] with annoying or molesting a child.

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

1. **The defendant entered an inhabited (dwelling house/part of a building/trailer coach) without consent.**

2. **After entering the (house/building/trailer coach), the defendant engaged in conduct directed at a child.**

3. **A normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct.**

4. **The defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child.**

[AND]

5. **The child was under the age of 18 years at the time of the conduct.**

[AND

6. **The defendant had previously been convicted of _____** *<insert crime>* **under Penal Code section _____** *<insert section number>***.]**

[It is not necessary that the child actually be irritated or disturbed.] [It is [also] not necessary that the child actually be touched.]

[It is not a defense that the child may have consented to the act.]

[A (house/part of a building/trailer coach) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged conduct.]

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

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

[A *trailer coach* is a vehicle without its own mode of power, designed to be pulled by a motor vehicle. It is made for human habitation or human occupancy and for carrying property.]

[A *trailer coach* is [also] a park trailer that is intended for human habitation for recreational or seasonal use only and

(1) has a floor area of no more than 400 square feet;

(2) is not more than 14 feet wide;

(3) is built on a single chassis;

AND

(4) may be transported on public highways only with a permit.]

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

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 in a single count with multiple alleged acts, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Jones* (1990) 51 Cal.3d 294, 321–322; *People v. Epps* (1981) 122 Cal.App.3d 691, 703–704.) However, child annoyance or molestation may be committed by a single act or a repetitive course of conduct. There is no sua sponte duty to give a unanimity instruction when a defendant's conduct clearly constituted a single course of conduct. (*People v. Moore* (1986) 185 Cal.App.3d 1005, 1014–1016.) The court must determine if a unanimity instruction is required and whether it is appropriate to give the standard unanimity instruction, Instruction 160, Unanimity on Specific Act or Acts, or the modified unanimity instruction, Instruction 161, Unanimity—When Generic Testimony Of Offense Presented. Review the discussion in the bench notes to these two instructions and *People v. Jones, supra,* 51 Cal.3d at pp. 321–322.

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If the defendant is charged with a prior conviction under Penal Code section 647.6 or any other specified sexual offense (see Pen. Code, § 647.6(c)), the defendant may stipulate to the conviction. (*People v. Merkley* (1996) 51 Cal.App.4th 472, 476; see *People v. Bouzas* (1991) 53 Cal.3d 467, 477–480; see Bench Notes to Instruction 200: Prior Conviction.) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give element 6. Specified sexual offenses include any conviction under Penal Code section 288 (lewd or lascivious act); a felony conviction involving a minor under the age of 16 under Penal Code section 261 (rape), 264.1 (unlawful sexual intercourse), 269 (aggravated sexual assault), 285 (incest), 286 (sodomy), 288a (oral copulation), 288.5 (continuous sexual abuse), or 289 (sexual penetration); or a felony conviction under Penal Code section 311.4 (employing minor to perform sexual conduct in films) involving a minor under the age of 14. (Pen. Code, § 647.6(c)(2).)

If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135.) If the court grants a bifurcated trial, give Instruction 201, Prior Conviction: Bifurcated Trial. See Bench Notes to Instruction 200, Prior Conviction on the standard for granting a bifurcated trail.

If a defendant charged with prior convictions stipulates or the court grants a bifurcated trial on the priors, give only elements 1 through 5.

Give the bracketed sentence that begins, “It is not a defense that,” on request if there is evidence that the minor consented to the act. (See *People v. Kemp* (1934) 139 Cal.App. 48, 51.)

If appropriate, give any of the bracketed definitions of “inhabited,” “house” or “trailer coach” on request.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

If the defendant was charged with simple annoying or molesting a child without any allegations about entering an inhabited house, building, or trailer coach, do not give this instruction. Give Instruction 1226, Annoying or Molesting a Child.

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Do not give instruction 309, Motive, with this instruction because motive is an element of the crime. (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1227.)

AUTHORITY

Elements ▸ Pen. Code, § 647.6(a)–(c).
Inhabitation Defined ▸ See Pen. Code, § 459 [in context of burglary].
Trailer Coach Defined ▸ Veh. Code, § 635; Health & Saf. Code, § 18009.3.
Acts Motivated by Unnatural or Abnormal Sexual Interest ▸ *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1127; *In re Gladys R.* (1970) 1 Cal.3d 855, 867.
Annoy and Molest Defined; Objective Standard ▸ *People v. Lopez* (1998) 19 Cal.4th 282, 289–290; *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1749–1750; *People v. Pallares* (1952) 112 Cal.App.2d Supp. 895, 901–902; see *People v. Martinez* (2001) 93 Cal.App.4th 481, 494–501.
Lewd Act Not Required ▸ *People v. Thompson* (1988) 206 Cal.App.3d 459, 465–466.
Minor's Consent Not a Defense ▸ See *People v. Cardenas* (1994) 21 Cal.App.4th 927, 937, fn. 7 [dicta, in context of lewd act].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 59, 60.

COMMENTARY

See the Commentary section of the Bench Notes for Instruction 1226, Annoying or Molesting a Child.

LESSER INCLUDED OFFENSES

Attempted Annoying or Molesting of Minor ▸ Pen. Code, §§ 663, 647.6(b).

Annoying or molesting a child without entering an inhabited dwelling is a misdemeanor and lesser included offense. (Pen. Code, § 647.6(a).)

Neither simple assault (*People v. Greene* (1973) 34 Cal.App.3d 622, 654–655) or contributing to the delinquency of a minor (*People v. Romero* (1975) 48 Cal.App.3d 752, 757 [construing former versions of Pen. Code, §§ 272 and 647.6]) is a necessarily included lesser offense of annoying or molesting a child.

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RELATED ISSUES

See the Related Issues section of the Bench Notes for Instruction 1226, Annoying or Molesting a Child.

After Entering
The statute does not require that the defendant engage in the molesting conduct while still in the home. (*People v. Mendoza* (May 13, 2004) 2nd Dist. Ct. of App., No. B166146, UPDATE CITATION.) It is sufficient if the defendant engaged in the conduct after entering the home and there is "a nexus between the residential entry and the molesting conduct." *(Ibid.)*

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STAFF NOTES

Elements
Penal Code section 647.6(a)–(c) provides:

> (a) Every person who annoys or molests any child under the age of 18 shall be punished by a fine not exceeding one thousand dollars ($1,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.
>
> (b) Every person who violates this section after having entered, without consent, an inhabited dwelling house, or trailer coach as defined in Section 635 of the Vehicle Code, or the inhabited portion of any other building, shall be punished by imprisonment in the state prison, or in a county jail not exceeding one year.
>
> (c)(1) Every person who violates this section shall be punished upon the second and each subsequent conviction by imprisonment in the state prison.
> (2) Every person who violates this section after a previous felony conviction under Section 261, 264.1, 269, 285, 286, 288a, 288.5, or 289, any of which involved a minor under the age of 16 years, or a previous felony conviction under this section, a conviction under Section 288, or a felony conviction under Section 311.4 involving a minor under the age of 14 years shall be punished by imprisonment in the state prison for two, four, or six years.

Annoy or Molest
People v. Lopez (1998) 19 Cal.4th 282, 289 states:

> [S]ection 647.6, subdivision (a), does not require a touching (citation) but does require (1) conduct a " 'normal person would unhesitatingly be irritated by' " (citations), and (2) conduct " 'motivated by an unnatural or abnormal sexual interest' " in the victim (citations).

People v. Kongs (1994) 30 Cal.App.4th 1741, 1749 states:

> "Annoy and molest" are synonymous and mean to disturb or irritate, especially by continued or repeated acts; to vex, to trouble; to irk; or to offend.

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Motivated by Unnatural or Abnormal Sexual Interest
Section 647.6 applies only to offenders motivated by an unnatural or abnormal sexual interest in children, as discussed in *In re Gladys R.* (1970) 1 Cal.3d 855, 867–868:

> We point out, however, the comparatively narrow province of [former]section 647a; it applies only to offenders who are motivated by an unnatural or abnormal sexual interest or intent. *People v. Pallares* . . . stated in part: "When [the words 'annoy' or 'molest'] are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender. Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in light of the evident purpose of this and similar legislation enacted in this state indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children."

See also *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126–1227 ["offense of section 647.6 is a strange beast"; prosecution must show that the acts or conduct were motivated by an unnatural or abnormal sexual interest].

Objective Test
People v. Lopez (1998) 19 Cal.4th 282, 290 states:

> The forbidden annoyance or molestation is not concerned with the child's state of mind, but rather refers to the defendant's objectionable acts that constitute the offense. (Citation.) Accordingly, to determine whether the defendant's conduct would unhesitatingly irritate or disturb a normal person, we employ an objective test not dependent on whether the child was in fact irritated or disturbed.

Lewd Act Not Required
People v. Thompson (1988) 206 Cal.App.3d 459, 465–466 states:

> [Section 647.6] did not require the specific act of annoying to be lewd or obscene. [The] section only requires proof of articulable, objective acts which would cause a normal person to be unhesitatingly irritated, provided the acts are motivated by an abnormal or unnatural sexual interest in the child victim. . . . [We] have concluded [that] the annoying or molesting act need not, in and of itself, be lewd . . ..

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Definitions of Inhabited and Trailer Coach
The definitions of "inhabited" and "trailer coach" are incorporated from instruction 1405, Burglary: Degrees. Note that instruction 1055, Arson: Inhabited Structure, uses a somewhat different definition (see Pen. Code, § 450(d)):

> A structure is inhabited if someone lives there and (a) is present or (b) has left but intends to return.

Vehicle Code section 635 provides:

> A "trailer coach" is a vehicle, other than a motor vehicle, designed for human habitation or human occupancy for industrial, professional, or commercial purposes, for carrying property on its own structure, and for being drawn by a motor vehicle. A "park trailer," as described in Section 18009.3 of the Health and Safety Code, is a trailer coach.

Health and Safety Code section 18009.3 provides:

> "Park trailer" means a trailer designed for human habitation for recreational or seasonal use only, that meets all of the following requirements:
> (a) It contains 400 square feet or less of gross floor area. It may not exceed 14 feet in width at the maximum horizontal projection.
> (b) It is built upon a single chassis.
> (c) It may only be transported upon the public highways with a permit issued pursuant to Section 35780 of the Vehicle Code.

Unanimity
People v. Epps (1981) 122 Cal.App.3d 691 declined to apply the continuous course of conduct exception to the general rule of unanimity regarding the acts committed:

> [T]he touching and kissing episodes occurred over a period of two months, not minutes, and each act of touching or kissing could have been charged as a separate annoyance or molestation crime under [former] section 647a. This conclusion flows from the fact the words "annoy" and "molest" are synonymously used in section 647a; and, while the conduct designed to disturb or irritate, or to offend, may consist of continued or repeated acts, it is " 'the objectionable acts of defendant which constitute the offense.' " (Citation.) The proof in this case shows the child was not "molested" by a series of acts, but by a single act on each occurrence. . . . [T]he multiple occurrences of annoyance or molestation here cannot properly be deemed a single annoyance or molestation. The jury must unanimously agree on which act or acts constitute the offense. (*Id.* at p. 703.)

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1228. Aggravated Sexual Assault of Child Under 14 Years

The defendant is charged [in Count __] with aggravated sexual assault of a child who was under the age of 14 years and at least 10 years younger than the defendant.

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

1. **The defendant committed forcible _____** *<insert sex offense specified in Pen. Code, § 269(a)(1)–(5)>* **on another person.**

AND

2. **When the defendant acted, the other person was under the age of 14 years and was at least 10 years younger than the defendant.**

In deciding whether the defendant committed _____ *<insert sex offense specified in Pen. Code, § 269(a)(1)–(5)>***, please refer to my instructions on that offense.**

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

BENCH NOTES

Instructional Duty

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

In element 1 and in the sentence following element 2, insert the sex offense specified in Penal Code section 269(a)(1)–(5) that is charged and supported by the evidence. The sex offenses specified in section 269(a)(1)–(5) and their applicable instructions are:

1. Forcible rape (Pen. Code, § 261(a)(2); see Instruction 1100, Rape or Spousal Rape by Force, Fear, or Threats).

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2. Forcible rape or sexual penetration in concert (Pen. Code, § 264.1; see Instructions 1102, Rape or Spousal Rape in Concert, and 1151, Sexual Penetration in Concert).

3. Forcible sodomy (Pen. Code, § 286(c)(2); see Instruction 1140, Sodomy by Force, Fear, or Threats).

4. Forcible oral copulation (Pen. Code, § 288a(c)(2); see Instruction 1120, Oral Copulation by Force, Fear, or Threats).

5. Forcible sexual penetration (Pen. Code, § 289(a)(1); see Instruction 1150, Sexual Penetration by Force, Fear, or Threats).

Penal Code section 269(a)(5) refers to a "violation of subdivision (a) of [Penal Code] Section 289," which governs the crime of sexual penetration by force (Pen. Code, § 289(a)(1)) or threats (Pen. Code, § 289(a)(2)). All the other crimes referenced in section 269(a)(1)–(4) are sex offenses committed by force only, not by threats. If sexual penetration by threats is charged, delete the word "forcible" in element 1.

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Pen. Code, § 269(a).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 54.

LESSER INCLUDED OFFENSES

Simple Assault ▸ Pen. Code, § 240.
Underlying Sex Offense ▸ Pen. Code, §§ 261(a)(2) [forcible rape], 264.1 [forcible rape or sexual penetration in concert], 286(c)(2) [forcible sodomy], 288a(c)(2) [forcible oral copulation], 289(a)(1) [forcible sexual penetration].

RELATED ISSUES

Duress
In looking at the totality of the circumstances to determine if duress was used to commit aggravated sexual assault of a child, "relevant factors include threats to

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harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. . . . The fact that the victim testifies the defendant did not use force or threats does not require a finding of no duress; the victim's testimony must be considered in light of her age and her relationship to the defendant." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 14.)

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STAFF NOTES

Elements

Penal Code section 269 provides:

> (a) Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child:
>
> (1) A violation of paragraph (2) of subdivision (a) of Section 261.
>
> (2) A violation of Section 264.1.
>
> (3) Sodomy, in violation of Section 286, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
>
> (4) Oral copulation, in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.
>
> (5) A violation of subdivision (a) of Section 289.
>
> (b) Any person who violates this section is guilty of a felony and shall be punished by imprisonment in the state prison for 15 years to life.

Element 2 is patterned on element 2 in instruction 1207, Oral Copulation With Person Under 14.

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1240. Showing or Sending Harmful Matter to Seduce a Minor

The defendant is charged [in Count __] with (showing[,]/ sending[,]/ distributing[,]/ [or] offering to show or distribute) harmful matter to a minor.

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

1. **The defendant (showed[,]/ sent[,]/caused to be sent[,]/ distributed[,]/ [or] offered to show or distribute) harmful matter to a minor.**

2. **When the defendant acted, (he/she) knew the character of the matter.**

<Alternative 2A—Pen. Code, § 288.2(a)>

[2. When the defendant acted, (he/she) (knew the other person was a minor/ [or] failed to use reasonable care to determine the minor's actual age).]

<Alternative 2B—Pen. Code, § 288.2(b)>

[2. When the defendant acted, (he/she) knew the other person was a minor.]

3. **When the defendant acted, (he/she) intended to sexually arouse, appeal to, or gratify the lust, passions, or sexual desires of (himself/herself) or of the minor.**

AND

4. **When the defendant acted, (he/she) intended to seduce the minor.**

If you conclude that the defendant (showed[,]/ sent[,]/caused to be sent[,]/ distributed[,]/ [or] offered to show or distribute) something to a minor, you must then decide whether what was (shown[,]/ sent[,]/ distributed[,]/ [or] offered to be shown or distributed) meets the definition of *harmful matter*. Matter is harmful if, when considered as a whole:

1. **It shows or describes sexual conduct in an obviously offensive way.**

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2. It lacks serious literary, artistic, political, or scientific value for minors.

AND

3. An average person, applying contemporary statewide standards, would conclude it appeals to prurient interest.

***Prurient interest* means a shameful or morbid interest in nudity, sex, or excretion.**

***Matter*, as used in this instruction, means any (book, magazine, newspaper, video recording, or other printed or written material[;]/ [or] any picture, drawing, photograph, or motion picture[;]/ [or] any statue or other figure[;]/ [or] any recording, transcription, or mechanical, chemical, or electrical reproduction[;]/ [or] any other articles, equipment, machines, or materials). [*Matter* includes live or recorded telephone messages when transmitted or distributed as part of a commercial transaction.]**

***Applying contemporary statewide standards* means using present-day standards and determining the effect of the matter on all those whom it is likely to reach within the state, in other words, its impact on the average person in the statewide community.**

The People must prove that the defendant knew the character of the matter but do not need to prove that the defendant knew whether the matter met the definition of harmful matter.

***To seduce a minor* means to entice the minor to engage in a sexual act involving physical contact between the seducer and the minor.**

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.]

[If it appears from the nature of the matter or the circumstances of its distribution or showing that it is designed for clearly defined deviant sexual groups, the appeal of the matter must be judged based on its intended audience.]

[Harmful matter may be sent or distributed by (live or recorded telephone messages/electronic mail/the Internet/commercial online services).]

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[To *distribute* means to transfer possession, whether or not the transfer is made for money or anything else of value.]

<Defense: Parent providing sex education>
[A parent or guardian is not guilty of this offense if he or she acted to promote legitimate sex education. The People must prove beyond a reasonable doubt that the defendant was not providing legitimate sex education. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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

BENCH NOTES

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

In element 2, give alternative 2A if the defendant is charged under Penal Code section 288.2(a) with distributing harmful matter by any means, including a recorded telephone message, while knowing that the recipient is a minor or failing to exercise reasonable care to ascertain the recipient's age. Give alternative 2B if the defendant is charged under section 288.2(b) with distributing harmful matter by electronic mail, the Internet, or a commercial online service while knowing that the recipient is a minor.

Give the bracketed sentence about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

Give one of the final two bracketed paragraphs if the defendant claims that his or her conduct falls under Penal Code section 288.2(c) or (d). The code is silent on the burden of proof for these defenses. Until the appellate courts provide further guidance, this instruction does not allocate any burden of proof to the defendant.

AUTHORITY

Elements ▸ Pen. Code, § 288.2(a) & (b).

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Harmful Matter Defined ▸ Pen. Code, § 313.
Know Character of Matter ▸ Pen. Code, § 313(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [no error in instructing that it was unnecessary to establish that the accused had knowledge that material was legally obscene].
Means of Distribution ▸ Pen. Code, § 288.2(a) & (b).
Contemporary Community Standards ▸ See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [quoting trial court instruction].
Seduce Defined ▸ *People v. Jensen* (2003) 114 Cal.App.4th 224, 239–240; *People v. Hsu* (2000) 82 Cal.App.4th 976, 992.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 108.

LESSER INCLUDED OFFENSES

Attempted Distribution of Harmful Matter to Minor ▸ Pen. Code, §§ 663, 288.2; see, e.g., *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 185.
Distribution of Obscene Matter ▸ Pen. Code, § 311.1(a); *People v. Jensen* (2003) 114 Cal.App.4th 224, 244.

RELATED ISSUES

Telephone, Cable, or ISPs
A telephone corporation, a cable television company or its affiliates, an Internet service provider, or commercial online service provider does not violate section 288.2 by carrying, broadcasting, or transmitting harmful matter while providing its services. (Pen. Code, § 288.2(e).)

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STAFF NOTES

Elements
Penal Code section 288.2(a) and (b) set forth the elements of the crime:

> (a) Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including, but not limited to, live or recorded telephone messages, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment in the state prison or in a county jail.
> A person convicted of a second and any subsequent conviction for a violation of this section is guilty of a felony.
>
> (b) Every person who, with knowledge that a person is a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by electronic mail, the Internet, as defined in Section 17538 of the Business and Professions Code, or a commercial online service, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent, or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment in the state prison or in a county jail.
> A person convicted of a second and any subsequent conviction for a violation of this section is guilty of a felony.

Harmful Matter Defined
Penal Code section 313 provides:

> As used in this chapter:
> (a) "Harmful matter" means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.
> (1) When it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the matter shall be judged with reference to its intended recipient group.

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(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, that evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter lacks serious literary, artistic, political, or scientific value for minors.

(b) "Matter" means any book, magazine, newspaper, video recording, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials. "Matter" also includes live or recorded telephone messages when transmitted, disseminated, or distributed as part of a commercial transaction.

(c) "Person" means any individual, partnership, firm, association, corporation, limited liability company, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

(g) "Minor" means any natural person under 18 years of age.

Prurient Interest

Bloom v. Municipal Court (1976) 16 Cal.3d 71, 77, quoted former section 311, which included a definition of “prurient interest”:

> “Obscene matter” is . . . “matter, taken as a whole, the predominant appeal of which to the average person, . . ., is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion.”

Although section 311 was amended since *Bloom*, the definition of prurient is still instructive. Webster’s II New College Dictionary defines “prurient” to mean obsessively interested in sexual matters.

Contemporary Statewide Standards

See the discussion in the Staff Notes to instruction 1241, Distributing Obscene Matter Showing Sexual Conduct by a Minor.

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Seduce Defined
In holding that the terms of section 288.2 are not unconstitutionally vague, the court in *People v. Hsu* (2000) 82 Cal.App.4th 976, 992, stated:

> Although "seduce[]" . . . can mean simply "to lead astray," it is also defined as "persuading into partnership in sexual intercourse." (Citation.) In the context of section 288.2, subdivision (b), with its references to gratifying lust, passion, and sexual desire, people of ordinary intelligence (citation) would readily understand "seducing" as used here to mean the latter definition.

In *People v. Jensen* (Dec. 11, 2003) 6th App. Dist, D.A.R. 13542, 13546, the court held that it was error to instruct the jury "the word 'seduce' means persuading into sexual intercourse or other sexual activity." The instruction failed to make clear to the jury that the required intent is for "the perpetrator to *engage in a sexual act with the minor*," not merely for the minor to perform a sexual act alone. (*Id.* at p. 13547 [emphasis in original].) The court stated,

> [T]he "seducing" intent element of the offense requires that the perpetrator intend to entice the minor to engage in a sexual act involving physical contact between the perpetrator and the minor."

(Ibid.)

Sexual Conduct Defined
People v. Hsu (2000) 82 Cal.App.4th 976, 992–993, also discusses the meaning of sexual conduct:

> [T]he meaning of sexual conduct for purposes of the acts proscribed by section 288.2, subdivision (b) "can be objectively ascertained by reference to common experiences of mankind." . . . Insofar as section 288.2, subdivision (b) is among the numerous statutes specifically enacted to protect minors against exploitation and predation (citation), the definition of "sexual conduct" used in like statutes permits a reasonable and practical construction of "sexual conduct" as used in section 313 and, by extension, in section 288.2, subdivision (b).

For example, Penal Code sections 311.3(b) and 311.4(d)(1) define types of sexual conduct.

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Means of Distribution Defined
Penal Code section 288.2(a) punishes distributing harmful matter "by any means, including, but not limited to, live or recorded telephone messages." Section 288.2(b) punishes distributing harmful matter "by electronic mail, the Internet, as defined in Section 17538 of the Business and Professions Code, or a commercial online service."

Business and Professions Code section 17538(e)(6) defines the term "Internet" as used in sections 17538 and 17538.3.

Defenses and Burden of Proof
Penal Code section 288.2(c) and (d) provide:

> (c) It shall be a defense to any prosecution under this section that a parent or guardian committed the act charged in aid of legitimate sex education.
>
> (d) It shall be a defense in any prosecution under this section that the act charged was committed in aid of legitimate scientific or educational purposes.

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1241. Distributing Obscene Matter Showing Sexual Conduct by a Minor

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The defendant is charged [in Count __] with distributing obscene matter that shows a minor engaging in sexual conduct.

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

<Alternative 1A—sent>

[1. The defendant (sent/caused to be sent/brought/caused to be brought) obscene matter into California for (sale/distribution).]

<Alternative 1B—possessed>

[1. The defendant (possessed/prepared/published/produced/developed/duplicated/printed) obscene matter with the intent to (distribute/show/exchange) it (to/with) other persons [for money or other commercial benefit].]

<Alternative 1C—distributed>

[1. The defendant (distributed/showed/exchanged/offered to distribute) obscene matter (to/with) other persons [for money or other commercial benefit].]

2. When the defendant acted, (he/she) knew the character of the matter.

AND

3. When the defendant acted, (he/she) knew that the matter showed a person under the age of 18 years who was personally participating in or simulating sexual conduct.

If you conclude that the defendant (sent/produced/offered to send) something (to other persons/into California), you must then decide whether what was (sent/produced/offered to be sent) meets the definition of obscene matter. Matter is *obscene* if, when considered as a whole:

1. It shows or describes sexual conduct in an obviously offensive way.

2. It lacks serious literary, artistic, political, or scientific value.

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AND

3. **An average person, applying contemporary statewide standards, would conclude it appeals to prurient interest.**

Matter is not obscene if all persons under the age of 18 who are shown are legally emancipated or if it only shows lawful conduct between spouses.

Prurient interest **means a shameful or morbid interest in nudity, sex, or excretion.**

Matter **means any representation of information, data, or image, including any (film/filmstrip/photograph/negative/slide/photocopy/videotape/video laser disc/computer hardware or software/computer floppy disk/data storage medium/CD-ROM/computer-generated equipment/any [other] computer-generated image that contains any film or filmstrip).**

Applying contemporary statewide standards **means using present-day standards and determining the effect of the matter on all those whom it is likely to reach within the state, in other words, its impact on the average person in the statewide community.**

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)>*).**

The People must prove that the defendant knew the character of the matter but do not need to prove that the defendant knew whether the matter met the definition of obscene.

[*To distribute* means to transfer possession, whether or not the transfer is made for money or anything else of value.]

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

[In deciding the matter's nature and whether it lacks serious literary, artistic, political, or scientific value, consider whether the circumstances of its (production/presentation/sale/dissemination/distribution/publicity) indicate that the matter was being commercially exploited because of its prurient

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appeal. You must determine the weight, if any, to give this evidence.] [In deciding whether the matter lacks serious literary, artistic, political, or scientific value, you may [also] consider whether the defendant knew that the matter showed persons under the age of 16 years engaging in sexual conduct.]

[If it appears from the nature of the matter or the circumstances of its distribution or showing that it is designed for clearly defined deviant sexual groups, the appeal of the matter must be judged based on its intended audience.]

[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/other people).]

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

<Defense: Law enforcement agent>
[The defendant is not guilty of this offense if, when distributing the material, (he/she) was a member [or agent] of a law enforcement or prosecuting agency and was involved in the investigation or prosecution of criminal offenses.

[A person is an *agent* of a law enforcement or prosecuting agency if he or she does something at the request, suggestion, or direction of a law enforcement or prosecuting agency.]]

BENCH NOTES

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

In element 1, give one of the alternatives A–C depending on the charges and evidence in the case. Use the bracketed phrase “for money or other commercial

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benefit" in element 1B or 1C if the defendant is charged under Penal Code section 311.2(b).

In the definition of "sexual conduct," describe the sexual conduct involved in the case. Sexual conduct, as defined in Penal Code section 311.4(d), means any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Penal Code section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. (See *People v. Spurlock* (2004) 114 CalApp.4th 1122, 1131 [statutory language of "exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer" sufficiently clear, did not require further explanatory instruction].)

If the defendant asserts that his or her conduct fits within statutory exceptions (see Pen. Code, §§ 311.1(b)–(d), 311.2(e)–(g); see also discussion of excluded conduct in Related Issues section below), give any of the final three bracketed paragraphs on request as appropriate. Sections 311.1 and 311.2 are silent on the burden of proof for these exceptions. Until appellate courts provide further guidance, this instruction does not allocate any burden of proof to the defendant. (See also *People v. Woodward* (2004) 116 CalApp.4th 821, 840–841 ["legitimate" does not require definition and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889].)

It is a felony to distribute or exhibit to, or exchange with, a minor any matter depicting a minor personally engaging in or simulating sexual conduct. (Pen. Code, § 311.2(d).) If the defendant is charged with violating section 311.2(d), change "obscene matter" in elements 1A–1C to "matter," insert "to a minor" at the end of element 1A, and change "other persons" in elements 1B and 1C and in the first sentence of the paragraph following element 2 to "a minor."

AUTHORITY

Elements ▸ Pen. Code, §§ 311.1(a), 311.2(b).
Commercial Exploitation Is Probative of Matter's Nature ▸ Pen. Code, § 311(a)(2); *People v. Kuhns* (1976) 61 Cal.App.3d 735, 748–753.
Distribute Defined ▸ Pen. Code, § 311(d).
Exceptions to Statutory Prohibitions ▸ Pen. Code, §§ 311.1(b)–(d), 311.2(e)–(g); see Fam. Code, § 7000 et seq. [emancipation of minors]; Pen. Code, § 311.8 ["defense" if legitimate scientific or educational purpose].

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Exhibit Defined ▸ Pen. Code, § 311(f).

Knowingly Defined ▸ Pen. Code, § 311(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [no error in instructing that it was unnecessary to establish that the accused had knowledge that the material was "legally" obscene].

Knowledge That Matter Depicts Child Under 16 Is Probative of Matter's Nature ▸ Pen. Code, § 311(a)(3).

Matter Designed for Deviant Sexual Group ▸ Pen. Code, § 311(a)(1); see *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 13.

Obscene Matter Defined ▸ Pen. Code, § 311(a); see *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77, 81; *Miller v. California* (1973) 413 U.S. 15, 24; see also *Pope v. Illinois* (1987) 481 U.S. 497, 500–501 [only first two prongs of *Miller* test are determined by applying community standards].

Person Defined ▸ Pen. Code, § 311(c).

Sexual Conduct Defined ▸ Pen. Code, § 311.4(d)(1); see *People v. Spurlock* (2004) 114 CalApp.4th 1122, 1131.

Visual Works Depicting Prohibited Conduct ▸ Pen. Code, § 311(h); see *People v. Cantrell* (1992) 7 Cal.App.4th 523, 542.

Agent Defined ▸ See *People v. McIntire* (1979) 23 Cal.3d 742, 748 [in context of entrapment].

Contemporary Community Standards ▸ See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [quoting trial court instruction].

Obscenity Contrasted With Sex and Nudity ▸ *Roth v. United States* (1957) 354 U.S. 476, 487; *In re Panchot* (1968) 70 Cal.2d 105, 108–109.

Prurient Interest Defined ▸ *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77 [quoting former section 311].

Specific Intent to Distribute or Exhibit ▸ *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 12 [possession with intent to distribute or exhibit]; see *People v. Burrows* (1968) 260 Cal.App.2d 228, 231 [violation of section 311.2 requires preparation or publication with specific intent to distribute]; *In re Klor* (1966) 64 Cal.2d 816, 819.

Taken or Considered as a Whole ▸ *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3 [not error for officer to view segments of film that were separable and unrelated to other parts]; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231 [reviewing court must look at context of material].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 79–91.

7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §§ 310–313.

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LESSER INCLUDED OFFENSES

Attempted Distribution of Obscene Matter ▸ Pen. Code, §§ 663, 311.1(a).
Attempted Distribution of Obscene Matter for Commercial Consideration ▸ Pen. Code, §§ 663, 311.2(b).

RELATED ISSUES

Advertising Obscene Matter Involving Minors
It is a felony to advertise for sale or distribution any obscene matter knowing that it depicts a minor engaged in sexual conduct. (Pen. Code, § 311.10.)

Employing or Using Minor to Pose in Film
It is a felony to employ, use, or persuade a minor to engage in or assist others in posing or modeling for the purpose of preparing a commercial or noncommercial film or other medium involving sexual conduct by a minor. (See Pen. Code, § 311.4(b), (c).) Producing child pornography and posting it on the Internet to induce others to trade such pornography without making a monetary profit satisfies the "commercial purposes" requirement of Penal Code section 311.4(b). (*People v. Cochran* (2002) 28 Cal.4th 396, 406–407.)

Excluded Conduct
Neither section 311.1 or 311.2 applies to law enforcement and prosecuting agencies investigating or prosecuting criminal offenses, to legitimate medical, scientific, or educational activities, or to lawful conduct between spouses. (Pen. Code, §§ 311.1(b), 311.2(e); see Pen. Code, § 311.8(a) ["defense" that act committed in aid of legitimate scientific or educational purpose].) Nor do these sections apply to depictions of a minor who is legally emancipated, including lawful conduct between spouses when one or both are minors. (Pen. Code, §§ 311.1(c), 311.2(f); see Fam. Code, § 7000 et seq. [emancipation of minors].)

Telephone Services
A telephone corporation (see Pub. Util. Code, § 234) does not violate section 311.1 or 311.2 by carrying or transmitting messages described in these sections, or by performing related activities in providing telephone services. (Pen. Code, §§ 311.1(d), 311.2(g).)

Expert Testimony Not Required
Neither the prosecution nor the defense is required to introduce expert witness testimony regarding the obscene nature of the matter. (Pen. Code, § 312.1.)

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STAFF NOTES

Elements

Penal Code section 311.1(a) set forth the elements of the crime of distributing obscene matter depicting a minor engaged in sexual conduct:

> (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, develops, duplicates, or prints any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer- generated image that contains or incorporates in any manner, any film or filmstrip, with intent to distribute or to exhibit to, or to exchange with, others, or who offers to distribute, distributes, or exhibits to, or exchanges with, others, any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4, shall be punished either by imprisonment in the county jail for up to one year, by a fine not to exceed one thousand dollars ($1,000), or by both the fine and imprisonment, or by imprisonment in the state prison, by a fine not to exceed ten thousand dollars ($10,000), or by the fine and imprisonment.

Penal Code section 311.2(b) defines the same crime when the obscene matter is *distributed for commercial consideration*:

> (b) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, develops, duplicates, or prints any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer- generated image that contains or incorporates in any manner, any film or filmstrip, with intent to distribute or to exhibit to, or to exchange with, others *for commercial consideration*, or who offers to distribute, distributes, or exhibits to, or exchanges with, others *for commercial consideration*, any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4, is guilty of a felony and shall be punished by imprisonment in the state prison for two, three, or six years, or by a fine not exceeding one hundred thousand

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> dollars ($100,000), in the absence of a finding that the defendant would be incapable of paying such a fine, or by both that fine and imprisonment. [Italics added.]

Knowledge of Matters Character

Witkin text states that all three alternatives must be done knowingly. (2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, § 90, p. 398.) The legislative history supports this interpretation:

Legislative history. The 1961 version of section 311.2 defined only the misdemeanor offense, and stated "Every person who knowingly**:** sends or causes to be sent . . . into this state for sale or distribution, or in this state prepares, publishes, . . . or has in his possession with intent to distribute or exhibit . . ., any obscene matter is guilty of a misdemeanor." The placement of the colon appears to indicate that "knowingly" applies to all types of sending or preparing. The 1969 amendment rewrote the first paragraph of section 311.2 close to its present form, and deleted the colon. The 1977 amendment added subdivision (b), tracking the use of "knowingly" from subdivision (a). Section 311.1(a) was added in 1994, and basically tracks the key language of section 311.2(b).

Case law. In construing the 1969 version of section 311.2, *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–757 states:

> The statute applies to those who "knowingly" distribute or exhibit obscene matter. (Citation.) "[K]nowingly" has been defined as "be[ing] aware of the character of the matter." (Citations.) The amendment was apparently made to bring the statute in accord with *Mishkin v. New York* . . .. There the court stated: "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity. . . ." . . . " 'A reading of the statute [referencing a similar New York statute] as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished.' "

See also *People v. Pinkus* (1967) 256 Cal.App.2d Supp. 941, 948–949 [construing section 311(e)].

Sections 311.2(b) and 311.1(a) require the additional knowledge element of "knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct." Since these statutes were amended to include this language, no case law has held that this latter knowledge element alone is sufficient scienter, or held that both knowledge of the obscene character and knowledge that the matter depicts a minor are required. The

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language from *Kuhns*, above, arguably requires both knowledge elements for all violations of sections 311.1(a) and 311.2(b).

Obscene Matter Defined

Penal Code section 311(a)–(f) defines obscene matter and related terms:

> As used in this chapter, the following definitions apply:
> (a) "Obscene matter" means matter, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.
> (1) If it appears from the nature of the matter or the circumstances of its dissemination, distribution, or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the matter shall be judged with reference to its intended recipient group.
> (2) In prosecutions under this chapter, if circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, this evidence is probative with respect to the nature of the matter and may justify the conclusion that the matter lacks serious literary, artistic, political, or scientific value.
> (3) In determining whether the matter taken as a whole lacks serious literary, artistic, political, or scientific value in description or representation of those matters, the fact that the defendant knew that the matter depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (c) of Section 311.4, is a factor that may be considered in making that determination.
>
> (b) "Matter" means any book, magazine, newspaper, or other printed or written material, or any picture, drawing, photograph, motion picture, or other pictorial representation, or any statue or other figure, or any recording, transcription, or mechanical, chemical, or electrical reproduction, or any other article, equipment, machine, or material. "Matter" also means live or recorded telephone messages if transmitted, disseminated, or distributed as part of a commercial transaction.
>
> (c) "Person" means any individual, partnership, firm, association, corporation, limited liability company, or other legal entity.
>
> (d) "Distribute" means transfer possession of, whether with or without consideration.

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(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means show.

Prurient Interest

Bloom v. Municipal Court (1976) 16 Cal.3d 71, 77, quoted former section 311, which included a definition of "prurient interest":

> "Obscene matter" is . . . "matter, taken as a whole, the predominant appeal of which to the average person, . . ., is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion."

Although section 311 was amended since *Bloom*, the definition of prurient is still instructive. Webster's II New College Dictionary defines "prurient" to mean obsessively interested in sexual matters.

Contemporary Community Standards

In *Roth v. United States* (1957) 354 U.S. 476, 489–490, the United States Supreme Court referred approvingly to the trial court instruction on community standards:

> The test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved. . . .
> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards. In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious--men, women and children.

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In *Miller v. California* (1973) 413 U.S. 15, 30–34, the Supreme Court rejected a national standard, and approved the trial court's use of a statewide standard. Section 311(a) was amended to require "applying contemporary statewide standards."

Sexual Conduct Defined
Penal Code section 311.4(d)(1) defines "sexual conduct":

> (d)(1) As used in subdivisions (b) and (c), "sexual conduct" means any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct.

"[C]hild pornography . . ., like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law . . .. Here the nature of the harm to be combated requires that the state offense be limited to works that *visually* depict conduct by children below a specified age. . . . The category of "sexual conduct" proscribed must also be suitably limited and described. . . . [T]he distribution of descriptions or other of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." (*New York v. Ferber* (1982) 458 U.S. 747, 764–765 [construing New York statute prohibiting promotion of sexual performances by minors under age 16 by distributing depictions of the performance, regardless of whether the material is obscene].)

Excluded Conduct
Penal Code section 311.1(b)–(d) provides:

> (b) This section does not apply to the activities of law enforcement and prosecuting agencies in the investigation and prosecution of criminal offenses or to legitimate medical, scientific, or educational activities, or to lawful conduct between spouses.
>
> (c) This section does not apply to matter which depicts a child under the

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age of 18, which child is legally emancipated, including lawful conduct between spouses when one or both are under the age of 18.

(d) It does not constitute a violation of this section for a telephone corporation, as defined by Section 234 of the Public Utilities Code, to carry or transmit messages described in this chapter or perform related activities in providing telephone services.

Penal Code section 311.2(e)–(g) provides:

(e) Subdivisions (a) to (d), inclusive, do not apply to the activities of law enforcement and prosecuting agencies in the investigation and prosecution of criminal offenses, to legitimate medical, scientific, or educational activities, or to lawful conduct between spouses.

(f) This section does not apply to matter that depicts a legally emancipated child under the age of 18 years or to lawful conduct between spouses when one or both are under the age of 18 years.

(g) It does not constitute a violation of this section for a telephone corporation, as defined by Section 234 of the Public Utilities Code, to carry or transmit messages described in this chapter or perform related activities in providing telephone services.

Penal Code section 311.8(a) and (b) provides:

(a) It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes.

(b) It shall be a defense in any prosecution for a violation of this chapter by a person who knowingly distributed any obscene matter by the use of telephones or telephone facilities to any person under the age of 18 years that the defendant has taken either of the following measures to restrict access to the obscene matter by persons under 18 years of age:

(1) Required the person receiving the obscene matter to use an authorized access or identification code, as provided by the information provider, before transmission of the obscene matter begins, where the defendant has previously issued the code by mailing it to the applicant therefor after taking reasonable measures to ascertain that the applicant was 18 years of age or older and has established a procedure to immediately cancel the code of any person after receiving notice, in writing or by

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telephone, that the code has been lost, stolen, or used by persons under the age of 18 years or that the code is no longer desired.

(2) Required payment by credit card before transmission of the matter.

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1245. Pimping

The defendant is charged [in Count __] with pimping.

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

1. **The defendant knew that _____** *<insert name>* **was a prostitute.**

[AND]

<Alternative 2A—money earned by prostitute supported defendant>
[2. The (money/proceeds) that _____ *<insert name>* **earned as a prostitute supported defendant, in whole or in part.]**

<Alternative 2B—money loaned by house manager supported defendant>
[2. Money that was (loaned/advanced to/charged against) _____ *<insert name>* **by a person who (kept/managed/was a prostitute at) the house or other place where the prostitution occurred, supported the defendant in whole or in part.]**

<Alternative 2C—defendant asked for payment>
[2. The defendant asked for payment or received payment for soliciting customers for _____ *<insert name>***.]**

[AND

3. **_____** *<insert name>* **was (16 or 17 years old/under the age of 16) when engaged in the prostitution.]**

A *prostitute* is a person who engages in sexual intercourse or any lewd act with another person for money or other compensation. A *lewd act* means physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal, gratification, annoyance, or offense.

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

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BENCH NOTES

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

In element 2, use the appropriate alternative A–C depending on the evidence in the case.

Give element 3 if it is alleged that the prostitute was either a minor aged 16 or 17, or a minor under 16. (Pen. Code, § 266h(b).)

If necessary for the jury's understanding of the case, the court should instruct **sua sponte** on a defense theory in evidence, for example, that nude modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute. (*People v. Hill* (1980) 103 Cal.App.3d 525, 536–537.)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Pen. Code, § 266h.
Prostitution Defined ▸ Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [lewd act requires touching between prostitute and customer].
General Intent Crime ▸ *People v. McNulty* (1988) 202 Cal.App.3d 624, 630–631.
Proof Person Is a Prostitute ▸ *People v. James* (1969) 274 Cal.App.2d 608, 613.
Solicitation Defined ▸ *People v. Hill* (1980) 103 Cal.App.3d 525, 532; *People v. Smith* (1955) 44 Cal.2d 77, 79; *People v. Phillips* (1945) 70 Cal.App.2d 449, 453.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 67–69.

COMMENTARY

Solicitation
In deciding there was sufficient evidence of solicitation, the court in *People v. Phillips* (1945) 70 Cal.App.2d 449, 453, quoted the following definitions:

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> "[S]olicit" is defined as: "To tempt . . .; to lure on, esp. into evil, . . .; to bring about . . .; to seek to induce or elicit . . . ." (Webster's New International Dictionary (2d ed.)). ". . . to ask earnestly; to ask for the purpose of receiving; to endeavor to obtain by asking or pleading; . . . to try to obtain. . . . While it does imply a serious request, it requires no particular degree of importunity, entreaty, imploration or supplication." (58 C.J. 804–805.)

General Intent
The three ways of violating Penal Code section 266h are all general intent crimes, as held in *People v. McNulty* (1988) 202 Cal.App.3d 624, 630–631:

> [D]eriving support with knowledge that the other person is a prostitute is all that is required for violating the section in this manner. No specific intent is required. . . . Receiving compensation for soliciting with knowledge that the other person is a prostitute is the only requirement under the first alternative of violating section 266h by solicitation. [¶] Under the second alternative to pimping by soliciting (soliciting compensation), . . . if the accused has solicited for the prostitute and has solicited compensation even though he had not intended to receive compensation, he would nevertheless be guilty of pimping. [¶] Pimping in all its forms is not a specific intent crime.

LESSER INCLUDED OFFENSES

Attempted Pimping ▸ Pen. Code, §§ 663, 266h; see *People v. Osuna* (1967) 251 Cal.App.2d 528, 531.

There is no crime of aiding and abetting prostitution. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 385.)

RELATED ISSUES

House of Prostitution
One room of a building or other place is sufficient to constitute a house of prostitution, and one person may keep such a place to which others resort for purposes of prostitution. (*People v. Frey* (1964) 228 Cal.App.2d 33, 53; see *Aguilera v. Superior Court* (1969) 273 Cal.App.2d 848, 852.)

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Receiving Support
A conviction for living or deriving support from a prostitute's earnings does not require evidence that the defendant received money directly from the prostitute, or that the defendant used money received from the prostitution solely to pay his or her own living expenses. (*People v. Navarro* (1922) 60 Cal.App. 180, 182; see *People v. Tipton* (1954) 124 Cal.App.2d 213, 217–218 [elements of proof under former statute].)

Unanimity Instruction Not Required
Pimping is a crime "of a continuous ongoing nature and [is] not subject to the requirement that the jury must agree on the specific act or acts constituting the offense." (*People v. Dell* (1991) 232 Cal.App.3d 248, 265–266; *People v. Lewis* (1978) 77 Cal.App.3d 455, 460–462 [living or deriving support from prostitute's earnings is an ongoing continuing offense].) However, proof of an ongoing relationship between the defendant and the prostitute is not required. (*People v. Jackson* (1980) 114 Cal.App.3d 207, 209–210.)

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STAFF NOTES

Elements
Penal Code section 266h sets forth the elements of the crime:

> (a) Except as provided in subdivision (b), any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, is guilty of pimping, a felony, and shall be punished by imprisonment in the state prison for three, four, or six years.
>
> (b) If the person engaged in prostitution is a minor over the age of 16 years, the offense is punishable by imprisonment in the state prison for three, four, or six years. If the person engaged in prostitution is under 16 years of age, the offense is punishable by imprisonment in the state prison for three, six, or eight years.

Prostitution
Penal Code section 647(b), proscribing misdemeanor disorderly conduct by soliciting, engaging in, or agreeing to engage in prostitution, defines prostitution:

> As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

"Prostitution" as used in section 266h was defined to include sexual intercourse and lewd acts in *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535:

> [W]e construe the term "prostitution," as used in Penal Code section[] 266h . . ., as meaning sexual intercourse between persons for money or other considerations and only those "lewd and dissolute" acts between persons for money or other consideration as set forth in the *Pryor* case. . . . [F]or a "lewd" or "dissolute" act to constitute "prostitution," the genitals, buttocks, or female breast, of either the prostitute or the customer[,] must come in contact with some part of the body of the other for the purpose of sexual arousal or gratification of the customer or of the prostitute.

There must be contact between the prostitute and the customer, as stated in *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433:

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> [Penal Code] section 647, subdivision (b), defines prostitution as "any lewd act between persons for money or other consideration." Although this broad definition of prostitution could plausibly be interpreted to include sexual conduct between two dancers, for money or other consideration from a customer, *Hill* and *Freeman* [*People v. Freeman* (1988) 46 Cal.3d 419, 424–425] support a different interpretation: That a lewd act, an element of prostitution, requires touching between the prostitute and the customer, even if the customer is simply an observer of sexual acts between two prostitutes. . . .[W]e conclude that the definition of prostitution under section 647, subdivision (b), . . . requires sexual contact between the prostitute and the customer.

The older cases limited prostitution to sexual intercourse, as in *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91:

> "A prostitute is defined variously, as 'A woman given to indiscriminate lewdness; now, specif., a woman who offers herself indiscriminately to sexual intercourse for hire.' (Webster's New International Dictionary (2d ed.). . . ."

Solicitation

The leading case construing "who solicits or receives compensation for soliciting for the person" is *People v. Smith* (1955) 44 Cal.2d 77, 79:

> [T]he second way in which the offense may be committed is by soliciting compensation for soliciting for a prostitute, and not by merely soliciting a customer. . . . Such an act of mere solicitation by a person of either sex was no doubt intended to be classed as a misdemeanor under section 318 of the Penal Code . . ..

The methods of violation section 266h were summarized in *People v. McNulty* (1988) 202 Cal.App.3d 624, 630 [italics in original]:

> [S]ection 266h can be violated in either of two basic ways: (1) by *deriving support* from the earnings of another's act of prostitution or (2) by *soliciting*. In order to violate the statute by soliciting, there must be *either* the receipt of compensation for soliciting for a prostitute *or* the solicitation of compensation for soliciting for a prostitute. (Citation.)

In the interests of plain English, the statutory phrase "who solicits or receives compensation for soliciting for the person" is rendered in element 2C as "the

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defendant asked for or received payment for soliciting customers for _____ *<name>*."

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1246. Pandering

The defendant is charged [in Count __] with pandering.

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

<Alternative 1A—persuaded/procured>

[1. The defendant (persuaded/procured) _____ *<insert name>* **to be a prostitute.]**

<Alternative 1B—promises/threats/violence>

[1. The defendant used (promises[,]/ threats[,]/ violence [,]/ [or] any device or scheme) to (cause/persuade/encourage/induce) _____ *<insert name>* **to become a prostitute or to remain in a house of prostitution or any other place where prostitution is encouraged or allowed.]**

<Alternative 1C—arranged a position>

[1. The defendant (arranged/procured a position) for _____ *<insert name>* **to be a prostitute in either a house of prostitution or any other place where prostitution is encouraged or allowed.]**

<Alternative 1D—used fraud>

[1. The defendant used fraud, trickery, or duress [or abused a position of confidence or authority] to (persuade/procure) _____ *<insert name>* **to (be a prostitute/enter any place where prostitution is encouraged or allowed/enter or leave California for the purpose of prostitution).]**

<Alternative 1E—received money>

[1. The defendant (received/gave/agreed to receive/agreed to give) money or something of value in exchange for (persuading/attempting to persuade/procuring/attempting to procure) _____ *<insert name>* **to (be a prostitute/enter or leave California for the purpose of prostitution).]**

[AND]

[2. The defendant intended to influence _____ *<insert name>* **to be a prostitute.]**

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[AND

3. _____ *<insert name>* **was (16 or 17 years old/under the age of 16) when (he/she) engaged in the prostitution.]**

A *prostitute* is a person who engages in sexual intercourse or any lewd act with another person for money or other compensation. A *lewd act* means physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal, gratification, annoyance, or offense.

[*Duress* means a direct or implied threat of force, violence, danger, or retribution that would cause a reasonable person to do [or submit to] something that he or she would not do [or submit to] otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the (woman's/man's) age and (her/his) relationship to the defendant.]

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

BENCH NOTES

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

In element 1, give the appropriate alternative A–E depending on the evidence in the case. (See *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12, 24, 27–28 [statutory alternatives are not mutually exclusive].)

There is some conflict in the case law about the intent required to prove pandering. (See *People v. Mathis* (1985) 173 Cal.App.3d 1251, 1256 [pandering under former § 266i(b) (now § 266i(a)(2)) requires a specific intent to influence a person to become a prostitute]; but see *People v. Montgomery, supra,* 47 Cal.App.2d at p. 16 [pandering does not necessarily involve specific intent].) The trial court must decide whether to give bracketed element 2 on specific intent.

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Give bracketed element 3 if it is alleged that the person procured, or otherwise caused to act, by the defendant was either a minor age 16 or 17 or a minor under 16. (Pen. Code, § 266i(b).)

Give the bracketed paragraph defining duress on request if there is sufficient evidence that duress was used to procure a person for prostitution. (Pen. Code, § 266i(a)(5); see Pen. Code, § 261(b) [in context of rape].)

If necessary for the jury's understanding of the case, the court should instruct **sua sponte** on a defense theory in evidence, for example, that nude modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute. (*People v. Hill* (1980) 103 Cal.App.3d 525, 536–537.)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Pen. Code, § 266i.
Prostitution Defined ▸ Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [lewd act requires touching between prostitute and customer].
Procurement Defined ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12.
Proof of Actual Prostitution Not Required ▸ *People v. Osuna* (1967) 251 Cal.App.2d 528, 531–532.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 70–78.

LESSER INCLUDED OFFENSES

Attempted Pandering ▸ Pen. Code, §§ 663, 266i; *People v. Charles* (1963) 218 Cal.App.2d 812, 819; *People v. Benenato* (1946) 77 Cal.App.2d 350, 366–367.

There is no crime of aiding and abetting prostitution. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 385.)

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RELATED ISSUES

House of Prostitution

One room of a building or other place is sufficient to constitute a house of prostitution, and one person may keep such a place to which others resort for purposes of prostitution. (*People v. Frey* (1964) 228 Cal.App.2d 33, 53; *Aguilera v. Superior Court* (1969) 273 Cal.App.2d 848, 852.)

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STAFF NOTES

Elements

Penal Code section 266i sets forth the elements of the crime:

> (a) Except as provided in subdivision (b), any person who does any of the following is guilty of pandering, a felony, and shall be punished by imprisonment in the state prison for three, four, or six years:
> (1) Procures another person for the purpose of prostitution.
> (2) By promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute.
> (3) Procures for another person a place as an inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state.
> (4) By promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate.
> (5) By fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution.
> (6) Receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution.
>
> (b) If the other person is a minor over the age of 16 years, the offense is punishable by imprisonment in the state prison for three, four, or six years. Where the other person is under 16 years of age, the offense is punishable by imprisonment in the state prison for three, six, or eight years.

Element 1A uses "persuaded" as an alternative for "procured," based on *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12:

> [T]he term "procure" . . . necessarily implies the use of persuasion, solicitation, encouragement and assistance in achieving the unlawful purpose[.] . . . [I]f a defendant is charged with "procuring" a female as an inmate for a house of prostitution, he may be found guilty . . . if . . . he either assisted, induced, persuaded, or encouraged her to become an inmate.

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One court, however, reversed pandering convictions under section 266i(a)(2) because in defining "procure" to include "assistance," the court in effect equated aiding and abetting prostitution with pandering. (See *People v. Mathis* (1985) 173 Cal.App.3d 1251, 1255, 1256.) The instruction above does not use "assist" to avoid any possible confusion.

"Induces" in section 266i(a)(2) and (a)(4) was omitted in the interests of plain English. "Causes, encourages, or persuades" in element 1C appear broad enough to include the meaning of induce.

"Encourage" in section 299i(a)(2) does not require success, that is, that the person encouraged actually became a prostitute. (*People v. Bradshaw* (1973) 31 Cal.App.3d 421, 425.)

The instruction uses the plain English "trickery" in element 1D instead of "artifice" (see Pen. Code, § 266i(a)(5)), similar to the use of "trickery" in the rape instructions.

"The word 'inmate' as it is used in the statute . . . merely means that the female is induced or encouraged to occupy, live or abide in the house." (*People v. Benenato* (1946) 77 Cal.App.2d 350, 362 [no prejudice by omitting the word "inmate" from the indictment].)

Prostitution

Penal Code section 647(b), proscribing misdemeanor disorderly conduct by soliciting, engaging in, or agreeing to engage in prostitution, defines prostitution:

> As used in this subdivision, "prostitution" includes any lewd act between persons for money or other consideration.

"Prostitution" as used in section 266h was defined to include sexual intercourse and lewd acts in *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535:

> [W]e construe the term "prostitution," as used in Penal Code section[] 266h . . . as meaning sexual intercourse between persons for money or other considerations and only those "lewd and dissolute" acts between persons for money or other consideration as set forth in the *Pryor* case. . . . [F]or a "lewd" or "dissolute" act to constitute "prostitution," the genitals, buttocks, or female breast, of either the prostitute or the customer[,] must come in contact with some part of the body of the other for the purpose of sexual arousal or gratification of the customer or of the prostitute.

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Prostitution requires contact between the prostitute and the customer, as stated in *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433:

> [Penal Code] section 647, subdivision (b), defines prostitution as "any lewd act between persons for money or other consideration." Although this broad definition of prostitution could plausibly be interpreted to include sexual conduct between two dancers, for money or other consideration from a customer, *Hill* and *Freeman* [*People v. Freeman* (1988) 46 Cal.3d 419, 424–425] support a different interpretation: That a lewd act, an element of prostitution, requires touching between the prostitute and the customer, even if the customer is simply an observer of sexual acts between two prostitutes. . . .[W]e conclude that the definition of prostitution under section 647, subdivision (b), . . . requires sexual contact between the prostitute and the customer.

The older cases limited prostitution to sexual intercourse, as in *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91:

> "A prostitute is defined variously, as 'A woman given to indiscriminate lewdness; now, specif., a woman who offers herself indiscriminately to sexual intercourse for hire.' (Webster's New International Dictionary (2d ed.). . . ."

Actual prostitution is not required for procurement, as held in *People v. Osuna* (1967) 251 Cal.App.2d 528, 531–532:

> [T]he defendant contend that the crime of pandering requires . . . proof of actual prostitution . . .. We find this argument singularly specious. . . . "[T]he prostitutes were procured, ready for business, and money for their services had changed hands. . . . Pandering . . . consists of either procuring a female for a place of prostitution, or procuring a place for a prostitute where she can ply her trade. The pandering in this case were clearly completed crimes. The prostitutes were procured."

Sexual conduct between two dancers in exchange for consideration from viewing customers does not constitute prostitution. "Without the underlying crime of prostitution, there can be no pimping or pandering." (*Wooten, supra,* 93 Cal.App.4th at p. 436.) But in reviewing charges that a club owner's dancers offered to perform sex acts on customers, *Wooten* agrees that pimping or pandering does not require a completed act of prostitution. "[P]imping requires that a defendant know that another person is a prostitute. . . . [Pandering] also

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requires that a defendant encourage prostitution, whether attempted or completed." (*Id.* at p. 437.)

Multiple Offenses

Whether or not there are multiple offenses may depend on form of pandering charged. For example, in *People v. White* (1979) 89 Cal.App.3d 143, 151, the court stated that pandering under section 266i(c) "is a one-act offense, but the offense is completed by a defendant's *act of procuring* . . . a place as an inmate in a house of prostitution. The offense is completed when the female involved becomes an inmate in a house and commits therein a single act of prostitution. The fact that, thereafter, the female commits numerous acts of prostitution . . . does not result in separate and additional offenses of pandering." (Italics in original.)

Under section 266i(b), however, "it is not even necessary that the victim of pandering actually *become* a prostitute; by its terms, the statute includes under its coverage acts which simply 'encourage' someone to become a prostitute, whether or not the victim ever performs an act of prostitution at all." (*People v. DeLoach* (1989) 207 Cal.App.3d 323, 333 [italics in original].)

Intent

At least some of the acts proscribed in section 266i may require a specific intent, as discussed in *People v. Mathis* (1985) 173 Cal.App.3d 1251, 1256:

> [Former] section 266i, subdivision (b) [now see subdivision (a)(2)] has two elements. It requires the defendant to cause, induce, persuade or encourage another person to become a prostitute; and the causing, inducing, encouraging or persuading must be accompanied *by* promises, threats, violence or any device or scheme. Implicit in the necessity of both of these elements of the crime is the inference of a specific intent to influence a person to become a prostitute.

However, *People v. Montgomery* (1941) 47 Cal.App.2d 1, 16, construing the original uncodified pandering statute, stated that specific intent is not necessarily involved for pandering:

> The crime of pandering does not necessarily involve the question of specific intent. Under the statute, all that is required to render a person guilty of pandering is the commission of any one of the acts set forth in section I thereof, and the only intent required is that the act be voluntarily done or performed by the person charged, with full knowledge of its nature. . . . Anyone who knowingly takes a part in the evil practice condemned is

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guilty of a violation of the law regardless of the state of his mind with relation to the act in question.

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1247. Child Procurement

The defendant is charged [in Count __] with (providing/causing) a child to engage in a lewd or lascivious act.

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

<Alternative 1A—gave/transported a child>

[1. The defendant intentionally (gave/transported/provided/made available) a child to another person so the person could engage in a lewd or lascivious act with that child.]

<Alternative 1B—offered to give/transport a child>

[1. The defendant offered to (give/transport/provide/make available) a child to someone else so the person could engage in a lewd or lascivious act with that child.]

<Alternative 1C—caused child to engage in>

[1. The defendant (caused/persuaded/induced) a child to engage in a lewd or lascivious act with someone else.]

AND

2. When the defendant acted, the child was under the age of 16 years.

A *lewd or lascivious act* is any touching of a child with the intent to sexually arouse either the perpetrator or the child. The touching need not be done in a lewd or sexual manner. Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched.

[A *lewd or lascivious act* includes causing a child to touch his or her own body or someone else's body at the instigation of the other person who has the required intent.]

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

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BENCH NOTES

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

In element 1, give the appropriate alternative A–C depending on the evidence in the case.

Give the penultimate bracketed paragraph if there is evidence that the child was asked to touch himself or herself, or to touch someone else. (See *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153.)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

Related Instructions
See Instructions 1220 through 1223, relating to lewd and lascivious acts in violation of Penal Code section 288.

AUTHORITY

Elements ▸ Pen. Code, § 266j.
Any Touching of Child With Intent to Arouse ▸ *People v. Martinez* (1995) 11 Cal.4th 434, 444, 452 [in context of Pen. Code, § 288; disapproving *People v. Wallace* (1992) 11 Cal.App.4th 568, 574–580 and its progeny]; see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427–1428 [list of examples].
Child Touching Own Body Parts at Defendant's Request ▸ *People v. Meacham* (1984) 152 Cal.App.3d 142, 152–153 ["constructive" touching; approving *Austin* instruction in context of Pen. Code, § 288]; *People v. Austin* (1980) 111 Cal.App.3d 110, 114–115.
Lewd Defined ▸ *In re Smith* (1972) 7 Cal.3d 362, 365 [in context of indecent exposure]; see *People v. Babb* (1951) 103 Cal.App.2d 326, 330.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 39, 45–46.

LESSER INCLUDED OFFENSES

Attempted Child Procurement ▸ Pen. Code, §§ 663, 266j.

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RELATED ISSUES

Any Act That Constitutes Crime
A lewd or lascivious act includes any act that constitutes a crime as provided in part 1 of the Penal Code (Pen. Code, §§ 26–679.04). (Pen. Code, § 288(a).)

Corroboration Not Required
A minor victim is not an accomplice and the jury need not be instructed that the minor's testimony requires corroboration. (*People v. Mena* (1988) 206 Cal.App.3d 420, 425.)

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STAFF NOTES

Elements
Penal Code section 266j sets forth the elements of the crime:

> Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available to another person, a child under the age of 16 for the purpose of any lewd or lascivious act as defined in Section 288, or who causes, induces, or persuades a child under the age of 16 to engage in such an act with another person, is guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years, and by a fine not to exceed fifteen thousand dollars ($15,000).

Lewd or Lascivious Act
"[T]he meaning of 'lewd' is 'sexually unchaste or licentious,' 'dissolute, lascivious,' 'suggestive of or tending to moral looseness,' 'inciting to sensual desire or imagination,' 'indecent, obscene, salacious.' (Webster's New Internat. Dict. (3d ed. 1961) p. 1301.)" (*In re Smith* (1972) 7 Cal.3d 362, 365.) "Similarly, the word 'lascivious' means 'tending to arouse sexual desire'; it is synonymous with 'lewd, lustful,' 'libidinous, salacious.'" (*People v. Martinez* (1995) 11 Cal.4th 434, 449, fn. 15, quoting Webster's New Internat. Dict., *supra,* at p. 1274; see also *People v. Pitts* (1990) 223 Cal.App.3d 606, 887.) Justice Mosk simply read section 288(a) to impliedly define "a lewd or lascivious act" as any conduct committed "with the intent of arousing, appealing to, or gratifying" the "lust," "passions," or "sexual desires" of either the perpetrator or the underage victim. (*People v. Martinez, supra,* 11 Cal.4th at p. 453 (conc. opn. of Mosk, J.).)

In *People v. Martinez* (1995) 11 Cal.4th 434, 444, the California Supreme Court adhered to the weight of authority that section 288 is violated by "any touching" of an underage child committed with the intent to sexually arouse either the defendant or child:

> [T]he the "gist" of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. . . . "If [the] intent of the act, although it may have the outward appearance of innocence, is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute . . .." (Citation.) [*Id*. at p. 444.] . . . [T]he only way to determine whether a particular touching is permitted or prohibited is by reference to the actor's intent as inferred from all the circumstances. . . . [*Id*. at p. 450.] . . . For all the foregoing reasons, we adhere to the long-standing rule that section 288 is violated by "any touching" of an underage child accomplished with the

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> intent of arousing the sexual desires of either the perpetrator or the child. [*Id*. at p. 452.]

The definitions of lewd and lascivious acts are borrowed from instruction 1120, Lewd or Lascivious Acts: Child Under 14.

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1250. Indecent Exposure

The defendant is charged [in Count __] with indecent exposure.

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

1. **The defendant willfully exposed (his/her) genitals in the presence of another person or persons who might be offended or annoyed by the defendant's actions.**

[AND]

2. **When the defendant exposed (himself/herself), (he/she) acted lewdly by intending to direct public attention to (his/her) genitals for the purpose of sexually arousing or gratifying (himself/herself) or another person, or sexually offending another person.**

[AND]

<Alternative 3A—within inhabited dwelling>

[3. The willful and lewd exposure occurred after the defendant had entered an inhabited (dwelling house/part of a building/trailer coach) without consent.]

<Alternative 3B—prior conviction>

[3. The defendant had previously been convicted of (indecent exposure under Penal Code section 314, subdivision 1/committing a lewd or lascivious act under Penal Code section 288).]

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.

[It is not required that another person actually see the exposed genitals.]

[A (house/part of a building/trailer coach) is *inhabited* if someone uses it as a dwelling, whether or not someone is inside at the time of the alleged indecent exposure.]

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

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

[A *trailer coach* is a vehicle without its own mode of power, designed to be pulled by a motor vehicle. It is made for human habitation or human occupancy and for carrying property.]

[A *trailer coach* is [also] a park trailer that is intended for human habitation for recreational or seasonal use only and

1. **has a floor area of no more than 400 square feet;**

2. **is not more than 14 feet wide;**

3. **is built on a single chassis;**

AND

4. **may only be transported on public highways with a permit.]**

BENCH NOTES

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

In element 3, give alternative 3A if the defendant is charged with entering an inhabited dwelling.

If the defendant is charged with one or more prior convictions for indecent exposure, the defendant may stipulate to the convictions. (*People v. Merkley* (1996) 51 Cal.App.4th 472, 476; see *People v. Bouzas* (1991) 53 Cal.3d 467, 477–480; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90.) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give alternative 3B in element 3. If the defendant stipulates to the truth of the

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convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135.) If the court grants a bifurcated trial, give Instruction 201, Prior Conviction: Bifurcated Trial. See Bench Notes to Instruction 200, Prior Conviction on the standard for granting a bifurcated trail.

If a defendant charged with a prior conviction stipulates or the court grants a bifurcated trial on the priors, give only elements 1 and 2.

Give only elements 1 and 2 if the defendant is charged with a misdemeanor.

Give the bracketed sentence that begins, "It is not required that another person actually see" if the evidence shows that no one actually saw the defendant's genitals. (*People v. Carbajal* (2003) 114 Cal.App.4th 978, 986.)

Related Instruction
For authority relating to the definitions of an inhabited house, building, or trailer coach, see Instruction 1405, Burglary: Degrees.

AUTHORITY

Elements ▸ Pen. Code, § 314.
Affront Must Be Sexual ▸ *People v. Dallas* (2000) 85 Cal.App.4th 937, 939; *People v. Archer* (2002) 98 Cal.App.4th 402, 406 ["sexual affront" means to sexually insult or offend another person].
Exposing Person Must Have Intent to Expose Genitals ▸ *People v. Massicot* (2002) 97 Cal.App.4th 920, 925, fn. 3.
Must Expose to Other Person But Other Person Need Not View ▸ *People v. Carbajal* (2003) 114 Cal.App.4th 978, 986.
Lewd Intent Defined ▸ *In re Smith* (1972) 7 Cal.3d 362, 365–366.
Lewd Intent Does Not Require That Genitals Be Touched ▸ *People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1766; see *People v. Meeker* (1989) Cal.App.3d 358, 362.
"Private Parts" Means Genitals ▸ *People v. Massicot* (2002) 97 Cal.App.4th 920, 926, 928; see *In re Smith* (1972) 7 Cal.3d 362, 366.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 109–112.

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LESSER INCLUDED OFFENSES

Attempted Indecent Exposure ▸ Pen. Code, §§ 663, 314; *People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1766–1767; see also *People v. Finley* (1994) 26 Cal.App.4th 454, 458 [attempted misdemeanor indecent exposure is not elevated to felony by recidivist provision of Pen. Code, § 314].

Indecent exposure is a misdemeanor if the defendant does not have qualifying priors and the alleged event did not occur in an inhabited dwelling. (Pen. Code, § 314.) If the defendant is charged with one of the factors that elevates the offense to a felony, then the misdemeanor is a lesser included offense.

Soliciting anyone to engage in lewd or dissolute conduct in any public place (see Pen. Code, § 647(a)) is not a lesser included offense of indecent exposure under Penal Code section 314, subdivision 1. (*People v. Meeker* (1989) Cal.App.3d 358, 362 [following construction of "lewd or dissolute conduct" in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256]; contra, *People v. Curry* (1977) 76 Cal.App.3d 181, 187; *People v. Swearington* (1977) 71 Cal.App.3d 935, 944.) Burglary is also not a necessarily included offense of unlawful entry for indecent exposure. (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1768–1769.)

RELATED ISSUES

Presence of Others
"[A] conviction for indecent exposure under Penal Code section 314, subdivision 1 requires evidence that a defendant actually exposed his or her genitals in the presence of another person, but there is no concomitant requirement that such person must actually have seen the defendant's genitals." (*People v. Carbajal* (2003) 114 Cal.App.4th 978, 986.)

Burglary
Felony indecent exposure can be the underlying felony to support a burglary charge. (*People v. Rehmeyer* (1993) 19 Cal.App.4th 1758, 1767.)

After Entering
The statute does not require that the defendant expose himself or herself while still in the home. (*People v. Mendoza* (May 13, 2004) 2nd Dist. Ct. of App., No. B166146, UPDATE CITATION [discussing identical language in Pen. Code, § 647.6(a)].) It is sufficient if the defendant engaged in the conduct after entering the home and there is "a nexus between the residential entry and the . . . conduct." *(Ibid.)*

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STAFF NOTES

Elements

The definition and elements of the crime of felony indecent exposure are set forth in Penal Code section 314:

> Every person who willfully and lewdly, either:
> 1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,
> 2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.
>
> Every person who violates subdivision 1 of this section after having entered, without consent, an inhabited dwelling house, or trailer coach as defined in Section 635 of the Vehicle Code, or the inhabited portion of any other building, is punishable by imprisonment in the state prison, or in the county jail not exceeding one year.
>
> Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288, every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison.

Lewd Intent

"Lewd" intent is "something more than mere nudity," as defined in *In re Smith* (1972) 7 Cal.3d 362, 366:

> [A] person does not expose his private parts "lewdly" within the meaning of section 314 unless his conduct is sexually motivated. Accordingly, a conviction of that offense requires proof beyond a reasonable doubt that the actor not only meant to expose himself, but intended by his conduct to direct public attention to his genitals for purposes of sexual arousal, gratification, or affront.

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An “affront” must be a sexual affront, as held in *People v. Dallas* (2000) 85 Cal.App.4th 937, 939:

> [T]he word “sexual” modifies “arousal,” “gratification,” and “affront,” not just “arousal” and “gratification.”

Exposes the Person

People v. Massicot (2002) 97 Cal.App.4th 920, 926, construes the phrase “exposes his person” in Penal Code section 314:

> [I]n order to expose the person within the plain meaning of the statute, one must “open to view” his or her body in its entirety, that is in the nude. [Citation omitted.] A person in a state of complete undress necessarily displays their genitals. Under this reading of section 314, intent to expose one’s genitals is a necessary element of the offense.

Private Parts

The term “private parts” in Penal Code section 314 is changed to “genitals” pursuant to *People v. Massicot* (2002) 97 Cal.App.4th 920, 925, 926, 928:

> There is no issue here whether Massicot exposed his genitals under section 314, subdivision 1. The People, interpreting the term “private parts” as synonymous with genitals, n.3 concede he did not.
>
> > n.3. The trial court instructed the jury that the term “ ‘private parts’ refers to one’s genitals.” In supplemental briefing, the People concede the term refers to the genitals. Indeed, the dictionary definition of the term “private parts” is “the external genitalia and excretory organs.” [Citation omitted.] The Oregon high court has expressly held the term “private parts” to be synonymous with one’s genitals. [Citations omitted.]
>
> . . . At least one court of appeal has assumed without analyzing the statutory language that exposure of the “private parts,” i.e., genitals, is an essential element of the indecent exposure offense. (*People v. Swearington* (1977) 71 Cal.App.3d 935, 943 . . ..) . . . We reject any attempt to read the Court of Appeal’s decision in *Dallas* to implicitly hold that exposure of the buttocks with lewd intent is sufficient conduct to violate section 314; . . .. Our conclusion is bolstered by the fact the common law offense of indecent exposure requires display of the genitals.

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In Presence of Another Person

In *People v. Carbajal* (Jan. 2, 2004) 04 C.D.O.S. 37, 39, the court considered whether indecent exposure required someone to actually see the genitals of the defendant. The complaining witness testified that she was working as a waitress in a restaurant and she saw the defendant engaging in what she believed to be masturbation below a table. She did not see his genitals.

After reviewing the common law of indecent exposure and decisions from other jurisdictions, the court stated:

> Our review of the common law and cases from other jurisdictions leads us to conclude that a conviction for indecent exposure under Penal Code section 314, subdivision 1 requires evidence that a defendant actually exposed his or her genitals in the presence of another person, but there is no concomitant requirement that such person actually must have seen the defendant's genitals. Thus, we will uphold defendant's conviction for indecent exposure in the absence of evidence of any direct visual observation of his genitals so long as there is sufficient circumstantial evidence to show that actual exposure occurred.

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1255. Incest With a Minor

The defendant is charged [in Count __] with incest.

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

1. **The defendant had sexual intercourse with a minor.**

AND

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

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

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

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

BENCH NOTES

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

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

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Pen. Code, § 285.

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Incestuous Marriages ▸ Fam. Code, § 2200.
Sexual Intercourse Defined ▸ See Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585].

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

LESSER INCLUDED OFFENSES

Attempted Incest ▸ Pen. Code, §§ 663, 285.

RELATED ISSUES

Accomplice Instructions
A minor is a victim of, not at accomplice to, incest. Accomplice instructions are not appropriate in a trial for incest involving a minor. (*People v. Tobias* (2001) 25 Cal.4th 327, 334; see *People v. Stoll* (1927) 84 Cal.App. 99, 101–102.) An exception may exist when two minors engage in consensual sexual intercourse, and thus both are victims of the other's crime. (*People v. Tobias, supra,* 327 Cal.4th at p. 334; see *In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1364–1365 [minor perpetrator under Pen. Code, § 261.5].) An adult woman who voluntarily engages in the incestuous act is an accomplice, whose testimony must be corroborated. (See *People v. Stratton* (1904) 141 Cal. 604, 609.)

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

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

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STAFF NOTES

Elements
Penal Code section 285 defines the crime of incest:

> Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison.

Family Code section 2200 defines incestuous and void marriages:

> Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate.

No Accomplice Instructions
The Supreme Court held in *People v. Tobias* (2001) 25 Cal.4th 327, 334, that accomplice instructions are not appropriate when a minor is the victim of incest:

> The conclusion that a minor cannot be held criminally liable for having incestuous sexual intercourse with an adult need not . . . turn on the minor's categorical inability "to give legal assent" to sexual intercourse. (*Stoll*, *supra*, 84 Cal.App. at p. 102.) Rather, it may rest on the comprehensive legislative scheme establishing that the minor is a *victim* of, not an accomplice to, the incest. . . . Because the minor, even if a willing participant in the defendant's conduct, is a victim and cannot be prosecuted as an accomplice, accomplice instructions are not appropriate. . . . An exception to this rule might exist where two minors engage in consensual sexual intercourse, and thus both are victims of the other's crime (*In re T.A.J.* (1998) 62 Cal.App.4th 1350, 1364-1365 . . .), but this exception clearly does not apply here.

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1260. Failure to Register as Sex Offender

The defendant is charged [in Count __] with failing to register as a sex offender.

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

<Alternative 1A—previous offense other than violation of Pen. Code, § 290>

[1. The defendant was previously (convicted of/found to have committed) _____ *<specify any offense or attempted offense listed in Pen. Code, § 290(a)(2)(A) or, if a previous juvenile offender, in Pen. Code, § 290(d)(3)>***.]**

<Alternative 1B—previous violation of Pen. Code, § 290>

[1. The defendant was previously (convicted of violating/found to have violated) Penal Code section 290 by failing to register as a sex offender.]

<Alternative 2A—resided/located within city>

[2. The defendant [temporarily] (resided/ [or] was located) in _____ *<insert name of city>***, California.]**

<Alternative 2B—resided/located within unincorporated area>

[2. The defendant [temporarily] (resided/ [or] was located) in an unincorporated area or a city with no police department in _____ *<insert name of county>* **County, California.]**

<Alternative 2C—resided/located on campus>

[2. The defendant [temporarily] (resided/ [or] was located) on the campus or in the facilities of _____ *<insert name of a University of California or California State University campus, or name of a California community college>***.]**

3. The defendant actually knew (he/she) had a duty to register as a sex offender under Penal Code section 290 [within five working days of (his/her) birthday] wherever (he/she) (resided/ [or] was located).

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AND

<Alternative 4A—change of residence/becoming homeless>

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

<Alternative 4B—birthday>

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of failing to register as a sex offender. There are many variations of this type of offense. (See discussion of other violations in the Commentary section below.) This instruction covers most of the commonly encountered cases. The court may need to modify or augment the instruction depending on the exact charges and facts. Note also that this is an area where case law is developing rapidly. The court should review recent decisions on Penal Code section 290 before instructing.

In element 1, give alternative 1A if the prosecution alleges that the defendant was previously convicted of, or adjudged in juvenile court to have committed, an offense or attempted offense listed in Penal Code section 290(a)(2)(A) or (d)(3). (See Pen. Code, § 290(a)(2)(A), (d)(3) & (g)(2).) Insert the alleged offense or attempted offense in the blank. Give alternative 1B if the prosecution alleges that the defendant was previously convicted of failing, or adjudged to have failed, to register as a sex offender. (See Pen. Code, § 290(g)(2).)

In element 2, give alternative 2A if there is evidence that the defendant resided or was located in a city. Give alternative 2B if there is evidence that the defendant resided or was located in an unincorporated area or a city without a police department. (See Pen. Code, § 290(a)(1)(A).) Insert the name of the appropriate city or county. Give alternative 2C if there is evidence that the defendant resided

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or was located on any specified university or college campus. (See Pen. Code, § 290(a)(1)(A).) In element 4, select the appropriate phrases in alternative 4A or 4B, depending on which alternatives 2A–2C are given.

A convicted sex offender must register wherever he or she "temporarily" resides or is located. (Pen. Code, § 290(a)(1).) Give the bracketed word "temporarily" in element 2, depending on which alternatives 2A–2C are given, if there is evidence that the defendant's residence was temporary or the defendant was homeless.

In element 4, give alternative 4A if the defendant is charged with failing to register within five working days of changing his or her residence or becoming homeless. (Pen. Code, § 290(a)(1)(A).) Give alternative 4B if the defendant is charged with failing to update his or her registration within five working days of his or her birthday. (Pen. Code, § 290(a)(1)(D).) If alternative 4B is given, also give the bracketed phrase in element 3.

There is a split in authority as to whether it is appropriate to instruct on general criminal intent in a case charging failure to register. (*People v. Edgar* (2002) 104 Cal.App.4th 210, 219 [error to instruct on general intent]; *People v. Poslof* (June 9, 2004) __ Cal.App.4th __, E033503, 4th App. Dist [same]; *People v. Barker* (2003) 107 Cal.App.4th 147, 157–158, [REVIEW GRANTED AND DEPUBLISHED, June 11, 2003, S115438] [not error].) The court should review the Related Issues section to Instruction 121, Union Of Act And Intent: General Intent, before giving a general intent instruction in a case in which failure to register is charged.

AUTHORITY

Elements ▸ Pen. Code, § 290(a)(1)(A) [duty to register after changing residence or location], (a)(1)(D) [duty to register after birthday], (a)(2)(A) [persons with specified prior convictions], (d)(1) & (3) [juveniles with specified prior adjudications], (g)(2) [punishment for willful violation]; *People v. Garcia* (2001) 25 Cal.4th 744, 752.

Registration Defined ▸ Pen. Code, § 290(e)(2).

Willfully Defined ▸ Pen. Code, § 7, subd. 1.

Actual Knowledge of Duty Required ▸ *People v. Garcia* (2001) 25 Cal.4th 744, 752.

Continuing Offense ▸ *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527–528.

General Intent Crime ▸ *People v. Johnson* (1998) 67 Cal.App.4th 67, 72.

No Duty to Define Residence ▸ *People v. McCleod* (1997) 55 Cal.App.4th 1205, 1219.

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"Location" of Transient Registrant Unconstitutionally Vague ▸ *People v. North* (2003) 112 Cal.App.4th 621, 634; but see *People v. Annin* (2004) 116 Cal.App.4th 725, 737–740.

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

RELATED ISSUES

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

Other Violations of Section 290
This instruction focuses on violations under Penal Code section 290(a)(1)(A), (a)(1)(D), (a)(2)(A), (d)(3), and (g)(2). Section 290 imposes numerous other duties on persons convicted of sex offenses. For example, a registered sex offender must:

1. Notify the agency where he or she was *last* registered of any new address or location, whether inside or outside California, or any name change. (See Pen. Code, § 290(f)(1) & (3); *People v. Smith* (2004) 32 Cal.4th 792, 800–802 [sufficient notice if defendant mails change of address form even if agency does not receive it]; *People v. Annin* (2004) 116 Cal.App.4th 725, 737–740 [discussing meaning of "changed" residence or location, disagreeing with analysis in *North*]; *People v. Davis* (2002) 102 Cal.App.4th 377, 385 [court failed to instruct on requirement of actual knowledge]; *People v. Vigil* (2001) 94 Cal.App.4th 485, 501 [failure to notify law enforcement of the addition of a second temporary residence]; see also *People v. Franklin* (1999) 20 Cal.4th 249, 255–256 [construing former Pen. Code, § 290(f), which did not specifically require registration when registrant moved outside California].)

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2. Register multiple residences wherever he or she regularly resides. (See Pen. Code, § 290(a)(1)(B); *People v. Edgar* (2002) 104 Cal.App.4th 210, 219–222 [court failed to instruct that jury must find that defendant actually knew of duty to register multiple residences].)

3. Update his or her registration at least once every 60 days if he or she has no residence. (See Pen. Code, § 290(a)(1)(C).)

A sexually violent predator who is released from custody must verify his or her address at least once every 90 days and verify any place of employment. (See Pen. Code, § 290(a)(1)(E).) Other special requirements govern:

1. Residents of other states who must register in their home state but are working or attending school in California. (See Pen. Code, § 290(a)(1)(G).)

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

Persons required to register other than those convicted of offenses listed in Penal Code section 290(a)(2)(A) or (d)(3) include any person who was or will be:

1. Released, discharged, or paroled after being confined for the commission or attempted commission of any of the listed sex offenses. (See Pen. Code, § 290(a)(2)(B).)

2. Determined to be a mentally disordered sex offender or found not guilty of any listed offense by reason of insanity. (See Pen. Code, § 290(a)(2)(C).)

3. Convicted in other jurisdictions for specified sex offenses. (See Pen. Code, § 290(a)(2)(D).)

4. Ordered to register for any offenses not specifically listed but that were committed because of sexual compulsion or for sexual gratification. (See Pen. Code, § 290(a)(2)(E).)

Forgetting to Register

A person willfully fails to register when he or she actually knows of the requirement but forgets to register. (*People v. Cox* (2002) 94 Cal.App.4th 1371, 1376; *People v. Barker* (2003) 107 Cal.App.4th 147 REVIEW GRANTED AND DEPUBLISHED, Dec. 8, 2003, S115438 [Note: REVIEW GRANTED also in

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unpublished case of *People v. Sorden* (Oct. 31, 2003, A099674) [review granted—Jan. 14, 2004, S120677] [holding that forgetting is a defense to willful failure to register]].)

Temporary Residence
Penal Code section 290 requires registration of temporary residences. The requirement for a sex offender to notify law enforcement when he or she "changes" a residence address (see Pen. Code, § 290(f)(1)) also applies to temporary residences. (*People v. Vigil* (2001) 94 Cal.App.4th 485, 499; see *People v. Edgar* (2002) 104 Cal.App.4th 210, 219–222.) A "change" in residence includes adding, eliminating, or otherwise altering a residence address. (*People v. Vigil, supra,* 94 Cal.App.4th at p. 501; see *People v. Horn* (1998) 68 Cal.App.4th 408, 418 [multiple residences; duty to notify when temporarily staying somewhere for more than the minimum statutory time period].)

"Location" Registration Requirement for Transient Unconstitutionally Vague
In *People v. North* (2003) 112 Cal.App.4th 621, 634, the court held that the requirement that a homeless person register the "location" where he or she may be found was void for vagueness:

> [W]e hold that when the Legislature used "location" to require registration or notification of particular places where an offender may regularly be found, it failed to provide enough specificity for either the offender or the authorities to understand what the statute demands. The provisions of section 290, subdivisions (a)(1)(A) and (f)(1) requiring reregistration and written notification upon a change of "location" are void for vagueness, as is the subdivision (a)(1)(B) requirement that a transient offender specify all the places where he is regularly located within a jurisdiction. Also void is the provision of section 290, subdivision (a)(1)(D) requiring annual verification of a transient offender's "temporary location."

On the other hand, the court upheld the requirement that a homeless person register that he or she is "located" within a particular jurisdiction:

> [W]hen the Legislature used "located" as a basis for identifying the jurisdictions in which registration is required, it provided the offender and the authorities with a reasonably certain registration requirement. It is possible to ascertain when a transient offender is within a jurisdiction, though it cannot be determined which locations within the jurisdiction must be separately identified, or when movement within the jurisdiction constitutes a change of location. Thus, the provisions of section 290, subdivision (a)(1)(A) requiring

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> registration in the jurisdiction where an offender without a residence is "located," and the provision of subdivision (a)(1)(B) requiring registration in all jurisdictions where such an offender is regularly "located," are valid. *(Ibid.)*

(But see *People v. Annin* (2004) 116 Cal.App.4th 725, 737–740 [disagreeing with analysis in *North*].)

Registration Requirement for Consensual Oral Copulation With Minor
Penal Code section 290 requires lifetime registration for a person convicted of consensual oral copulation with a minor but does not require such registration for a person convicted of consensual sexual intercourse with a minor. (Pen. Code, § 290(a)(1)(A) & (a)(2)(A).) There is a split in authority over whether this distinction violates equal protection. (Compare *People v. Hofsheier* (2004) 117 Cal.App.4th 438, 442 [does violate equal protection (~~VERIFY~~ REVIEW ~~NOT~~ GRANTED, DEPUBLISHED June 11, 2004, S124636)]; *People v. Jones* (2002) 101 Cal.App.4th 220, 227–229 [does not violate equal protection]; *People v. Alcala* (May 28, 2004) C037000, 2004 DJDAR 6286 [does not violate equal protection].)

Moving Between Counties—Failure to Notify County Leaving and County Moving To Can Only Be Punished as One Offense
A person who changes residences a single time, failing to notify both the jurisdiction he or she is departing from and the jurisdiction he or she is entering, commits two violations of Penal Code section 290 but can only be punished for one. (*People v. Britt* (Apr. 20, 2004) S115377, p. 4698 [UPDATE CITATION WHEN AVAILABLE].) Further, if the defendant has been prosecuted in one county for the violation, and the prosecutor in the second county is aware of the previous prosecution, the second county cannot subsequently prosecute the defendant. (*Id.*)

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STAFF NOTES

Scope of Instruction
Penal Code section 290(a)(1)(A), (a)(1)(D), (a)(2)(A), (d)(3), and (g)(2) sets forth the elements of the crime covered by this instruction, which focuses on failing to register as a sex offender within (1) five working days of establishing a residence or location within a city, county, or campus, or (2) five working days of the sex offender's birthday.

Note that section 290 was amended effective January 1, 2002. (See Stats. 2001, ch. 843, §§ 1.3, 2 [incorporating amendments made by Stats. 2001, chs. 485 (A.B. 1004) and 544 (A.B. 4)].) Section 290 was amended again by urgency legislation effective March 28, 2002, but this amendment only made a technical change to section 290(a)(1)(C), which is not covered by this instruction. (See Stats. 2002, ch. 17, § 1.) Another technical change was made by Stats. 2002, ch. 664, effective January 1, 2003.

Who Must Register
Element 1A, relating to who is required to register based on convictions for specific crimes or attempted crimes, is supported by Penal Code section 290(a)(2)(A):

> (2) The following persons shall be required to register pursuant to paragraph (1):
>
> (A) Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, Section 243.4, paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, or paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, 266j, 267, 269, 285, 286, 288, 288a, 288.5, or 289, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; or any person who since that date has been or is hereafter convicted of the attempt to commit any of the above-mentioned offenses.

Element 1A also relates to who is required to register based on prior juvenile adjudications for specific crimes or attempted crimes, which is supported by Penal Code section 290(d)(1) and (3):

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> (d)(1) Any person who, on or after January 1, 1986, is discharged or paroled from the Department of the Youth Authority to the custody of which he or she was committed after having been adjudicated a ward of the juvenile court pursuant to Section 602 of the Welfare and Institutions Code because of the commission or attempted commission of any offense described in paragraph (3) shall be subject to registration under the procedures of this section.
> . . .
> (3) Any person described in this subdivision who committed an offense in violation of any of the following provisions shall be required to register pursuant to this section:
> (A) Assault with intent to commit rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 under Section 220.
> (B) Any offense defined in paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, Section 264.1, 266c, or 267, paragraph (1) of subdivision (b) of, or subdivision (c) or (d) of, Section 286, Section 288 or 288.5, paragraph (1) of subdivision (b) of, or subdivision (c) or (d) of, Section 288a, subdivision (a) of Section 289, or Section 647.6.
> (C) A violation of Section 207 or 209 committed with the intent to violate Section 261, 286, 288, 288a, or 289.

Element 1B, relating to who is required to register based on a prior conviction or juvenile adjudication for failure to register, is supported by Penal Code section 290(g)(2) [underlining added]:

> (g)(2) Except as provided in paragraphs (5) and (7), any person who is required to register under this section based on a felony conviction or juvenile adjudication who willfully violates any requirement of this section <u>or who has a prior conviction or juvenile adjudication for the offense of failing to register under this section</u> and who subsequently and willfully violates any requirement of this section is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years.

Duty to Register After Establishing New Residence or Location or Annually After Birthday

Elements 2A, 2B, 2C, and 4A are supported by Penal Code section 290(a)(1)(A), which establishes the duty of a sex offender who resides in or is located within California to register after coming into or changing a residence or location within a city, county, or campus [underlining added]:

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> (a)(1)(A) Every person described in paragraph (2), for the rest of his or her life while residing in, or, if he or she has no residence, while located within California, or while attending school or working in California, as described in subparagraph (G), shall be required to register with the chief of police of the city in which he or she is residing, or if he or she has no residence, is located, or the sheriff of the county if he or she is residing, or if he or she has no residence, is located, in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing, or if he or she has no residence, is located upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence or location within, any city, county, or city and county, or campus in which he or she temporarily resides, or, if he or she has no residence, is located.

Element 4B is supported by Penal Code section 290(a)(1)(D), which establishes the duty of a sex offender to register annually after his or her birthday:

> (a)(1)(D) Beginning on his or her first birthday following registration or change of address, the person shall be required to register annually, within five working days of his or her birthday, to update his or her registration with the entities described in subparagraph (A). At the annual update, the person shall provide current information as required on the Department of Justice annual update form, including the information described in subparagraphs (A) to (C), inclusive, of paragraph (2) of subdivision (e).

Elements 4A and 4B are also supported by section 290(g)(2), which provides:

> (g)(2) Except as provided in paragraphs (5) and (7), any person who is required to register under this section based on a felony conviction or juvenile adjudication who willfully violates any requirement of this section or who has a prior conviction or juvenile adjudication for the offense of failing to register under this section and who subsequently and willfully violates any requirement of this section is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, or two or three years.

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Actual Knowledge
Element 3 is supported by the recent holding in *People v. Garcia* (2001) 25 Cal.4th 744, 752, that Penal Code section 290 requires that the defendant actually know of the duty to register [italics in original]:

> In a case like this, involving a *failure* to act, we believe section 290 requires the defendant to actually know of the duty to act. . . . [A] sex offender is guilty of a felony only if he "willfully violates" the registration or notification provisions of section 290. [Citation.] The word "willfully" implies a "purpose or willingness" to make the omission. [Citation.] Logically one cannot purposefully fail to perform an act without knowing what act is required to be performed. . . . 'K]nowledge has been held to be a concomitant of willfulness.' . . . Accordingly, a violation of section 290 requires actual knowledge of the duty to register. A jury may infer knowledge from notice, but notice alone does not necessarily satisfy the willfulness requirement.

If a defendant is charged with failing to register multiple residences, even temporary residences, the jury must be instructed to find actual knowledge, as discussed in *People v. Edgar* (2002, A093514) __ Cal.App.4th __:

> [U]nlike in *Garcia*, the court gave no instructions that required the jury to find that appellant actually knew that staying at a transient hotel or homeless shelter, even on a temporary basis, while still maintaining his residence at the Clarinada Avenue address, required notification of law enforcement. . . . Furthermore, . . . the prosecution presented absolutely no evidence showing that appellant also knew that acquiring a second residence address constituted a change in residence that required registration of the new address.

Residence
There is no duty to define the "residence," as held in *People v. McCleod* (1997) 55 Cal.App.4th 1205, 1219:

> We believe the manifest purpose of section 290 . . . is best subserved by construing "residence" . . . as likewise referring to a term so easily understood by a person of common intelligence as "connot[ing] more than passing through or presence for a limited visit[]" that further definition is not required. . . . We thus conclude the trial court did not have a sua sponte duty to define the term "residence" for purposes of defining the crime described in section 290, subdivision (f).

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In comparing "residence" to "domicile," *McLeod* also stated that "[r]esidence . . . denotes any factual place of abode of some permanency, that is, more than a mere temporary sojourn [citation]." (*Id*. at p. 1217, quoting *Whittell v. Franchise Tax Board* (1964) 213 Cal.App.2d 278, 284.)

People v. Horn (1998) 68 Cal.App.4th 408, 414, held that an instruction correctly stated that a defendant is required to register an additional place of residence if he has one. The instruction, in part, defined "residence" as follows:

> The term residence means a temporary or permanent dwelling place, which one keeps and to which one intends to return, as opposed to a place where one rests or shelters during a trip or a transient visit. [¶] Depending on the circumstances, one may have a single place of residence or more than one place of residence or no residence.

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1270. Other Evidence Not Required to Support Testimony in Sex Offense Case

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Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone.

BENCH NOTES

Instructional Duty
This instruction may be given on request if a complaining witness testifies in a sex offense case. The court has a **sua sponte** duty to give Instruction 400, Single Witness's Testimony, in every case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885.) Because both instructions correctly state the law and 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 [resolving split of authority on whether the two instructions can be given together].)

AUTHORITY

Instructional Requirements ▸ *People v. Blassingill* (1988) 199 Cal.App.3d 1413, 1422; *People v. Akey* (1912) 163 Cal. 54, 55–56.
Conviction of Sex Crime Sustained on Prosecutrix's Uncorroborated Testimony ▸ *People v. Poggi* (1988) 45 Cal.3d 306, 326.
Given Together With Instruction on Single Witness's Testimony ▸ *People v. Gammage* (1992) 2 Cal.4th 693, 701–702; *People v. Hollis* (1991) 235 Cal.App.3d 1521, 1525–1526.

5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 651.

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STAFF NOTES

The Supreme Court reaffirmed in *People v. Gammage* (1992) 2 Cal.4th 693, 701–702 that this instruction may be given along with the instruction about testimony from a single witness:

> It is not disputed that both CALJIC No. 2.27 and No. 10.60, considered separately, correctly state the law. "In California conviction of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix." (*People v. Poggi* (1988) 45 Cal.3d 306, 326. . . . We thus hold that it is proper for the trial court to give CALJIC No. 10.60 in addition to CALJIC No. 2.27 in cases involving sex offenses. We disapprove of contrary language in *People v. Pringle, supra,* 177 Cal.App.3d 785, and *People v. Adams, supra,* 186 Cal.App.3d 75.

Instruction 400, Single Witness's Testimony, states:

> **[Except for the testimony of _____** *[insert witness's name],* **which requires supporting evidence,] (the/The) testimony of a single witness can prove any fact in the case. Before you conclude that the testimony of a single witness proves a fact, you should carefully review all the evidence.**

Instruction 1270 restates instruction 400 in the context of a charged sex offense. Justice Kennard "would not encourage use of this instruction, because it is redundant and thus of little value. . . . Before . . . *Rincon-Pineda* . . . [it] served to minimize the impact of former CALJIC No. 10.22 . . ., which told jurors that rape is a charge 'which is easily made and . . . difficult to defend against.'" (*People v. Gammage* (1992) 2 Cal.4th 693, 706 (conc. by Kennard, J.).) Justice Mosk agreed in his concurrence. (*Ibid.* at p. 703.) Nevertheless, the majority opinion in *Gammage* upheld use of both instructions, so a separate instruction is provided.

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1280. Testimony on Rape Trauma Syndrome

You have heard testimony from _____ *<insert name of expert>* **regarding rape trauma syndrome.**

_____'s *<insert name of expert>* **testimony about rape trauma syndrome is not evidence that the defendant committed any of the crimes charged against (him/her).**

You may consider this evidence only in deciding whether or not _____'s *<insert name of alleged rape victim>* **conduct was not inconsistent with the conduct of someone who has been raped, and in evaluating the believability of her testimony.**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction if an expert testifies on rape trauma syndrome. (See *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 [**sua sponte** duty in context of child sexual abuse accommodation syndrome (CSAAS)]; *CJER Mandatory Criminal Jury Instructions Handbook* (CJER 10th ed. 2001) Sua Sponte Instructions, § 2.132; but see *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 [instruction on CSAAS only required on request].)

Related Instructions
If this instruction is given, also give Instruction 330, Limited Purpose Evidence in General, and Instruction 450, Expert Witness.

AUTHORITY

Rebut Inference That Victim's Conduct Inconsistent With Claim of Rape ▸ *People v. Bledsoe* (1984) 36 Cal.3d 236, 247–248.
Syndrome Evidence Not Admissible to Prove Rape Occurred ▸ *People v. Bledsoe* (1984) 36 Cal.3d 236, 251.

1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 52.

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COMMENTARY

It is unnecessary and potentially misleading to instruct that the expert testimony assumes that a rape has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387 [in context of child molestation].)

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STAFF NOTES

Appropriate Use of Rape Trauma Syndrome Evidence
The Supreme Court summarized the appropriate use of rape trauma syndrome in the leading case of *People v. Bledsoe* (1984) 36 Cal.3d 236, 247–248:

> Rape trauma syndrome is a rather recent concept . . .and, to date, there have been relatively few cases which have addressed the question of the use of expert testimony on the syndrome in a judicial setting. In a number of the cases in which the issue has arisen, the alleged rapist has suggested to the jury that some conduct of the victim after the incident - for example, a delay in reporting the sexual assault - is inconsistent with her claim of having been raped, and evidence on rape trauma syndrome has been introduced to rebut such an inference by providing the jury with recent findings of professional research on the subject of a victim's reaction to sexual assault. (Citations.) As a number of decisions have recognized, in such a context expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths.

But evidence of rape trauma syndrome is not admissible to prove the victim was raped, as stated in *Bledsoe* at p. 251:

> Given the history, purpose and nature of the rape trauma syndrome concept, we conclude that expert testimony that a complaining witness suffers from rape trauma syndrome is not admissible to prove that the witness was raped. . . . We hasten to add that nothing in this opinion is intended to imply that evidence of the emotional and psychological trauma that a complaining witness suffers after an alleged rape is inadmissible in a rape prosecution.

Underlying Factual Assumption
It is not required to state in the instruction that the expert testimony assumes that a rape in fact has occurred for purposes of illustration, as discussed in *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387, in the context of child molestation:

> As part of the final instructions to the jury, the court said "[y]ou are reminded that testimony of [the expert] was offered and may be considered by you only for the purpose of understanding and explaining the behavior of one or more of the alleged victims in this case, and not as proof that the molestation occurred as to any one or more of the alleged victims." [¶] [The defendant] complains that these instructions did not advise the jury that evidence of this kind "*assumes* that a molestation has in fact occurred and

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that the complaining witnesses[’] reactions were common explanations of a factual event,” and therefore the jury was allowed to use the evidence “without being fully instructed that this evidence is premised on a molestation having in fact occurred.” [¶] There was no error. [The defendant]’s argument is based on explanatory language, in *Bowker,* which in our view was patently intended to make the opinion clear to the attorney or judge who read it and not to be incorporated (at least in the unelaborated form [the defendant] suggests) in an instruction to the jury. The instructions the trial court gave were clear, accurate, and sufficient. We would consider it unnecessary, and potentially confusing and misleading, to add the language [the defendant] proposes.

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1281. Testimony on Child Sexual Abuse Accommodation Syndrome

You have heard testimony from _____ *<insert name of expert>* **regarding child sexual abuse accommodation syndrome.**

_____'s *<insert name of expert>* **testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her).**

You may consider this evidence only in deciding whether or not _____'s *<insert name of alleged victim of abuse>* **conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of (his/her) testimony.**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction if an expert testifies on child sexual abuse accommodation syndrome. (*People v. Housley* (1992) 6 Cal.App.4th 947, 958–959; but see *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736, and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 [instruction required only on request].)

Related Instructions
If this instruction is given, also give Instruction 330, Limited Purpose Evidence in General, and Instruction 450, Expert Witness.

AUTHORITY

Eliminate Juror Misconceptions or Rebut Attack on Victim's Credibility ▸ *People v. Bowker* (1988) 203 Cal.App.3d 385, 393–394.

1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, §§ 53–55.

COMMENTARY

The jurors must understand that the research on child sexual abuse accommodation syndrome assumes a molestation occurred and seeks to describe and explain children's common reactions to the experience. (*People v. Bowker*

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(1988) 203 Cal.App.3d 385, 394.) However, it is unnecessary and potentially misleading to instruct that the expert testimony assumes that a molestation has in fact occurred. (See *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387.)

In the typical case, the prosecution must identify the myth or misconception the evidence is designed to rebut (*People v. Bowker, supra*, 203 Cal.App.3d at p. 394; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 735; *People v. Harlan* (1990) 222 Cal.App.3d 439, 449–450), or the victim's credibility must have been placed in issue (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744–1745).

RELATED ISSUES

Expert Testimony Regarding Parent's Behavior

An expert may also testify regarding reasons why a parent may delay reporting molestation of his or her child. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300–1301.)

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STAFF NOTES

Sua Sponte Duty to Instruct on Child Sexual Abuse Accommodation Syndrome

The court in *People v. Housley* (1992) 6 Cal.App.4th 947, 958–59, summarized the trial court's duty to instruct on child sexual abuse accommodation syndrome:

> We thus conclude that because of the potential for misuse of CSAAS evidence, and the potential for great prejudice to the defendant in the event such evidence is misused, it is appropriate to impose upon the courts a duty to render a sua sponte instruction limiting the use of such evidence. Accordingly, in all cases in which an expert is called to testify regarding CSAAS we hold the jury must sua sponte be instructed that (1) such evidence is admissible solely for the purpose of showing the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested; and (2) the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true.

See also the Staff Notes to instruction 1280, Rape Trauma Syndrome.

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375. Possession of Recently Stolen Property as Evidence of a Crime

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If you conclude that the defendant knew (he/she) possessed property and you conclude that the property had in fact been recently (stolen/extorted), you may not convict the defendant of _____ *<insert crime>* **based on those facts alone. However, if you also find that supporting evidence tends to prove (his/her) guilt, then you may conclude that the evidence is sufficient to prove (he/she) committed _____** *<insert crime>***.**

The supporting evidence need only be slight, and need not be enough by itself to establish guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove (his/her) guilt of _____ *<insert crime>***.**

[You may also consider whether _____ *<insert other appropriate factors for consideration>***.]**

Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt.

BENCH NOTES

Instructional Duty

The instruction should be given **sua sponte** if there is evidence of possession of stolen property and corroborating evidence of guilt. (See *People v. Clark* (1953) 122 Cal.App.2d 342, 346 [failure to instruct that unexplained possession alone does not support finding of guilt was error]; *People v. Smith* (1950) 98 Cal.App.2d 723, 730.)

If there is conflicting evidence on possession or the status of the property as stolen, the instruction must be qualified to avoid misleading the jury into assuming these facts. (*People v. Morris* (1988) 46 Cal.3d 1, 40 [overruled on other ground in *In re Sassounian* (1995) 9 Cal.4th 535]; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1172; see *People v. Johnson* (1993) 6 Cal.4th 1, 36–37 [sufficient evidence of possession of stolen property].)

The instruction may be given when the charged crime is robbery, burglary, theft, or receiving stolen property. (See *People v. McFarland* (1962) 58 Cal.2d 748, 755 [burglary and theft]; *People v. Johnson, supra,* 6 Cal.4th at pp. 36–37 [burglary];

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People v. Gamble (1994) 22 Cal.App.4th 446, 453 [robbery]; *People v. Anderson* (1989) 210 Cal.App.3d 414, 424 [receiving stolen property].) The crime of receiving stolen property includes receiving property that was obtained by extortion (Pen. Code, § 496). Thus, the instruction also includes optional language for recently extorted property.

Use of this instruction should be limited to theft and theft-related crimes. (*People v. Barker* (2001) 91 Cal.App.4th 1166, 1176 [disapproving use of instruction to infer guilt of murder]; but see *People v. Smithey* (1999) 20 Cal.4th 936, 975–978 [in a case involving both premeditated and felony murder, no error in instructing on underlying crimes of robbery and burglary]; *People v. Mendoza* (2000) 24 Cal.4th 130, 176–177 [instruction included kidnapping to commit robbery, but court did not address whether this was an extension of *McFarland*].)

Corroborating Evidence
The bracketed paragraph may be used if the court grants a request for instruction on specific examples of corroboration supported by the evidence. (See *People v. Russell* (1932) 120 Cal.App. 622, 625–626 [list of examples]; see also *People v. Peters* (1982) 128 Cal.App.3d 75, 85–86 [reference to false or contradictory statement improper when no such evidence was introduced]). Examples include the following:

a. False, contradictory, or inconsistent statements. (*People v. Anderson* (1989) 210 Cal.App.3d 414, 424; see, e.g., *People v. Peete* (1921) 54 Cal.App. 333, 345–346 [false statement showing consciousness of guilt]; *People v. Lang* (1989) 49 Cal.3d 991, 1024–1025 [false explanation for possession of property]; *People v. Farrell* (1924) 67 Cal.App. 128, 133–134 [same].)

b. The attributes of possession, e.g., the time, place, and manner of possession that tend to show guilt. (*People v. Anderson, supra,* 210 Cal.App.3d at p. 424; *People v. Hallman* (1973) 35 Cal.App.3d 638, 641; see, e.g., *People v. Gamble* (1994) 22 Cal.App.4th 446, 453–454.)

c. The opportunity to commit the crime. (*People v. Anderson, supra,* 210 Cal.App.3d at p. 425; *People v. Mosqueira* (1970) 12 Cal.App.3d 1173, 1176.)

d. The defendant's conduct or statements tending to show guilt, or the failure to explain possession of the property under circumstances that indicate a "consciousness of guilt." (*People v. Citrino* (1956) 46 Cal.2d 284, 288–289; *People v. Wells* (1960) 187 Cal.App.2d 324, 328–329,

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331–332; *People v. Mendoza* (2000) 24 Cal.4th 130, 175–176; *People v. Champion* (1968) 265 Cal.App.2d 29, 32.)

e. Flight after arrest (*People v. Scott* (1924) 66 Cal.App. 200, 203; *People v. Wells, supra,* 187 Cal.App.2d 324, 329.)

f. Assuming a false name and being unable to find the person from whom the defendant claimed to have received the property. (*People v. Cox* (1916) 29 Cal.App. 419, 422.)

g. Sale of property under a false name and at an inadequate price. (*People v. Majors* (1920) 47 Cal.App. 374, 375.)

h. Sale of property with identity marks removed (*People v. Miller* (1920) 45 Cal.App. 494, 496–497) or removal of serial numbers (*People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1401).

i. Modification of the property. (*People v. Esquivel, supra,* 28 Cal.App.4th at p. 1401 [shortening barrels of shotguns].)

j. Attempting to throw away the property. (*People v. Crotty* (1925) 70 Cal.App. 515, 518–519.)

AUTHORITY

Instructional Requirements ▸ *People v. Williams* (2000) 79 Cal.App.4th 1157, 1172; see *People v. McFarland* (1962) 58 Cal.2d 748, 755.

Corroboration Defined ▸ See Pen. Code, § 1111; *People v. McFarland* (1962) 58 Cal.2d 748, 754–755.

Due Process Requirements for Permissive Inferences ▸ *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157, 165; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1172; *People v. Gamble* (1994) 22 Cal.App.4th 446, 454–455.

Examples of Corroborative Evidence ▸ *People v. Russell* (1932) 120 Cal.App. 622, 625–626.

Recently Stolen ▸ *People v. Anderson* (1989) 210 Cal.App.3d 414, 421–422; *People v. Lopez* (1954) 126 Cal.App.2d 274, 278 [nine-month period found to be "recent"].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 13 [in context of larceny]; § 82 [in context of receiving stolen property]; § 86 [in context of robbery]; § 135 [in context of burglary]; Criminal Trial, § 526 [presumptions].

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1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 62; Circumstantial Evidence, § 129.

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STAFF COMMENTS

Permissive Inference of Guilt

The general rule allowing an inference of guilt from possession of stolen property was summarized in *People v. McFarland* (1962) 58 Cal.2d 748, 755:

> Where recently stolen property is found in the conscious possession of a defendant who, upon being questioned by the police, gives a false explanation regarding his possession or remains silent under circumstances indicating a consciousness of guilt, an inference of guilt is permissible and it is for the jury to determine whether or not the inference should be drawn in the light of all the evidence. As shown by the California cases cited above, this rule is applicable whether the crime charged is theft, burglary, or knowingly receiving stolen property.

The instruction is also appropriate when the crime charged is robbery. (*People v. Gamble* (1994) 22 Cal.App.4th 446, 453; *People v. Smithey* (1999) 20 Cal.4th 936, 975–977 [robbery and burglary]; *People v. Holt* (1997) 15 Cal.4th 619, 676–677 [robbery and burglary]; *People v. Lang* (1989) 49 Cal.3d 991, 1024–1025; *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1400–1401; *People v. Sorrentino* (1956) 146 Cal.App.2d 149, 160.)

No cases were found involving recently extorted property. Nevertheless, extorted is included as an alternative to "stolen property" because the crime of receiving stolen property includes receiving property that was obtained by extortion. (See Pen. Code, § 496.)

If the evidence relating to possession is conflicting or unclear, the instruction permitting an inference of guilt must be qualified so as not to imply that the defendant did in fact possess the stolen property, as discussed in *People v. Williams* (2000) 79 Cal.App.4th 1157, 1172:

> [T]here was conflicting evidence on the issue of [the defendant's] conscious possession of the wallet: either he stole it or he was unaware that the carjacker had stashed it in the van. However, unlike the instruction in *Morris* . . ., the court's instruction here was not "unqualified" in a way that might imply that defendant did in fact possess [the] wallet. Rather, the instruction permitted an inference of guilt only if the jury first found that defendant was in conscious possession of the wallet and there was additional corroborating evidence of guilt.

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See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 977–978 [evidence sufficient to support finding of possession and intent to steal for robbery and burglary]; *People v. Johnson* (1993) 6 Cal.4th 1, 36–37 [sufficient evidence of possession of stolen property to justify instruction].

Telling the jury it cannot rely solely on evidence that the defendant possessed recently stolen property does not suggest to the jury that it need not find beyond a reasonable doubt all the statutory elements of the charged crime. The jury is still instructed on all the elements of the crime, such as burglary, robbery, or theft. (*People v. Smithey* (1999) 20 Cal.4th 936, 976–977, 978; *People v. Holt* (1997) 15 Cal.4th 619, 677.) With sufficient corroborating evidence, the jury rationally can connect the evidence to guilt of the charged crime. (*People v. Smithey, supra,* 20 Cal.4th at p. 978.) The instruction does not violate due process by lessening the prosecutor's burden of proving every element of the crime beyond a reasonable doubt, as discussed in *People v. Gamble, supra,* 22 Cal.App.4th at pp. 454–455:

> The instruction creates only a permissive inference, one the jury could either credit or reject "based on its evaluation of the evidence, and therefore does not relieve the People of any burden of establishing guilt beyond a reasonable doubt." (Citations.) A permissive inference does not shift the prosecution's burden of proof, and violates due process "only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (. . . *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157–163.)

See also *People v. Mendoza* (2000) 24 Cal.4th 130, 180 [in context of inference to be drawn from a defendant's flight]; *Ulster County Court v. Allen* (1979) 442 U.S. 140, 157, 165 [a permissive presumption does not shift the burden of proof unless there is no rational way the jury could make the connection permitted by the inference].

Drawing an inference of guilty knowledge from possession of stolen property has withstood constitutional challenge, as discussed in *People v. Barker* (2001) 91 Cal.App.4th 1166, 1173–1174:

> In *Barnes* [*v. United States* (1973) 412 U.S. 837], the United States Supreme Court noted that "[f]or centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods." (*Barnes, supra*, 412 U.S. at p. 843 . . ..) The court in *Barnes* found that such inference comported with due process if "the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt . . .." (*Ibid.*)

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People v. Williams (2000) 79 Cal.App.4th 1157, 1173–1174, reaffirmed the *Barnes* analysis:

> *Barnes* does not suggest that the failure to explain possession of recently stolen property is a constitutionally mandated foundational requirement for drawing an inference of guilt. Nor does *Barnes* suggest that no circumstances other than the lack of an explanation can combine with conscious possession of recently stolen property to support an inference of guilt. Rather, . . . an inference of guilt may rationally arise from the concurrence of conscious possession and many other circumstances. . . . In our view, CALJIC No. 2.15 correctly prohibits the jury from drawing an inference of guilt solely from conscious possession of recently stolen property but properly permits the jury to draw such an inference where there is additional corroborating evidence. *As long as the corroborating evidence together with the conscious possession could naturally and reasonably support an inference of guilt, and that inference is sufficient to sustain a verdict beyond a reasonable doubt, we discern nothing that lessens the prosecution's burden of proof or implicates a defendant's right to due process.* Indeed, CALJIC No. 2.15 has repeatedly withstood challenges on the grounds that it lessens the burden of proof or otherwise denies a defendant due process of law. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936 . . .; *People v. Holt* (1997) 15 Cal.4th 619 . . .; *People v. Hernandez* (1995) 34 Cal.App.4th 73 . . .; *People v. Esquivel* (1994) 28 Cal.App.4th 1386 . . .; *People v. Gamble* (1994) 22 Cal.App.4th 446 . . .; *People v. Anderson, supra,* 210 Cal.App.3d 414.) [Italics added.]

Factual Inferences

Evidence Code section 600(b) defines an “inference”:

> (b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

The court in *People v. Barker, supra,* 91 Cal.App.4th at pp. 1174–1175, summarized some of the factual inferences that can be drawn from conscious possession with corroborating evidence:

> Further, "it is not just the inference as to defendant's knowledge that the property was stolen that may be drawn, but in the context of theft crimes other than receiving stolen property, CALJIC No. 2.15 by its very language permits the jury in a proper case to infer the identity of defendant as the one who committed the crime." (*Gamble, supra,* 22 Cal.App.4th at p. 453 . . . .)

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> CALJIC No. 2.15 has also been held appropriate in cases where the inference to be drawn in theft-related crimes was regarding the defendant's intent to steal (*Holt, supra,* 15 Cal.4th at pp. 676-677 . . .; *Johnson, supra,* 6 Cal.4th at pp. 35-38 . . .), or whether the property in the defendant's possession had even been stolen from the victims (*ibid.*).

Corroborating Evidence

The corroborating evidence need only be slight, as stated in *People v. McFarland* (1962) 58 Cal.2d 748, 754:

> Possession of recently stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt. . . . "[P]ossession of stolen property, accompanied by no explanation, or an unsatisfactory explanation of the possession, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen. The rule is generally applied where the accused is found in possession of the articles soon after they were stolen." [Citations.] . . . "[T]he failure to show that possession was honestly obtained is itself a strong circumstance tending to show the possessor's guilt of the burglary."

The corroborating evidence "need not by itself be sufficient to warrant an inference of guilt." (*People v. Gamble* (1994) 22 Cal.App.4th 446, 453.)

The instructions uses the phrase "supporting evidence [that] tends to prove (his/her) guilt" instead of "corroborating evidence." (See Pen. Code, § 1111 [accomplice testimony must be "corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense"]; *People v. McFarland* (1962) 58 Cal.2d 748, 754–755 [defendant who remains silent "under circumstances indicating a consciousness of guilt"]; see also instruction 480, Accomplice Testimony.)

Recently Stolen

Whether property is recently stolen is a factual determination for the jury, as discussed in *People v. Anderson* (1989) 210 Cal.App.3d 414, 421–422:

> There is no question but that the phrase "recently stolen" is a key portion of the legal principle and the instruction. . . . [T]here is no specific authority as to what time intervals may be embraced within the term "recent." . . . The longer period of time . . . merely weakens the inference of guilty knowledge. . . . Under the

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> circumstances of this case, we believe it to have been well within reason for a jury to have determined that possession within four and a half months, and certainly possession within approximately one month, of the theft should lead to an inference of knowledge of the stolen nature of the property.

***Griffin* Error**

Comments on an accused's silence or an instruction that such silence is evidence of guilt are forbidden under the Fifth Amendment to the United States Constitution. (*Griffin v. State of California* (1965) 380 U.S. 609, 615; see *People v. Moore* (1965) 239 Cal.App.2d 70, 72–74.) Some cases attempt to distinguish between a comment or instruction about a defendant's failure to testify and explain possession of stolen property after a defendant exercises his or her right not to testify, which is *Griffin* error, from circumstances under which a defendant's silence or failure to explain indicates a "consciousness of guilt." (See *People v. Champion* (1968) 265 Cal.App.2d 29, 32.) "While *Griffin* . . . prohibits reference to defendant's failure to take the stand in his own defense, it does not overrule decisions which permit comments on the failure of the defense to introduce material evidence." (*People v. Grant* (1968) 268 Cal.App.2d 470, 475.)

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1318. Petty Theft With Prior Conviction

The defendant is charged [in Count __] with committing a petty theft after (he/she) previously was convicted and served time in prison or jail for _____ *<insert crime[s]>***.**

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

1. **The defendant took possession of property owned by someone else without the owner's consent.**

2. **The defendant took the property with the intent (to deprive the owner of it permanently/ [or] to remove it from the owner's possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property).**

3. **The defendant moved the property, even a small distance, and kept it for any period of time, however brief.**

4. **The defendant was previously convicted of (petty theft[,]/ grand theft[,]/ auto theft[,]/ carjacking[,]/ burglary[,]/ robbery[,]/ [and] felony receiving stolen property).**

AND

5. **(He/She) served a term in a penal institution for (that/one of those) previous conviction[s].**

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

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

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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. (See Pen. Code, § 1025 [on defendant's denial, jury must decide issue of prior convictions]; *People v. Barre* (1992) 11 Cal.App.4th 961, 965 [prior-conviction allegation properly submitted to jury].)

The prior–conviction and incarceration requirement of Penal Code section 666 is a sentencing factor for the trial court and not an element of a section 666 offense. (*People v. Bouzas* (1991) 53 Cal.3d 467, 478–480; *People v. Stevens* (1996) 48 Cal.App.4th 982, 987.) Thus, the defendant may stipulate to the convictions. (*People v. Bouzas, supra,* 53 Cal.3d at pp. 478–480; *People v. Stevens, supra,* 48 Cal.App.4th at p. 987; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90.) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give this instruction.

If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (Pen. Code, §§ 1025, 1093; see *People v. Bouzas, supra,* 53 Cal.3d at pp. 471–472, 480.)

If the defendant stipulates or the court grants a bifurcated trial, the jury should only be instructed on the pending charge of petty theft. (See *People v. Fairchild* (1967) 254 Cal.App.2d 831, 837 [after admission of prior conviction, better practice to submit a verdict form focused on petty theft charge].) Give Instruction 1300, Theft by Larceny.

If the court grants a bifurcated trial, give Instruction 201, Prior Conviction: Bifurcated Trial. See Bench Notes to Instruction 200, Prior Conviction on the standard for granting a bifurcated trail.

To have the requisite intent for theft, the thief must either intend to deprive the owner of his or her property permanently or to deprive the owner of a major portion of the property's value or enjoyment. (See *People v. Avery* (2002) 27 Cal.4th 49, 57–58.) Select the appropriate language in element 2.

The incarceration must have been served in a penal institution for a prior conviction or "as a condition of probation." (Pen. Code, § 666.) However, the jury

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need only determine whether the defendant actually served time in jail or prison, so element 5 is limited to that issue.

If there is a factual dispute about whether the defendant served a term in a penal institution, give the bracketed sentence that begins, "A *penal institution* includes . . . ." If there is no factual dispute, the court may instruct the jury that the place where the defendant was incarcerated "is a penal institution."

Related Instructions
For a theft instruction, see Instruction 1300, Theft by Larceny. All thefts that are not grand thefts are petty thefts. (See Pen. Code, §§ 484, 486–488.)

AUTHORITY

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

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 7.
3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 334.

LESSER INCLUDED OFFENSES

Petty Theft ▸ Pen. Code, §§ 484, 486, 488; *People v. Barre* (1992) 11 Cal.App.4th 961, 967.

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

RELATED ISSUES

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

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

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STAFF NOTES

Elements of Petty Theft
Petty theft is the first element of petty theft with a prior, pursuant to the following language in Penal Code section 666:

> Every person [with a prior theft conviction] who . . . is subsequently convicted of petty theft . . . .

Elements 1–3 set forth the elements of petty theft, as governed by Penal Code sections 484, 486, and 488. See instructions 1300, Theft by Larceny, and 1305, Theft: Degrees. By not instructing on the nature of the property or minimum value requirements for grand theft, element 1 by implication describes petty theft. (See Pen. Code, § 488.)

Prior Incarceration and Conviction
Elements 4 and 5 are supported by Penal Code section 666, which provides:

> Every person who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

People v. Bean (1989) 213 Cal.App.3d 639, 642 discusses these elements:

> To be in violation of . . . section 666 one must: 1) bear the status of having been convicted of one of the specified offenses; 2) have served a defined term therefor; and 3) be "subsequently convicted of petit theft."

People v. Bruno (1987) 191 Cal.App.3d 1102, 1105 also discusses the elements:

> The elements of violation of section 666 are (1) the commission of a petit theft (2) by one previously convicted of petit theft or one of the specified felonies (3) for which prior conviction a term was served in any penal institution either under a sentence or as a condition of probation.

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People v. Perry (1962) 204 Cal.App.2d 201, 204 holds that a prior theft conviction in a foreign state is considered in determining whether or not Penal Code section 666 applies:

> There are no words in section 666 requiring the prior offense to have been committed in California. . . . Irrespective of where the crime was committed, the commission of it established the character of the individual, his dangerous propensisties [sic] and his threat to society. Thus, to give effect to the purpose underlying this section, and all similar sections, it must be concluded that prior foreign offenses are within the scope of section 666 of the Penal Code.

People v. Cortez (1994) 24 Cal.App.4th 510, 513–514 discusses what does not constitute a prior incarceration:

> The record establishes that defendant's 30 day jail term imposed as a condition of probation was entirely satisfied by her participation in a work release program. Accordingly, defendant did not serve a term in a penal institution within the meaning of Penal Code section 666 as a result of her prior petit theft conviction, and the proof of that essential element of the instant charge fails as a matter of law.

People v. James (1957) 155 Cal.App.2d 604, 612 clarifies service of a partial prison term is sufficient:

> [Former] [s]ection 667 merely requires services of a term of imprisonment "in any penal institution." It is unnecessary for the People to allege and prove that the accused was imprisoned for the full term of his sentence; service of a portion of the term is sufficient.

Penal Institution

"Penal institution" is defined by case law and related statutes. "Prison" or "penal institution" includes all facilities, camps, hospitals, and institutions for the confinement, treatment, employment, training, and discipline of persons in the legal custody of the Department of Corrections, including the Cal. Institution for Women (Pen. Code, §§ 6081, 6082), but excludes Juvenile Halls (Welf. & Inst. Code, § 851). Penal Code section 667.5(h) defines a prison term to include any confinement in "any state prison or federal penal institution as punishment for commission of an offense, including confinement in a hospital or other institution or facility credited as service of prison time in the jurisdiction of the confinement." Certified copies of prison records that may be introduced into evidence under Penal Code section 969b as prima facie evidence of incarceration include records

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"of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary."

Ex parte Wolfson (1947) 30 Cal.2d 20, 26 makes clear that county jails are penal institutions:

> [T]he phrase 'penal institution' as used by the Legislature in other sections of the Penal Code which deal with repeated offenders, refers to a county jail as well as a state prison or federal penitentiary. Thus section 666 provides for punishment of offenders who have suffered a previous conviction of petty theft and 'served a term therefor in any penal institution.' The 'penal institution' there referred to must include a county jail, for in California one who is convicted of petty theft and who has suffered no previous conviction can be imprisoned only in a county jail.

See also *People v. Bruno* (1987) 191 Cal.App.3d 1102, 1104–1105:

> The phrase "any penal institution" as used in section 666 includes not only those institutions in which service of a "prior separate prison term" qualifies as an enhancement under section 667.5 but also county jails.

People v. Valenzuela (1981) 116 Cal.App.3d 798, 803, 804, 807–808, discusses presentence custody and the CRC:

> [Appellant] contends that because the sentencing court has no choice but to allow a defendant credit for time served, such time served for presentence custody does not come within the purview of . . . section [666]. . . . The Legislature did not choose to except custody resulting from credit for time served from the effect of section 666. . . . [¶] A county jail is a penal institution. [Citation.] Each jail commitment was a condition of appellant's probation. We think it inconsequential whether the time in custody was served before or after sentencing. In either instance, imprisonment has been in a penal institution within the meaning of section 666. . . . [¶¶] [W]e hold that CRC [California Rehabilitation Center] is a 'penal institution' within the meaning of Penal Code section 666, and that a person who has undergone a commitment to such an institution has 'served a term' in a penal institution.

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Issue for Jury

It is not error to submit the prior conviction issue to the jury, as held in *People v. Barre* (1992) 11 Cal.App.4th 961, 965:

> Contrary to appellant's contention, *Bouzas* did not hold that, if denied, a prior-conviction allegation should not be presented to the jury. (3 Cal.3d at p. 480.) [¶] *Bouzas* [see discussion of stipulations below] did not purport to, and did not, alter settled statutory law: [quoting Pen. Code, §§ 1025, 1158] [¶] Because appellant denied the prior-conviction allegation and did not request it be bifurcated, [fn.] the trial court properly submitted it to the jury.

Penal Code section 1025 provides:

> (a) When a defendant . . . is charged in the accusatory pleading with having suffered a prior conviction . . . he or she shall be asked whether he or she has suffered the prior conviction. . . . If the defendant enters a denial, his or her answer shall be entered in the minutes of the court. The refusal of the defendant to answer is equivalent to a denial that he or she has suffered the prior conviction.
>
> (b) Except as provided in subdivision (c), the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty, or in the case of a plea of guilty or nolo contendere, by a jury impaneled for that purpose . . ..
>
> (c) Notwithstanding the provisions of subdivision (b), the question of whether the defendant is the person who has suffered the prior conviction shall be tried by the court without a jury.

Penal Code section 1158 provides:

> Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury . . . must . . . find whether or not he has suffered such previous conviction. The verdict or finding upon the charge of previous conviction may be: . . .. If more than one previous conviction is charged a separate finding must be made as to each.

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If the defendant does not present any evidence to meet the People's prima facie showing on the prior conviction, it becomes a question of law, as stated in *People v. Bradley* (1970) 3 Cal.App.3d 273, 277–278:

> Pursuant to section 1158, whenever a defendant is found guilty of the offense with which he is charged, the jury must find whether a defendant has suffered a previous conviction where such conviction is charged in the accusatory pleading, unless the defendant admits such previous conviction. [Citation.] In the present case defendant denied the alleged prior conviction. Accordingly, the jury was required to make the finding whether the charge of previous conviction was true. (§ 1158.) Here the certified copy of the minute order and the amended information in the Alameda County Superior Court constituted a prima facie establishment of the prior conviction in that court. Defendant presented no evidence to overcome or to meet such a prima facie case. Accordingly, no factual issue with respect to the prior conviction was tendered and the question was one of law.

Lesser Included Offense

Petty theft necessarily is a lesser included offense, as stated in *People v. Barre* (1992) 11 Cal.App.4th 961, 967:

> The conviction of petty theft, a lesser included offense of section 666, is affirmed.

People v. Bean (1989) 213 Cal.App.3d 639, 642, fn. 4, 644, explains there is no attempted violation of section 666:

> None of these elements is capable of being attempted. . . . One cannot 'attempt' to have been convicted of an offense, or have served a term therefor, or to be convicted of petit theft. . . . [¶] . . . [Even] assuming section 666 is an 'element' statute, one of the elements of the crime is a present conviction of petty theft. It is not the commission of the petty theft but the conviction which triggers the more onerous sentencing provisions of section 666.

Judicial Notice

The trial court must give clarifying instructions if it takes judicial notice of an alleged prior conviction, as held in *People v. Barre* (1992) 11 Cal.App.4th 961, 965–966:

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> It is error for a trial court to take judicial notice of a defendant's alleged prior conviction without clarifying jury instructions. "This statement could be understood by a reasonable juror in only one way: the trial court had conclusively determined the prior-conviction allegation to be true and it was no longer a fact to be determined by the jury."

Stipulation to Prior Conviction and Incarceration

A defendant may stipulate to a prior conviction and incarceration, thereby preventing the jury from knowing about the prior conviction, as held in *People v. Bouzas* (1991) 53 Cal.3d 467, 479, 480:

> [A] charge under section 666 merely puts a defendant on notice (see § 969 [prior convictions must be alleged in the information]) that if he is convicted of the substantive offense and if the prior conviction and incarceration allegation of section 666 is admitted or found true, he faces enhanced punishment at the time of sentencing. We conclude that, on its face, section 666 is a sentence-enhancing statute, not a substantive 'offense' statute. . . .
> We therefore conclude that the prior conviction and incarceration requirement of section 666 is a sentencing factor for the trial court and not an 'element' of the section 666 'offense' that must be determined by a jury. . . . [D]efendant had a right to stipulate to the prior conviction and incarceration and thereby preclude the jury from learning of the fact of his prior conviction.

If the defendant admits a prior conviction, the better practice is for the trial court to submit a verdict form restricted to petty theft, as discussed in *People v. Fairchild* (1967) 254 Cal.App.2d 831, 837:

> The record in the instant case discloses that defendant admitted the prior conviction of a felony, to wit, robbery. Accordingly, if defendant was found guilty by the jury of the crime of petty theft he was guilty of a felony under [former] section 667 [now 666], since such offense is punishable either as a felony or as a misdemeanor. [Citations.] However, since the imposition of the penalty under section [former] 667 was for the trial court [citations] it would have been better practice for the trial court to submit a form of verdict under which the jury would have merely found whether defendant was guilty of petty theft.

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The stipulation elevates the theft conviction from misdemeanor to wobbler (felony/misdemeanor) status, as stated in *People v. Witcher* (1995) 41 Cal.App.4th 223, 234:

> [W]hile priors are not an 'element' of a section 666 offense, they do serve to raise a petty theft to a felony with attendant penal consequences. (*People v. Bouzas, supra*, 53 Cal.3d at p. 479.) Nevertheless we are not convinced that *Bouzas* or any other national or state authority requires that a stipulation for section 666 purposes demands the full panoply of [*Boykin/Tahl/Yurko*] constitutional admonitions required to properly admit charged prior convictions. . . . The stipulation was effective to deny the prosecutor the opportunity to prove the priors before the jury; it should likewise be effective to elevate the theft conviction from misdemeanor to wobbler (felony/misdemeanor) status.

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1320. Owner's Opinion of Value

A witness gave (his/her) opinion of the value of the property (he/she) [allegedly] owned. In considering the opinion, you may but are not required to accept it as true or correct. Evaluate the witness's opinion by following the instructions I have given regarding the believability of witnesses generally. Also consider the reasons the witness gave for any opinion and the facts or information on which (he/she) relied in forming that opinion. You must decide whether the information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

BENCH NOTES

Instructional Duty

When the owner of property testifies about his or her opinion of the value of the property, give this instruction.

If an expert witness testified about its value, give Instruction 450, Expert Witness.

AUTHORITY

Owner May Testify to Value ▸ *People v. Coleman* (1963) 222 Cal.App.2d 358, 361.

Jury Must Decide What Weight to Give Owner Opinion ▸ *People v. Pena* (1977) 68 Cal.App.3d 100, 102–103.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 8.

1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, §§ 18, 102.

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STAFF COMMENTS

Owner Qualified to Testify as to Value

> "The owner of personal property who is familiar with its original cost and use is qualified to testify regarding its value. . . ." (*People* v. *Haney* (1932) 126 Cal.App. 473, 475.)

(*People v. Coleman* (1963) 222 Cal.App.2d 358, 361; see also *People v. Pugh* (1955) 137 Cal.App.2d 226, 235.)

Jury Not Required to Accept Opinion of Owner

> The court instructed the jury in accordance with CALJIC Nos. 14.26 and 14.27. n1 CALJIC No. 14.26 is based on Penal Code section 484 which states in pertinent part: "In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, . . ."
>
> n1 The trial court instructed the jury as follows: "When the value of property alleged to have been taken by theft must be determined, the reasonable and fair market value at the time and in the locality of the theft shall be the test. Fair market value is the highest price, estimated in terms of money, for which the property would have sold in the open market at that time and in that locality, if the owner was desirous of buying but under no urgent necessity of doing so, if the seller had a reasonable time within which to find a purchaser, and if the buyer had knowledge of the character of the property and of the uses to which it might be put. [para.] Any expression of opinion on value that the court has received in evidence may be considered by you in determining value. You are not bound to accept any such opinion as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion if you find it to be unreasonable." The foregoing instructions are taken from CALJIC Nos. 14.26 and 14.27, respectively.
>
> Defendant contends that this instruction misstates the law and should not have been utilized as a guideline for any witness or in the jury's determination. [. . .]

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> CALJIC No. 14.26 does not require that the jury accept whatever value is placed on the article either by its owner or by an expert. It is left to the jury the determination of which valuation, that of the People's expert or that of the defendant's expert, was correct or which expert was credible.

(*People v. Pena* (1977) 68 Cal.App.3d 100, 102-103.)

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1321. Jury Does Not Need to Agree on Form of Theft

The defendant is charged [in Count __] with theft.

The defendant has been prosecuted for theft under (two/__ <*insert number*>) theories: _____ <*insert theories, e.g., theft by trick, theft by larceny, etc.*>.

Each theory of theft has different requirements, and I have instructed you on (both/all).

You may not find the defendant guilty of theft unless all of you agree that the People have proved that the defendant committed theft under at least one theory. But all of you do not have to agree on the same theory.

BENCH NOTES

Instructional Duty

Give this instruction when instructing on multiple forms of theft.

AUTHORITY

Unanimity on Theft Theory Not Required ▸ *People v. McLemore* (1994) 27 Cal.App.4th 601, 605; *People v. Counts* (1995) 31 Cal.App.4th 785, 792–793; *People v. Failla* (1966) 64 Cal.2d 560, 567–569 [burglary case]; *People v. Nor Woods* (1951) 37 Cal.2d 584, 586 [addressing the issue for theft].)

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

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STAFF COMMENTS

The language of this instruction is modeled on Instruction 737, Malice Versus Felony Murder.

Unanimity Not Required

> While discussing jury instructions in the petty theft trial, defense counsel argued the prosecution had alleged two separate acts of theft. First, by claiming the dress was his mother's and attempting to exchange it defendant allegedly committed theft by an act of trick and device. Second, the act of taking the dress from the store without paying for it constituted simple larceny. Counsel insisted if the prosecution was going to argue both theories of theft, the court should give CALJIC No. 17.01 (the unanimity instruction) and not CALJIC No. 14.47 (agreement on form of theft committed unnecessary). The court ruled CALJIC No. 17.01 was not required on the facts of this case. Citing *People v. Melendez* (1990) 224 Cal.App.3d 1420, defendant argues the court was required to give the unanimity instruction, because the evidence presented two factual scenarios that would support distinct theories of guilt. We disagree.
>
> The crux of the present controversy deals with the meaning of a unanimous criminal verdict. Must the jurors agree the defendant committed the ultimate statutory offense of theft or must they also agree on his course of conduct in accomplishing the crime? (Cf. *People v. Sullivan* (1903) 173 N.Y. 122; *United States v. Gipson* (5th Cir. 1977) 553 F.2d 453.)
>
> In *Melendez*, the defendant and two accomplices committed a robbery of a store. The prosecution did not claim the defendant was an active participant in the crime. However, the prosecutor told the jury the defendant could be found guilty either as a conspirator or as an aider and abettor, and it did not matter which theory the jurors believed. The trial court did not give a unanimity instruction.
>
> On appeal the defendant argued he was denied his right to a unanimous verdict because some jurors could have relied on certain evidence to find him guilty of conspiracy while other jurors could have relied on different evidence to find him guilty as an aider and

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abettor. Thus, the defendant might have been convicted of the robbery when the jury was not unanimous about the acts he committed. Relying on *United States v. Gipson*, *supra*, 553 F.2d at pages 457-458, the Court of Appeal concluded "[w]here a single crime can be proven by different theories based on different acts and at least two of these theories rely on different evidence, and where the circumstances demonstrate a reasonable possibility that a juror will find one theory proven and the other not proven but that all of the jurors will not agree on the same theory, a unanimity instruction must be given." (*People v. Melendez*, *supra*, 224 Cal.App.3d at pp. 1433-1434.)

The continued validity of *Melendez* is questionable. In *Schad v. Arizona* (1991) 501 U.S. 624, the United States Supreme Court considered the issue of jury unanimity in the context of first degree murder; that is, whether a jury had to unanimously agree on whether the murder was premeditated or a felony murder. In a five-to-four decision, the plurality of the court rejected the analysis set forth in *Gipson* and held each juror need only find the defendant guilty beyond a reasonable doubt of the single statutory offense of first degree murder. (*Id*., at pp. 634-637.) The *Schad* view has been adopted by the California Supreme Court. [Citations.]

In *People v. Davis* (1992) 8 Cal.App.4th 28, a defendant was convicted of robbery. The evidence showed he could have been convicted as a perpetrator or as an aider and abettor. On appeal he contended a unanimity instruction should have been given. The Court of Appeal analyzed the differing rules articulated in *People v. Sullivan*, *supra*, and *United States v. Gipson*, *supra*, reviewed the Supreme Court's analysis in *Schad v. Arizona*, *supra*, and concluded *Melendez* had been wrongly decided and "... the trial court was not required to instruct concerning jury unanimity with regard to the various theories of criminal participation." (*People v. Davis*, *supra*, at p. 45.) Similar results were reached in *People v. Sutherland* (1993) 17 Cal.App.4th 602, 609-611 (no unanimity instruction required on whether defendant forged or uttered check), *People v. Snead* (1993) 20 Cal.App.4th 1088, 1095-1096 (unanimity not required on whether defendant was perpetrator, coconspirator or aider and abettor), and *People v. Perez* (1993) 21 Cal.App.4th 214, 222-223 (same). We agree with this line of cases.

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> In the instant action it was irrelevant whether defendant obtained the dress by trick or intimidation of the store employees. The end result was that he left the store with property he had not paid for.

(*People v. McLemore* (1994) 27 Cal.App.4th 601, 605–606.)

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1350. Extortion by Threat or Force

The defendant is charged [in Count __] with extortion by (threat/ [or] force).

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

<Alternative 1A—threatened to injure or used force>

[1. The defendant threatened to unlawfully injure [or used force against] (another person or a third person/ [or] the property of another person or a third person).]

<Alternative 1B—threatened to accuse of crime>

[1. The defendant threatened to accuse another person[, or that person's relative or family member,] of a crime.]

<Alternative 1C—threatened to expose secret>

[1. The defendant threatened to expose a secret about another person[, or that person's relative or family member,] [or to expose or connect (him/her/any of them) with any (disgrace[,]/ [or] crime[,]/ [or] deformity)].]

2. When (making the threat/using force), the defendant intended to use that (fear/force) to obtain the other person's consent (to give the defendant money [or property]/ [or] to do an official act).

AND

3. As a result of the (threat/use of force):

a. The other person consented (to give the defendant money [or property]/ [or] to do an official act).

AND

b. The other person then (gave the defendant money [or property]/ [or] did an official act).

The term *consent* has a special meaning here. Consent for extortion can be coerced or unwilling, as long as it is given as a result of the wrongful use of force or fear.

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The (threat/use of force) must be the controlling reason that the other person consented. If the person consented because of some other controlling reason, the defendant is not guilty of extortion.

[Threatening to do something that a person has a legal right to do is not a threat to commit an unlawful injury.]

[The threat may involve harm to be inflicted by the defendant or by someone else.]

[An *official act* is an act that a person does in his or her official capacity, using the authority of his or her public office.]

[A *secret* is a fact that:

1. **Is unknown to the general public or to someone who might be interested in knowing the fact.**

AND

2. **Harms the threatened person's reputation or other interest so greatly that he or she would be likely to (pay money/give away property/do an official act) to prevent the fact from being revealed.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. (See *People v. Hesslink* (1985) 167 Cal.App.3d 781, 788–790 [sua sponte duty to instruct that extortion is a specific-intent crime].)

Depending on the evidence, in element 1, give the appropriate alternative A–C describing the threat. (Pen. Code, § 519.)

Related Instructions
For an instruction on the crime of kidnapping for ransom, reward, or extortion, see Instruction 955, Kidnapping: For Ransom, Reward, or Extortion.

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AUTHORITY

Elements ▸ Pen. Code, §§ 518, 519; *People v. Hesslink* (1985) 167 Cal.App.3d 781, 789.
Felony Punishment ▸ Pen. Code, § 520.
Property Defined ▸ Pen. Code, § 7, subds. 10 & 12; see *People v. Baker* (1978) 88 Cal.App.3d 115, 119 [includes right to file administrative protest]; *People v. Cadman* (1881) 57 Cal. 562, 564 [includes right to prosecute appeal]; *People v. Kozlowski* (2002) 96 Cal.App.4th 853, 869 [includes PIN code].
Coerced Consent ▸ *People v. Goodman* (1958) 159 Cal.App.2d 54, 61; *People v. Peck* (1919) 43 Cal.App. 638, 645.
Force or Fear Must Be Controlling Cause ▸ *People v. Goodman* (1958) 159 Cal.App.2d 54, 61.
Intent ▸ *People v. Hesslink* (1985) 167 Cal.App.3d 781, 789–790.
Official Act Defined ▸ See *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [kidnapping for extortion]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [same].
Secret Defined ▸ *People v. Lavine* (1931) 115 Cal.App. 289, 295.
Threat of Harm by Third Person ▸ *People v. Hopkins* (1951) 105 Cal.App.2d 708, 709–710.
Unlawful Injury Defined ▸ *People v. Schmitz* (1908) 7 Cal.App. 330, 369–370.
Wrongful Defined ▸ *People v. Beggs* (1918) 178 Cal. 79, 83–84.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 103–108.

LESSER INCLUDED OFFENSES

Attempted Extortion ▸ Pen. Code, § 524; see *People v. Sales* (2004) 116 Cal.App.4th 741, 748–749; *People v. Franquelin* (1952) 109 Cal.App.2d 777, 783–784; *Isaac v. Superior Court of Los Angeles County* (1978) 79 Cal.App.3d 260, 263; *People v. Lavine* (1931) 115 Cal.App. 289, 297.

RELATED ISSUES

No Defense of Good Faith
A good faith belief in the right to property does not negate the specific intent required for extortion. A debt cannot be collected by extortion. (*People v. Beggs* (1918) 178 Cal. 79, 84; see *People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677–1678 [kidnapping for ransom].)

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STAFF NOTES

Elements of Extortion
Penal Code section 518 defines extortion as follows:

> Extortion is the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right.

Evidence of a request or demand for a specific sum is not required, as held in *People v. Hesslink* (1985) 167 Cal.App.3d 781, 787:

> It is true that in many cases a specific sum of money was requested or demanded, but so far as we are informed no appellate decision has held or stated that evidence of a demand or request for a specific sum is a prerequisite to a conviction of extortion.

Felony or Misdemeanor Extortion
Extortion by use of force or fear is a felony pursuant to Penal Code section 520:

> Every person who extorts any money or other property from another, under circumstances not amounting to robbery or carjacking, by means of force, or any threat, such as is mentioned in Section 519, shall be punished by imprisonment in the state prison for two, three or four years.

The addition of "official act" to section 518 in 1939 expanded the scope of felony extortion in section 520 to include the extortion of official acts. (*Isaac v. Superior Court of Los Angeles County* (1978) 79 Cal.App.3d 260, 263–264; see discussion of Official Acts below).

Extortion under color of official right is a misdemeanor pursuant to Penal Code section 521 when no other punishment is prescribed:

> Every person who commits any extortion under color of official right, in cases for which a different punishment is not prescribed in this Code, is guilty of a misdemeanor.

Extortion under color of official right resembles bribery of a public official, but requires an element of coercion. (See Erwin et al., Cal. Criminal Defense Practice (2001) § 143.02[1][d], p. 143-32.) An instruction on misdemeanor extortion under

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color of official right can be drafted for series 2200, Misdemeanor Violations—Penal Code, if the Task Force wants to include it.

Property Subject to Extortion

The word "property" includes both real and personal property. (Pen. Code, § 7(10).) "Personal property" includes money, goods, chattels, things in action, and evidence of debt. (Pen. Code, § 7(12).) A "thing in action" is a right to recover money or other personal property by a judicial proceeding. (Civ. Code, § 953.) "[T]he right to take and prosecute an appeal is property within the meaning of the Code . . . [thus] a threat made for the purpose of inducing an appellant to dismiss an appeal is a threat made with intent to extort property from another." (*People v. Cadman* (1881) 57 Cal. 562, 564.) "In view of the expanded approach California courts have taken with regards to the definition and application of 'things in action,' it is consistent to conclude that for the purposes of Penal Code sections 520 and 523, the words 'other property' include the right to file an administrative protest." (*People v. Baker* (1978) 88 Cal.App.3d 115, 119.)

A PIN code also constitutes property for purposes of kidnapping for extortion, as held in *People v. Kozlowski* (2002) 96 Cal.App.4th 853, __:

> Operating as it does as a means of account access, a PIN code can be characterized as intangible property. . . . [W]hen [the defendants] compelled [the victims] to reveal their PIN codes, that knowledge destroyed the intangible benefit of being able to control access to the bank accounts. The intangible property taken—the PIN codes—were the means to obtain the more tangible property—the bank funds—contained in those accounts. . . . [W]e conclude that a PIN code constitutes property for purposes of kidnapping for extortion.

An "official act" may also be considered to be property for purposes of extortion. (See discussion of Official Acts below).

Specific Intent

Extortion is a specific intent crime, as stated in *People v. Hesslink* (1985) 167 Cal.App.3d 781, 789–790:

> In substance, what is proscribed is the successful wrongful use of force or fear to obtain property from another with his or her consent. Viewed from that standpoint, the elements of the offense are: (1) A wrongful use of force or fear, (2) with the specific intent of inducing the victim to consent to the defendant's obtaining his or her property, (3) which does in fact induce such consent and results in the defendant's obtaining property from the victim. Applying the

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> *Hood* formulation to the elements thus stated, the intent required is seen to be a specific one. The crime requires an unlawful use of force or fear with the intent of achieving a further consequence, the inducement of another person to consent to the actor's obtaining the other's property.

Force or Fear

Although section 518 and 520 refer to "force," little authority exists on this aspect of extortion, which is difficult to distinguish from robbery. Thus, the usual case involves consent induced by fear. (2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) § 104, p. 137; see *People v. Torres* (1995) 33 Cal.App.4th 37, 50, 52, fn. 7 [distinguishing robbery and extortion].)

Penal Code section 519 defines "fear" used to extort as follows:

> Fear, such as will constitute extortion, may be induced by a threat, either:
> 1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or,
> 2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or,
> 3. To expose, or to impute to him or them any deformity, disgrace or crime; or,
> 4. To expose any secret affecting him or them.

These threats constitute the "wrongful use of fear" proscribed by section 518, as discussed in *People v. Beggs* (1918) 178 Cal. 79, 83:

> [T]he Legislature[,] in denouncing the wrongful use of fear as a means of obtaining property from another[,] had in mind threats to do the acts specified in section 519, the making of which for the purpose stated is declared to be a wrongful use of fear induced thereby.

A threat does not require precise language, as stated in *People v. Asta* (1967) 251 Cal.App.2d 64, 81–82, quoting from *People v. Oppenheimer* (1962) 209 Cal.App.2d 413, 422:

> An experienced extortionist does not find it necessary to designate specifically what he intends to do as a means of terrifying his prey. [Citations.] It was appropriately stated in *People v. Sanders* . . . that "[t]he more vague and general the terms of the accusation the better it would subserve the purpose of the accuser in magnifying the fears

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> of his victim, and the better also it would serve to protect him in the event of failure to accomplish his extortion and of a prosecution for his attempted crime." [Citation.] . . . Threats may consist of a menace of destruction or injury to person or property. No precise or particular form of words is necessary in order to constitute a threat under the circumstances. Threats can be made by innuendo and the circumstances under which the threat is uttered and the relations between [defendant and the victims] may be taken into consideration in making a determination of the question involved.

Threatened Injury Must Be Unlawful

Under section 519(1) the threatened injury to person or property must be unlawful, as defined in *People v. Schmitz* (1908) 7 Cal.App. 330, 369–370, 94 P. 419 [referring to the Supreme Court opinion denying application for hearing from *People v. Schmitz* (1908) 7 Cal.App. 330, 94 P. 407]:

> It is very clear that, to constitute the crime of extortion committed by means of any threat to injury [sic] property of the person threatened, the injury threatened . . . must be in itself unlawful, irrespective of whether or not the purpose with which the threat is made is to obtain money to which the person threatening is not entitled. . . . The word "unlawful" . . . qualifies the word "injury" alone. If the injury threatened to property is one which the person threatening has as absolute legal right to do, he cannot be held to have threatened "to do an unlawful injury" to the property . . . . [¶] What is meant by the term "unlawful injury"? Giving to such term the broadest meaning possible under the authorities, it can include no injury that is not of such a character that, if it had been committed as threatened, it would have constituted an actionable wrong, an injury for which an action for the resultant damages could be maintained against the defendant, or which, if merely threatened, could be enjoined in equity if the remedy at law were deemed inadequate.

See *In re Nichols* (1927) 82 Cal.App. 73, 76–77 [quoting *Schmitz*]; see also *Rothman v. Vedder Park Management* (9th Cir. 1990) 912 F.2d 315, 317–318 [landlord's threatened rent increases and service charges not "wrongful use of force of fear" under federal or state law].

Threatened Accusation of Crime

Section 519(2) states that fear may be induced by a threat to accuse someone of a crime, even if the accused did in fact commit the crime. As stated in *People v. Beggs* (1918) 178 Cal. 79, 84, 85–86:

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> The law does not contemplate the use of criminal process as a means of collecting a debt. . . . The plain import of our code is that to threaten a thief with an accusation and prosecution based thereon, unless he pays the value of property stolen, and which by reason of fear induced by such threat he does pay, is extortion within the meaning of section 518 of the Penal Code.

Threatened Exposure of Secrets or Disgrace

Threatened exposure of secrets or disgrace constitutes extortion under section 519(3) and (4), even if there is no proof that the victim committed a crime, as held in *People v. Goldstein* (1948) 84 Cal.App.2d 581, 586:

> The requirements of [section 518] are that property may be obtained from another with his consent "by a wrongful use of force or fear," by a threat to accuse him or any relative of a crime, or to expose or impute to him any disgrace or crime, or to expose any secret affecting him or them. [Citation.] From the utterances of appellant immediately prior to his taking the $42 it was a reasonable inference that the prosecutrix counted out the money to him to save herself from some accusation in a newspaper of a crime or of disgraceful conduct or from an exposure of a secret affecting her. [Citation.] Want of proof that the prosecutrix had committed a crime does not in the slightest minimize appellant's guilt.

See *People v. Peniston* (1966) 242 Cal.App.2d 719, 722–724 [threatened disclosure of partially nude photographs].

Coerced Consent

Consent is given even though the victim protests in his or her own mind, as discussed in *People v. Peck* (1919) 43 Cal.App. 638, 645:

> [The victim] could under the circumstances have consented to the taking of the money by [defendant], and yet protest in his own heart against his money being taken for that purpose. . . . In a legal sense, in a case of this kind, money or property is obtained from a person with his consent if he with apparent willingness gives it to the party obtaining it with the understanding that thus he is to save himself from some personal calamity or injury, notwithstanding that within himself he may still protest against the circumstances requiring him to dispose of his money in that way or for such a purpose.

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Fear Must Be Controlling Cause
The force or fear must be the controlling cause compelling the victim's consent, as stated in *People v. Goodman* (1958) 159 Cal.App.2d 54, 61:

> To constitute extortion the victim must consent, albeit it is a coerced and unwilling consent, to surrender of his property; the wrongful use of force or fear must be the operating or controlling cause compelling the victim's consent to surrender the thing to the extortionist.

Harm Threatened to Be Inflicted by Third Person
Threatening harm to be inflicted by a third person is sufficient if it causes the victim to fear for his or her safety, as held in *People v. Hopkins* (1951) 105 Cal.app.2d 708, 709–710:

> [The defendant] contends that he cannot be held guilty of extortion since the evidence does not show that he took the moneys . . . under threats that he, himself, would do harm to [the victim] if the amount requested were not paid; and that extortion by means of threats that third persons would do harm to the victim do not constitute a violation of section 518 . . .. [That] section does not state that the fear which induces the obtaining of property must be fear induced by threats that the person extorting it will, himself, do bodily harm to his victim; and no authority is cited for such construction of the statute nor has any been found. We conclude that if, as the jury has found, the money was secured by threats which caused [the victim] to fear for his bodily safety, the statute was violated.

Official Act Extorted
Obtaining an official act can be the basis of extortion by the wrongful use of force or fear. (See Pen. Code, § 518.) An official act can be viewed as a type of property, or an alternative subject of extortion. (See, e.g., *Isaac v. Superior Court of Los Angeles County* (1978) 79 Cal.App.3d 260, 262 [attempted extortion of official act from police chief]; see also *People v. Chacon* (1995) 37 Cal.App.4th 52, 62 [obtaining property or official act are alternative objectives of extortion].) Section 518, as amended in 1939, corrects previous case law that held an official act could not be the subject of extortion. (*Isaac v. Superior Court of Los Angeles County, supra*, 79 Cal.App.3d at p. 262.)

"Official act," as used in section 518, is defined in *People v. Norris* (1985) 40 Cal.3d 51, 55–56, to include acts that make use of a public office, as follows:

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> [W]e conclude that [the Legislature] intended to limit the concept of "official act" to include only those acts performed by an officer in his official capacity, which make some use of his public office. . . . [T]hreats or demands cannot be converted into extortion merely because the person threatened happens to be an on-duty law enforcement officer.

See *People v. Mayfield* (1997) 14 Cal.4th 668, 773 ["official act" does not have a plain, unambiguous meaning, and carries a particular and restricted meaning in context of section 518].

Adding "official act" to section 518 expanded the definition of extortion in the sections 520, 523, and 524, as stated in *Isaac v. Superior Court of Los Angeles County* (1978) 79 Cal.App.3d 260, 263–264:

> In 1939, in order to correct *Robinson*, the Legislature amended section 518 by adding to the definition of extortion the obtaining of an official act of a public officer. [Citation.] Inasmuch as sections 520, 523, and 524 are dealing with the crime of extortion, the Legislature[,] by enlarging the definition of the crime, obviously believed it was unnecessary to change the wording of the other sections. The definition of extortion is clearly controlling and must modify sections 520, 523, and 524, otherwise the amendment would be meaningless.

Secret Defined

"Secret" does not have a technical meaning, but is defined in *People v. Lavine* (1931) 115 Cal.App. 289, 295:

> The word "secret" as used in section 519, in connection with the other words and phrases of the section, is definitely clear in its meaning. By reasonable construction it thus appears that the thing held secret must be unknown to the general public, or to some particular part thereof which might be interested in obtaining knowledge of the secret; the secret must concern some matter of fact, relating to things past, present, or future; [and] the secret must affect the threatened person in some way so far unfavorable to the reputation, or to some other interest of the threatened person, that threatened exposure thereof would be likely to induce him through fear to pay out money or property for the purpose of avoiding the exposure.

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Attempted Extortion
Penal Code section 524 establishes punishment for attempted extortion:

> Every person who attempts, by means of any threat, such as is specified in Section 519 of this code, to extort money or other property from another is punishable by imprisonment in the county jail not longer than one year or in the state prison or by fine not exceeding ten thousand dollars ($10,000), or by both such fine and imprisonment.

See, e.g., *People v. Camodeca* (1959) 52 Cal.2d 142, 148 [defendant attempted to place victim in fear of unlawful injury to his business and person if money not paid]; see also *People v. Lavine* (1931) 115 Cal.App. 289, 296 [general code sections governing attempt do not apply to attempted extortion].

No Good Faith Exception
While a good faith belief in right to the property taken negates the specific intent required for theft, the same is not true of a ransom demand. Holding one for ransom is an attempt at a form of extortion, which is "the obtaining of property from another, with his consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right." (Pen. Code, § 518.) There is no such good faith exception to extortion or kidnapping for ransom. Even if a debt is owing, it cannot be collected by the reprehensible and dangerous means of abducting and holding a person to be ransomed by payment of the debt. (*People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677–1678.)

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1351. Extortion by Threatening Letter

The defendant is charged [in Count __] with sending a threatening letter with the intent to extort.

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

1. **The defendant sent or delivered a threatening letter [or other writing] to another person.**

<Alternative 2A—threatened to injure>

[2. In the letter [or writing], the defendant threatened to unlawfully injure (the other person or someone else/ [or] the property of the other person or someone else).]

<Alternative 2B—threatened to accuse of crime>

[2. In the letter [or writing], the defendant threatened to accuse the other person[, or that person's relative or family member,] of a crime.]

<Alternative 2C—threatened to expose secret>

[2. In the letter [or writing], the defendant threatened to expose a secret about the other person[, or that person's relative or family member,] [or to expose or connect (him/her/any of them) with any (disgrace[,]/ [or] crime[,]/ [or] deformity)].]

AND

3. **When sending [or delivering] the letter [or writing], the defendant intended to use fear to obtain (money/property/the performance of an official act) with the other person's consent.**

The term *consent* has a special meaning here. Consent for extortion can be coerced or unwilling, as long as it is given as a result of the wrongful use of force or fear.

[The threat can be directly stated in the letter [or writing] or can be implied by the contents of the letter [or writing] and the surrounding circumstances or can be intended by the sender to be understood as a threat by the recipient.]

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[Threatening to do something that a person has a legal right to do is not a threat to commit an unlawful injury.]

[The letter [or writing] need not be signed and need not have been (written/dictated/composed) by the defendant.]

[The crime is complete when the letter [or writing] is either delivered to someone or deposited in a post office or any other place, with the intent that the letter [or writing] be forwarded to the intended recipient. It is not required that the intended recipient actually receive the letter [or writing].]

[It is not required that the intended recipient actually (give the defendant money [or property]/do an official act).]

[An *official act* is an act that a person does in his or her official capacity, using the authority of his or her public office.]

[A *secret* is a fact that:

1. **Is unknown to the general public or to someone who might be interested in knowing the fact.**

AND

2. **Harms the threatened person's reputation or other interest so greatly that he or she would be likely to (pay money/give away property/do an official act) to prevent the fact from being revealed.]**

BENCH NOTES

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

Depending on the evidence, in element 2, give the appropriate alternative A–C describing the threat. (Pen. Code, § 519.)

AUTHORITY

Elements ▸ Pen. Code, § 523.
Crime Complete When Mailed ▸ Pen. Code, § 660.

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Felony Punishment ▸ Pen. Code, § 520.
Threats ▸ Pen. Code, § 519.
Coerced Consent ▸ *People v. Goodman* (1958) 159 Cal.App.2d 54, 61; *People v. Peck* (1919) 43 Cal.App. 638, 645 [extortion under Pen. Code, §§ 518, 519].
Official Act Defined ▸ See *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [kidnapping for extortion]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [same].
Secret Defined ▸ *People v. Lavine* (1931) 115 Cal.App. 289, 295 [extortion under Pen. Code, §§ 518, 519].
Unlawful Injury Defined ▸ *People v. Schmitz* (1908) 7 Cal.App. 330, 369–370 [extortion under Pen. Code, §§ 518, 519].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 109.

COMMENTARY

Adding "official act" to section 518 expanded the definition of extortion in the related code sections, including section 523, to include extortion of an official act. (*Isaac v. Superior Court of Los Angeles County* (1978) 79 Cal.App.3d 260, 263–264.)

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STAFF NOTES

Elements of Extortion by Threatening Letter
Penal Code section 523 defines extortion by threatening letter as follows:

> Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in Section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat.

The instruction incorporates the wrongful use of fear from Penal Code section 518, which defines extortion. The instruction omits the use of force. (See instructional duty section in Bench Notes to instruction 1350, Extortion by Threat or Force.)

Intent
Extortion by threatening letter depends on the intent of the person making the threat, not on whether the victim was afraid, as held in *People v. Fox* (1958) 157 Cal.App.2d 426, 430:

> [I]t is well settled that the crime here charged ". . . depends upon the conduct and intent of the person who makes the threat, and that the effect produced upon the person against whom it is made is immaterial, so that if the . . . evidence warranted the jury in believing that the defendant intended that his threat would produce 'fear' in the mind of . . . [the victim], and if the threat was of such character as might reasonably have that result, it would be wholly immaterial that . . . [the victim] was unaffected thereby." (*People v. Robinson*, 130 Cal.App. 664, 668 [20 P.2d 369].)

Threats
Penal Code section 519, incorporated by reference in section 523, specifies the threats that induce fear as follows:

> Fear, such as will constitute extortion, may be induced by a threat, either:
> 1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or,
> 2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or,

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3. To expose, or to impute to him or them any deformity, disgrace or crime; or,
4. To expose any secret affecting him or them.

See, e.g., *People v. Tonielli* (1889) 81 Cal. 275, 277–279 [threat to impute disgrace]; *Libarian v. State Bar of California* (1952) 38 Cal.2d 328, 329–330 [threatened perjury accusation unless client paid].

The writing must contain a direct or implied threat, or language adapted to imply a threat, as held in *People v. Choynski* (1892) 95 Cal. 640, 641–642:

> It is not necessary that a threat should be apparent from the face of the letter, nor even necessary that it should be implied therefrom. The statute says if the language used is adapted to imply a threat, then the writing is sufficient. Parties guilty of the offense here alleged seldom possess the hardihood to speak out boldly and plainly, but deal in mysterious and ambiguous phrases. Mysterious and ambiguous to the world at large but, read in the light of surrounding circumstances by the party for whom intended, they have no uncertain meaning.

See *People v. Oppenheimer* (1962) 209 Cal.App.2d 413, 422 [threats can be made by innuendo; surrounding circumstances may be considered].

The "letter must be adapted to imply one or more of those threats specially mentioned in section 519, or the offense is not committed." (*People v. Choynski, supra*, 95 Cal. at p. 642.)

For further discussion of the different types of threats, see the Staff Notes to instruction 1350, Extortion by Threat or Force.

Signature Not Required

The threatening letter need not be signed. Section 523 states that the threat may be made in "any letter or other writing, whether subscribed or not." See *People v. Cadman* (1881) 57 Cal. 562:

> But the Code makes it a crime to send or deliver a letter containing such threats with the intent to extort money or other property from another, "whether subscribed or not," . . ..

Crime Complete When Mailed

Extortion by threatening letter is complete when the letter is mailed, as provided in Penal Code section 660:

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> In the various cases in which the sending of a letter is made criminal by this Code, the offense is deemed complete from the time when such letter is deposited in any Post Office or any other place, or delivered to any person, with intent that it shall be forwarded.

Coerced Consent
For additional discussion of coerced consent, see the Staff Notes to instruction 1350, Extortion by Threat or Force.

Extortion of Official Act
Adding "official act" to section 518 expanded the definition of extortion in the related code sections, including section 523, as stated in *Isaac v. Superior Court of Los Angeles County* (1978) 79 Cal.App.3d 260, 263–264:

> In 1939, in order to correct *Robinson*, the Legislature amended section 518 by adding to the definition of extortion the obtaining of an official act of a public officer. [Citation.] Inasmuch as sections 520, 523, and 524 are dealing with the crime of extortion, the Legislature[,] by enlarging the definition of the crime, obviously believed it was unnecessary to change the wording of the other sections. The definition of extortion is clearly controlling and must modify sections 520, 523, and 524, otherwise the amendment would be meaningless.

In light of *Isaac*, the instruction includes optional language in items 1 and 2 regarding extortion of an official act. For additional discussion of "official acts," see the Staff Notes to instruction 1350, Extortion by Threat or Force.

Property Subject to Extortion
See the discussion of property that may be extorted in the Staff Notes to instruction 1350, Extortion by Threat or Force.

Unlawful Injury
For a definition of "unlawful injuries," see the Staff Notes to instruction 1350, Extortion by Threat or Force.

Secret Defined
For a definition of "secret," see the Staff Notes to instruction 1350, Extortion by Threat or Force.

Attempt to Send Threatening Letter With Intent to Extort

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A violation of section 523 by itself is in the nature of an attempt: the defendant sends a threatening letter with the intent to extort. Actually obtaining the property or official act is not required. Penal Code section 524 establishes a lesser punishment for attempting plain extortion:

> Every person who attempts, by means of any threat, such as is specified in Section 519 of this code, to extort money or other property from another is punishable by imprisonment in the county jail not longer than one year or in the state prison or by fine not exceeding ten thousand dollars ($10,000), or by both such fine and imprisonment.

No cases were found applying section 524 to section 523. The CJER Mandatory Jury Instructions Handbook simply lists section 524 after listing extortion under sections 518, 519, 522, and 523. If the Task Force decides section 524 does apply, a Lesser Included Offenses section must be added.

Felony

Sending a threatening letter with the intent to extort is punished the same as a completed extortion (Pen. Code, § 523), which is imprisonment for two, three, or four years. (Pen. Code, § 520.)

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1352. Extortion of Signature

The defendant is charged [in Count __] with obtaining a signature by extortion.

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

<Alternative 1A—threatened to injure or used force>

[1. The defendant (threatened to unlawfully injure/used force against) (another person or someone else/ [or] the property of another person or someone else).]

<Alternative 1B—threatened to accuse of crime>

[1. The defendant threatened to accuse another person[, or that person's relative or family member,] of a crime.]

<Alternative 1C—threatened to expose secret>

[1. The defendant threatened to expose a secret about another person[, or that person's relative or family member,] [or to expose or connect (him/her/any of them) with any (disgrace[,]/ [or] crime[,]/ [or] deformity)].]

2. When (making the threat/using force), the defendant intended to use that (fear/force) to obtain the other person's consent to sign (a/an) (document/check/_____ *<specify other paper or instrument>***) that, if voluntarily signed, would transfer property or create a (debt/demand/charge/right of legal action).**

AND

3. As a result of the (threat/use of force), the other person:

a. Consented to sign the (document/check/_____ *<specify other paper or instrument>***).**

AND

b. Signed the (document/check/_____ *<specify other paper or instrument>***).**

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The term *consent* has a special meaning here. Consent for extortion can be coerced or unwilling, as long as it is given as a result of the wrongful use of force or fear.

[Threatening to do something that a person has a legal right to do is not a threat to commit an unlawful injury.]

[The fear caused by the threat must be the controlling reason that the other person consented. If the person consented because of some other controlling reason, the defendant is not guilty of extortion.]

[A *secret* is a fact that:

1. **Is unknown to the general public or to someone who might be interested in knowing the fact.**

AND

2. **Harms the threatened person's reputation or other interest so greatly that he or she would be likely to (pay money/give away property/do an official act) to prevent the fact from being revealed.]**

BENCH NOTES

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

Depending on the evidence, in element 1, give the appropriate alternative A–C describing the threat. (See Pen. Code, § 519.)

AUTHORITY

Elements ▸ Pen. Code, § 522.
Coerced Consent ▸ *People v. Goodman* (1958) 159 Cal.App.2d 54, 61; *People v. Peck* (1919) 43 Cal.App. 638, 645 [extortion under Pen. Code, §§ 518, 519].
Crime Complete When Document Signed ▸ *People v. Massengale* (1970) 10 Cal.App.3d 689, 692.
Fear Must Be Controlling Cause ▸ *People v. Goodman* (1958) 159 Cal.App.2d 54, 61 [extortion under Pen. Code, §§ 518, 519].

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Secret Defined ▸ *People v. Lavine* (1931) 115 Cal.App. 289, 295 [extortion under Pen. Code, §§ 518, 519].

Unlawful Injury Defined ▸ *People v. Schmitz* (1908) 7 Cal.App. 330, 369–370 [extortion under Pen. Code, §§ 518, 519].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 110.

LESSER INCLUDED OFFENSES

Attempted Extortion ▸ Pen. Code, § 524.

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STAFF NOTES

Elements
Penal Code section 522 prohibits obtaining a signature by extortion, as follows:

> OBTAINING SIGNATURE BY MEANS OF THREATS. Every person who, by any extortionate means, obtains from another his signature to any paper or instrument, whereby, if such signature were freely given, any property would be transferred, or any debt, demand, charge, or right of action created, is punishable in the same manner as if the actual delivery of such debt, demand, charge, or right of action were obtained.

Extortionate Means
"[B]y any extortionate means" is construed by staff to include the fear-inducing threats specified in section 519, as set forth in the alternative paragraph 3's. Section 522 incorporates the same penalty as simple extortion under section 518 and 520, and has been described as "extending the definition" of extortion under section 518. (*People v. Kohn* (1968) 258 Cal.App.2d 368, 374.) If the fear-inducing threats are incorporated from section 519, then the definitions of coerced consent, fear, and unlawful injury also must be incorporated into this instruction. (See cross-references below.)

But "[a]n allegation to the effect that an official signature was obtained under extreme political pressure does not constitute extortion or extortionate means under [sections 518 and 522]." (*Kehoe v. City of Berkeley* (1977) 67 Cal.App.3d 666, 677.) Section 522 also "does not embrace the obtaining of a confession of blackmail by extortionate means." (*People v. Kohn* (1968) 258 Cal.App.2d 368, 375.)

Paper or Instrument
Section 522 prohibits obtaining a signature by extortionate means on "any paper or instrument, whereby, if such signature were freely given, any property would be transferred, or any debt, demand, charge, or right of action created."

"Paper" or "instrument" is rendered as "document/check/_____ <*specify other paper or instrument*>."

There are few case examples. Such an instrument includes a check delivered to an association for the defendants' benefit, as held in *People v. Peppercorn* (1939) 34 Cal.App.2d 603, 608:

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> [T]he signatures were obtained by extortionate means to checks which if freely given would result in the transfer of property to the association being formed for the benefit of defendants. Upon the formation of the association the payment of the checks, if freely given, could be enforced.

See also *People v. Massengale* (1968) 261 Cal.App.2d 758, 761–762 [obtaining personalized check through menacing conduct].

When Crime Complete
Extortion of a signature is complete when the signature is obtained, as discussed in *People v. Massengale* (1970) 10 Cal.App.3d 689, 692:

> Extortion of a signature, as defined in section 522, is complete when a signature is obtained to an instrument which, if freely given, would have transferred property, without the necessity of proof that the defendant intended to use the instrument for that purpose.

Coerced Consent
For additional discussion of coerced consent, see the Staff Notes to instruction 1350, Extortion by Threat or Force.

Fear Must Be Controlling Cause
For a discussion of the requirement that the induced fear be the controlling cause, see the Staff Notes to instruction 1350, Extortion by Threat or Force.

Unlawful Injury
For discussion of threatened unlawful injuries, see the Staff Notes to instruction 1350, Extortion by Threat or Force.

Secret Defined
For a definition of "secret," see the Staff Notes to instruction 1350, Extortion by Threat or Force.

Official Act Not Incorporated
Adding "official act" to section 518 expanded the definition of extortion in the sections 520, 523, and 524, but apparently not in section 522, as discussed in *Isaac v. Superior Court of Los Angeles County* (1978) 79 Cal.App.3d 260, 263–264:

> In 1939, in order to correct *Robinson*, the Legislature amended section 518 by adding to the definition of extortion the obtaining of an official act of a public officer. [Citation.] Inasmuch as sections 520, 523, and 524 are dealing with the crime of extortion, the

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> Legislature[,] by enlarging the definition of the crime, obviously believed it was unnecessary to change the wording of the other sections. The definition of extortion is clearly controlling and must modify sections 520, 523, and 524, otherwise the amendment would be meaningless.

The extortion charge in *Isaac* only involved attempted extortion by letter under sections 520, 523, and 524, which may explain the omission of section 522. Nevertheless, the objective under section 522 is to obtain a signature. It appears unnecessary to incorporate obtaining an official act within section 522's scope, even if the signature is by a public officer.

Felony

A conviction for violating section 522 is punished under section 520, as held in *People v. Massengale* (1970) 10 Cal.App.3d 689, 693:

> [F]or extorting a signature, section 522 prescribes the same punishment as if the money had been delivered, i.e., the punishment provided in section 520.

Section 520 requires punishment "by imprisonment in the state prison for two, three or four years."

Attempted Extortion

Penal Code section 524 establishes punishment for attempted extortion:

> Every person who attempts, by means of any threat, such as is specified in Section 519 of this code, to extort money or other property from another is punishable by imprisonment in the county jail not longer than one year or in the state prison or by fine not exceeding ten thousand dollars ($10,000), or by both such fine and imprisonment.

No cases were found applying section 524 to section 522. The CJER Mandatory Jury Instructions Handbook simply lists section 524 after listing extortion under sections 518, 519, 522, and 523. It's not clear what acts would constitute an attempted extortion by obtaining a signature by threat.

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1406. Burglary: Intent of Aider and Abettor

To be guilty of burglary as an aider and abettor, the defendant must have known of the perpetrator's unlawful purpose and must have formed the intent to aid, facilitate, promote, instigate, or encourage commission of the burglary before the perpetrator finally left the structure.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction when the defendant is charged with aiding and abetting a burglary and there is an issue about when the defendant allegedly formed the intent to aid and abet. This instruction **must** be given with Instruction 501, Aiding and Abetting: Intended Crimes.

Do not give this instruction if the defendant is charged with felony murder. Give Instruction 738, Felony Murder: During Commission of Felony—Defined.

AUTHORITY

Aider and Abettor to Burglary—When Intent Formed ▸ *People v. Montoya* (1994) 7 Cal.4th 1027, 1044–1046.

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STAFF COMMENTS

Aider and Abettor—When Intent Formed

> [I]f an individual happens upon a scene in which a perpetrator unlawfully has entered with intent to commit a felony or theft, and, upon learning of that circumstance, forms the intent to facilitate the perpetrator's illegal purpose in entering, that individual incurs the liability of an aider and abettor, commensurate with the liability of the perpetrator. This conclusion in turn compels the analogous conclusion that an aider and abettor is not liable for burglary (just as the perpetrator is not liable) where the perpetrator formed the intent to commit a felony or theft only following the entry. . . .
>
> Our determination that, for the purpose of assessing the liability of an aider and abettor, a burglary is considered ongoing during the time the perpetrator remains inside the structure finds additional support in the analysis of sexual offenses, which, because of their similar element of unwanted personal invasion, may be analogized to the invasive act comprising a burglary. . . .
>
> We next apply the above described rule in the context of the present case, in which the perpetrator made several entries and exits of the burgled dwelling during the course of a single burglary. We conclude that in such a case, the aider and abettor may be liable if he or she, with knowledge of the perpetrator's unlawful purpose, forms the intent to commit, encourage or facilitate commission of the offense at any time prior to the perpetrator's final departure from the structure.

(*People v. Montoya* (1994) 7 Cal.4th 1027, 1044–1046.)

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1410. Receiving Stolen Property

The defendant is charged [in Count __] with receiving stolen property.

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

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

AND

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

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

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

[To *receive property* means to take possession and control of it. Mere presence near or access to the property is not enough.] [Two or more people can possess the property at the same time.] [A person does not have to actually hold or touch something to possess it. It is enough if the person has [control over it] [or] [the right to control it], either personally or through (another person/other people).]

BENCH NOTES

Instructional Duty

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

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

Related Instructions
For instructions defining extortion and the different forms of theft, see series 1300, Theft and Extortion.

For an instruction about when guilt may be inferred from possession of recently stolen property, see Instruction 375, Possession of Recently Stolen Property as Evidence of a Crime.

AUTHORITY

Elements ▸ Pen. Code, § 496(a); *People v. Land* (1994) 30 Cal.App.4th 220, 223.
Extortion Defined ▸ Pen. Code, § 518.
Theft Defined ▸ Pen. Code, § 490a.
Concealment ▸ *Williams v. Superior Court* (1978) 81 Cal.App.3d 330, 343–344.
Intent ▸ *People v. Wielograf* (1980) 101 Cal.App.3d 488, 494 [general intent crime].
Possession and Control ▸ *People v. Land* (1994) 30 Cal.App.4th 220, 223–224; *People v. Zyduck* (1969) 270 Cal.App.2d 334, 336; see *People v. Gatlin* (1989) 209 Cal.App.3d 31, 44–45 [constructive possession means knowingly having the right of control over the property directly or through another]; *People v. Scott* (1951) 108 Cal.App.2d 231, 234 [two or more persons may jointly possess property].
Stolen Property ▸ *People v. Kunkin* (1973) 9 Cal.3d 245, 250 [theft]; see, e.g., *People v. Candiotto* (1960) 183 Cal.App.2d 348, 349 [burglary]; *People v. Siegfried* (1967) 249 Cal.App.2d 489, 493 [robbery].

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

LESSER INCLUDED OFFENSES

Attempted Receiving Stolen Property ▸ Pen. Code, §§ 663, 496(d); *People v. Rojas* (1961) 55 Cal.2d 252, 258 [stolen goods recovered by police were no longer "stolen"]; *People v. Moss* (1976) 55 Cal.App.3d 179, 183 [antecedent theft not a necessary element].

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

RELATED ISSUES

Defense of Voluntary Intoxication or Mental Disease

Though receiving stolen property is a general intent crime, one element of the offense is knowledge that the property was stolen, a specific mental state. With regard to the element of knowledge, receiving stolen property is a "specific intent crime" as that term is used in Penal Code sections 22(b) and 28(a). (*People v. Reyes* (1997) 52 Cal.App.4th 975, 985.) Therefore, the defendant should have the opportunity to introduce evidence and request instructions regarding the lack of requisite knowledge. (*Id.* at p. 986; see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131; but see *People v. Atkins* (2001) 25 Cal.4th 76, 96 (conc. opn. of Brown, J.) [criticizing *Mendoza* and *Reyes* as wrongly transmuting a knowledge requirement into a specific intent].) See Instruction 650, Voluntary Intoxication.

Dual Convictions

A person may not be convicted of stealing and of receiving the same property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757; see *People v. Tatum* (1962) 209 Cal.App.2d 179, 183 [cannot be convicted for both stealing and concealing or withholding].) This common law rule was codified in 1992 in the second sentence of the second paragraph of Penal Code section 496(a). (*People v. Allen* (1999) 21 Cal.4th 846, 857; see also the Related Issues section of the Bench Notes for Instruction 1316, Unlawful Taking or Driving of Vehicle [convictions for unlawful taking or driving and receiving stolen property].) For an instruction about alternative crimes when there is a possibility of a prohibited dual conviction, see Instruction 164, Multiple Counts—Alternative Charges For One Event.

The first sentence of the second paragraph of section 496(a) abrogates the "broad" application of the common law rule that declared a person cannot be both thief and receiver of the same property. After the 1992 amendment, a defendant can be convicted for receiving stolen property even though he or she stole the property, provided the defendant had not been convicted of the theft. (*People v. Allen, supra,* 21 Cal.4th at pp. 853, 857; *People v. Strong* (1994) 30 Cal.App.4th 366, 373; see Pen. Code, § 496(a), second paragraph.) A thief may be convicted of violating section 496 whether or not the statute of limitations on theft has run. (*People v. Allen, supra,* 21 Cal.4th at p. 861 [disapproving *In re Kali D.* (1995) 37 Cal.App.4th 381].) A burglar also may be convicted both of burglary and of violating section 496 with respect to property he or she stole in the burglary. (*People v. Allen, supra,* 21 Cal.4th at pp. 853, 866; *People v. Carr* (1998) 66 Cal.App.4th 109, 114; see also Pen. Code, § 954 [allowing multiple convictions].)

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However, multiple punishments for the same act are barred by Penal Code section 654. (*People v. Allen, supra,* 21 Cal.4th at pp. 853, 866–867.)

Receiving Multiple Items on Single Occasion
A defendant who receives more than one item of stolen property on a single occasion commits one offense of receiving stolen property. (See *People v. Lyons* (1958) 50 Cal.2d 245, 275.)

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

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

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

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

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

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

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STAFF COMMENTS

Elements
Penal section 496(a) sets forth the elements of the crime of receiving stolen property:

> Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year.

The elements for the act of receiving stolen property were summarized in *People v. Johnson* (1980) 104 Cal.App.3d 598, 605:

> [T]he elements of receiving stolen property are: (1) that the particular property was stolen; (2) that the accused received, concealed or withheld it from the owner thereof; and (3) that the accused knew that the property was stolen.

Possession is sometimes emphasized when receipt of stolen property is charged, as in *People v. Land* (1994) 30 Cal.App.4th 220, 223:

> [T]o sustain a conviction for receiving stolen property, the prosecution must prove (1) the property was stolen; (2) the defendant knew the property was stolen; and, (3) the defendant had possession of the stolen property.

Knowledge that the property was stolen can be inferred from the evidence. (See, e.g., *People v. Riccio* (1996) 42 Cal.app.4th 995, 1001; see also instruction 355, Possession of Stolen Property.)

Separate Offenses
Each criminal act described in section 496(a) is a separate and distinct offense, as discussed in *People v. Boyce* (1980) 110 Cal.App.3d 726, 734:

> [T]he acts of receiving, withholding and concealing stolen property as well as theft are consistently treated as separate and distinct criminal offenses whether for the purpose of applying the statute of limitations, the rules of pleading, or the determination of an accomplice. . . . [T]he concept that each of the prohibited acts listed

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> in section 496 . . . are separate and distinct offenses should apply logically and consistently to the act of "selling" stolen property. The act of receiving stolen property is completed when the culprit takes possession; similarly, the act of selling stolen property is accomplished when he late transfers possession to another person for gain.

Concealing stolen property is discussed in *Williams v. Superior Court* (1978) 81 Cal.App.3d 330, 343–344:

> Concealing stolen property is a distinct and separate offense from receiving stolen property precisely because receiving congeals and is completed upon taking possession with guilty knowledge, whereas concealing, by definition, continues. . . . [Concealing] consists of the act of intentionally secreting stolen property in violation of the affirmative duty to return it or at least to disclose its whereabouts to its rightful owner. . . . [O]ne of the purposes of including both receiving and concealing in . . . section 496 is to enable prosecution for the continuing purposeful concealment of stolen property where prosecution for the receipt of that property is barred by the statute of limitations.

The Michigan Jury Instructions define "conceal" to mean intentionally hiding, disguising, getting rid of, or doing any other act to keep the property from being discovered. (Michigan Criminal Jury Instructions, no. CJI2d 26.2.)

It is not necessary to prove receipt, possession, or control when a person is charged with concealing, selling, or withholding stolen property. (See *People v. Rossi* (1936) 15 Cal.App.2d 180, 182; 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 76, p. 105.)

Stolen Property

The property received must be stolen, as discussed in *People v. Kunkin* (1973) 9 Cal.3d 245, 250:

> Section 496 applies to the receipt of "any property which has been stolen or which has been obtained in any manner constituting theft or extortion." This broad language is intended to include property which has been obtained not only by theft by larceny (i.e., stealing) but also by such other forms of theft as embezzlement.

Stolen property also includes property obtained by burglary (see, e.g., *People v. Candiotto* (1960) 183 Cal.App.2d 348, 349) or robbery (see, e.g., *People v.*

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Siegfried (1967) 249 Cal.App.2d 489, 493). To simplify the language, the instruction above uses the phrase "stolen or obtained by extortion," but provides an optional definition of "stolen" that includes the different forms of theft.

If the information or evidence is based on the defendant knowing that the property was stolen by a particular means of theft, a definition of that type of theft may be given on request. For example, in *Kunkin*, the jury was instructed on the elements of theft by larceny. (*People v. Kunkin, supra,* 9 Cal.3d at p. 250–251.) The instruction above, however, does not include definitions of the different forms of theft because no other cases were found where such definitions were given.

Property Obtained by Extortion
The definition of extortion is adapted from the definition used in instruction 955, Kidnapping: For Ransom, Reward, or Extortion. Only the first extortion definition is used, obtaining property with consent through the use of force or fear.

Possession of the Property
Possession may be actual or constructive, and does not require physical possession, as discussed in *People v. Land* (1994) 30 Cal.App.4th 220, 223–224:

> Possession of the stolen property may be actual or constructive and need not be exclusive. [Citations.] Physical possession is also not a requirement. It is sufficient if the defendant acquires a measure of control or dominion over the stolen property.

Something more than mere presence or access is required to establish possession, as stated in *People v. Zyduck* (1969) 270 Cal.App.2d 334, 336:

> Dominion and control are essentials of possession, and they cannot be inferred from mere presence or access. Something more must be shown to support inferring of these elements. Of course, the necessary additional circumstances may, in some fact contexts, be rather slight. [Citations.] It is clear, however, that some additional fact is essential.

See *People v. Gatlin* (1989) 209 Cal.App.3d 31, 44–45 [constructive possession means knowingly having the right of control over the property directly or through another]; see also *People v. Scott* (1951) 108 Cal.App.2d 231, 234 [approved instruction that two or more persons may jointly possess property if they jointly have dominion, control, and exclusive possession].

A passenger in a stolen vehicle may be in constructive possession of the vehicle, as discussed in *People v. Land* (1994) 30 Cal.App.4th 220, 227–228:

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> "[A]n inference of possession may arise from a passenger's presence in a stolen automobile when that presence is coupled with additional evidence that the passenger knew the driver, knew that the vehicle was stolen, and intended to use the vehicle for his or her own benefit and enjoyment.. . . ." [Citation.] . . . From the facts of appellant's close relationship to the driver, use of the vehicle for a common criminal mission, and stops along the way before abandoning it (during which appellant apparently made no effort to disassociate himself from his friend or the stolen vehicle) a reasonable juror could infer appellant, as the passenger, was in a position to exert control over the vehicle. This inference, in turn, would support a finding of constructive possession.

The defendant must know he or she possesses the property, as stated in *People v. Speaks* (1981) 120 Cal.App.3d 36, 39:

> To be convicted of receiving stolen property, one must know he received or was in possession of the goods. [Citation.] . . . Conscious presence of the items is an element of the offense.

Character and Value of Property

"Property" includes money, goods, chattels, things in action, and evidence of debt. (*People v. Dolbeer* (1963) 214 Cal.App.2d 619, 622–623.)

"The value of the property received is not a necessary element of proof in a violation of Penal Code section 496." (*People v. Superior Court (Mace)* (1969) 271 Cal.App.2d 524, 527; see *People v. Fitzpatrick* (1889) 80 Cal. 538, 541.)

Nevertheless, the accusatory pleading may charge the offense as a misdemeanor if the stolen property's value does not exceed $400, as provided in section 496(a):

> However, if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed four hundred dollars ($400), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year.

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Attempted Receiving Stolen Property
A defendant who receives stolen property that was recovered by the police may still be convicted of attempted receiving stolen property, as discussed in *People v. Rojas* (1961) 55 Cal.2d 252, 258:

> [T]he criminality of the attempt is not destroyed by the fact that the goods, having been recovered by the . . . police, had, unknown to the defendants, lost their 'stolen' status. . . . We approve the holding of the *Faustina* case . . . that upon a state of facts such as that here, "Even though we say that, technically, the (goods) . . . were not 'stolen' nevertheless the defendant did attempt to receive stolen property."

Following the *Rojas* line of cases, the court in *People v. Moss* (1976) 55 Cal.App.3d 179, 183, explained:

> [I]t is not necessary [for the crime of attempting to receive stolen property] for the People to allege or prove that the defendant had had any prior connection with the thief, or that the goods received had been stolen.

Attempting to receive stolen property is subject to the same punishment as the completed crime pursuant to section 496(d), which provides:

> Notwithstanding Section 664, any attempt to commit any act prohibited by this section, except an offense specified in the accusatory pleading as a misdemeanor, is punishable by imprisonment in the state prison, or in a county jail for not more than one year.

Stealing and Receiving Same Property
With certain exceptions, a defendant may not be convicted of stealing and receiving the same property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757.) This does not mean, however, that the prosecution must prove that someone other than the defendant stole the property, even though the evidence strongly suggests that it was the defendant that stole the property. (*People v. Price* (1991) 1 Cal.4th 324, 464.) The Supreme Court explained when an instruction on stealing and receiving the same property must be given (*Ibid.*):

> The trial court is not required to instruct sua sponte on the principle that a person may not be convicted of both stealing and receiving the same property. Such an instruction is required only when the defendant is charged with two mutually exclusive offenses.

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Section 496(a), second paragraph, as amended in 1992 (and relettered in 1997), provides:

> A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property.

The second sentence of the 1992 amendment to Penal Code section 496 codifies the common law rule. (*People v. Allen* (1999) 21 Cal.4th 846, 857.) The first sentence of the 1992 amendment effectively abrogates the "broad" application of the common law rule that declared a person cannot be both thief and receiver of the same property. After the amendment, a defendant can be convicted for receiving stolen property even though he or she stole the property, provided the defendant has not actually been convicted of the theft. (*Ibid*.) A thief may be convicted of violating section 496 whether or not the statute of limitations on theft has run. (I*d.* at p. 861, disapproving *In re Kali D.* (1995) 37 Cal.App.4th 381.) A burglar may be convicted both of burglary and of violating section 496 with respect to property stolen in the burglary, but multiple punishments for the same act are barred by Penal Code section 654. (*People v. Allen, supra*, 21 Cal.4th at pp. 853, 866–867.)

Sources from Other Jurisdictions

Michigan Criminal Jury Instructions, no. CJI2d 26.1–26.6.

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1415. Defense to Receiving Stolen Property: Innocent Intent

The defendant is not guilty of receiving (stolen/extorted) property if (he/she) intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/concealed/withheld) the property.

If you have a reasonable doubt about whether the defendant intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/concealed/withheld) the property, you must find (him/her) not guilty of receiving (stolen/extorted) property.

[This defense does not apply if the defendant decided to (return the property to its owner/ [or] deliver the property to law enforcement) only after (he/she) (bought/received/concealed/withheld) the property.] [The defense [also] does not apply if the defendant intended to (return the property to its owner/ [or] deliver the property to law enforcement) when (he/she) (bought/received/concealed/withheld) it, but later decided to (sell/conceal/withhold) the property.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on this defense if there is substantial evidence supporting the defense and the defendant is relying on the defense or the defense is not inconsistent with the defendant's theory of the case. (*People v. Osborne* (1978) 77 Cal.App.3d 472, 477; see *People v. Sedeno* (1974) 10 Cal.3d 703, 716–717; *People v. Burnham* (1986) 176 Cal.App.3d 1134, 1139, fn. 3.)

Related Instructions

For the general requirement of a union between an act and intent (Pen. Code, § 20), see Instruction 122, Union Of Act And Intent—General Intent.

AUTHORITY

Instructional Requirements ▸ *People v. Osborne* (1978) 77 Cal.App.3d 472, 476.
Burden of Proof ▸ *People v. Dishman* (1982) 128 Cal.App.3d 717, 721–722; *People v. Wielograf* (1980) 101 Cal.App.3d 488, 494.

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

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STAFF COMMENTS

The innocent intent to return property to its true owner is a defense to a charge of having received stolen property, as held in *People v. Osborne* (1978) 77 Cal.App.3d 472, 476:

> [While] a specific fraudulent intent by the perpetrator . . . is not an element of the crime which the prosecution must prove, the absence of any such guilty intent is a defense which, if established, disproves the charge. [Citations.] . . . If the defendant received the stolen [property] with an intention of returning it to the true owner, that was a matter of defense upon which he would have had a right to introduce evidence, and upon the coming in of such evidence the issue of intent could have been dealt with by a proper instruction. [Citation.] . . . If the jury . . . found it to be true that defendant in receiving the "stolen" property only intended to effect the arrest of the thief . . ., such a finding would then necessarily include the idea that after the arrest the defendant and the property would be turned over to the police. . . . We hold that the innocent intent of returning the property to the true owner is a defense to the charge of attempted receiving of stolen property.

The burden is on the defendant to prove innocent intent, as discussed in *People v. Dishman* (1982) 128 Cal.App.3d 717, 721–722:

> The burden of proving innocent intent is upon a defendant. . . . [T]he critical factor is the intent of the receiver at the moment that he receives the stolen property. . . . A defense that although all other elements [of receiving stolen property] were present, the defendant did not have any criminal intent but had, from the moment that he received the stolen property, intended to return it to the rightful owner, if proven and accepted by the jury, will absolve him of guilt. . . . [T] attacked statement [in the instruction given] does not make any reference to the fact that an intent to restore at the moment the stolen property is received is an affirmative defense to the charge.

There is no duty to instruct on innocent intent absent substantial evidence of the defense, as discussed in *People v. Wielograf* (1980) 101 Cal.App.3d 488, 494–495:

> [T]he defendant is obliged to prove that his intent was innocent. . . . [T]he mere receipt of stolen goods with knowledge that they have been stolen is not itself a crime if the property was received with

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> intent to restore it to the owner without reward or with any other innocent intent (76 C.J.S., § 9, pp. 14–16). The critical factor is the defendant's intent at the time he receives or initially conceals the stolen property from the owner. The intent to restore must exist at the moment the stolen property is accepted by the receiver if he is to be acquitted. If the defendant received or concealed stolen property with general criminal intent to aid the thief, or to deprive the owner of possession, or renders more difficult a discovery by the owner, or to collect a reward, he possesses the requisite wrongful intent, and it is not defense that he subsequently intended to return the stolen property to the owner. . . . We do not understand *Osborne* to hold, nor the law to be, that an instruction on innocent intent is necessary whenever a defendant disclaims guilty intent. . . . The evidence in this case did not impose on the trial court the duty to instruct the jury, sua sponte, that the defendant's intent to return the stolen car to its owner is a defense to the charge of receiving stolen property.

Sources from Other Jurisdictions

Michigan Criminal Jury Instructions, no. CJI2d 26.5.

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1450A. Forgery by False Signature

The defendant is charged [in Count __] with forgery committed by signing a false signature.

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 _____** *<insert type of document 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.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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 types of documents 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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BENCH NOTES

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

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, 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.)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give Instruction 1455, 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; *People v. Maiolo* (1933) 135 Cal.App. 205, 207.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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

LESSER INCLUDED OFFENSES

Attempted Forgery ▸ Pen. Code, §§ 663, 470.

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RELATED ISSUES

Documents Not Specifically Listed in Penal Code Section 470(d)
A document not specifically listed in Penal Code section 470(d) may still come within the scope of the forgery statute if the defendant "forges the . . . handwriting of another." (Pen. Code, § 470(b).) "[A] writing not within those listed may fall under the part of section 470 covering a person who 'counterfeits or forges the . . . handwriting of another' if, on its face, the writing could possibly defraud anyone. [Citations.] The false writing must be something which will have the effect of defrauding one who acts upon it as genuine." (*People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 741–742.) 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 [campaign letter with false signature of President Reagan could not be basis of forgery charge].) See Instruction 1451, 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; *People v. Pearson* (1957) 151 Cal.App.2d 583, 586.) 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 Instruction 164, Multiple Counts—Alternative Charges For One Event.)

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 Instruction 164, Multiple Counts—Alternative Charges For One Event.)

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; *People v. Braver* (1964) 229 Cal.App.2d 303, 307–308.) 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 [evidence of defendant's offer to repay following arrest not relevant]; *People v. Wing* (1973) 32 Cal.App.3d 197, 202 [evidence of restitution not relevant where defendant falsely

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signed the name of another to a check knowing he had no authority to do so].) If such evidence is presented, the court may give Instruction 1324, 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 Instruction 1324:

> 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.

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STAFF NOTES

Penal Code, § 470:

(a) Every person who, with the intent to defraud, knowing that he or she has no authority to do so, signs the name of another person or of a fictitious person to any of the items listed in subdivision (d) is guilty of forgery.

(b) Every person who, with the intent to defraud, counterfeits or forges the seal or handwriting of another is guilty of forgery.

(c) Every person who, with the intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court or the return of any officer to any process of any court, is guilty of forgery.

(d) 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 following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check, bond, bank bill, or note, cashier's check, traveler's check, money order, post note, draft, any controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, receipt for money or goods, bill of exchange, promissory note, order, or any assignment of any bond, writing obligatory, or other contract for money or other property, contract, due bill for payment of money or property, receipt for money or property, passage ticket, lottery ticket or share purporting to be issued under the California State Lottery Act of 1984, trading stamp, power of attorney, certificate of ownership or other document evidencing ownership of a vehicle or undocumented vessel, or any certificate of any share, right, or interest in the stock of any corporation or association, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release or discharge of any debt, account, suit, action, demand, or any other thing, real or personal, or any transfer or assurance of money, certificate of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer

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> certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal; or any matter described in subdivision (b).
>
> (e) Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any forged bill or note, it is not necessary to prove the incorporation of the bank or company by the charter or act of incorporation, but it may be proved by general reputation; and persons of skill are competent witnesses to prove that the bill or note is forged or counterfeited.

Pen. Code, § 8, "What intent to defraud is sufficient":

> Whenever, by any of the provisions of this code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever.

Elements

> The crime of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud. (Sec. 470, Pen. Code.) Whether the forged instrument is one of a particular name or character or, if genuine, would create legal liability, is immaterial; the test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine.

(*People v. McKenna* (1938) 11 Cal.2d 327, 332.)

> Forgery has three elements: a writing or other subject of forgery, the false making of the writing, and intent to defraud. [Citation.] The subject of forgery is ordinarily an instrument or other writing which, if genuine, would create some legal right or obligation. [Citation.] Section 470 sets forth a long list of various documents which are the subject matter for forgery. This recital is supplemented by other statutes which prohibit special types of forgery, e.g., forgery of public or corporate seals, trademarks, drivers' licenses, telephone messages, public transportation tickets, narcotic or other prescriptions, etc. [Citation.] . . .

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(*People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 741–742.)

Intent to Defraud

> CALJIC No. 15.26 defines intent to defraud as an intent to deceive for the purpose of gaining a material advantage over the person deceived or inducing that person to part with property or alter his position to his injury or risk. In other words, the intent behind the fabrication must be to cause demonstrable or measurable harm to another. The instruction, in effect, tells the jury they must find appellant intended to cause a loss or damage to the legal, monetary or property rights of another to find the requisite intent to defraud. Thus, CALJIC No. 15.26 is not inadequate or incomplete under [*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 383–384].

(*People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.)

> An intent to defraud is an intent to deceive another person for the purpose of gaining a material advantage over that person or to induce that person to part with property or alter that person's position by some false statement or false representation of fact, wrongful concealment or suppression of the truth or by any artifice or act designed to deceive.

(*People v. Pugh* (2002) 104 Cal.App.4th 66, 72.)

Must Prove Signature Not Authorized

> We believe the People's case is fatally defective in that it fails to show the defendant had no authority to issue the checks at the time of their utterance.
>
> To prove that an accused person signed the name of another to an instrument, and that he passed such instrument as genuine, does not prove the commission of a crime. It must still be shown that it was a *false instrument*, and this is not proven until it is shown that the person who signed another's name did so *without authority*. Until this proof is made it is not shown to be a false instrument, and the defendant is not put to his proof at all.

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(*People v. Maiolo* (1933) 135 Cal.App. 205, 207 [citation and quotation marks omitted, italics in original].)

> Neither by the minutes, nor by the records, of Baker Ice Machine Company was it shown that no other person or persons (possibly including L. Baker and H. Spencer) was or were respectively authorized by the corporation to draw checks on the said banking account. In part to the contrary, according to the records of the bank, it was "authorized" to honor a signature by "J. M. McKenzie, Manager of the Corporation, *or any other* by said J. M. McKenzie". No showing was made that J. M. McKenzie did not authorize L. Baker and H. Spencer to draw the checks which were the subject of the forgery. It is probable that even within the city of Los Angeles there are many different persons whose names would be properly represented by that of "L. Baker"; and the same situation would apply to the name "H. Spencer". Assuming that neither "L. Baker" nor "H. Spencer" was a fictitious name, it was necessary for the prosecution to show that neither of those persons was authorized to sign the check, and if authorized, that neither of them had either signed the check or authorized his name to be signed by defendant thereto. [Citations.] No attempt was made by the prosecution so to do. In fact, neither J. M. McKenzie nor any other officer of the corporation was called as a witness.

(*People v. Hidalgo* (1933) 128 Cal.App. 703, 707.)

Document Need Not be Specifically Listed

> [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. Guy-Alexander* (1995) 32 Cal.App.4th 735, 741–742.)

> The test is not the designation of the document; it has been repeatedly held that the forms of forgery set forth in section 470 are not exclusive. [Citations.] Whether the forged instrument is one of a particular name or character or, if genuine would create legal

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> liability, is immaterial; the test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine.

(*People v. Vincent* (1993) 19 Cal.App.4th 696, 700 [citations and quotation marks omitted].)

Forged Document Must Affect Legal Right—Pecuniary Right Not Required

> The statutory offense of forgery, "whether it be of making or sending of a fabricated instrument, requires an intention to defraud. [Citation.] More importantly, the controlling case law plainly indicates that only schemes to prejudice, damage or defraud persons as to their legal rights, generally money or property, are within the ambit of section 470." (*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 398-399.)

(*People v. Vincent* (1993) 19 Cal.App.4th 696, 700.)

> The prohibitory ambit of the forgery statute includes a writing which apparently affects a legal right. Intent to defraud under section 470 is limited to purposes concerning money or property or *identifiable legal rights*.

(*People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 743 [italics in original, quotation marks and citation omitted.])

In *People v. Guy-Alexander*, *supra*, 32 Cal.App.4th at p. 744, the court held that the defendant was properly convicted of forgery where the document she forged was a removal order, requesting that a prisoner be moved from state prison to county jail. Noting that the defendant had also been convicted of conspiracy to escape, the court stated, “the forged removal order was intended to deprive a specific public agency (the Department of Corrections) of a tangible legal right, Alexander's lawful custody.” (*Id.* at p. 744.)

On the other hand, in *Lewis v. Superior Court*, *supra*, 217 Cal.App.3d at pp. 398-399, the court held that a forgery conviction could not be based on a letter endorsing a political candidate to which the defendant falsely signed the name of President Reagan. The court stated:

> Unless the consequential harm of the fabrication is a loss, damage, or prejudice of a legal right, generally a pecuniary or property right, there is no harm of the kind to which the statute is directed and

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> hence no forgery. The attempted persuasion of another to vote does not implicate such a right.

(Ibid.)

Actual Loss Not Necessary

"Failure to consummate the intended fraud is not of the essence." (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801.)

Unanimity

> [W]here the state charges fewer counts of forgery than the number of forged instruments shown by the evidence, a unanimity instruction may be required, as in any case where the information charges fewer offenses than are proved by the evidence and it cannot be assured that the jury will be unanimous as to which crime the defendant committed. [Citation.]

(*People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.)

Each Forged Document May Support Separate Charged

> The real essence of the crime of forgery, however, is not concerned with the end, i.e., what is obtained or taken by the forgery; it has to do with the means, i.e., the act of signing the name of another with intent to defraud and without authority, or of falsely making a document, or of uttering the document with intent to defraud. Theft pursuant to a plan can be viewed as a large total taking accomplished by smaller takings. It is difficult to apply an analogous concept to forgery. The designation of a series of forgeries as one forgery would be a confusing fiction. . . .
>
> Here, each forgery was certainly not a means for the accomplishment of any of the others. Nor was it a means to the immediate end of any of the others. Each act of forgery was committed for the taking of certain goods, separate from and unrelated to the goods taken by the other forgeries.

(*People v. Neder* (1971) 16 Cal.App.3d 846, 852–854.)

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Return of Property

> In *People* v. *Braver* [1964] 229 Cal.App.2d 303, 307-308, it was held that evidence of restitution, though not a defense to fraud, does tend to show that no fraud was intended. . . .
>
> Accordingly, under the principles of *Braver* Sahati was entitled to and did present evidence of his attempts at repayment of the various loans in an endeavor to convince the jury that he did not know the certificates were false and therefore lacked the requisite specific intent to defraud. The claim of defendant is not that he was prevented from offering evidence of repayment, but that the court by its instructions misled the jury into believing that Sahati's repayments were irrelevant. The instructions given by the court on the subject of repayment are set out verbatim in the footnote. n7
>
> n7 "It is not a defense to a prosecution for theft that after the theft was committed complete or partial restitution was made to the owner of the stolen property or that this loss was wholly or partly recouped by other means." . . .
>
> Sahati contends, however, that a further instruction was required on the specific subject of repayments. . . .
>
> [We] do not think that the court erred in failing to instruct on this subject *sua sponte*, although such an instruction would have been proper under *Braver* if requested.

(*People v. Katzman* (1968) 258 Cal.App.2d 777, 790–792.)

> As a general proposition, subsequent restoration, restitution or repayment is not a defense to the crime of forgery. [Citations.] It is recognized in *People* v. *Braver, supra*, upon which defendant relies, that, in some instances evidence of repayment may be relevant to disprove the defendant's intent to defraud, an essential element of the crime of forgery. In *Braver*, the defendant signed his aunt's and uncle's name on a promissory note and a chattel mortgage in obtaining a loan. The defendant then made payments on the note. The court, in reversing the conviction, found that the defendant's making payments on the loan constituted some evidence that he had no intent to defraud at the time the loan was sought and obtained.

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> In the case at bench, however, there was no loan transaction and no continuing obligation to repay such as exists in the case of a loan. The crime was complete when the check was cashed, and repayment by defendant after his arrest was not relevant to show his lack of intent to defraud when he endorsed and cashed the check.

(*People v. Parker* (1970) 11 Cal.App.3d 500, 510.)

> We hold that in a prosecution for violation of Penal Code section 470, in the absence of evidence that the defendant had authority to affix either his name or some other person's name to the instrument, or that he did not know the instrument was false at the time he passed it, the bare fact of restitution or repayment is irrelevant as having no tendency in reason to prove or disprove any fact that is of consequence in the action. [Citations.]

(*People v. Wing* (1973) 32 Cal.App.3d 197, 202 [footnote omitted].)

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1450B. Forgery by Endorsement

The defendant is charged [in Count __] with forgery committed by endorsement.

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 _____** *<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.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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 types of documents 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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BENCH NOTES

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

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, 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.)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give Instruction 1455, 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; *People v. Maiolo* (1933) 135 Cal.App. 205, 207.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Forgery by Endorsement ▸ *People v. Maldonado* (1963) 221 Cal.App.2d 128, 133–134; *In re Valencia* (1927) 84 Cal.App. 26, 26.
Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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

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LESSER INCLUDED OFFENSES

Attempted Forgery ▸ Pen. Code, §§ 663, 470.

RELATED ISSUES

See the Related Issues section of the Bench Notes for Instruction 1450, Forgery by False Signature.

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STAFF NOTES

Penal Code, § 470:

(a) Every person who, with the intent to defraud, knowing that he or she has no authority to do so, signs the name of another person or of a fictitious person to any of the items listed in subdivision (d) is guilty of forgery.

Endorsement

> From the evidence produced before the magistrate it appears that a pay-roll voucher of the Southern Pacific Company, a corporation, was issued and delivered to its employee Luis Sanchez, payable in the sum of $ 10.27 when properly indorsed by the payee. This voucher was lost by Sanchez or was stolen from him. According to some of the testimony, the voucher came into the hands of Valencia, who turned it over to one Reynosa, with instructions to cash it. Reynosa indorsed upon the voucher not the name "Luis Sanchez," but the name "Luis Gonzales." With this paper so indorsed he succeeded in delivering it to a merchant, who paid him the face value thereof.
>
> Omitting sundry other circumstances shown by the evidence, the one clear point appears that the act of forgery was not committed. There is no charge that the instrument itself was forged, but only that the indorsement was forged. Necessarily, this could only be accomplished by writing the name "Luis Sanchez." We may concede that a slight variation in spelling of the name might occur, and the act still remain a forgery. But when a distinctly different name is used, it is not a forgery. So here, the writing of the name "Gonzales" cannot be accepted as a forgery of the name "Sanchez." For the purposes of this proceeding, we cannot be concerned with the fact that the defendant may have committed another kind of crime when he, together with Reynosa, obtained said sum of money in the manner described by the testimony. The record is that petitioner has been committed and held to answer to the crime of forgery without any evidence that there was a forgery.

(*In re Valencia* (1927) 84 Cal.App. 26, 26.)

> [A]ppellant argues that an endorsement is no part of a check, that the evidence falls short of forgery of a check as charged and that forgery

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> of endorsement thereon is not alleged in the information. Appellant's position is not sound, for not only is the evidence such that the jury could properly infer that defendant forged the checks alleged and the proof unquestionably shows that he forged the endorsement on the reverse side of each, but under section 470, Penal Code, and the holding in *People* v. *Jones*, 12 Cal.App. 129 decided in 1909, forgery of endorsement is properly alleged in each count of the information. In defining forgery, section 470 specifies numerous instruments that may be the subject of that offense listing by name all kinds and character of writing; and it was early held in *People* v. *Jones*, 12 Cal.App. 129, that an "order for money" within the meaning of that section includes the endorsement of the name of the payee on the reverse side of the check. Said the court therein on page 132: "The indorsement of a check is equivalent to an 'order for money,' and therefore is included within section 470." In the instant case each count not only alleges forgery of "a certain check" but specifically includes therein forgery of "an order in writing for the payment of money."
>
> The offenses of forgery of endorsement having been properly pleaded, we find the evidence overwhelming in its support of defendant's guilt. The minimum elements required to be proved in a charge of forging an instrument are the actual making of the false writing and the intent to defraud. [Citations.] Two handwriting experts established the endorsement on the reverse side of each check (Exs. 1 through 4), "Joseph G. Carr 4731 Waring Ave LA, Calif.," to be in the handwriting of the defendant; and from this and other evidence the jury had a right to infer that defendant intended to defraud someone. [Citations.] Moreover, direct and circumstantial evidence supporting the conclusion that defendant presented the checks with their forged endorsements receiving therefor goods and cash, is an added circumstance for the consideration of the jury.

(*People v. Luizzi* (1960) 187 Cal.App.2d 639, 644–645.)

> When defendant bought the Rangels' car he had title placed in the name of Sydney Brotman, doing business as "Syd Brotman, Used Cars." Representing to Enoch Chevrolet that the car belonged to Brotman defendant caused a check to be issued to Brotman for $ 2,000 and a check to himself for $ 25 for finding the deal. Without authority from Brotman defendant endorsed the $ 2,000 check "Syd Brotman, Used Cars," by himself, and received for it a cashier's check for $ 1,300 payable to

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> Brotman and $ 700 in cash. He gave the cahier's check to Brotman. He owned Brotman some $ 200. He caused Brotman to pay to a customer about $ 650 which defendant owed and from time to time received from Brotman sums amounting to several hundred dollars. Defendant used Brotman's name in the transaction with the Rangels without his knowledge or consent.
>
> The crime of forgery of endorsement is complete when one passes a false instrument with intent to defraud. In determining this intent, the test is whether upon its face the false instrument will have the effect of defrauding one who acts upon it as genuine. [Citations.]
>
> The evidence does not support the conviction, under count III, of forging Brotman's name to the $ 2,000 check. Although Brotman did not authorize the endorsement or cashing of the check he was not defrauded. If defendant had not used Brotman as a dummy to obtain an additional $ 25 from Enoch Chevrolet he could have had the check made payable to himself. The Rangels were not entitled to receive the money and they were not defrauded by defendant's endorsement of the check. And since an intent to defraud is an element of the crime of forgery under section 470 of the Penal Code (*People* v. *Valdes*, 155 Cal.App.2d 613 [318 P.2d 118]), the conviction under count III must be reversed for insufficiency of the evidence.

(*People v. Maldonado* (1963) 221 Cal.App.2d 128, 133–134.)

See Notes to Instruction 1450.

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1451. Forgery of Handwriting or Seal

The defendant is charged [in Count __] with forging [or counterfeiting] the (handwriting/seal) of another person.

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 of document that could defraud; see discussion in Related Issues>***.**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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 types of documents 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].]**

BENCH NOTES

Instructional Duty

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

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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.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, 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.)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give Instruction 1455, 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. Guy-Alexander* (1995) 32 Cal.App.4th 735, 741–742.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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

LESSER INCLUDED OFFENSES

Attempted Forgery ▸ Pen. Code, §§ 663, 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

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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 [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. Guy-Alexander* (1995) 32 Cal.App.4th 735, 741–742.) 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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STAFF NOTES

Penal Code, § 470, in relevant part:

> (b) Every person who, with the intent to defraud, counterfeits or forges the seal or handwriting of another is guilty of forgery.

Elements

> The crime of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud. (Sec. 470, Pen. Code.) Whether the forged instrument is one of a particular name or character or, if genuine, would create legal liability, is immaterial; the test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine.

(*People v. McKenna* (1938) 11 Cal.2d 327, 332.)

> Forgery has three elements: a writing or other subject of forgery, the false making of the writing, and intent to defraud. [Citation.] The subject of forgery is ordinarily an instrument or other writing which, if genuine, would create some legal right or obligation. [Citation.] Section 470 sets forth a long list of various documents which are the subject matter for forgery. This recital is supplemented by other statutes which prohibit special types of forgery, e.g., forgery of public or corporate seals, trademarks, drivers' licenses, telephone messages, public transportation tickets, narcotic or other prescriptions, etc. [Citation.] . . .

(*People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 741–742.)

Document Need Not be Specifically Listed

> [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.

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(*People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 741–742.)

> The test is not the designation of the document; it has been repeatedly held that the forms of forgery set forth in section 470 are not exclusive. [Citations.] Whether the forged instrument is one of a particular name or character or, if genuine would create legal liability, is immaterial; the test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine.

(*People v. Vincent* (1993) 19 Cal.App.4th 696, 700 [citations and quotation marks omitted].)

Forged Document Must Affect Legal Right—Pecuniary Right Not Required

> The statutory offense of forgery, "whether it be of making or sending of a fabricated instrument, requires an intention to defraud. [Citation.] More importantly, the controlling case law plainly indicates that only schemes to prejudice, damage or defraud persons as to their legal rights, generally money or property, are within the ambit of section 470." (*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 398-399.)

(*People v. Vincent* (1993) 19 Cal.App.4th 696, 700.)

> The prohibitory ambit of the forgery statute includes a writing which apparently affects a legal right. Intent to defraud under section 470 is limited to purposes concerning money or property or *identifiable legal rights*.

(*People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 743 [italics in original, quotation marks and citation omitted.])

In *People v. Guy-Alexander, supra,* 32 Cal.App.4th at p. 744, the court held that the defendant was properly convicted of forgery where the document she forged was a removal order, requesting that a prisoner be moved from state prison to county jail. Noting that the defendant had also been convicted of conspiracy to escape, the court stated, “the forged removal order was intended to deprive a specific public agency (the Department of Corrections) of a tangible legal right, Alexander's lawful custody.” (*Id.* at p. 744.)

On the other hand, in *Lewis v. Superior Court, supra,* 217 Cal.App.3d at pp. 398-399, the court held that a forgery conviction could not be based on a letter

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endorsing a political candidate to which the defendant falsely signed the name of President Regan. The court stated:

> Unless the consequential harm of the fabrication is a loss, damage, or prejudice of a legal right, generally a pecuniary or property right, there is no harm of the kind to which the statute is directed and hence no forgery. The attempted persuasion of another to vote does not implicate such a right.

(Ibid.)

Intent to Defraud
See Notes to Instruction 1450.

Unanimity
See Notes to Instruction 1450.

Return of Property
See Notes to Instruction 1450.

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1452. Forgery by Altering or Falsifying Will or Other Legal Document

---

The defendant is charged [in Count __] with forgery committed by (altering[,]/ corrupting[,]/ [or] falsifying) a legal document.

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

1. **The defendant (altered[,]/ corrupted[,]/ [or] falsified) a document.**

2. **That document was a [record of a] (will[,]/ codicil[,]/ conveyance[,]/ [or] court judgment[,]/ [or] an officer's return to a court's process/ [or other] legal writing that the law accepts as evidence).**

AND

3. **When the defendant (altered[,]/ [or] corrupted[,]/ [or] falsified) the document, (he/she) intended to defraud.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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 (altered[,]/ [or] corrupted[,]/ [or] falsified) the following documents: _____ *<insert types of documents when multiple items alleged>*. **You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (altered[,]/ [or] corrupted[,]/ [or] falsified) at least one of these documents and you all agree on which document (he/she) (altered[,]/ [or] corrupted[,]/ [or] falsified).]**

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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.

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.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, 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.)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give Instruction 1455, Forging and Passing or Attempting to Pass: Two Theories in One Count.

If the prosecution alleges that the document was "corrupted," the court may need to draft a definition of this term based on the evidence.

AUTHORITY

Elements ▸ Pen. Code, § 470(c).
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Alteration Defined ▸ *People v. Nasseth* (1954) 127 Cal.App.2d 712, 718–720; *People v. Hall* (1942) 55 Cal.App.2d 343, 352.
Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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

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Attempted Forgery ▸ Pen. Code, §§ 663, 470.

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STAFF NOTES

Penal Code, § 470:

> (c) Every person who, with the intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court or the return of any officer to any process of any court, is guilty of forgery.

Forgery by Alteration

> [T]he alteration of an existing instrument, so as to give to it a different effect, was forgery**,** (Roscoe Crim. Ev. 488). "Any alteration of a genuine instrument, in the material part, whereby a new operation is given to it, is a forgery of the whole," (2 Whart. Am. Crim. Law, § 1,421). And when a genuine instrument is so altered, the forgery may be specially alleged, as constituted by the alteration, or the forgery of the entire instrument may be alleged. As altered, it is a forgery of the whole, (*State* v. *Weaver*, 13 Ired. 491).

(*People v. Brotherton* (1874) 47 Cal. 388, 401.)

> The crime of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud. (Sec. 470, Pen. Code.) Whether the forged instrument is one of a particular name or character or, if genuine, would create legal liability, is immaterial; the test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine.

(*People v. McKenna* (1938) 11 Cal.2d 327, 332.)

> Likewise, the rule is established in California that alteration of a document without authority with the intent to defraud may constitute forgery and that such alteration may consist of the insertion of matter in the document in question after it has been signed.

(*People v. Nasseth* (1954) 127 Cal.App.2d 712, 720.) The alteration must make a material difference to the document. (*Id.* at p. 718.)

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> Coming to the forgery charge, we think the evidence above recited is ample to support the jury's verdict. From it the jury could find that after Frank had signed the deed and delivered it to defendant the latter, without Frank's knowledge or consent, changed the name of the grantee and used the deed so altered as a means of obtaining payment from Yebras for the property then appearing to be conveyed to him by it. A deed so altered is, of course, void and ineffective as a conveyance to the person whose name is so inserted as grantee. This is sufficient to satisfy the provision of section 470 of the Penal Code . . ..”

(*People v. Hall* (1942) 55 Cal.App.2d 343, 352.)

> To alter has been judicially defined to mean modifying something without changing it into something else. [Citation.] It is established that an alteration of a negotiable instrument means a physical alteration of the instrument in such a manner as to mutually affect the rights of the parties. [Citation.] As used in connection with the forgery statutes in the Penal Code (§ 470 et seq.), it is recognized that alteration is within the definition of forgery and is precise enough to give adequate notice to persons of ordinary intelligence. (See 1 Witkin, *op. cit*., § 503, p. 458.)
>
> Although the sections involved here are found in another code, the juxtaposition of the words "counterfeit" in both sections and the word "forged" in section 19667 makes it clear that the alteration referred to and prohibited is an alteration with intent to defraud, and not a mere innocent mutilation of the parimutuel ticket.

(*People v. Bratis* (1977) 73 Cal.App.3d 751, 757.)

See Notes to Instruction 1450.

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1453. Forgery by Falsifying, Altering, or Counterfeiting Document

---

The defendant is charged [in Count __] with forgery committed by (falsely making[,]/ [or] altering[,]/ [or] forging[,]/ [or] counterfeiting) a document.

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 _____** *<insert type of document from Pen. Code, § 470(d)>***.**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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 types of documents 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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BENCH NOTES

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

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, 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.)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give Instruction 1455, 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; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Alteration Defined ▸ *People v. Nasseth* (1954) 127 Cal.App.2d 712, 718–720; *People v. Hall* (1942) 55 Cal.App.2d 343, 352.
Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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

LESSER INCLUDED OFFENSES

Attempted Forgery ▸ Pen. Code, §§ 663, 470.

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STAFF NOTES

Penal Code, § 470:

> (d) 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 following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check, bond, bank bill, or note, cashier's check, traveler's check, money order, post note, draft, any controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, receipt for money or goods, bill of exchange, promissory note, order, or any assignment of any bond, writing obligatory, or other contract for money or other property, contract, due bill for payment of money or property, receipt for money or property, passage ticket, lottery ticket or share purporting to be issued under the California State Lottery Act of 1984, trading stamp, power of attorney, certificate of ownership or other document evidencing ownership of a vehicle or undocumented vessel, or any certificate of any share, right, or interest in the stock of any corporation or association, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release or discharge of any debt, account, suit, action, demand, or any other thing, real or personal, or any transfer or assurance of money, certificate of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal; or any matter described in subdivision (b).

Elements

> Forgery has three elements: a writing or other subject of forgery, the false making of the writing, and intent to defraud. [Citation.] The subject of forgery is ordinarily an instrument or other writing which, if genuine, would create some legal right or obligation. [Citation.] Section 470 sets forth a long list of various documents which are the subject matter for forgery. This recital is supplemented by other statutes which prohibit special types of forgery, e.g., forgery of public or corporate seals, trademarks, drivers' licenses, telephone

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> messages, public transportation tickets, narcotic or other prescriptions, etc. [Citation.] . . .

(*People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 741–742.)

Forgery by Alteration

> [T]he alteration of an existing instrument, so as to give to it a different effect, was forgery**,** (Roscoe Crim. Ev. 488). "Any alteration of a genuine instrument, in the material part, whereby a new operation is given to it, is a forgery of the whole," (2 Whart. Am. Crim. Law, § 1,421). And when a genuine instrument is so altered, the forgery may be specially alleged, as constituted by the alteration, or the forgery of the entire instrument may be alleged. As altered, it is a forgery of the whole, (*State* v. *Weaver*, 13 Ired. 491).

(*People v. Brotherton* (1874) 47 Cal. 388, 401.)

> The crime of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud. (Sec. 470, Pen. Code.) Whether the forged instrument is one of a particular name or character or, if genuine, would create legal liability, is immaterial; the test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine.

(*People v. McKenna* (1938) 11 Cal.2d 327, 332.)

> Likewise, the rule is established in California that alteration of a document without authority with the intent to defraud may constitute forgery and that such alteration may consist of the insertion of matter in the document in question after it has been signed.

(*People v. Nasseth* (1954) 127 Cal.App.2d 712, 720.) The alteration must make a material difference to the document. (*Id.* at p. 718.)

> Coming to the forgery charge, we think the evidence above recited is ample to support the jury's verdict. From it the jury could find that after Frank had signed the deed and delivered it to defendant the latter, without Frank's knowledge or consent, changed the name of the grantee and used the deed so altered as a means of obtaining payment from Yebras for the property then appearing to be

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> conveyed to him by it. A deed so altered is, of course, void and ineffective as a conveyance to the person whose name is so inserted as grantee. This is sufficient to satisfy the provision of section 470 of the Penal Code . . ..”

(*People v. Hall* (1942) 55 Cal.App.2d 343, 352.)

> To alter has been judicially defined to mean modifying something without changing it into something else. [Citation.] It is established that an alteration of a negotiable instrument means a physical alteration of the instrument in such a manner as to mutually affect the rights of the parties. [Citation.] As used in connection with the forgery statutes in the Penal Code (§ 470 et seq.), it is recognized that alteration is within the definition of forgery and is precise enough to give adequate notice to persons of ordinary intelligence. (See 1 Witkin, *op. cit*., § 503, p. 458.)
>
> Although the sections involved here are found in another code, the juxtaposition of the words "counterfeit" in both sections and the word "forged" in section 19667 makes it clear that the alteration referred to and prohibited is an alteration with intent to defraud, and not a mere innocent mutilation of the parimutuel ticket.

(*People v. Bratis* (1977) 73 Cal.App.3d 751, 757.)

Intent to Defraud
See Notes to Instruction 1450.

Unanimity
See Notes to Instruction 1450.

Return of Property
See Notes to Instruction 1450.

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1454. Forgery by Passing or Attempting to Use Forged Document

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

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 (false[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) _____** *<insert type of document from Pen. Code, § 470(d)>***.**

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

AND

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

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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.

[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 (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) the following documents: _____ *<insert types of documents 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).]**

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant 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.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72, 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.)

If the prosecution also alleges that the defendant forged the same document, give Instruction 1455, Forging and Passing or Attempting to Pass: Two Theories in One Count.

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AUTHORITY

Elements ▸ Pen. Code, § 470(d).
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
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 [overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122].
Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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

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, 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 [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."

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STAFF NOTES

Penal Code, § 470, in relevant part:

> (d) 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 following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check, bond, bank bill, or note, cashier's check, traveler's check, money order, post note, draft, any controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, receipt for money or goods, bill of exchange, promissory note, order, or any assignment of any bond, writing obligatory, or other contract for money or other property, contract, due bill for payment of money or property, receipt for money or property, passage ticket, lottery ticket or share purporting to be issued under the California State Lottery Act of 1984, trading stamp, power of attorney, certificate of ownership or other document evidencing ownership of a vehicle or undocumented vessel, or any certificate of any share, right, or interest in the stock of any corporation or association, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release or discharge of any debt, account, suit, action, demand, or any other thing, real or personal, or any transfer or assurance of money, certificate of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal; or any matter described in subdivision (b).
>
> [Subdivision (b) reads: “Every person who, with the intent to defraud, counterfeits or forges the seal or handwriting of another is guilty of forgery.”]

Elements

> Appellant clearly committed a forgery for, although there was no evidence that he signed Webb's name, he did attempt to pass or utter ("make use of": *People* v. *Jones* (1962) 210 Cal.App.2d 805, 807) the check knowing it to be false and with the necessary intent.

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(*People v. Landry* (1971) 14 Cal.App.3d 445, 447.)

Utter

> The words "utter" and "publish," in the law of forgery, are synonymous, for the meaning of both is "to declare or assert, directly or indirectly, by words or actions," that the forged instrument is genuine. Thus, to offer a forged bank note in payment, is both to utter it and to publish it. To complete the offense of uttering and publishing, it is not necessary that the note should be passed. Hence "to pass" is not synonymous with "uttering" and "publishing;" nor is "attempting to pass" synonymous with "passing."

(*People v. Tomlinson* (1868) 35 Cal. 503, 509.)

> A violation of [this statute] can consist of "uttering" a false prescription for drugs, as well as passing such a prescription. The word "utter" means to use or *attempt to use* an instrument, whereby or in connection with which, a person asserts or represents to another, directly or indirectly, expressly or impliedly, by words or conduct, that the instrument is genuine. (CALJIC No. 15.25 (3d ed. 1970).)

(*People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [footnote omitted, emphasis in original, overruled on other grounds *People v. Anderson* (1987) 43 Cal.3d 1104, 1122].)

> “Utter” means to "use or *attempt to use* an instrument, whereby or in connection with which a person asserts or represents to another, directly or indirectly, expressly or impliedly, by words or conduct, that the instrument is genuine."

(*People v. Pugh* (2002) 104 Cal.App.4th 66, 73.)

Staff has drafted the instructing replacing the statutory word “utter” with the more understandable “use or attempt to use.”

Overt Act Required

> Section 470 of the Penal Code . . . makes a forgery of any one or all of three different kinds of act: . . . 3. The crime is committed if he so

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> attempt to pass such counterfeited matters, et cetera. In criminal law, an attempt to pass a false instrument as genuine is an uttering, even if the attempt fail. But the codifiers for clearness have specifically declared that an attempt to pass shall constitute the crime. . . . [T]he jury was told that if one having a forged instrument in his possession, knowing it to be forged, delivers it to another, with intent to have it uttered, published, and passed as genuine, he is guilty of forgery. But such was not the common law, and such is not the law under our code.
>
> In general, before an attempt to commit a crime can be made out, some overt act *toward* its commission, other than a mere act of preparation *for* its commission, must be established. . . . Now, the essence of the third class of forgeries is the attempt to injure an innocent person by foisting upon him a known false instrument. As is aptly said in *People v. Rathbun*, 21 Wend. 509, where the subject is learnedly and exhaustively considered: "Uttering implies two parties, a party acting and one acted upon. If it be by way of sale, there must be a vendee; if by pledge, there must be a pledgee; if by offer, there must be some one present to hear the offer. And, if it simply declare its goodness, there must be someone addressed as reader or hearer."
>
> Therefore, if one deliver to his agent a false instrument with the design that the agent shall utter or pass it, the crime of uttering or attempting to pass is not complete until after some overt act done by the agent to this end, for, until this shall come to pass, in contemplation of law the paper is still within the control of the principal, and all the steps are but steps of preparation. Equally true is it that if A and B should conspire to commit a crime, and A should deliver a forged instrument to B, by whom it was to be uttered, and B should destroy the paper without attempting to pass it, the crime of uttering or attempting to pass would not have been committed, for there would have been no effort to foist it upon an innocent person, and, as has been said, if the uttering is by offer, the offer must be made to some one. The instruction under consideration announced an opposite rule, and was, therefore, erroneous.

(*People v. Compton* (1899) 123 Cal. 403, 409–411 [italics in original, paragraph breaks inserted].)

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Sufficient Evidence of Attempt to Pass

Defendant urges that he did not attempt to pass the check. In his testimony at the trial he claimed that he took the check in question as security for a loan which he had previously made to the named payee, Tommy Carpenter, and that his purpose in presenting the check to the clerk in the cigar store was "To find out if this check was negotiable, whether it was any good." He further claims that the testimony of the witness for the prosecution, Miss Pins, corroborated this fact, and that the prosecution failed to establish any attempt by defendant to make use of the check.

As against these contentions we have the following evidence which is supportive of the jury's implied finding that defendant intended and was attempting to pass the check in question: Miss Pins testified that she heard defendant ask the clerk whether the check could be cashed; defendant gave an affirmative answer when she asked "'is this your check?'" "'do you work there [at the Ensign Cafe]?'"; when the validity of the check was questioned defendant appeared to be in a hurry to retrieve it and to leave the store. With respect to the latter circumstance, while there is no evidence that defendant attempted to flee the scene, the jury could nevertheless reasonably infer that his acts demonstrated a consciousness of guilt. [Citation.] The record also discloses that after the police arrived, defendant persisted in his false representations that he was Tommy Carpenter, that the check in question was his, and that it was in payment for working at the Ensign Cafe.

Although the evidence is sufficient to support a finding that defendant attempted to pass the check in question, in order to constitute the offense of uttering a forgery as that offense is defined in section 470, two other factors must be present: (1) It must be known to the person attempting to pass the check that it is not genuine [citations] and (2) the uttering must be done with the intent to prejudice, damage, or defraud some person. [Citations.] It is established that the requisite specific intent can be inferred from a finding that the defendant attempted to pass a check which he knew to be false. [Citations.]

In the instant case there is sufficient evidence from which it could be inferred that defendant knew the check was not genuine and that he intended to defraud the proprietor of the cigar store. Supportive of

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> this inference is the testimony by both Inspector Hall and Miss Pins that defendant stated he worked at the Ensign Cafe, the drawer of the subject check; the testimony by Miss Pins that defendant told her the cafe was "already closed" when she attempted to locate its telephone number; the testimony of Hall and Patrolman Buckley that the cafe was no longer in business; and the evidence of defendant's attempt to pull the check from the proprietor's hand and defendant's eagerness to leave the store.

(*People v. Fork* (1965) 233 Cal.App.2d 725, 730–731.)

True and Genuine

> The court gave the following instruction on uttering: "Now, in order to prove the commission of such crime [uttering], each of the following elements must be proved, each of them. Here we go.
>
> "Number one, that a person passed or offered to pass a forged instrument. That is the first one.
>
> "Two that such person knew that the instrument was forged; and three, that such person passed or offered to pass such instrument with the specific intent to defraud another person or persons."
>
> Prantil correctly says this instruction omits the requirement that the defendant intend to pass the forged instrument as "true and genuine."

(*People v. Prantil* (1985) 169 Cal.App.3d 592, 605–606.)

Intent to Defraud
See Notes to 1450.

Unanimity
See Notes to 1450.

Return of Property
See Notes to 1450.

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1455. Forging and Passing or Attempting to Pass: Two Theories in One Count

---

The defendant is charged [in Count __] with forgery of _____ *<insert type of document from Pen. Code, §470(d)>***.**

The defendant is being prosecuted for forgery under two theories: (1) that the defendant forged the document; and (2) that the defendant (passed[,]/ used[,]/ [or] (attempted/ [or] offered) to use) the forged document.

Each theory of forgery has different requirements, and I have instructed you on both.

You may not find the defendant guilty of forgery unless all of you agree that the People have proved that the defendant committed forgery under at least one theory. But all of you do not have to agree on the same theory.

BENCH NOTES

Instructional Duty

This instruction is to be given when the prosecution pursues the two theories of forgery of a single document in one count. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 618–619.)

AUTHORITY

Unanimity on Theory Not Required ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 618–619.

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

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STAFF NOTES

Unanimity on Theory Not Required

California's forgery statute defines the offense in the alternative; if the defendant either forges the instrument in question or utters it, the defendant is guilty of forgery so long as either or both acts were done with the intent to defraud. The evidence in this case supported jury conclusions that defendant both forged and uttered the checks in question or, assuming the jury believed part of the evidence but not all, that the defendant committed one act or the other. We therefore must decide whether the trial court erred by failing to ensure jury unanimity on the specific acts which supported each forgery conviction. We consider two questions; first, whether under established principles announced in California cases a unanimity instruction was required in this case, and second, if not, whether due process nonetheless required one. We conclude that the instruction was not required for either reason.

First, we find that under the forgery statute, forging and uttering are different legal theories under which a jury may find the defendant guilty of the generic statutory offense of forgery. Thus, no jury unanimity is required as to whether the defendant's conduct falls into either or both categories; in any case, the jury is unanimous that by one means or another, the defendant has committed a single forgery. [Citation.] We conclude that under well-established principles, no unanimity instruction is required as to a single count of forgery involving a single instrument, even though the evidence shows different acts of forging and acts of uttering.

Second, we conclude that the statutory agglutination of these acts under the rubric of a single offense does not require a unanimity instruction to avoid a due process violation where the evidence shows both categories of acts in the prosecution of a single count arising out of the forging or uttering of a single instrument. n6

n6 Of course, where the state charges fewer counts of forgery than the number of forged instruments shown by the evidence, a unanimity instruction may be required, as in any case where the information charges fewer offenses than are proved by the evidence

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> and it cannot be assured that the jury will be unanimous as to which crime the defendant committed. [Citation.]

(*People v. Sutherland* (1993) 17 Cal.App.4th 602, 618–619 [footnote 5 omitted].)

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1456. Falsifying, Altering, or Counterfeiting a Driver's License

The defendant is charged [in Count __] with (altering[,]/ [or] falsifying[,]/ [or] forging[,]/ [or] duplicating[,]/ [or] reproducing[,]/ [or] counterfeiting) a (driver's license/ [or] government-issued identification card).

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

1. **The defendant (altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or] counterfeited) a (driver's license/ [or] government-issued identification card).**

AND

2. **When the defendant did that act, (he/she) intended that the (driver's license/ [or] identification card) be used to commit forgery.**

Someone *intends to commit forgery* if he or she intends to use a forged, counterfeit, altered, falsified, duplicated, or reproduced document to deceive another person in order to cause a loss of, or 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 *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.]

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

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(altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or] counterfeited).]

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant forged multiple 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.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, 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.)

AUTHORITY

Elements ▸ Pen. Code, § 470a.
Alteration Defined ▸ *People v. Nasseth* (1954) 127 Cal.App.2d 712, 718–720; *People v. Hall* (1942) 55 Cal.App.2d 343, 352.
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 155.

LESSER INCLUDED OFFENSES

Possession of Altered Driver's License ▸ Veh. Code, § 14610; see *People v. Johnson* (1997) 58 Cal.App.4th 482, 486–487 [review granted but subsequently dismissed and remanded to Second Appellate District, Division Five, Nov. 18, 1998, S065957].

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STAFF NOTES

Penal Code, § 470a:

> Every person who alters, falsifies, forges, duplicates or in any manner reproduces or counterfeits any driver's license or identification card issued by a governmental agency with the intent that such driver's license or identification card be used to facilitate the commission of any forgery, is punishable by imprisonment in the state prison, or by imprisonment in the county jail for not more than one year.

See Notes to Instructions 1450-1454.

Lesser Included

> After examining the legal definition of the crime in section 470b, we conclude that the offense described in Vehicle Code section 14610 is not a necessarily included offense of section 470b because section 470b can be violated by possession or display of an unlawful driver's license or identification card, while Vehicle Code section 14610 can be violated only by possession or display of an unlawful driver's license only. Thus, a person who possessed or displayed an unlawful identification card could violate section 470b but not Vehicle Code section 14610.
>
> Here, however, appellant was charged with the crime of possession of a forged driver's license in violation of section 470b in that defendant possessed a driver's license and identification card of the "type enumerated in Penal Code section 470a with the intent that said document be used to facilitate the commission of a forgery." By so charging defendant, the People charged that defendant possessed a driver's license which had been altered, falsified, forged, duplicated or in any manner reproduced or counterfeited. Possession of either a fictitious or a fraudulently altered driver's license is a violation of Vehicle Code section 14610 as well as a violation of section 470b. Thus, the information necessarily charged the defendant with a violation of both section 470b and Vehicle Code section 14610.

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(*People v. Johnson* (1997) 58 Cal.App.4th 482, 486–487 [review granted but subsequently dismissed and remanded to Appellate Court, Nov. 18, 1998, S065957].)

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1457. Possessing or Displaying False, Altered, or Counterfeit Driver's License

The defendant is charged [in Count __] with (possessing[,]/ [or] displaying[,]/ [or] causing [or permitting] to be displayed) (an/a) (altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or] counterfeited) (driver's license/ [or] government-issued identification card).

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

1. **The defendant (possessed[,]/ [or] displayed[,]/ [or] caused [or permitted] to be displayed) a (driver's license/ [or] government-issued identification card).**

2. **The (driver's license/ [or] government-issued identification card) was (altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or] counterfeited).**

3. **The defendant knew that the (driver's license/ [or] government-issued identification card) had been (altered[,]/ [or] falsified[,]/ [or] forged[,]/ [or] duplicated[,]/ [or] reproduced[,]/ [or] counterfeited).**

AND

4. **When the defendant (possessed[,]/ [or] displayed[,]/ [or] caused [or permitted] to be displayed) the (driver's license/ [or] government-issued identification card), (he/she) intended that the document be used to commit forgery.**

Someone *intends to commit forgery* if he or she intends to use a forged, counterfeit, altered, falsified, duplicated, or reproduced document to deceive another person in order to cause a loss of, or 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 *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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[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.]

[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/other people).]

[The People allege that the defendant (possessed[,]/ [or] displayed[,]/ [or] caused [or permitted] to be displayed) the following documents: _____ *<insert types of documents 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] displayed[,]/ [or] caused [or permitted] to be displayed) at least one of these documents and you all agree on which document (he/she) (possessed[,]/ [or] displayed[,]/ [or] caused [or permitted] to be displayed).]**

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant forged multiple 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.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, 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.)

AUTHORITY

Elements ▸ Pen. Code, § 470b.

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Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 155.

LESSER INCLUDED OFFENSES

Possession of Altered Driver's License ▸ Veh. Code, § 14610; see *People v. Johnson* (1997) 58 Cal.App.4th 482, 486–487 [review granted but subsequently dismissed and remanded to Second Appellate District, Division Five, Nov. 18, 1998, S065957].

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STAFF NOTES

Penal Code, § 470b:

> Every person who displays or causes or permits to be displayed or has in his possession any driver's license or identification card of the type enumerated in Section 470a with the intent that such driver's license or identification card be used to facilitate the commission of any forgery, is punishable by imprisonment in the state prison, or by imprisonment in the county jail for not more than one year.

Penal Code, § 470a:

> Every person who alters, falsifies, forges, duplicates or in any manner reproduces or counterfeits any driver's license or identification card issued by a governmental agency with the intent that such driver's license or identification card be used to facilitate the commission of any forgery, is punishable by imprisonment in the state prison, or by imprisonment in the county jail for not more than one year.

See Notes to Instructions 1450-1454.

Lesser Included

> After examining the legal definition of the crime in section 470b, we conclude that the offense described in Vehicle Code section 14610 is not a necessarily included offense of section 470b because section 470b can be violated by possession or display of an unlawful driver's license or identification card, while Vehicle Code section 14610 can be violated only by possession or display of an unlawful driver's license only. Thus, a person who possessed or displayed an unlawful identification card could violate section 470b but not Vehicle Code section 14610.
>
> Here, however, appellant was charged with the crime of possession of a forged driver's license in violation of section 470b in that defendant possessed a driver's license and identification card of the "type enumerated in Penal Code section 470a with the intent that said document be used to facilitate the commission of a forgery." By so charging defendant, the People charged that defendant possessed

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> a driver's license which had been altered, falsified, forged, duplicated or in any manner reproduced or counterfeited. Possession of either a fictitious or a fraudulently altered driver's license is a violation of Vehicle Code section 14610 as well as a violation of section 470b. Thus, the information necessarily charged the defendant with a violation of both section 470b and Vehicle Code section 14610.

(*People v. Johnson* (1997) 58 Cal.App.4th 482, 486–487 [review granted but subsequently dismissed and remanded to Appellate Court, Nov. 18, 1998, S065957].)

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1458. Forgery of Government, Public, or Corporate Seal

The defendant is charged [in Count __] with (forging/ [or] counterfeiting) a (government/public/corporate) seal [or (falsely making[,]/ [or] forging[,]/ [or] counterfeiting) an impression representing a seal].

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

1. **The defendant (forged/ [or] counterfeited) a seal [or (falsely made[,]/ [or] forged[,]/ [or] counterfeited) an impression representing a seal] of (this state[,] /[or] a legally authorized public officer[,] /[or] a court of record[,] /[or] a corporation[,]/ [or] a public seal legally authorized or recognized by any state, government, or country).**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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[,]/ [or] falsely made) the following items: _____ *<insert types of seals or impressions when multiple items alleged>*. **You may not find the defendant guilty unless you all agree that the People have proved that the defendant (forged[,]/ [or] counterfeited[,]/ [or] falsely made) at least one of these items and you all agree on which item (he/she) (forged[,]/ [or] counterfeited[,]/ [or] falsely made).]**

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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.

If the prosecution alleges under a single count that the defendant forged 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.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, 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.)

AUTHORITY

Elements ▸ Pen. Code, § 472.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 155.

LESSER INCLUDED OFFENSES

Attempted Forgery of Seal ▸ Pen. Code, §§ 663, 472.

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STAFF NOTES

Penal Code, § 472:

> Every person who, with intent to defraud another, forges, or counterfeits the seal of this state, the seal of any public officer authorized by law, the seal of any court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this state, or of any other state, government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery.

Elements and Intent to Defraud

> There was substantial evidence to support defendant's conviction for possession of a counterfeit government seal. Section 472 provides . . . [Penal Code] Section 8 provides: "Whenever, by any of the provisions of this Code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever." In this case the jury was instructed with CALJIC No. 15.00 which provides in pertinent part: "In order to prove this crime, each of the following elements must be proved: [P] 1. A person had in his possession a counterfeited impression of a public seal; [P] 2. That person knew the impression to be counterfeit and willfully concealed that fact; and [P] 3. That person acted with the specific intent to defraud another person."
>
> Defendant further argues that because he neither presented nor furnished the resident alien card to obtain money or property of value there is no substantial evidence he had no intent to defraud. Defendant is mistaken. In *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741, the court held: "Forgery has three elements: a writing or other subject of forgery, the false making of the writing, and intent to defraud. (2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Crimes Against Property, § 697, p. 792.) The subject of forgery is ordinarily an instrument or other writing which, if genuine, would create some legal right or obligation. [Citation.]" In *People v. Wilkins* (1972) 27 Cal. App. 3d 763, 773, the court held:

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> "Specific intent as an element of a crime may be proved by circumstantial evidence." [Citations.] The *Wilkins* court held that the defendant's possession of blank sheets of selective service cards and instructions on making California driver's licenses could lead a reasonable trier of fact to infer that he possessed the requisite intent to defraud. [Citation.] In *Lewis v. Superior Court* (1990) 217 Cal. App. 3d 379, 388, the court looked to common law to define forgery: "Making virtually any kind of false document affords an inference that the maker intends to deceive someone. However, only a document with apparent legal efficacy is naturally suited to perpetrate the kind of deception that is strictly speaking a defrauding. Fabricating such a document by that very act affords an inference of an intention to 'defraud,' namely by such deceit to detrimentally accomplish something akin to a theft by false pretenses."
>
> In this instance, the forged or counterfeit resident alien card in defendant's possession did not contain a point of entry on the front of the card. The card represented a combination of Immigration and Nationalization cards issued in 1977 and 1989, had original ink and fingerprint. The forged or counterfeit card did not have a legitimate number. The forged or counterfeit resident alien card bearing defendant's photograph would create a legal right or obligation to someone such as a prospective employer. The employer might reasonably conclude defendant would be lawfully authorized to work in the United States. Likewise, it could be, and apparently was, used to secure a Social Security card in defendant's name. Substantial evidence supports the intent to defraud element.

(*People v. Castellanos* (2003) 110 Cal.App4th 1489, 1493–1494.)

See Notes to Instruction 1450-1454.

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1459. Possession of Forged Government, Public, or Corporate Seal

The defendant is charged [in Count __] with possessing a (forged/ [or] counterfeit) (government/public/corporate) seal [or an impression of a (forged/ [or] counterfeit) (government/public/corporate) seal].

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

1. **The defendant possessed a (forged/ [or] counterfeit) seal [or an impression of a (forged/ [or] counterfeit) seal] of (this state[,] /[or] a legally authorized public officer[,] /[or] a court of record[,] /[or]a corporation[,]/ [or] a public seal legally authorized or recognized by any state, government, or country).**

2. **The defendant knew that the seal [or impression of the seal] was counterfeit.**

3. **The defendant willfully concealed the fact that the seal [or impression of the seal] was counterfeit.**

AND

4. **When the defendant possessed the seal [or impression of the seal], (he/she) intended to defraud.**

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

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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.]

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

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[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/other people).]

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

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant possessed multiple 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.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, 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.)

AUTHORITY

Elements ▸ Pen. Code, § 472.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 155.

LESSER INCLUDED OFFENSES

Attempted Possession of Forged Seal ▸ Pen. Code, §§ 663, 472.

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STAFF NOTES

Penal Code, § 472:

> Every person who, with intent to defraud another, forges, or counterfeits the seal of this state, the seal of any public officer authorized by law, the seal of any court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this state, or of any other state, government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery.

Elements and Intent to Defraud

> There was substantial evidence to support defendant's conviction for possession of a counterfeit government seal. Section 472 provides . . . [Penal Code] Section 8 provides: "Whenever, by any of the provisions of this Code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever." In this case the jury was instructed with CALJIC No. 15.00 which provides in pertinent part: "In order to prove this crime, each of the following elements must be proved: [P] 1. A person had in his possession a counterfeited impression of a public seal; [P] 2. That person knew the impression to be counterfeit and willfully concealed that fact; and [P] 3. That person acted with the specific intent to defraud another person."
>
> Defendant further argues that because he neither presented nor furnished the resident alien card to obtain money or property of value there is no substantial evidence he had no intent to defraud. Defendant is mistaken. In *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741, the court held: "Forgery has three elements: a writing or other subject of forgery, the false making of the writing, and intent to defraud. (2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Crimes Against Property, § 697, p. 792.) The subject of forgery is ordinarily an instrument or other writing which, if genuine, would create some legal right or obligation. [Citation.]" In *People v. Wilkins* (1972) 27 Cal. App. 3d 763, 773, the court held:

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> "Specific intent as an element of a crime may be proved by circumstantial evidence." [Citations.] The *Wilkins* court held that the defendant's possession of blank sheets of selective service cards and instructions on making California driver's licenses could lead a reasonable trier of fact to infer that he possessed the requisite intent to defraud. [Citation.] In *Lewis v. Superior Court* (1990) 217 Cal. App. 3d 379, 388, the court looked to common law to define forgery: "Making virtually any kind of false document affords an inference that the maker intends to deceive someone. However, only a document with apparent legal efficacy is naturally suited to perpetrate the kind of deception that is strictly speaking a defrauding. Fabricating such a document by that very act affords an inference of an intention to 'defraud,' namely by such deceit to detrimentally accomplish something akin to a theft by false pretenses."
>
> In this instance, the forged or counterfeit resident alien card in defendant's possession did not contain a point of entry on the front of the card. The card represented a combination of Immigration and Nationalization cards issued in 1977 and 1989, had original ink and fingerprint. The forged or counterfeit card did not have a legitimate number. The forged or counterfeit resident alien card bearing defendant's photograph would create a legal right or obligation to someone such as a prospective employer. The employer might reasonably conclude defendant would be lawfully authorized to work in the United States. Likewise, it could be, and apparently was, used to secure a Social Security card in defendant's name. Substantial evidence supports the intent to defraud element.

(*People v. Castellanos* (2003) 110 Cal.App4th 1489, 1493–1494.)

See Notes to Instruction 1450-1454.

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1460. Possession of Forged Document

The defendant is charged [in Count __] with (possessing/ [or] receiving) a (forged[,]/ [or] altered[,]/ [or] counterfeit) document.

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

1. **The defendant (possessed/ [or] received) a (forged[,]/ [or] altered[,]/ [or] counterfeit) _____** *<insert type of document 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] facilitate the passage or use of) the document as genuine.**

AND

4. **When the defendant (possessed/ [or] received) the document, (he/she) intended to defraud.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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 types of documents 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.]

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant possessed multiple 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.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72, 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.)

AUTHORITY

Elements ▸ Pen. Code, § 475(a).
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
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.
Alteration Defined ▸ *People v. Nasseth* (1954) 127 Cal.App.2d 712, 718–720; *People v. Hall* (1942) 55 Cal.App.2d 343, 352.

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Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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

RELATED ISSUES

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

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 [11 checks supported 1 count, not 11].)

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STAFF NOTES

Penal Code, § 475:

(a) Every person who possesses or receives, with the intent to pass or facilitate the passage or utterance of any forged, altered, or counterfeit items, or completed items contained in subdivision (d) of Section 470 with intent to defraud, knowing the same to be forged, altered, or counterfeit, is guilty of forgery.

(b) Every person who possesses any blank or unfinished check, note, bank bill, money order, or traveler's check, whether real or fictitious, with the intention of completing the same or the intention of facilitating the completion of the same, in order to defraud any person, is guilty of forgery.

(c) Every person who possesses any completed check, money order, traveler's check, warrant or county order, whether real or fictitious, with the intent to utter or pass or facilitate the utterance or passage of the same, in order to defraud any person, is guilty of forgery.

Penal Code, § 470, in relevant part:

(d) 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 following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check, bond, bank bill, or note, cashier's check, traveler's check, money order, post note, draft, any controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, receipt for money or goods, bill of exchange, promissory note, order, or any assignment of any bond, writing obligatory, or other contract for money or other property, contract, due bill for payment of money or property, receipt for money or property, passage ticket, lottery ticket or share purporting to be issued under the California State Lottery Act of 1984, trading stamp, power of attorney, certificate of ownership or other document evidencing ownership of a vehicle or undocumented vessel, or any certificate of any share, right, or interest in the stock of any corporation or association, or the delivery of goods or chattels of any kind, or for the delivery of any

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> instrument of writing, or acquittance, release or discharge of any debt, account, suit, action, demand, or any other thing, real or personal, or any transfer or assurance of money, certificate of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal; or any matter described in subdivision (b).
>
> [Subdivision (b) reads: "Every person who, with the intent to defraud, counterfeits or forges the seal or handwriting of another is guilty of forgery."]

Utter
See Notes to Instruction 1454.

Intent to Defraud
See Notes to Instruction 1450.

Alteration
See Notes to Instruction 1453.

Possession of Multiple Documents Only One Offense

> [I]n this case appellant possessed all 11 checks at the same time and was guilty of only 1 violation of Penal Code section 475. Although the statute refers to "any check," the singular includes the plural.
>
> The People cite no case supporting multiple counts in these circumstances. *People* v. *Neder*, 16 Cal.App.3d 846, 852-853, is distinguishable because it was a prosecution for forgery under Penal Code section 470 in which it was held that three separate forgeries on three separate sales slips charged on another person's credit card constituted separate offenses. Here the prosecution was based on possession, not forgery. Respondent's argument that there were 11 "potential victims" is not controlling in these circumstances.

(*People v. Bowie* (1977) 72 Cal.App.3d 143, 156–157.)

Unanimity
See Notes to Instruction 1450.

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1461. Possession of Blank Check: With Intent to Defraud

The defendant is charged [in Count __] with possessing a (blank/ [or] unfinished) (check[,]/ [or] note[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] bank bill) with intent to defraud.

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

1. **The defendant possessed a (blank/ [or] unfinished) (check[,]/ [or] note[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] bank bill).**

AND

2. **When the defendant possessed the document, (he/she) intended to complete [or aid the completion of] the document in order to defraud.**

An act is done *in order to defraud* if the person doing it intends to deceive another person to cause a loss of, or 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 (check[,]/ [or] note[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] bank bill) may be real or false.]

[The People allege that the defendant possessed the following documents: _____ <*insert types of documents 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.]

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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.

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.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, 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.)

AUTHORITY

Elements ▸ Pen. Code, § 475(b).
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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

RELATED ISSUES

Possession of Multiple Documents Only One Offense
Even if the defendant possessed multiple 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 [11 checks supported 1 count, not 11].)

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STAFF NOTES

Penal Code, § 475:

> (b) Every person who possesses any blank or unfinished check, note, bank bill, money order, or traveler's check, whether real or fictitious, with the intention of completing the same or the intention of facilitating the completion of the same, in order to defraud any person, is guilty of forgery.

Intent to Defraud
See Notes to Instruction 1450.

Possession of Multiple Documents Only One Offense
See Instruction 1460.

Unanimity
See Notes to Instruction 1450.

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1462. Possession of Completed Check: With Intent to Defraud

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.

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.**

An act is done *in order to defraud* if the person doing it intends to deceive another person to cause a loss of, or 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 types of documents 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.]**

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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.

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.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72, 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.)

AUTHORITY

Elements ▸ Pen. Code, § 475(c).
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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

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RELATED ISSUES

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

Possession of Multiple Documents Only One Offense
Even if the defendant possessed multiple 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 [11 checks supported 1 count, not 11].)

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STAFF NOTES

Penal Code, § 475:

> (c) Every person who possesses any completed check, money order, traveler's check, warrant or county order, whether real or fictitious, with the intent to utter or pass or facilitate the utterance or passage of the same, in order to defraud any person, is guilty of forgery.

Forged Check is "Completed"

> As we understand it, the only question on appeal is defendant's contention that he did not violate Penal Code, section 475a because: (a) section 475a contemplates a genuine check and appellant possessed a forged check . . .
>
> We see no merit to the contention that section 475a requires that the check be genuine. The section applies to a "completed check" in possession "whether the parties thereto are real or fictitious."

(*People v. Bartsch* (1963) 217 Cal.App.2d 318, 320–321.)

Check Need Not be Endorsed

> The question then is whether the check in evidence was *completed* within the meaning of that section. The check was filled in on its face. Defendant argues that it was not completed because it was not endorsed by Bill Bailey. The additional act of forging Bill Bailey's signature as an endorsement by defendant was not necessary to complete the forged instrument. Defendant was passing himself off as Bill Bailey for this purpose and when arrested he said that he was Bill Bailey, and it does appear that defendant would not have hesitated to identify himself as Bailey if he had gone to cash the check.

(*People v. Bartsch* (1963) 217 Cal.App.2d 318, 321.)

May Not Be Convicted of Both Possessing and Uttering Same Instrument

> [T]he crime of violating Penal Code section 475a is an offense necessarily included within the crime of forgery by uttering. To

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> knowingly utter a forged check with the intent to defraud, it is obviously necessary to possess the completed check with the intent to defraud.

(*People v. Reisdorff* (1971) 17 Cal.App.3d 675, 679.)

Utter
See Notes to Instruction 1454.

Intent to Defraud
See Notes to Instruction 1450.

Alteration
See Notes to Instruction 1453.

Possession of Multiple Documents Only One Offense
See Instruction 1460.

Unanimity
See Notes to Instruction 1450.

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1463. Making, Passing, etc., Fictitious Check or Bill

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

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 (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.**

<Include 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.]**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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.]

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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 types of documents 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).]

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant 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.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72, 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.)

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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.)

AUTHORITY

Elements ▸ Pen. Code, § 476.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
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 [overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122].
Alteration Defined ▸ *People v. Nasseth* (1954) 127 Cal.App.2d 712, 718–720; *People v. Hall* (1942) 55 Cal.App.2d 343, 352.
Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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

LESSER INCLUDED OFFENSES

Attempted Making, etc., of Fictitious Check ▸ Pen. Code, §§ 663, 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; *People v. Pearson* (1957) 151 Cal.App.2d 583, 586.) 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 Instruction 164, Multiple Counts—Alternative Charges For One Event.)

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STAFF NOTES

Penal Code, § 476, in relevant part:

> Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery.

Elements

> The uttering and publishing of a fictitious check with knowledge of its character and an intent to defraud are the essentials of the offense of which the defendant was found guilty. It was not essential for the people to prove that the defendant drew or attempted to draw on the account which he had established; or that the bank was in fact injured or defrauded by the transaction.

(*People v. Walker* (1911) 15 Cal.App. 400, 403.)

Utter
See Notes to Instruction 1454.

Overt Act Required
See Notes to Instruction 1454.

Intent to Defraud
See Notes to Instruction 1450.

Alteration
See Notes to Instruction 1453.

Unanimity
See Notes to Instruction 1450.

Return of Property
See Notes to Instruction 1450.

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1464. Procuring Filing of False Document or Offering False Document for Filing

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The defendant is charged [in Count __] with (offering a (false/ [or] forged) document for (filing[,]/ [or] recording[,]/ [or] registration)/having a (false/ [or] forged) document (filed[,]/ [or] recorded[,]/ [or] registered)).

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

<Alternative 1A—offering>

[1. The defendant offered a (false/ [or] forged) document for (filing[,]/ [or] recording[,]/ [or] registration) in a California public office.

<Alternative 1B—procuring>

[1. The defendant caused a (false/ [or] forged) document to be (filed[,]/ [or] recorded[,]/ [or] registered) in a California public office.

2. When the defendant did that act, (he/she) knew that the document was (false/ [or] forged).

AND

3. The document was one that, if genuine, could be legally filed, registered, or recorded.

BENCH NOTES

Instructional Duty

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

AUTHORITY

Elements ▸ Pen. Code, § 115.

Materiality of Alteration Not Element ▸ *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1578–1579.

Meaning of Instrument as Used in Penal Code section 115 ▸ *People v. Parks* (1992) 7 Cal.App.4th 883, 886–887; *Generes v. Justice Court* (1980) 106

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Cal.App.3d 678, 682–684; *People v. Powers* (2004) 117 Cal.App.4th 291, 295–297.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 171–172.

RELATED ISSUES

Meaning of Instrument

Penal Code section 115 applies to any "instrument" that, "if genuine, might be filed, registered, or recorded under any law of this state or of the United States . . . ." (Pen. Code, § 115(a).) Modern cases have interpreted the term "instrument" expansively, including any type of document that is filed or recorded with a public agency that, if acted on as genuine, would have the effect of deceiving someone. (See *People v. Parks* (1992) 7 Cal.App.4th 883, 886–887; *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682–684.) Thus, the courts have held that "instrument" includes a modified restraining order (*People v. Parks, supra,* 7 Cal.App.4th at p. 886), false bail bonds (*People v. Garcia* (1990) 224 Cal.App.3d 297, 306–307), and falsified probation work referrals (*People v. Tate* (1997) 55 Cal.App.4th 663, 667). In the recent case of *People v. Powers* (2004) 117 Cal.App.4th 291, 297, the court held that fishing records were "instruments" under Penal Code section 115. The court stated that "California courts have shown reluctance to interpret section 115 so broadly that it encompasses any writing that may be filed in a public office." (*Id.* at p. 295.) The court adopted the following analysis for whether a document is an "instrument," quoting the Washington Supreme Court:

> (1) the claimed falsity relates to a material fact represented in the instrument; and (2a) the information contained in the document is of such a nature that the government is required or permitted by law, statute or valid regulation to act in reliance thereon; or (2b) the information contained in the document materially affects significant rights or duties of third persons, when this effect is reasonably contemplated by the express or implied intent of the statute or valid regulation which requires the filing, registration, or recording of the document.

(*Id.* at p. 297 [quoting *State v. Price* (1980) 94 Wash.2d 810, 620 P.2d 994, 999.)

Each Document Constitutes a Separate Offense

Penal Code section 115 provides that each fraudulent instrument filed or offered for filing constitutes a separate violation (subdivision (b)) and may be punished

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separately (subdivision (d)). “Thus, the Legislature has unmistakably authorized the imposition of separate penalties for each prohibited act even though they may be part of a continuous course of conduct and have the same objective.” (*People v. Gangemi* (1993) 13 Cal.App.4th 1790, 1800.)

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STAFF NOTES

Penal Code, § 115:

> (a) Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony.
>
> (b) Each instrument which is procured or offered to be filed, registered, or recorded in violation of subdivision (a) shall constitute a separate violation of this section.
>
> (c) Except in unusual cases where the interests of justice would best be served if probation is granted, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following persons:
>
> (1) Any person with a prior conviction under this section who is again convicted of a violation of this section in a separate proceeding.
>
> (2) Any person who is convicted of more than one violation of this section in a single proceeding, with intent to defraud another, and where the violations resulted in a cumulative financial loss exceeding one hundred thousand dollars ($ 100,000).
>
> (d) For purposes of prosecution under this section, each act of procurement or of offering a false or forged instrument to be filed, registered, or recorded shall be considered a separately punishable offense.

Modern Meaning of Instrument—Expansive

In *People v. Parks* (1992) 7 Cal.App.4th 883, 885, the defendant filed an altered TRO. In concluding that this qualified as an “instrument” within the meaning of Penal Code section 115, the court reviewed the changing judicial interpretation of that term:

> An early decision of our Supreme Court interpreting the word "instrument" *as used in the Civil Code* defined it as a "written paper

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> or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or a duty." (*Hoag v. Howard* (1880) 55 Cal. 564, 565.) This definition of the word "instrument" was later adopted and modified in an appeal from a demurrer to a prosecution under section 115, with the appellate court there holding an "instrument" was an "agreement expressed in writing, signed, and delivered from one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty. [Citations.]" (*People v. Fraser* (1913) 23 Cal.App. 82, 85.) . . .
>
> Parks relies extensively upon *People v. Fox* (1977) 73 Cal.App.3d 178, 180-182, which followed *Fraser* and held a false voter registration affidavit, like a birth certificate, was not an "instrument" under section 115. In particular, Parks reads into that court's reference to prolonged legislative inaction and stare decisis (at p. 181) a requirement the restrictive definition of "instrument" used therein now be treated as binding. For several reasons, we disagree.
>
> In *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682-684, it was argued the *Fraser* definition of "instrument" as an "agreement" which was "delivered from one person to another" precluded conviction for filing a false grant deed. Pointing to *Fraser's* distortion of the language used in *Hoag v. Howard, supra,* 55 Cal. 564 (which in any event had not involved § 115) the *Generes* court held "that to qualify as an instrument within Penal Code section 115, a document need not represent an agreement; moreover it is not necessary that such a document be one that requires a delivery as a condition to validity." (*Generes v. Justice Court, supra,* 106 Cal.App.3d at p. 684.) . . .
>
> Whatever else may be meant by the word "instrument," on these facts we find that protection of judicial and public records such as the documents in this case was clearly within the legislative intent of section 115.

(*People v. Parks* (1992) 7 Cal.App.4th 883, 886-887; see also *People v. Tate* (1997) 55 Cal.App.4th 663, 667.)

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Materiality Not an Element

> The terms of section 115 do not suggest materiality is an element of the offense. . . .
>
> The core purpose of Penal Code section 115 is to protect the integrity and reliability of public records." [Citations.] This purpose is served by an interpretation that prohibits any knowing falsification of public records. Accordingly, we will not insert into section 115 a requirement of materiality that the Legislature did not see fit to include.

(*People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1578–1579.)

Intent to Defraud Not Required

> The section under which appellant is charged, section 115 of the Penal Code, does not require that the act must be done with the intent to defraud another, nor is there any provision therein requiring that anyone be defrauded thereby. In this it differs from many other sections of the same code relating to forgery.

(*People v. Standley* (1932) 126 Cal.App. 739, 747.)

Forgery Not Required

> Generes is incorrect in her assertion that a violation of Penal Code section 115 requires a writing which falsely purports to be the writing of another, i.e., a forgery. Reliance for this proposition on *People* v. *Baender, supra*, is misplaced, because *Baender* factually involved a forged rather than a false instrument. Penal Code section 115 differentiates between the two categories, clearly proscribing either a false *or* a forged instrument.

(*Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682.)

Offering for Filing

> The gravamen of the charged offense is the *offering* for probate of a will known to be false or forged. (See *People* v. *Standley* (1932) 126 Cal. App. 739, 746.) The offense was complete at the moment defendant offered the will for probate with knowledge of its falsity. .

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> . . Whether or not a violation of section 115 actually produces a false public record is simply not material to the offense defined by that statute.

(*People v. Garfield* (1985) 40 Cal.3d 192, 195.)

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1470. Sale or Transfer of Access Card or Account Number

The defendant is charged [in Count __] with (selling[,]/ [or] transferring[,]/ [or] conveying) an access card.

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

1. **The defendant (sold[,]/ [or] transferred[,]/ [or] conveyed) an access card.**

2. **The defendant did so without the consent of the cardholder or the issuer of the card.**

AND

3. **When the defendant (sold[,]/ [or] transferred[,]/ [or] conveyed) the access card, (he/she) intended to defraud.**

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

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

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

A *card issuer* is a company [or person] that issues an access card to a cardholder, either directly or through an agent.

[*Selling* means exchanging something for money, services, or anything of value.]

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or damage to, a legal, financial, or property right.

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[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 (sold[,]/ [or] transferred[,]/ [or] conveyed) the following access cards: _____ <*insert description of cards when multiple items alleged*>**. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (sold[,]/ [or] transferred[,]/ [or] conveyed) at least one of these cards and you all agree on which card (he/she) (sold[,]/ [or] transferred[,]/ [or] conveyed).]**

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant sold or transferred multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

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

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

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

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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.)

AUTHORITY

Elements ▸ Pen. Code, § 484e(a).
Definitions ▸ Pen. Code, § 484d.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 190–191.

LESSER INCLUDED OFFENSES

Possession of Access Card With Intent to Sell (Pen. Code, § 484e(c)) may be a lesser included offense. (But see *People v. Butler* (1996) 43 Cal.App.4th 1224, 1245–1246.)

RELATED ISSUES

Multiple Charges Based on Single Act
Prosecution under Penal Code section 484d et seq. does not preclude simultaneous prosecution under other statutes for the same conduct. (*People v. Braz* (1997) 57 Cal.App.4th 1, 8; *People v. Butler* (1996) 43 Cal.App.4th 1224, 1243–1244.) Thus, the defendant may also be charged with such offenses as burglary (Pen. Code, § 459), forgery (Pen. Code, § 470), grand theft (Pen. Code, § 487), or telephone fraud (Pen. Code, § 502.7). (*People v. Braz, supra,* 57 Cal.App.4th at p. 8; *People v. Butler, supra,* 43 Cal.App.4th at pp. 1243–1244.) However, Penal Code section 654 may preclude punishment for multiple offenses. (*People v. Butler, supra,* 43 Cal.App.4th at p. 1248.)

Cloned Cellular Phone
"[T]he Legislature intended that the definition of access card be broad enough to cover future technologies, the only limitation being on purely paper transactions. As the evidence disclosed here, a cloned cellular phone is a sophisticated and unlawful 'means of account access' to the account of a legitimate telephone subscriber." (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1244.)

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STAFF NOTES

Penal Code, § 484e:

(a) Every person who, with intent to defraud, sells, transfers, or conveys, an access card, without the cardholder's or issuer's consent, is guilty of grand theft.

(b) Every person, other than the issuer, who within any consecutive 12-month period, acquires access cards issued in the names of four or more persons which he or she has reason to know were taken or retained under circumstances which constitute a violation of subdivision (a), (c), or (d) is guilty of grand theft.

(c) Every person who, with the intent to defraud, acquires or retains possession of an access card without the cardholder's or issuer's consent, with intent to use, sell, or transfer it to a person other than the cardholder or issuer is guilty of petty theft.

(d) Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft.

Penal Code, § 484d, “Definitions in provisions governing access card offenses”:

As used in this section and Sections 484e to 484j, inclusive:

(1) "Cardholder" means any person to whom an access card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of an access card to another person.

(2) "Access card" means any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access card, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by a paper instrument.

(3) "Expired access card" means an access card which shows on its face it has elapsed.

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(4) "Card issuer" means any person who issues an access card or the agent of that person with respect to that card.

(5) "Retailer" means every person who is authorized by an issuer to furnish money, goods, services, or anything else of value upon presentation of an access card by a cardholder.

(6) An access card is "incomplete" if part of the matter other than the signature of the cardholder which an issuer requires to appear on the access card before it can be used by a cardholder has not been stamped, embossed, imprinted, or written on it.

(7) "Revoked access card" means an access card which is no longer authorized for use by the issuer, that authorization having been suspended or terminated and written notice thereof having been given to the cardholder.

(8) "Counterfeit access card" means any access card that is counterfeit, fictitious, altered, or forged, or any false representation or depiction of an access card or a component thereof.

(9) "Traffic" means to transfer or otherwise dispose of property to another, or to obtain control of property with intent to transfer or dispose of it to another.

(10) "Card making equipment" means any equipment, machine, plate, mechanism, impression, or other device designed, used, or intended to be used to produce an access card.

See Notes to Instruction 1450 for Definitions

Multiple Charges Based on Single Act

Appellant contends that Penal Code section 484g is a special statute precluding the application of the burglary statute. Appellant states that her actions necessarily constituted a violation of section 484g. . . .

The distinction between general and special statutes is, rather than a rule of substantive law, a tool to effect legislative intent. When a particular statute covers much the same topic as a general law, it is an indication that the Legislature intended the more specific

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> provision to apply. However, the legislative history of this section indicates the Legislature, in enacting this section and related sections (Pen. Code, § 484d et seq.), did not intend to preclude application of the burglary statute or any other statute. This history is summarized in *People v. Butler* (1996) 43 Cal. App. 4th 1224, 1243-1244. "[I]n 1967 the Legislature repealed section 484a and replaced it with comprehensive credit card legislation, new section 484d et seq. The new statute contained an uncodified section 8 which read: 'This act shall not be construed to preclude the applicability of any other provision of the criminal law of this state which presently applies or may in the future apply to any transaction which violates this act.' (Stats. 1967, ch. 1395, § 8, p. 3260.) The report of the 1967 Assembly Committee on Criminal Procedure states at page 16: 'Section 9 [ultimately section 8] of the bill provides that any transaction which violates the terms of this bill and at the same time violates any other provision of the law is prosecutable under *either* provision.' (Italics added.) 'The use by the Legislature in section 8 of the language 'any other provision of the criminal law' is all-encompassing, making no distinction between general or special statutes as long as the criminal activities are within the proscribed scope of such enactments.' (*People v. Liberto* (1969) 274 Cal. App. 2d 460, 464 . . . .) Following the passage of the 1967 amendments, a series of cases held that section 484d et seq. did not bar prosecution under other statutes. [Citations.]

(*People v. Braz* (1997) 57 Cal.App.4th 1, 8–9.)

Access Card Includes New Technologies Such as Cellular Phone

> [W]e conclude that defendant was properly convicted of receiving access cards with the intent to defraud when he had in his possession two cloned cellular phones. Part of the difficulty in reaching this conclusion is due to semantics, as that word is used to describe the study of meanings. A card may not seem to be a phone, nor is it commonly "a code, account number or other means of account access." If the Legislature had borrowed the phrase "access device" [from the comparable federal statute] and not just its definition, application of the statute to cellular phones would be facially sensible.
>
> Yet, the history is clear that the Legislature intended "access card" to have the same meaning as the federal "access device." Accordingly,

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> the federal cases construing access devices to include cloned cellular phones are highly persusasive. . . . Thus, the Legislature intended that the definition of access card be broad enough to cover future technologies, the only limitation being on purely paper transactions. As the evidence disclosed here, a cloned cellular phone is a sophisticated and unlawful “means of account access” to the account of a legitimate telephone subscriber.

Lesser Included

> Defendant argues that section 484e, subdivision (a), misdemeanor acquisition of an access card without consent, is a lesser included offense to section 484e, subdivision (c) of which he was convicted. . . . Section 484e, subdivision (a) provides: "Every person who acquires an access card from another without the cardholder's or issuer's consent or who, with knowledge that it has been so acquired, acquires the access card, with intent to use it or to sell or transfer it to a person other than the issuer or the cardholder is guilty of petty theft."
>
> Defendant's major premise is flawed, however, since one can violate section 484e, subdivision (c) without necessarily violating section 484e, subdivision (a); hence, the latter is not a lesser included offense. Section 484e, subdivision (a) requires that the accused acquire an access card either without the consent of the cardholder or issuer, or with the knowledge that it has been previously so acquired. No such requirement is found in section 484e, subdivision (c). Thus, if the accused were given a card by a third person who had lawfully acquired it from the holder or issuer and at the time of acquisition the accused had the intent to defraud, the accused would be in violation of section 484e, subdivision (c) but not section 484e, subdivision (a). At most, the two statutes involve related offenses. . . .
>
> Even if section 484e, subdivision (a) were a lesser included offense, no instruction would be warranted under the evidence adduced at the trial.

(*People v. Butler* (1996) 43 Cal.App.4th 1224, 1245–1246.)

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1471. Acquiring or Retaining an Access Card or Account Number

The defendant is charged [in Count __] with unlawfully (acquiring/ [or] retaining) an access card.

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

1. **The defendant (acquired/ [or] retained) an access card.**

2. **The defendant did so without the consent of the cardholder or the issuer of the card.**

AND

3. **When the defendant (acquired/ [or] retained) the access card, (he/she) intended to defraud by (using it[,]/ [or] selling or transferring it to someone other than the cardholder or issuer).**

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

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

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

A *card issuer* is a company [or person] that issues an access card to a cardholder, either directly or through an agent.

[*Selling* means exchanging something for money, services, or anything of value.]

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or damage to, a legal, financial, or property right.

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[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 (acquired/ [or] retained) the following access cards: _____ *<insert description of cards when multiple items alleged>*. **You may not find the defendant guilty unless you all agree that the People have proved that the defendant (acquired/ [or] retained) at least one of these cards and you all agree on which card (he/she) (acquired/ [or] retained).]**

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant possessed multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

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

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

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

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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.)

AUTHORITY

Elements ▸ Pen. Code, § 484e(c).
Definitions ▸ Pen. Code, § 484d.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 190–191.

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STAFF NOTES

Penal Code, § 484e:

> (c) Every person who, with the intent to defraud, acquires or retains possession of an access card without the cardholder's or issuer's consent, with intent to use, sell, or transfer it to a person other than the cardholder or issuer is guilty of petty theft.

See Notes to Instructions 1450 and 1470.

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1472. Acquiring or Retaining Account Information

The defendant is charged [in Count __] with (acquiring/ [or] retaining) the account information of an access card.

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

1. **The defendant (acquired/ [or] retained) the account information of an access card that was validly issued to someone else.**

2. **The defendant did so without the consent of the cardholder or the issuer of the card.**

AND

3. **When the defendant (acquired/ [or] retained) the account information, (he/she) intended to use that information fraudulently.**

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

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

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

A *card issuer* is a company [or person] that issues an access card to a cardholder, either directly or through an agent.

A person *intends to use the information fraudulently* if he or she intends to use it to deceive another person in order to cause a loss of, or damage to, a legal, financial, or property right.

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[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 (acquired/ [or] retained) the account information of the following access cards: _____ *<insert description of cards when multiple items alleged>*. **You may not find the defendant guilty unless you all agree that the People have proved that the defendant (acquired/ [or] retained) the account information of at least one of these cards and you all agree on which card's account information (he/she) (acquired/ [or] retained).]**

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant possessed the account information of multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

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

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

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

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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.)

AUTHORITY

Elements ▸ Pen. Code, § 484e(d).
Definitions ▸ Pen. Code, § 484d.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 190–191.

RELATED ISSUES

Acquires
"If appellant is arguing that only the person who *first* acquires this information with the requisite intent is guilty of the crime, we disagree. We interpret the crime to apply to any person who acquires that information with the intent to use it fraudulently." (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1470.)

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STAFF NOTES

Penal Code, § 484e:

> (d) Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft.

See Notes to Instructions 1450 and 1470.

Account Information
"Account Information" is not defined in Penal Code section 484d.

Acquire

> Contrary to appellant's claim, the evidence was also sufficient to convict him of acquiring access card information with respect to an access card validly issued to another (§ 484e, subd. (e)). Appellant argues: "There was absolutely no evidence offered at any time that Appellant actually did the leg work to obtain the access card account information (of another) that was encoded in the card." . . .
>
> If appellant is arguing that only the person who *first* acquires this information with the requisite intent is guilty of the crime, we disagree. We interpret the crime to apply to any person who acquires that information with the intent to use it fraudulently. There was certainly evidence appellant acquired the card in this case knowing it bore information from a validly issued access card and with the intent to use the card fraudulently.

(*People v. Smith* (1998) 64 Cal.App.4th 1458, 1470 [italics in original].)

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1473. Making Counterfeit Access Card or Account Number

The defendant is charged [in Count __] with (designing[,]/ [or] making[,]/ [or] altering[,]/ [or] embossing) a counterfeit access card.

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

1. **The defendant (designed[,]/ [or] made[,]/ [or] altered[,]/ [or] embossed) a counterfeit access card.**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

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

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

A *counterfeit access card* is a counterfeit, fictitious, altered, or forged access card or a false representation or depiction of an access card or any part of such a card.

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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* an access card if he or she adds to, erases, or changes a part of the card that affects a legal, financial, or property right.]

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

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant made multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

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

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

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

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

AUTHORITY

Elements ▸ Pen. Code, § 484f(a).
Definitions ▸ Pen. Code, § 484d.

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Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Alteration Defined ▸ *People v. Nasseth* (1954) 127 Cal.App.2d 712, 718–720; *People v. Hall* (1942) 55 Cal.App.2d 343, 352.
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 192.

LESSER INCLUDED OFFENSES

Attempted Forgery of Access Card ▸ Pen. Code, §§ 663, 484f.

RELATED ISSUES

See the Related Issues sections in Instructions 1450, Forgery by False Signature, and 1470, Sale or Transfer of Access Card or Account Number.

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STAFF NOTES

Penal Code, § 484f:

(a) Every person who, with the intent to defraud, designs, makes, alters, or embosses a counterfeit access card or utters or otherwise attempts to use a counterfeit access card is guilty of forgery.

(b) A person other than the cardholder or a person authorized by him or her who, with the intent to defraud, signs the name of another or of a fictitious person to an access card, sales slip, sales draft, or instrument for the payment of money which evidences an access card transaction, is guilty of forgery.

Penal Code, § 484d, "Definitions in provisions governing access card offenses":

As used in this section and Sections 484e to 484j, inclusive:

(1) "Cardholder" means any person to whom an access card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of an access card to another person.

(2) "Access card" means any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access card, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by a paper instrument.

(3) "Expired access card" means an access card which shows on its face it has elapsed.

(4) "Card issuer" means any person who issues an access card or the agent of that person with respect to that card.

(5) "Retailer" means every person who is authorized by an issuer to furnish money, goods, services, or anything else of value upon presentation of an access card by a cardholder.

(6) An access card is "incomplete" if part of the matter other than the

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signature of the cardholder which an issuer requires to appear on the access card before it can be used by a cardholder has not been stamped, embossed, imprinted, or written on it.

(7) "Revoked access card" means an access card which is no longer authorized for use by the issuer, that authorization having been suspended or terminated and written notice thereof having been given to the cardholder.

(8) "Counterfeit access card" means any access card that is counterfeit, fictitious, altered, or forged, or any false representation or depiction of an access card or a component thereof.

(9) "Traffic" means to transfer or otherwise dispose of property to another, or to obtain control of property with intent to transfer or dispose of it to another.

(10) "Card making equipment" means any equipment, machine, plate, mechanism, impression, or other device designed, used, or intended to be used to produce an access card.

Intent to Defraud
See Instruction 1450.

Actual Loss Not Necessary
See Instruction 1450.

Unanimity
See Instruction 1450.

Return of Property
See Instruction 1450.

Forgery by Alteration
See Instruction 1453.

Multiple Charges Based on Single Act
See Instruction 1470.

Access Card Includes New Technologies Such as Cellular Phone
See Instruction 1470.

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1474. Using or Attempting to Use Counterfeit Access Card

The defendant is charged [in Count __] with (using/ [or] attempting to use) a counterfeit access card.

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

1. **The defendant (used/ [or] attempted to use) a counterfeit access card.**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

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

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

A *counterfeit access card* is a counterfeit, fictitious, altered, or forged access card or a false representation or depiction of an access card or any part of such a card.

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/an unincorporated 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* an access card if he or she adds to, erases, or changes a part of the card that affects a legal, financial, or property right.]

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

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

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant used multiple cards, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72, 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."

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

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

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

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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.)

AUTHORITY

Elements ▸ Pen. Code, § 484f(a).
Definitions ▸ Pen. Code, § 484d.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Alteration Defined ▸ *People v. Nasseth* (1954) 127 Cal.App.2d 712, 718–720; *People v. Hall* (1942) 55 Cal.App.2d 343, 352.
Pass or Attempt to Use Defined ▸ *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122].
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 192.

RELATED ISSUES

See the Related Issues sections in Instructions 1450, Forgery by False Signature, and 1470, Sale or Transfer of Access Card or Account Number.

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STAFF NOTES

Penal Code, § 484f:

(a) Every person who, with the intent to defraud, designs, makes, alters, or embosses a counterfeit access card or utters or otherwise attempts to use a counterfeit access card is guilty of forgery.

(b) A person other than the cardholder or a person authorized by him or her who, with the intent to defraud, signs the name of another or of a fictitious person to an access card, sales slip, sales draft, or instrument for the payment of money which evidences an access card transaction, is guilty of forgery.

Penal Code, § 484d, "Definitions in provisions governing access card offenses":

As used in this section and Sections 484e to 484j, inclusive:

(1) "Cardholder" means any person to whom an access card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of an access card to another person.

(2) "Access card" means any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access card, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by a paper instrument.

(3) "Expired access card" means an access card which shows on its face it has elapsed.

(4) "Card issuer" means any person who issues an access card or the agent of that person with respect to that card.

(5) "Retailer" means every person who is authorized by an issuer to furnish money, goods, services, or anything else of value upon presentation of an access card by a cardholder.

(6) An access card is "incomplete" if part of the matter other than the

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signature of the cardholder which an issuer requires to appear on the access card before it can be used by a cardholder has not been stamped, embossed, imprinted, or written on it.

(7) "Revoked access card" means an access card which is no longer authorized for use by the issuer, that authorization having been suspended or terminated and written notice thereof having been given to the cardholder.

(8) "Counterfeit access card" means any access card that is counterfeit, fictitious, altered, or forged, or any false representation or depiction of an access card or a component thereof.

(9) "Traffic" means to transfer or otherwise dispose of property to another, or to obtain control of property with intent to transfer or dispose of it to another.

(10) "Card making equipment" means any equipment, machine, plate, mechanism, impression, or other device designed, used, or intended to be used to produce an access card.

Intent to Defraud
See Instruction 1450.

Actual Loss Not Necessary
See Instruction 1450.

Unanimity
See Instruction 1450.

Return of Property
See Instruction 1450.

Utter
See Instruction 1454.

Overt Act Required
See Instruction 1454.

Multiple Charges Based on Single Act
See Instruction 1470.

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Access Card Includes New Technologies Such as Cellular Phone
See Instruction 1470.

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1475. False Signature on Access Card or Receipt

The defendant is charged [in Count __] with forgery committed by signing a false signature on (an access card/ [or] a document authorizing payment by an access card).

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) on [an access card] [or] [a (sales slip[,]/ [or] sales draft[,]/ [or] document for the payment of money) to complete an access card transaction].**

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

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

AND

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

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

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

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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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[The People allege that the defendant forged the following (access cards/ [or] documents authorizing payment by an access card): _____ *<insert description of items when multiple items alleged>*. **You may not find the defendant guilty unless you all agree that the People have proved that the defendant forged at least one of these (cards/documents) and you all agree on which (card/document) (he/she) forged.]**

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant forged multiple cards or transactions, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.) Give the last bracketed paragraph, inserting the items alleged.

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

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

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

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

AUTHORITY

Elements ▸ Pen. Code, § 484f(b).
Definitions ▸ Pen. Code, § 484d.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.

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Intent to Defraud Entity ▸ Pen. Code, § 8.
Signature Not Authorized—Element of Offense ▸ *People v. Hidalgo* (1933) 128 Cal.App. 703, 707; *People v. Maiolo* (1933) 135 Cal.App. 205, 207.
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 192.

LESSER INCLUDED OFFENSES

Attempted Forgery of Access Card ▸ Pen. Code, §§ 663, 484f.

RELATED ISSUES

See the Related Issues sections in Instructions 1450, Forgery by False Signature, and 1470, Sale or Transfer of Access Card or Account Number.

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STAFF NOTES

Penal Code, § 484f:

> (b) A person other than the cardholder or a person authorized by him or her who, with the intent to defraud, signs the name of another or of a fictitious person to an access card, sales slip, sales draft, or instrument for the payment of money which evidences an access card transaction, is guilty of forgery.

Penal Code, § 484d, "Definitions in provisions governing access card offenses":
See Instruction 1470.

Section 484f Distinguished From Section 484g

> [D]efendant's attempt to show that the facts of the case specifically fall within section 484g rather than within the provisions of section 484f do not bear analysis. Section 484f, subdivision (2) applies to "A person other than the cardholder or a person authorized by him. . . ." The evidence was clear that defendant was such a person. It proscribes signing the name of another (which defendant did) with intent to defraud (which is inferable from the circumstances) to a sales slip which evidences a credit card transaction (such a sales slip was introduced in evidence). Defendant's contention that subdivision (2) of section 484f is limited in application to types of conduct which embrace wholesale credit card forgery operations is not warranted from the wording of the statute. . . . The salient element of the subdivision is the signing of the name of another or of a fictitious person in connection with the transaction. Such is forgery.
>
> Section 484g deals with theft. On its face it has no reference to signing and merely refers to the use of certain described credit cards: (1) a credit card obtained or retained in violation of section 484e, that is, wrongfully acquired or retained . . .; (2) a credit card known to be forged; (3) a credit card known to be expired; and (4) a credit card known to have been revoked. (Cf. former § 484a, subds. (b)(6) and (c); Stats. 1961, ch. 813, § 1, p. 2091.) If a person with the intent to defraud uses such a card for the purpose of obtaining money, goods, services or anything else of value, he is guilty of theft. The

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> section apparently also covers the situation where no card is involved but money, goods, services or anything else of value is obtained by one who represents, without the consent of the cardholder, that he is the holder of an extant card, or who represents that he is the holder of a credit card when no such card has in fact been issued. As can be appreciated from the foregoing analysis section 484g covers a multitude of sins, of varying severity. The cardholder using an expired or revoked credit card, or one using a card which he knows to have been lost, mislaid or misdelivered, may be deemed less culpable than one who brazenly signs another's name while using a stolen credit card.

(*People v. Gingles* (1973) 32 Cal.App.3d 1030, 1038–1039.)

Intent to Defraud
See Instruction 1450.

Actual Loss Not Necessary
See Instruction 1450.

Unanimity
See Instruction 1450.

Each Forged Document May Support Separate Charged
See Instruction 1450.

Return of Property
See Instruction 1450.

Must Prove Signature Not Authorized
See Instruction 1450.

Multiple Charges Based on Single Act
See Instruction 1470.

Access Card Includes New Technologies Such as Cellular Phone
See Instruction 1470.

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1476. Use of Forged, etc., Access Card

The defendant is charged [in Count __] with using (an access card/ [or] account information for an access card) that had [been] (altered[,]/ [or] forged[,]/ [or] expired[,]/ [or] revoked[,]/ [or] acquired or retained without permission of the cardholder or card issuer[,]/ [or] _____ *<insert other description of card obtained or retained in violation of Pen. Code, §§ 484e or 484f>***).**

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

1. **The defendant used (an access card/ [or] account information for an access card) that had [been] (altered[,]/ [or] forged[,]/ [or] expired[,]/ [or] revoked[,]/ [or] acquired or retained without permission of the cardholder or card issuer[,]/ [or] _____** *<insert other description of card obtained or retained in violation of Pen. Code, §§ 484e or 484f>***).**

2. **The defendant knew that the (access card/ [or] account information) had [been] (altered[,]/ [or] forged[,]/ [or] expired[,]/ [or] revoked[,]/ [or] acquired or retained without permission of the cardholder or card issuer[,]/ [or] _____** *<insert other description of card obtained or retained in violation of Pen. Code, §§ 484e or 484f>***).**

3. **When the defendant used the (card/ [or] information), (he/she) intended to obtain money, goods, services, or anything of value.**

AND

4. **When the defendant used the (card/ [or] information), (he/she) intended to defraud.**

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

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

[An *expired access card* is one that shows on its face an expiration date that has passed.]

[A *revoked access card* is one that the card issuer no longer authorizes for use by the cardholder who has been given written notice of the revocation.]

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

[A *card issuer* is any company [or person] that issues an access card to a cardholder, either directly or through an agent.]

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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* an access card if he or she adds to, erases, or changes a part of the card that affects a legal, financial, or property right.]

[The People allege that the defendant used the following (access cards/ [or] access card account information): _____ *<insert description of cards when multiple items alleged>***. You may not find the defendant guilty unless you all agree that the People have proved that the defendant used at least one of these (cards/ [or] card's account information) and you all agree on which (card/ [or] card account information) (he/she) used.]**

BENCH NOTES

Instructional Duty

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

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If the prosecution alleges under a single count that the defendant forged multiple cards or transactions, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

If the prosecution alleges that the card was "obtained or retained in violation of Penal Code section 484e or 484f," the court may use the phrase "acquired or retained without permission of the cardholder or card issuer," if appropriate based on the facts, or may insert an appropriate description where indicated. If the court inserts another description, the court should also give the jury an instruction explaining when a card is "obtained or retained" in violation of the applicable section, defining any necessary terms.

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

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

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

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

AUTHORITY

Elements ▸ Pen. Code, § 484g(a).
Definitions ▸ Pen. Code, § 484d.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Alteration Defined ▸ *People v. Nasseth* (1954) 127 Cal.App.2d 712, 718–720; *People v. Hall* (1942) 55 Cal.App.2d 343, 352.
Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 193.

LESSER INCLUDED OFFENSES

Attempted Use of Access Card ▸ Pen. Code, §§ 663, 484g.

RELATED ISSUES

See the Related Issues sections in Instructions 1450, Forgery by False Signature, and 1470, Sale or Transfer of Access Card or Account Number.

Revoked Access Card
To prove that the defendant used a "revoked" access card, the prosecution must prove that written notice of the revocation was sent to the cardholder. (*People v. Whight* (1995) 36 Cal.App.4th 1143, 1150.)

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STAFF NOTES

Penal Code, § 484g:

Every person who, with the intent to defraud, (a) uses, for the purpose of obtaining money, goods, services, or anything else of value, an access card or access card account information that has been altered, obtained, or retained in violation of Section 484e or 484f, or an access card which he or she knows is forged, expired, or revoked, or (b) obtains money, goods, services, or anything else of value by representing without the consent of the cardholder that he or she is the holder of an access card and the card has not in fact been issued, is guilty of theft. If the value of all money, goods, services, and other things of value obtained in violation of this section exceeds four hundred dollars ($ 400) in any consecutive six-month period, then the same shall constitute grand theft.

Penal Code, § 484d, "Definitions in provisions governing access card offenses":

As used in this section and Sections 484e to 484j, inclusive:

(1) "Cardholder" means any person to whom an access card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of an access card to another person.

(2) "Access card" means any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access card, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by a paper instrument.

(3) "Expired access card" means an access card which shows on its face it has elapsed.

(4) "Card issuer" means any person who issues an access card or the agent of that person with respect to that card.

(5) "Retailer" means every person who is authorized by an issuer to furnish money, goods, services, or anything else of value upon

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presentation of an access card by a cardholder.

(6) An access card is "incomplete" if part of the matter other than the signature of the cardholder which an issuer requires to appear on the access card before it can be used by a cardholder has not been stamped, embossed, imprinted, or written on it.

(7) "Revoked access card" means an access card which is no longer authorized for use by the issuer, that authorization having been suspended or terminated and written notice thereof having been given to the cardholder.

(8) "Counterfeit access card" means any access card that is counterfeit, fictitious, altered, or forged, or any false representation or depiction of an access card or a component thereof.

(9) "Traffic" means to transfer or otherwise dispose of property to another, or to obtain control of property with intent to transfer or dispose of it to another.

(10) "Card making equipment" means any equipment, machine, plate, mechanism, impression, or other device designed, used, or intended to be used to produce an access card.

Section 484f Distinguished From Section 484g

[D]efendant's attempt to show that the facts of the case specifically fall within section 484g rather than within the provisions of section 484f do not bear analysis. Section 484f, subdivision (2) applies to "A person other than the cardholder or a person authorized by him. . . ." The evidence was clear that defendant was such a person. It proscribes signing the name of another (which defendant did) with intent to defraud (which is inferable from the circumstances) to a sales slip which evidences a credit card transaction (such a sales slip was introduced in evidence). Defendant's contention that subdivision (2) of section 484f is limited in application to types of conduct which embrace wholesale credit card forgery operations is not warranted from the wording of the statute. . . . The salient element of the subdivision is the signing of the name of another or of a fictitious person in connection with the transaction. Such is forgery.

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> Section 484g deals with theft. On its face it has no reference to signing and merely refers to the use of certain described credit cards: (1) a credit card obtained or retained in violation of section 484e, that is, wrongfully acquired or retained . . .; (2) a credit card known to be forged; (3) a credit card known to be expired; and (4) a credit card known to have been revoked. (Cf. former § 484a, subds. (b)(6) and (c); Stats. 1961, ch. 813, § 1, p. 2091.) If a person with the intent to defraud uses such a card for the purpose of obtaining money, goods, services or anything else of value, he is guilty of theft. The section apparently also covers the situation where no card is involved but money, goods, services or anything else of value is obtained by one who represents, without the consent of the cardholder, that he is the holder of an extant card, or who represents that he is the holder of a credit card when no such card has in fact been issued. As can be appreciated from the foregoing analysis section 484g covers a multitude of sins, of varying severity. The cardholder using an expired or revoked credit card, or one using a card which he knows to have been lost, mislaid or misdelivered, may be deemed less culpable than one who brazenly signs another's name while using a stolen credit card.

(*People v. Gingles* (1973) 32 Cal.App.3d 1030, 1038–1039.)

Relationship to Sections 487 and 489

> Penal Code section 484g expands and particularizes the definition of grand theft as it appears in section 487. Section 484g, unlike former section 484a, does not create any separate offense, nor does section 484g state the punishment for the offense it describes. The punishments for grand theft, whether or not the theft is of the species described in section 484g, are stated in Penal Code section 489.

(*People v. Edwards* (1978) 86 Cal.App.3d 260, 263.)

Intent to Defraud
See Instruction 1450.

Actual Loss Not Necessary
See Instruction 1450.

Unanimity
See Instruction 1450.

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Each Forged Document May Support Separate Charged
See Instruction 1450.

Return of Property
See Instruction 1450.

Multiple Charges Based on Single Act
See Instruction 1470.

Access Card Includes New Technologies Such as Cellular Phone
See Instruction 1470.

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1477. Obtaining Money, etc., by Representing Self as Holder of Access Card

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

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

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

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

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

AND

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

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

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

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

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or damage to, a legal, financial, or property right.

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[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.]

BENCH NOTES

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

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

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

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

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

AUTHORITY

Elements ▸ Pen. Code, § 484g(b).
Definitions ▸ Pen. Code, § 484d.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 193.

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COMMENTARY

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

LESSER INCLUDED OFFENSES

Attempted Use of Access Card ▸ Pen. Code, §§ 663, 484g.

RELATED ISSUES

See the Related Issues sections in Instructions 1450, Forgery by False Signature, and 1470, Sale or Transfer of Access Card or Account Number.

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STAFF NOTES

Penal Code, § 484g:

> Every person who, with the intent to defraud, (a) uses, for the purpose of obtaining money, goods, services, or anything else of value, an access card or access card account information that has been altered, obtained, or retained in violation of Section 484e or 484f, or an access card which he or she knows is forged, expired, or revoked, or (b) obtains money, goods, services, or anything else of value by representing without the consent of the cardholder that he or she is the holder of an access card and the card has not in fact been issued, is guilty of theft. If the value of all money, goods, services, and other things of value obtained in violation of this section exceeds four hundred dollars ($ 400) in any consecutive six-month period, then the same shall constitute grand theft.

See Notes to Instruction 1476

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1480. Making, Using, etc., Check Knowing Funds Insufficient

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

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

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

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

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

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

AND

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

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

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

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

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

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or damage to, a legal, financial, or property right.

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

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

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

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

<Defense: Reasonable Expectation of Payment>

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

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

<Defense: Defendant Informed Payee About Insufficient Funds>

[If, when the defendant (made[,]/ [or] drew[,]/ [or] delivered[,]/ [or] used[,]/ [or] attempted to use) the (check[,]/ draft[,]/ [or] order), (he/she) told the person designated to receive payment on the (check[,]/ draft[,]/ [or] order) that there were insufficient funds in the (bank/depository) to cover the (check[,]/ draft[,]/ [or] order), then the defendant is not guilty of this crime.

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

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under a single count that the defendant made or used multiple checks, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.) Give the bracketed paragraph that begins with "The People allege that the defendant," inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

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

If the prosecution alleges that the defendant made or attempted to use, etc., more than $200 in checks, give Instruction 1481, Making, Using, etc., Check Knowing Funds Insufficient: Total Value of Checks. If the prosecution alleges that the defendant has a prior forgery-related conviction, give Instruction 200: Prior Conviction.

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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.)

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

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

AUTHORITY

Elements ▸ Pen. Code, § 476a.
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Use or Attempt to Use ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 73; *People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122].
Informed Payee About Insufficient Funds ▸ *People v. Poyet* (1972) 6 Cal.3d 530, 535–537; *People v. Pugh* (2002) 104 Cal.App.4th 66, 73.
Reasonable Expectation of Payment ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 73.
Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 140–147.

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LESSER INCLUDED OFFENSES

This offense is a misdemeanor if the total amount of the checks does not exceed $200, unless the defendant has been previously convicted of a specified theft offense. (Pen. Code, § 476(b).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the total amount of the checks exceeds $200 or if the prior conviction has or has not been proved. If the jury finds that the amount did not exceed $200 or the prior conviction was not proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

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

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

Return of Property
Two cases have held that the defendant may present evidence that he or she returned some or all of the property in an effort to demonstrate that he or she did not originally intend to defraud. (*People v. Katzman* (1968) 258 Cal.App.2d 777, 790; *People v. Braver* (1964) 229 Cal.App.2d 303, 307–308.) However, other cases have held that, based on the facts of the particular cases, such evidence was not admissible. (*People v. Parker* (1970) 11 Cal.App.3d 500, 510 [evidence of defendant's offer to repay following arrest not relevant]; *People v. Wing* (1973) 32 Cal.App.3d 197, 202 [evidence of restitution not relevant where defendant falsely signed the name of another to a check knowing he had no authority to do so].) If

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such evidence is presented, the court may give Instruction 1324, Return of Property Not a Defense to Theft. (*People v. Katzman, supra*, 258 Cal.App.2d at p. 791.) In addition, in *People v. Katzman, supra*, 258 Cal.App.2d at p. 792, the court held that, on request, the defense may be entitled to a pinpoint instruction that evidence of restitution may be relevant to determining if the defendant intended to defraud. If the court concludes that such an instruction is appropriate, the court may add the following to the beginning of Instruction 1324:

> 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.

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STAFF NOTES

Penal Code, § 476a, in relevant part:

(a) Any person who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank or depositary, or person, or firm, or corporation, for the payment of money, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank or depositary, or person, or firm, or corporation, for the payment of such check, draft, or order and all other checks, drafts, or orders upon such funds then outstanding, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison.

(b) However, if the total amount of all such checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering does not exceed two hundred dollars ($ 200), the offense is punishable only by imprisonment in the county jail for not more than one year, except that this subdivision shall not be applicable if the defendant has previously been convicted of a violation of Section 470, 475, or 476, or of this section, or of the crime of petty theft in a case in which defendant's offense was a violation also of Section 470, 475, or 476 or of this section or if the defendant has previously been convicted of any offense under the laws of any other state or of the United States which, if committed in this state, would have been punishable as a violation of Section 470, 475 or 476 or of this section or if he has been so convicted of the crime of petty theft in a case in which, if defendant's offense had been committed in this state, it would have been a violation also of Section 470, 475, or 476, or of this section.

(c) Where such check, draft, or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with such bank or depositary, or person, or firm, or corporation.

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(d) In any prosecution under this section involving two or more checks, drafts, or orders, it shall constitute prima facie evidence of the identity of the drawer of a check, draft, or order if:

(1) At the time of the acceptance of such check, draft or order from the drawer by the payee there is obtained from the drawer the following information: name and residence of the drawer, business or mailing address, either a valid driver's license number or Department of Motor Vehicles identification card number, and the drawer's home or work phone number or place of employment. Such information may be recorded on the check, draft, or order itself or may be retained on file by the payee and referred to on the check, draft, or order by identifying number or other similar means; and

(2) The person receiving the check, draft, or order witnesses the drawer's signature or endorsement, and, as evidence of that, initials the check, draft, or order at the time of receipt.

(e) The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depositary or person or firm or corporation for the payment of such check, draft or order.

Pen. Code, § 8, "What intent to defraud is sufficient":

Whenever, by any of the provisions of this code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever.

§ 3104. Negotiable instrument; Checks; Certificate of deposit; Definitions

Universal Commercial Code, § 3104, "Negotiable instrument; Checks; Certificate of deposit; Definitions":

(a) Except as provided in subdivisions (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it is all of the following:

(1) Is payable to bearer or to order at the time it is issued or first

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comes into possession of a holder.

(2) Is payable on demand or at a definite time.

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) "Instrument" means a negotiable instrument.

(c) An order that meets all of the requirements of subdivision (a), except paragraph (1), and otherwise falls within the definition of "check" in subdivision (f) is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this division.

(e) An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.

(f) "Check" means (1) a draft, other than a documentary draft, payable on demand and drawn on a bank, (2) a cashier's check or teller's check, or (3) a demand draft. An instrument may be a check even though it is described on its face by another term, such as "money order."

(g) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) "Teller's check" means a draft drawn by a bank (1) on another bank, or (2) payable at or through a bank.

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(i) "Traveler's check" means an instrument that (1) is payable on demand, (2) is drawn on or payable at or through a bank, (3) is designated by the term "traveler's check" or by a substantially similar term, and (4) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(j) "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.

(k) "Demand draft" means a writing not signed by a customer that is created by a third party under the purported authority of the customer for the purpose of charging the customer's account with a bank. A demand draft shall contain the customer's account number and may contain any or all of the following:

(1) The customer's printed or typewritten name.

(2) A notation that the customer authorized the draft.

(3) The statement "No Signature Required" or words to that effect.

A demand draft shall not include a check purportedly drawn by and bearing the signature of a fiduciary, as defined in paragraph (1) of subdivision (a) of Section 3307.

Elements

Conviction for a violation of Penal Code section 476a, subdivision (a), requires a person with the intent to defraud make, draw, utter or deliver, in this case, a check, knowing at that time there are insufficient funds for its payment. There is, however, no fraudulent intent if the maker informs the payee at the time the check is uttered that there are insufficient funds to pay the check. (*People v. Poyet* (1972) 6 Cal.3d 530, 536.) Neither is there fraudulent intent if the person uttering the check, while aware there are insufficient funds to cover it, believes sufficient funds will be in the account when the check is presented for payment. (*People v. Griffith* (1953) 120 Cal. App. 2d 873, 880.)

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(*People v. Pugh* (2002) 104 Cal.App.4th 66, 73.)

> The essential elements of the offense of a violation of section 476a of the Penal Code consist of the drawing or issuing of a check or draft with knowledge that at the time of such drawing the drawer does not have sufficient funds in, or credit with the bank to meet the payment upon presentation and such check is drawn or issued with intent to defraud the payee or other person.
>
> Knowledge of lack of sufficient funds and intent to defraud are the gist of the offense. They may be proved by circumstantial evidence.

(*People v. Privitier* (1962) 200 Cal.App.2d 725, 728.)

> Presentment of the check to the bank upon which it was drawn was not a necessary element of the offense.

(*People v. Rubin* (1963) 223 CalApp.2d 825, 832.)

Intent to Defraud

> CALJIC No. 15.26 defines intent to defraud as an intent to deceive for the purpose of gaining a material advantage over the person deceived or inducing that person to part with property or alter his position to his injury or risk. In other words, the intent behind the fabrication must be to cause demonstrable or measurable harm to another. The instruction, in effect, tells the jury they must find appellant intended to cause a loss or damage to the legal, monetary or property rights of another to find the requisite intent to defraud. Thus, CALJIC No. 15.26 is not inadequate or incomplete under [*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 383–384].

(*People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.)

> An intent to defraud is an intent to deceive another person for the purpose of gaining a material advantage over that person or to induce that person to part with property or alter that person's position by some false statement or false representation of fact, wrongful concealment or suppression of the truth or by any artifice or act designed to deceive.

(*People v. Pugh* (2002) 104 Cal.App.4th 66, 72.)

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> The suggestion, however, is that violation of Penal Code section 476a is predicated upon an intent to defraud the person to whom the check was delivered rather than an intent to defraud the bank upon which the check is drawn . . .
>
> [T]he scope of that provision is sufficiently wide to encompass appellant's behavior, since, in all events, that behavior contemplated a fraud either on the bank or the recipients of the checks, depending only upon the manner in which the bank's indemnification agreement, to which appellant was not a party, might operate.

(*People v. North* (1982) 131 Cal.App.3d 112, 116–117.)

Utter

> The words "utter" and "publish," in the law of forgery, are synonymous, for the meaning of both is "to declare or assert, directly or indirectly, by words or actions," that the forged instrument is genuine. Thus, to offer a forged bank note in payment, is both to utter it and to publish it. To complete the offense of uttering and publishing, it is not necessary that the note should be passed. Hence "to pass" is not synonymous with "uttering" and "publishing;" nor is "attempting to pass" synonymous with "passing."

(*People v. Tomlinson* (1868) 35 Cal. 503, 509.)

> A violation of [this statute] can consist of "uttering" a false prescription for drugs, as well as passing such a prescription. The word "utter" means to use or *attempt to use* an instrument, whereby or in connection with which, a person asserts or represents to another, directly or indirectly, expressly or impliedly, by words or conduct, that the instrument is genuine. (CALJIC No. 15.25 (3d ed. 1970).)

(*People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [footnote omitted, emphasis in original, overruled on other grounds *People v. Anderson* (1987) 43 Cal.3d 1104, 1122].)

> “Utter” means to "use or *attempt to use* an instrument, whereby or in connection with which a person asserts or represents to another, directly or

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> indirectly, expressly or impliedly, by words or conduct, that the instrument is genuine."

(*People v. Pugh* (2002) 104 Cal.App.4th 66, 73.)

Staff has drafted the instructing replacing the statutory word “utter” with the more understandable “use or attempt to use.”

Actual Loss Not Necessary

> Appellant points out that some the checks were actually paid. Payment of the checks under the circumstances here shown does not constitute a defense. The crime was completed upon the drawing and uttering of the checks with the intent to defraud. It was not necessary to show that the victim actually was defrauded.

(*People v. Zimmer* (1937) 23 Cal.app.2d 581, 585.)

Defenses—Informs Payee Insufficient Funds

> [The defendat] requested an instruction that the disclosure of the present insufficiency of funds was a defense n2 to the charge. The instruction was refused by the court, and the subject matter was not covered in other instructions.
>
> n2 The requested instruction provides: "You are instructed that if you find the defendant informed the payee at the time of delivery that there were insufficient funds on deposit to pay the check and the payee consented to accept the check, you must return a verdict of not guilty to the charge of violation of section 476a, regardless of the fact the defendant may have subsequently failed to carry out a promise to subsequently deposit such funds." . . .
>
> Penal Code section 476a, as similar statutes elsewhere, is directed at the specific representation, implicit in the making, drawing, uttering, or delivering of a check or draft, that at the time of making, drawing, uttering, or delivery the maker *then* has sufficient funds in or credit with the bank for payment of that check or draft and all other checks or drafts then outstanding. With disclosure of the insufficiency, the essential underlying misrepresentation no longer exists and the crime cannot be committed. No matter how fraudulent the promise to make

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> a deposit sufficient to cover the check, disclosure of the present insufficiency of funds precludes conviction under this section. . . .
>
> [T]he requested instruction, though ungrammatical, would have been proper and should have been given in substance.

(*People v. Poyet* (1972) 6 Cal.3d 530, 535–537.)

> There is, however, no fraudulent intent if the maker informs the payee at the time the check is uttered that there are insufficient funds to pay the check. (*People v. Poyet* (1972) 6 Cal.3d 530, 536.) . . .
>
> There is no dispute that when appellant uttered the $ 10,000 check to Sagredo on February 26 he told her not to cash it until March 10, stating he was expecting a deal to close before that date. As to the uttering of the check on February 26, therefore, appellant could not be convicted of uttering a check to defraud since he told Sagredo there were insufficient funds at that time to cover it.
>
> A dispute does exist, however, concerning events after March 10. Appellant's position was that he communicated with Sagredo and told her for various reasons not to cash the check. Sagredo on the other hand testified appellant sometime not long after March 10 told her to resubmit the check for payment. At that time appellant did not tell Sagredo there were insufficient funds to cover the check. By that time appellant by his own admission knew that his expected windfall was not forthcoming at least in the immediate future. In any event, his claim of expected funds was based solely on his own impeachable testimony and could be reasonably rejected by the jury. . . .
>
> After March 10 when appellant told Sagredo to resubmit the check, he uttered it. The evidence was sufficient to convict him of fraudulently uttering a check.

(*People v. Pugh* (2002) 104 Cal.App.4th 66, 73.)

Defenses—Reasonable Expectation of Payment

> Neither is there fraudulent intent if the person uttering the check, while aware there are insufficient funds to cover it, believes

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> sufficient funds will be in the account when the check is presented for payment. (*People v. Griffith* (1953) 120 Cal. App. 2d 873, 880.)

(*People v. Pugh* (2002) 104 Cal.App.4th 66, 73.)

> [T]he rule of law upon which the defendant relies requires that there be a "reasonable expectation of funds" as the source for payment of the check upon its presentation. As stated in *Williams* v. *United States*, *supra*, 278 F.2d 535, at page 537: "The expectation of the defendant must, however, be more than mere hope. The circumstances must be such as to justify a reasonably certain belief that funds will be available.

(*People v. Rubin* (1963) 223 CalApp.2d 825, 832; see also *People v. Gaines* (1951) 106 Cal.app.2d 176, 180–181 [reversible error to preclude testimony on expectation of payment].)

Multiple Checks Totaling Over $200

Under Penal Code section 476a(b), the offense is a felony-misdemeanor wobbler if the total amount of the checks issued exceeds $200. In general, the prosecution may charge a separate count for each check. However, if the individual checks do not meet the statutory amount and the offense is charged as a felony only based on the aggregate value, the prosecution can only charge a single felony count covering all of the checks which total $200. Thus, in *In re Watkins* (1966) 64 Cal.2d 866, 868–869, decided when the statutory amount was $50, the court stated:

> The facts of this case come squarely within the rule announced in *In re Dick*, *ante*, p. 272. In that case, the defendant had been convicted of seven felonies for issuing seven bad checks totaling approximately $ 96. Each check was for an amount less than $ 50, and each was charged in a separate count. It was held that the issuance of the fourth check, which brought the total amount above $ 50, was a felony, and that the first three offenses were merged into the fourth. The charges involving the first three checks were therefore ordered dismissed, and the conviction of the felony for the issuance of the fourth check was affirmed.
>
> Accordingly, when petitioner issued the check charged in the third count, making the total of checks issued $ 58.91, the violation constituted a felony. Hence, he was properly convicted of a felony under the third count and is not guilty of only two misdemeanors as

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> he contends.
>
> Under our holding in *In re Dick, supra*, however, petitioner was improperly convicted under the second count.

If, on the other hand, the defendant is charged with felony offenses based on a prior forgery related conviction, the prosecution may charge each separate check as a separate felony count. (*People v. Pettit* (1964) 230 Cal.App.2d 397, 398.)

Unanimity

> [W]here the state charges fewer counts of forgery than the number of forged instruments shown by the evidence, a unanimity instruction may be required, as in any case where the information charges fewer offenses than are proved by the evidence and it cannot be assured that the jury will be unanimous as to which crime the defendant committed. [Citation.]

(*People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.)

Presumption of Knowledge Based on Protest
Penal Code section 476a(c) states that:

> Where such check, draft, or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, nonpayment and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with such bank or depositary, or person, or firm, or corporation.

In *People v. Bullock* (1932) 123 Cal.App. 299, 302–303, a divided court upheld this presumption against constitutional challenge. One justice "reluctantly concurred," feeling bound by precedent while one dissented. This opinion has not been cited for this proposition since 1934. (*People v. Lenore* (1934) 139 Cal.App. 40, 41. CALJIC does not include any reference to this presumption in its instructions. Staff has likewise left this presumption out of the instructions, concluding that it is of doubtful constitutional validity at this time. (See modern discussion of presumptions in *People v. McCall* (Jan. 15, 2004) S113433.)

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Prima Facie Evidence of Identity
Penal Code section 476a(d) states that certain evidence constitutes "prima facie evidence of identity" in cases involving two or more checks. CALJIC quotes this passage in the use notes but provides no instructions on it. Staff has been unable to locate any cases discussing this subsection.

Return of Property

> In *People* v. *Braver* [1964] 229 Cal.App.2d 303, 307-308, it was held that evidence of restitution, though not a defense to fraud, does tend to show that no fraud was intended. . . .
>
> Accordingly, under the principles of *Braver* Sahati was entitled to and did present evidence of his attempts at repayment of the various loans in an endeavor to convince the jury that he did not know the certificates were false and therefore lacked the requisite specific intent to defraud. The claim of defendant is not that he was prevented from offering evidence of repayment, but that the court by its instructions misled the jury into believing that Sahati's repayments were irrelevant. The instructions given by the court on the subject of repayment are set out verbatim in the footnote. n7
>
> n7 "It is not a defense to a prosecution for theft that after the theft was committed complete or partial restitution was made to the owner of the stolen property or that this loss was wholly or partly recouped by other means." . . .
>
> Sahati contends, however, that a further instruction was required on the specific subject of repayments. . . .
>
> [We] do not think that the court erred in failing to instruct on this subject *sua sponte*, although such an instruction would have been proper under *Braver* if requested.

(*People v. Katzman* (1968) 258 Cal.App.2d 777, 790–792.)

> As a general proposition, subsequent restoration, restitution or repayment is not a defense to the crime of forgery. [Citations.] It is recognized in *People* v. *Braver, supra*, upon which defendant relies, that, in some instances evidence of repayment may be relevant to disprove the defendant's intent to defraud, an essential element of the crime of forgery. In *Braver*, the defendant signed his aunt's and

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> uncle's name on a promissory note and a chattel mortgage in obtaining a loan. The defendant then made payments on the note. The court, in reversing the conviction, found that the defendant's making payments on the loan constituted some evidence that he had no intent to defraud at the time the loan was sought and obtained.
>
> In the case at bench, however, there was no loan transaction and no continuing obligation to repay such as exists in the case of a loan. The crime was complete when the check was cashed, and repayment by defendant after his arrest was not relevant to show his lack of intent to defraud when he endorsed and cashed the check.

(*People v. Parker* (1970) 11 Cal.App.3d 500, 510.)

> Defendant's offer of restitution itself is no defense to a prosecution under section 476a of the Penal Code; a court may reject evidence of the subsequent payment of checks while the criminal proceeding is pending.

(*People v. Privitier* (1962) 200 Cal.App.2d 725, 728.)

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1481. Making, Using, etc., Check Knowing Funds Insufficient: Total Value of Checks

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If you find the defendant guilty of (making[,]/ [or] drawing[,]/ [or] delivering[,]/ [or] using[,]/ [or] attempting to use) (a/an) (check[,]/ draft[,]/ [or] order) knowing that there were insufficient funds to cover it, you must then decide whether the People have proved that the total value of the (check[s][,]/ [or] draft[s][,]/ [or] order[s]) [(in each count/in Count[s]__)] was more than $200.

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.

BENCH NOTES

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

This instruction **must** be given with the appropriate instruction on the other elements of the offense, Instruction 1480, Making, Using, etc., Check Knowing Funds Insufficient.

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 that the value of the checks exceeds $200.

AUTHORITY

Elements ▸ Pen. Code, § 476a(b).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 140.

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RELATED ISSUES

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

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STAFF NOTES

Penal Code, § 476a, in relevant part:

> (b) However, if the total amount of all such checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering does not exceed two hundred dollars ($ 200), the offense is punishable only by imprisonment in the county jail for not more than one year, except that this subdivision shall not be applicable if the defendant has previously been convicted of a violation of Section 470, 475, or 476, or of this section, or of the crime of petty theft in a case in which defendant's offense was a violation also of Section 470, 475, or 476 or of this section or if the defendant has previously been convicted of any offense under the laws of any other state or of the United States which, if committed in this state, would have been punishable as a violation of Section 470, 475 or 476 or of this section or if he has been so convicted of the crime of petty theft in a case in which, if defendant's offense had been committed in this state, it would have been a violation also of Section 470, 475, or 476, or of this section.

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1485. Insurance Fraud: Fraudulent Claims

The defendant is charged [in Count __] with insurance fraud committed by fraudulent claim.

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

<Alternative 1A—presented fraudulent claim>

[1. The defendant (presented/ [or] caused to be presented) a false or fraudulent claim for payment for a loss or injury.]

<Alternative 1B—presented fraudulent claim for vehicle theft or damage>

[1. The defendant falsely or fraudulently claimed payment for a loss due to (theft[,]/ [or] destruction[,]/ [or] damage[,]/ [or] conversion) of (a motor vehicle[,]/ [or] a motor vehicle part[,]/ [or] contents of a motor vehicle).]

<Alternative 1C—writing to be used for fraudulent claim>

[1. The defendant (prepared[,]/ [or] made[,]/ [or] signed or subscribed) a document with the intent to (present or use it/ [or] allow it to be presented) to support a false or fraudulent claim.]

<Alternative 1D—made fraudulent claim for health-care benefits>

[1. The defendant (made/ [or] caused to be made) a false or fraudulent claim for payment of a health-care benefit.]

<Alternative 1E—submitted claim for health-care benefit not used>

[1. The defendant presented a claim for a health-care benefit that was not used by [or on behalf of] the person named in the claim.]

<Alternative 1F—presented claim for health-care benefit undercharges>

[1. The defendant claimed payment for undercharges for health-care benefits for a specific person without presenting for reconciliation, at that same time, any known overcharges for benefits for the same person.]

2. The defendant knew that the claim was false or fraudulent.

AND

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3. When the defendant did that act, (he/she) intended to defraud.

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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 *claims, makes, or presents a claim for payment* by requesting payment under a contract of insurance for (a/an) (loss/ [or] injury/ [or] health-care benefit).

[A *claim for payment of a health-care benefit* includes a claim submitted by or on behalf of the provider of a workers' compensation health benefit defined in the Labor Code.]

[*Conversion* of property means interfering with someone else's property, without authorization or justification, and depriving the owner of use and possession of the property.]

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant presented or caused to be presented multiple claims or made multiple documents in support of a fraudulent claim, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.) However, where the evidence shows a "continuous course of conduct," a unanimity instruction is not required. (*Id.* at p. 275.) If the court concludes that a unanimity instruction is required, give Instruction 160, Unanimity.

In element 1, give alternative 1A if the prosecution alleges a violation of Penal Code section 550(a)(1). Give alternative 1B if the prosecution alleges a violation of Penal Code section 550(a)(4). Give alternative 1C if the prosecution alleges a

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violation of Penal Code section 550(a)(5). Give alternative 1D if the prosecution alleges a violation of Penal Code section 550(a)(6). Give alternative 1E if the prosecution alleges a violation of Penal Code section 550(a)(7). Give alternative 1F if the prosecution alleges a violation of Penal Code section 550(a)(9).

If a violation of Penal Code section 550(a)(2) or (8) is alleged, give Instruction 1486, Insurance Fraud: Multiple Claims. If a violation of Penal Code section 550(a)(3) is alleged, give Instruction 1487, Insurance Fraud: Vehicle Accident.

If the defendant is charged with a felony violation of Penal Code section 550(a)(6), (7), or (9), give Instruction 1488, Insurance Fraud: Health-Care Claims—Total Value.

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.

Related Instructions
Instruction 1486, Insurance Fraud: Multiple Claims.
Instruction 1487, Insurance Fraud: Vehicle Accident.
Instruction 1488, Insurance Fraud: Health-Care Claims—Total Value.

AUTHORITY

Elements ▸ Pen. Code, § 550(a)(1), (4), (5), (6), (7) & (9).
Intent to Defraud Element of Offense ▸ *People v. Scofield* (1971) 17 Cal.App.3d 1018, 1025–1026; *People v. Benson* (1962) 206 Cal.App.2d 519, 529 [overruled on other grounds in *People v. Perez* (1965) 62 Cal.2d 769, 776, fn. 2].
Intent to Defraud—Defined ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.
Unanimity Instruction ▸ *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 185–186.

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LESSER INCLUDED OFFENSES

Fraudulent claims for health-care benefits, under Penal Code section 550(a)(6) to (9), are misdemeanors if the total amount of the claims does not exceed $400. (Pen. Code, § 550(c)(2).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the total amount of the claims exceeds $400. If the jury finds that the amount does not exceed $400, then the offense should be set at a misdemeanor.

RELATED ISSUES

Writing to Be Used for Fraudulent Claim

Penal Code section 550(a)(5) makes it a felony to "[k]nowingly prepare, make, or subscribe any writing, with the intent to present or use it, or to allow it to be presented, in support of any false or fraudulent claim." "Under this section, the writing required need not be false or fraudulent as long as it is intended to be presented or used in support of any false or fraudulent claim." (*People v. Zelver* (1955) 135 Cal.App.2d 226, 235.) In addition, "[i]t need not be shown that defendant himself executed the false instrument if there is proof that he procured its execution or aided and abetted another in doing so." (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1376.)

Liability of Care Provider

A doctor or other care provider who prepares false documents for a fraudulent insurance claim may be prosecuted under Penal Code section 550(a)(1) for "causing the presentation of a fraudulent claim," even though another person actually presents the claim. (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1369–1370.) Alternatively, the care provider may be prosecuted under Penal Code section 550(a)(5), discussed above. *(Ibid.)*

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STAFF NOTES

Penal Code, § 550(a):

(a) It is unlawful to do any of the following, or to aid, abet, solicit, or conspire with any person to do any of the following:

(1) Knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance.

(2) Knowingly present multiple claims for the same loss or injury, including presentation of multiple claims to more than one insurer, with an intent to defraud.

(3) Knowingly cause or participate in a vehicular collision, or any other vehicular accident, for the purpose of presenting any false or fraudulent claim.

(4) Knowingly present a false or fraudulent claim for the payments of a loss for theft, destruction, damage, or conversion of a motor vehicle, a motor vehicle part, or contents of a motor vehicle.

(5) Knowingly prepare, make, or subscribe any writing, with the intent to present or use it, or to allow it to be presented, in support of any false or fraudulent claim.

(6) Knowingly make or cause to be made any false or fraudulent claim for payment of a health care benefit.

(7) Knowingly submit a claim for a health care benefit that was not used by, or on behalf of, the claimant.

(8) Knowingly present multiple claims for payment of the same health care benefit with an intent to defraud.

(9) Knowingly present for payment any undercharges for health care benefits on behalf of a specific claimant unless any known overcharges for health care benefits for that claimant are presented for reconciliation at that same time.

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> (10) For purposes of paragraphs (6) to (9), inclusive, a claim or a claim for payment of a health care benefit also means a claim or claim for payment submitted by or on the behalf of a provider of any workers' compensation health benefits under the Labor Code.

Previous versions of this statute were number Insurance Code section 556 and Insurance Code section 1871.1. Some of the cases discussed below cite these early versions of the statute.

Pen. Code, § 8, "What intent to defraud is sufficient":

> Whenever, by any of the provisions of this code, an intent to defraud is required in order to constitute any offense, it is sufficient if an intent appears to defraud any person, association, or body politic or corporate, whatever.

Elements—Intent to Defraud is an Element

> The evidence, as recited in the statement of facts, compels the determination that there was substantial evidence [citation] that defendant attempted to violate Insurance Code section 556, subdivision (a) in that the May 18 bill was false and in that, when defendant submitted it to Aetna, he had knowledge of that fact and had the specific intent to defraud. The prosecution proved convictingly [sic] that Nelson did not receive most of the treatments in the bill. It was not necessary that it prove which paticular [sic]entries in the bill were the false ones.
>
> An intention to defraud is an essential element of the offense under review, but it may properly be determined from a consideration of all the circumstances. (*People* v. *Benson* [1962] 206 Cal.App.2d 519, 529, overruled on another point in *People* v. *Perez*, 62 Cal.2d 769, 776[, fn. 2].) One who wilfully [sic] submits a claim, knowing it to be false, necessarily does so with intent to defuraud [sic]. [Citation.]

(*People v. Scofield* (1971) 17 Cal.App.3d 1018, 1025–1026 [footnote omitted].)

> The gravamen [sic] of the crimes charged is the intent to defraud. . . .
>
> [I]f a person wilfully [sic] or knowingly submits a claim, knowing it to be false, to the commission for the purpose of obtaining,

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> increasing, reducing or defeating any benefit under the act, he necessarily does so to defraud. He evidences a purpose or willingness to present a false claim to effect the payment under the act and hence is presenting such claim with intent to defraud. [P. 107.] . . . A person making a false representation which in good faith he believes to be true is not doing so wilfully [sic] or knowingly. While he is not required to know the unlawfulness of the act to come within the definition of 'knowingly' or 'wilfully' [sic] he certainly must know that his statement is false or untrue.

(*People v. Burnham* (1961) 194 Cal.App.2d 836, 841–842 [citation and quotation marks omitted].)

Intent to Defraud—Defined

> CALJIC No. 15.26 defines intent to defraud as an intent to deceive for the purpose of gaining a material advantage over the person deceived or inducing that person to part with property or alter his position to his injury or risk. In other words, the intent behind the fabrication must be to cause demonstrable or measurable harm to another. The instruction, in effect, tells the jury they must find appellant intended to cause a loss or damage to the legal, monetary or property rights of another to find the requisite intent to defraud. Thus, CALJIC No. 15.26 is not inadequate or incomplete under [*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 383–384].

(*People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.)

> An intent to defraud is an intent to deceive another person for the purpose of gaining a material advantage over that person or to induce that person to part with property or alter that person's position by some false statement or false representation of fact, wrongful concealment or suppression of the truth or by any artifice or act designed to deceive.

(*People v. Pugh* (2002) 104 Cal.App.4th 66, 72.)

Claim—Commonly Understood

> The word "claim" is one of common meaning and is defined by Webster's International Dictionary, Second Edition, unabridged, as follows: "To ask for, or seek to obtain, by . . . right, or supposed

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> right; to demand as due." It is to be assumed that the Legislature in using the word "claim" intended it to have its common meaning and intended to proscribe the presentment of any false demand under a policy of insurance irrespective of the form of that demand. Certainly it was not the intent of the Legislature to only proscribe the filing of a false written proof of loss for proofs of loss are made, not as a claim, but in support of a claim, and it is the making of the false proofs of loss which is in part the subject matter of paragraph (b) of section 556.
>
> The purpose of the two paragraphs of the section is apparent. A claim of loss under a policy of insurance might not be false, yet the proof of loss presented in support of the claim be false. For example: Under a policy of fire insurance, the risk insured against, a loss by fire, might have occurred and a claim for some loss and the amount thereof be true, but the proof of loss might assert the loss of property which was not in fact destroyed or damaged by the fire, or falsely state the quality, character or value of the property destroyed. . . .
>
> That there was ample proof from which the jury might find that a false claim of loss was made is clear. The witness Weiss testified that there was no robbery or theft of furs from appellant's premises on the night of December 27th. Appellant caused to be presented to the insurance companies, People's Exhibit 10, which is an itemized list of more than 280 fur garments, with the value of each, and their total value set forth, and stated to the police that that list was the final list for the insurance company. It is evident that the jury might well find from this evidence that by presenting this itemized list, containing the value of each item of the property described, appellant intended it to be a claim for the payment of a loss under the policies, irrespective of the fact that in order to fix the liability of the insurers under the policies, it would be necessary for him to file a formal and sworn proof of loss in support of the claim.
>
> Appellant also complains that the court did not instruct the jury as to the meaning of the word "claim." A sufficient answer to this claim of error is that the word "claim" is one of common meaning and that the appellant did not request any instruction defining that meaning.

(*People v. Teitelbaum* (1958) 163 Cal.App.2d 184, 212–213.)

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Subsection 1—Cause Claim To Be Presented—Liability of Caregiver

> Burke contends that only the insured or his attorney who prepared the demand letter can be liable under Insurance Code former section 556, subdivision (a)(1). The care provider could only be liable for preparing fraudulent writings in support of a false claim, a violation of Insurance Code former section 556, subdivision (a)(4). . . .
>
> Can the care provider, whose billings form the basis of such a fraudulent claim actually tendered by another party, be said to have *caused the presentation of* the fraudulent claim? The question appears to be one of first impression, and we answer in the affirmative. The reported cases on this topic all involve the culpability of the insured or his attorney who actually presented the claim to the insurer. [Citations.] Insurance Code former section 556, subdivision (a)(1) makes liable both those who present fraudulent claims and those who *cause them to be presented*. We must interpret the phrase "cause to be presented" in a way that avoids rendering it surplusage. [Citation.] Consequently, the statute must reach those who present claims and anyone who intentionally, by their actions, causes the fraudulent claim to be presented. If this provision could only be violated by the person who actually presented a claim, the phrase "or cause to be presented" would be unnecessary. In order for the phrase to have meaning, a person may violate this section if he intentionally acts to cause another to present a fraudulent claim. Here, the evidence shows Burke did precisely that under the same analysis set out in part A, *ante*.

(*People v. Singh* (1995) 37 Cal.App.4th 1343, 1369–1370.)

Subsection 5—Prepare a Writing

Pen. Code, §550(a)(5), states: “Knowingly prepare, make, or subscribe any writing, with the intent to present or use it, or to allow it to be presented, in support of any false or fraudulent claim.” “Under this section, the writing required need not be false or fraudulent as long as it is intended to be presented or used in support of any false or fraudulent claim.” (*People v. Zelver* (1955) 135 Cal.App.2d 226, 235.)

> “It need not be shown that defendant himself executed the false instrument if there is proof that he procured its execution or aided and abetted another in doing so." [Citation.] There is substantial evidence in this record that Singh procured the execution of the

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> fraudulent declarations. Singh's reading of the words "makes" and "prepares" is far too narrow. He cannot disclaim liability for preparing or making a fraudulent document, where the jury found he had the requisite fraudulent intent, merely because another person acted as scrivener.

(*People v. Singh* (1995) 37 Cal.App.4th 1343, 1376.)

Conversion

The Findlaw Legal Dictionary defines conversion as:

> [I]nterfering with the ownership of another's movable or personal property without authorization or justification (as a lien) and esp. of depriving the owner of use and possession.

http://dictionary.lp.findlaw.com/scripts/results.pl?co=dictionary.lp.findlaw.com&topic=ae/ae7c305de57ce6dc709397bf752cb845

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1486. Insurance Fraud: Multiple Claims

The defendant is charged [in Count __] with submitting multiple insurance claims with intent to defraud.

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

1. **The defendant presented two or more claims for (the same (loss/ [or] injury)/payment of the same health-care benefit) to (the same/ [or] more than one) insurer.**

2. **The defendant knew that (he/she) was submitting two or more claims for the same ((loss/ [or] injury)/health-care benefit).**

AND

3. **When the defendant presented the claims, (he/she) intended to defraud.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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 *presents a claim for payment* by demanding payment under a contract of insurance for (a/an) ((loss/ [or] injury)/ health-care benefit).

[A *claim for payment of a health-care benefit* includes a claim submitted by or on behalf of the provider of a workers' compensation health benefit defined in the Labor Code.]

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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. Use this instruction if a violation of Penal Code section 550(a)(2) or (8) is alleged.

If the defendant is charged with a felony violation of Penal Code section 550(a)(8), give Instruction 1488, Insurance Fraud: Health-Care Claims—Total Value, with this instruction.

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.

Related Instructions
Instruction 1485, Insurance Fraud: Fraudulent Claims.
Instruction 1487, Insurance Fraud: Vehicle Accident.
Instruction 1488, Insurance Fraud: Health-Care Claims—Total Value.

AUTHORITY

Elements ▸ Pen. Code, § 550(a)(2) & (8).
Intent to Defraud Element of Offense ▸ *People v. Scofield* (1971) 17 Cal.App.3d 1018, 1025–1026; *People v. Benson* (1962) 206 Cal.App.2d 519, 529 [overruled on other grounds in *People v. Perez* (1965) 62 Cal.2d 769, 776, fn. 2].
Intent to Defraud—Defined ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 185–186.

LESSER INCLUDED OFFENSES

Fraudulent claims for health-care benefits, under Penal Code section 550(a)(6) to (9), are misdemeanors if the total amount of the claims does not exceed $400. (Pen. Code, § 550(c)(2).) If the defendant is charged with a felony, then the

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misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the total amount of the claims exceeds $400. If the jury finds that the amount does not exceed $400, then the offense should be set at a misdemeanor.

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STAFF NOTES

See Notes to Instruction 1485.

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1487. Insurance Fraud: Vehicle Accident

The defendant is charged [in Count __] with insurance fraud in connection with a vehicle accident.

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

1. **The defendant caused or participated in a vehicle accident.**

2. **The defendant knew that the purpose of the accident was to present a false or fraudulent insurance claim.**

AND

3. **When the defendant caused or participated in the accident, (he/she) intended to defraud.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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 *presents a claim* by demanding payment under a contract of insurance for (a/an) ((loss/ [or] injury)/health-care benefit).

[A person *causes an accident* if the accident is the direct, natural, and probable consequence of the person's action. A *natural and probable consequence* is one that a reasonable and prudent 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 an accident. An act causes an accident, only if it is a substantial factor in causing the accident. A *substantial factor* is

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more than a trivial or remote factor. However, it need not be the only factor that causes the accident.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction if a violation of Penal Code section 550(a)(3) is alleged.

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.) If the evidence indicates that there was only one cause of the accident, 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 the accident, the court should give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

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.

Related Instructions
Instruction 1485, Insurance Fraud: Fraudulent Claims.
Instruction 1486, Insurance Fraud: Multiple Claims.
Instruction 1488, Insurance Fraud: Health-Care Claims—Total Value.

AUTHORITY

Elements ▸ Pen. Code, § 550(a)(3).
Intent to Defraud Element of Offense ▸ *People v. Scofield* (1971) 17 Cal.App.3d 1018, 1025–1026; *People v. Benson* (1962) 206 Cal.App.2d 519, 529 [overruled on other grounds in *People v. Perez* (1965) 62 Cal.2d 769, 776, fn. 2].
Intent to Defraud—Defined ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.

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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 185.

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STAFF NOTES

See Notes to Instruction 1485.

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1488. Insurance Fraud: Health-Care Claims—Total Value

If you find the defendant guilty of insurance fraud in connection with health-care claims, you must then decide whether the People have proved that the total value of the (claim[s] involved/ [or] amount at issue) was more than $400 [within a period of 12 consecutive months].

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.

BENCH NOTES

Instructional Duty
If the defendant is charged with a felony based on the total value of the claims, the court has a **sua sponte** duty to instruct on this element.

This instruction **must** be given with the appropriate instruction on the other elements of the offense, Instruction 1485, Insurance Fraud: Fraudulent Claims, Instruction 1486, Insurance Fraud: Multiple Claims, or Instruction 1487, Insurance Fraud: Vehicle Accident.

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 that the total value of the claims exceeded $400.

Give the bracketed "within a period of 12 consecutive months" if the facts show several claims filed over a period of time.

AUTHORITY

Elements ▸ Pen. Code, § 550(c)(2).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 186.

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STAFF NOTES

Penal Code, § 550, in relevant part:

> (2) Every person who violates paragraph (6), (7), (8), or (9) of subdivision (a) is guilty of a public offense.
>
> (A) Where the claim or amount at issue exceeds four hundred dollars ($ 400), the offense is punishable by imprisonment in the state prison for two, three, or five years, or by a fine not exceeding fifty thousand dollars ($ 50,000), or by both that imprisonment and fine, unless the value of the fraud exceeds fifty thousand dollars ($ 50,000), in which event the fine may not exceed double the value of the fraud, or by imprisonment in a county jail not to exceed one year, by a fine of not more than one thousand dollars ($ 1,000), or by both that imprisonment and fine.
>
> (B) Where the claim or amount at issue is four hundred dollars ($ 400) or less, the offense is punishable by imprisonment in a county jail not to exceed six months, or by a fine of not more than one thousand dollars ($ 1,000), or by both that imprisonment and fine, unless the aggregate amount of the claims or amount at issue exceeds four hundred dollars ($ 400) in any 12-consecutive-month period, in which case the claims or amounts may be charged as in subparagraph (A).

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1489. Insurance Fraud: Destruction of Insured Property

The defendant is charged [in Count __] with (injuring[,]/ [or] destroying[,]/ [or] hiding[,]/ [or] abandoning[,]/ [or] disposing of) insured property with intent to defraud.

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

1. **The defendant (injured[,]/ [or] destroyed[,]/ [or] hid[,]/ [or] abandoned[,]/ [or] disposed of) property that was insured against loss or damage from (theft[,]/ [or] embezzlement[,]/ [or] any casualty other than fire).**

AND

2. **When the defendant did that act, (he/she) intended to defraud the insurer.**

A person *intends to defraud* if he or she intends to deceive another person in order to cause a loss of, or 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.]

[It does not matter whether the defendant or someone else owned or possessed the property.]

BENCH NOTES

Instructional Duty

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

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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.

Give the bracketed sentence that begins with "It does not matter" if there is evidence that someone else owned or possessed the property.

For arson, see the 1050 series of instructions.

AUTHORITY

Elements ▸ Pen. Code, § 548(a).
Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72; *People v. Guy-Alexander* (1995) 32 Cal.App.4th 735, 745.
Intent to Defraud Entity ▸ Pen. Code, § 8.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 188.

LESSER INLCUDED OFFENSE

Attempted Destruction or Disposal of Property ▸ Pen. Code, §§ 663, 548; *People v. Splawn* (1985) 165 Cal.App.3d 553, 559.

RELATED ISSUES

Disposes Of
"'[D]isposes of' in Penal Code section 548 requires a definite change of control [of the property]." (*People v. Splawn* (1985) 165 Cal.App.3d 553, 558.)

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STAFF NOTES

Penal Code, § 548:

(a) Every person who willfully injures, destroys, secretes, abandons, or disposes of any property which at the time is insured against loss or damage by theft, or embezzlement, or any casualty with intent to defraud or prejudice the insurer, whether the property is the property or in the possession of such person or any other person, is punishable by imprisonment in the state prison for two, three, or five years and by a fine not exceeding fifty thousand dollars ($ 50,000).

For purposes of this section, "casualty" does not include fire.

(b) Any person who violates subdivision (a) and who has a prior conviction of the offense set forth in that subdivision, in Section 550 of this code, or in former Section 556 or former Section 1871.1 of the Insurance Code, shall receive a two-year enhancement for each prior conviction in addition to the sentence provided under subdivision (a). The existence of any fact which would subject a person to a penalty enhancement shall be alleged in the information or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

Disposes Of

Defendant contends the evidence is insufficient because he did not relinquish physical control of his car and therefore the crime was not complete. He says the crux of the appeal is the interpretation of the statutory language "disposes of" in Penal Code section 548 which he views as having required a physical transfer of control of the vehicle to Velarde. On the facts here, he sees no more than an *attempted* violation of section 548. We agree.

The parties have failed to cite case law or statutory history, and we have found none, defining the term "disposes of" as it appears in section 548. Consequently, this statutory term must be interpreted according to the "plain meaning rule." . . . "Disposes of" was part of a 1921 amendment to Penal Code section 548 which added

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> "secretes, abandons, or disposes of" to "injures" and "destroys." These are words of common usage. It is clear that the Legislature's intent was that the overall scheme of section 548 be nontechnical. [Citations.]
>
> A common definition of "dispose of" is to "(1) . . . arrange, settle. (2) To transfer or part with, as by giving or selling." (The American Heritage Dict. (1979) p. 380.) Similarly, a portion of the definition in Black's Law Dictionary is "[to] exercise finally, in any manner, one's power of control over; to pass into the control of someone else; to alienate, relinquish, part with, or get rid of; to put out of the way . . . ." (Black's Law Dict. (5th Ed. 1979) p. 423.)
>
> From the foregoing definitions and by applying the plain meaning rule, we conclude that "disposes of" in Penal Code section 548 requires a definite change of control, and the facts show defendant did not dispose of the property within the meaning of Penal Code section 548 because he did not relinquish any control of the vehicle to Velarde. Although the $ 900 changed hands, the fact remains that neither the car keys nor the car changed from defendant's possession to Velarde's. Defendant was still seated behind the steering wheel of the vehicle when he was arrested. These facts indicate that defendant had not yet relinquished control of the vehicle, and, at most, had entered the parameters of an *attempt* to violate Penal Code section 548.

(*People v. Splawn* (1985) 165 Cal.App.3d 553, 557–558 [footnote omitted].)

Insurance Policy Need Not Be Valid

> Defendant contends the jury was improperly instructed that the insurance policy need not be valid for purposes of Penal Code section 548 pursuant to CALJIC No. 14.89. n12
>
> n12 CALJIC No. 14.89 provides as follows: "The commission of the crime with which defendant is charged is not dependent on whether an insurance policy on the property was actually valid if, at the time of the alleged burning, the defendant believed that the policy was valid and in force. Neither is it an element of such crime that the person committing it shall have gained any benefit from his acts."
>
> There is no requirement that the insurance policy be enforceable or

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> valid under Penal Code section 548. "Proof of valid collectible insurance is not essential. Indeed, intentionally setting fire to premises would invalidate the policy and prevent any recovery." (1 Witkin, Cal. Crimes, § 469.) "It was not necessary for the prosecution to prove that the Hartford Insurance Company was legally incorporated, or that the policy was valid and that the defendant could maintain an action thereon for loss or damage. His guilt or innocence of the offense charged in this indictment cannot be made to depend upon any such questions." (*People* v. *Hughes* (1865) 29 Cal. 257, 260.) "The rime may be complete, though the policy be invalid, if defendants believed it to be valid and committed the act with the intent to collect on the policy." (*People* v. *Morley* (1908) 8 Cal.App. 372, 37].)
>
> The jury was properly instructed in the law when the court gave CALJIC No. 14.89.

(*People v. Foster* (1981) 114 Cal.App.3d 421, 431–432.)

However, it appears that this instruction has been removed from CALJIC.

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1495. False Financial Statement: Making False Statement

The defendant is charged [in Count __] with (making/ [or] causing to be made) a false written statement about (his/her/another person's/a corporation's) (financial condition[,]/ [or] means[,]/ [or] ability to pay).

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

<Alternative 1A—statement made about defendant himself/herself>

[1. The defendant (made/ [or] caused to be made) a false written statement about (his/her) (financial condition[,]/ [or] means[,]/ [or] ability to pay).]

<Alternative 1B—statement made about someone else or a corporation>

[1. The defendant (made/ [or] caused to be made) a false written statement about the (financial condition[,]/ [or] means[,]/ [or] ability to pay) of (another person/a firm or corporation (in which the defendant had an interest/ [or] for which the defendant was acting)).]

2. The defendant knew that the statement was false.

3. When the defendant (made the statement/ [or] caused the statement to be made), (he/she) intended that the statement be relied on.

AND

4. The defendant (made the statement/ [or] caused the statement to be made) to obtain the (delivery of personal property[,]/ [or] payment of cash[,]/ [or] making of a loan[,]/ [or] extension of [a] credit[,]/ [or] execution of a contract of guaranty or suretyship[,]/ [or] discount of an account receivable[,]/ [or] making, acceptance, discount, sale, or endorsement of a bill of exchange or promissory note) for ((his/her) benefit/the benefit of the (other person/corporation)).

[A person may (make a false statement/ [or] cause a false statement to be made) either directly or indirectly, or through his or her agent. An *agent* is someone authorized by the defendant to act for (him/her) in dealings with third parties.]

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[The People allege that the defendant (made/ [or] caused to be made) the following statements: _____ *<insert descriptions when multiple statements alleged>*. **You may not find the defendant guilty unless you all agree that the People have proved that the defendant (made/ [or] caused to be made) at least one of these statements and that the statement was false. You must all agree on which false statement (he/she) (made/ [or] caused to be made).]**

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant made multiple false statements, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.) However, where the evidence shows a "continuous course of conduct," a unanimity instruction is not required. (*People v. Dieguez, supra,* 89 Cal.App.4th at p. 275.) If the court concludes that a unanimity instruction is required, give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

If the defendant is charged with a felony violation of Penal Code section 532a(1), give Instruction 1498, False Financial Statement: Use of False Identifying Information.

Give the penultimate bracketed paragraph if there is evidence that the defendant made or caused any statements to be made indirectly or through an agent.

Related Instructions
Instruction 1496, False Financial Statement: Obtaining Benefit.
Instruction 1497, False Financial Statement: Reaffirming Statement.
Instruction 1498, False Financial Statement: Use of False Identifying Information.

AUTHORITY

Elements ▸ Pen. Code, § 532a(1).
Agent ▸ Civ. Code, § 2295.

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Unanimity Instruction If Multiple Items ▸ See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 42.

LESSER INCLUDED OFFENSE

A violation of Penal Code section 532a is a misdemeanor unless the defendant used "a fictitious name, social security number, business name, or business address, or . . . falsely represent[ed] himself or herself to be another person or another business." (Pen. Code, § 532a(4).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if this allegation has or has not been proved. If the jury finds that the allegation has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Misrepresentation of Identity Insufficient
Penal Code section 532a "require[s] a false statement respecting 'financial condition, or means or ability to pay.' " (*People v. Vincent* (1993) 19 Cal.App.4th 696, 702–703.) A statement in which the defendant misrepresents his or her identity or social security number is insufficient. *(Ibid.)*

Application for Credit Does Not Include Apartment Rental
In *People v. Maguire* (1998) 67 Cal.App.4th 1022, 1029–1030, the court held that an application to rent an apartment containing false information was not covered by Penal Code section 532a.

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STAFF NOTES

Penal Code, § 532a:

(1) Any person who shall knowingly make or cause to be made, either directly or indirectly or through any agency whatsoever, any false statement in writing, with intent that it shall be relied upon, respecting the financial condition, or means or ability to pay, of himself, or any other person, firm or corporation, in whom he is interested, or for whom he is acting, for the purpose of procuring in any form whatsoever, either the delivery of personal property, the payment of cash, the making of a loan or credit, the extension of a credit, the execution of a contract of guaranty or suretyship, the discount of an account receivable, or the making, acceptance, discount, sale or indorsement of a bill of exchange, or promissory note, for the benefit of either himself or of such person, firm or corporation shall be guilty of a public offense.

(2) Any person who knowing that a false statement in writing has been made, respecting the financial condition or means or ability to pay, of himself, or a person, firm or corporation in which he is interested, or for whom he is acting, procures, upon the faith thereof, for the benefit either of himself, or of such person, firm or corporation, either or any of the things of benefit mentioned in the first subdivision of this section shall be guilty of a public offense.

(3) Any person who knowing that a statement in writing has been made, respecting the financial condition or means or ability to pay of himself or a person, firm or corporation, in which he is interested, or for whom he is acting, represents on a later day in writing that the statement theretofore made, if then again made on said day, would be then true, when in fact, said statement if then made would be false, and procures upon the faith thereof, for the benefit either of himself or of such person, firm or corporation either or any of the things of benefit mentioned in the first subdivision of this section shall be guilty of a public offense.

(4) Any person committing a public offense under subdivision (1), (2), or (3) shall be guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars ($ 1,000), or by imprisonment in the county jail for not more than six months, or by both such fine

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> and imprisonment. Any person who violates the provisions of subdivision (1), (2), or (3), by using a fictitious name, social security number, business name, or business address, or by falsely representing himself or herself to be another person or another business, is guilty of a felony and is punishable by a fine not exceeding five thousand dollars ($ 5,000) or by imprisonment in the state prison, or by both such fine and imprisonment, or by a fine not exceeding two thousand five hundred dollars ($ 2,500) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.
>
> (5) This section shall not be construed to preclude the applicability of any other provision of the criminal law of this state which applies or may apply to any transaction.

Agent

Civil Code section 2295 defines “agent” as, “one who represents another, called the principal, in dealings with third persons.”

Statement Regarding Financial Condition

> Appellant argues that a "statement in writing . . . respecting . . . financial condition" within the meaning of section 532a, subdivision (1) is not defined in the Penal Code, and thus must be interpreted in accordance with the definition of the term "financial statement" in Financial Code section 118. She then asserts that none of the documents relied on for this conviction--an application to open a bank account, a signature card, a request for an automated teller card, and a fraudulent check to the bank--is a financial statement within that definition.
>
> We disagree with her first assertion, but agree with the second. Section 532a, subdivision (1) does not limit itself to a "financial statement," an accounting term defined by Financial Code section 118. Instead, it casts its net more broadly, proscribing "any false statement in writing . . . respecting the financial condition, or means or ability to pay, of himself, or any other person, firm or corporation, . . ."
>
> The problem, however, is that even under this broader phrase, the written documents relied upon at trial are insufficient to establish the crime. Nowhere on the account applications, the request for

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> automated teller card, or the inquiry regarding identification n1 were there any representations regarding the business or financial condition of appellant or her means or ability to pay. The false statements contained in these documents involved appellant's name, address, and Social Security number; they did not involve financial condition within the meaning of section 532a, subdivision (1). . . .
>
> Respondent argues that the use of the term "by" rather than the phrase "in addition to" means that the statute may be violated simply by making a false written statement of a name or other specified identification. The problem with this argument is that it ignores the antecedent language of the statute. Subdivision (4), as amended, provides that a violation of any of the preceding subdivisions by means of the false representation of identity renders the perpetrator liable to punishment as a felon. It is still necessary that one of the subdivisions be violated, and nothing in the amendment obviates any of the elements of these provisions. These subdivisions require a false statement respecting "financial condition, or means or ability to pay."

(*People v. Vincent* (1993) 19 Cal.App.4th 696, 702–703 [footnote omitted].)

Application for Credit Does Not Include Apartment Rental

> Penal Code section 532a does not define the term "credit." In context, however, its meaning is evident. It means one is guilty of a crime when one is granted rights by a creditor to defer payment of a debt. When a creditor "extends credit," or one procures the "making of credit" the creditor has granted the right to the "debtor to defer payment of debt or to incur debt and defer its payment." (Black's Law Dict. (5th ed. 1979) p. 331, col. 1.) In this context, "credit" is "[t]he ability of a . . . person to borrow money, or obtain goods on time, in consequence of the favorable opinion held by the particular lender as to solvency and reliability." (*Ibid*.) This definition is consistent with the definition of "credit" found in other statutes. (Civ. Code, § 1812.30, subd. (g) [" 'credit' means obtainment of money, property, labor, or services on a deferred-payment basis"]; Civ. Code, § 2957, subd. (d) [" 'credit' means the right granted by a vendor to a purchaser to purchase property and to defer payment therefore"].)

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> Here, the two questionable counts of violating Penal Code section 532a subdivision (1) were premised upon defendant being able to rent two apartments by falsely providing financial information on rent applications. While the fraudulent financial information established a false "credit history" or "credit rating," and induced the landlords to lease the apartments to defendant, it did not result in defendant obtaining "credit," nor was "credit" extended to him. When one rents an apartment or signs a lease, one does not obtain "credit." A renter does not defer the payment on property acquired. A renter acquires temporary rights through a leasehold.

(*People v. Maguire* (1998) 67 Cal.App.4th 1022, 1029–1030 [footnote omitted].)

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1496. False Financial Statement: Obtaining Benefit

The defendant is charged [in Count __] with obtaining [a] benefit[s] using a false written statement about (his/her/another person's/a corporation's) (financial condition[,]/ [or] means[,]/ [or] ability to pay).

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

<Alternative 1A—statement made about defendant himself/herself>

[1. The defendant knew that a false written statement had been made about (his/her) (financial condition[,]/ [or] means[,]/ [or] ability to pay).]

<Alternative 1B—statement made about someone else or a corporation>

[1. The defendant knew that a false written statement had been made about the (financial condition[,]/ [or] means[,]/ [or] ability to pay) of (another person/a firm or corporation (in which the defendant had an interest/ [or] for which the defendant was acting)).]

AND

2. The defendant obtained, for ((his/her) benefit/the benefit of the (other person/corporation)), the (delivery of personal property[,]/ [or] payment of cash[,]/ [or] making of a loan[,]/ [or] extension of [a] credit[,]/ [or] execution of a contract of guaranty or suretyship[,]/ [or] discount of an account receivable[,]/ [or] making, acceptance, discount, sale, or endorsement of a bill of exchange or promissory note) by using the false written statement.

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

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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.

If the prosecution alleges under a single count that the defendant received multiple benefits, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.) However, where the evidence shows a "continuous course of conduct," a unanimity instruction is not required. (*People v. Dieguez, supra,* 89 Cal.App.4th at p. 275.) If the court concludes that a unanimity instruction is required, give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

If the defendant is charged with a felony violation of Penal Code section 532a(1), give Instruction 1498, False Financial Statement: Use of False Identifying Information.

Related Instructions
Instruction 1495, False Financial Statement: Making False Statement.
Instruction 1497, False Financial Statement: Reaffirming Statement.
Instruction 1498, False Financial Statement: Use of False Identifying Information.

AUTHORITY

Elements ▸ Pen. Code, § 532a(2).
Unanimity Instruction If Multiple Items ▸ See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 42.

LESSER INCLUDED OFFENSE

A violation of Penal Code section 532a is a misdemeanor unless the defendant used "a fictitious name, social security number, business name, or business address, or . . . falsely represent[ed] himself or herself to be another person or another business." (Pen. Code, § 532a(4).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must

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provide the jury with a verdict form on which the jury will indicate if this allegation has or has not been proved. If the jury finds that the allegation has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of the Bench Notes to Instruction 1495, False Financial Statement: Making False Statement.

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STAFF NOTES

See Notes to Instruction 1495.

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1497. False Financial Statement: Reaffirming Statement

The defendant is charged [in Count __] with representing in writing that a false written statement about (his/her/another person's/a corporation's) (financial condition[,]/ [or] means[,]/ [or] ability to pay) was true.

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

<Alternative 1A—statement made about defendant himself/herself>

[1. The defendant knew a written statement had been made about (his/her) (financial condition[,]/ [or] means[,]/ [or] ability to pay).]

<Alternative 1B—statement made about someone else or a corporation>

[1. The defendant knew a written statement had been made about the (financial condition[,]/ [or] means[,]/ [or] ability to pay) of (another person/a firm or corporation (in which the defendant had an interest/ [or] for which the defendant was acting)).]

2. After that first written statement had been made, the defendant made a second written statement representing that the contents of the first statement were true at the time of the second statement.

3. The defendant knew that the contents of the first statement were not true at the time (he/she) made the second statement.

AND

4. Based on the second statement, the defendant obtained the (delivery of personal property[,]/ [or] payment of cash[,]/ [or] making of a loan[,]/ [or] extension of [a] credit[,]/ [or] execution of a contract of guaranty or suretyship[,]/ [or] discount of an account receivable[,]/ [or] making, acceptance, discount, sale, or endorsement of a bill of exchange or promissory note) for ((his/her) benefit/the benefit of the (other person/corporation)).

[The People allege that the defendant represented that the following statements were true: _____ *<insert descriptions when multiple statements alleged>***. You may not find the defendant guilty unless you all agree that the People have proved that the defendant represented that at least one of these**

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statements was true while knowing that the statement was false. You must all agree on which false statement (he/she) represented to be true.]

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant represented as true multiple false statements, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.) However, where the evidence shows a "continuous course of conduct," a unanimity instruction is not required. (*People v. Dieguez, supra,* 89 Cal.App.4th at p. 275.) If the court concludes that a unanimity instruction is required, give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to Instruction 160, Unanimity, discussing when instruction on unanimity is and is not required.)

If the defendant is charged with a felony violation of Penal Code section 532a(1), give Instruction 1498, False Financial Statement: Use of False Identifying Information.

Related Instructions
Instruction 1495, False Financial Statement: Making False Statement.
Instruction 1496, False Financial Statement: Obtaining Benefit.
Instruction 1498, False Financial Statement: Use of False Identifying Information.

AUTHORITY

Elements ▸ Pen. Code, § 532a(3).
Unanimity Instruction If Multiple Items ▸ See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 42.

LESSER INCLUDED OFFENSE

A violation of Penal Code section 532a is a misdemeanor unless the defendant used "a fictitious name, social security number, business name, or business

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address, or . . . falsely represent[ed] himself or herself to be another person or another business." (Pen. Code, § 532a(4).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if this allegation has or has not been proved. If the jury finds that the allegation has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

See the Related Issues section of the Bench Notes to Instruction 1495, False Financial Statement: Making False Statement.

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STAFF NOTES

See Notes to Instruction 1495.

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1498. False Financial Statement: Use of False Identifying Information

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If you find the defendant guilty of ((making/ [or] causing to be made) a false written statement as charged in Count ___[,]/ [or] obtaining [a] benefit[s] using a false written statement as charged in Count ___[,]/ [or] representing as true a false written statement as charged in Count ___), you must then decide whether the People have proved that the defendant used false identifying information.

<Alternative A—fictitious information>
[To prove this allegation, the People must prove that the defendant used a fictitious (name[,]/ [or] social security number[,]/ [or] business name[,]/ [or] business address).]

<Alternative B—represented self as someone else>
[To prove this allegation, the People must prove that the defendant falsely (represented that (he/she) was someone else/ [or] claimed that (he/she) represented a business when (he/she) did not).]

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.

BENCH NOTES

Instructional Duty
If the defendant is charged with a felony based on using false identifying information, the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with the appropriate instruction on the other elements of the offense, Instructions 1495 to 1497.

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 that the defendant used false identifying information.

Related Instructions
Instruction 1495, False Financial Statement: Making False Statement.

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Instruction 1496, False Financial Statement: Obtaining Benefit.
Instruction 1497, False Financial Statement: Reaffirming Statement.

AUTHORITY

Elements ▸ Pen. Code, § 532a(4).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 42.

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STAFF NOTES

Penal Code, § 532a, in relevant part:

> (4) Any person committing a public offense under subdivision (1), (2), or (3) shall be guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars ($ 1,000), or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment. Any person who violates the provisions of subdivision (1), (2), or (3), by using a fictitious name, social security number, business name, or business address, or by falsely representing himself or herself to be another person or another business, is guilty of a felony and is punishable by a fine not exceeding five thousand dollars ($ 5,000) or by imprisonment in the state prison, or by both such fine and imprisonment, or by a fine not exceeding two thousand five hundred dollars ($ 2,500) or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

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1499. Unauthorized Use of Personal Identifying Information

The defendant is charged [in Count __] with the unauthorized use of someone else's personal identifying information.

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

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

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

AND

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

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

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

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An *unlawful purpose* includes unlawfully (obtaining/ [or] attempting to obtain) (credit[,]/ [or] goods[,]/ [or] services[,]/ [or] medical information) in the name of the other person.

BENCH NOTES

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

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

AUTHORITY

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

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

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STAFF NOTES

Penal Code, § 530.5:

(a) Every person who willfully obtains personal identifying information, as defined in subdivision (b), of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, or medical information in the name of the other person without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished either by imprisonment in a county jail not to exceed one year, a fine not to exceed one thousand dollars ($ 1,000), or both that imprisonment and fine, or by imprisonment in the state prison, a fine not to exceed ten thousand dollars ($ 10,000), or both that imprisonment and fine.

(b) "Personal identifying information," as used in this section, means the name, address, telephone number, health insurance identification number, taxpayer identification number, school identification number, state or federal driver's license number, or identification number, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, checking account number, PIN (personal identification number) or password, alien registration number, government passport number, date of birth, unique biometric data including fingerprint, facial scan identifiers, voice print, retina or iris image, or other unique physical representation, unique electronic data including identification number, address, or routing code, telecommunication identifying information or access device, information contained in a birth or death certificate, or credit card number of an individual person.

(c) In any case in which a person willfully obtains personal identifying information of another person, uses that information to commit a crime in addition to a violation of subdivision (a), and is convicted of that crime, the court records shall reflect that the person whose identity was falsely used to commit the crime did not commit the crime.

(d) Every person who, with the intent to defraud, acquires, transfers, or retains possession of the personal identifying information, as

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defined in subdivision (b), of another person is guilty of a public offense, and upon conviction therefor, shall be punished by imprisonment in a county jail not to exceed one year, or a fine not to exceed one thousand dollars ($ 1,000), or by both that imprisonment and fine.

No Cases

There are no published cases on this statute, enacted in 1997.

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1600. Driving Under the Influence

The defendant is charged [in Count __] with driving under the influence of (an alcoholic beverage/ [and/or] a drug).

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

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

AND

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

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

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

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

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90.) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give Instruction 1610, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions. If the court grants a bifurcated trial, give Instruction 1611, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

In the definition of alcoholic beverage, the court may use the bracketed "liquid or solid" at its discretion.

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If there is evidence of a test result of 0.08 percent or more blood alcohol, the jury may presume that the defendant was under the influence. (Veh. Code, § 23610.) In that case, give the bracketed sentence that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more." (Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 505.) If the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15.) The court should consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5, with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11.)

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

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

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

Related Instructions
Instruction 1601, Driving With 0.08 Percent Blood Alcohol.
Instruction 1610, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions.
Instruction 1611, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial.

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AUTHORITY

Elements ▸ Veh. Code, § 23152(a).
Alcoholic Beverage Defined ▸ Veh. Code, § 109, Bus. & Prof. Code, § 23004.
Drug Defined ▸ Veh. Code, § 312.
Driving ▸ *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768.
Presumptions ▸ Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505.
Under the Influence Defined ▸ *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666.
Manner of Driving ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 84; *People v. McGrath* (1928) 94 Cal.App. 520, 524.
Legal Entitlement to Use Drug Not a Defense ▸ Veh. Code, § 23630.
Prior Convictions ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.
2 Witkin, Cal. Evidence (3d ed. 2003) Demonstrative Evidence, § 54.

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Driving
"[S]ection 23152 requires proof of volitional movement of a vehicle." (*Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768.) However, the movement may be slight. (*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029; *Henslee v. Dept. of Motor Vehicles* (1985) 168 Cal.App.3d 445, 450–453.) Further, driving may be established through circumstantial evidence. (*Mercer, supra,* 53 Cal.3d at p. 770; *People v. Wilson* (1985) 176 Cal.App.3d Supp. 1, 9 [sufficient evidence of driving where the vehicle was parked on the freeway, over a mile from the on-ramp, and the defendant, the sole occupant of the vehicle, was found in the driver's seat with the vehicle's engine running].)

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PAS Test Results
The results of a preliminary alcohol screening (PAS) test "are admissible upon a showing of either compliance with title 17 or the foundational elements of (1) properly functioning equipment, (2) a properly administered test, and (3) a qualified operator . . . ." (*People v. Williams* (2002) 28 Cal.4th 408, 417.)

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

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STAFF NOTES

Veh. Code, § 23152(a):

> (a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

Veh. Code, § 109, "Alcoholic beverage"; "Intoxicating liquor", in relevant part:

> "Alcoholic beverage" includes any liquid or solid material intended to be ingested by a person which contains ethanol, also known as ethyl alcohol, drinking alcohol, or alcohol, including, but not limited to, alcoholic beverages as defined in Section 23004 of the Business and Professions Code, intoxicating liquor, malt beverage, beer, wine, spirits, liqueur, whiskey, rum, vodka, cordials, gin, and brandy, and any mixture containing one or more alcoholic beverages. Alcoholic beverage includes a mixture of one or more alcoholic beverages whether found or ingested separately or as a mixture.

Bus. & Prof. Code, § 23004, "Alcoholic beverage":

> "Alcoholic beverage" includes alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine, or beer, and which contains one-half of 1 percent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances.

Veh. Code, § 312, "Drug":

> The term "drug" means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions.

Veh. Code, § 23610, “Presumptions affecting burden of proof”:

> (a) Upon the trial of any criminal action, or preliminary proceeding in a criminal action, arising out of acts alleged to have been

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committed by any person while driving a vehicle while under the influence of an alcoholic beverage in violation of subdivision (a) of Section 23152 or subdivision (a) of Section 23153, the amount of alcohol in the person's blood at the time of the test as shown by chemical analysis of that person's blood, breath, or urine shall give rise to the following presumptions affecting the burden of proof:

(1) If there was at that time less than 0.05 percent, by weight, of alcohol in the person's blood, it shall be presumed that the person was not under the influence of an alcoholic beverage at the time of the alleged offense.

(2) If there was at that time 0.05 percent or more but less than 0.08 percent, by weight, of alcohol in the person's blood, that fact shall not give rise to any presumption that the person was or was not under the influence of an alcoholic beverage, but the fact may be considered with other competent evidence in determining whether the person was under the influence of an alcoholic beverage at the time of the alleged offense.

(3) If there was at that time 0.08 percent or more, by weight, of alcohol in the person's blood, it shall be presumed that the person was under the influence of an alcoholic beverage at the time of the alleged offense.

(b) Percent, by weight, of alcohol in the person's blood shall be based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

(c) This section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether the person ingested any alcoholic beverage or was under the influence of an alcoholic beverage at the time of the alleged offense.

Evid. Code, § 607, "Effect of certain presumption in a criminal action":

When a presumption affecting the burden of proof operates in a criminal action to establish presumptively any fact that is essential to the defendant's guilt, the presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt, and, in such case, the defendant need only raise a reasonable doubt as to the existence of

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the presumed fact.

Veh. Code, § 23630, “Entitlement to use of drug”:

> The fact that any person charged with driving under the influence of any drug or the combined influence of alcoholic beverages and any drug in violation of Section 23152 or 23153 is, or has been entitled to use, the drug under the laws of this state shall not constitute a defense against any violation of the sections.

Under the Influence

> Driving while under the influence of alcohol" (DUI), which is prohibited by section 23152, subdivision (a), is defined in the following terms: "'A person is [under the influence of an alcoholic beverage] . . . when as a result of [drinking such alcoholic beverage] . . . [his] [her] physical or mental abilities are impaired to such a degree that [he] [she] no longer has the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances.'

(*Hamilton v. Gourley* (2002) 103 Cal.App.4th 351, 360 [quotation marks, citations and italics removed].)

> The jury was given the following instruction taken from CALJIC 971 (rev.) which, in pertinent part, provides: "A person is under the influence of intoxicating liquor when as a result of drinking such liquor his physical or mental abilities are impaired so that he no longer has the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence, under the same or similar circumstances." . . .
>
> Before its revision, CALJIC 971 used an established and traditional instruction defining the degree to which a person must be influenced by alcohol to warrant a conviction under the law. This concept was first promulgated in 1922 in the case of *People* v. *Dingle*, [1922] 56 Cal.App. 445, 449 in which the court held: ". . . with respect to the meaning of the phrase 'under the influence of intoxicating liquor,' as used in this statute, we think we are well within the bounds of accuracy in saying that if intoxicating liquor has so far affected the nervous system, brain, or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in

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> the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions, then such driver is 'under the influence of intoxicating liquor' within the meaning of the statute." . . .
>
> The only thing missing from CALJIC 971 (rev.) is the magic phrase, "to an appreciable degree." Yet what other meaning can reasonably be given to an instruction which says that the driver's ability to operate a car is so impaired that he no longer has the ability to drive with the cautious characteristics of a sober person of ordinary prudence under the same or similar condition?
>
> We hold, therefore, that CALJIC 971 (rev.) properly defines "under the influence of intoxicating liquor."

(*People v. Schoonover* (1970) 5 Cal.App.3d 101, 105-107; *see also People v. Haeussler* (1953) 41 Cal.2d 252, 261 [approving of instruction based on *Dingle*]; *People v. Weathington* (1991) 231 Cal.App.3d 69, 80-81 [court not required to instruct on impairment “to an appreciable degree”].)

> The term "under the influence" differs for the purposes of section 23152, subdivision (a) and Health and Safety Code section 11550. "To be 'under the influence' within the meaning of the Vehicle Code, the . . . drug(s) must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree *the ability to operate a vehicle* in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties. [Citations.] In contrast, 'being under the influence' within the meaning of Health and Safety Code section 11550 merely requires that the person be under the influence in any detectable manner. The symptoms of being under the influence within the meaning of that statute are not confined to those commensurate with misbehavior, nor to those which demonstrate impairment of physical or mental ability. [Citation.]”

(*People v. Enriquez* (1996) 42 Cal.App.4th 661, 665.)

> Our view that a definition of "under the influence" is required when instructing pursuant to CALJIC No. 12.65 [misdemeanor DUI] is reinforced by the fact that a definition of "under the influence" is

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> required when instructing on felony driving under the influence in violation of section 23153, subdivision (a). (See CALJIC No. 12.60.)

(*Id.* at p. 666.)

Manner of Driving

> CALJIC No. 16.832 provides: "The manner in which a vehicle is being operated is not sufficient in itself to establish that the driver of the vehicle either is or is not [under the influence of an alcoholic beverage] . . . .
>
> "However, the manner in which the vehicle is being operated is a factor to be considered in light of all the proved surrounding circumstances in deciding whether the person operating the vehicle was or was not [under the influence of an alcoholic beverage] . . . ."
>
> CALJIC No. 16.832 is a correct statement of the law.

(*People v. Weathington* (1991) 231 Cal.App.3d 69, 82, 84; see also *People v. Rice* (1988) 200 Cal.App.3d 647, 653 [approving of CALJIC instruction].)

People v. Weathington, supra, noted that this instruction appears to derive from *People v. McGrath* (1928) 94 Cal.App. 520, 524. *People v. McGrath, supra,* considered whether reckless driving was a necessarily included offense in driving under the influence. (*Id.* at p. 523.) In concluding that it was not, the court observed,

> The determining factor in the trial of a case presented under [. . . the charge of driving under the influence] relates, therefore, to the mental and physical condition of the driver, that is, his ability to operate his car, and not to the manner in which the car is being actually driven, nor the result of its operation.

(*Id.* at p. 524.)

Presumptions Arising from Blood Alcohol Level

> [T]he presumption is neither unfair nor unconstitutional. A statutory presumption affecting the burden of proof in a criminal cause does not alter the People's duty to prove defendant's guilt beyond a reasonable doubt. It merely allows proof of an ultimate fact by

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> permitting that fact to be presumed from proof of a preliminary fact. Whether the ultimate fact is proved by direct evidence or by a presumption which arises from proof of a preliminary fact, the defendant's burden of rebuttal remains the same: he need only raise a reasonable doubt as to the sufficiency of the proof of the ultimate fact.

(*People v. Lachman* (1972) 23 Cal.App.3d 1094, 1097.)

> To be proper in a criminal prosecution, the underlying fact giving rise to the presumption must be proved beyond a reasonable doubt (Evid. Code, § 607), and due process requires that there be a rational connection between the proven fact and that presumed.

(*People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4-5.)

However, the previous CALJIC instruction was held to be error because it instructed that the jury "should find the defendant was under the influence," thereby creating an impermissible mandatory presumption:

> The California Supreme Court in [*People* v. *Roder* (1983) 33 Cal.3d] states that a sharp distinction is drawn between a *permissive* presumption and a *mandatory* presumption. A permissive presumption allows -- but does not require -- the trier of fact to infer the ultimate fact from proof by the prosecutor of the "basic" fact, and places no burden of any kind on defendant. A *mandatory* presumption tells the trier of fact that it *must* find the "elemental fact" upon proof of the "basic fact" unless the defendant comes forward with some evidence to rebut the presumed connection between the two facts. . . .
>
> [W]e note the concern expressed by the CALJIC Committee in the use note for CALJIC No. 12.61.1 (1983 rev.): " . . . On the question of whether the trial court in using CALJIC 12.61.1 should use the phrase 'should find' or 'may but are not required to infer,' see *People* v. *Roder*, 33 Cal.3d 491 . . . . The Committee believes that *People* v. *Roder* requires that the statutory presumption should be treated as a permissible inference in which event the first and third bracketed phrase should be stricken."
>
> We agree. Granted, the word "should" does not have the same mandatory message as the word "shall," it is nonetheless a

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> mandatory word which requires the presumption of the elemental fact from proof of the basic fact. In *Roder, supra*, the Attorney General contended that the word "should" be used rather than the term "are permitted, but not required." The court's reply was: "In our view, the use of the word 'should' in this context could easily be interpreted by a reasonable juror to transform the instruction from a permissive guideline into a mandatory directive, reintroducing the same constitutional problems posed by the current mandatory presumption." (*People* v. *Roder, supra*, 33 Cal.3d 491, 506, fn. 15.) Hence, the giving of the instruction as worded was error.

(*People v. Milham* (1984) 159 Cal.App.3d 487, 503–505.)

Where the defendant's blood alcohol level at the time of the test falls within the range in which no presumption applies, currently 0.05 % to less than 0.08%, it is error to read the presumption instruction to the jury. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15.) Further, one court held that where the test result did not exceed the margin of error for the testing system, it was error to instruct on the presumption. (*People v. Campos, supra,* 138 Cal.App.3d Supp. at p. 5.) However, a later court held that after the instruction had been revised to eliminate the "should" language, it was not error to give the instruction despite the fact that the test result was not above margin of error. (*People v. Randolph* (1989) 213 CalApp.3d Supp. 1, 11.)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05%. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496.) It is not error to refuse an instruction on this presumption if the prosecution's theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250.)

The statute establishes no time limit for the administering of the test. (*People v. Schrieber* (1975) 45 Cal.App.3d 917, 922.) However, the court in *People v. Schrieber, supra,* noted that the test must be "incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe such person was driving a motor vehicle upon a highway while under the influence of intoxicating liquor. . . ." (*Id.* at p. 922 [quoting Veh. Code, § 13353].) The court stated,

> In other words, as prescribed by the statute, the test must be incidental to both the offense and to the arrest and the only reasonable interpretation which can be given such language is

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> that no substantial time elapse occurs between the offense and the arrest.

(Ibid.)

Failure to Comply with Title 17

> The [*People v. Adams* (1976) 59 Cal.App.3d 559] court authorized admitting breath test evidence after a showing of (1) the reliability of the instrument, (2) the proper administration of the test, and (3) the competence of the operator. (*Adams*, *supra*, 59 Cal. App. 3d at p. 567.) To meet these requirements, the evidence would be admitted upon either a showing of compliance with the title 17 regulations or independent proof of the three elements. . . .
>
> Essential to *Adams* was the principle that admissibility depends on the reliability and consequent relevance of the evidence, not the precise manner in which it was collected. Compliance with regulations is sufficient to support admission, but not necessary. Noncompliance goes only to the weight of the evidence, not its admissibility. (*Adams*, *supra*, 59 Cal. App. 3d at p. 567.) . . .
>
> We conclude the holding of *Adams*, that the breath test results are admissible upon a showing of either compliance with title 17 or the foundational elements of (1) properly functioning equipment, (2) a properly administered test, and (3) a qualified operator, is the better approach.

(*People v. Williams* (2002) 28 Cal.4th 408, 414–417.)

Driving

"[S]ection 23152 requires proof of volitional movement of a vehicle." (*Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 768.)

> It is true that the driver in *Henslee* only moved the car slightly. But the movement need not be extensive; even a matter of a few inches will suffice to constitute driving. *In our view, if the driver does not move the vehicle in the officer's presence, the offense is not committed in his presence*. Here Officer Nagel conceded that no driving occurred in his presence; the car, although running, was not moved. We are thus constrained to agree that the offense did not

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> occur in Officer Nagel's presence for purposes of Penal Code section 836. [Citations.]

(*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029 [discussing *Henslee v. Depart. of Motor Vehicles* (1985) 168 Cal.App.3d 445, 450-453]; see also *Music v. Depart. of Motor Vehicles* (1990) 221 Cal.App.3d 841, 850.)

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1601. Driving With 0.08 Percent Blood Alcohol

The defendant is charged [in Count __] with driving with a blood alcohol level of 0.08 percent or more.

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

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

AND

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

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

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

BENCH NOTES

Instructional Duty

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

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90.) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336;

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People v. Weathington, *supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give Instruction 1610, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions. If the court grants a bifurcated trial, give Instruction 1611, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

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

Related Instructions
Instruction 1600, Driving Under the Influence.
Instruction 1610, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions.
Instruction 1611, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial.

AUTHORITY

Elements ▸ Veh. Code, § 23153(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266.
Partition Ratio ▸ Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890.
Presumptions ▸ Veh. Code, § 23153(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505.
Statute Constitutional ▸ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273.
Prior Convictions ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

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LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Partition Ratio

In 1990, the Legislature amended Vehicle Code section 23152(b) to state that the "percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath." Following this amendment, the Supreme Court held that evidence of variability of breath-alcohol partition ratios was not relevant and properly excluded. (*People v. Bransford* (1994) 8 Cal.4th 885, 890–893.) However, evidence of variability in urine-alcohol partition ratios is admissible. (*People v. Acevedo* (2001) 93 Cal.App.4th 757, 765.)

See the Related Issues section in Instruction 1600, Driving Under the Influence.

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STAFF NOTES

Veh. Code, § 23152, in relevant part:

> (b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.
>
> For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.
>
> In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

Elements and Proof of Blood Alcohol Level

> Although under section 23152, subdivision (b), it is no longer necessary to prove that the defendant was in fact under the influence, the People still must prove beyond a reasonable doubt that at the time he was driving his blood alcohol exceeded [0.08 . . .] percent. (See fn. 10.)
>
> n.10 Section 23152, subdivision (b), prohibits driving a vehicle with a blood-alcohol level of [0.08 . . .]percent or higher; it does not prohibit driving a vehicle when a subsequent test shows a level of [0.08 . . .]percent or more. Circumstantial evidence will generally be necessary to establish the requisite blood-alcohol level called for by the statute. A test for the proportion of alcohol in the blood will, obviously, be the usual type of circumstantial evidence, but of course the test is not conclusive: the defendant remains free to challenge the accuracy of the test result, the manner in which it was administered, and by whom.

(*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266.)

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Presumptions Arising from Blood Alcohol Level

See Notes to Instruction 1600.

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1602. Driving Under the Influence Causing Injury

The defendant is charged [in Count __] with causing injury to another person while driving under the influence of (an alcoholic beverage/ [and/or] a drug).

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

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

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

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

AND

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

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

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

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

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

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

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

<Alternative A—illegal act[s] not separately charged>
[To prove that the defendant committed _____ *<list name of offense>***, the People must prove that:** *<LIST ELEMENTS>*
*<Repeat for each illegal act alleged that is not separately charged.>***]**

<Alternative B—illegal act separately charged>
[Instruction _____ *<insert instruction number>* **explains what the People must prove to establish that the defendant committed _____** *<list name of offense>***.**
*<Repeat for each illegal act alleged that is separately charged.>***]**

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

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable and prudent 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.]

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

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

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

<Alternative A—unanimity required; see Bench Notes>
[The People allege that the defendant (committed the following illegal act[s]/ [or] failed to perform the following legal (duty/duties)): _____ *<insert alleged predicate acts or omissions when multiple acts/omissions alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed at least one of these alleged acts/ [or] failed to perform at least one of these duties). You must all agree on (which act the defendant committed/ [or] which duty the defendant failed to perform).]**

<Alternative B—unanimity not required; see Bench Notes>
[The People allege that the defendant (committed the following illegal act[s]/ [or] failed to perform the following legal (duty/duties)): _____ *<insert alleged predicate acts or omissions when multiple acts/omissions alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed at least one of these alleged acts/ [or] failed to perform at least one of these duties). But you do not have to all agree on (which act the defendant committed/ [or] which duty the defendant failed to perform).]**

BENCH NOTES

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

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense

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alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.)

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

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

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [unanimity instruction not required, failure to give harmless error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

In the definition of alcoholic beverage, the court may use the bracketed "liquid or solid" at its discretion.

If there is evidence of a test result of 0.08 percent or more blood alcohol, the jury may presume that the defendant was under the influence. (Veh. Code, § 23610.) In that case, give the bracketed sentence that begins with "If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more." (Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 505.) If the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15.) The

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court should consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5, with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11.)

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

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

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

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90.) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give Instruction 1610, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions. If the court grants a bifurcated trial, give Instruction 1611, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

If there is sufficient evidence and the defendant so requests, the court should instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware*

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(1940) 41 Cal.App.2d 268, 269–270.) The court may use the bracketed instruction on sudden emergency in Instruction 770, Gross Vehicular Manslaughter While Intoxicated.

Related Instructions
Instruction 1603, Driving With 0.08 Percent Blood Alcohol Causing Injury.
Instruction 1610, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions.
Instruction 1611, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial.
Instruction 775, Vehicular Manslaughter: Speeding Laws Defined.

AUTHORITY

Elements ▸ Veh. Code, § 23153(a); *People v. Minor* (1994) 28 Cal.App.4th 431, 438.
Alcoholic Beverage Defined ▸ Veh. Code, § 109, Bus. & Prof. Code, § 23004.
Drug Defined ▸ Veh. Code, § 312.
Presumptions ▸ Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505.
Under the Influence Defined ▸ *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666.
Must Instruct on Elements of Predicate Offense ▸ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.
Negligence—Ordinary Care ▸ Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282.
Causation ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.
Legal Entitlement to Use Drug Not a Defense ▸ Veh. Code, § 23630.
Unanimity Instruction ▸ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587.
Prior Convictions ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.
2 Witkin, Cal. Evidence (3d ed. 2003) Demonstrative Evidence, § 54.

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LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

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

Neglect of Duty Imposed by Law
"In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of [the Vehicle Code] was violated." (Veh. Code, § 23153(c); *People v. Oyass* (1985) 173 Cal.App.3d 663, 669.) "[The] neglect of duty element . . . is satisfied by evidence which establishes that the defendant's conduct amounts to no more than ordinary negligence." (*People v. Oyass, supra,* 173 Cal.App.3d at p. 669.) "[T]he law imposes on any driver [the duty] to exercise ordinary care at all times and to maintain a proper control of his or her vehicle." (*Id.* at p. 670.)

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

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

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STAFF NOTES

Veh. Code, § 23153, in relevant part:

> (a) It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver. [. . .]
>
> (c) In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of this code was violated.

Veh. Code, § 109, "Alcoholic beverage"; "Intoxicating liquor", in relevant part:

> "Alcoholic beverage" includes any liquid or solid material intended to be ingested by a person which contains ethanol, also known as ethyl alcohol, drinking alcohol, or alcohol, including, but not limited to, alcoholic beverages as defined in Section 23004 of the Business and Professions Code, intoxicating liquor, malt beverage, beer, wine, spirits, liqueur, whiskey, rum, vodka, cordials, gin, and brandy, and any mixture containing one or more alcoholic beverages. Alcoholic beverage includes a mixture of one or more alcoholic beverages whether found or ingested separately or as a mixture.

Bus. & Prof. Code, § 23004, "Alcoholic beverage":

> "Alcoholic beverage" includes alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine, or beer, and which contains one-half of 1 percent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances.

Veh. Code, § 312, "Drug":

> The term "drug" means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and

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cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions.

Veh. Code, § 23610, "Presumptions affecting burden of proof":

(a) Upon the trial of any criminal action, or preliminary proceeding in a criminal action, arising out of acts alleged to have been committed by any person while driving a vehicle while under the influence of an alcoholic beverage in violation of subdivision (a) of Section 23152 or subdivision (a) of Section 23153, the amount of alcohol in the person's blood at the time of the test as shown by chemical analysis of that person's blood, breath, or urine shall give rise to the following presumptions affecting the burden of proof:

(1) If there was at that time less than 0.05 percent, by weight, of alcohol in the person's blood, it shall be presumed that the person was not under the influence of an alcoholic beverage at the time of the alleged offense.

(2) If there was at that time 0.05 percent or more but less than 0.08 percent, by weight, of alcohol in the person's blood, that fact shall not give rise to any presumption that the person was or was not under the influence of an alcoholic beverage, but the fact may be considered with other competent evidence in determining whether the person was under the influence of an alcoholic beverage at the time of the alleged offense.

(3) If there was at that time 0.08 percent or more, by weight, of alcohol in the person's blood, it shall be presumed that the person was under the influence of an alcoholic beverage at the time of the alleged offense.

(b) Percent, by weight, of alcohol in the person's blood shall be based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

(c) This section shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether the person ingested any alcoholic beverage or was under the influence of an alcoholic beverage at the time of the alleged offense.

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Evid. Code, § 607, "Effect of certain presumption in a criminal action":

> When a presumption affecting the burden of proof operates in a criminal action to establish presumptively any fact that is essential to the defendant's guilt, the presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt, and, in such case, the defendant need only raise a reasonable doubt as to the existence of the presumed fact.

Veh. Code, § 23630, "Entitlement to use of drug":

> The fact that any person charged with driving under the influence of any drug or the combined influence of alcoholic beverages and any drug in violation of Section 23152 or 23153 is, or has been entitled to use, the drug under the laws of this state shall not constitute a defense against any violation of the sections.

Elements

> The law is clear that the elements of section 23153, subdivision (a), are as follows: (1) driving a vehicle while under the influence of an alcoholic beverage or drug; (2) when so driving, committing some act which violates the law or is a failure to perform some duty required by law; and (3) as a proximate result of such violation of law or failure to perform a duty, another person was injured. (*People v. Capetillo* (1990) 220 Cal. App. 3d 211, 216.) . . ..

(*People v. Minor* (1994) 28 Cal.App.4th 431, 438.)

Under the Influence
See Note to Instruction 1600.

Presumptions Arising from Blood Alcohol Level
See Note to Instruction 1600.

DUI Cannot Serve as Predicate Unlawful Act

> To satisfy the second element, the evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence. (*People v. Oyaas* (1985) 173 Cal. App. 3d 663, 668.)

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(*People v. Minor* (1994) 28 Cal.App.4th 431, 438 [italics in original].)

Must Instruct on Elements of Predicate Offense

> Here, the section 23153 violations as charged in the amended information alleged Minor "in so driving did an act forbidden by law, to wit: VC21658(a), VC22350, VC22349, and neglected a duty imposed by law . . . ." An examination of the record shows the prosecution case was based on Minor violating these Vehicle Code sections--not on a negligence theory. In *People v. Gary* (1987) 189 Cal. App. 3d 1212, in which the defendant was charged with violating sections 23153, subdivision (a), and 23153, subdivision (b), the Court of Appeal held it was error not to define the three underlying Vehicle Code violations alleged in the information in conjunction with the two counts. (*Id*. at pp. 1216-1217.) "Here, by failing to instruct the jury on the charged acts forbidden by law, the trial court failed to instruct on an essential element of the offense." (*Id*. at p. 1217.)
>
> Here, with respect to the felony drunk driving charges, the trial court read CALJIC No. 12.60, which includes only the phrase "did some act which violated the law or failed to perform some duty required by law . . . ." Because the trial court did not reference the applicable Vehicle Code violations with respect to Minor's felony drunk driving counts, the jury very well may have concluded it did not have to find any Vehicle Code violation to convict him on these counts. Inasmuch as the jury could have convicted Minor without finding all of the requisite elements under this instructional charge, we are compelled to find error in this case. In circumstances such as this, where the prosecution is relying on specific code violations for both manslaughter and felony drunk driving, the trial court must make it clear to the jurors that they are required to find the code section violations for both offenses. In our view, CALJIC No. 12.60 should be adjusted accordingly in such cases.

(*People v. Minor (*1994) 28 Cal.App.4th 431, 438-439 [footnote omitted].)

Unlawful Act Must be Committed When Driving

> The common thread weaving through all these cases is the violation of law or failure to perform a duty imposed by law occurred *when* the accused was driving the vehicle. Each case identifies some

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> feature which is in addition to and independent from the mere act of driving the vehicle while under the influence of alcohol or a narcotic.
>
> In the present case, the only acts or omissions supported by the evidence are the joyriding and hit-and-run offenses. . . .
>
> [Joyriding”] does not satisfy the requirement of "when so driving, do any act forbidden by law . . . in the driving of the vehicle." In this case it was Capetillo's driving the stolen vehicle which, itself, violated the law, rather than his violating the law or neglecting a duty "when driving." Although the unlawful driving or taking of a vehicle is an act forbidden by law, it is not a violation which occurred when Mr. Capetillo was "so driving."

(*People v. Capetillo* (1990) 220 Cal. App. 3d 211, 217.)

A 1992 amendment to the statute changed the phrase from “when so driving” to “concurrently.” (*See People v. Weems* (1997) 54 Cal.App.4th 854, 858, fn. 4.)

Neglect of Duty—Ordinary Negligence Sufficient

“In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of . . . [the Vehicle Code] was violated.” (Veh. Code, § 23153(c); *People v. Oyass* (1985) 173 Cal.App.3d 663, 669.)

“[The] neglect of duty element . . . is satisfied by evidence which establishes that the defendant's conduct amounts to no more than ordinary negligence.” (*People v. Oyass, supra,* 173 Cal.App.3d at p. 669.) “[T]he law imposes on any driver [the duty] to exercise ordinary care at all times and to maintain a proper control of his or her vehicle.” (*Id.* at p. 670.)

Unlawful Act or Neglect of Duty Must Cause Injury, Not Necessarily Accident

In *People v. Weems* (1997) 54 Cal.App.4th 854, 859–860, the defendant violated the mandatory seat belt law by failing to require that his adult passengers wear their seat belts. A passenger in the vehicle was injured when he hit the ceiling of the vehicle during the accident. *(Ibid.)* The court held that this satisfied the unlawful act or neglect of duty element of Vehicle Code section 23153 because

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there was a causal connection between the *injury* and the violation even though the violation did not cause the *accident*. *(Ibid.)*

> Both subdivisions (a) and (b) of section 23153 clearly refer to an "act or neglect" which "proximately causes bodily injury to any person other than the driver." The statute is also clear that the only required link between the driving under the influence and the "act or neglect" is that the two occur "concurrently." (§ 23153, subds. (a) and (b).) There is nothing in the language of the statute which suggests the "act or neglect" must also proximately cause the accident and relate "to the actual careless driving of the vehicle," as defendant contends.

(Ibid.)

On the other hand, in *People v. Capetillo* (1990) 220 Cal. App. 3d 211, 220, the defendant's flight from the scene of the accident did not cause any of the injuries to the victims and thus did not support the felony drunk driving charge:

> The proper question is whether there was an unbroken connection between the wrongful act and the injury. . . .
>
> Here, the prosecution failed to prove any injuries or aggravation to existing injuries were proximately caused by Capetillo's failure to identify himself and render aid. Therefore, on the evidence in this case the hit and run cannot support a conviction for felony drunk driving.

Unanimity Instruction

Authority is divided over whether a unanimity instruction must be given when more than one unlawful act is presented to the jury as a possible basis for felony drunk driving. One court held that,

> [I]n order to comply with the requirement that the crime charged be proved beyond a reasonable doubt, a defendant's guilt as to each element must be proved beyond a reasonable doubt. Thus if the facts of a case present a situation where different acts could constitute the same element of an offense, the defendant is entitled to a unanimity instruction.

(*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481].)

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Another court held that,

> [T]he unanimity instruction as to a single act need not be given where the acts proved are 'just alternate ways of proving a necessary element of the *same offense*,'' and do not in themselves constitute separate chargeable offenses.

(*People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [quoting *People v. Kent* (1981) 125 Cal.App. 3d 2078, 213, italics in original].)

A unanimity instruction is provided for the court to use at its discretion.

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1603. Driving With 0.08 Percent Blood Alcohol Causing Injury

The defendant is charged [in Count __] with causing injury to another person while driving with a blood alcohol level of 0.08 percent or more.

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

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

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

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

AND

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

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

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

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

<Alternative A—illegal act[s] not separately charged>
[To prove that the defendant committed _____*<list name of offense>***, the People must prove that:** *<LIST ELEMENTS>*

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*<Repeat for each illegal act alleged that is not separately charged.>***]**

<Alternative B—illegal act[s] separately charged>
[Instruction _____ *<insert instruction number>* **explains what the People must prove to establish that the defendant committed _____** *<list name of offense>***.**
*<Repeat for each illegal act alleged that is separately charged.>***]**

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

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable and prudent person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

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

<Alternative A—unanimity required; see Bench Notes>
[The People allege that the defendant (committed the following illegal act[s]/ [or] failed to perform the following legal (duty/duties)): _____ *<insert alleged predicate acts or omissions when multiple acts/omissions alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed at least one of these alleged acts/ [or] failed to perform at least one of these duties). You must all agree on (which act the defendant committed/ [or] which duty the defendant failed to perform).]**

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<Alternative B—unanimity not required; see Bench Notes>
[The People allege that the defendant (committed the following illegal act[s]/ [or] failed to perform the following legal (duty/duties)): _____ *<insert alleged predicate acts or omissions when multiple acts/omissions alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed at least one of these alleged acts/ [or] failed to perform at least one of these duties). But you do not have to all agree on (which act the defendant committed/ [or] which duty the defendant failed to perform).]**

BENCH NOTES

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

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

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

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

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People*

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v. Durkin (1988) 205 Cal.App.3d Supp. 9, 13 [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [unanimity instruction not required, failure to give harmless error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

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

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90.) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give Instruction 1610, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions. If the court grants a bifurcated trial, give Instruction 1611, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

If there is sufficient evidence and the defendant so requests, the court should instruct on the "imminent peril/sudden emergency" doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270.) The court may use the bracketed instruction on sudden emergency in Instruction 770, Gross Vehicular Manslaughter While Intoxicated.

Related Instructions
Instruction 1602, Driving Under the Influence Causing Injury.
Instruction 1610, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions.

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Instruction 1611, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial.
Instruction 775, Vehicular Manslaughter: Speeding Laws Defined.

AUTHORITY

Elements ▸ Veh. Code, § 23153(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266.
Partition Ratio ▸ Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890.
Presumptions ▸ Veh. Code, § 23153(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505.
Must Instruct on Elements of Predicate Offense ▸ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339.
Negligence—Ordinary Care ▸ Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282.
Causation ▸ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440.
Unanimity Instruction ▸ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587.
Statute Constitutional ▸ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273.
Prior Convictions ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

See the Related Issues section in Instruction 1602, Driving Under the Influence Causing Injury.

Partition Ratio
In 1990, the Legislature amended Vehicle Code section 23152(b) to state that "percent, by weight, of alcohol in a person's blood is based upon grams of alcohol

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per 100 milliliters of blood or grams of alcohol per 210 liters of breath." Following this amendment, the Supreme Court held that evidence of variability of breath-alcohol partition ratios was not relevant and was properly excluded. (*People v. Bransford* (1994) 8 Cal.4th 885, 890–893.) However, evidence of variability in urine-alcohol partition ratios is admissible. (*People v. Acevedo* (2001) 93 Cal.App.4th 757, 765.)

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STAFF NOTES

Veh. Code, § 23153, in relevant part:

> (b) It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.
>
> In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after driving.
>
> (c) In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of this code was violated.

Veh. Code, § 23152(b), in relevant part:

> For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

Elements and Proof of Blood Alcohol Level

> Although under section 23152, subdivision (b), it is no longer necessary to prove that the defendant was in fact under the influence, the People still must prove beyond a reasonable doubt that at the time he was driving his blood alcohol exceeded [0.08 . . .]percent. (See fn. 10.)
>
> n.10 Section 23152, subdivision (b), prohibits driving a vehicle with a blood-alcohol level of [0.08 . . .]percent or higher; it does not prohibit driving a vehicle when a subsequent test shows a level of [0.08 . . .]percent or more. Circumstantial evidence will generally be necessary to establish the requisite blood-alcohol level called for by the statute. A test for the proportion of alcohol in the blood will,

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> obviously, be the usual type of circumstantial evidence, but of course the test is not conclusive: the defendant remains free to challenge the accuracy of the test result, the manner in which it was administered, and by whom.

(*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266.)

Presumptions Arising from Blood Alcohol Level
See Notes to Instruction 1600.

DUI Cannot Serve as Predicate Unlawful Act
See Notes to Instruction 1602.

Must Instruct on Elements of Predicate Offense
See Notes to Instruction 1602.

Unlawful Act Must be Committed When Driving
See Notes to Instruction 1602.

Neglect of Duty—Ordinary Negligence Sufficient
See Notes to Instruction 1602.

Unlawful Act or Neglect of Duty Must Cause Injury but Not Accident
See Notes to Instruction 1602.

Unanimity Instruction
See Notes to Instruction 1602.

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1604. Driving While Addicted to a Drug

The defendant is charged [in Count __] with driving while addicted to a drug.

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

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

AND

2. **When (he/she) drove, the defendant was addicted to a drug.**

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

A person is *addicted* to a drug if he or she:

1. **Has become physically dependent on the drug, suffering withdrawal symptoms if he or she is deprived of it.**

2. **Has developed a tolerance to the drug's effects and therefore requires larger and more potent doses.**

AND

3. **Has become emotionally dependent on the drug, experiencing a compulsive need to continue its use.**

BENCH NOTES

Instructional Duty

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

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If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90.) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give Instruction 1610, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions. If the court grants a bifurcated trial, give Instruction 1611, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

Vehicle Code section 23630 states that the fact that the defendant was legally entitled to use the drug is not a defense to a charge of driving under the influence. (Veh. Code, § 23630.) It is unclear if this provision applies to the charge of driving while addicted. If the court concludes that the statute does apply, the court may add to the end of the instruction the sentence "It is not a defense that the defendant was legally entitled to use the drug."

Related Instructions

Instruction 1610, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions.

Instruction 1611, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial.

AUTHORITY

Elements ▸ Veh. Code, § 23152(c).
Drug Defined ▸ Veh. Code, § 312.
Addict Defined ▸ *People v. O'Neil* (1965) 62 Cal.2d 748, 754.
Prior Convictions ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

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STAFF NOTES

Veh. Code, § 23152(c):

> It is unlawful for any person who is addicted to the use of any drug to drive a vehicle. This subdivision shall not apply to a person who is participating in a narcotic treatment program approved pursuant to Article 3 (commencing with Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code.

Veh. Code, § 312, "Drug":

> The term "drug" means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions.

Veh. Code, § 23630, “Entitlement to use of drug”:

> The fact that any person charged with driving under the influence of any drug or the combined influence of alcoholic beverages and any drug in violation of Section 23152 or 23153 is, or has been entitled to use, the drug under the laws of this state shall not constitute a defense against any violation of the sections.

Narcotic Addict

> The prosecution's burden is to show (1) that the defendant has become "emotionally dependent" on the drug in the sense that he experiences a compulsive need to continue its use, (2) that he has developed a "tolerance" to its effects and hence requires larger and more potent doses, and (3) that he has become "physically dependent" so as to suffer withdrawal symptoms if he is deprived of his dosage.

(*People v. O’Neil* (1965) 62 Cal.2d 748, 754.)

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1605. Driving With 0.05 Percent Blood Alcohol When Under 21

The defendant is charged [in Count __] with driving when under the age of 21 years with a blood alcohol level of 0.05 percent or more.

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

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

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

AND

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

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Note that this offense is an infraction. (Veh. Code, §§ 4000.1, 4000.15.) However, this instruction has been included because this offense may serve as a predicate offense for gross vehicular manslaughter while intoxicated or vehicular manslaughter while intoxicated. (Pen. Code, §§ 191.5, 192(c)(3); see *People v. Goslar* (1999) 70 Cal.App.4th 270, 275–276.)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with "In evaluating (the/any) test results in this case." (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [failure to follow

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regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Veh. Code, § 23140(a); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266.
Statute Constitutional ▸ See *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273; *People v. Goslar* (1999) 70 Cal.App.4th 270, 275–276.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

RELATED ISSUES

Partition Ratio
In 1990, the Legislature amended Vehicle Code section 23152(b) to state that "percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath." Following this amendment, the Supreme Court held that evidence of variability of breath-alcohol partition ratios was not relevant and was properly excluded. (*People v. Bransford* (1994) 8 Cal.4th 885, 890–893.) However, evidence of variability in urine-alcohol partition ratios is admissible. (*People v. Acevedo* (2001) 93 Cal.App.4th 757, 765.)

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STAFF NOTES

Veh. Code, § 23140, in relevant part:

> (a) It is unlawful for a person under the age of 21 years who has 0.05 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.
>
> (b) A person may be found to be in violation of subdivision (a) if the person was, at the time of driving, under the age of 21 years and under the influence of, or affected by, an alcoholic beverage regardless of whether a chemical test was made to determine that person's blood-alcohol concentration and if the trier of fact finds that the person had consumed an alcoholic beverage and was driving a vehicle while having a concentration of 0.05 percent or more, by weight, of alcohol in his or her blood.

Elements and Proof of Blood Alcohol Level

> Although under section 23152, subdivision (b), it is no longer necessary to prove that the defendant was in fact under the influence, the People still must prove beyond a reasonable doubt that at the time he was driving his blood alcohol exceeded [0.08 . . .]percent. (See fn. 10.)
>
> n.10 Section 23152, subdivision (b), prohibits driving a vehicle with a blood-alcohol level of [0.08 . . .]percent or higher; it does not prohibit driving a vehicle when a subsequent test shows a level of [0.08 . . .]percent or more. Circumstantial evidence will generally be necessary to establish the requisite blood-alcohol level called for by the statute. A test for the proportion of alcohol in the blood will, obviously, be the usual type of circumstantial evidence, but of course the test is not conclusive: the defendant remains free to challenge the accuracy of the test result, the manner in which it was administered, and by whom.

(*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266.)

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1610. Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Conviction

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If you find the defendant guilty of ([causing injury while] driving under the influence/ [or] [causing injury while] driving with a blood alcohol level of 0.08 percent or more) [or the lesser offense of driving under the influence [or driving with a blood alcohol level of 0.08 percent or more], you must then determine whether the People have proved the additional allegation that the defendant has been convicted of (a/___ *<insert number>***) driving under the influence offense[s] before.**

The People allege that the defendant was previously convicted of the following offense[s]:

> **[1.] A violation of _____** *<insert Veh. Code section violated>***, on _____** *<insert date of conviction>***, in the _____** *<insert name of court>***, in Case Number _____** *<insert docket or case number>***.**
> *<REPEAT FOR EACH PRIOR CONVICTION ALLEGED.>*

The defendant is the person named in the documents admitted to prove (the/each) alleged conviction.

[You may only consider the evidence presented on this allegation in deciding whether the People have proved that the defendant has previously been convicted of the offense[s] alleged [or for the limited purpose of _____*<insert other permitted purpose, e.g., assessing credibility of the defendant>***]. Do not consider this evidence for any other purpose.]**

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on proof of the alleged prior convictions.

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The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90.) If the defendant stipulates, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336; *People v. Weathington, supra,* 231 Cal.App.3d at p. 90.) If the court grants a bifurcated trial, give Instruction 1611, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial. See the Bench Notes to Instruction 200, Prior Conviction, for an extensive discussion of bifurcation.

If the defendant does not stipulate and the court does not grant a bifurcated trial, give this instruction.

This instruction **must** be given with the appropriate instruction defining the elements of the driving under the influence offense charged, Instructions 1600–1603.

On request, the court should give the bracketed limiting instruction regarding the evidence of the prior convictions. (See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7.) There is no sua sponte duty to give the limiting instruction and the defense may prefer that no limiting instruction be given. (See *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.)

The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have or have not been proved.

AUTHORITY

Elements ▸ Veh. Code, §§ 23550, 23550.5 & 23566.
Prior Convictions ▸ *People v. Weathington* (191) 231 Cal.App.3d 69, 90.
Judge Determines if Defendant Person Named in Documents ▸ Pen. Code, § 1025(b); *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165.
Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 222–225.

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RELATED ISSUES

Order of Convictions, Not Offenses Relevant
In order for the sentencing enhancements for multiple driving under the influence offenses to apply, the conviction for the other offense or offenses must predate the current offense. (*People v. Snook* (1997) 16 Cal.4th 1210, 1216.) The date on which the other offenses occurred is not relevant. *(Ibid.)*

Seven-Year Period
"[F]or a fourth DUI offense to be charged as a felony, the offense must be committed within seven years of three or more separate DUI violations resulting in convictions, and all four must occur within a period of seven years." (*People v. Munoz* (2002) 102 Cal.App.4th 12, 20.)

Prior Felony Reduced to Misdemeanor
In *People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1389, the defendant had been previously convicted of a felony driving under the influence offense. After successful completion of probation, that felony was reduced to a misdemeanor under Penal Code section 17(b). *(Ibid.)* The court held that that conviction could not later be used as a prior *felony* conviction to enhance the defendant's sentence. *(Ibid.)*

See also the Related Issues section and Bench Notes to Instruction 200, Prior Conviction.

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STAFF NOTES

Veh. Code, § 23550, in relevant part:

(a) If any person is convicted of a violation of Section 23152 and the offense occurred within seven years of three or more separate violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination thereof, which resulted in convictions, that person shall be punished by imprisonment in the state prison, or in a county jail for not less than 180 days nor more than one year, and by a fine of not less than three hundred ninety dollars ($ 390) nor more than one thousand dollars ($ 1,000). The person's privilege to operate a motor vehicle shall be revoked by the Department of Motor Vehicles pursuant to paragraph (7) of subdivision (a) of Section 13352. The court shall require the person to surrender the driver's license to the court in accordance with Section 13550.

Veh. Code, § 23550.5, in relevant part:

(a) A person is guilty of a public offense, punishable by imprisonment in the state prison or confinement in a county jail for not more than one year and by a fine of not less than three hundred ninety dollars ($ 390) nor more than one thousand dollars ($ 1,000) if that person is convicted of a violation of Section 23152 or 23153, and the offense occurred within 10 years of any of the following:

(1) A prior violation of Section 23152 that was punished as a felony under Section 23550 or this section, or both, or under former Section 23175 or former Section 23175.5, or both.

(2) A prior violation of Section 23153 that was punished as a felony.

(3) A prior violation of paragraph (1) of subdivision (c) of Section 192 of the Penal Code that was punished as a felony.

(b) Every person who, having previously been convicted of a violation of Section 191.5 of the Penal Code or a felony violation of paragraph (3) of subdivision (c) of Section 192 of the Penal Code, is subsequently convicted of a violation of Section 23152 or 23153 is guilty of a public offense punishable by imprisonment in the state prison or confinement in a county jail for not more than one year and

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by a fine of not less than three hundred ninety dollars ($ 390) nor more than one thousand dollars ($ 1,000).

Veh. Code, § 23566, in relevant part:

(a) If any person is convicted of a violation of Section 23153 and the offense occurred within seven years of two or more separate violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination of these violations, which resulted in convictions, that person shall be punished by imprisonment in the state prison for a term of two, three, or four years and by a fine of not less than one thousand fifteen dollars ($ 1,015) nor more than five thousand dollars ($ 5,000). The person's privilege to operate a motor vehicle shall be revoked by the Department of Motor Vehicles pursuant to paragraph (6) of subdivision (a) of Section 13352. The court shall require the person to surrender the driver's license to the court in accordance with Section 13550.

(b) If any person is convicted of a violation of Section 23153, and the act or neglect proximately causes great bodily injury, as defined in Section 12022.7 of the Penal Code, to any person other than the driver, and the offense occurred within seven years of two or more separate violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination of these violations, which resulted in convictions, that person shall be punished by imprisonment in the state prison for a term of two, three, or four years and by a fine of not less than one thousand fifteen dollars ($ 1,015) nor more than five thousand dollars ($ 5,000). The person's privilege to operate a motor vehicle shall be revoked by the Department of Motor Vehicles pursuant to paragraph (6) of subdivision (a) of Section 13352. The court shall require the person to surrender the driver's license to the court in accordance with Section 13550.

(c) If any person is convicted under subdivision (b), and the offense for which the person is convicted occurred within seven years of four or more separate violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination of these violations, that resulted in convictions, that person shall, in addition and consecutive to the sentences imposed under subdivision (b), be punished by an additional term of imprisonment in the state

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> prison for three years.
>
> The enhancement allegation provided in this subdivision shall be pleaded and proved as provided by law.

Limiting Instruction

> [W]here the fact of a prior conviction is admitted solely to establish ex-felon status as an element of violation of section 12021, the trial court, at defendant's request, should give an instruction limiting the jury's consideration of the prior to that single purpose. The instruction should make clear that the nature of the prior conviction is irrelevant in this context, and that the jury should not speculate on the nature of the prior.

(*People v. Valentine* (1986) 42 Cal.3d 170, 182 n.7.)

> [W]hether to seek a limiting instruction is a tactical decision properly left to defense counsel, since defense counsel might conclude that the risk of a limiting instruction (unnecessarily highlighting a defendant's status as a felon) outweighed the questionable benefits such an instruction would provide.

(*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1141 [holding no sua sponte duty to give limiting instruction].)

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1611. Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial

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The People have alleged that the defendant was previously convicted of (a/___ *<insert number>*) driving under the influence offense[s]. You must now decide if the People have proved this additional allegation.

The People allege that the defendant was convicted of the following offense[s]:

> **[1.] A violation of _____** *<insert Veh. Code section violated>***, on _____** *<insert date of conviction>***, in the _____** *<insert name of court>***, in Case Number _____** *<insert docket or case number>***.**
> *<REPEAT FOR EACH PRIOR CONVICTION ALLEGED.>*

The defendant is the person named in the documents admitted to prove (the/each) alleged conviction.

[In deciding whether the People have proved the alleged prior conviction[s], consider only the evidence presented in this proceeding. Do not consider any evidence presented in the earlier part of the trial and do not consider your verdict from the earlier part of the trial.]

Remember, the defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove [each of] the alleged conviction[s] beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved [each of] the alleged conviction[s] beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received in this proceeding. [You must consider each alleged conviction separately.] If you have a reasonable doubt whether the People have proved (the/any) alleged conviction, you must find that it has not been proved.

In order for you to return a finding that (the/any) alleged conviction has been proved or not, all 12 of you must agree.

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BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on proof of the alleged prior convictions.

Give this instruction if the court has granted a bifurcated trial on the prior convictions and the defendant has not stipulated to the truth of the priors. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90; *People v. Hall* (1998) 67 Cal.App.4th 128, 135.) See the Bench Notes to Instruction 200, Prior Conviction, for an extensive discussion of bifurcation.

Give the bracketed paragraph that begins, "In deciding whether the People have proved," on request.

The court must provide the jury with a verdict form on which the jury will indicate if the prior conviction has been proved. (Pen. Code, § 1158.)

AUTHORITY

Elements ▸ Veh. Code, §§ 23550, 23550.5 & 23566.
Prior Convictions ▸ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90.
Bifurcation ▸ *People v. Calderon* (1994) 9 Cal.4th 69, 77–79; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336.
Judge Determines if Defendant Person Named in Documents ▸ Pen. Code, § 1025(b); *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 222–225.

RELATED ISSUES

See the Related Issues section in Instruction 1610, Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions and Instruction 200: Prior Conviction.

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STAFF NOTES

See Notes to Instruction 1610.

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1615. Refusal—Consciousness of Guilt

The law requires that any driver submit to a chemical test at the request of a peace officer to determine (his or her blood alcohol level/ [or] whether he or she had consumed a drug). If the defendant refused to submit to such a test after a peace officer asked (him/her) to submit to such a test and explained the test's nature to the defendant, then the defendant's conduct may show that (he/she) was aware of (his/her) guilt. If you conclude that the defendant refused to submit to such a test, it is up to you to decide the meaning and importance of the refusal. However, evidence that the defendant refused to submit to such a test cannot prove guilt by itself.

BENCH NOTES

Instructional Duty
The court may instruct the jury that refusal to submit to a chemical analysis for blood alcohol content may demonstrate consciousness of guilt. (*People v. Sudduth* (1966) 65 Cal.2d 543, 547.) There is no sua sponte duty to give this instruction.

Do not give this instruction if the defendant is exempted from the implied consent law because the defendant has hemophilia or is taking anticoagulants. (See Veh. Code, § 23612(b) & (c).)

AUTHORITY

Implied Consent Statute ▸ Veh. Code, § 23612.
Instruction Constitutional ▸ *People v. Sudduth* (1966) 65 Cal.2d 543, 547.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 226–235.

RELATED ISSUES

Silence
Silence in response to repeated requests to submit to a chemical analysis constitutes a refusal. (*Lampman v. Dept. of Motor Vehicles* (1972) 28 Cal.App.3d 922, 926.)

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Inability to Complete Chosen Test
If the defendant selects one test but is physically unable to complete that test, the defendant's refusal to submit to an alternative test constitutes a refusal. (*Cahall v. Dept. of Motor Vehicles* (1971) 16 Cal.App.3d 491, 496; *Kessler v. Dept. of Motor Vehicles* (1992) 9 Cal.App.4th 1134, 1139.)

Conditions Placed on Test by Defendant
"It is established that a *conditional* consent to a test constitutes a refusal to submit to a test within the meaning of section 13353." (*Webb v. Miller* (1986) 187 Cal.App.3d 619, 626 [request by defendant to see chart in wallet constituted refusal, italics in original]; *Covington v. Dept. of Motor Vehicles* (1980) 102 Cal.App.3d 54, 57 [defendant's response that he would only take test with attorney present constituted refusal].) However, in *Ross v. Dept. of Motor Vehicles* (1990) 219 Cal.App.3d 398, 402–403, the court held that the defendant was entitled under the implied consent statute to request to see the identification of the person drawing his blood. The court found the request reasonable in light of the risks of HIV infection from improper needle use. (*Id.* at p. 403.) Thus, the defendant could not be penalized for refusing to submit to the test when the technician declined to produce identification. *(Ibid.)*

Defendant Consents After Initial Refusal
"Once the driver refuses to take any one of the three chemical tests, the law does not require that he later be given one when he decides, for whatever reason, that he is ready to submit. [Citations.] [¶] . . . Simply stated, one offer plus one rejection equals one refusal; and, one suspension." (*Dunlap v. Dept. of Motor Vehicles* (1984) 156 Cal.App.3d 279, 283.)

Defendant Refuses Request for Urine Sample Following Breath Test
In *People v. Roach* (1980) 108 Cal.App.3d 891, 893, the defendant submitted to a breath test revealing a blood alcohol level of 0.08 percent. The officer then asked the defendant to submit to a urine test in order to detect the presence of drugs, but the defendant refused. *(Ibid.)* The court held that this was a refusal under the implied consent statute. *(Ibid.)*

Sample Taken by Force After Refusal
"[T]here was no voluntary submission on the part of respondent to any of the blood alcohol tests offered by the arresting officer. The fact that a blood sample ultimately was obtained and the test completed is of no significance." (*Cole v. Dept. of Motor Vehicles* (1983) 139 Cal.App.3d 870, 875.)

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Refusal Admissible Even If Faulty Admonition

Vehicle Code section 23612 requires a specific admonition to the defendant regarding the consequences of refusal to submit to a chemical test. If the officer fails to properly advise the defendant in the terms required by statute, the defendant may not be subject to the mandatory license suspension or the enhancement for willful refusal to complete a test. (See *People v. Brannon* (1973) 32 Cal.App.3d 971, 978; *People v. Municipal Court (Gonzales)* (1982) 137 Cal.App.3d 114, 118.) However, the refusal is still admissible in criminal proceedings for driving under the influence. (*People v. Municipal Court (Gonzales), supra,* 137 Cal.App.3d at p. 118.) Thus, the court in *People v. Municipal Court (Gonzales), supra,* 137 Cal.App.3d at p. 118, held that the defendant's refusal was admissible despite the officer's failure to advise the defendant that refusal would be used against him in a court of law, an advisement specifically required by the statute. (See Veh. Code, § 23612(a)(4).)

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STAFF NOTES

Veh. Code, § 23612, in relevant part:
*Note: Statute amended, effective 1/1/2004. Additions are marked with A><A, deletions with *** and brackets around deleted material.*

(a)(1)(A) * * * [A> A <A] person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for * * * [A> AN <A] offense allegedly committed in violation of Section 23140, 23152, or 23153. If a blood or breath test, or both, are unavailable, then paragraph (2) of subdivision (d) applies.

(B) * * * [A> A <A] person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or urine for the purpose of determining the drug content of his or her blood, if lawfully arrested for * * * [A> AN <A] offense allegedly committed in violation of Section 23140, 23152, or 23153.

(C) The testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153.

(D) The person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a violation of Section 23152 or 23153, and (i) the suspension of the person's privilege to operate a motor vehicle for a period of one year, (ii) the revocation of the person's privilege to operate a motor vehicle for a period of two years if the refusal occurs within seven years of a separate violation of Section 23103 as specified in Section 23103.5, or of Section 23140, 23152, or 23153, or of Section 191.5 or paragraph (3) of subdivision (c) of Section 192 of the Penal Code that resulted in a conviction, or if the person's privilege to operate a motor vehicle has been suspended or revoked pursuant to Section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion, or (iii) the revocation of the person's privilege to operate a motor vehicle for a period of three years if the refusal occurs within seven years of two or more separate violations of Section 23103 as specified in Section 23103.5, or of Section 23140,

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23152, or 23153, or of Section 191.5 or paragraph (3) of subdivision (c) of Section 192 of the Penal Code, or any combination thereof, that resulted in convictions, or if the person's privilege to operate a motor vehicle has been suspended or revoked two or more times pursuant to Section 13353, 13353.1, or 13353.2 for offenses that occurred on separate occasions, or if there is any combination of those convictions or administrative suspensions or revocations.

(2)(A) If the person is lawfully arrested for driving under the influence of an alcoholic beverage, the person has the choice of whether the test shall be of his or her blood or breath and the officer shall advise the person that he or she has that choice. If the person arrested either is incapable, or states that he or she is incapable, of completing the chosen test, the person shall submit to the remaining test. If a blood or breath test, or both, are unavailable, then paragraph (2) of subdivision (d) applies.

(B) If the person is lawfully arrested for driving under the influence of any drug or the combined influence of an alcoholic beverage and any drug, the person has the choice of whether the test shall be of his or her blood, breath, or urine, and the officer shall advise the person that he or she has that choice.

(C) A person who chooses to submit to a breath test may also be requested to submit to a blood or urine test if the officer has reasonable cause to believe that the person was driving under the influence of* * * [A> A <A] drug or the combined influence of an alcoholic beverage and* * * [A> A <A] drug and if the officer has a clear indication that a blood or urine test will reveal evidence of the person being under the influence. The officer shall state in his or her report the facts upon which that belief and that clear indication are based. The person has the choice of submitting to and completing a blood or urine test, and the officer shall advise the person that he or she is required to submit to an additional test and that he or she may choose a test of either blood or urine. If the person arrested either is incapable, or states that he or she is incapable, of completing either chosen test, the person shall submit to and complete the other remaining test.

(3) If the person is lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153, and, because of the need for medical treatment, the person is first

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transported to a medical facility where it is not feasible to administer a particular test of, or to obtain a particular sample of, the person's blood, breath, or urine, the person has the choice of those tests that are available at the facility to which that person has been transported. In that case, the officer shall advise the person of those tests that are available at the medical facility and that the person's choice is limited to those tests that are available.

(4) The officer shall also advise the person that he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during administration of the test or tests chosen, and that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law.

(5) * * * [A> A <A] person who is unconscious or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn his or her consent and a test or tests may be administered whether or not the person is told that his or her failure to submit to, or the noncompletion of, the test or tests will result in the suspension or revocation of his or her privilege to operate a motor vehicle.* * * [A> A <A] person who is dead is deemed not to have withdrawn his or her consent and a test or tests may be administered at the direction of a peace officer.

(b) * * * [A> A <A] person who is afflicted with hemophilia is exempt from the blood test required by this section.

(c) * * * [A> A <A] person who is afflicted with a heart condition and is using an anticoagulant under the direction of a licensed physician and surgeon is exempt from the blood test required by this section.

Instruction Appropriate and Constitutional

The sole rationale for the rule against comment on a failure to testify is that such a rule is a necessary protection for the exercise of the underlying privilege of remaining silent. [Citation]. A wrongful refusal to cooperate with law enforcement officers does not qualify for such protection. A refusal that might operate to suppress evidence of intoxication, which disappears rapidly with the passage of time [citation] should not be encouraged as a device to escape

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> prosecution. . . .
>
> It is contended that the instruction n5 given by the court on defendant's refusal to submit to a sobriety test erroneously authorized the jury to consider defendant's silence in response to questions at the time of his arrest, when such silence could not be considered evidence of guilt because it was an exercise of his constitutional right. We do not believe, however, that the jury would understand the instruction to refer to defendant's refusal to answer questions as distinguished from his refusal to participate in a test. The instruction specifically refers to refusal to take "a breathalyzer test or other sobriety test after he or she has been [made] aware of the nature of the test and its effect" and the prosecutor did not comment on defendant's failure to answer questions, but only on his refusal to take tests.
>
> n5 "YOU ARE INSTRUCTED that in a case where a defendant is accused of violating Section 23101 of the Vehicle Code it is permissible to prove that the defendant was offered a breathalyzer test or other sobriety test after he or she has been aware of the nature of the test and its effect. The fact that such test is refused under such circumstances is not sufficient standing alone and by itself to establish the guilt of a defendant but is a fact which if proven may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not such conduct shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination."

(*People v. Sudduth* (1966) 65 Cal.2d 543, 546–547 [footnote 6 omitted].)

Refusal Admissible Even if Faulty Admonition

> The more apt question is whether the failure to expressly advise the defendant that he has a choice of tests, in violation of section 13353, is constitutionally intolerable, requiring the application of the exclusionary rule in a section 23102 prosecution. We have concluded that such a violation of section 13353 involves no violation of any constitutionally protected interest. It follows that absent an express statutory provision making the evidence obtained as a result of such statutory violation inadmissible, the evidence was properly admitted.

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(*People v. Brannon* (1973) 32 Cal.App.3d 971, 978 [test results admissible even though defendant not advised of choice of tests].)

> Any failure to admonish the arrestee of his choice of tests, or that a refusal to submit to a test will result in the suspension of his license, precludes the administrative suspension of the defendant's driving privilege; but the results of the test or a refusal are still admissible in a criminal proceeding.

(*People v. Municipal Court (Gonzales)* (1982) 137 Cal.App.3d 114, 118.)

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1616. Refusal—Enhancement

If you find the defendant guilty of (causing injury while driving under the influence/ [or] [the lesser offense of] driving under the influence), you must then determine whether the People have proved the additional allegation that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug).

To prove this allegation, the People must prove that:

1. **A peace officer asked the defendant to submit to a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug).**

2. **The peace officer fully advised the defendant of the requirement to submit to a test and the consequences of not submitting to a test.**

AND

3. **The defendant willfully refused to (submit to a test/ [or] to complete the test).**

To have *fully advised the defendant*, the peace officer must have told (him/her) all of the following information:

1. **(He/She) may choose a blood(,/ or) breath[, or urine] test. [If (he/she) completes a breath test, (he/she) may also be required to submit to a blood [or urine] test to determine if (he/she) had consumed a drug.] [If only one test is available, (he/she) must complete the test available.] [If (he/she) is not able to complete the test chosen, (he/she) must submit to (the other/another) test.]**

2. **(He/She) does not have the right to have an attorney present before saying whether (he/she) will submit to a test, before deciding which test to take, or during administration of a test.**

3. **If (he/she) refuses to submit to a test, the refusal may be used against (him/her) in court.**

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4. Failure to submit to or complete a test will result in a fine and mandatory imprisonment if (he/she) is convicted of driving under the influence or with a blood alcohol level of 0.08 percent or more.

AND

5. Failure to submit to or complete a test will result in suspension of (his/her) driving privilege for one year or revocation of (his/her) driving privilege for two or three years.

<Short Alternative; see Bench Notes>

[(His/Her) driving privilege will be revoked for two or three years if (he/she) has previously been convicted of one or more specific offenses related to driving under the influence or if (his/her) driving privilege has previously been suspended or revoked.]

<Long Alternative; see Bench Notes>

[A. (His/Her) driving privilege will be revoked for two years if (he/she) has been convicted within the previous seven years of a separate violation of Vehicle Code section 23140, 23152, 23153, or 23103 as specified in section 23103.5, or of Penal Code section 191.5 or 192(c)(3). (His/Her) driving privilege will also be revoked for two years if (his/her) driving privilege has been suspended or revoked under Vehicle Code section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion within the previous seven years.

AND

B. (His/Her) driving privilege will be revoked for three years if (he/she) has been convicted within the previous seven years of two or more of the offenses just listed. (His/Her) driving privilege will also be revoked for three years if (his/her) driving privilege was previously suspended or revoked on two occasions, or if (he/she) has had any combination of two convictions, suspensions, or revocations, on separate occasions, within the previous seven years.]

[Vehicle Code section 23140 prohibits a person under the age of 21 from driving with a blood alcohol content of 0.05 percent or more. Vehicle Code section 23152 prohibits driving under the influence of alcohol or drugs or driving with a blood alcohol level of 0.08 percent or more. Vehicle Code

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section 23153 prohibits causing injury while driving under the influence of alcohol or drugs or causing injury while driving with a blood alcohol level of 0.08 percent or more. Vehicle Code section 23103 as specified in section 23103.5 prohibits reckless driving involving alcohol. Penal Code section 191.5 prohibits gross vehicular manslaughter while intoxicated, and Penal Code section 192(c)(3) prohibits vehicular manslaughter while intoxicated.]

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.

A sworn member of _____ *<insert name of agency that employs peace officer >*, **authorized by _____** *<insert appropriate section from Pen. Code, § 830 et seq.>* **to _____** *<describe statutory authority>*, **is a *peace officer*.**

The People have the burden of proving beyond a reasonable doubt that the defendant willfully refused to (submit to/ [or] complete) a chemical test to determine ((his/her) blood alcohol content/ [or] whether (he/she) had consumed a drug). If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of the enhancement.

Do not give this instruction if the defendant is exempted from the implied consent law because the defendant has hemophilia or is taking anticoagulants. (See Veh. Code, § 23612(b) & (c).)

No reported case has established the degree of detail with which the jury must be instructed regarding the refusal admonition mandated by statute. The committee has provided several different options. The first sentence of element 5 under the definition of "fully advised" **must** be given. The court then may add either the short alternative or the long alternative or neither. If there is no issue regarding the two- and three-year revocations in the case and both parties agree, the court may choose to use the short alternative or to give just the first sentence of element 5. The court may choose to use the long alternative if there is an objection to the short version or the court determines that the longer version is more appropriate.

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The court may also choose to give the bracketed paragraph defining the Vehicle and Penal Code sections discussed in the long alternative at its discretion.

AUTHORITY

Elements ▸ Veh. Code, §§ 23577 & 23612.
Statute Constitutional ▸ *Quintana v. Municipal Court* (1987) 192 Cal.App.3d 361, 366–369.
Statutory Admonitions Not Inherently Confusing or Misleading ▸ *Blitzstein v. Dept. of Motor Vehicles* (1988) 199 Cal.App.3d 138, 142.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 226–235.

RELATED ISSUES

See the Related Issues section in Instruction 1615, Refusal—Consciousness of Guilt.

Admonition Must Convey Strong Likelihood of Suspension
It is insufficient for the officer to advise the defendant that his or her license "could" be suspended. (*Decker v. Dept. of Motor Vehicles* (1972) 6 Cal.3d 903, 905–906; *Giomi v. Dept. of Motor Vehicles* (1971) 15 Cal.App.3d 905, 907.) The officer must convey to the defendant that there is a strong likelihood that his or her license will be suspended. (*Decker, supra,* 6 Cal.3d at p. 906; *Giomi, supra,* 15 Cal.App.3d at p. 907.)

Admonition Must Be Clearly Conveyed
"[T]he burden is properly placed on the officer to give the warning required by section 13353 in a manner comprehensible to the driver." (*Thompson v. Dept. of Motor Vehicles* (1980) 107 Cal.App.3d 354, 363.) Thus, in *Thompson, supra,* 107 Cal.App.3d at p. 363, the court set aside the defendant's license suspension because radio traffic prevented the defendant from hearing the admonition. However, where the defendant's own "obstreperous conduct . . . prevented the officer from completing the admonition," or where the defendant's own intoxication prevented him or her from understanding the admonition, the defendant may be held responsible for refusing to submit to a chemical test. (*Morphew v. Dept. of Motor Vehicles* (1982) 137 Cal.App.3d 738, 743–744; *Bush v. Bright* (1968) 264 Cal.App.2d 788, 792.)

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Defendant Incapable of Understanding Due to Injury or Illness
Where the defendant, through no fault of his or her own, is incapable of understanding the admonition or of submitting to the test, the defendant cannot be penalized for refusing. (*Hughey v. Dept. of Motor Vehicles* (1991) 235 Cal.App.3d 752, 760.) Thus, in *Hughey, supra*, 235 Cal.App.3d at p. 760, the court held that the defendant was rendered incapable of refusing due to a head trauma. However, in *McDonnell v. Dept. of Motor Vehicles* (1975) 45 Cal.App.3d 653, 662, the court upheld the license suspension where defendant's use of alcohol triggered a hypoglycemic attack. The court held that because voluntary alcohol use aggravated the defendant's illness, the defendant could be held responsible for his subsequent refusal, even if the illness prevented the defendant from understanding the admonition. *(Ibid.)*

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STAFF NOTES

Veh. Code, § 23577:

(a) If any person is convicted of a violation of Section 23152 or 23153, and at the time of the arrest leading to that conviction that person willfully refused a peace officer's request to submit to, or willfully failed to complete, the chemical test or tests pursuant to Section 23612, the court shall impose the following penalties:

(1) If the person is convicted of a first violation of Section 23152, notwithstanding any other provision of subdivision (a) of Section 23538, the terms and conditions of probation shall include the conditions in paragraph (1) of subdivision (a) of Section 23538.

(2) If the person is convicted of a first violation of Section 23153, the punishment shall be enhanced by an imprisonment of 48 continuous hours in the county jail, whether or not probation is granted and no part of which may be stayed, unless the person is sentenced to, and incarcerated in, the state prison and the execution of that sentence is not stayed.

(3) If the person is convicted of a second violation of Section 23152, punishable under Section 23540, or a second violation of Section 23153, punishable under Section 23560, the punishment shall be enhanced by an imprisonment of 96 hours in the county jail, whether or not probation is granted and no part of which may be stayed, unless the person is sentenced to, and incarcerated in, the state prison and execution of that sentence is not stayed.

(4) If the person is convicted of a third violation of Section 23152, punishable under Section 23546, the punishment shall be enhanced by an imprisonment of 10 days in the county jail, whether or not probation is granted and no part of which may be stayed.

(5) If the person is convicted of a fourth or subsequent violation of Section 23152, punishable under Section 23550 or 23550.5, the punishment shall be enhanced by imprisonment of 18 days in the county jail, whether or not probation is granted and no part of which may be stayed.

(b) The willful refusal or failure to complete the chemical test

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required pursuant to Section 23612 shall be pled and proven.

Veh. Code, § 23612, in relevant part:
*Note: Statute amended, effective 1/1/2004. Additions are marked with A><A, deletions with *** and brackets around deleted material.*

(a)(1)(A) * * * [A> A <A] person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for * * * [A> AN <A] offense allegedly committed in violation of Section 23140, 23152, or 23153. If a blood or breath test, or both, are unavailable, then paragraph (2) of subdivision (d) applies.

(B) * * * [A> A <A] person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or urine for the purpose of determining the drug content of his or her blood, if lawfully arrested for * * * [A> AN <A] offense allegedly committed in violation of Section 23140, 23152, or 23153.

(C) The testing shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe the person was driving a motor vehicle in violation of Section 23140, 23152, or 23153.

(D) The person shall be told that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a violation of Section 23152 or 23153, and (i) the suspension of the person's privilege to operate a motor vehicle for a period of one year, (ii) the revocation of the person's privilege to operate a motor vehicle for a period of two years if the refusal occurs within seven years of a separate violation of Section 23103 as specified in Section 23103.5, or of Section 23140, 23152, or 23153, or of Section 191.5 or paragraph (3) of subdivision (c) of Section 192 of the Penal Code that resulted in a conviction, or if the person's privilege to operate a motor vehicle has been suspended or revoked pursuant to Section 13353, 13353.1, or 13353.2 for an offense that occurred on a separate occasion, or (iii) the revocation of the person's privilege to operate a motor vehicle for a period of three years if the refusal occurs within seven years of two or more separate violations of Section 23103 as specified in Section 23103.5, or of Section 23140,

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23152, or 23153, or of Section 191.5 or paragraph (3) of subdivision (c) of Section 192 of the Penal Code, or any combination thereof, that resulted in convictions, or if the person's privilege to operate a motor vehicle has been suspended or revoked two or more times pursuant to Section 13353, 13353.1, or 13353.2 for offenses that occurred on separate occasions, or if there is any combination of those convictions or administrative suspensions or revocations.

(2)(A) If the person is lawfully arrested for driving under the influence of an alcoholic beverage, the person has the choice of whether the test shall be of his or her blood or breath and the officer shall advise the person that he or she has that choice. If the person arrested either is incapable, or states that he or she is incapable, of completing the chosen test, the person shall submit to the remaining test. If a blood or breath test, or both, are unavailable, then paragraph (2) of subdivision (d) applies.

(B) If the person is lawfully arrested for driving under the influence of any drug or the combined influence of an alcoholic beverage and any drug, the person has the choice of whether the test shall be of his or her blood, breath, or urine, and the officer shall advise the person that he or she has that choice.

(C) A person who chooses to submit to a breath test may also be requested to submit to a blood or urine test if the officer has reasonable cause to believe that the person was driving under the influence of* * * [A> A <A] drug or the combined influence of an alcoholic beverage and* * * [A> A <A] drug and if the officer has a clear indication that a blood or urine test will reveal evidence of the person being under the influence. The officer shall state in his or her report the facts upon which that belief and that clear indication are based. The person has the choice of submitting to and completing a blood or urine test, and the officer shall advise the person that he or she is required to submit to an additional test and that he or she may choose a test of either blood or urine. If the person arrested either is incapable, or states that he or she is incapable, of completing either chosen test, the person shall submit to and complete the other remaining test.

(3) If the person is lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153, and, because of the need for medical treatment, the person is first

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transported to a medical facility where it is not feasible to administer a particular test of, or to obtain a particular sample of, the person's blood, breath, or urine, the person has the choice of those tests that are available at the facility to which that person has been transported. In that case, the officer shall advise the person of those tests that are available at the medical facility and that the person's choice is limited to those tests that are available.

(4) The officer shall also advise the person that he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test or tests to take, or during administration of the test or tests chosen, and that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law.

(5) * * * [A> A <A] person who is unconscious or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn his or her consent and a test or tests may be administered whether or not the person is told that his or her failure to submit to, or the noncompletion of, the test or tests will result in the suspension or revocation of his or her privilege to operate a motor vehicle.* * * [A> A <A] person who is dead is deemed not to have withdrawn his or her consent and a test or tests may be administered at the direction of a peace officer.

(b) * * * [A> A <A] person who is afflicted with hemophilia is exempt from the blood test required by this section.

(c) * * * [A> A <A] person who is afflicted with a heart condition and is using an anticoagulant under the direction of a licensed physician and surgeon is exempt from the blood test required by this section. . . .

(h) A preliminary alcohol screening test that indicates the presence or concentration of alcohol based on a breath sample in order to establish reasonable cause to believe the person was driving a vehicle in violation of Section 23140, 23152, or 23153 is a field sobriety test and may be used by an officer as a further investigative tool.

(i) If the officer decides to use a preliminary alcohol screening test, the officer shall advise the person that he or she is requesting that

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> person to take a preliminary alcohol screening test to assist the officer in determining if that person is under the influence of alcohol or drugs, or a combination of alcohol and drugs. The person's obligation to submit to a blood, breath, or urine test, as required by this section, for the purpose of determining the alcohol or drug content of that person's blood, is not satisfied by the person submitting to a preliminary alcohol screening test. The officer shall advise the person of that fact and of the person's right to refuse to take the preliminary alcohol screening test.

No Authority on Instruction

Staff located no cases on the appropriate instruction for this enhancement. The only case on the enhancement statute, *Quintana v. Municipal Court* (1987) 192 Cal.App.3d 361, 366–369, was decided on a writ from a demurer and held that the statute was constitutional.

Statutes Referred to in Enhancement Law

Vehicle Code section 23103 as specified in Section 23103.5—Wet Reckless
Vehicle Code section 23140—Driving with Over 0.05 Percent When Under 21
Vehicle Code section 23152—DUI or Over 0.08 Percent
Vehicle Code section 23153—DUI or Over 0.08 Percent with Injury
Penal Code section 191.5—Gross Vehicular Manslaughter While Intoxicated
Penal Code section 192(c)(3)—Vehicular Manslaughter While Intoxicated (Ordinary Negligence)
Vehicle Code sections 13353, 13353.1, or 13353.2—Administrative Suspension or Revocation of Driving Privilege

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1630. Failure to Perform Duty Following Accident: Property Damage—Defendant Driver

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The defendant is charged [in Count __] with failing to perform a legal duty following a vehicle accident that caused property damage.

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 damage to someone else's property.**

3. **The defendant knew that (he/she) had been involved in an accident that caused property damage [or knew from the nature of the accident that it was probable that property had been damaged].**

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

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

   OR

   (b) To provide the owner or person in control of the damaged property with (his/her) name and current residence address [and the name and address of the owner of the vehicle the defendant was driving].

The driver of a vehicle may provide the required information in one of two ways:

1. **The driver may locate the owner or person in control of the damaged property and give that person the information directly. On request, the driver must also show that person his or her driver's license and the vehicle registration.**

OR

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2. **The driver may leave the required information in a written note in a conspicuous place on the vehicle or other damaged property. The driver must then also, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.**

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

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

The driver of a vehicle must perform the duties listed 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.]

[The property damaged may include any vehicle other than the one allegedly driven by the defendant.]

[An accident causes property damage if the property damage is the direct, natural, and probable consequence of the accident. A *natural and probable consequence* is one that a reasonable and prudent 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 property damage. An accident causes property damage only if it is a substantial factor in causing the damage. A

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***substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the property damage.]**

[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.]]

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 Instruction 1631, Failure to Perform Duty Following Accident: Property Damage—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.) If the evidence indicates that there was only one cause of property damage, 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 property damage, 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; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

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

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

Give the bracketed sentence that begins with "The property damaged may include" if the evidence shows that the accident may have damaged only the defendant's vehicle.

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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.

AUTHORITY

Elements ▸ Veh. Code, § 20002; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10.

Knowledge of Accident ▸ *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10.

Willful Failure to Perform Duty ▸ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22.

Duty Applies Regardless of Fault for Accident ▸ *People v. Scofield* (1928) 203 Cal. 703, 708.

Involved Defined ▸ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631; *People v. Sell* (1950) 96 Cal.App.2d 521, 523.

Immediately Stopped Defined ▸ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647.

Statute Does Not Violate Fifth Amendment Privilege ▸ *California v. Byers* (1971) 402 U.S. 424, 434.

Must Identify Self as Driver ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546.

Unanimity Instruction Required ▸ *People v. Scofield* (1928) 203 Cal. 703, 710.

Unconscious Driver Unable to Comply at Scene ▸ *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204.

Offense May Occur on Private Property ▸ *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204.

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

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STAFF NOTES

Veh. Code, § 20002:

(a) The driver of any vehicle involved in an accident resulting only in damage to any property, including vehicles, shall immediately stop the vehicle at the nearest location that will not impede traffic or otherwise jeopardize the safety of other motorists. Moving the vehicle in accordance with this subdivision does not affect the question of fault. The driver shall also immediately do either of the following:

(1) Locate and notify the owner or person in charge of that property of the name and address of the driver and owner of the vehicle involved and, upon locating the driver of any other vehicle involved or the owner or person in charge of any damaged property, upon being requested, present his or her driver's license, and vehicle registration, to the other driver, property owner, or person in charge of that property. The information presented shall include the current residence address of the driver and of the registered owner. If the registered owner of an involved vehicle is present at the scene, he or she shall also, upon request, present his or her driver's license information, if available, or other valid identification to the other involved parties.

(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

(b) Any person who parks a vehicle which, prior to the vehicle again being driven, becomes a runaway vehicle and is involved in an accident resulting in damage to any property, attended or unattended, shall comply with the requirements of this section relating to notification and reporting and shall, upon conviction thereof, be liable to the penalties of this section for failure to comply with the requirements.

(c) Any person failing to comply with all the requirements of this

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> section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one thousand dollars ($ 1,000), or by both that imprisonment and fine.

Elements

> The essential elements of a violation of section 20002, subdivision (a) are that the defendant: (1) knew he or she was involved in an accident; (2) knew damage resulted from the accident; and (3) knowingly and willfully left the scene of the accident (4) without giving the required information to the other driver(s). (*People v. Crouch* (1980) 108 Cal. App. 3d Supp. 14, 21.)

(*People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10.)

Must be Willful

> We agree with the wording of CALJIC No. 16.650 (1979 rev.) to the effect that the failure to give the required information to the other person involved must be willful. That is, for example, it would not be willful if the accused person were transported by ambulance from the scene in an unconscious condition. The element of willful failure to give the required information at the scene then makes this crime one requiring only general criminal intent as described in CALJIC No. 3.30. The other elements of knowing that he had been involved in an accident and knowing that damage to the other vehicle had resulted from the accident are necessary mental states as set forth in CALJIC No. 3.31.5.

(*People v. Crouch* (1980) 108 Cal. App. 3d Supp. 14, 21–22 [footnotes omitted].)

Involved

> It seems clear that the word 'involved' is there used in the sense of being connected with (an accident) in a natural or logical manner. The statute relates to a driver thus involved in such accident and is in no way made dependent upon whether or not control of a vehicle is retained or lost, or upon who may ultimately be found to be most at fault.

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> Assuming, as defendant contends, that the real *cause* of the accident could have been the actions of the driver of the station wagon in perhaps failing to see defendant pull out into his lane until it was too late, or in electing to attempt to pass rather than to brake sharply so as to pull in behind defendant's car, nevertheless defendant was *involved* in the accident because it was her pulling out into the intersection in front of the oncoming station wagon which precipitated the necessity for some immediate action upon the part of its driver. One can be involved under section 20001 in an accident without being its legal cause. A good example of this is where in an impending accident the other person has a last clear chance to prevent it.

(*People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [emphasis in original; citation and quotation marks omitted]; see also *People v. Sell* (1950) 96 Cal.App.2d 521, 523.)

Immediately Stop

> The statute requires the driver of a machine under the circumstances of this case to "immediately stop such vehicle at the scene of such accident". This phrase should receive a reasonable construction. It means that he should promptly stop at the scene of the accident for the purpose of rendering assistance to the injured person. The word "immediately" does not mean instantly. The law does not require impossible things to be performed. Proof of the fact that a driver who was involved in an accident in which some individual was injured stopped his machine as promptly as possible under the circumstances of the case would certainly exempt him from liability on that account.

(*People v. Odom* (1937) 19 Cal.App.2d 641, 646–647.)

Must Identify Self as Driver

"[T]o comply in a meaningful way with the statute, a driver must identify himself as the driver of a vehicle involved in the accident." (*People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546.) The court further held that under *California v. Byers* (1971) 402 U.S. 424, 434, this reporting requirement did not violate the Fifth Amendment. (*Id.* at p. 1553.)

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Unanimity Instruction Required

> A failure to perform any of the required acts is a separate offense. Evidence sufficient to support one charge might be entirely unrelated to and insufficient to support another. The jury might not all agree on any one of the offenses, but might all agree that there had been a violation of some portions of the section. We think the situation here presented called for an instruction from the court on the point contended for by the defendant even though no such instruction was requested. It is difficult to lay down a rule which will fit all cases, but this much may be said, generally, that when a defendant is charged with separate and distinct offenses each requiring independent proof, the court should properly instruct the jury as to each offense even though instructions thereon be not requested by either party. Applying this rule, we think it was error not to instruct the jury on the point that they must agree on at least one of the separate offenses alleged in count three of the information in order to find the defendant guilty on that count.

(*People v. Scofield* (1928) 203 Cal. 703, 710.)

Unconscious Driver

> If a driver is unconscious, obviously she will not be able to comply with the requirements of section 20003 at the scene of the accident. . . . When the driver regains consciousness, compliance is no longer impossible and she must comply with the disclosure requirements of the statute as soon as reasonably possible.

(*People v. Flores* (1996) 51 Cal.App.4th 1199, 1204.)

Non-Driving Owner

> Evidently the legislature intended by this language to prescribe a penalty against the owner of a machine who occupies the vehicle and has the control over its operation at the time of the accident, and who wilfully omits to render reasonable assistance to the injured party, as well as the actual driver thereof. Any other construction of the language would seem to be unreasonable because the owner of the vehicle who has the legal right to control the operation thereof may actually discourage or prevent the driver from rendering the aid which he might be willing or anxious to perform. We are therefore

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> of the opinion that the owner of a machine who is riding therein having the control of its operation at the time of an accident may be deemed to be the driver thereof, for the purposes of this section, even though another person may be actually seated at the steering-wheel.

(*People v. Rallo* (1931) 119 Cal.App. 393, 397.)

Offense May Occur on Private Property

> [I]t is not necessary to allege and prove that the offense was committed on a public highway, but that the statute applies to accidents occurring on private property, or off a public highway.

(*People v. Stansberry* (1966) 242 Cal.App.2d 199, 204.)

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1631. Failure to Perform Duty Following Accident: Property Damage—Defendant Nondriving Owner or Passenger in Control

The defendant is charged [in Count __] with failing to perform a legal duty following a vehicle accident that caused property damage.

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

1. **The defendant [owned and] was riding as a passenger in a vehicle involved in an accident.**

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

3. **The accident caused damage to someone else's property.**

4. **The defendant knew that (he/she) had been involved in an accident that caused property damaged [or knew from the nature of the accident that it was probable that property had been damaged].**

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

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

   OR

   (b) To provide the owner or person in control of the damaged property with (his/her) name and current residence address [and the name and address of the driver of the vehicle the defendant [owned and] was a passenger in].

The (owner/passenger in control) may provide the required information in one of two ways:

1. **He or she may locate the owner or person in control of the damaged property and give that person the required information directly. On**

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request, he or she must also show that person his or her driver's license, or any other available identification, and the vehicle registration.

OR

2. He or she may leave the required information in a written note in a conspicuous place on the vehicle or other damaged property. He or she must then also, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.

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

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

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

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

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

[The property damaged may include any vehicle other than the one the defendant allegedly (owned/ was a passenger in).]

[An accident causes property damage if the property damage is the direct, natural, and probable consequence of the accident. A *natural and probable consequence* is one that a reasonable and prudent 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.]

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

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control. If the prosecution alleges that that the defendant drove the vehicle, give Instruction 1630, Failure to Perform Duty Following Accident: Property Damage—Defendant Driver.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If the evidence indicates that there was only one cause of property damage, 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 property damage, 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; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

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

Give the bracketed sentence that begins with "The property damaged may include" if the evidence shows that the accident may have damaged only the defendant's vehicle.

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

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

AUTHORITY

Elements ▸ Veh. Code, § 20002; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10.
Knowledge of Accident ▸ *People v. Carbajal* (1995) 10 Cal.4th 1114, 1123, fn. 10.
Willful Failure to Perform Duty ▸ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22.
Duty Applies Regardless of Fault for Accident ▸ *People v. Scofield* (1928) 203 Cal. 703, 708.
Involved Defined ▸ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631; *People v. Sell* (1950) 96 Cal.App.2d 521, 523.
Immediately Stopped Defined ▸ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647.
Nondriving Owner ▸ *People v. Rallo* (1931) 119 Cal.App. 393, 397.
Statute Does Not Violate Fifth Amendment Privilege ▸ *California v. Byers* (1971) 402 U.S. 424, 434.
Unanimity Instruction Required ▸ *People v. Scofield* (1928) 203 Cal. 703, 710.
Unconscious Driver Unable to Comply at Scene ▸ *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204.
Offense May Occur on Private Property ▸ *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204.

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

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STAFF NOTES

See Staff Notes to Instruction 1630.

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1632. Failure to Perform Duty Following Accident: Injury—Defendant Driver

The defendant is charged [in Count __] with failing to perform a legal duty following a vehicle accident that caused injury to another person.

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 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 another person had been injured].**

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

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

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

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

   OR

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

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

   [AND]

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

[[AND]

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

[AND

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

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

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

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

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

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

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

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[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.]

[An accident causes injury if the injury is the direct, natural, and probable consequence of the accident. A *natural and probable consequence* is one that a reasonable and prudent person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

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

[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.]]

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 Instruction 1633, Failure to Perform Duty Following Accident: 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.) If the evidence indicates that there was only one cause of 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 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; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

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

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injured person was necessary in light of aid provided by others. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027; *People v. Scofield* (1928) 203 Cal. 703, 708; see also discussion in the Related Issues section below.)

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

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

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.

AUTHORITY

Elements ▸ Veh. Code, §§ 20001, 20003 & 20004.
Sentence for Injury ▸ Veh. Code, § 20001(b)(1).
Knowledge of Accident and Injury ▸ *People v. Holford* (1965) 63 Cal.2d 74, 79–80; *People v. Carter* (1966) 243 Cal.App.2d 239, 241; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134.
Willful Failure to Perform Duty ▸ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22.
Duty Applies Regardless of Fault for Accident ▸ *People v. Scofield* (1928) 203 Cal. 703, 708.
Involved Defined ▸ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631; *People v. Sell* (1950) 96 Cal.App.2d 521, 523.
Immediately Stopped Defined ▸ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647.
Duty to Render Assistance ▸ *People v. Scofield* (1928) 203 Cal. 703, 708; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027.
Statute Does Not Violate Fifth Amendment Privilege ▸ *California v. Byers* (1971) 402 U.S. 424, 434.
Must Identify Self as Driver ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546.
Unanimity Instruction Required ▸ *People v. Scofield* (1928) 203 Cal. 703, 710.
Unconscious Driver Unable to Comply at Scene ▸ *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204.

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Offense May Occur on Private Property ▸ *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204.
Duty Applies to Injured Passenger in Defendant's Vehicle ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546.

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

LESSER INCLUDED OFFENSES

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

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 [citations omitted].)

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.) "In this connection it must be noted that the statute requires that *necessary* assistance be rendered." (*People v. Scofield* (1928) 203 Cal. 703, 708 [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.) 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.)

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STAFF NOTES

Veh. Code, § 20001, in relevant part:

(a) The driver of any vehicle involved in an accident resulting in injury to any person, other than himself or herself, or in the death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004.

(b)(1) Except as provided in paragraph (2), any person who violates subdivision (a) shall be punished by imprisonment in the state prison, or in a county jail for not more than one year, or by a fine of not less than one thousand dollars ($ 1,000) nor more than ten thousand dollars ($ 10,000), or by both that imprisonment and fine.

(2) If the accident described in subdivision (a) results in death or permanent, serious injury, any person who violates subdivision (a) shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than 90 days nor more than one year, or by a fine of not less than one thousand dollars ($ 1,000) nor more than ten thousand dollars ($ 10,000), or by both that imprisonment and fine. However, the court, in the interests of justice and for reasons stated in the record, may reduce or eliminate the minimum imprisonment required by this paragraph.

(3) In imposing the minimum fine required by this subdivision, the court shall take into consideration the defendant's ability to pay the fine and , in the interests of justice and for reasons stated in the record, may reduce the amount of that minimum fine to less than the amount otherwise required by this subdivision.

(c) A person who flees the scene of the crime after committing a violation of Section 191.5 of, paragraph (1) or (3) of subdivision (c) of Section 192 of, or subdivision (a) or (c) of Section 192.5 of, the Penal Code, upon conviction of any of those sections, in addition and consecutive to the punishment prescribed, shall be punished by an additional term of imprisonment of five years in the state prison. This additional term shall not be imposed unless the allegation is charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact. The court shall not strike a finding that brings a person within the provisions of this subdivision

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or an allegation made pursuant to this subdivision.

(d) As used in this section, "permanent, serious injury" means the loss or permanent impairment of function of any bodily member or organ.

Veh. Code, § 20003:

(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall also give his or her name, current residence address, the names and current residence addresses of any occupant of the driver's vehicle injured in the accident, the registration number of the vehicle he or she is driving, and the name and current residence address of the owner to the person struck or the driver or occupants of any vehicle collided with, and shall give the information to any traffic or police officer at the scene of the accident. The driver also shall render to any person injured in the accident reasonable assistance, including transporting, or making arrangements for transporting, any injured person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if that transportation is requested by any injured person.

(b) Any driver or injured occupant of a driver's vehicle subject to the provisions of subdivision (a) shall also, upon being requested, exhibit his or her driver's license, if available, or, in the case of an injured occupant, any other available identification, to the person struck or to the driver or occupants of any vehicle collided with, and to any traffic or police officer at the scene of the accident.

Veh. Code, § 20004:

In the event of death of any person resulting from an accident, the driver of any vehicle involved after fulfilling the requirements of this division, and if there be no traffic or police officer at the scene of the accident to whom to give the information required by Section 20003, shall, without delay, report the accident to the nearest office of the Department of the California Highway Patrol or office of a duly authorized police authority and submit with the report the information required by Section 20003.

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Failure to Perform One of the Statutory Duties

> It is conceded by the prosecution that a defendant may be convicted under said section 141 of a failure to do any one of several things required of him in the event of a collision with another car or with a human being. Of them he may be convicted of a failure (1) to stop immediately; or (2) to give his name and address; or (3) to give the names and addresses of the passengers in his car; or (4) to give the registration number of his car; or (5) to render necessary assistance. A violation of any of these provisions is in terms made punishable under the penal provisions of the statute. [Citation] A failure to perform any of the required acts is a separate offense.

(*People v. Scofield* (1928) 203 Cal. 703, 710.)

"Omission to perform any one of the acts required by section 20001 of the Vehicle Code constitutes the offense." (*People v. Limon* (1967) 252 Cal.App.2d 575, 578.)

Knowledge of Accident and Injury

> Section 20001 of the Vehicle Code penalizes the driver who fails to stop the vehicle which is "involved in an accident resulting in injury"; previous cases have said that knowledge of injury is an essential element of the crime proscribed by that section. [Citations] Usually, however, such knowledge must be derived from the surrounding facts and circumstances of the accident. [Citation] Yet the driver who leaves the scene of the accident seldom possesses actual knowledge of injury; by leaving the scene he forecloses any opportunity to acquire such actual knowledge. Hence a requirement of actual knowledge of injury would realistically render the statute useless. We therefore believe that criminal liability attaches to a driver who knowingly leaves the scene of an accident if he actually knew of the injury or if he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person.

(*People v. Holford* (1965) 63 Cal.2d 74, 79–80.)

> [C]riminal liability only attaches to a driver "if he actually knew of the injury or if he knew that the accident was of such a nature that one would reasonably anticipate that it resulted in injury to a person." (*People* v. *Holford*, 63 Cal.2d 74, 80.) . . .

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> Was the accident such that constructive knowledge of personal injury could properly be attributed to Carter? Such knowledge may be imputed to the driver of a vehicle where the fact of personal injury is visible and obvious [citation] or where the seriousness of the collision would lead a reasonable person to assume there must have been resulting injuries. [citation] But here the personal injuries were minor and the collision was not of sufficient magnitude to compel the conclusion that injuries had probably occurred. We find no basis for imputing constructive knowledge of injury in the present case.

(People v. Carter (1966) 243 Cal.App.2d 239, 241.)

Involved
See Notes to Instruction 1630.

Immediately Stop
See Notes to Instruction 1630.

Must Identify Self as Driver
See Notes to Instruction 1630.

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.)

> [I]t must be noted that the statute requires that *necessary* assistance be rendered. Under the facts in this case the deceased was given all the assistance that could be required without the aid of the defendant. It is suggested that the defendant might have interjected his person into the midst of the several individuals who were caring for the deceased and insisted upon his own ministrations. This, we think, he was not required to do under the circumstances here shown. In other words, his assistance was not *necessary*.

(*People v. Scofield* (1928) 203 Cal. 703, 708-709.)

> Pursuant to CALJIC No. 12.70, the court instructed the jury that a verdict of guilty could be based on appellant's failure "[t]o render reasonable assistance to a person injured." The court explained that such assistance "includ[ed] the transportation or making

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> arrangements for the transportation of any injured person to a physician, surgeon or hospital for medical or surgical treatment, if it is apparent that such treatment is necessary or that transportation is requested by the injured person." . . .
>
> We have no quarrel with the proposition that the above instruction is inappropriate where such assistance by the driver is unnecessary, as in the case where paramedics have responded within moments following the accident. We disagree, however, that the driver's statutory duty to render "reasonable assistance" is nullified merely because bystanders are on the scene or offer "assistance." . . .
>
> We hold 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.

(*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027.)

> [T]he "reasonable assistance" referred to in the statute might be the summoning of aid. In some cases, it would be much better for the driver to call for assistance than to attempt immediate ministrations to the injured person.

(*People v. Limon* (1967) 252 Cal.App.2d 575, 578.)

Unanimity Instruction Required
See Notes to Instruction 1630.

Unconscious Driver
See Notes to Instruction 1630.

Non-Driving Owner
See Notes to Instruction 1630.

Offense May Occur on Private Property
See Notes to Instruction 1630.

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1633. Failure to Perform Duty Following Accident: Injury—Defendant Nondriving Owner or Passenger in Control

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The defendant is charged [in Count __] with failing to perform a legal duty following a vehicle accident that caused injury to another person.

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

1. **The defendant [owned and] was riding as a passenger in a vehicle involved in an accident.**

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

3. **The accident caused injury to someone else.**

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

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

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

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

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

   OR

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

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

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

[AND]

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

[[AND]

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

[AND

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

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

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

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

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excused merely because bystanders are on the scene or could provide assistance.]

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

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

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

[An accident causes injury if the injury is the direct, natural, and probable consequence of the accident. A *natural and probable consequence* is one that a reasonable and prudent person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

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

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the prosecution alleges that the defendant was a

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nondriving owner present in the vehicle or other passenger in control. If the prosecution alleges that that the defendant drove the vehicle, give Instruction 1632, Failure to Perform Duty Following Accident: Injury—Defendant Driver.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) If the evidence indicates that there was only one cause of 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 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; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

Give the bracketed portion that begins with "The (owner/passenger in control) is not required to provide assistance" if there is an issue over whether assistance by the defendant to the injured person was necessary in light of aid provided by others. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027; *People v. Scofield* (1928) 203 Cal. 703, 708; see also discussion in the Related Issues section in Instruction 1632, Failure to Perform Duty Following Accident: Injury—Defendant Driver.)

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

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

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

AUTHORITY

Elements ▸ Veh. Code, §§ 20001, 20003 & 20004.
Sentence for Injury ▸ Veh. Code, § 20001(b)(1).
Knowledge of Accident and Injury ▸ *People v. Holford* (1965) 63 Cal.2d 74, 79–80; *People v. Carter* (1966) 243 Cal.App.2d 239, 241; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134.
Willful Failure to Perform Duty ▸ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22.

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Duty Applies Regardless of Fault for Accident ▸ *People v. Scofield* (1928) 203 Cal. 703, 708.

Involved Defined ▸ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631; *People v. Sell* (1950) 96 Cal.App.2d 521, 523.

Immediately Stopped Defined ▸ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647.

Duty to Render Assistance ▸ *People v. Scofield* (1928) 203 Cal. 703, 708; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027.

Nondriving Owner ▸ *People v. Rallo* (1931) 119 Cal.App. 393, 397.

Statute Does Not Violate Fifth Amendment Privilege ▸ *California v. Byers* (1971) 402 U.S. 424, 434.

Unanimity Instruction Required ▸ *People v. Scofield* (1928) 203 Cal. 703, 710.

Unconscious Driver Unable to Comply at Scene ▸ *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204.

Offense May Occur on Private Property ▸ *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204.

Duty Applies to Injured Passenger in Defendant's Vehicle ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546.

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

See the Related Issues section in Instruction 1632, Failure to Perform Duty Following Accident: Injury—Defendant Driver.

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STAFF NOTES

See Staff Notes to Instruction 1632.

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1634. Failure to Perform Duty Following Accident: Death or Permanent Injury—Defendant Driver

---

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.

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].**

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

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

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

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

   [OR]

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

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

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[AND]

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

[[AND]

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

[AND

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

[OR

(e) To report the accident and all required information to either the nearest office of the California Highway Patrol or office of a local law enforcement agency if there was no peace officer at the scene of the accident to receive the information.]

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

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

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

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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. A *natural and probable consequence* is one that a reasonable and prudent 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.]]

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

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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 Instruction 1635, Failure to Perform Duty Following Accident: Death or Permanent 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.) 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; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

Give bracketed element 5(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; *People v. Scofield* (1928) 203 Cal. 703, 708; see also discussion in the Related Issues section below.)

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

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

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.

AUTHORITY

Elements ▸ Veh. Code, §§ 20001, 20003 & 20004.
Sentence for Death or Permanent Injury ▸ Veh. Code, § 20001(b)(2).
Knowledge of Accident and Injury ▸ *People v. Holford* (1965) 63 Cal.2d 74, 79–80; *People v. Carter* (1966) 243 Cal.App.2d 239, 241; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134.

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Willful Failure to Perform Duty ▸ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22.
Duty Applies Regardless of Fault for Accident ▸ *People v. Scofield* (1928) 203 Cal. 703, 708.
Involved Defined ▸ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631; *People v. Sell* (1950) 96 Cal.App.2d 521, 523.
Immediately Stopped Defined ▸ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647.
Duty to Render Assistance ▸ *People v. Scofield* (1928) 203 Cal. 703, 708; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027.
Permanent, Serious Injury Defined ▸ Veh. Code, § 20001(d).
Statute Does Not Violate Fifth Amendment Privilege ▸ *California v. Byers* (1971) 402 U.S. 424, 434.
Must Identify Self as Driver ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546.
Unanimity Instruction Required ▸ *People v. Scofield* (1928) 203 Cal. 703, 710.
Unconscious Driver Unable to Comply at Scene ▸ *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204.
Offense May Occur on Private Property ▸ *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204.
Duty Applies to Injured Passenger in Defendant's Vehicle ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546.

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

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; *People v. Carter* (1966) 243 Cal.App.2d 239, 242–243.

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 [citations omitted].)

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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.) "In this connection it must be noted that the statute requires that *necessary* assistance be rendered." (*People v. Scofield* (1928) 203 Cal. 703, 708 [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.) 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.)

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STAFF NOTES

Veh. Code, § 20001, in relevant part:

(a) The driver of any vehicle involved in an accident resulting in injury to any person, other than himself or herself, or in the death of any person shall immediately stop the vehicle at the scene of the accident and shall fulfill the requirements of Sections 20003 and 20004.

(b)(1) Except as provided in paragraph (2), any person who violates subdivision (a) shall be punished by imprisonment in the state prison, or in a county jail for not more than one year, or by a fine of not less than one thousand dollars ($ 1,000) nor more than ten thousand dollars ($ 10,000), or by both that imprisonment and fine.

(2) If the accident described in subdivision (a) results in death or permanent, serious injury, any person who violates subdivision (a) shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than 90 days nor more than one year, or by a fine of not less than one thousand dollars ($ 1,000) nor more than ten thousand dollars ($ 10,000), or by both that imprisonment and fine. However, the court, in the interests of justice and for reasons stated in the record, may reduce or eliminate the minimum imprisonment required by this paragraph.

(3) In imposing the minimum fine required by this subdivision, the court shall take into consideration the defendant's ability to pay the fine and , in the interests of justice and for reasons stated in the record, may reduce the amount of that minimum fine to less than the amount otherwise required by this subdivision.

(c) A person who flees the scene of the crime after committing a violation of Section 191.5 of, paragraph (1) or (3) of subdivision (c) of Section 192 of, or subdivision (a) or (c) of Section 192.5 of, the Penal Code, upon conviction of any of those sections, in addition and consecutive to the punishment prescribed, shall be punished by an additional term of imprisonment of five years in the state prison. This additional term shall not be imposed unless the allegation is charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact. The court shall not strike a finding that brings a person within the provisions of this subdivision

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or an allegation made pursuant to this subdivision.

(d) As used in this section, "permanent, serious injury" means the loss or permanent impairment of function of any bodily member or organ.

Veh. Code, § 20003:

(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall also give his or her name, current residence address, the names and current residence addresses of any occupant of the driver's vehicle injured in the accident, the registration number of the vehicle he or she is driving, and the name and current residence address of the owner to the person struck or the driver or occupants of any vehicle collided with, and shall give the information to any traffic or police officer at the scene of the accident. The driver also shall render to any person injured in the accident reasonable assistance, including transporting, or making arrangements for transporting, any injured person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if that transportation is requested by any injured person.

(b) Any driver or injured occupant of a driver's vehicle subject to the provisions of subdivision (a) shall also, upon being requested, exhibit his or her driver's license, if available, or, in the case of an injured occupant, any other available identification, to the person struck or to the driver or occupants of any vehicle collided with, and to any traffic or police officer at the scene of the accident.

Veh. Code, § 20004:

In the event of death of any person resulting from an accident, the driver of any vehicle involved after fulfilling the requirements of this division, and if there be no traffic or police officer at the scene of the accident to whom to give the information required by Section 20003, shall, without delay, report the accident to the nearest office of the Department of the California Highway Patrol or office of a duly authorized police authority and submit with the report the information required by Section 20003.

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Failure to Perform One of the Statutory Duties
See Notes to Instruction 1602.

Knowledge of Accident and Injury
See Notes to Instruction 1602.

Involved
See Notes to Instruction 1600.

Immediately Stop
See Notes to Instruction 1600.

Must Identify Self as Driver
See Notes to Instruction 1600.

Reasonable Assistance
See Notes to Instruction 1602.

Unanimity Instruction Required
See Notes to Instruction 1602.

Unconscious Driver
See Notes to Instruction 1600.

Non-Driving Owner
See Notes to Instruction 1600.

Offense May Occur on Private Property
See Notes to Instruction 1600.

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1635. Failure to Perform Duty Following Accident: Death or Permanent Injury—Defendant Nondriving Owner or Passenger in Control

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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.

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

1. **The defendant [owned and] was riding as a passenger in a vehicle involved in an accident.**

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

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

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

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

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

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

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

   [OR]

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

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

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

[AND]

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

[[AND]

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

[AND

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

[OR

(e) To report the accident and all required information to either the nearest office of the California Highway Patrol or office of a local law enforcement agency if there was no peace officer at the scene of the accident to receive the information.]

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

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

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

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

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

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

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

[An accident causes (death/ [or] permanent, serious injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the accident. A *natural and probable consequence* is one that a reasonable and prudent 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).]

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

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

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control. If the prosecution alleges that that the defendant drove the vehicle, give Instruction 1634, Failure to Perform Duty Following Accident: Death or Permanent Injury—Defendant Driver.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591.) 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; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

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

Give the bracketed portion that begins with "The (owner/passenger in control) is not required to provide assistance" if there is an issue over whether assistance by the defendant to the injured person was necessary in light of aid provided by others. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027; *People v. Scofield* (1928) 203 Cal. 703, 708; see also discussion in the Related Issues section of Instruction 1634, Failure to Perform Duty Following Accident: Death or Permanent Injury—Defendant Driver.)

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

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

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

AUTHORITY

Elements ▸ Veh. Code, §§ 20001, 20003 & 20004.
Sentence for Death or Permanent Injury ▸ Veh. Code, § 20001(b)(2).
Knowledge of Accident and Injury ▸ *People v. Holford* (1965) 63 Cal.2d 74, 79–80; *People v. Carter* (1966) 243 Cal.App.2d 239, 241; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134.
Willful Failure to Perform Duty ▸ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22.
Duty Applies Regardless of Fault for Accident ▸ *People v. Scofield* (1928) 203 Cal. 703, 708.
Involved Defined ▸ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631; *People v. Sell* (1950) 96 Cal.App.2d 521, 523.
Immediately Stopped Defined ▸ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647.
Duty to Render Assistance ▸ *People v. Scofield* (1928) 203 Cal. 703, 708; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027.
Permanent, Serious Injury Defined ▸ Veh. Code, § 20001(d).
Nondriving Owner ▸ *People v. Rallo* (1931) 119 Cal.App. 393, 397.
Statute Does Not Violate Fifth Amendment Privilege ▸ *California v. Byers* (1971) 402 U.S. 424, 434.
Unanimity Instruction Required ▸ *People v. Scofield* (1928) 203 Cal. 703, 710.
Unconscious Driver Unable to Comply at Scene ▸ *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204.
Offense May Occur on Private Property ▸ *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204.
Duty Applies to Injured Passenger in Defendant's Vehicle ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546.

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

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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; *People v. Carter* (1966) 243 Cal.App.2d 239, 242–243.

RELATED ISSUES

See Related Issues section in Instruction 1634, Failure to Perform Duty Following Accident: Death or Permanent Injury—Defendant Driver.

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STAFF NOTES

See Staff Notes to Instruction 1634.

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1640. Fleeing the Scene Following Accident: Enhancement for Vehicular Manslaughter

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The People have also alleged that the defendant fled the scene of the accident after committing vehicular manslaughter. If you find the defendant guilty of vehicular manslaughter [as a felony] [under Count __], you must then decide whether the People have proved this additional allegation.

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

1. **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

2. **The defendant willfully failed to stop immediately at the scene of the accident.**

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

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

[To be *involved in an 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.]

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.

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BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

Give this instruction if the defendant is charged with an enhancement under Vehicle Code section 20001(c). This enhancement only applies to felony vehicular manslaughter convictions (Pen. Code, §§ 191.5, 192(c)(1) & (3), and 192.5(a) & (c)) and must be pleaded and proved. (Veh. Code, § 20001(c).) Give the bracketed "felony" in the introductory paragraph if the jury is also being instructed on misdemeanor vehicular manslaughter.

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

AUTHORITY

Enhancement ▸ Veh. Code, § 20001(c).
Knowledge of Accident and Injury ▸ *People v. Holford* (1965) 63 Cal.2d 74, 79–80; *People v. Carter* (1966) 243 Cal.App.2d 239, 241; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134.
Willful Failure to Perform Duty ▸ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22.
Involved Defined ▸ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631; *People v. Sell* (1950) 96 Cal.App.2d 521, 523.
Immediately Stopped Defined ▸ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 245.

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STAFF NOTES

Veh. Code, § 20001, in relevant part:

> (c) A person who flees the scene of the crime after committing a violation of Section 191.5 of, paragraph (1) or (3) of subdivision (c) of Section 192 of, or subdivision (a) or (c) of Section 192.5 of, the Penal Code, upon conviction of any of those sections, in addition and consecutive to the punishment prescribed, shall be punished by an additional term of imprisonment of five years in the state prison. This additional term shall not be imposed unless the allegation is charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact. The court shall not strike a finding that brings a person within the provisions of this subdivision or an allegation made pursuant to this subdivision.

Does the Enhancement Incorporate All of the Elements of 20001(a)?

The plain language of Vehicle Code section 20001(c) requires merely that the defendant "flee the scene of the crime" after committing a vehicular manslaughter offense. This language does not appear to incorporate all of the notification requirements of Vehicle Code section 20001(a). On the other hand, no further definition of "flee the scene" is provided.

The only case on this enhancement is *People v. Ramirez* (2003) 109 Cal.App.4th 992. The issue is *Ramirez, supra*, was whether a defendant who pled guilty had sufficient notice of the mandatory five year consecutive term under Vehicle Code section 20001(c). (*Id.* at p. 995.) The court concluded that the defendant did have sufficient notice because the complaint alleged a violation of Vehicle Code section 20001(a) and the felony plea form noted that the defendant was pleading guilty to Vehicle Code section 20001 (a) and (c). (*Id.* at p. 996.) The court reaches this conclusion by treating Vehicle Code section 20001(c) as a "sentencing scheme," parallel to the sentencing provisions of subsection (b), rather than as an enhancement. (*Id.* at pp. 997–1000.) Under the reasoning of this case, subsection (c) incorporates all of the provisions of subsection (a), including the duty to provide identifying information and render aid under Vehicle Code sections 20003 and 20004.

Justice Perren, writing in dissent in *People v. Ramirez, supra*, recognized that Vehicle Code section 20001(c) is an enhancement to a conviction for felony vehicular manslaughter, not merely a "sentencing scheme" for a violation of Vehicle Code section 20001(a). (*Id.* at p. 1003.) As such, the enhancement must be

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specifically pled and proved. (*Id.* at pp. 1003–1004.) Indeed, subsection (c) itself requires that the enhancement be separately pled and proved. Under this reasoning, the enhancement does not necessarily incorporate all of the notification requirements of subsection (a).

Staff has drafted the instruction requiring knowledge and a willful failure to stop, in accordance with case law interpreting Vehicle Code section 20001(a). However, because subsection (c) refers only to "fleeing the scene," Staff has not incorporated the duties to provide identifying information or render aid contained in Vehicle Code sections 20003 and 20004. Because the enhancement requires that the defendant first be convicted of felony vehicular manslaughter, Staff has not included in this enhancements the elements of driving or an accident causing death. These elements are necessarily included in every felony vehicular manslaughter offense.

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1650. Evading Peace Officer: Misdemeanor

The defendant is charged [in Count __] with evading a peace officer.

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

1. **A peace officer in a vehicle was pursuing the defendant, who was also driving a vehicle.**

2. **The defendant intended to evade the peace officer.**

3. **While driving, the defendant willfully fled from, or tried to elude, the pursuing peace officer.**

AND

4. **All of the following were true:**

   (a) **There was at least one lighted red lamp visible from the front of the peace officer's vehicle.**

   (b) **The defendant either saw or reasonably should have seen the lamp.**

   (c) **The peace officer's vehicle was sounding a siren as reasonably necessary.**

   (d) **The peace officer's vehicle was distinctively marked.**

   AND

   (e) **The peace officer was wearing a distinctive uniform.**

A sworn member of _____ *<insert name of agency that employs peace officer>***, authorized by _____** *<insert appropriate section from Pen. Code, § 830 et seq.>* **to _____** *<describe statutory authority>***, is a *peace officer*.**

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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.

A vehicle is *distinctively marked* if[, in addition to the red lamp and siren,] it has a marking or device that identifies it as a peace officer's vehicle. The vehicle's appearance must be such that a person would know or reasonably should know that it is a law enforcement vehicle.

A *distinctive uniform* means clothing adopted by a law enforcement agency to identify or distinguish members of its force. The uniform does not have to be complete or of any particular level of formality. However, a badge, without more, is not enough.

BENCH NOTES

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

The jury must determine whether a peace officer was pursuing the defendant. (*People v. Flood* (1998) 18 Cal.4th 470, 482.) The court must instruct the jury in the appropriate definition of "peace officer" from the statute. *(Ibid.)* It is error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].)

There is a split in authority over whether a law enforcement vehicle must have something more than a red lamp and siren to be "distinctively marked." (*People v. Estrella* (1995) 31 Cal.App.4th 716, 722–723 [something in addition to red lamp and siren required]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [following *Estrella*, vehicle sufficiently marked where it had red lamp, siren, and wigwag lights]; *People v. Chicanti* (1999) 71 Cal.App.4th 956, 962 [disagreeing with *Estrella*, finding that red lamp and siren may be sufficient if these markings alone were enough to put the defendant on notice that this was a police vehicle].) This issue is currently pending before the Supreme Court. (*People v. Hudson* (May 12, 2004) S122816.) In the definition of "distinctively marked," the court may give the bracketed "in addition to the red lamp and siren" at its discretion, until the Supreme Court has resolved this issue.

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On request, the court must give Instruction 650, Voluntary Intoxication, if there is sufficient evidence of voluntary intoxication to negate the intent to evade. (*People v. Finney* (1980) 110 Cal.App.3d 705, 712.)

AUTHORITY

Elements ▸ Veh. Code, § 2800.1(a).
Distinctively Marked Vehicle ▸ *People v. Estrella* (1995) 31 Cal.App.4th 716, 722–723; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491; *People v. Chicanti* (1999) 71 Cal.App.4th 956, 962.
Distinctive Uniform ▸ *People v. Estrella* (1995) 31 Cal.App.4th 716, 724; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491.
Jury Must Determine If Peace Officers ▸ *People v. Flood* (1998) 18 Cal.4th 470, 482.
Red Lamp, Siren, and Distinctive Uniform Must Be Proved ▸ *People v. Shakhvaladyan* (2004) 117 Cal.App.4th 232, 237–238; *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199; *People v. Brown* (1989) 216 Cal.App.3d 596, 599–600.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 260.

RELATED ISSUES

Multiple Pursuing Officers Constitutes Only One Offense
A defendant "may only be convicted of one count of section 2800.2 even though the pursuit involved multiple police officers in multiple police vehicles." (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1163.)

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STAFF NOTES

Veh. Code, § 2800.1, in relevant part:

> (a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor if all of the following conditions exist:
>
> (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp.
>
> (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary.
>
> (3) The peace officer's motor vehicle is distinctively marked.
>
> (4) The peace officer's motor vehicle is operated by a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, and that peace officer is wearing a distinctive uniform.

Distinctively Marked

> Something is distinctive if it serves to distinguish or set apart. (See Webster's Third New Internat. Dict. (1986) p. 659.) The adjective "marked" means having a mark of a specified kind, or having a distinctive or strongly pronounced character. (See *id*. at p. 1383.) A "mark" is a character, device, label, brand, seal, or other sign put on an article, especially to show the maker or owner, to certify quality, or for identification. (See *id*. at p. 1382.) The word is used here in the context of a list of conditions relating to the appearance of officers and their vehicles. It may reasonably be concluded that a vehicle is distinctively marked if it bears a symbol or device that identifies it as a peace officer's vehicle. . . .
>
> [A]lthough we agree that a red light and siren alone do not distinctively mark a police vehicle, we conclude that under the circumstances presented here, the additional "devices" (see Webster's definition, *supra*) consisting of wigwag lights and the flashing blue and clear lights adequately identified Haskins's vehicle

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> as a police vehicle. n5 We find it incredible to believe or even seriously argue that a reasonable person, upon seeing a vehicle in pursuit with flashing red and blue lights, wigwag headlights and hearing a siren, would have any doubt that said pursuit vehicle was a police vehicle.
>
> n5 We do not consider the presence of a push-bar on the front of the vehicle or spotlights mounted on each side as being significant identifiers of police vehicles. . . .
>
> Accordingly, we adopt a commonsense approach to this question, one which looks at the indicia identified with the pursuit vehicle which are supplemental to a red light and siren, to ascertain whether a person fleeing is on reasonable notice that pursuit is by a peace officer. Stated somewhat differently, under section 2800.1, does the person know or reasonably should know that a police vehicle is in pursuit?

(*People v. Estrella* (1995) 31 Cal.App.4th 716, 722–723; see also *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [following *Estrella*, vehicle sufficiently marked where it had red light, siren and wigwag lights].)

> In construing Vehicle Code sections 2800.1 and 2800.2, the court in *Estrella* was concerned that an interpretation of the statutes allowing for conviction upon a finding a police vehicle was distinctively marked based on the presence of a red light and siren would render the requirement that the vehicle be "distinctively marked" mere surplusage. "Therefore, to construe 'distinctively marked' to mean simply exhibiting a red light and sounding a siren would result in [Vehicle Code] section 2800.1, subdivision (c) (requiring the vehicle to be 'distinctively marked') being considered as mere surplusage." (*People v. Estrella*, *supra*, 31 Cal. App. 4th at p. 723.)
>
> We respectfully disagree with the *Estrella* concern that the "distinctively marked" requirement would be rendered "mere surplusage" if the red lamp and siren could be used as the basis for a finding the vehicle was distinctively marked. The requirements are separate elements, and a reasonable trier of fact which found the red lamp was lighted and siren was on *may or may not* also conclude under the circumstances of a particular case that the red lamp and siren satisfy the distinctive marking element.

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(*People v. Chicanti* (1999) 71 Cal.App.4th 956, 962.)

Distinctive Uniform

> The statute requires only that the peace officer be wearing a "distinctive uniform." Defendant does not point to any related provision of law that would define "uniform" in a manner that would exclude either Borton's vest or Haskins's police department vest, cloth badge, gunbelt and navy blue baseball cap marked "Police" in bright yellow lettering. n6 A "uniform" is dress of a distinctive design or fashion adopted by or prescribed for members of a particular group and serving as a means of identification. (See Webster's Third New Internat. Dict., *supra*, p. 2498.) Something is distinctive if it serves to distinguish, or sets something apart from others, or if it is characteristic of or peculiar to its type. (See *id*. p. 659.)
>
> Here, Borton's bulletproof vest and Haskins's attire qualify as parts of police uniforms. The statute does not require that the uniform be of any particular level of formality or that it be complete.

(*People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [footnote omitted].)

> Thus, a law enforcement officer's "distinctive uniform" is the clothing prescribed for or adopted by a law enforcement agency which serves to identify or distinguish members of its force.
>
> As *Estrella* noted, the statute does not specify a uniform must be of any degree of formality or completeness, stating, "the word 'Police' and a badge are distinctive ways of identifying the wearers as police." (31 Cal. App. 4th at p. 724.) However, a badge is not an article of clothing, and while it may help to distinguish a law enforcement officer, it does not constitute a "distinctive uniform." Since the officer here was in plain clothes, with only a badge to identify himself as a police officer, he was not wearing a "distinctive uniform" as required by Vehicle Code section 2800.1.

(*People v. Mathews* (1998) 64 Cal.App.4th 485, 490–491.)

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Jury Must Determine if Peace Officers

> [W]e conclude that the trial court's instruction to the jury that Bridgeman and Gurney were peace officers violated defendant's due process right under the California Constitution to have the jury determine each element of the offense set forth in section 2800.3. An individual violates that statute whenever his or her "willful flight or attempt to elude a pursuing peace officer in violation of Section 2800.1 proximately causes death or serious bodily injury to any person . . . ." One element of a violation of section 2800.1 is that the pursuing peace officer's motor vehicle "is operated by a peace officer, as defined in [Penal Code sections 830 through 832.9], and that peace officer is wearing a distinctive uniform." (§ 2800.1, subd. (a)(4).) Penal Code section 830.1, subdivision (a), defines the term "peace officer" to include "any police officer, employed in that capacity and appointed by the chief of police . . . of a city." Therefore, in prosecuting defendant for violating section 2800.3, the prosecutor had the burden of proving beyond a reasonable doubt that Bridgeman and Gurney were so employed. The trial court did not instruct the jury to determine whether the officers fell within the Penal Code's definition of "peace officer." Instead, it informed the jury that Bridgeman and Gurney were peace officers, thus removing this element of the crime from the jury's consideration. Even though the only evidence regarding the peace officer element supports a finding for the prosecution, prior appellate decisions make clear that the trial court's instruction violated defendant's right to due process under the California Constitution.

(*People v. Flood* (1998) 18 Cal.4th 470, 482 [footnotes omitted].)

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1651. Evading Peace Officer: Reckless Driving

The defendant is charged [in Count __] with evading a peace officer with wanton disregard for safety.

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

1. **A peace officer in a vehicle was pursuing the defendant, who was also driving a vehicle.**

2. **The defendant intended to evade the peace officer.**

3. **While driving, the defendant willfully fled from, or tried to elude, the pursuing peace officer.**

4. **While fleeing from, or trying to elude, the pursuing peace officer, the defendant drove with willful or wanton disregard for the safety of persons or property.**

AND

5. **All of the following were true:**

   (a) **There was at least one lighted red lamp visible from the front of the peace officer's vehicle.**

   (b) **The defendant either saw or reasonably should have seen the lamp.**

   (c) **The peace officer's vehicle was sounding a siren as reasonably necessary.**

   (d) **The peace officer's vehicle was distinctively marked.**

   AND

   (e) **The peace officer was wearing a distinctive uniform.**

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A sworn member of _____ *<insert name of agency that employs peace officer>***, authorized by _____** *<insert appropriate section from Pen. Code, § 830 et seq.>* **to _____** *<describe statutory authority>***, is a *peace officer*.**

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.

A person acts with *wanton disregard for safety* when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk of harm, (2) he or she intentionally ignores that risk, and (3) ignoring the risk is grossly different from what a reasonable person would have done in the same situation. The person does not, however, have to intend to cause damage.

[*Driving with willful or wanton disregard for the safety of persons or property* includes, but is not limited to, causing damage to property while driving or committing three or more violations that are each assigned a traffic violation point.]

[_____ *<insert traffic violations alleged>* **are each assigned a traffic violation point.]**

A vehicle is *distinctively marked* if[, in addition to the red lamp and siren,] it has a marking or device that identifies it as a peace officer's vehicle. The vehicle's appearance must be such that a person would know or reasonably should know that it is a law enforcement vehicle.

A *distinctive uniform* means clothing adopted by a law enforcement agency to identify or distinguish members of its force. The uniform does not have to be complete or of any particular level of formality. However, a badge, without more, is not enough.

BENCH NOTES

Instructional Duty

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

The jury must determine whether a peace officer was pursuing the defendant. (*People v. Flood* (1998) 18 Cal.4th 470, 482.) The court must instruct the jury in the appropriate definition of "peace officer" from the statute. *(Ibid.)* It is error for

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the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].)

Give the bracketed definition of "driving with willful or wanton disregard" if there is evidence that the defendant committed three or more traffic violations. The court may also, at its discretion, give the bracketed sentence that follows this definition, inserting the names of the traffic violations alleged.

There is a split in authority over whether a law enforcement vehicle must have something more than a red lamp and siren to be "distinctively marked." (*People v. Estrella* (1995) 31 Cal.App.4th 716, 722–723 [something in addition to red lamp and siren required]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [following *Estrella*, vehicle sufficiently marked where it had red lamp, siren, and wigwag lights]; *People v. Chicanti* (1999) 71 Cal.App.4th 956, 962 [disagreeing with *Estrella*, finding that red lamp and siren may be sufficient if these markings alone were enough to put the defendant on notice that this was a police vehicle].) This issue is currently pending before the Supreme Court. (*People v. Hudson* (May 12, 2004) S122816.) In the definition of "distinctively marked," the court may give the bracketed "in addition to the red lamp and siren" at its discretion, until the Supreme Court has resolved this issue.

On request, the court must give Instruction 650, Voluntary Intoxication, if there is sufficient evidence of voluntary intoxication to negate the intent to evade. (*People v. Finney* (1980) 110 Cal.App.3d 705, 712.)

AUTHORITY

Elements ▸ Veh. Code, §§ 2800.2, 2800.1(a).

Willful or Wanton Disregard ▸ *People v. Schumacher* (1961) 194 Cal.App.2d 335, 240.

Three Violations or Property Damage as Wanton Disregard—Definitional ▸ *People v. Pinkston* (2003) 112 Cal.App.4th 387, 392–393; *People v. Williams* (2004) 116 Cal.App.4th 1114, 1121, REVIEW GRANTED AND DEPUBLISHED, June 11, 2004, S123910.

Distinctively Marked Vehicle ▸ *People v. Estrella* (1995) 31 Cal.App.4th 716, 722–723; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491; *People v. Chicanti* (1999) 71 Cal.App.4th 956, 962.

Distinctive Uniform ▸ *People v. Estrella* (1995) 31 Cal.App.4th 716, 724; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491.

Jury Must Determine If Peace Officers ▸ *People v. Flood* (1998) 18 Cal.4th 470, 482.

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Red Lamp, Siren, and Distinctive Uniform Must Be Proved ▸ *People v. Shakhvaladyan* (2004) 117 Cal.App.4th 232, 237–238; *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199; *People v. Brown* (1989) 216 Cal.App.3d 596, 599–600.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 260.

LESSER INCLUDED OFFENSES

Misdemeanor Evading a Pursuing Peace Officer ▸ Veh. Code, § 2800.1; *People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680–1681.

RELATED ISSUES

Multiple Pursuing Officers Constitutes Only One Offense
A defendant "may only be convicted of one count of section 2800.2 even though the pursuit involved multiple police officers in multiple police vehicles." (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1163.)

Inherently Dangerous Felony—Issue on Review
Two cases previously held that a violation of Vehicle Code section 2800.2 is an inherently dangerous felony supporting a felony-murder conviction. (*People v. Johnson* (1993) 15 Cal.App.4th 169, 174; *People v. Sewell* (2000) 80 Cal.App.4th 690, 697.) However, the issue is currently pending before the Supreme Court. (*People v. Howard* (2002) 99 Cal.App.4th 43 [REVIEW GRANTED AND DEPUBLISHED (Sept. 11, 2002, S108353); see also *People v. Williams* (2004) 116 Cal.App.4th 1114, 1118; REVIEW GRANTED AND DEPUBLISHED, June 11, 2004, S123910 [holding that Veh. Code, § 2800.2 does not support felony-murder conviction].)

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STAFF NOTES

Veh. Code, § 2800.2:

(a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year. The court may also impose a fine of not less than one thousand dollars ($ 1,000) nor more than ten thousand dollars ($ 10,000), or may impose both that imprisonment or confinement and fine.

(b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs.

Veh. Code, § 2800.1, in relevant part:

(a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor if all of the following conditions exist:

(1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp.

(2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary.

(3) The peace officer's motor vehicle is distinctively marked.

(4) The peace officer's motor vehicle is operated by a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, and that peace officer is wearing a distinctive uniform.

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Willful or Wanton Disregard

> "In this case we are required . . . to construe the part of the statute descriptive of the forbidden driving. Its words are, 'in wilful or wanton disregard for the safety of persons or property.' The term 'wantonness' is thus defined: 'Wantonness includes the elements of consciousness of one's conduct, intent to do or omit the act in question, realization of the probable injury to another, and reckless disregard of consequences.' [Citation.] . . . The word 'wilful' in this connection means 'intentional' [citations]. The intention here referred to relates to the disregard of safety, etc., not merely to the act done in disregard thereof." (*People* v. *Nowell*, 45 Cal.App.2d Supp. 811, 815.)

(*People v. Schumacher* (1961) 194 Cal.App.2d 335, 240.)

People v. Schumacher, supra, addressed the meaning of "willful and wanton disregard for safety" in the context of the reckless driving statute. (*Id.* at p. 239.) This definition has been applied to the evading statute. (See *People v. Richie* (1994) 28 Cal.App.4th 1347, 1361.)

In *People v. Richie* (1994) 28 Cal.App.4th 1347, 1361–1362, the court held that it was not error for the trial court to omit the CALJIC definition of "willful and wanton disregard." The court held that the term did not require definition. (*Ibid.)* However, the defendant in *Richie, supra*, conceded the evading charge at trial. (*Id.* at p. 1362.) Thus, the precedential value of this decision is limited and it is better practice for the court to continue to define the phrase.

The definition contained in this instruction is derived from the Task Force definition of recklessness. See Task Force Instruction 1060, Unlawfully Causing a Fire and Task Force Instruction 1872, Possession of Explosive or Destructive Device in Specified Place.

Three Violations Constitutes Wanton Disregard—Definition not Presumption

> Consistent with Vehicle Code section 2800.2, subdivision (b), the trial court instructed Pinkston's jury in the words of CALJIC No. 12.85 that: "A willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time the person driving commits three or more Vehicle Code violations, such

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> as running a red light ..., failing to stop at a posted stop sign ..., passing a vehicle on the right by driving off the main traveled portion of the roadway ..., driving with a suspended license ... or damage to property. 'Willful or wanton' means an act or acts intentionally performed with a conscious disregard for the safety of persons or property. It does not necessarily include an intent to injure." . . .
>
> Subdivision (b) of Vehicle Code section 2800.2 does not state a mandatory presumption. Rather, it sets out the Legislature's *definition* of what qualifies as willful and wanton conduct under subdivision (a). Although Vehicle Code section 2800.2 uses the phrase "willful or wanton disregard for the safety of persons or property" to describe an element of reckless evading, the statute defines this element so that it may be satisfied by proof of property damage or by proof of that the defendant committed three Vehicle Code violations. Thus, section 2800.2, subdivision (b) establishes a rule of substantive law rather than a presumption apportioning the burden of persuasion concerning certain propositions or varying the duty of coming forward with evidence. (See *People v. Dillon* (1983) 34 Cal.3d 441, 474-475.) In other words, evasive driving during which the defendant commits three or more specified traffic violations *is* a violation of section 2800.2 "*because of the substantive statutory definition of the crime*" rather than because of any presumption. (*People v. Dillon, supra,* at p. 475.) Since there is no presumption, due process is not violated. (*Id.* at p. 476.)

(*People v. Pinkston* (2003) 112 Cal.App.4th 387, 391–393 [emphasis in original].)

Distinctively Marked
See Notes to Instruction 1650.

Distinctive Uniform
See Notes to Instruction 1650.

Jury Must Determine if Peace Officers
See Notes to Instruction 1650.

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1652. Evading Peace Officer: Death or Serious Bodily Injury

The defendant is charged [in Count __] with evading a peace officer and causing (death/ [or] serious bodily injury).

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

1. **A peace officer in a vehicle was pursuing the defendant, who was also driving a vehicle.**

2. **The defendant intended to evade the peace officer.**

3. **While driving, the defendant willfully fled from, or tried to elude, the pursuing peace officer.**

4. **The defendant's attempt to flee from, or elude, the pursuing peace officer caused (the death of/ [or] serious bodily injury to) someone else.**

AND

5. **All of the following were true:**

   (a) **There was at least one lighted red lamp visible from the front of the peace officer's vehicle.**

   (b) **The defendant either saw or reasonably should have seen the lamp.**

   (c) **The peace officer's vehicle was sounding a siren as reasonably necessary.**

   (d) **The peace officer's vehicle was distinctively marked.**

   AND

   (e) **The peace officer was wearing a distinctive uniform.**

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A sworn member of _____ *<insert name of agency that employs peace officer>***, authorized by _____** *<insert appropriate section from Pen. Code, § 830 et seq.>* **to _____** *<describe statutory authority>***, is a *peace officer*.**

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.

[*Serious bodily injury* means a serious impairment of physical condition, including[, but not limited to, the following:] (loss of consciousness[,]/[and]concussion[,]/[and] bone fracture[,]/[and] protracted loss or impairment of function of any bodily member or organ[,]/[and] a wound requiring extensive suturing[,]/ [and] serious disfigurement).]

A vehicle is *distinctively marked* if[, in addition to the red lamp and siren,] it has a marking or device that identifies it as a peace officer's vehicle. The vehicle's appearance must be such that a person would know or reasonably should know that it is a law enforcement vehicle.

A *distinctive uniform* means clothing adopted by a law enforcement agency to identify or distinguish members of its force. The uniform does not have to be complete or of any particular level of formality. However, a badge, without more, is not enough.

[An act causes (death/ [or] serious bodily injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable and prudent 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] serious bodily injury). An act 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).]

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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.

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.) 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 give the "substantial factor" instruction in the second bracketed paragraph on causation. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

The jury must determine whether a peace officer was pursuing the defendant. (*People v. Flood* (1998) 18 Cal.4th 470, 482.) The court must instruct the jury on the appropriate definition of "peace officer" from the statute. *(Ibid.)* It is error for the court to instruct that the witness is a peace officer as a matter of law. (*Ibid.* [instruction that "Officer Bridgeman and Officer Gurney are peace officers" was error].)

There is a split in authority over whether a law enforcement vehicle must have something more than a red lamp and siren to be "distinctively marked." (*People v. Estrella* (1995) 31 Cal.App.4th 716, 722–723 [something in addition to red lamp and siren required]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [following *Estrella*, vehicle sufficiently marked where it had red lamp, siren, and wigwag lights]; *People v. Chicanti* (1999) 71 Cal.App.4th 956, 962 [disagreeing with *Estrella*, finding that red lamp and siren may be sufficient if, under the circumstances of the case, these markings alone were enough to put the defendant on notice that this was a police vehicle].) This issue is currently pending before the Supreme Court. (*People v. Hudson* (May 12, 2004) S122816. In the definition of "distinctively marked," the court may give the bracketed "in addition to the red lamp and siren" at its discretion, until the Supreme Court has resolved this issue.

On request, the court must give Instruction 650, Voluntary Intoxication, if there is sufficient evidence of voluntary intoxication to negate the intent to evade. (*People v. Finney* (1980) 110 Cal.App.3d 705, 712.)

AUTHORITY

Elements ▸ Veh. Code, §§ 2800.3, 2800.1(a).

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Serious Bodily Injury Defined ▸ Pen. Code, § 243(f)(4).

Distinctively Marked Vehicle ▸ *People v. Estrella* (1995) 31 Cal.App.4th 716, 722–723; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491; *People v. Chicanti* (1999) 71 Cal.App.4th 956, 962.

Distinctive Uniform ▸ *People v. Estrella* (1995) 31 Cal.App.4th 716, 724; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491.

Jury Must Determine If Peace Officers ▸ *People v. Flood* (1998) 18 Cal.4th 470, 482.

Red Lamp, Siren, and Distinctive Uniform Must Be Proved ▸ *People v. Shakhvaladyan* (2004) 117 Cal.App.4th 232, 237–238; *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199; *People v. Brown* (1989) 216 Cal.App.3d 596, 599–600.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 260.

LESSER INCLUDED OFFENSES

Misdemeanor Evading a Pursuing Peace Officer ▸ Veh. Code, § 2800.1; *People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680–1681.

RELATED ISSUES

Multiple Pursuing Officers Constitutes Only One Offense

A defendant "may only be convicted of one count of section 2800.2 even though the pursuit involved multiple police officers in multiple police vehicles." (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1163.)

Not Inherently Dangerous Felony

Vehicle Code section 2800.3 is not an inherently dangerous felony and does not support a felony-murder conviction. (*People v. Jones* (2000) 82 Cal.App.4th 663, 668–669; *People v. Sanchez* (2001) 86 Cal.App.4th 970, 974.)

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STAFF NOTES

Veh. Code, § 2800.3:

> Whenever willful flight or attempt to elude a pursuing peace officer in violation of Section 2800.1 proximately causes death or serious bodily injury to any person, the person driving the pursued vehicle, upon conviction, shall be punished by imprisonment in the state prison for three, four, or five years, by imprisonment in the county jail for not more than one year, or by a fine of not less than two thousand dollars ($ 2,000) nor more than ten thousand dollars ($ 10,000), or by both that fine and imprisonment.
>
> For purposes of this section, "serious bodily injury" has the same meaning as defined in paragraph (4) of subdivision (f) of Section 243 of the Penal Code.

Veh. Code, § 2800.1, in relevant part:

> (a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor if all of the following conditions exist:
>
> (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp.
>
> (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary.
>
> (3) The peace officer's motor vehicle is distinctively marked.
>
> (4) The peace officer's motor vehicle is operated by a peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, and that peace officer is wearing a distinctive uniform.

Definition of Serious Bodily Injury

As stated in the Staff Notes for Instruction 851, “Battery Causing Serious Bodily Injury,” the definition of “serious bodily injury” comes from Penal Code section 243(f)(4):

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> "Serious bodily injury" means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness, concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

Distinctively Marked

See Notes to Instruction 1650.

Distinctive Uniform

See Notes to Instruction 1650.

Jury Must Determine if Peace Officers

See Notes to Instruction 1650.

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1700. Simple Possession of Controlled Substance

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

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

1. **The defendant possessed a controlled substance.**

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

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

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

AND

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

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

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

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

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

BENCH NOTES

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

The prescription defense is codified in Health and Safety Code sections 11350 and 11377. It is not available as a defense to possession of all controlled substances. The defendant need only raise a reasonable doubt about whether his or her possession of the drug was lawful because of a valid prescription. (See *People v. Mower* (2002) 28 Cal.4th 457, 479.)

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11350, 11377; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75.
Usable Amount ▸ *People v. Piper* (1971) 19 Cal.3d 248, 250.
Prescription ▸ Health & Saf. Code, §§ 11027, 11164, 11164.5.
Persons Authorized to Write Prescriptions ▸ Health & Saf. Code, § 11150.

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

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STAFF NOTES

Health & Saf. Code, § 11350:

(a) Except as otherwise provided in this division, every person who possesses (1) any controlled substance specified in subdivision (b) or (c), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) or subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison.

(b) Except as otherwise provided in this division, every person who possesses any controlled substance specified in subdivision (e) of Section 11054 shall be punished by imprisonment in the county jail for no more than one year or in the state prison.

(c) Except as otherwise provided in this division, whenever a person who possesses any of the controlled substances specified in subdivision (a) or (b), the judge may, in addition to any punishment provided for pursuant to subdivision (a) or (b), assess against that person a fine not to exceed seventy dollars ($70) with proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

(d) Except in unusual cases in which it would not serve the interest of justice to do so, whenever a court grants probation pursuant to a felony conviction under this section, in addition to any other conditions of probation which may be imposed, the following conditions of probation shall be ordered:

(1) For a first offense under this section, a fine of at least one thousand dollars ($1,000) or community service.

(2) For a second or subsequent offense under this section, a fine of a least two thousand dollars ($2,000) or community service.

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(3) If a defendant does not have the ability to pay the minimum fines specified in paragraphs (1) and (2), community service shall be ordered in lieu of the fine.

Health & Saf. Code, §11377, in relevant part:

> (a) Except as authorized by law and as otherwise provided in subdivision (b) or Section 11375, or in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f) of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in a county jail for a period of not more than one year or in the state prison. [. . .]
>
> (c) In addition to any fine assessed under subdivision (b), the judge may assess a fine not to exceed seventy dollars ($ 70) against any person who violates subdivision (a), with the proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

Elements

People v. Palaschak (1995) 9 Cal.4th 1236, 1242, provides the elements for simple possession of a controlled substance:

> The essential elements of possession of a controlled substance are "dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially."

[Citations omitted.]

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The knowledge requirement has also been expressed thus:

> In order to sustain a conviction of possession of narcotics it must be shown that the defendant had either physical or constructive possession, and that he was aware that the substance of which he had possession was a narcotic.

(*People v. Gorg* (1955) 45 Cal.2d 776, 780.)

Knowledge—Need Not Know Which Substance
The defendant does not need to know which specific controlled substance he possesses:

> [K]nowledge for the purpose of conviction under Health and Safety Code section 11377, is knowledge of the controlled nature of the substance and not its precise chemical composition. Although the *Garringer* court dealt with mere possession rather than possession for sale, the knowledge element is the same.

(*People v. Guy* (1980) 107 Cal.App.3d 593, 601.)

Constructive Possession
This instruction follows the analysis in *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 (citing *Armstrong v Superior Court* (1990) 217 Cal.App.3d 535, 539-540):

> For purposes of drug transactions, the terms ‘control’ and ‘right to control’ are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance . . . *Armstrong* made clear that merely agreeing to buy contraband, without more, does *not* constitute constructive possession. It stated, “Likewise we reject the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession. We have found no authority which has established constructive possession based upon a bare agreement to purchase illegal contraband. We thus conclude that in the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether

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> the defendant has exercised the requisite control over the illegal goods." [Emphasis in original.]

Usable Amount
People v. Piper (1971) 19 Cal.App.3d 248, 250, held:

> The prosecution bears its burden when it shows the substance defendant possessed was marijuana and it was of a quantity which could be potentiated by consumption in any of the manners customarily employed by users, rather than useless traces or debris of narcotic.

The *Piper* court specifically rejected the notion that the usable amount must be enough to affect the user:

> [Defendant's] sole contention on appeal is the prosecution did not bear its burden of showing he possessed a "usable" quantity of marijuana because no quantitative analysis of the marijuana was made to establish the particular marijuana he possessed had a potential to produce a narcotic effect on one using it. The law regulating possession of marijuana draws not distinction between a high grade and a low grade plant . . . The legislative intent is to regulate the possession of marijuana in any form. Possession is not privileged because the particular plant may contain a low level of THC any more than it would be privileged to a person who has developed a high tolerance to the narcotic effect of marijuana.

Prescription
See Health and Safety Code section 11164 for a definition of prescription.

Burden of Proof for Prescription Defense
The Supreme Court found that the analogous prescription defense for marijuana possession requires only that a defendant raise a reasonable doubt:

> We conclude that, under general principles of California law, the burden of proof as to the facts underlying the section 11362.5(d) defense may, and should, be allocated to a defendant, but the defendant should be required merely to raise a reasonable doubt as to those facts rather than to prove them by a preponderance of the evidence.

(*People v. Mower* (2002) 28 Cal.4th 457, 464.)

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1701. Possession for Sale of Controlled Substance

The defendant is charged [in Count ___] with possessing for sale _____ <*insert type of controlled substance*>, a controlled substance.

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

1. **The defendant possessed a controlled substance.**

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

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

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

5. **The controlled substance that the defendant possessed for sale was _____ <*insert type of controlled substance*>.**

AND

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

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

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

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

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

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[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/other people).]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

BENCH NOTES

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

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11351, 11351.5, 11378, 11378.5.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75.
Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.
Usable Amount ▸ *People v. Piper* (1971) 19 Cal.3d 248, 250.

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

LESSER INCLUDED OFFENSES

Simple Possession of a Controlled Substance ▸ *People v. Saldana* (1984) 157 Cal.App.3d 443, 453–458.

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STAFF NOTES

Health & Saf. Code § 11351:

> Except as otherwise provided in this division, every person who possesses for purposes of sale (1) any controlled substance specified in subdivision (b), (c) or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment in the state prison for two, three, or four years.

Health & Saf. Code § 11351.5:

> Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale cocaine base which is specified in paragraph (1) of subdivision (f) of Section 11054, shall be punished by imprisonment in the state prison for a period of three, four, or five years.

Health & Saf. Code § 11378:

> Except as otherwise provided in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses for sale any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, except subdivision (g) of Section 11056, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f), except paragraph (3) of subdivision (e) and subparagraphs (A) and (B) of paragraph (2) of subdivision (f), of Section 11055, shall be punished by imprisonment in the state prison.

Health & Saf. Code § 11378.5:

> Except as otherwise provided in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses for sale phencyclidine or any

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> analog or any precursor of phencyclidine which is specified in paragraph (21), (22), or (23) of subdivision (d) of Section 11054 or in paragraph (3) of subdivision (e) or in subdivision (f), except subparagraph (A) of paragraph (1) of subdivision (f), of Section 11055, shall be punished by imprisonment in the state prison for a period of three, four, or five years.

Elements

People v. Palaschak (1995) 9 Cal.4th 1236, 1242, provides the elements for simple possession of a controlled substance:

> The essential elements of possession of a controlled substance are "dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially."

[Citations omitted.]

The knowledge requirement has also been expressed thus:

> In order to sustain a conviction of possession of narcotics it must be shown that the defendant had either physical or constructive possession, and that he was aware that the substance of which he had possession was a narcotic.

(*People v. Gorg* (1955) 45 Cal.2d 776, 780.)

Knowledge—Need Not Know Which Substance

The defendant does not need to know which specific controlled substance he possesses:

> [K]nowledge for the purpose of conviction under Health and Safety Code section 11377, is knowledge of the controlled nature of the substance and not its precise chemical composition. Although the *Garringer* court dealt with mere possession rather than possession for sale, the knowledge element is the same.

(*People v. Guy* (1980) 107 Cal.App.3d 593, 601.)

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Selling
In *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845, the Court of Appeal found:

> The evil which Health and Safety Code section 11351.5 is designed to proscribe is as surely present when a seller, rather than first obtaining cash with which to purchase other commodities or services, obtains those items and considerations directly by making payment with the contraband itself . . .
>
> There is no indication that the Legislature sought to prohibit only sales for cash. The conclusion that sale includes transfers other than for money comports with the evident purposes of the California legislation, the commonly accepted meaning of the term and settled rules of statutory interpretation.

Constructive Possession
This instruction follows the analysis in *People v. Barnes* (1997) 57 Cal.App.4th552, 556 (*citing Armstrong v Superior Court* (1990) 217 Cal.App.3d 535, 539-540):

> For purposes of drug transactions, the terms 'control' and 'right to control' are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance . . . *Armstrong* made clear that merely agreeing to buy contraband, without more, does *not* constitute constructive possession. It stated, "Likewise we reject the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession. We have found no authority which has established constructive possession based upon a bare agreement to purchase illegal contraband. We thus conclude that in the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether the defendant has exercised the requisite control over the illegal goods." [Emphasis in original.]

Usable Amount
People v. Piper (1971) 19 Cal.App.3d 248, 250, held:

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> The prosecution bears its burden when it shows the substance defendant possessed was marijuana and it was of a quantity which could be potentiated by consumption in any of the manners customarily employed by users, rather than useless traces or debris of narcotic.

The *Piper* court specifically rejected the notion that the usable amount must be enough to affect the user:

> [Defendant's] sole contention on appeal is the prosecution did not bear its burden of showing he possessed a "usable" quantity of marijuana because no quantitative analysis of the marijuana was made to establish the particular marijuana he possessed had a potential to produce a narcotic effect on one using it. The law regulating possession of marijuana draws not distinction between a high grade and a low grade plant . . . The legislative intent is to regulate the possession of marijuana in any form. Possession is not privileged because the particular plant may contain a low level of THC any more than it would be privileged to a person who has developed a high tolerance to the narcotic effect of marijuana.

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1702. Defense: Momentary Possession of Controlled Substance

Even if you conclude that the defendant possessed _____ *<insert name of controlled substance>***, that possession was not illegal if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:**

1. **The defendant possessed _____** *<insert name of controlled substance>* **only for a momentary or transitory period.**

2. **The defendant possessed _____** *<insert name of controlled substance>* **in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it.**

AND

3. **The defendant did not intend to prevent law enforcement officials from obtaining the _____** *<insert name of controlled substance>***.**

The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the three elements of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the defense of transitory possession when supported by the evidence. (*People v. Mijares* (1971) 6 Cal.3d 415, 423.)

This defense "applies only to momentary or transitory possession of contraband for the purpose of disposal . . . ." (*People v. Martin* (2001) 25 Cal. 4th 1180, 1191 [disapproving of *People v. Cole* (1988) 202 Cal.App.3d 1439, 1145, which had held that the length of time the contraband was possessed was just one factor to consider].) As the *Martin* court explained, the defense is established if the evidence shows "brief or transitory possession of narcotics with the intent to

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dispose of the contraband." (*Id.* at p. 1191, fn. 9.) The *Martin* court did not state that the defendant must also specifically intend to end someone else's unlawful possession of the contraband or prevent someone else from obtaining the contraband. Thus, the committee has not included this as an element.

AUTHORITY

Momentary Possession ‣ *People v. Martin* (2001) 25 Cal. 4th 1180, 1191; *People v. Mijares* (1971) 6 Cal.3d 415, 423.

Burden on Defendant to Establish by Preponderance ‣ *People v. Spry* (1997) 58 Cal.App.4th 1345, 1369 [noted as valid authority on this holding in *People v. Martin* (2001) 25 Cal.4th 1180, 1192, fn. 10]; *People v. Mower* (2002) 28 Cal.4th 457, 480, fn. 8.

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

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STAFF NOTES

Lawful Possession as a Defense
People v. Mijares (1971) 6 Cal.3d 415, 420, 423 provides that:

> To "possess" means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature . . . Courts of this state have spoken on the issue of momentary possession on three occasions, and each time there was the clear implication that given the proper factual surroundings, such limited handling would not support a conviction.
>
> The jury should have been instructed that the possession prohibited by section 11500 of the code does not include merely handling for only brief moments prior to abandoning the narcotic.
>
> As aptly explained in *People v. Spry, supra,* 58 Cal. App. 4th at page 1369, "When a defendant relies on the *Mijares* defense, he or she essentially admits the commission of the offense of simple possession of narcotics: The defendant exercised control over the narcotics, he or she knew of its nature and presence, and possessed a usable amount. (CALJIC No. 12.00.) However, the defendant additionally asserts that he or she possessed the narcotics for the limited purpose of disposal, abandonment, or destruction. *Mijares* does not serve to negate an element of the offense of possession of narcotics. Instead, it offers a judicially created exception of lawful possession under certain specific circumstances as a matter of public policy, similar to the defenses of entrapment and necessity."

(*People v. Martin* (2001) 25 Cal.4th 1180, 1190-1191.)

Possession for the Purpose of Abandonment
People v. Mijares (1971) 6 Cal.3d 415, 422 provides further that:

> The logic is inescapable and the rule is well-settled that actual abandonment of an object terminates possession thereof. (citations omitted) It would be incongruous to adhere to cases declaring that abandonment concludes an existing narcotic possession and then hold that during the brief moment involved in abandoning the narcotic, a sufficient possession which did not previously exist somehow comes into being to support a conviction for possession of contraband.

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Possession for the Purpose of Disposal
People v. Mijares (1971) 6 Cal.3d 415, 423, fn. 5, states that:

> [T]here was sufficient evidence that defendant possessed the heroin only for purposes of disposal. Without an instruction stating that such possession was insufficient for a conviction under section 11500, the jury could have disbelieved the other incriminating evidence and believed that he had possession only in order to abandon it; yet under the instructions as given the jury would have been required to find defendant guilty no matter which version of the evidence it believed.

Abandonment to Evade Seizure Not a Defense
People v. Mijares (1971) 6 Cal.3d 415, 422 emphasized that:

> [O]ur decision in no way insulates from prosecution under the narcotics laws those individuals who, fearing they are about to be apprehended, remove contraband from their immediate possession.

Possession Must be Momentary
In *People v. Martin* (2001) 25 Cal.4th 1180, 1191, the Supreme Court resolved a conflict in appellate cases, holding that possession must be transitory in order for the defendant to invoke this defense:

> We conclude that the defense of transitory possession devised in *Mijares* applies only to momentary or transitory possession of contraband for the purpose of disposal, and that the trial court did not err in refusing defendant's requested instruction based on the holding in *Cole*. To the extent *People v. Cole, supra,* 202 Cal. App. 3d 1439, and *People v. Spry, supra,* 58 Cal. App. 4th 1345, n10 are inconsistent with the views expressed herein, they are disapproved.

Defendant has Burden to Establish by Preponderance of the Evidence
In *People v. Martin* (2001) 25 Cal.4th 1180, 1192, n.10, the court noted that the central holding of *People v. Spry* (1997) 58 Cal.app.4th 1345, 1369, was that "*the defendant* bears the burden of establishing the *Mijares* affirmative defense of possession for the purpose of disposal by a preponderance of the evidence." (*People v. Martin* (2001) 25 Cal.4th 1180, 1192, n.10; *People v. Spry* (1997) 58 Cal.app.4th 1345, 1369.)

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Although the *Martin* court disapproved of *Spry* to the extent that it allowed for more than momentary possession of contraband, the *Martin* court stated, "*Spry* is thus good authority for the proposition directly considered therein--the allocation of the burden of proof under the *Mijares* affirmative defense instruction [. . . .]" (*People v. Martin* (2001) 25 Cal.4th 1180, 1192, n.10.)

Similarly, in *People v. Mower* (2002) 28 Cal.4th 457, 480 n.8, the court noted that the defense of transitory possession requires the defendant to establish the facts in support of the defense by a preponderance of the evidence.

Definition of Preponderance of the Evidence

The definition used here was taken from Task Force Instruction 1275, Evidence of Uncharged Sex Offense.

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1703. Sale, Transportation, etc., of Controlled Substance

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

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

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

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

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

[AND]

4. **The controlled substance that the defendant (sold/furnished/administered/gave away/transported/imported) was _____** *<insert type of controlled substance>***.**

[AND

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

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

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

[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

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the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

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

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

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; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682.) Sale of a controlled substance does not. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524.) 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.

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.
Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75.
Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.
Transportation: Usable Amount ▸ *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682.

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

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LESSER INCLUDED OFFENSES

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

Possession for Sale ▸ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [lesser related offense but not necessarily included].

Note: In reviewing the appropriateness of sentencing enhancements, *People v. Valenzuela* (1995) 33 Cal.App.4th 1445, 1451, 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) and selling does not require specific intent, the committee does not include offering to sell as a lesser included offense.

RELATED ISSUES

Transportation

Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134.) Transportation also does not require personal possession by the defendant. *(Ibid*.) "Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt . . . ." (*Id.* at pp. 135–136.) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685). 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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STAFF NOTES

Health & Saf. Code §11352:

(a) Except as otherwise provided in this division, every person who transports, imports into this state, sells furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for three, four, or five years.

(b) Notwithstanding the penalty provisions of subdivision (a), any person who transports for sale any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment in the state prison for three, six, or nine years.

Health & Saf. Code §11379:

(a) Except as otherwise provided in subdivision (b) and in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, except subdivision (g) of Section 11056, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d) or (e), except paragraph (3) of subdivision (e), or specified in subparagraph (A) of paragraph (1) of subdivision (f),

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of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in the state prison for a period of two, three, or four years.

(b) Notwithstanding the penalty provisions of subdivision (a), any person who transports for sale any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment in the state prison for three, six, or nine years.

Knowledge—Need Not Know Which Substance

The defendant does not need to know which specific controlled substance is transported for sale:

> We see no grounds for construing knowledge of a drug's "narcotic character" to mean knowledge of its chemical composition or its peculiar intoxicating powers.

(*People v. Ochoa Romero* (1997) 55 Cal.App.4th 147, 153.)

Constructive Possession or Transportation

> It is well established that one may become criminally liable for possession for sale or for transportation of a controlled substance, based upon either actual or constructive possession of the substance. *Citations omitted*. Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another . . . Similarly, a defendant may be liable for constructive transportation of a controlled substance when his or her dominion and control are exercised through the acts of an agent.

(*People v. Morante* (1999) 20 Cal.4th 403, 417.)

Selling

In *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845, the Court of Appeal found:

> The evil which Health and Safety Code section 11351.5 is designed to proscribe is as surely present when a seller, rather than first obtaining cash with which to purchase other commodities or

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> services, obtains those items and considerations directly by making payment with the contraband itself . . .
>
> There is no indication that the Legislature sought to prohibit only sales for cash. The conclusion that sale includes transfers other than for money comports with the evident purposes of the California legislation, the commonly accepted meaning of the term and settled rules of statutory interpretation.

Minimal Movement

In *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316, the court confirmed that no specific distance must be moved to have "transportation" occur within the meaning of the statute:

> As we have observed before, "Transportation of a controlled substance is established by [simply] carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746 . . .) Neither this nor any other court has ever required that the length of travel exceed "minimal movement."

Usable Quantity

As stated in the above quote, transportation requires "conveying a usable quantity of a controlled substance [. . . .]" (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682.) Sale of a controlled substance does not require possession of a usable amount. (*See People v. Peregrina-Larios* (1994) 22 Cal.app.4th 1522, 1524.)

Transportation

Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134.) Transportation also does not require possession by the defendant. (*Ibid.*)

> Although possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may "transport" marijuana or other drugs even though they are in the exclusive possession of another.

(*Id.* at p. 134.)

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> Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt [. . . .]

(*Id.* at pp. 135-136.) Thus, in *People v. Rogers, supra,* the court held that the defendant may be convicted of transporting marijuana where he was the driver of the car and a passenger in the car was in possession of the drug if the defendant knew of the presence and nature of the drug. (*Ibid.*)

Transportation of a controlled substance includes riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685.) The controlled substance must be moved "from one location to another" but the movement may be minimal. (*Id.* at p. 684.)

Meaning of Administer
Health and Safety Code section 11002 defines "Administer" as follows:

> "Administer means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient for his immediate needs or to the body of a research subject by any of the following:
>
> (a) A practitioner or, in his presence, by his authorized agent.
> (b) The patient or research subject at the direction and in the presence of the practitioner.

Health & Safety Code Definition of "Administer" Applies
Section 11001 of the Health & Safety Code provides that "Unless the context otherwise requires, the definitions in this chapter [Division 10, Uniform Controlled Substances Act] govern the construction of this division."

Administering Does Not Include Administering to Self
In *People v. Label* (1974) 43 Cal.App.3d 766, 770–771, the Court of Appeal found that the term "administer" as used in Health & Safety Code section 11352 does not include administering drugs to oneself:

> In Health and Safety Code section 11352 . . . it is obvious that the word "administers" is used as defined in Webster's Third International Dictionary: "2a: to mete out; Dispense." One cannot "sell" or "give away" to himself. Although one can "furnish" himself with an article and diabetics and persons suffering from allergies "administer" prescribed insulin or allergens to themselves, in the

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context of the section and its place in the penal provisions designed to control illicit substances we cannot believe that the Legislature intended to proscribe the self-administration of such substances and used “furnish” and “administer” as intransitives rather than in the same transitive sense that necessarily applies to the companion words, “sell” and “give away.”

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1704. Offering to Sell, Transport, etc., a Controlled Substance

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The defendant is charged [in Count ___] with offering to (sell/furnish/administer/give away/transport/import) _____ *<insert type of controlled substance>***, a controlled substance.**

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

1. **The defendant offered to (sell/furnish/administer/give away/transport/import into California) _____** *<insert type of controlled substance>***, a controlled substance.**

AND

2. **The defendant intended to (sell/furnish/administer/give away/transport/import) the controlled substance.**

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

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

[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.]

BENCH NOTES

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

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11352, 11379.
Administering ▸ Health & Saf. Code, § 11002.

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Specific Intent ‣ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§64–92.

LESSER INCLUDED OFFENSES

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

Possession for Sale ‣ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [lesser related offense but not necessarily included].

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs

A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469; *People v. Brown* (1960) 55 Cal.2d 64, 68.)

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STAFF NOTES

Health & Saf. Code § 11352:

(a) Except as otherwise provided in this division, every person who transports, imports into this state, sells furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for three, four, or five years.

(b) Notwithstanding the penalty provisions of subdivision (a), any person who transports for sale any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment in the state prison for three, six, or nine years.

Health & Saf. Code §11379:

(a) Except as otherwise provided in subdivision (b) and in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, except subdivision (g) of Section 11056, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d) or (e), except paragraph (3) of subdivision (e), or specified in subparagraph (A) of paragraph (1) of subdivision (f),

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of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in the state prison for a period of two, three, or four years.

(b) Notwithstanding the penalty provisions of subdivision (a), any person who transports for sale any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment in the state prison for three, six, or nine years.

Knowledge—Need Not Know Which Substance

The defendant does not need to know which specific controlled substance is transported for sale:

> We see no grounds for construing knowledge of a drug's "narcotic character" to mean knowledge of its chemical composition or its peculiar intoxicating powers.

(*People v. Ochoa Romero* (1997) 55 Cal.App.4th 147, 153.)

Specific Intent

In *People v. Jackson* (1963) 59 Cal.2d 468, 469–470, the Supreme Court found fault with a jury instruction that did not include specific intent to make a sale as an element of making an offer to sell:

> This instruction is erroneous. It states that the only intent required is the intent to make an offer and that an intent to make a sale is not necessary. In *People v. Brown* (citation omitted) we held that "a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under section 11501." Persons who offer to sell narcotics with no intention of performing are not engaged in narcotics traffic.

No Requirement that Defendant Delivered or Possessed Drugs

> The evidence shows that defendant offered to sell heroin to Officer Lawrence, an undercover narcotics agent, that Officer Lawrence gave defendant $ 20, and that defendant did not deliver heroin or anything else.
>
> Defendant contends that section 11501 does not encompass an offer

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> to sell a narcotic when nothing is delivered. It is settled, however, that delivery is not an essential element of the offense of offering to sell a narcotic.

(*People v. Jackson* (1963) 59 Cal.2d 468, 469; *see also People v. Brown* (1960) 55 Cal.2d 64, 68.)

Health & Safety Code Definition of "Administer" Applies
Section 11001 of the Health & Safety Code provides that "Unless the context otherwise requires, the definitions in this chapter [Division 10, Uniform Controlled Substances Act] govern the construction of this division."

Administering Does Not Include Administering to Self
In *People v. Label* (1974) 43 Cal.App.3d 766, 770–771, the Court of Appeal found that the term "administer" as used in Health & Safety Code section 11352 does not include administering drugs to oneself:

> In Health and Safety Code section 11352 . . . it is obvious that the word "administers" is used as defined in Webster's Third International Dictionary: "2a: to mete out; Dispense." One cannot "sell" or "give away" to himself. Although one can "furnish" himself with an article and diabetics and persons suffering from allergies "administer" prescribed insulin or allergens to themselves, in the context of the section and its place in the penal provisions designed to control illicit substances we cannot believe that the Legislature intended to proscribe the self-administration of such substances and used "furnish" and "administer" as intransitives rather than in the same transitive sense that necessarily applies to the companion words, "sell" and "give away."

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1705. Sale of Substitute Substance

The defendant is charged [in Count ___] with (selling/transporting/administering/giving/furnishing/delivering) a noncontrolled substance in place of _____ *<insert name of controlled substance>***.**

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

1. **The defendant (agreed/consented/offered/arranged/negotiated) to (sell/transport/administer/give/furnish/deliver) _____** *<insert name of controlled substance>***, a controlled substance.**

AND

2. **After doing so, the defendant (sold/transported/administered/gave/delivered) a noncontrolled substance in place of _____** *<insert name of controlled substance>***.**

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

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

[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.]

BENCH NOTES

Instructional Duty

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

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AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11355, 11382; *People v. McDaniel* (1979) 24 Cal.3d 661, 669–670.

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

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STAFF NOTES

Health & Saf. Code §11355:

> Every person who agrees, consents, or in any manner offers to unlawfully sell, furnish, transport, administer, or give (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (13), (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b), (c), or (g) of Section 11055, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug to any person, or who offers, arranges, or negotiates to have any such controlled substance unlawfully sold, delivered, transported, furnished, administered, or given to any person and who then sells, delivers, furnishes, transports, administers, gives, or offers, arranges, or negotiates to have sold, delivered, transported, furnished, administered, or given to any other person any other liquid, substance, or material in lieu of any such controlled substance shall be punished by imprisonment in the county jail for not more than one year, or in the state prison.

Health & Saf. Code § 11382:

> Every person who agrees, consents, or in any manner offers to unlawfully sell, furnish, transport, administer, or give any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, or (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), specified in paragraph (11) of subdivision (c) of Section 11056, or specified in subdivision (d), (e), or (f) of Section 11055, to any person, or offers, arranges, or negotiates to have that controlled substance unlawfully sold, delivered, transported, furnished, administered, or given to any person and then sells, delivers, furnishes, transports, administers, or gives, or offers, or arranges, or negotiates to have sold, delivered, transported, furnished, administered, or given to any person any other liquid, substance, or material in lieu of that controlled substance shall be punished by imprisonment in the county jail for not more than one year, or in the state prison.

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Mere Offer versus Actual Delivery
People v. McDaniel (1979) 24 Cal.3d 661, 669–670 provides that "delivery of a substance other than the particular controlled substance proffered for sale has never been held to be a necessary element of the crime defined by section 11355."

However, if there is no delivery, specific intent is required:

> [O]n the evidence presented here [where no delivery took place] a specific intent to deliver a substance other than the particular controlled substance proffered for sale is required for violation of section 11355.

If delivery takes place, the crime is treated as any other general intent crime. (*Ibid.*)

Selling
In *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845, the Court of Appeal found:

> The evil which Health and Safety Code section 11351.5 is designed to proscribe is as surely present when a seller, rather than first obtaining cash with which to purchase other commodities or services, obtains those items and considerations directly by making payment with the contraband itself [. . . .]
>
> There is no indication that the Legislature sought to prohibit only sales for cash. The conclusion that sale includes transfers other than for money comports with the evident purposes of the California legislation, the commonly accepted meaning of the term and settled rules of statutory interpretation.

Minimal Movement
In *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316, the court confirmed that no specific distance must be moved to have "transportation" occur within the meaning of the statute:

> As we have observed before, "Transportation of a controlled substance is established by [simply] carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746 . . .) Neither this nor any other court has ever required that the length of travel exceed "minimal movement."

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Meaning of Administer

Health and Safety Code section 11002 defines "Administer" as follows:

> "Administer means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient for his immediate needs or to the body of a research subject by any of the following:

(a) A practitioner or, in his presence, by his authorized agent.
(b) The patient or research subject at the direction and in the presence of the practitioner.

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1706. Offer to Sell Substitute Substance

The defendant is charged [in Count ___] with intending to (sell/transport/administer/give/furnish/deliver) a noncontrolled substance instead of _____ *<insert name of controlled substance>*.

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

1. **The defendant offered to (sell/transport/administer/give/furnish/deliver) _____** *<insert name of controlled substance>*, **a controlled substance.**

AND

2. **The defendant intended to (sell/transport/administer/give/furnish/deliver) a noncontrolled substance in place of _____** *<insert name of controlled substance>*.**]**

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

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

[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.]

BENCH NOTES

Instructional Duty

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

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AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11355, 11382; *People v. McDaniel* (1979) 24 Cal.3d 661, 669–670.

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

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STAFF NOTES

Health & Saf. Code §11355:

> Every person who agrees, consents, or in any manner offers to unlawfully sell, furnish, transport, administer, or give (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (13), (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b), (c), or (g) of Section 11055, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug to any person, or who offers, arranges, or negotiates to have any such controlled substance unlawfully sold, delivered, transported, furnished, administered, or given to any person and who then sells, delivers, furnishes, transports, administers, gives, or offers, arranges, or negotiates to have sold, delivered, transported, furnished, administered, or given to any other person any other liquid, substance, or material in lieu of any such controlled substance shall be punished by imprisonment in the county jail for not more than one year, or in the state prison.

Health & Saf. Code § 11382:

> Every person who agrees, consents, or in any manner offers to unlawfully sell, furnish, transport, administer, or give any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, or (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), specified in paragraph (11) of subdivision (c) of Section 11056, or specified in subdivision (d), (e), or (f) of Section 11055, to any person, or offers, arranges, or negotiates to have that controlled substance unlawfully sold, delivered, transported, furnished, administered, or given to any person and then sells, delivers, furnishes, transports, administers, or gives, or offers, or arranges, or negotiates to have sold, delivered, transported, furnished, administered, or given to any person any other liquid, substance, or material in lieu of that controlled substance shall be punished by imprisonment in the county jail for not more than one year, or in the state prison.

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Mere Offer versus Actual Delivery
People v. McDaniel (1979) 24 Cal.3d 661, 669–670 provides that "delivery of a substance other than the particular controlled substance proffered for sale has never been held to be a necessary element of the crime defined by section 11355."

However, if there is no delivery, specific intent is required:

> [O]n the evidence presented here [where no delivery took place] a specific intent to deliver a substance other than the particular controlled substance proffered for sale is required for violation of section 11355.

If delivery takes place, the crime is treated as any other general intent crime. (*Ibid.*)

Selling
In *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845, the Court of Appeal found:

> The evil which Health and Safety Code section 11351.5 is designed to proscribe is as surely present when a seller, rather than first obtaining cash with which to purchase other commodities or services, obtains those items and considerations directly by making payment with the contraband itself [. . . .]
>
> There is no indication that the Legislature sought to prohibit only sales for cash. The conclusion that sale includes transfers other than for money comports with the evident purposes of the California legislation, the commonly accepted meaning of the term and settled rules of statutory interpretation.

Minimal Movement
In *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316, the court confirmed that no specific distance must be moved to have "transportation" occur within the meaning of the statute:

> As we have observed before, "Transportation of a controlled substance is established by [simply] carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746 . . .) Neither this nor any other court has ever required that the length of travel exceed "minimal movement."

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Meaning of Administer

Health and Safety Code section 11002 defines "Administer" as follows:

> "Administer means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient for his immediate needs or to the body of a research subject by any of the following:

(a) A practitioner or, in his presence, by his authorized agent.
(b) The patient or research subject at the direction and in the presence of the practitioner.

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1707. Forged Prescription for Narcotic

The defendant is charged [in Count __] with ((forging/altering) a prescription/ [or] (giving someone/using [or attempting to use] (an altered/a forged) prescription)) for a narcotic drug.

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

<Alternative 1A—forged or altered>

[1. The defendant (forged/altered) a prescription.]

<Alternative 1B—issued>

[1. The defendant gave someone (an altered prescription/a prescription with a forged or fictitious signature).]

<Alternative 1C—used or attempted to use>

[1. The defendant used [or attempted to use] (an altered prescription/a prescription with a forged or fictitious signature) to obtain drugs.]

[AND]

2. The prescription was for a narcotic drug.

[AND

3. The defendant knew that the (prescription was altered/signature on the prescription was forged or fictitious).]

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

BENCH NOTES

Instructional Duty

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

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Use this instruction when the prosecution alleges that the defendant forged, issued, or attempted to use a forged prescription without actually obtaining the narcotic. When the prosecution alleges that the defendant obtained or possessed the narcotic by using a forged prescription, use Instruction 1708, Forged Prescription for Narcotic—With Possession of Drug.

Give element 3 when the prosecution alleges that the defendant issued, used, or attempted to use an altered or forged prescription. Do not give element 3 when the prosecution alleges that the defendant personally forged or altered the prescription.

AUTHORITY

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

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

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STAFF NOTES

Health & Saf. Code §11368:

Every person who forges or alters a prescription or who issues or utters an altered prescription, or who issues or utters a prescription bearing a forged or fictitious signature for any narcotic drug, or who obtains any narcotic drug by any forged, fictitious, or altered prescription, or who has in possession any narcotic drug secured by a forged, fictitious, or altered prescription, shall be punished by imprisonment in the county jail for not less than six months nor more than one year, or in the state prison.

Health & Saf. Code § 11019:

"Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(b) Any salt, compound, isomer, or derivative, whether natural or synthetic, of the substances referred to in subdivision (a), but not including the isoquinoline alkaloids of opium.

(c) Opium poppy and poppy straw.

(d) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(e) Cocaine, whether natural or synthetic, or any salt, isomer, derivative, or preparation thereof.

(f) Ecgonine, whether natural or synthetic, or any salt, isomer, derivative, or preparation thereof.

(g) Acetylfentanyl, the thiophene analog thereof, derivatives of either, and any salt, compound, isomer, or preparation of acetylfentanyl or the thiophene analog thereof.

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Elements

> The point that the information fails to charge an intent to defraud is without merit as the crime [. . .] does not include an intent to defraud as one of the elements of the *corpus delicti*.

(*People v. Beesley* (1931) 119 Cal.App. 82, 86.)

> Moreover, if the prescriptions were forged by Katz, as charged, with intent to make use of them as valid prescriptions, it would have been immaterial whether the drugs were actually dispensed.

(*People v. Katz* (1962) 207 Cal.App.2d 739, 745.)

> A specific intent to defraud is not an element of the crime of forging a prescription for narcotics to be proved independently of the act of writing a false prescription to serve as a record of the transaction.

(*People v. Katz* (1962) 207 Cal.App.2d 739, 746.)

Utter

> The words "utter" and "publish," in the law of forgery, are synonymous, for the meaning of both is "to declare or assert, directly or indirectly, by words or actions," that the forged instrument is genuine. Thus, to offer a forged bank note in payment, is both to utter it and to publish it. To complete the offense of uttering and publishing, it is not necessary that the note should be passed. Hence "to pass" is not synonymous with "uttering" and "publishing;" nor is "attempting to pass" synonymous with "passing."

(*People v. Tomlinson* (1868) 35 Cal. 503, 509.)

> A violation of [this statute] can consist of "uttering" a false prescription for drugs, as well as passing such a prescription. The word "utter" means to use or *attempt to use* an instrument, whereby or in connection with which, a person asserts or represents to another, directly or indirectly, expressly or impliedly, by words or conduct, that the instrument is genuine. (CALJIC No. 15.25 (3d ed. 1970).)

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(*People v. Jackson* (1979) 92 Cal.App.3d 556, 562 [footnote omitted, emphasis in original, overruled on other grounds *People v. Anderson* (1987) 43 Cal.3d 1104, 1122].)

Staff has drafted the instructing replacing the statutory word "utter" with the more understandable "use or attempt to use."

Prescription

Health and Safety Code section 11164 defines prescription as follows:

> Except as provided in Section 11167, no person shall prescribe a controlled substance, nor shall any person fill, compound, or dispense such a prescription unless it complies with the requirements of this section.
>
> (a) The signature on each prescription for a controlled substance classified in Schedule II shall be wholly written in ink or indelible pencil in the handwriting of the prescriber upon the official prescription form issued by the Department of Justice. Each prescription shall be prepared in triplicate, signed by the prescriber, and shall contain, either typewritten or handwritten by the physician or his or her employee, the date, name, and address of the person for whom the controlled substance is prescribed, the name, quantity, and strength of the controlled substance prescribed, directions for use, and the address, category of professional licensure, and the federal controlled substance registration number of the prescriber. The original and duplicate of the prescription shall be delivered to the pharmacist filling the prescription. The duplicate shall be retained by the pharmacist and the original, properly endorsed by the pharmacist with the name and address of the pharmacy, the pharmacy's state license number, the date the prescription was filled and the signature of the pharmacist, shall be transmitted to the Department of Justice at the end of the month in which the prescription was filled. Upon receipt of an incompletely prepared official prescription form of the Department of Justice, the pharmacist may enter on the face of the prescription the address of the patient. A pharmacist may fill a prescription for a controlled substance classified in Schedule II containing an error or errors, if the pharmacist notifies the prescriber of the error or errors and the prescriber approves any correction. The prescriber shall fax or mail a corrected prescription to the pharmacist within seven days of the prescription being dispensed.

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(b) Each prescription for a controlled substance classified in Schedule III, IV, or V, except as authorized by subdivision (c), shall be subject to the following requirements:

(1) The prescription shall be signed and dated by the prescriber and shall contain the name of the person for whom the controlled substance is prescribed, the name and quantity of the controlled substance prescribed, and directions for use. With respect to prescriptions for controlled substances classified in Schedules III and IV, the signature, date, and information required by this paragraph shall be wholly written in ink or indelible pencil in the handwriting of the prescriber.

(2) In addition, the prescription shall contain the name, address, telephone number, category of professional licensure, and federal controlled substance registration number of the prescriber. The information required by this paragraph shall be either preprinted upon the prescription blank, typewritten, rubber stamped, or printed by hand. Notwithstanding any provision in this section, the prescriber's address, telephone number, category of professional licensure, or federal controlled substances registration number need not appear on the prescription if that information is readily retrievable in the pharmacy.

(3) The prescription shall also contain the address of the person for whom the controlled substance is prescribed. If the prescriber does not specify this address on the prescription, the pharmacist filling the prescription or an employee acting under the direction of the pharmacist shall write or type the address on the prescription or maintain this information in a readily retrievable form in the pharmacy.

(c) Any controlled substance classified in Schedule III, IV, or V may be dispensed upon an oral or electronically transmitted prescription, which shall be reduced to writing by the pharmacist filling the prescription of by any other person expressly authorized by provisions of the Business and Professions Code. The date of issue of the prescription and all the information required for a written prescription by subdivision (b) shall be included in the written record of the prescription. The pharmacist need not reduce to writing the address, telephone number, license classification, or federal registry number of the prescriber or the address of the patient if that

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information is readily retrievable in the pharmacy. Pursuant to authorization of the prescriber, any employee of the prescriber on behalf of the prescriber may orally or electronically transmit a prescription for a controlled substance classified in Schedule III, IV, or V, if in these cases the written record of the prescription required by this subdivision specifies the name of the employee of the prescriber transmitting the prescription.

(d) The use of commonly used abbreviations shall not invalidate an otherwise valid prescription

(e) Notwithstanding any provision of subdivisions (b) and (c), prescriptions for a controlled substance classified in Schedule V may be for more than one person in the same family with the same medical need.

(f) In addition to the prescriber's record required by Section 11190, any practitioner dispensing a controlled substance classified in Schedule II in accordance with subdivision (b) of Section 11158 shall prepare a written record thereof on the official forms issued by the Department of Justice, pursuant to Section 11161, and shall transmit the original to the Department of Justice in accordance with any rules that the department may adopt for completion and transmittal of the forms.

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1708. Forged Prescription for Narcotic: With Possession of Drug

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The defendant is charged [in Count __] with (obtaining/possessing) a narcotic drug obtained with (a/an) (forged/fictitious/altered) prescription.

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

1. **The defendant (obtained/had in (his/her) possession) a narcotic drug.**

2. **The narcotic drug was obtained by using (a/an) (forged/fictitious/ altered) prescription.**

AND

3. **The defendant knew that the narcotic was obtained using (a/an) (forged/fictitious/altered) prescription.**

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

BENCH NOTES

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

Use this instruction when the prosecution alleges that the defendant obtained or possessed the narcotic by using a forged prescription. When the prosecution alleges that the defendant forged or attempted to use a forged prescription without obtaining the narcotic, use Instruction 1707, Forged Prescription for Narcotic.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11368; *People v. Beesley* (1931) 119 Cal.App. 82, 86 [intent to defraud not an element]; *People v. Katz* (1962) 207 Cal.App.2d 739, 745.
Narcotic Drug ▸ Health & Saf. Code, § 11019.

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Prescription ▸ Health & Saf. Code, §§ 11027, 11164, 11164.5.
Persons Authorized to Write Prescriptions ▸ Health & Saf. Code, § 11150.
Forgery of Prescription by Telephone ▸ *People v. Jack* (1965) 233 Cal.App.2d 446, 455.

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

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STAFF NOTES

Health & Saf. Code §11368:

Every person who forges or alters a prescription or who issues or utters an altered prescription, or who issues or utters a prescription bearing a forged or fictitious signature for any narcotic drug, or who obtains any narcotic drug by any forged, fictitious, or altered prescription, or who has in possession any narcotic drug secured by a forged, fictitious, or altered prescription, shall be punished by imprisonment in the county jail for not less than six months nor more than one year, or in the state prison.

Health & Saf. Code § 11019:

"Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(b) Any salt, compound, isomer, or derivative, whether natural or synthetic, of the substances referred to in subdivision (a), but not including the isoquinoline alkaloids of opium.

(c) Opium poppy and poppy straw.

(d) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(e) Cocaine, whether natural or synthetic, or any salt, isomer, derivative, or preparation thereof.

(f) Ecgonine, whether natural or synthetic, or any salt, isomer, derivative, or preparation thereof.

(g) Acetylfentanyl, the thiophene analog thereof, derivatives of either, and any salt, compound, isomer, or preparation of acetylfentanyl or the thiophene analog thereof.

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Elements

> The point that the information fails to charge an intent to defraud is without merit as the crime [. . .] does not include an intent to defraud as one of the elements of the *corpus delicti*.

(*People v. Beesley* (1931) 119 Cal.App. 82, 86.)

> Moreover, if the prescriptions were forged by Katz, as charged, with intent to make use of them as valid prescriptions, it would have been immaterial whether the drugs were actually dispensed.

(*People v. Katz* (1962) 207 Cal.App.2d 739, 745.)

> A specific intent to defraud is not an element of the crime of forging a prescription for narcotics to be proved independently of the act of writing a false prescription to serve as a record of the transaction.

(*People v. Katz* (1962) 207 Cal.App.2d 739, 746.)

Utter

> The words "utter" and "publish," in the law of forgery, are synonymous, for the meaning of both is "to declare or assert, directly or indirectly, by words or actions," that the forged instrument is genuine. Thus, to offer a forged bank note in payment, is both to utter it and to publish it. To complete the offense of uttering and publishing, it is not necessary that the note should be passed. Hence "to pass" is not synonymous with "uttering" and "publishing;" nor is "attempting to pass" synonymous with "passing."

(*People v. Tomlinson* (1868) 35 Cal. 503, 509.)

> A violation of [this statute] can consist of "uttering" a false prescription for drugs, as well as passing such a prescription. The word "utter" means to use or *attempt to use* an instrument, whereby or in connection with which, a person asserts or represents to another, directly or indirectly, expressly or impliedly, by words or conduct, that the instrument is genuine. (CALJIC No. 15.25 (3d ed. 1970).)

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(*People v. Jackson* (1979) 92 Cal.App.3d 556, 562 [footnote omitted, emphasis in original, overruled on other grounds *People v. Anderson* (1987) 43 Cal.3d 1104, 1122].)

Staff has drafted the instructing replacing the statutory word "utter" with the more understandable "use or attempt to use."

Prescription

Health and Safety Code section 11164 defines prescription as follows:

> Except as provided in Section 11167, no person shall prescribe a controlled substance, nor shall any person fill, compound, or dispense such a prescription unless it complies with the requirements of this section.
>
> (a) The signature on each prescription for a controlled substance classified in Schedule II shall be wholly written in ink or indelible pencil in the handwriting of the prescriber upon the official prescription form issued by the Department of Justice. Each prescription shall be prepared in triplicate, signed by the prescriber, and shall contain, either typewritten or handwritten by the physician or his or her employee, the date, name, and address of the person for whom the controlled substance is prescribed, the name, quantity, and strength of the controlled substance prescribed, directions for use, and the address, category of professional licensure, and the federal controlled substance registration number of the prescriber. The original and duplicate of the prescription shall be delivered to the pharmacist filling the prescription. The duplicate shall be retained by the pharmacist and the original, properly endorsed by the pharmacist with the name and address of the pharmacy, the pharmacy's state license number, the date the prescription was filled and the signature of the pharmacist, shall be transmitted to the Department of Justice at the end of the month in which the prescription was filled. Upon receipt of an incompletely prepared official prescription form of the Department of Justice, the pharmacist may enter on the face of the prescription the address of the patient. A pharmacist may fill a prescription for a controlled substance classified in Schedule II containing an error or errors, if the pharmacist notifies the prescriber of the error or errors and the prescriber approves any correction. The prescriber shall fax or mail a corrected prescription to the pharmacist within seven days of the prescription being dispensed.

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(b) Each prescription for a controlled substance classified in Schedule III, IV, or V, except as authorized by subdivision (c), shall be subject to the following requirements:

(1) The prescription shall be signed and dated by the prescriber and shall contain the name of the person for whom the controlled substance is prescribed, the name and quantity of the controlled substance prescribed, and directions for use. With respect to prescriptions for controlled substances classified in Schedules III and IV, the signature, date, and information required by this paragraph shall be wholly written in ink or indelible pencil in the handwriting of the prescriber.

(2) In addition, the prescription shall contain the name, address, telephone number, category of professional licensure, and federal controlled substance registration number of the prescriber. The information required by this paragraph shall be either preprinted upon the prescription blank, typewritten, rubber stamped, or printed by hand. Notwithstanding any provision in this section, the prescriber's address, telephone number, category of professional licensure, or federal controlled substances registration number need not appear on the prescription if that information is readily retrievable in the pharmacy.

(3) The prescription shall also contain the address of the person for whom the controlled substance is prescribed. If the prescriber does not specify this address on the prescription, the pharmacist filling the prescription or an employee acting under the direction of the pharmacist shall write or type the address on the prescription or maintain this information in a readily retrievable form in the pharmacy.

(c) Any controlled substance classified in Schedule III, IV, or V may be dispensed upon an oral or electronically transmitted prescription, which shall be reduced to writing by the pharmacist filling the prescription of by any other person expressly authorized by provisions of the Business and Professions Code. The date of issue of the prescription and all the information required for a written prescription by subdivision (b) shall be included in the written record of the prescription. The pharmacist need not reduce to writing the address, telephone number, license classification, or federal registry number of the prescriber or the address of the patient if that

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information is readily retrievable in the pharmacy. Pursuant to authorization of the prescriber, any employee of the prescriber on behalf of the prescriber may orally or electronically transmit a prescription for a controlled substance classified in Schedule III, IV, or V, if in these cases the written record of the prescription required by this subdivision specifies the name of the employee of the prescriber transmitting the prescription.

(d) The use of commonly used abbreviations shall not invalidate an otherwise valid prescription

(e) Notwithstanding any provision of subdivisions (b) and (c), prescriptions for a controlled substance classified in Schedule V may be for more than one person in the same family with the same medical need.

(f) In addition to the prescriber's record required by Section 11190, any practitioner dispensing a controlled substance classified in Schedule II in accordance with subdivision (b) of Section 11158 shall prepare a written record thereof on the official forms issued by the Department of Justice, pursuant to Section 11161, and shall transmit the original to the Department of Justice in accordance with any rules that the department may adopt for completion and transmittal of the forms.

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1710. Manufacturing a Controlled Substance

The defendant is charged [in Count ___] with (manufacturing/compounding/converting/producing/deriving/processing/preparing) _____ *<insert controlled substance from Health & Saf. Code, §§ 11054, 11055, 11056, 11057, or 11058>*, **a controlled substance.**

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

1. **The defendant (manufactured/compounded/converted/produced/derived/processed/prepared) a controlled substance, specifically _____** *<insert controlled substance>*, **using chemical extraction or independent chemical synthesis.**

AND

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

[The chemical extraction or independent chemical synthesis may be done either directly or indirectly.]

[The People need not prove that the defendant knew which specific controlled substance was involved, only that (he/she) was aware that it was a controlled substance.]

[The People need not prove that the defendant completed the process of manufacturing or producing a controlled substance. Rather, the People must prove that the defendant knowingly participated in the beginning or intermediate steps to process or make a controlled substance.][Thus, the defendant is guilty of this crime if the People have proved that:

1. **The defendant engaged in the synthesis, processing, or preparation of a chemical that is not itself a controlled substance.**

AND

2. **The defendant knew that the chemical was going to be used in the manufacture of a controlled substance.]**

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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 the bracketed paragraph stating that "The People need not prove that the defendant completed the process" when the evidence indicates that the defendant completed only initial or intermediary stages of the process. (*People v. Jackson* (1990) 218 Cal.App.4th 1493, 1503–1504; *People v. Lancellotti* (1993) 19 Cal.App.4th 809, 813.) Give the final bracketed section stating "Thus, the defendant is guilty" when the evidence shows that the defendant manufactured a precursor chemical, such as ephedrine, but had not completed the process of manufacturing a controlled substance. (*People v. Pierson* (2000) 86 Cal.App.4th 983, 932.)

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11379.6(a) & (b), 11054–11058.
Knowledge of Controlled Substance ▸ *People v. Coria* (1999) 21 Cal.4th 868, 874.
Initial or Intermediary Stages ▸ *People v. Jackson* (1990) 218 Cal.App.4th 1493, 1503–1504; *People v. Lancellotti* (1993) 19 Cal.App.4th 809, 813; *People v. Heath* (1998) 66 Cal.App.4th 697, 703–704.
Precursor Chemicals ▸ *People v. Pierson* (2000) 86 Cal.App.4th 983, 932.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 112.

RELATED ISSUES

Providing Place for Manufacture
Health and Safety Code section 11366.5 prohibits providing a place for the manufacture or storage of a controlled substance. A defendant who provides a place for the manufacture of a controlled substance may be convicted both as an aider and abettor under Health and Safety Code section 11379.6 and as a principal under Health and Safety Code section 11366.5. (*People v. Sanchez* (1994) 27 Cal.App.4th 918, 923; *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1208.) Conviction under Health and Safety Code section 11379.6 requires evidence that the defendant specifically intended to aid the manufacture of the controlled substance, while conviction under Health and Safety Code section 11366.5

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requires evidence that the defendant knew that the controlled substance was for sale or distribution. (*People v. Sanchez* (1994) 27 Cal.App.4th 918, 923; *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1208.)

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STAFF NOTES

Health & Saf. Code, § 11379.6, in relevant part:

(a) Except as otherwise provided by law, every person who manufactures, compounds, converts, produces, derives, processes, or prepares, either directly or indirectly by chemical extraction or independently by means of chemical synthesis, any controlled substance specified in Section 11054, 11055, 11056, 11057, or 11058 shall be punished by imprisonment in the state prison for three, five, or seven years and by a fine not exceeding fifty thousand dollars.

(b) Except as otherwise provided by law, every person who offers to perform an act which is punishable under subdivision (a) shall be punished by imprisonment in the state prison for three, four, or five years.

Knowledge

The Supreme Court held in *People v. Coria* (1999) 21 Cal.4th 868, 878, that the knowledge requirement for other controlled substance offenses applies to manufacturing as well:

> [F]rom the standpoint of public health and safety, manufacturing controlled substances appears akin to selling those substances. Yet as previously noted, our case law holds that if the defendant is prosecuted for *possession or sale* of a controlled substance, his knowledge of the character of the substance possessed is an essential element of the offense. [Citations omitted.] Logically, a defendant prosecuted for manufacturing those substances should be similarly treated [. . .] [A]lthough criminal statutes prohibiting the possession, transportation, or sale of a controlled substance do not expressly contain an element that the accused be aware of the character of the controlled substance at issue [. . .], such a requirement has been implied by the courts. [Citations omitted.] For the same reason, the manufacturing statute must be construed to include such a knowledge element. [Citations omitted, emphasis in original.]

Initial or Intermediary Stages

The defendant does not have to complete the manufacturing process. Initial or intermediate steps of the process are sufficient as stated in *People v. Jackson* (1990) 218 Cal.App.4th 1493, 1503-1504:

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> As used in section 11379.6, subdivision (a), the words "manufactures," "produces" and "processes" do not have separate technical meanings apart from those attributed to them in general usage. [Citation omitted.] Both the dictionary definition and the commonsense, everyday usage of these terms entail notions of the ongoing and progressive making, assembly or creation of an item by hand or machine. [Citations and footnote omitted.] The ongoing and progressive making, assembly or creation of PCP from its component chemicals may, but does not necessarily by definition, include the culmination of the manufacturing process, the finished PCP product. [. . .]
>
> Similarly, the conduct proscribed by section 11379.6 encompasses the initial and intermediate steps carried out to manufacture, produce or process PCP. To require that the manufacturer actually complete the finished product, rather than be merely engaged in its completion, would give the words in the statute "a forced and strained meaning contrary to [their] common understanding." ([Citation omitted.] As the trial court aptly stated, section 11379.6, subdivision (a) is violated if the manufacturing, producing or processing of PCP is "occurring," "taking place," and "in the course of its progress."

(See also *People v. Lancellotti* (1993) 19 Cal.App.4th 809, 813; *People v. Heath* (1998) 66 Cal.App.4th 697, 703-704; *People v. Stone* (1999) 75 Cal.App.4th 707, 715.)

Precursor Chemicals

In *People v. Pierson* (2000) 86 Cal.app.4th 983, 986, the evidence established that the defendant had produced ephedrine but had not completed the process of making methamphetamine. The trial court “instructed the jury that the person must have knowledge that the substance being manufactured was methamphetamine or an immediate precursor.” (*Id.* at p. 991.) Although Health and Safety Code section 11055(f) lists certain “immediate precursos[s]” to methamphetamine as controlled substances, it does not include ephedrine. (*Ibid.*) The Court of Appeals reversed the conviction, stating:

> We agree that ephedrine, although a precursor to methamphetamine, is not a controlled substance under the applicable statutes. Accordingly, to convict of manufacturing a controlled substance based on ephedrine extraction, the People must prove defendant knew methamphetamine was being manufactured. (*People v. Coria*

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> (1999) 21 Cal. 4th 868.) Failing to instruct on this element of the offense was error under both the state and federal Constitutions.

(*Id.* at p. 986.)

The court recommended that the following instruction be given in the future:

> In this case, defendant is charged with manufacturing a controlled substance. Methamphetamine is a controlled substance. Ephedrine and pseudoephedrine are not controlled substances.
>
> In order to be guilty of the crime of manufacturing a controlled substance, it is not necessary that the process of manufacturing be completed. Rather, the crime is committed when a person knowingly participates in the initial or intermediate steps carried out to process a controlled substance. Thus, it is unlawful for a person to engage in the synthesis, processing, or preparation of a chemical used in the manufacture of a controlled substance, even if the chemical is not itself a controlled substance, provided the person knows that the chemical is to be used in the manufacturing of a controlled substance.

(*Id.* at p. 992.)

Similarly, in *People v. Stone* (1999) 75 Cal.App.4th 707, 715, the court stated:

> When properly phrased, the crucial inquiry regarding a precursor to PCP, such as piperidine, in the context of section 11379.6, is: Was the manufacture of piperidine solely an end to itself or was its manufacture simply or also an intermediate step to the ultimate goal of manufacturing PCP? In this case, appellant clearly was engaged in the manufacture of piperidine for the purpose of manufacturing PCP.

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1711. Offering to Manufacture a Controlled Substance

The defendant is charged [in Count ___] with offering to (manufacture/compound/convert/produce/derive/process/prepare) _____ <*insert controlled substance from Health & Saf. Code, §§ 11054, 11055, 11056, 11057, or 11058* >, a controlled substance.

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

1. **The defendant offered to (manufacture/compound/convert/ produce/derive/process/prepare) a controlled substance, specifically _____ <*insert controlled substance*>, intending to use chemical extraction or independent chemical synthesis.**

AND

2. **The defendant intended to (manufacture/compound/convert/ produce/derive/process/prepare) the controlled substance.**

[The intent to use chemical extraction or chemical synthesis includes the intent to use such methods directly or indirectly.]

[The People need not prove that the defendant knew which specific controlled substance was involved, only that (he/she) was aware that it was a controlled substance.]

BENCH NOTES

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

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11379.6(a) & (b), 11054–11058.
Specific Intent ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470.

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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 112.

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STAFF NOTES

See Notes to 1714A.

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1712. Possession With Intent to Manufacture Methamphetamine or N-ethylamphetamine

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The defendant is charged [in Count ___] with possessing substances with the intent to manufacture (methamphetamine/N-ethylamphetamine).

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

1. **The defendant possessed both (methylamine and phenyl-2-propanone/ethylamine and phenyl-2-propanone) at the same time.**

AND

2. **When the defendant possessed both those substances, (he/she) intended to use them to manufacture (methamphetamine/N-ethylamphetamine).**

[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/other people).]

BENCH NOTES

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

If the defendant is charged with possessing isomers or precursor chemicals under Health and Safety Code section 11383(e), (f), (g), or (h), give Instruction 1715, Possession of Isomers or Precursors With Intent to Manufacture Controlled Substance, instead of this instruction.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11383(a).

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Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.

Specific Intent Required ▸ *People v. Jenkins* (1979) 91 Cal.App.3d 579, 583.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 114.

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STAFF NOTES

Health & Saf. Code, § 11383:

> (a) Any person who possesses both methylamine and phenyl-2-propanne (phenylacetone) at the same time with the intent to manufacture methamphetamine, or who possesses both ethylamine and phenyl-2-propanone (phenylacetone) at the same time with the intent to manufacture N-ethylamphetamine, is guilty of a felony and shall be punished by imprisonment in the state prison for two, four, or six years. [. . .]

Constructive Possession

This instruction follows the analysis in *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 (*citing Armstrong v Superior Court* (1990) 217 Cal.App.3d 535, 539-540):

> For purposes of drug transactions, the terms 'control' and 'right to control' are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance . . . *Armstrong* made clear that merely agreeing to buy contraband, without more, does *not* constitute constructive possession. It stated, "Likewise we reject the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession. We have found no authority which has established constructive possession based upon a bare agreement to purchase illegal contraband. We thus conclude that in the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether the defendant has exercised the requisite control over the illegal goods." [Emphasis in original.]

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1713. Possession With Intent to Manufacture PCP

The defendant is charged [in Count ___] with possessing substances with the intent to manufacture phencyclidine (PCP) [or _____ *<insert analog from Health & Saf. Code, § 11054(d)(22) or § 11055(e)(3)>***].**

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

1. **The defendant possessed both (piperidine and cyclohexanone/pyrrolidine and cyclohexanone/morpholine and cyclohexanone) at the same time, either as individual substances or combined together in one substance.**

2. **When the defendant possessed (that/those) substance[s], (he/she) intended to use (it/them) to manufacture phencyclidine (PCP) [or _____** *<insert analog from Health & Saf. Code, § 11054(d)(22) or § 11055(e)(3)>***].**

[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/other people).]

BENCH NOTES

Instructional Duty

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

If the defendant is charged with possessing isomers or precursor chemicals under Health and Safety Code section 11383(e), (f), (g), or (h), give Instruction 1715, Possession of Isomers or Precursors With Intent to Manufacture Controlled Substance, instead of this instruction.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11383(b).

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Constructive vs. Actual Possession ‣ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.

Specific Intent Required ‣ *People v. Jenkins* (1979) 91 Cal.App.3d 579, 583.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 114.

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STAFF NOTES

Health & Saf. Code, § 11383:

> (b) Any person who possesses at the same time any of the following combinations, or a combination product thereof, with intent to manufacture phencyclidine (PCP) or any of its analogs specified in paragraph (22) of subdivision (d) of Section 11054 or paragraph (3) of subdivision (e) of Section 11055 is guilty of a felony and shall be punished by imprisonment in the state prison for two, four, or six years:
>
> (1) Piperidine and cyclohexanone.
>
> (2) Pyrrolidine and cyclohexanone.
>
> (3) Morpholine and cyclohexanone.

Constructive Possession

This instruction follows the analysis in *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 (*citing Armstrong v Superior Court* (1990) 217 Cal.App.3d 535, 539-540):

> For purposes of drug transactions, the terms ‘control’ and ‘right to control’ are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance . . . *Armstrong* made clear that merely agreeing to buy contraband, without more, does *not* constitute constructive possession. It stated, “Likewise we reject the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession. We have found no authority which has established constructive possession based upon a bare agreement to purchase illegal contraband. We thus conclude that in the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether the defendant has exercised the requisite control over the illegal goods.” [Emphasis in original.]

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1714. Possession With Intent to Manufacture Methamphetamine

The defendant is charged [in Count ___] with possessing substances with the intent to manufacture methamphetamine [or _____ *<insert analog from Health & Saf. Code, § 11055(d)>***].**

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

<Alternative 1A—ephedrine or pseudoephedrine>

[1. The defendant possessed [a substance containing] (ephedrine/ [or] pseudoephedrine) [or any salts, isomers, or salts of isomers of (ephedrine/ [or] pseudoephedrine)].]

<Alternative 1B—other listed substances>

[1. The defendant possessed both _____ *<insert substances from Health & Saf. Code, § 11383(c)>* **at the same time, either as individual substances or combined together in one substance.]**

AND

2. When the defendant possessed (that/those) substance[s], (he/she) intended to use (it/them) to manufacture methamphetamine [or _____ *<insert analog from Health & Saf. Code, § 11055(d)>***].**

[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/other people).]

BENCH NOTES

Instructional Duty

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

If the defendant is charged with possessing isomers or precursor chemicals under Health and Safety Code section 11383(e), (f), (g), or (h), give Instruction 1715,

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Possession of Isomers or Precursors With Intent to Manufacture Controlled Substance, instead of this instruction.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11383(c).
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Specific Intent Required ▸ *People v. Jenkins* (1979) 91 Cal.App.3d 579, 583.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 114.

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STAFF NOTES

Health & Saf. Code, § 11383:

(c) (1) Any person who, with intent to manufacture methamphetamine or any of its analogs specified in subdivision (d) of Section 11055, possesses ephedrine or pseudoephedrine, or any salts, isomers, or salts of isomers of ephedrine or pseudoephedrine, or who possesses a substance containing ephedrine or pseudoephedrine, or any salts, isomers, or salts of isomers of ephedrine or pseudoephedrine, or who possesses at the same time any of the following, or a combination product thereof, is guilty of a felony and shall be punished by imprisonment in the state prison for two, four, or six years:

(A) Ephedrine, pseudoephedrine, norpseudoephedrine, N-methylephedrine, N-ethylephedrine, N-methylpseudoephedrine, N-ethylpseudoephedrine, or phenylpropanolamine, plus hydriodic acid.

(B) Ephedrine, pseudoephedrine, norpseudoephedrine, N-;methylephedrine, N-ethylephedrine, N-;methylpseudoephedrine, N-ethylpseudoephedrine, or phenylpropanolamine, thionyl chloride and hydrogen gas.

(C) Ephedrine, pseudoephedrine, norpseudoephedrine, N-methylephedrine, N-ethylephedrine, N-methylpseudoephedrine, N-ethylpseudoephedrine, or phenylpropanolamine, plus phosphorus pentachloride and hydrogen gas.

(D) Ephedrine, pseudoephedrine, norpseudoephedrine, N-methylephedrine, N-ethylephedrine, N-methylpseudoephedrine, N-ethylpseudoephedrine, chloroephedrine and chloropseudoephedrine, or phenylpropanolamine, plus any "reducing" agent.

(2) Any person who, with intent to manufacture methamphetamine or any of its analogs specified in subdivision (d) of Section 11055, possesses hydriodic acid or any product containing hydriodic acid is guilty of a felony and shall be punished by imprisonment in the state prison for two, four, or six years.

(d) For purposes of this section, "reducing" means a chemical

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> reaction in which hydrogen combines with another substance or in which oxygen is removed from a substance.

Constructive Possession

This instruction follows the analysis in *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 (*citing Armstrong v Superior Court* (1990) 217 Cal.App.3d 535, 539-540):

> For purposes of drug transactions, the terms ‘control’ and ‘right to control’ are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance . . . *Armstrong* made clear that merely agreeing to buy contraband, without more, does *not* constitute constructive possession. It stated, “Likewise we reject the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession. We have found no authority which has established constructive possession based upon a bare agreement to purchase illegal contraband. We thus conclude that in the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether the defendant has exercised the requisite control over the illegal goods.” [Emphasis in original.]

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1715. Possession of Isomers or Precursors With Intent to Manufacture Controlled Substance

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The defendant is charged [in Count ___] with possessing substances with the intent to manufacture (methamphetamine [or _____ *<insert analog of methamphetamine from Health & Saf. Code, § 11055(d)>***]/N-ethylamphetamine/phencyclidine (PCP) [or _____** *<insert analog of PCP from Health & Saf. Code, § 11054(d) or § 11055(e)>***]).**

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

1. **The defendant possessed _____** *<insert name or description of substance[s] from Health & Saf. Code, § 11383(e), (f), (g), or (h)>***.]**

AND

2. **When the defendant possessed (that/those) substance[s], (he/she) intended to use (it/them) to manufacture (methamphetamine [or _____** *<insert analog of methamphetamine from Health & Saf. Code, § 11055(d)>***]/N-ethylamphetamine/phencyclidine (PCP) [or _____** *<insert analog of PCP from Health & Saf. Code, § 11054(d) or § 11055(e)>***]).**

[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/other people).]

BENCH NOTES

Instructional Duty

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

Effective January 1, 2004, subdivisions (e), (f), (g), and (h) of Health and Safety Code section 11383 make it a felony to possess any of the following: isomers of other substances listed in that section, precursor chemicals sufficient for

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manufacturing listed substances, chemicals sufficient to manufacture hydriodic acid or another reducing agent, and compounds or mixtures containing listed substances. In element 1, the court should insert the name or description of the specific substances the defendant is charged with possessing.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11383(e), (f), (g) & (h).
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Specific Intent Required ▸ *People v. Jenkins* (1979) 91 Cal.App.3d 579, 583.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 114.

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STAFF NOTES

Health & Saf. Code, § 11383, in relevant part:

(e) Any person who possesses the optical, positional, or geometric isomer of any of the compounds listed in this section, with intent to manufacture any of the following controlled substances is guilty of a felony and shall be punished by imprisonment in the state prison for two, four, or six years:

(1) Methamphetamine.

(2) Any analog of methamphetamine specified in subdivision (d) of Section 11055.

(3) N-ethylamphetamine.

(4) Phencyclidine (PCP).

(5) Any analog of PCP specified in subdivision (d) of Section 11054, or in subdivision (e) of Section 11055.

(f) Any person who possesses immediate precursors sufficient for the manufacture of methylamine, ethylamine, phenyl-2-propanone, piperidine, cyclohexanone, pyrrolidine, morpholine, ephedrine, pseudoephedrine, norpseudoephedrine, N-methylephedrine, N-ethylephedrine, phenylpropanolamine, hydriodic acid or a reducing agent, thionyl chloride, or phosphorus pentachloride, with intent to manufacture methamphetamine, is guilty of a felony and shall be punished by imprisonment in the state prison for two, four, or six years.

(g) Any person who possesses essential chemicals sufficient to manufacture hydriodic acid or a reducing agent, with intent to manufacture methamphetamine, is guilty of a felony and shall be punished by imprisonment in the state prison for two, four, or six years.

(h) Any person who possesses any compound or mixture containing piperidine, cyclohexanone, pyrrolidine, or morpholine ephedrine, pseudoephedrine, norpseudoephedrine, N-methylephedrine, N-ethylephedrine, phenylpropanolamine, hydriodic acid or a reducing

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> agent, thionyl chloride, or phosphorus pentachloride, with intent to manufacture methamphetamine, is guilty of a felony and shall be punished by imprisonment in the state prison for two, four, or six years.

Effective January 1, 2004.

History of Subsections

Previously, Health and Safety Code section 11383 provided that:

> (e) For purposes of this section, possession of the optical, positional, or geometric isomer of any of the compounds listed in this section shall be deemed to be possession of the derivative substance.
>
> (f) For purposes of this section, possession of immediate precursors sufficient for the manufacture of methylamine, ethylamine, phenyl-2-propanone, piperidine, cyclohexanone, pyrrolidine, morpholine, ephedrine, pseudoephedrine, norpseudoephedrine, N-methylephedrine, N-ethylephedrine, phenylpropanolamine, hydriodic acid, thionyl chloride, or phosphorus pentachloride shall be deemed to be possession of the derivative substance. Additionally, possession of essential chemicals sufficient to manufacture hydriodic acid, with intent to manufacture methamphetamine, shall be deemed to be possession of hydriodic acid. Additionally, possession of any compound or mixture containing piperidine, cyclohexanone, pyrrolidine, or morpholine ephedrine, pseudoephedrine, norpseudoephedrine, N-methylephedrine, N-ethylephedrine, phenylpropanolamine, hydriodic acid, thionyl chloride, or phosphorus pentachloride shall be deemed to be possession of the substance.

In *People v. McCall* (2002) 104 Cal.App.4th 1365, 1373 [depublished and reversed by *People v. McCall* (Jan. 15, 2004) S113433], the court held that the previous version of subsection (f) created an unconstitutional mandatory presumption. In response, the Legislature amended that statute, adding the new subdivisions, to explicitly provide that possession of isomers and precursor chemicals is a felony. (See discussion in *People v. McCall* (Jan. 15, 2004) S113433.)

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Constructive Possession

This instruction follows the analysis in *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 (*citing Armstrong v Superior Court* (1990) 217 Cal.App.3d 535, 539-540):

> For purposes of drug transactions, the terms 'control' and 'right to control' are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance . . . *Armstrong* made clear that merely agreeing to buy contraband, without more, does *not* constitute constructive possession. It stated, "Likewise we reject the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession. We have found no authority which has established constructive possession based upon a bare agreement to purchase illegal contraband. We thus conclude that in the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether the defendant has exercised the requisite control over the illegal goods." [Emphasis in original.]

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1720. Simple Possession of Marijuana: Misdemeanor

The defendant is charged [in Count ___] with possessing more than 28.5 grams of marijuana, a controlled substance.

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

1. **The defendant [unlawfully] possessed a controlled substance.**

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

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

4. **The controlled substance the defendant possessed was marijuana.**

AND

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

[Possession of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant.] [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature

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stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]

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

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

BENCH NOTES

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

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [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 [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

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

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

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11357(c), 11018; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.

Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3; *People v. Winston* (1956) 46 Cal.2d 151, 158.

Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.

Medical Marijuana ▸ Health & Saf. Code, § 11362.5.

Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460.

Amount Must Be Reasonably Related to Patient's Medical Needs ▸ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§64–92.

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STAFF NOTES

Health & Saf. Code § 11357:

> (c) Except as authorized by law, every person who possesses more than 28.5 grams of marijuana, other than concentrated cannabis, shall be punished by imprisonment in the county jail for a period of not more than six months or by a fine of not more than five hundred dollars ($ 500), or by both such fine and imprisonment.

Definition of Marijuana
Health and Safety Code section 11018 defines marijuana as follows:

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

The Oxford English Dictionary defines "resin" as follows: A vegetable product, formed by secretion in special canals in almost all trees and plants, from many of which (as the fir and pine) it exudes naturally, or can be readily obtained by incision; various kinds are extensively used in making varnishes or adhesive compositions, and in pharmacy. (The Oxford English Dictionary Online (2nd Ed. 1989) http://dictionary.oed.com/entrance.dtl.)

Elements
People v. Palaschak (1995) 9 Cal.4th 1236, 1242, provides the elements for simple possession of a controlled substance:

> The essential elements of possession of a controlled substance are "dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially."

[Citations omitted.]

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The knowledge requirement has also been expressed thus:

> In order to sustain a conviction of possession of narcotics it must be shown that the defendant had either physical or constructive possession, and that he was aware that the substance of which he had possession was a narcotic.

(*People v. Gorg* (1955) 45 Cal.2d 776, 780.)

Knowledge

The defendant does not need to know which specific controlled substance he possesses:

> [K]nowledge for the purpose of conviction under Health and Safety Code section 11377, is knowledge of the controlled nature of the substance and not its precise chemical composition. Although the *Garringer* court dealt with mere possession rather than possession for sale, the knowledge element is the same.

(*People v. Guy* (1980) 107 Cal.App.3d 593, 601; *see also People v. Romero* (1997) 55 Cal.App.4th 147, 151-153, 157 n.3 [discussing marijuana specifically]; *People v. Winston* (1956) 46 Cal.2d 151, 158.)

In *People v. Romero* (1997) 55 Cal.App.4th 147, 157, the court noted that, "[c]ocaine and marijuana are both controlled substances," citing Health and Safety Code sections 11054(d)(13) and 110566(b)(6). In rejecting the defendant's contention that he could raise as a defense to cocaine possession that he thought the substance he possessed was marijuana, the court observed,

> If defendant were correct, one would expect cases arising under the statutes which specifically prohibit the possession or sale of marijuana to require knowledge of its "marijuana character." All that is required, however, is knowledge of its "narcotic character." (E.g., *People v. Rogers* (1971) 5 Cal. 3d 129, 133; *People v. Eckstrom* (1986) 187 Cal. App. 3d 323, 331.)

Thus, it is accurate to state either that the defendant must know that the substance he or she possessed is a controlled substance or that the defendant must know the narcotic character of the substance possessed.

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Constructive Possession
This instruction follows the analysis in *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 (*citing Armstrong v Superior Court* (1990) 217 Cal.App.3d 535, 539-540):

> For purposes of drug transactions, the terms 'control' and 'right to control' are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance . . . *Armstrong* made clear that merely agreeing to buy contraband, without more, does *not* constitute constructive possession. It stated, "Likewise we reject the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession. We have found no authority which has established constructive possession based upon a bare agreement to purchase illegal contraband. We thus conclude that in the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether the defendant has exercised the requisite control over the illegal goods." [Emphasis in original.]

Medical Marijuana
Health & Safety Code section 11362.5(d) provides in pertinent part:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

People v. Mower (2002) 28 Cal.4th 457, 460, held that "as to the facts underlying the defense provided by section 11362.5(d), defendant is required merely to raise a reasonable doubt."

Thus, in *People v. Jones* (2003) 2003DJDAR 11032, 11034, the court held that the trial court erred by excluding the medical marijuana defense where the defendant's testimony raised a reasonable doubt that a physician had approved the use.

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Approved vs. Recommended

The Compassionate Use Act authorizes possession on "the written or oral recommendation or approval of a physician." (Health & Saf. Code § 11362.5(d).) In *People v. Jones* (2003) 2003DJDAR 11032, 11033, the court discussed the different meanings of these terms:

> In *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1548, the court concluded the words "recommendation" and "approval" "mean something slightly different, and ... 'approval' connotes a less formal act than a 'recommendation.'" We agree the two terms have different meanings, but the difference is not simply a matter of the degree of formality. To "recommend" something is "to present [it] as worthy of acceptance or trial." (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 974.) "approve" something is to "express a favorable opinion of" it. (*Id.* at p. 57.) The word "recommendation," as used in the Compassionate Use Act, suggests the physician has raised the issue of marijuana use and presented it to the patient as a treatment that would benefit the patient's health by providing relief from an illness. The word "approval," on the other hand, suggests the patient has raised the issue of marijuana use, and the physician has expressed a favorable opinion of marijuana use as a treatment for the patient. Thus, a physician could *approve* of a patient's suggested use of marijuana without ever *recommending* its use.

Amount Must Be "Reasonably Related" to Patient's Medical Needs

According to *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550-1551,

> [T]he test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs.

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1721. Simple Possession of Marijuana on School Grounds: Misdemeanor

The defendant is charged [in Count ___] with possessing marijuana, a controlled substance, on the grounds of a school.

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

1. **The defendant [unlawfully] possessed a controlled substance.**

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

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

4. **The controlled substance the defendant possessed was marijuana.**

5. **The marijuana was a usable amount but not more than 28.5 grams in weight.**

6. **The defendant was at least 18 years old.**

AND

7. **The defendant possessed the marijuana on the grounds of or inside a school providing instruction in any grade from kindergarten through 12, when the school was open for classes or school-related programs.**

[Possession of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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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 marijuana.]

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

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

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

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

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

BENCH NOTES

Instructional Duty

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

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The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) However, there are no cases on whether the defense applies to the charge of possession on school grounds. In general, the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [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 [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions if the court concludes that the defense applies to possession on school grounds.

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

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

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11357(d), 11018; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.

Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3; *People v. Winston* (1956) 46 Cal.2d 151, 158.

Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.

Usable Amount ▸ *People v. Piper* (1971) 19 Cal.3d 248, 250.

Medical Marijuana ▸ Health & Saf. Code, § 11362.5.

Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460.

Amount Must Be Reasonably Related to Patient's Medical Needs ▸ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551.

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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§64–92.

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STAFF NOTES

Health & Saf. Code § 11357:

> (d) Except as authorized by law, every person 18 years of age or over who possesses not more than 28.5 grams of marijuana, other than concentrated cannabis, upon the grounds of, or within, any school providing instruction in kindergarten or any of grades 1 through 12 during hours the school is open for classes or school-related programs is guilty of a misdemeanor and shall be punished by a fine of not more than five hundred dollars ($ 500), or by imprisonment in the county jail for a period of not more than 10 days, or both.

Definition of Marijuana
Health and Safety Code section 11018 defines marijuana as follows:

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

The Oxford English Dictionary defines "resin" as follows: A vegetable product, formed by secretion in special canals in almost all trees and plants, from many of which (as the fir and pine) it exudes naturally, or can be readily obtained by incision; various kinds are extensively used in making varnishes or adhesive compositions, and in pharmacy. (The Oxford English Dictionary Online (2nd Ed. 1989) http://dictionary.oed.com/entrance.dtl.)

Elements
People v. Palaschak (1995) 9 Cal.4th 1236, 1242, provides the elements for simple possession of a controlled substance:

> The essential elements of possession of a controlled substance are "dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its

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> restricted dangerous drug character. Each of these elements may be established circumstantially."

[Citations omitted.]

The knowledge requirement has also been expressed thus:

> In order to sustain a conviction of possession of narcotics it must be shown that the defendant had either physical or constructive possession, and that he was aware that the substance of which he had possession was a narcotic.

(*People v. Gorg* (1955) 45 Cal.2d 776, 780.)

Knowledge

The defendant does not need to know which specific controlled substance he possesses:

> [K]nowledge for the purpose of conviction under Health and Safety Code section 11377, is knowledge of the controlled nature of the substance and not its precise chemical composition. Although the *Garringer* court dealt with mere possession rather than possession for sale, the knowledge element is the same.

(*People v. Guy* (1980) 107 Cal.App.3d 593, 601; *see also People v. Romero* (1997) 55 Cal.App.4th 147, 151-153, 157 n.3 [discussing marijuana specifically]; *People v. Winston* (1956) 46 Cal.2d 151, 158.)

In *People v. Romero* (1997) 55 Cal.App.4th 147, 157, the court noted that, "[c]ocaine and marijuana are both controlled substances," citing Health and Safety Code sections 11054(d)(13) and 110566(b)(6). In rejecting the defendant's contention that he could raise as a defense to cocaine possession that he thought the substance he possessed was marijuana, the court observed,

> If defendant were correct, one would expect cases arising under the statutes which specifically prohibit the possession or sale of marijuana to require knowledge of its "marijuana character." All that is required, however, is knowledge of its "narcotic character." (E.g., *People v. Rogers* (1971) 5 Cal. 3d 129, 133; *People v. Eckstrom* (1986) 187 Cal. App. 3d 323, 331.)

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Thus, it is accurate to state either that the defendant must know that the substance he or she possessed is a controlled substance or that the defendant must know the narcotic character of the substance possessed.

Constructive Possession

This instruction follows the analysis in *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 (*citing Armstrong v Superior Court* (1990) 217 Cal.App.3d 535, 539-540):

> For purposes of drug transactions, the terms ‘control’ and ‘right to control’ are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance . . . *Armstrong* made clear that merely agreeing to buy contraband, without more, does *not* constitute constructive possession. It stated, “Likewise we reject the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession. We have found no authority which has established constructive possession based upon a bare agreement to purchase illegal contraband. We thus conclude that in the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether the defendant has exercised the requisite control over the illegal goods.” [Emphasis in original.]

Usable Amount

People v. Piper (1971) 19 Cal.App.3d 248, 250, held:

> The prosecution bears its burden when it shows the substance defendant possessed was marijuana and it was of a quantity which could be potentiated by consumption in any of the manners customarily employed by users, rather than useless traces or debris of narcotic.

The *Piper* court specifically rejected the notion that the usable amount must be enough to affect the user:

> [Defendant’s] sole contention on appeal is the prosecution did not bear its burden of showing he possessed a “usable” quantity of marijuana because no quantitative analysis of the marijuana was

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> made to establish the particular marijuana he possessed had a potential to produce a narcotic effect on one using it. The law regulating possession of marijuana draws not distinction between a high grade and a low grade plant . . . The legislative intent is to regulate the possession of marijuana in any form. Possession is not privileged because the particular plant may contain a low level of THC any more than it would be privileged to a person who has developed a high tolerance to the narcotic effect of marijuana.

Medical Marijuana

Health & Safety Code section 11362.5(d) provides in pertinent part:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

Concentrated cannabis is a form of marijuana and possession is criminalized by Health and Safety Code section 11357(a). (*See also* Health & Saf. Code § 11054(13) [listing marijuana as a controlled substance but not separately listing concentrated cannabis].) The Attorney General recently issued an opinion finding, "[c]oncentrated cannabis or hashish is included within the meaning of 'marijuana' as the term is used in the Compassionate Use Act of 1996." (Op. Att. Gen. (2003) 03 C.D.O.S. 9280.) The plain language of the statute appears to provide a defense to marijuana possession by an adult on school grounds. It is unclear if this was intended.

People v. Mower (2002) 28 Cal.4th 457, 460, held that "as to the facts underlying the defense provided by section 11362.5(d), defendant is required merely to raise a reasonable doubt."

Thus, in *People v. Jones* (2003) 2003DJDAR 11032, 11034, the court held that the trial court erred by excluding the medical marijuana defense where the defendant's testimony raised a reasonable doubt that a physician had approved the use.

Approved vs. Recommended

The Compassionate Use Act authorizes possession on "the written or oral recommendation or approval of a physician." (Health & Saf. Code § 11362.5(d).) In *People v. Jones* (2003) 2003DJDAR 11032, 11033, the court discussed the different meanings of these terms:

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> In *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1548, the court concluded the words "recommendation" and "approval" "mean something slightly different, and ... 'approval' connotes a less formal act than a 'recommendation.'" We agree the two terms have different meanings, but the difference is not simply a matter of the degree of formality. To "recommend" something is "to present [it] as worthy of acceptance or trial." (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 974.) "approve" something is to "express a favorable opinion of" it. (*Id.* at p. 57.) The word "recommendation," as used in the Compassionate Use Act, suggests the physician has raised the issue of marijuana use and presented it to the patient as a treatment that would benefit the patient's health by providing relief from an illness. The word "approval," on the other hand, suggests the patient has raised the issue of marijuana use, and the physician has expressed a favorable opinion of marijuana use as a treatment for the patient. Thus, a physician could *approve* of a patient's suggested use of marijuana without ever *recommending* its use.

Amount Must Be "Reasonably Related" to Patient's Medical Needs
According to *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550-1551,

> [T]he test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs.

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1722. Simple Possession of Concentrated Cannabis

The defendant is charged [in Count ___] with possessing concentrated cannabis, a controlled substance.

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

1. **The defendant [unlawfully] possessed a controlled substance.**

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

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

4. **The controlled substance that the defendant possessed was concentrated cannabis.**

AND

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

[Possession of concentrated cannabis is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana or concentrated 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 marijuana or concentrated cannabis possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess marijuana or concentrated 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 marijuana or concentrated cannabis.]

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

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the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.

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

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

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

BENCH NOTES

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

"Concentrated cannabis or hashish is included within the meaning of 'marijuana' as the term is used in the Compassionate Use Act of 1996." (86 Ops.Cal.Atty.Gen. 180 (2003) pp. 14–15.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [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 [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word "unlawfully." If the evidence shows that a physician may have "approved" but not "recommended" the marijuana use, give the bracketed phrase

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"or approved" in the paragraph on medical marijuana. (*People v. Jones*, *supra*, 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11357(a), 11006.5; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.

Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3; *People v. Winston* (1956) 46 Cal.2d 151, 158.

Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.

Usable Amount ▸ *People v. Piper* (1971) 19 Cal.3d 248, 250.

Medical Marijuana ▸ Health & Saf. Code, § 11362.5.

Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460.

Amount Must Be Reasonably Related to Patient's Medical Needs ▸ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§64–92.

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STAFF NOTES

Health & Saf. Code § 11357:

> (a) Except as authorized by law, every person who possesses any concentrated cannabis shall be punished by imprisonment in the county jail for a period of not more than one year or by a fine of not more than five hundred dollars ($500), or by both such fine and imprisonment, or shall be punished by imprisonment in the state prison.

Health & Saf. Code § 11006.5:

> "Concentrated cannabis" means the separated resin, whether crude or purified, obtained from marijuana.

Hashish

> Hashish consists of the THC-rich resinous material of the cannabis plant, which is collected, dried, and then compressed into a variety of forms, such as balls, cakes, or cookie-like sheets. The Middle East, North Africa, and Pakistan/Afghanistan are the main sources of hashish. The THC content of hashish that reached the United States, where demand is limited, averaged 6 percent in the 1990s.

(Partnership for a Drug Free America, citing the DEA, http://www.drugfreeamerica.org.)

Elements

People v. Palaschak (1995) 9 Cal.4th 1236, 1242, provides the elements for simple possession of a controlled substance:

> The essential elements of possession of a controlled substance are "dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially."

[Citations omitted.]

The knowledge requirement has also been expressed thus:

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> In order to sustain a conviction of possession of narcotics it must be shown that the defendant had either physical or constructive possession, and that he was aware that the substance of which he had possession was a narcotic.

(*People v. Gorg* (1955) 45 Cal.2d 776, 780.)

Knowledge
The defendant does not need to know which specific controlled substance he possesses:

> [K]nowledge for the purpose of conviction under Health and Safety Code section 11377, is knowledge of the controlled nature of the substance and not its precise chemical composition. Although the *Garringer* court dealt with mere possession rather than possession for sale, the knowledge element is the same.

(*People v. Guy* (1980) 107 Cal.App.3d 593, 601; *see also People v. Romero* (1997) 55 Cal.App.4th 147, 151-153, 157 n.3 [discussing marijuana specifically]; *People v. Winston* (1956) 46 Cal.2d 151, 158.)

In *People v. Romero* (1997) 55 Cal.App.4th 147, 157, the court noted that, "[c]ocaine and marijuana are both controlled substances," citing Health and Safety Code sections 11054(d)(13) and 110566(b)(6). In rejecting the defendant's contention that he could raise as a defense to cocaine possession that he thought the substance he possessed was marijuana, the court observed,

> If defendant were correct, one would expect cases arising under the statutes which specifically prohibit the possession or sale of marijuana to require knowledge of its "marijuana character." All that is required, however, is knowledge of its "narcotic character." (E.g., *People v. Rogers* (1971) 5 Cal. 3d 129, 133; *People v. Eckstrom* (1986) 187 Cal. App. 3d 323, 331.)

Thus, it is accurate to state either that the defendant must know that the substance he or she possessed is a controlled substance or that the defendant must know the narcotic character of the substance possessed.

Constructive Possession
This instruction follows the analysis in *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 (*citing Armstrong v Superior Court* (1990) 217 Cal.App.3d 535, 539-540):

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> For purposes of drug transactions, the terms ‘control’ and ‘right to control’ are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance . . . *Armstrong* made clear that merely agreeing to buy contraband, without more, does *not* constitute constructive possession. It stated, “Likewise we reject the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession. We have found no authority which has established constructive possession based upon a bare agreement to purchase illegal contraband. We thus conclude that in the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether the defendant has exercised the requisite control over the illegal goods.” [Emphasis in original.]

Usable Amount

People v. Piper (1971) 19 Cal.App.3d 248, 250, held:

> The prosecution bears its burden when it shows the substance defendant possessed was marijuana and it was of a quantity which could be potentiated by consumption in any of the manners customarily employed by users, rather than useless traces or debris of narcotic.

The *Piper* court specifically rejected the notion that the usable amount must be enough to affect the user:

> [Defendant’s] sole contention on appeal is the prosecution did not bear its burden of showing he possessed a “usable” quantity of marijuana because no quantitative analysis of the marijuana was made to establish the particular marijuana he possessed had a potential to produce a narcotic effect on one using it. The law regulating possession of marijuana draws not distinction between a high grade and a low grade plant . . . The legislative intent is to regulate the possession of marijuana in any form. Possession is not privileged because the particular plant may contain a low level of THC any more than it would be privileged to a person who has developed a high tolerance to the narcotic effect of marijuana.

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Medical Marijuana
Health & Safety Code section 11362.5(d) provides in pertinent part:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

Concentrated cannabis is a form of marijuana and possession is criminalized by Health and Safety Code section 11357(a). (*See also* Health & Saf. Code § 11054(13) [listing marijuana as a controlled substance but not separately listing concentrated cannabis].) The Attorney General recently issued an opinion finding, "[c]oncentrated cannabis or hashish is included within the meaning of 'marijuana' as the term is used in the Compassionate Use Act of 1996." (Op. Att. Gen. (2003) 03 C.D.O.S. 9280.)

People v. Mower (2002) 28 Cal.4th 457, 460, held that "as to the facts underlying the defense provided by section 11362.5(d), defendant is required merely to raise a reasonable doubt."

Thus, in *People v. Jones* (2003) 2003DJDAR 11032, 11034, the court held that the trial court erred by excluding the medical marijuana defense where the defendant's testimony raised a reasonable doubt that a physician had approved the use.

Approved vs. Recommended
The Compassionate Use Act authorizes possession on "the written or oral recommendation or approval of a physician." (Health & Saf. Code § 11362.5(d).) In *People v. Jones* (2003) 2003DJDAR 11032, 11033, the court discussed the different meanings of these terms:

> In *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1548, the court concluded the words "recommendation" and "approval" "mean something slightly different, and ... 'approval' connotes a less formal act than a 'recommendation.'" We agree the two terms have different meanings, but the difference is not simply a matter of the degree of formality. To "recommend" something is "to present [it] as worthy of acceptance or trial." (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 974.) To "approve" something is to "express a favorable opinion of" it. (*Id.* at p. 57.) The word "recommendation," as used in the Compassionate Use Act, suggests the physician has raised the

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> issue of marijuana use and presented it to the patient as a treatment that would benefit the patient's health by providing relief from an illness. The word "approval," on the other hand, suggests the patient has raised the issue of marijuana use, and the physician has expressed a favorable opinion of marijuana use as a treatment for the patient. Thus, a physician could *approve* of a patient's suggested use of marijuana without ever *recommending* its use.

Amount Must Be "Reasonably Related" to Patient's Medical Needs
According to *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550-1551,

> [T]he test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs.

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1723. Possession for Sale of Marijuana

The defendant is charged [in Count ___] with possessing for sale marijuana, a controlled substance.

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

1. **The defendant possessed a controlled substance.**

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

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

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

5. **The controlled substance that the defendant possessed was marijuana.**

AND

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

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

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

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

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therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]

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

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

BENCH NOTES

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

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

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11359, 11018.
Knowlegdge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3; *People v. Winston* (1956) 46 Cal.2d 151, 158.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.
Usable Amount ▸ *People v. Piper* (1971) 19 Cal.3d 248, 250.
Compassionate Use Not a Defense ▸ *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389.

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Medical Marijuana Not a Defense to Possession for Sale
The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of possession for sale under Health and Safety Code section 11359. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389.) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389). Evidence of a compassionate use defense may be admissible if the defendant denies intent to sell and asserts such a defense to simple possession or cultivation. (See *People v. Galambos, supra,* 104 Cal.App.4th at p. 1165 [trial court properly instructed on medical marijuana defense to simple possession and cultivation for personal use].)

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STAFF NOTES

Health & Saf. Code § 11359:

> Every person who possesses for sale any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison.

Elements
People v. Palaschak (1995) 9 Cal.4th 1236, 1242, provides the elements for simple possession of a controlled substance:

> The essential elements of possession of a controlled substance are "dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially."

[Citations omitted.]

The knowledge requirement has also been expressed thus:

> In order to sustain a conviction of possession of narcotics it must be shown that the defendant had either physical or constructive possession, and that he was aware that the substance of which he had possession was a narcotic.

(*People v. Gorg* (1955) 45 Cal.2d 776, 780.)

Knowledge
The defendant does not need to know which specific controlled substance he possesses:

> [K]nowledge for the purpose of conviction under Health and Safety Code section 11377, is knowledge of the controlled nature of the substance and not its precise chemical composition. Although the *Garringer* court dealt with mere possession rather than possession for sale, the knowledge element is the same.

(*People v. Guy* (1980) 107 Cal.App.3d 593, 601; *see also People v. Romero* (1997) 55 Cal.App.4th 147, 151-153, 157 n.3 [discussing marijuana specifically]; *People v. Winston* (1956) 46 Cal.2d 151, 158.)

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In *People v. Romero* (1997) 55 Cal.App.4th 147, 157, the court noted that, "[c]ocaine and marijuana are both controlled substances," citing Health and Safety Code sections 11054(d)(13) and 110566(b)(6). In rejecting the defendant's contention that he could raise as a defense to cocaine possession that he thought the substance he possessed was marijuana, the court observed,

> If defendant were correct, one would expect cases arising under the statutes which specifically prohibit the possession or sale of marijuana to require knowledge of its "marijuana character." All that is required, however, is knowledge of its "narcotic character." (E.g., *People v. Rogers* (1971) 5 Cal. 3d 129, 133; *People v. Eckstrom* (1986) 187 Cal. App. 3d 323, 331.)

Thus, it is accurate to state either that the defendant must know that the substance he or she possessed is a controlled substance or that the defendant must know the narcotic character of the substance possessed.

Constructive Possession

This instruction follows the analysis in *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 (*citing Armstrong v Superior Court* (1990) 217 Cal.App.3d 535, 539-540):

> For purposes of drug transactions, the terms 'control' and 'right to control' are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance . . . *Armstrong* made clear that merely agreeing to buy contraband, without more, does *not* constitute constructive possession. It stated, "Likewise we reject the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession. We have found no authority which has established constructive possession based upon a bare agreement to purchase illegal contraband. We thus conclude that in the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether the defendant has exercised the requisite control over the illegal goods." [Emphasis in original.]

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Selling
In *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845, the Court of Appeal found:

> The evil which Health and Safety Code section 11351.5 is designed to proscribe is as surely present when a seller, rather than first obtaining cash with which to purchase other commodities or services, obtains those items and considerations directly by making payment with the contraband itself . . .
>
> There is no indication that the Legislature sought to prohibit only sales for cash. The conclusion that sale includes transfers other than for money comports with the evident purposes of the California legislation, the commonly accepted meaning of the term and settled rules of statutory interpretation.

Usable Amount
People v. Piper (1971) 19 Cal.App.3d 248, 250, held:

> The prosecution bears its burden when it shows the substance defendant possessed was marijuana and it was of a quantity which could be potentiated by consumption in any of the manners customarily employed by users, rather than useless traces or debris of narcotic.

The *Piper* court specifically rejected the notion that the usable amount must be enough to effect the user:

> [Defendant's] sole contention on appeal is the prosecution did not bear its burden of showing he possessed a "usable" quantity of marijuana because no quantitative analysis of the marijuana was made to establish the particular marijuana he possessed had a potential to produce a narcotic effect on one using it. The law regulating possession of marijuana draws not distinction between a high grade and a low grade plant . . . The legislative intent is to regulate the possession of marijuana in any form. Possession is not privileged because the particular plant may contain a low level of THC any more than it would be privileged to a person who has developed a high tolerance to the narcotic effect of marijuana.

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Definition of Marijuana
Health and Safety Code section 11018 defines marijuana as follows:

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

The Oxford English Dictionary defines "resin" as follows: A vegetable product, formed by secretion in special canals in almost all trees and plants, from many of which (as the fir and pine) it exudes naturally, or can be readily obtained by incision; various kinds are extensively used in making varnishes or adhesive compositions, and in pharmacy. (The Oxford English Dictionary Online (2nd Ed. 1989) http://dictionary.oed.com/entrance.dtl.)

Medical Marijuana
Health & Safety Code section 11362.5(d) provides in pertinent part:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

The medical marijuana defense is not available to a charge of possession for sale. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165-1167; *People v. Young* (2001) 92 Cal.App.4th 229, 237; *People ex re. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389; *People v. Trippet* (1997) 56 Cal. App. 4th 1532, 1547, 1550.)

In *People ex re. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1392, the court concluded that the medical marijuana defense was not available to charges of sales or possession for sale, even when the sales were "non-profit":

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> We find no support in section 11362.5 for respondents' argument that sales of marijuana on an allegedly nonprofit basis do not violate state laws against marijuana sales. No provision in section 11362.5 so states. Sections 11359 and 11360 explicitly forbid both the sale and the "giv[ing] away" of marijuana. Section 11362.5(d) exempts "a patient" and "a patient's primary caregiver" from prosecution for two specific offenses only: possession of marijuana (§ 11357) and cultivation of marijuana (§ 11358). It does not preclude prosecution under sections 11359 (possession of marijuana for sale) or 11360(a), which makes it a crime for anyone to "sell[], *furnish*[], *administer*[], *or give*[] *away*" marijuana (italics added). This is particularly significant in interpreting section 11362.5, because at subdivision (b)(2) the statute provides: "Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others . . . ." The Legislature had, theretofore, effectively determined in enacting sections 11359 and 11360 that the sale and giving away of marijuana, to which criminal penalties attach, constituted "conduct that endangers others . . . ."

Similarly, in *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165-67, the court held that the medical marijuana defense was not available to someone who was growing and supplying marijuana to others for medical purposes:

> Defendant argues that "the protection afforded to patients and caregivers in [section] 11362.5 necessarily implies exceptions . . . other than those expressly enumerated in [section] 11362.5, including protection for those who *provide* medicinal cannabis to patients and/or caregivers." (Italics added.)
>
> Various permutations of defendant's contention have been rejected in *People v. Young* [citation], [*People v.*] *Trippet* [citation] and *People ex rel. Lungren v. Peron* [citation].
>
> In *Young,* we ruled that Proposition 215 "does not provide a defense to the transportation of marijuana in the circumstances presented there" since "the statute on its face exempts only possession and cultivation from criminal sanctions for qualifying patients." (*Young, supra*, 92 Cal.App.4th at p. 237.) There, the defendant was transporting 4.74 ounces of marijuana in his car under the purported auspices of a physician's recommendation for use of cannabis. (*Id.* at p. 232.)

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In *Trippet*, the Court of Appeal ruled that the "symmetry between legal principle and evidence of the voters' intent compels the conclusion that, as a general matter, Proposition 215 does not exempt the transportation of marijuana allegedly used or to be used for medical purposes from prosecution . . . ." (*Trippet*, *supra*, 56 Cal.App.4th at p. 1550.) [Footnote omitted.]

In *Peron*, the Court of Appeal held that parties operating a commercial enterprise selling or otherwise furnishing marijuana to patients did not qualify as primary caregivers under Proposition 215 simply by obtaining from the purchaser a designation as such: "The statutory language limits the patient's access to marijuana to that which is personally cultivated by the patient or the patient's primary caregiver on behalf of the patient. If the drafters of the initiative wanted to legalize the sale of small amounts of marijuana for approved medical purposes, they could have easily done so. [Citation.] The fact that they did not, and the reasons advanced in the ballot pamphlet in support of the initiative, indicated with certainty that its drafters were aware of both state and federal law prohibiting such sales and were attempting to avoid a conflict therewith." (*Peron*, *supra*, 59 Cal.App.4th at p. 1394.)

Based on these cases and the language of the initiative and the ballot materials, we reject defendant's claim that Proposition 215 can be construed to imply an exception for furnishing marijuana to a marijuana buyers' cooperative.

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1724. Sale, Furnishing, etc., of Marijuana

The defendant is charged [in Count ___] with (selling/furnishing/ administering/importing) marijuana, a controlled substance.

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

1. **The defendant (sold/furnished/administered/imported into California) a controlled substance**

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

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

[AND]

4. **The controlled substance that the defendant (sold/furnished/administered/imported) was marijuana.**

[AND

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

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

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

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

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant.] [It also includes every compound, manufacture, salt, derivative, mixture, or

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preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]

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

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

BENCH NOTES

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

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

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

AUTHORITY

Elements ▸ Health & Saf. Code, § 11360(a); *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906.

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Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3; *People v. Winston* (1956) 46 Cal.2d 151, 158.
Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.
Administering ▸ Health & Saf. Code, § 11002.
Administering Does Not Include Self-Administering ▸ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Usable Amount ▸ *People v. Piper* (1971) 19 Cal.3d 248, 250.
Compassionate Use Not a Defense ▸ *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389.

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

LESSER INCLUDED OFFENSES

Simple Possession of Marijuana ▸ Health & Saf. Code, § 11357.
Possession for Sale of Marijuana ▸ Health & Saf. Code, § 11359.

RELATED ISSUES

Medical Marijuana Not a Defense to Sales
The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389.) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389). Evidence of a compassionate use defense may be admissible if the defendant denies intent to sell and asserts such a defense to simple possession or cultivation. (See *People v. Galambos, supra,* 104 Cal.App.4th at p. 1165 [trial court properly instructed on medical marijuana defense to simple possession and cultivation for personal use].) There is no case law on whether compassionate use may be raised as a defense to “furnishing” or “administering” marijuana.

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STAFF NOTES

Health & Saf. Code § 11360:

(a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years.

(b) Except as authorized by law, every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($ 100). In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking.

Knowledge
The defendant does not need to know which specific controlled substance is sold:

> We see no grounds for construing knowledge of a drug's "narcotic character" to mean knowledge of its chemical composition or its peculiar intoxicating powers.

(*People v. Ochoa Romero* (1997) 55 Cal.App.4th 147, 153.)

In *People v. Romero* (1997) 55 Cal.App.4th 147, 157, the court noted that, "[c]ocaine and marijuana are both controlled substances," citing Health and Safety Code sections 11054(d)(13) and 110566(b)(6). In rejecting the defendant's contention that he could raise as a defense to cocaine possession that he thought the substance he possessed was marijuana, the court observed,

> If defendant were correct, one would expect cases arising under the statutes which specifically prohibit the possession or sale of marijuana to require knowledge of its "marijuana character." All that

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> is required, however, is knowledge of its "narcotic character." (E.g., *People v. Rogers* (1971) 5 Cal. 3d 129, 133; *People v. Eckstrom* (1986) 187 Cal. App. 3d 323, 331.)

Thus, it is accurate to state either that the defendant must know that the substance he or she possessed is a controlled substance or that the defendant must know the narcotic character of the substance possessed.

Constructive Possession or Transportation

> It is well established that one may become criminally liable for possession for sale or for transportation of a controlled substance, based upon either actual or constructive possession of the substance. [Citations omitted.] Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another . . . Similarly, a defendant may be liable for constructive transportation of a controlled substance when his or her dominion and control are exercised through the acts of an agent.

(*People v. Morante* (1999) 20 Cal.4th 403, 417.)

Selling

In *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845, the Court of Appeal found:

> The evil which Health and Safety Code section 11351.5 is designed to proscribe is as surely present when a seller, rather than first obtaining cash with which to purchase other commodities or services, obtains those items and considerations directly by making payment with the contraband itself . . .
>
> There is no indication that the Legislature sought to prohibit only sales for cash. The conclusion that sale includes transfers other than for money comports with the evident purposes of the California legislation, the commonly accepted meaning of the term and settled rules of statutory interpretation.

Meaning of Administer

Health and Safety Code section 11002 defines “Administer” as follows:

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> "Administer means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient for his immediate needs or to the body of a research subject by any of the following:
>
> (a) A practitioner or, in his presence, by his authorized agent.
> (b) The patient or research subject at the direction and in the presence of the practitioner.

Health & Safety Code Definition of "Administer" Applies
Section 11001 of the Health & Safety Code provides that "Unless the context otherwise requires, the definitions in this chapter [Division 10, Uniform Controlled Substances Act] govern the construction of this division."

Administering Does Not Include Administering to Self
In *People v. Label* (1974) 43 Cal.App.3d 766, 770-771, the Court of Appeal found that the term "administer" as used in Health & Safety Code section 11352 does not include administering drugs to oneself:

> In Health and Safety Code section 11352 . . . it is obvious that the word "administers" is used as defined in Webster's Third International Dictionary: "2a: to mete out; Dispense." One cannot "sell" or "give away" to himself. Although one can "furnish" himself with an article and diabetics and persons suffering from allergies "administer" prescribed insulin or allergens to themselves, in the context of the section and its place in the penal provisions designed to control illicit substances we cannot believe that the Legislature intended to proscribe the self-administration of such substances and used "furnish" and "administer" as intransitives rather than in the same transitive sense that necessarily applies to the companion words, "sell" and "give away."

Usable Amount
People v. Piper (1971) 19 Cal.App.3d 248, 250, held:

> The prosecution bears its burden when it shows the substance defendant possessed was marijuana and it was of a quantity which could be potentiated by consumption in any of the manners customarily employed by users, rather than useless traces or debris of narcotic.

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The *Piper* court specifically rejected the notion that the usable amount must be enough to effect the user:

> [Defendant's] sole contention on appeal is the prosecution did not bear its burden of showing he possessed a "usable" quantity of marijuana because no quantitative analysis of the marijuana was made to establish the particular marijuana he possessed had a potential to produce a narcotic effect on one using it. The law regulating possession of marijuana draws not distinction between a high grade and a low grade plant . . . The legislative intent is to regulate the possession of marijuana in any form. Possession is not privileged because the particular plant may contain a low level of THC any more than it would be privileged to a person who has developed a high tolerance to the narcotic effect of marijuana.

Definition of Marijuana

Health and Safety Code section 11018 defines marijuana as follows:

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

The Oxford English Dictionary defines "resin" as follows: A vegetable product, formed by secretion in special canals in almost all trees and plants, from many of which (as the fir and pine) it exudes naturally, or can be readily obtained by incision; various kinds are extensively used in making varnishes or adhesive compositions, and in pharmacy. (The Oxford English Dictionary Online (2nd Ed. 1989) http://dictionary.oed.com/entrance.dtl.)

Medical Marijuana

Health & Safety Code section 11362.5(d) provides in pertinent part:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or

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> cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

The medical marijuana defense is not available to a charge of sales. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165-1167; *People v. Young* (2001) 92 Cal.App.4th 229, 237; *People ex re. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389; *People v. Trippet* (1997) 56 Cal. App. 4th 1532, 1547, 1550.)

In *People ex re. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1392, the court concluded that the medical marijuana defense was not available to charges of sales or possession for sale, even when the sales were “non-profit”:

> We find no support in section 11362.5 for respondents' argument that sales of marijuana on an allegedly nonprofit basis do not violate state laws against marijuana sales. No provision in section 11362.5 so states. Sections 11359 and 11360 explicitly forbid both the sale and the "giv[ing] away" of marijuana. Section 11362.5(d) exempts "a patient" and "a patient's primary caregiver" from prosecution for two specific offenses only: possession of marijuana (§ 11357) and cultivation of marijuana (§ 11358). It does not preclude prosecution under sections 11359 (possession of marijuana for sale) or 11360(a), which makes it a crime for anyone to "sell[], *furnish*[], *administer*[], *or give*[] *away*" marijuana (italics added). This is particularly significant in interpreting section 11362.5, because at subdivision (b)(2) the statute provides: "Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others . . . ." The Legislature had, theretofore, effectively determined in enacting sections 11359 and 11360 that the sale and giving away of marijuana, to which criminal penalties attach, constituted "conduct that endangers others . . . ."

Similarly, in *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165-67, the court held that the medical marijuana defense was not available to someone who was growing and supplying marijuana to others for medical purposes:

> Defendant argues that "the protection afforded to patients and caregivers in [section] 11362.5 necessarily implies exceptions . . . other than those expressly enumerated in [section] 11362.5, including protection for those who *provide* medicinal cannabis to patients and/or caregivers." (Italics added.)
>
> Various permutations of defendant's contention have been rejected in

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> *People v. Young* [citation], [*People v.*] *Trippet* [citation] and *People ex rel. Lungren v. Peron* [citation].
>
> In *Young,* we ruled that Proposition 215 "does not provide a defense to the transportation of marijuana in the circumstances presented there" since "the statute on its face exempts only possession and cultivation from criminal sanctions for qualifying patients." (*Young, supra*, 92 Cal.App.4th at p. 237.) There, the defendant was transporting 4.74 ounces of marijuana in his car under the purported auspices of a physician's recommendation for use of cannabis. (*Id.* at p. 232.)
>
> In *Trippet*, the Court of Appeal ruled that the "symmetry between legal principle and evidence of the voters' intent compels the conclusion that, as a general matter, Proposition 215 does not exempt the transportation of marijuana allegedly used or to be used for medical purposes from prosecution . . . ." (*Trippet, supra*, 56 Cal.App.4th at p. 1550.) [Footnote omitted.]
>
> In *Peron*, the Court of Appeal held that parties operating a commercial enterprise selling or otherwise furnishing marijuana to patients did not qualify as primary caregivers under Proposition 215 simply by obtaining from the purchaser a designation as such: "The statutory language limits the patient's access to marijuana to that which is personally cultivated by the patient or the patient's primary caregiver on behalf of the patient. If the drafters of the initiative wanted to legalize the sale of small amounts of marijuana for approved medical purposes, they could have easily done so. [Citation.] The fact that they did not, and the reasons advanced in the ballot pamphlet in support of the initiative, indicated with certainty that its drafters were aware of both state and federal law prohibiting such sales and were attempting to avoid a conflict therewith." (*Peron*, *supra*, 59 Cal.App.4th at p. 1394.)
>
> Based on these cases and the language of the initiative and the ballot materials, we reject defendant's claim that Proposition 215 can be construed to imply an exception for furnishing marijuana to a marijuana buyers' cooperative.

In *People v. Trippet* (1997) 56 Cal. App. 4th 1532, 1547, 1550, the court held that there is a limited defense to the charge of transporting marijuana where the transportation was “reasonably related to the patient’s current medical needs.” A

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similar argument may be raised regarding charges of furnishing or administering marijuana against a primary caregiver who was assisting a patient. There are no cases on this issue.

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1725. Offering to Sell, Furnish, etc., Marijuana

The defendant is charged [in Count ___] with offering to (sell/furnish/administer/import) marijuana, a controlled substance.

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

1. **The defendant offered to (sell/furnish/administer/import into California) marijuana, a controlled substance.**

AND

2. **The defendant intended to (sell/furnish/administer/import) the controlled substance.**

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

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

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

BENCH NOTES

Instructional Duty

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

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

AUTHORITY

Elements ▸ Health & Saf. Code, § 11360; *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906.
Specific Intent ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470.
Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3; *People v. Winston* (1956) 46 Cal.2d 151, 158.
Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.
Administering ▸ Health & Saf. Code, § 11002.
Administering Does Not Include Self-Administering ▸ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771.
Compassionate Use Not a Defense ▸ *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389.

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

LESSER INCLUDED OFFENSES

Simple Possession of Marijuana ▸ Health & Saf. Code, § 11357.
Possession for Sale of Marijuana ▸ Health & Saf. Code, § 11359.

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs
A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469; *People v. Brown* (1960) 55 Cal.2d 64, 68.)

Medical Marijuana Not a Defense to Sales or Offering to Sell
The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales or offering to sell under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389.) The defense is not available even if the marijuana is provided to someone

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permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389). Evidence of a compassionate use defense may be admissible if the defendant denies intent to sell and asserts such a defense to simple possession or cultivation. (See *People v. Galambos, supra,* 104 Cal.App.4th at p. 1165 [trial court properly instructed on medical marijuana defense to simple possession and cultivation for personal use].) There is no case law on whether compassionate use may be raised as a defense to "furnishing" or "administering" marijuana.

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STAFF NOTES

Health & Saf. Code § 11360:

(a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years.

(b) Except as authorized by law, every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($ 100). In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking.

Knowledge

The defendant does not need to know which specific controlled substance is transported for sale:

> We see no grounds for construing knowledge of a drug's "narcotic character" to mean knowledge of its chemical composition or its peculiar intoxicating powers.

(*People v. Ochoa Romero* (1997) 55 Cal.App.4th 147, 153.)

In *People v. Romero* (1997) 55 Cal.App.4th 147, 157, the court noted that, "[c]ocaine and marijuana are both controlled substances," citing Health and Safety Code sections 11054(d)(13) and 110566(b)(6). In rejecting the defendant's contention that he could raise as a defense to cocaine possession that he thought the substance he possessed was marijuana, the court observed,

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> If defendant were correct, one would expect cases arising under the statutes which specifically prohibit the possession or sale of marijuana to require knowledge of its "marijuana character." All that is required, however, is knowledge of its "narcotic character." (E.g., *People v. Rogers* (1971) 5 Cal. 3d 129, 133; *People v. Eckstrom* (1986) 187 Cal. App. 3d 323, 331.)

Thus, it is accurate to state either that the defendant must know that the substance he or she possessed is a controlled substance or that the defendant must know the narcotic character of the substance possessed.

Specific Intent

In *People v. Jackson* (1963) 59 Cal.2d 468, 469–470, the Supreme Court found fault with a jury instruction that did not include specific intent to make a sale as an element of making an offer to sell:

> This instruction is erroneous. It states that the only intent required is the intent to make an offer and that an intent to make a sale is not necessary. In *People v. Brown* (citation omitted) we held that "a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under section 11501." Persons who offer to sell narcotics with no intention of performing are not engaged in narcotics traffic.

No Requirement that Defendant Delivered or Possessed Drugs

> The evidence shows that defendant offered to sell heroin to Officer Lawrence, an undercover narcotics agent, that Officer Lawrence gave defendant $ 20, and that defendant did not deliver heroin or anything else.
>
> Defendant contends that section 11501 does not encompass an offer to sell a narcotic when nothing is delivered. It is settled, however, that delivery is not an essential element of the offense of offering to sell a narcotic.

(*People v. Jackson* (1963) 59 Cal.2d 468, 469; *see also People v. Brown* (1960) 55 Cal.2d 64, 68.)

Meaning of Administer

Health and Safety Code section 11002 defines "Administer" as follows:

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> "Administer means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient for his immediate needs or to the body of a research subject by any of the following:
>
> (a) A practitioner or, in his presence, by his authorized agent.
> (b) The patient or research subject at the direction and in the presence of the practitioner.

Health & Safety Code Definition of "Administer" Applies
Section 11001 of the Health & Safety Code provides that "Unless the context otherwise requires, the definitions in this chapter [Division 10, Uniform Controlled Substances Act] govern the construction of this division."

Administering Does Not Include Administering to Self
In *People v. Label* (1974) 43 Cal.App.3d 766, 770-771, the Court of Appeal found that the term "administer" as used in Health & Safety Code section 11352 does not include administering drugs to oneself:

> In Health and Safety Code section 11352 . . . it is obvious that the word "administers" is used as defined in Webster's Third International Dictionary: "2a: to mete out; Dispense." One cannot "sell" or "give away" to himself. Although one can "furnish" himself with an article and diabetics and persons suffering from allergies "administer" prescribed insulin or allergens to themselves, in the context of the section and its place in the penal provisions designed to control illicit substances we cannot believe that the Legislature intended to proscribe the self-administration of such substances and used "furnish" and "administer" as intransitives rather than in the same transitive sense that necessarily applies to the companion words, "sell" and "give away."

Definition of Marijuana
Health and Safety Code section 11018 defines marijuana as follows:

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

The Oxford English Dictionary defines "resin" as follows: A vegetable product, formed by secretion in special canals in almost all trees and plants, from many of which (as the fir and pine) it exudes naturally, or can be readily obtained by incision; various kinds are extensively used in making varnishes or adhesive compositions, and in pharmacy. (The Oxford English Dictionary Online (2nd Ed. 1989) http://dictionary.oed.com/entrance.dtl.)

Medical Marijuana

Health & Safety Code section 11362.5(d) provides in pertinent part:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

The medical marijuana defense is not available to a charge of sales or offering to sell. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165-1167; *People v. Young* (2001) 92 Cal.App.4th 229, 237; *People ex re. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389; *People v. Trippet* (1997) 56 Cal. App. 4th 1532, 1547, 1550.)

In *People ex re. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1392, the court concluded that the medical marijuana defense was not available to charges of sales or possession for sale, even when the sales were "non-profit":

> We find no support in section 11362.5 for respondents' argument that sales of marijuana on an allegedly nonprofit basis do not violate state laws against marijuana sales. No provision in section 11362.5 so states. Sections 11359 and 11360 explicitly forbid both the sale and the "giv[ing] away" of marijuana. Section 11362.5(d) exempts "a patient" and "a patient's primary caregiver" from prosecution for

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> two specific offenses only: possession of marijuana (§ 11357) and cultivation of marijuana (§ 11358). It does not preclude prosecution under sections 11359 (possession of marijuana for sale) or 11360(a), which makes it a crime for anyone to "sell[], *furnish*[], *administer*[], *or give*[] *away*" marijuana (italics added). This is particularly significant in interpreting section 11362.5, because at subdivision (b)(2) the statute provides: "Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others . . . ." The Legislature had, theretofore, effectively determined in enacting sections 11359 and 11360 that the sale and giving away of marijuana, to which criminal penalties attach, constituted "conduct that endangers others . . . ."

Similarly, in *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165-67, the court held that the medical marijuana defense was not available to someone who was growing and supplying marijuana to others for medical purposes:

> Defendant argues that "the protection afforded to patients and caregivers in [section] 11362.5 necessarily implies exceptions . . . other than those expressly enumerated in [section] 11362.5, including protection for those who *provide* medicinal cannabis to patients and/or caregivers." (Italics added.)
>
> Various permutations of defendant's contention have been rejected in *People v. Young* [citation], [*People v.*] *Trippet* [citation] and *People ex rel. Lungren v. Peron* [citation].
>
> In *Young,* we ruled that Proposition 215 "does not provide a defense to the transportation of marijuana in the circumstances presented there" since "the statute on its face exempts only possession and cultivation from criminal sanctions for qualifying patients." (*Young, supra*, 92 Cal.App.4th at p. 237.) There, the defendant was transporting 4.74 ounces of marijuana in his car under the purported auspices of a physician's recommendation for use of cannabis. (*Id.* at p. 232.)
>
> In *Trippet,* the Court of Appeal ruled that the "symmetry between legal principle and evidence of the voters' intent compels the conclusion that, as a general matter, Proposition 215 does not exempt the transportation of marijuana allegedly used or to be used for medical purposes from prosecution . . . ." (*Trippet, supra*, 56 Cal.App.4th at p. 1550.) [Footnote omitted.]

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In *Peron*, the Court of Appeal held that parties operating a commercial enterprise selling or otherwise furnishing marijuana to patients did not qualify as primary caregivers under Proposition 215 simply by obtaining from the purchaser a designation as such: "The statutory language limits the patient's access to marijuana to that which is personally cultivated by the patient or the patient's primary caregiver on behalf of the patient. If the drafters of the initiative wanted to legalize the sale of small amounts of marijuana for approved medical purposes, they could have easily done so. [Citation.] The fact that they did not, and the reasons advanced in the ballot pamphlet in support of the initiative, indicated with certainty that its drafters were aware of both state and federal law prohibiting such sales and were attempting to avoid a conflict therewith." (*Peron*, *supra*, 59 Cal.App.4th at p. 1394.)

Based on these cases and the language of the initiative and the ballot materials, we reject defendant's claim that Proposition 215 can be construed to imply an exception for furnishing marijuana to a marijuana buyers' cooperative.

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1726. Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor

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The defendant is charged [in Count ___] with (giving away/transporting) 28.5 grams or less of marijuana, a controlled substance.

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

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

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

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

4. **The controlled substance that the defendant (gave away/ transported) was marijuana.**

AND

5. **The marijuana was a usable amount but not more than 28.5 grams in weight.**

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

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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 marijuana.]

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

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

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

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

BENCH NOTES

Instructional Duty

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

The medical marijuana defense is available in some cases where a defendant is charged with transportation. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [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 [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

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

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

Related Instructions
Use this instruction when the defendant is charged with transporting or giving away 28.5 grams or less of marijuana. For offering to transport or give away 28.5 grams or less of marijuana, use Instruction 1728, Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor. For transporting or giving away more than 28.5 grams, use Instruction 1727, Transporting or Giving Away Marijuana: More Than 28.5 Grams. For offering to transport or give away more than 28.5 grams of marijuana, use Instruction 1729, Offering to Transport or Give Away Marijuana: More Than 28.5 Grams.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11360(b).
Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3; *People v. Winston* (1956) 46 Cal.2d 151, 158.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Medical Marijuana ▸ Health & Saf. Code, § 11362.5.
Compassionate Use Defense to Transportation ▸ *People v. Trippet* (1997) 56 Cal. App.4th 1532, 1550.
Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460.

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

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RELATED ISSUES

Transportation

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

Medical Marijuana Not a Defense to Giving Away

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389.) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389).

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STAFF NOTES

Health & Saf. Code §11360:

> (a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years.
>
> (b) Except as authorized by law, every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($ 100). In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking.

Constructive Possession or Transportation

> It is well established that one may become criminally liable for possession for sale or for transportation of a controlled substance, based upon either actual or constructive possession of the substance. *Citations omitted*. Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another . . . Similarly, a defendant may be liable for constructive transportation of a controlled substance when his or her dominion and control are exercised through the acts of an agent.

(*People v. Morante* (1999) 20 Cal.4th 403, 417.)

Minimal Movement

In *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316, the court confirmed that no specific distance must be moved to have "transportation" occur within the meaning of the statute:

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> As we have observed before, "Transportation of a controlled substance is established by [simply] carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746 . . .) Neither this nor any other court has ever required that the length of travel exceed "minimal movement."

Specific Intent

In *People v. Jackson* (1963) 59 Cal.2d 468, 469-470, the Supreme Court found fault with a jury instruction that did not include specific intent to make a sale as an element of making an offer to sell:

> This instruction is erroneous. It states that the only intent required is the intent to make an offer and that an intent to make a sale is not necessary. In *People v. Brown* [citation omitted] we held that "a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under section 11501." Persons who offer to sell narcotics with no intention of performing are not engaged in narcotics traffic.

Transportation

Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134.) Transportation also does not require possession by the defendant. (*Ibid.*)

> Although possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may "transport" marijuana or other drugs even though they are in the exclusive possession of another.

(*Id.* at p. 134.)

> Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt [. . . .]

(*Id.* at pp. 135-136.) Thus, in *People v. Rogers, supra,* the court held that the defendant may be convicted of transporting marijuana where he was the driver of the car and a passenger in the car was in possession of the drug if the defendant knew of the presence and nature of the drug. (*Ibid.*)

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Transportation of a controlled substance includes riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685.) The controlled substance must be moved "from one location to another" but the movement may be minimal. (*Id.* at p. 684.)

Definition of Marijuana

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

The Oxford English Dictionary defines "resin" as follows: A vegetable product, formed by secretion in special canals in almost all trees and plants, from many of which (as the fir and pine) it exudes naturally, or can be readily obtained by incision; various kinds are extensively used in making varnishes or adhesive compositions, and in pharmacy. (The Oxford English Dictionary Online (2nd Ed. 1989) http://dictionary.oed.com/entrance.dtl.)

Medical Marijuana

Health & Safety Code section 11362.5(d) provides in pertinent part:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

The medical marijuana defense is not available to a charge of sales. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165-1167; *People v. Young* (2001) 92 Cal.App.4th 229, 237; *People ex re. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389; *People v. Trippet* (1997) 56 Cal. App. 4th 1532, 1547, 1550.)

In *People ex re. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1392, the court concluded that the medical marijuana defense was not available to charges of sales or possession for sale, even when the sales were "non-profit":

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> We find no support in section 11362.5 for respondents' argument that sales of marijuana on an allegedly nonprofit basis do not violate state laws against marijuana sales. No provision in section 11362.5 so states. Sections 11359 and 11360 explicitly forbid both the sale and the "giv[ing] away" of marijuana. Section 11362.5(d) exempts "a patient" and "a patient's primary caregiver" from prosecution for two specific offenses only: possession of marijuana (§ 11357) and cultivation of marijuana (§ 11358). It does not preclude prosecution under sections 11359 (possession of marijuana for sale) or 11360(a), which makes it a crime for anyone to "sell[], *furnish*[], *administer*[], *or give*[] *away*" marijuana (italics added). This is particularly significant in interpreting section 11362.5, because at subdivision (b)(2) the statute provides: "Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others . . . ." The Legislature had, theretofore, effectively determined in enacting sections 11359 and 11360 that the sale and giving away of marijuana, to which criminal penalties attach, constituted "conduct that endangers others . . . ."

Similarly, in *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165-67, the court held that the medical marijuana defense was not available to someone who was growing and supplying marijuana to others for medical purposes:

> Defendant argues that "the protection afforded to patients and caregivers in [section] 11362.5 necessarily implies exceptions . . . other than those expressly enumerated in [section] 11362.5, including protection for those who *provide* medicinal cannabis to patients and/or caregivers." (Italics added.)
>
> Various permutations of defendant's contention have been rejected in *People v. Young* [citation], [*People v.*] *Trippet* [citation] and *People ex rel. Lungren v. Peron* [citation].
>
> In *Young*, we ruled that Proposition 215 "does not provide a defense to the transportation of marijuana in the circumstances presented there" since "the statute on its face exempts only possession and cultivation from criminal sanctions for qualifying patients." (*Young*, *supra*, 92 Cal.App.4th at p. 237.) There, the defendant was transporting 4.74 ounces of marijuana in his car under the purported auspices of a physician's recommendation for use of cannabis. (*Id.* at p. 232.)

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> In *Trippet*, the Court of Appeal ruled that the "symmetry between legal principle and evidence of the voters' intent compels the conclusion that, as a general matter, Proposition 215 does not exempt the transportation of marijuana allegedly used or to be used for medical purposes from prosecution . . . ." (*Trippet*, *supra*, 56 Cal.App.4th at p. 1550.) [Footnote omitted.]
>
> In *Peron*, the Court of Appeal held that parties operating a commercial enterprise selling or otherwise furnishing marijuana to patients did not qualify as primary caregivers under Proposition 215 simply by obtaining from the purchaser a designation as such: "The statutory language limits the patient's access to marijuana to that which is personally cultivated by the patient or the patient's primary caregiver on behalf of the patient. If the drafters of the initiative wanted to legalize the sale of small amounts of marijuana for approved medical purposes, they could have easily done so. [Citation.] The fact that they did not, and the reasons advanced in the ballot pamphlet in support of the initiative, indicated with certainty that its drafters were aware of both state and federal law prohibiting such sales and were attempting to avoid a conflict therewith." (*Peron*, *supra*, 59 Cal.App.4th at p. 1394.)
>
> Based on these cases and the language of the initiative and the ballot materials, we reject defendant's claim that Proposition 215 can be construed to imply an exception for furnishing marijuana to a marijuana buyers' cooperative.

However, in *People v. Trippet* (1997) 56 Cal. App. 4th 1532, 1550, the court held that there is a limited defense to the charge of transporting marijuana where the transportation was “reasonably related to the patient’s current medical needs.” The court stated,

> [P]ractical realities dictate that there be *some* leeway in applying section 11360 in cases where a Proposition 215 defense is asserted to companion charges. The results might otherwise be absurd. For example, the voters could not have intended that a dying cancer patient's "primary caregiver" could be subject to criminal sanctions for carrying otherwise legally cultivated and possessed marijuana down a hallway to the patient's room. Our holding does not, therefore, mean that *all* transportation of marijuana is without any defense under the new law. But so stating is a far cry from agreeing

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> that transportation of two pounds of marijuana in a car by one who claims to suffer from migraine headaches is, even assuming the necessary medical approval, ipso facto permissible, as appellant would have it. The test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs. If so, we conclude there should and can be an implied defense to a section 11360 charge; otherwise, there is not. [Emphasis in original.]

People v. Mower (2002) 28 Cal.4th 457, 460, held that "as to the facts underlying the defense provided by section 11362.5(d), defendant is required merely to raise a reasonable doubt."

Thus, in *People v. Jones* (2003) 2003DJDAR 11032, 11034, the court held that the trial court erred by excluding the medical marijuana defense where the defendant's testimony raised a reasonable doubt that a physician had approved the use.

Approved vs. Recommended

The Compassionate Use Act authorizes possession on "the written or oral recommendation or approval of a physician." (Health & Saf. Code § 11362.5(d).) In *People v. Jones* (2003) 2003DJDAR 11032, 11033, the court discussed the different meanings of these terms:

> In *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1548, the court concluded the words "recommendation" and "approval" "mean something slightly different, and ... 'approval' connotes a less formal act than a 'recommendation.'" We agree the two terms have different meanings, but the difference is not simply a matter of the degree of formality. To "recommend" something is "to present [it] as worthy of acceptance or trial." (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 974.) "approve" something is to "express a favorable opinion of" it. (*Id.* at p. 57.) The word "recommendation," as used in the Compassionate Use Act, suggests the physician has raised the issue of marijuana use and presented it to the patient as a treatment that would benefit the patient's health by providing relief from an illness. The word "approval," on the other hand, suggests the patient has raised the issue of marijuana use, and the physician has expressed a favorable opinion of marijuana use as a treatment for the patient. Thus, a physician could *approve* of a patient's suggested use of marijuana without ever *recommending* its use.

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Amount Must Be "Reasonably Related" to Patient's Medical Needs
According to *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550-1551,

> [T]he test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs.

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1727. Transporting or Giving Away Marijuana: More Than 28.5 Grams

The defendant is charged [in Count ___] with (giving away/transporting) more than 28.5 grams of marijuana, a controlled substance.

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

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

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

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

4. **The controlled substance that the defendant (gave away/ transported) was marijuana.**

AND

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

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

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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 marijuana.]

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

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

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

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

BENCH NOTES

Instructional Duty

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

The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [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 [defendant need not establish "medical necessity"].) If the defendant meets this

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

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

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

Related Instructions
Use this instruction when the defendant is charged with transporting or giving away more than 28.5 grams of marijuana. For offering to transport or give away more than 28.5 grams of marijuana, use Instruction 1729, Offering to Transport or Give Away Marijuana: More Than 28.5 Grams. For transporting or giving away 28.5 grams or less, use Instruction 1726, Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor. For offering to transport or give away 28.5 grams or less of marijuana, use Instruction 1728, Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11360(a).
Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3; *People v. Winston* (1956) 46 Cal.2d 151, 158.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Medical Marijuana ▸ Health & Saf. Code, § 11362.5.
Compassionate Use Defense to Transportation ▸ *People v. Trippet* (1997) 56 Cal. App.4th 1532, 1550.
Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460.

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

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LESSER INCLUDED OFFENSES

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

RELATED ISSUES

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

Medical Marijuana Not a Defense to Giving Away
The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389.) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389).

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STAFF NOTES

Health & Saf. Code §11360:

(a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years.

(b) Except as authorized by law, every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($ 100). In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking.

Constructive Possession or Transportation

> It is well established that one may become criminally liable for possession for sale or for transportation of a controlled substance, based upon either actual or constructive possession of the substance. [Citations omitted.] Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another . . . Similarly, a defendant may be liable for constructive transportation of a controlled substance when his or her dominion and control are exercised through the acts of an agent.

(*People v. Morante* (1999) 20 Cal.4th 403, 417.)

Minimal Movement

In *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316, the court confirmed that no specific distance must be moved to have "transportation" occur within the meaning of the statute:

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> As we have observed before, "Transportation of a controlled substance is established by [simply] carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character. [Citations.]" (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1746 . . .) Neither this nor any other court has ever required that the length of travel exceed "minimal movement."

Transportation

Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134.) Transportation also does not require possession by the defendant. (*Ibid.*)

> Although possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may "transport" marijuana or other drugs even though they are in the exclusive possession of another.

(*Id.* at p. 134.)

> Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt [. . . .]

(*Id.* at pp. 135-136.) Thus, in *People v. Rogers, supra*, the court held that the defendant may be convicted of transporting marijuana where he was the driver of the car and a passenger in the car was in possession of the drug if the defendant knew of the presence and nature of the drug. (*Ibid.*)

Transportation of a controlled substance includes riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685.) The controlled substance must be moved "from one location to another" but the movement may be minimal. (*Id.* at p. 684.)

Definition of Marijuana

Health and Safety Code section 11018 defines marijuana as follows:

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

The Oxford English Dictionary defines "resin" as follows: A vegetable product, formed by secretion in special canals in almost all trees and plants, from many of which (as the fir and pine) it exudes naturally, or can be readily obtained by incision; various kinds are extensively used in making varnishes or adhesive compositions, and in pharmacy. (The Oxford English Dictionary Online (2nd Ed. 1989) http://dictionary.oed.com/entrance.dtl.)

Medical Marijuana

Health & Safety Code section 11362.5(d) provides in pertinent part:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

The medical marijuana defense is not available to a charge of sales. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165-1167; *People v. Young* (2001) 92 Cal.App.4th 229, 237; *People ex re. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389; *People v. Trippet* (1997) 56 Cal. App. 4th 1532, 1547, 1550.)

In *People ex re. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1392, the court concluded that the medical marijuana defense was not available to charges of sales or possession for sale, even when the sales were "non-profit":

> We find no support in section 11362.5 for respondents' argument that sales of marijuana on an allegedly nonprofit basis do not violate state laws against marijuana sales. No provision in section 11362.5 so states. Sections 11359 and 11360 explicitly forbid both the sale and the "giv[ing] away" of marijuana. Section 11362.5(d) exempts "a patient" and "a patient's primary caregiver" from prosecution for two specific offenses only: possession of marijuana (§ 11357) and

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> cultivation of marijuana (§ 11358). It does not preclude prosecution under sections 11359 (possession of marijuana for sale) or 11360(a), which makes it a crime for anyone to "sell[], *furnish*[], *administer*[], *or give*[] *away*" marijuana (italics added). This is particularly significant in interpreting section 11362.5, because at subdivision (b)(2) the statute provides: "Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others . . . ." The Legislature had, theretofore, effectively determined in enacting sections 11359 and 11360 that the sale and giving away of marijuana, to which criminal penalties attach, constituted "conduct that endangers others . . . ."

Similarly, in *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165-67, the court held that the medical marijuana defense was not available to someone who was growing and supplying marijuana to others for medical purposes:

> Defendant argues that "the protection afforded to patients and caregivers in [section] 11362.5 necessarily implies exceptions . . . other than those expressly enumerated in [section] 11362.5, including protection for those who *provide* medicinal cannabis to patients and/or caregivers." (Italics added.)
>
> Various permutations of defendant's contention have been rejected in *People v. Young* [citation], [*People v.*] *Trippet* [citation] and *People ex rel. Lungren v. Peron* [citation].
>
> In *Young,* we ruled that Proposition 215 "does not provide a defense to the transportation of marijuana in the circumstances presented there" since "the statute on its face exempts only possession and cultivation from criminal sanctions for qualifying patients." (*Young, supra*, 92 Cal.App.4th at p. 237.) There, the defendant was transporting 4.74 ounces of marijuana in his car under the purported auspices of a physician's recommendation for use of cannabis. (*Id.* at p. 232.)
>
> In *Trippet*, the Court of Appeal ruled that the "symmetry between legal principle and evidence of the voters' intent compels the conclusion that, as a general matter, Proposition 215 does not exempt the transportation of marijuana allegedly used or to be used for medical purposes from prosecution . . . ." (*Trippet, supra*, 56 Cal.App.4th at p. 1550.) [Footnote omitted.]

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> In *Peron*, the Court of Appeal held that parties operating a commercial enterprise selling or otherwise furnishing marijuana to patients did not qualify as primary caregivers under Proposition 215 simply by obtaining from the purchaser a designation as such: "The statutory language limits the patient's access to marijuana to that which is personally cultivated by the patient or the patient's primary caregiver on behalf of the patient. If the drafters of the initiative wanted to legalize the sale of small amounts of marijuana for approved medical purposes, they could have easily done so. [Citation.] The fact that they did not, and the reasons advanced in the ballot pamphlet in support of the initiative, indicated with certainty that its drafters were aware of both state and federal law prohibiting such sales and were attempting to avoid a conflict therewith." (*Peron*, *supra*, 59 Cal.App.4th at p. 1394.)
>
> Based on these cases and the language of the initiative and the ballot materials, we reject defendant's claim that Proposition 215 can be construed to imply an exception for furnishing marijuana to a marijuana buyers' cooperative.

However, in *People v. Trippet* (1997) 56 Cal. App. 4th 1532, 1550, the court held that there is a limited defense to the charge of transporting marijuana where the transportation was “reasonably related to the patient’s current medical needs.” The court stated,

> [P]ractical realities dictate that there be *some* leeway in applying section 11360 in cases where a Proposition 215 defense is asserted to companion charges. The results might otherwise be absurd. For example, the voters could not have intended that a dying cancer patient's "primary caregiver" could be subject to criminal sanctions for carrying otherwise legally cultivated and possessed marijuana down a hallway to the patient's room. Our holding does not, therefore, mean that *all* transportation of marijuana is without any defense under the new law. But so stating is a far cry from agreeing that transportation of two pounds of marijuana in a car by one who claims to suffer from migraine headaches is, even assuming the necessary medical approval, ipso facto permissible, as appellant would have it. The test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs. If so, we conclude there should and can be an implied defense to a section 11360 charge; otherwise, there is not. [Emphasis in original.]

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People v. Mower (2002) 28 Cal.4th 457, 460, held that “as to the facts underlying the defense provided by section 11362.5(d), defendant is required merely to raise a reasonable doubt.”

Thus, in *People v. Jones* (2003) 2003DJDAR 11032, 11034, the court held that the trial court erred by excluding the medical marijuana defense where the defendant’s testimony raised a reasonable doubt that a physician had approved the use.

Approved vs. Recommended

The Compassionate Use Act authorizes possession on “the written or oral recommendation or approval of a physician.” (Health & Saf. Code § 11362.5(d).) In *People v. Jones* (2003) 2003DJDAR 11032, 11033, the court discussed the different meanings of these terms:

In *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1548, the court concluded the words "recommendation" and "approval" "mean something slightly different, and ... 'approval' connotes a less formal act than a 'recommendation.'" We agree the two terms have different meanings, but the difference is not simply a matter of the degree of formality. To "recommend" something is "to present [it] as worthy of acceptance or trial." (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 974.) "approve" something is to "express a favorable opinion of" it. (*Id.* at p. 57.) The word "recommendation," as used in the Compassionate Use Act, suggests the physician has raised the issue of marijuana use and presented it to the patient as a treatment that would benefit the patient's health by providing relief from an illness. The word "approval," on the other hand, suggests the patient has raised the issue of marijuana use, and the physician has expressed a favorable opinion of marijuana use as a treatment for the patient. Thus, a physician could *approve* of a patient's suggested use of marijuana without ever *recommending* its use.

Amount Must Be “Reasonably Related” to Patient’s Medical Needs

According to *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550-1551,

> [T]he test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient’s current medical needs.

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1728. Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor

---

The defendant is charged [in Count ___] with (offering to give away/offering to transport/attempting to transport) 28.5 grams or less of marijuana, a controlled substance.

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

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

AND

2. **The defendant intended to (give away/transport) the controlled substance.**

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

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

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant.] [It also includes every compound, manufacture, salt, derivative, mixture, or

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preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]

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

BENCH NOTES

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

The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [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 [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

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

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

Also give Instruction 504, Attempt Other Than Attempted Murder, if the defendant is charged with attempt to transport.

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Related Instructions
Use this instruction when the defendant is charged with offering to transport or give away 28.5 grams or less of marijuana. For transporting or giving away 28.5 grams or less of marijuana, use Instruction 1726, Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor. For offering to transport or give away more than 28.5 grams of marijuana, use Instruction 1729, Offering to Transport or Give Away Marijuana: More Than 28.5 Grams. For transporting or giving away more than 28.5 grams, use Instruction 1727, Transporting or Giving Away Marijuana: More Than 28.5 Grams.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11360(b).
Knowledge ▸ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3; *People v. Winston* (1956) 46 Cal.2d 151, 158.
Specific Intent ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470.
Medical Marijuana ▸ Health & Saf. Code, § 11362.5.
Compassionate Use Defense to Transportation ▸ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550.
Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460.

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

RELATED ISSUES

Medical Marijuana Not a Defense to Giving Away
The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389.) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389).

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STAFF NOTES

Health & Saf. Code §11360:

> (a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years.
>
> (b) Except as authorized by law, every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($ 100). In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking.

Specific Intent

In *People v. Jackson* (1963) 59 Cal.2d 468, 469-470, the Supreme Court found fault with a jury instruction that did not include specific intent to make a sale as an element of making an offer to sell:

> This instruction is erroneous. It states that the only intent required is the intent to make an offer and that an intent to make a sale is not necessary. In *People v. Brown* [citation omitted] we held that "a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under section 11501." Persons who offer to sell narcotics with no intention of performing are not engaged in narcotics traffic.

For other topics, see Notes to 2401A.

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1729. Offering to Transport or Give Away Marijuana: More Than 28.5 Grams

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

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

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

AND

2. **The defendant intended to (give away/transport) the controlled substance.**

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

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

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant.] [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature

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stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]

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

BENCH NOTES

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

The medical marijuana defense is available in some cases where the defendant is charged with transportation. (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [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 [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

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Also give Instruction 504, Attempt Other Than Attempted Murder, if the defendant is charged with attempt to transport.

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Related Instructions
Use this instruction when the defendant is charged with offering to transport or give away more than 28.5 grams of marijuana. For transporting or giving away more than 28.5 grams of marijuana, use Instruction 1727, Transporting or Giving Away Marijuana: More Than 28.5 Grams. For offering to transport or give away 28.5 grams or less of marijuana, use Instruction 1728, Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor. For transporting or giving away 28.5 grams or less, use Instruction 1726, Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor.

AUTHORITY

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Specific Intent ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470.
Medical Marijuana ▸ Health & Saf. Code, § 11362.5.
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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 94–101.

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Medical Marijuana Not a Defense to Giving Away
The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389.) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra,* 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th at p. 1389).

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STAFF NOTES

Health & Saf. Code §11360:

> (a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years.
>
> (b) Except as authorized by law, every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana, other than concentrated cannabis, is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($ 100). In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, such person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking.

Specific Intent

In *People v. Jackson* (1963) 59 Cal.2d 468, 469-470, the Supreme Court found fault with a jury instruction that did not include specific intent to make a sale as an element of making an offer to sell:

> This instruction is erroneous. It states that the only intent required is the intent to make an offer and that an intent to make a sale is not necessary. In *People v. Brown* [citation omitted] we held that "a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under section 11501." Persons who offer to sell narcotics with no intention of performing are not engaged in narcotics traffic.

Transportation

Transportation does not require intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134.) Transportation also does not require possession by the defendant. (*Ibid.*)

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> Although possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may "transport" marijuana or other drugs even though they are in the exclusive possession of another.

(*Id.* at p. 134.)

> Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt [. . . .]

(*Id.* at pp. 135-136.) Thus, in *People v. Rogers, supra*, the court held that the defendant may be convicted of transporting marijuana where he was the driver of the car and a passenger in the car was in possession of the drug if the defendant knew of the presence and nature of the drug. (*Ibid.*)

Transportation of a controlled substance includes riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685.) The controlled substance must be moved “from one location to another” but the movement may be minimal. (*Id.* at p. 684.)

Definition of Marijuana
See Notes to 1723A.

Medical Marijuana
See Notes to 1723A.

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1730. Planting, etc., Marijuana

The defendant is charged [in Count ___] with [unlawfully] (planting/cultivating/harvesting/drying/processing) marijuana, a controlled substance.

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

1. **The defendant [unlawfully] (planted/cultivated/harvested/dried/processed) one or more marijuana plants.**

AND

2. **The defendant knew that the substance (he/she) (planted/cultivated/harvested/dried/processed) was marijuana.**

[Possession or cultivation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes[, or as the primary caregiver of a patient with a medical need,] when a physician has recommended [or approved] such use. The amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this charge.]

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

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

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therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]

BENCH NOTES

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

The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11358. (See Health & Saf. Code, § 11362.5.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [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 [defendant need not establish "medical necessity"].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

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

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

AUTHORITY

Elements ▸ Health & Saf. Code, § 11358.
Harvesting ▸ *People v. Villa* (1983) 144 Cal.App.3d 386, 390.
Aider and Abettor Liability ▸ *People v. Null* (1984) 157 Cal.App.3d 849, 852.
Medical Marijuana ▸ Health & Saf. Code, § 11362.5.
Burden of Proof for Defense of Medical Use ▸ *People v. Mower* (2002) 28 Cal.4th 457, 460.

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Amount Must Be Reasonably Related to Patient's Medical Needs ▸ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 70, 111.

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

Aider and Abettor Liability of Landowner
In *People v. Null* (1984) 157 Cal.App.3d 849, 852, the court held that a landowner could be convicted of aiding and abetting cultivation of marijuana based on his or her knowledge of the activity and failure to prevent it. "If [the landowner] knew of the existence of the illegal activity, her failure to take steps to stop it would aid and abet the commission of the crime. This conclusion is based upon the control that she had over her property." *(Ibid.)*

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STAFF NOTES

Health & Saf. Code, § 11358:

> Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment in the state prison.

Harvesting
People v. Villa (1983) 144 Cal.App.3d 386, 389-390 upheld a jury instruction defining "harvesting:"

> The instruction to the jury on the definition of "harvesting" was proper . . . The court [] gave a special instruction requested by the People as follows: "The word 'harvesting' is defined as the gathering of crops of any kind. The verb, to 'harvest,' means (a) to gather in (a crop): REAP . . . (b) to gather (a natural product) as if by harvesting." This instruction was based on Webster's Third new International Dictionary.

The Committee did not find the additional definition beyond "gather of crops of any kind" helpful and therefore omitted it from the instruction.

Definition of Marijuana
Health and Safety Code section 11018 defines marijuana as follows:

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

The Oxford English Dictionary defines "resin" as follows: A vegetable product, formed by secretion in special canals in almost all trees and plants, from many of which (as the fir and pine) it exudes naturally, or can be readily obtained by incision; various kinds are extensively used in making varnishes or adhesive compositions, and in pharmacy. (The Oxford English Dictionary Online (2nd Ed. 1989) http://dictionary.oed.com/entrance.dtl.)

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Aider and Abettor Liability--Landowner
In *People v. Null* (1984) 157 Cal.App.3d 849, 852, the court upheld giving an aider and abettor instruction that did not include the "mere knowledge is insufficient" language in a case in which the landowner was charged with aiding and abetting cultivation. The court stated,

> The "mere knowledge" paragraph would be inappropriate in this case where it was established that the defendant owned and possessed the real property on which grew a marijuana garden. If [the landowner] knew of the existence of the illegal activity, her failure to take steps to stop it would aid and abet the commission of the crime. This conclusion is based upon the control that she had over her property.

(*Ibid*.)

Medical Marijuana
Health & Safety Code section 11362.5(d) provides in pertinent part:

> Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

People v. Mower (2002) 28 Cal.4th 457, 460, held that "as to the facts underlying the defense provided by section 11362.5(d), defendant is required merely to raise a reasonable doubt."

Thus, in *People v. Jones* (2003) 2003DJDAR 11032, 11034, the court held that the trial court erred by excluding the medical marijuana defense where the defendant's testimony raised a reasonable doubt that a physician had approved the use.

Approved vs. Recommended
The Compassionate Use Act authorizes possession on "the written or oral recommendation or approval of a physician." (Health & Saf. Code § 11362.5(d).) In *People v. Jones* (2003) 2003DJDAR 11032, 11033, the court discussed the different meanings of these terms:

In *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1548, the court concluded the words "recommendation" and "approval" "mean something slightly different, and

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... 'approval' connotes a less formal act than a 'recommendation.'" We agree the two terms have different meanings, but the difference is not simply a matter of the degree of formality. To "recommend" something is "to present [it] as worthy of acceptance or trial." (Merriam-Webster's Collegiate Dict. (10th ed. 2001) p. 974.) "approve" something is to "express a favorable opinion of" it. (*Id.* at p. 57.) The word "recommendation," as used in the Compassionate Use Act, suggests the physician has raised the issue of marijuana use and presented it to the patient as a treatment that would benefit the patient's health by providing relief from an illness. The word "approval," on the other hand, suggests the patient has raised the issue of marijuana use, and the physician has expressed a favorable opinion of marijuana use as a treatment for the patient. Thus, a physician could *approve* of a patient's suggested use of marijuana without ever *recommending* its use.

Amount Must Be "Reasonably Related" to Patient's Medical Needs
According to *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550-1551,

> [T]he test should be whether the quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs.

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1740. Sale, Furnishing, etc., of Controlled Substance to Minor

The defendant is charged [in Count __] with (selling/furnishing/ administering/giving away) _____ *<insert type of controlled substance>***, a controlled substance, to someone under 18 years of age.**

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

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

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

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

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

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

[AND]

6. **The controlled substance that the defendant (sold/furnished/ administered/gave away) was _____** *<insert type of controlled substance>***.**

[AND

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

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

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

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

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

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

BENCH NOTES

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

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

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

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

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AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11353, 11354, 11380(a).
Age of Defendant Element of Offense ▸ *People v. Montalvo* (1971) 4 Cal.3d 328, 332.
No Defense of Good Faith Belief Offeree Over 18 ▸ *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760.
Administering ▸ Health & Saf. Code, § 11002.
Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75.
Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Usable Amount ▸ *People v. Piper* (1971) 19 Cal.3d 248, 250.

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

LESSER INCLUDED OFFENSES

Sale to Person Not a Minor ▸ Health & Saf. Code, §§ 11352, 11379.
Simple Possession of Controlled Substance ▸ Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [lesser related offense but not necessarily included].
Possession for Sale of Controlled Substance ▸ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [lesser related offense but not necessarily included].

RELATED ISSUES

No Defense of Good Faith Belief Over 18
"The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a 'mistake of fact' defense to the intent element of the crime. [Citations omitted.]" (*People v. Williams* (1991) 233 Cal.App.3d 407, 410–411.)

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STAFF NOTES

Health & Saf. Code, §11353, in relevant part:

> Every person 18 years of age or over, [. . .] (c) who unlawfully sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give, any such controlled substance to a minor, shall be punished by imprisonment in the state prison for a period of three, six, or nine years.

Health & Saf. Code, §11354(a), in relevant part:

> Every person under the age of 18 years who in any voluntary manner [. . .] unlawfully sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give, any such controlled substance to a minor shall be punished by imprisonment in the state prison.

Health & Saf. Code, §11380(a), in relevant part:

> Every person 18 years of age or over [. . .] who unlawfully furnishes, offers to furnish, or attempts to furnish those controlled substances to a minor shall be punished by imprisonment in the state prison for a period of three, six, or nine years.

Age of Defendant Element of Offense

In a case charging a violation of Health and Safety Code section 11353, the fact that the defendant is over 18 years old is an element of the offense that the prosecution must prove. (*People v. Montalvo* (1971) 4 Cal.3d 328, 332.) It is not an affirmative defense. (*Id.* at p. 333.)

No Good Faith Belief Defense as to Age of Offeree

> *People* v. *Lopez* (1969) 271 Cal.App.2d 754, is the controlling case on this issue. In *Lopez*, we held that a *Hernandez* defense is not available to a charge of furnishing marijuana to a minor. The *Lopez* decision pointed out that there is "nothing in the acts of the Legislature to indicate that Health and Safety Code section 11352 applies only when the offender knows he is dealing with a minor." (*Id*. at p. 760.) Instead, the sale-to-minor provisions "simply provide . . . greater punishment when the offeree is a minor. As a general proposition, it has been said that a mistake of fact relating only to the gravity of an offense will not shield a deliberate offender from the

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> full consequences of the wrong actually committed." (*Id*. at pp. 760-761.)
>
> The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a "mistake of fact" defense to the intent element of the crime. [Citations omitted.]

(*People v. Williams* (1991) 233 Cal.App.3d 407, 410-411.)

Knowledge

The defendant does not need to know which specific controlled substance is transported for sale:

> We see no grounds for construing knowledge of a drug's "narcotic character" to mean knowledge of its chemical composition or its peculiar intoxicating powers.

(*People v. Ochoa Romero* (1997) 55 Cal.App.4th 147, 153.)

Constructive Possession or Transportation

> It is well established that one may become criminally liable for possession for sale or for transportation of a controlled substance, based upon either actual or constructive possession of the substance. [Citations omitted.] Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another [. . .] Similarly, a defendant may be liable for constructive transportation of a controlled substance when his or her dominion and control are exercised through the acts of an agent.

(*People v. Morante* (1999) 20 Cal.4th 403, 417.)

Selling

In *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845, the Court of Appeal found:

> The evil which Health and Safety Code section 11351.5 is designed to proscribe is as surely present when a seller, rather than first

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> obtaining cash with which to purchase other commodities or services, obtains those items and considerations directly by making payment with the contraband itself [. . ..]
>
> There is no indication that the Legislature sought to prohibit only sales for cash. The conclusion that sale includes transfers other than for money comports with the evident purposes of the California legislation, the commonly accepted meaning of the term and settled rules of statutory interpretation.

Usable Quantity

As stated in the above quote, transportation requires "conveying a usable quantity of a controlled substance [. . ..]" (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682.) Sale of a controlled substance does not require possession of a usable amount. (*See People v. Peregrina-Larios* (1994) 22 Cal.app.4th 1522, 1524.)

Meaning of Administer

Health and Safety Code section 11002 defines "Administer" as follows:

> "Administer means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient for his immediate needs or to the body of a research subject by any of the following:
>
> (a) A practitioner or, in his presence, by his authorized agent.
> (b) The patient or research subject at the direction and in the presence of the practitioner.

Health & Safety Code Definition of "Administer" Applies

Section 11001 of the Health & Safety Code provides that "Unless the context otherwise requires, the definitions in this chapter [Division 10, Uniform Controlled Substances Act] govern the construction of this division."

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1741. Offering to Sell, Furnish, etc., Controlled Substance to Minor

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The defendant is charged [in Count ___] with offering to (sell/furnish/ administer/give away) _____ *<insert type of controlled substance>***, a controlled substance, to someone under 18 years of age.**

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

1. **The defendant offered to (sell/furnish/administer/give away) _____** *<insert controlled substance>***, a controlled substance, to _____** *<insert name of alleged recipient>***.**

2. **The defendant intended to (sell/furnish/administer/give away) the controlled substance.**

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

AND

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

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

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

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

BENCH NOTES

Instructional Duty

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

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If the defendant is charged with violating Health and Safety Code section 11354(a), in element 3, the court should replace "18 years of age or older" with "under 18 years of age."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11353, 11354, 11380(a).
Age of Defendant Element of Offense ▸ *People v. Montalvo* (1971) 4 Cal.3d 328, 332.
No Defense of Good Faith Belief Offeree Over 18 ▸ *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760.
Specific Intent ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470.
Administering ▸ Health & Saf. Code, § 11002.

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

LESSER INCLUDED OFFENSES

Offering to Sell to Person Not a Minor ▸ Health & Saf. Code, §§ 11352, 11360, 11379.
Simple Possession of Controlled Substance ▸ Health & Saf. Code, §§ 11350, 11377; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [lesser related offense but not necessarily included].
Possession for Sale of Controlled Substance ▸ Health & Saf. Code, §§ 11351, 11378; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547; but see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [lesser related offense but not necessarily included].

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs
A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469; *People v. Brown* (1960) 55 Cal.2d 64, 68.)

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No Defense of Good Faith Belief Over 18

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

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STAFF NOTES

Health & Saf. Code, §11353, in relevant part:

> Every person 18 years of age or over, [. . .] (c) who unlawfully sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give, any such controlled substance to a minor, shall be punished by imprisonment in the state prison for a period of three, six, or nine years.

Health & Saf. Code, §11354, in relevant part:

> (a) Every person under the age of 18 years who in any voluntary manner [. . .] unlawfully sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give, any such controlled substance to a minor shall be punished by imprisonment in the state prison.

Health & Saf. Code, §11380(a), in relevant part:

> Every person 18 years of age or over [. . .] who unlawfully furnishes, offers to furnish, or attempts to furnish those controlled substances to a minor shall be punished by imprisonment in the state prison for a period of three, six, or nine years.

Age of Defendant Element of Offense

In a case charging a violation of Health and Safety Code section 11353, the fact that the defendant is over 18 years old is an element of the offense that the prosecution must prove. (*People v. Montalvo* (1971) 4 Cal.3d 328, 332.) It is not an affirmative defense. (*Id.* at p. 333.)

No Good Faith Belief Defense as to Age of Offeree

> *People* v. *Lopez* (1969) 271 Cal.App.2d 754, is the controlling case on this issue. In *Lopez*, we held that a *Hernandez* defense is not available to a charge of furnishing marijuana to a minor. The *Lopez* decision pointed out that there is "nothing in the acts of the Legislature to indicate that Health and Safety Code section 11352 applies only when the offender knows he is dealing with a minor." (*Id*. at p. 760.) Instead, the sale-to-minor provisions "simply provide . . . greater punishment when the offeree is a minor. As a general proposition, it has been said that a mistake of fact relating only to the gravity of an offense will not shield a deliberate offender from the

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> full consequences of the wrong actually committed." (*Id*. at pp. 760-761.)
>
> The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a "mistake of fact" defense to the intent element of the crime. [Citations omitted.]

(*People v. Williams* (1991) 233 Cal.App.3d 407, 410-411.)

Knowledge

The defendant does not need to know which specific controlled substance is transported for sale:

> We see no grounds for construing knowledge of a drug's "narcotic character" to mean knowledge of its chemical composition or its peculiar intoxicating powers.

(*People v. Ochoa Romero* (1997) 55 Cal.App.4th 147, 153.)

Specific Intent

In *People v. Jackson* (1963) 59 Cal.2d 468, 469–470, the Supreme Court found fault with a jury instruction that did not include specific intent to make a sale as an element of making an offer to sell:

> This instruction is erroneous. It states that the only intent required is the intent to make an offer and that an intent to make a sale is not necessary. In *People v. Brown* (citation omitted) we held that "a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under section 11501." Persons who offer to sell narcotics with no intention of performing are not engaged in narcotics traffic.

No Requirement that Defendant Delivered or Possessed Drugs

> The evidence shows that defendant offered to sell heroin to Officer Lawrence, an undercover narcotics agent, that Officer Lawrence gave defendant $ 20, and that defendant did not deliver heroin or anything else.

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> Defendant contends that section 11501 does not encompass an offer to sell a narcotic when nothing is delivered. It is settled, however, that delivery is not an essential element of the offense of offering to sell a narcotic.

(*People v. Jackson* (1963) 59 Cal.2d 468, 469; *see also People v. Brown* (1960) 55 Cal.2d 64, 68.)

Health & Safety Code Definition of "Administer" Applies

Section 11001 of the Health & Safety Code provides that "Unless the context otherwise requires, the definitions in this chapter [Division 10, Uniform Controlled Substances Act] govern the construction of this division."

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1742. Employment of Minor to Sell Controlled Substance

The defendant is charged [in Count __] with (hiring/employing/using) someone under 18 years of age to (transport/carry/sell/give away/prepare for sale/peddle) _____ *<insert type of controlled substance>***, a controlled substance.**

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

1. **The defendant (hired/employed/used) _____** *<insert name of person hired>***.**

2. **_____** *<insert name of person hired>* **was (hired/employed/used) to (transport/carry/sell/give away/prepare for sale/peddle) _____** *<insert type of controlled substance>***, a controlled substance.**

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

4. **At that time, _____** *<insert name of person hired>* **was under 18 years of age.**

AND

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

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

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

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

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

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 violating Health and Safety Code section 11354(a), in element 3, the court should replace "18 years of age or older" with "under 18 years of age."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11353, 11354.
Age of Defendant Element of Offense ▸ *People v. Montalvo* (1971) 4 Cal.3d 328, 332.
Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75.
Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.

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

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STAFF NOTES

Health & Saf. Code, §11353, in relevant part:

> Every person 18 years of age or over, [. . .] (b) who hires, employs, or uses a minor to unlawfully transport, carry, sell, give away, prepare for sale, or peddle any such controlled substance, [. . .] shall be punished by imprisonment in the state prison for a period of three, six, or nine years.

Health & Saf. Code, §11354, in relevant part:

> (a) Every person under the age of 18 years [. . .] who hires, employs, or uses a minor to unlawfully transport, carry, sell, give away, prepare for sale, or peddle (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug [. . .] shall be punished by imprisonment in the state prison.

Age of Defendant Element of Offense
In a case charging a violation of Health and Safety Code section 11353, the fact that the defendant is over 18 years old is an element of the offense that the prosecution must prove. (*People v. Montalvo* (1971) 4 Cal.3d 328, 332.) It is not an affirmative defense. (*Id.* at p. 333.)

Knowledge
The defendant does not need to know which specific controlled substance is transported for sale:

> We see no grounds for construing knowledge of a drug's "narcotic character" to mean knowledge of its chemical composition or its peculiar intoxicating powers.

(*People v. Ochoa Romero* (1997) 55 Cal.App.4th 147, 153.)

Selling
In *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845, the Court of Appeal found:

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> The evil which Health and Safety Code section 11351.5 is designed to proscribe is as surely present when a seller, rather than first obtaining cash with which to purchase other commodities or services, obtains those items and considerations directly by making payment with the contraband itself [. . ..]
>
> There is no indication that the Legislature sought to prohibit only sales for cash. The conclusion that sale includes transfers other than for money comports with the evident purposes of the California legislation, the commonly accepted meaning of the term and settled rules of statutory interpretation.

Meaning of Administer

Health and Safety Code section 11002 defines "Administer" as follows:

> "Administer means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient for his immediate needs or to the body of a research subject by any of the following:
>
> (a) A practitioner or, in his presence, by his authorized agent.
> (b) The patient or research subject at the direction and in the presence of the practitioner.

Health & Safety Code Definition of "Administer" Applies

Section 11001 of the Health & Safety Code provides that "Unless the context otherwise requires, the definitions in this chapter [Division 10, Uniform Controlled Substances Act] govern the construction of this division."

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1743. Use of Minor as Agent to Violate Controlled Substance Law

The defendant is charged [in Count __] with using as an agent someone under 18 years of age to (transport/sell/give away/possess/possess for sale) _____ <*insert type of controlled substance*>, a controlled substance.

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

1. **The defendant used _____ <*insert name of person hired*> as an agent.**

2. **_____ <*insert name of person hired*> was used to (transport/sell/give away/possess/possess for sale) _____ <*insert type of controlled substance*>, a controlled substance.**

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

4. **At that time, _____ <*insert name of person hired*> was under 18 years of age.**

AND

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

An *agent* is a person who is authorized to act for someone else in dealings with third parties.

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

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

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

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

BENCH NOTES

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

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Health & Saf. Code, § 11380(a).
Age of Defendant Element of Offense ▸ *People v. Montalvo* (1971) 4 Cal.3d 328, 332.
Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75.
Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.
Agent ▸ Civ. Code, § 2295.

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

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STAFF NOTES

Health & Saf. Code, §11380(a), in relevant part:

> Every person 18 years of age or over who violates any provision of this chapter involving controlled substances which are (1) classified in Schedule III, IV, or V and which are not narcotic drugs or (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), specified in paragraph (11) of subdivision (c) of Section 11056, specified in paragraph (2) or (3) or subdivision (f) of Section 11054, or specified in subdivision (d), (e), or (f) of Section 11055, by the use of a minor as agent [. . .] shall be punished by imprisonment in the state prison for a period of three, six, or nine years.

Used "as Agent"

Civil Code section 2295 defines "agent" as, "one who represents another, called the principal, in dealings with third persons." CALJIC provides a separate instruction for use of a minor "as an agent" to violate Health and Safety Code sections 11377, 11378 or 11379.

See Notes to 1742 for other topics.

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1744. Inducing Minor to Violate Controlled Substance Laws

The defendant is charged [in Count __] with (soliciting/inducing/encouraging/intimidating) someone under 18 years of age to commit the crime of _____ *<insert description of Health and Safety Code violation alleged>***.**

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

1. **The defendant willfully (solicited/induced/encouraged/intimidated) _____** *<insert name of person solicited>* **to commit the crime of _____** *<insert description of Health and Safety Code violation alleged>* **[of] _____** *<insert type of controlled substance>***.**

2. **The defendant intended that _____** *<insert name of person solicited>* **would commit that crime.**

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

AND

4. **At that time, _____** *<insert name of person solicited>* **was under 18 years of age.**

The defendant intended that _____ *<insert name of person solicited>* **would commit the crime of _____** *<insert description of Health and Safety Code violation alleged>* **if the defendant intended that:**

<INSERT THE ELEMENTS OF THE CRIME, SUBSTITUTING THE NAME OF THE PERSON SOLICITED FOR "DEFENDANT" AND CHANGING PAST TENSE TO PRESENT TENSE.>

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

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

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<Defense: Good Faith Belief Over 18>
[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ *<insert name of person solicited>* **was 18 years of age or older. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that _____** *<insert name of person solicited>* **was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

BENCH NOTES

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

The court has a **sua sponte** duty to give the final bracketed paragraph if there is substantial evidence supporting the defense that the defendant had a reasonable and good faith belief that the person was over 18 years of age. (*People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037.)

Where indicated in the instruction, insert a description of the Health and Safety Code violation allegedly solicited. For example, "the crime of possession for sale of cocaine," or "the crime of sale of marijuana."

If the defendant is charged with violating Health and Safety Code section 11354(a), in element 3, the court should replace "18 years of age or older" with "under 18 years of age."

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Health & Saf. Code, §§ 11353, 11354, 11380(a).
Age of Defendant Element of Offense ▸ *People v. Montalvo* (1971) 4 Cal.3d 328, 332.
Good Faith Belief Minor Over 18 Defense to Inducing or Soliciting ▸ *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 103, 104.

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STAFF NOTES

Health & Saf. Code, § 11353:

> Every person 18 years of age or over, (a) who in any voluntary manner solicits, induces, encourages, or intimidates any minor with the intent that the minor shall violate any provision of this chapter or Section 11550 with respect to either (1) a controlled substance which is specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) or Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, [. . .] shall be punished by imprisonment in the state prison for a period of three, six, or nine years.

Health & Saf. Code, §11354, in relevant part:

> (a) Every person under the age of 18 years who in any voluntary manner solicits, induces, encourages, or intimidates any minor with the intent that the minor shall violate any provision of this chapter or Section 11550, [. . .] shall be punished by imprisonment in the state prison.

Health & Saf. Code, §11380(a), in relevant part:

> Every person 18 years of age or over who violates any provision of this chapter involving controlled substances which are (1) classified in Schedule III, IV, or V and which are not narcotic drugs or (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), specified in paragraph (11) of subdivision (c) of Section 11056, specified in paragraph (2) or (3) or subdivision (f) of Section 11054, or specified in subdivision (d), (e), or (f) of Section 11055, [. . .] who solicits, induces, encourages, or intimidates any minor with the intent that the minor shall violate any provision of this article involving those controlled substances [. . .] shall be punished by imprisonment in the state prison for a period of three, six, or nine years.

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Good Faith Belief Minor Over 18

> Contention: "The trial court erred by refusing appellant's requested jury instruction pertaining to the defense of reasonable belief that the victim-minors were adults." [. . .]
>
> It is significant to Goldstein's contention that Health and Safety Code sections 11361 and 11353 relate only to minors. [. . .] It is *not* a criminal offense to so "solicit, induce, encourage, and intimidate" adult persons.
>
> A clearly indicated defense of Goldstein at the trial was that he had entertained a good faith belief that the minors of the charged offenses were 18 years of age or older.
>
> He therefore requested that as to "Counts IV and XII" the court give the instruction: "It is a defense to the charge of furnishing marijuana to a minor that the defendant reasonably believed that the person was 18 years of age or older"; and that as to "Counts III, XI and XVI" it give the instruction: "It is a defense to the charge of furnishing the controlled substance of cocaine to a minor that the defendant reasonably believed that the person was 18 years of age or older."
>
> The requested instructions were rejected by the trial court. [. . .]
>
> "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense . . . . So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication." [Quoting *People* v. *Hernandez* (1964) 61 Cal.2d 529, 530] [. . . .]
>
> Moreover, it appearing that Goldstein's defense to the instant charges was a good faith belief that the complaining witnesses were 18 years of age or older, the trial court was under a duty, *sua sponte*, to give correctly phrased instructions on that theory

(*People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036-1037.)

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Age of Defendant Element of Offense
In a case charging a violation of Health and Safety Code section 11353, the fact that the defendant is over 18 years old is an element of the offense that the prosecution must prove. (*People v. Montalvo* (1971) 4 Cal.3d 328, 332.) It is not an affirmative defense. (*Id.* at p. 333.)

"Induce"

> The word "induce" means "To lead on; to influence; to prevail on; to move by persuasion or influence." The word "encourage" means "To give courage to; to inspire with courage, spirit, or hope; to raise the confidence of; to animate; hearten." (Webster's New International Dictionary, Second Edition Unabridged.)

(*People v. Drake* (1957) 151 Cal.App.2d 28, 39.)

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1745. Sale, Furnishing, etc., of Marijuana to Minor

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

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

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

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

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

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

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

[AND]

6. **The controlled substance that the defendant (sold/furnished/ administered/gave away) was marijuana.**

[AND

7. **The marijuana was a usable amount.]**

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

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

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

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

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

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

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

BENCH NOTES

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

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

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524.) When the prosecution alleges sales, do not use bracketed element 7 or the definition of usable amount.

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There is no case law on whether furnishing, administering, or giving away require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [same].) Element 7 and the bracketed definition of usable amount are provided here for the court to use at its discretion.

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

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Health & Saf. Code, § 11361.
Age of Defendant Element of Offense ▸ *People v. Montalvo* (1971) 4 Cal.3d 328, 332.
No Defense of Good Faith Belief Offeree Over 18 ▸ *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760.
Administering ▸ Health & Saf. Code, § 11002.
Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75.
Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Usable Amount ▸ *People v. Piper* (1971) 19 Cal.3d 248, 250.

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

LESSER INCLUDED OFFENSES

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

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RELATED ISSUES

No Defense of Good Faith Belief Over 18

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

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Health & Saf. Code, §11361, in relevant part:

> (a) Every person 18 years of age or over [. . .] who unlawfully sells, or offers to sell, any marijuana to a minor, or who furnishes, administers, or gives, or offers to furnish, administer, or give any marijuana to a minor under 14 years of age, [. . .] shall be punished by imprisonment in the state prison for a period of three, five, or seven years.
>
> (b) Every person 18 years of age or over who furnishes, administers, or gives, or offers to furnish, administer, or give, any marijuana to a minor 14 years of age or older shall be punished by imprisonment in the state prison for a period of three, four, or five years.

Age of Defendant Element of Offense

In a case charging a violation of Health and Safety Code section 11353, the fact that the defendant is over 18 years old is an element of the offense that the prosecution must prove. (*People v. Montalvo* (1971) 4 Cal.3d 328, 332.) It is not an affirmative defense. (*Id.* at p. 333.)

No Good Faith Belief Defense as to Age of Offeree

> *People* v. *Lopez* (1969) 271 Cal.App.2d 754, is the controlling case on this issue. In *Lopez*, we held that a *Hernandez* defense is not available to a charge of furnishing marijuana to a minor. The *Lopez* decision pointed out that there is "nothing in the acts of the Legislature to indicate that Health and Safety Code section 11352 applies only when the offender knows he is dealing with a minor." (*Id*. at p. 760.) Instead, the sale-to-minor provisions "simply provide . . . greater punishment when the offeree is a minor. As a general proposition, it has been said that a mistake of fact relating only to the gravity of an offense will not shield a deliberate offender from the full consequences of the wrong actually committed." (*Id*. at pp. 760-761.)
>
> The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a "mistake of fact" defense to the intent element of the crime. [Citations omitted.]

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(*People v. Williams* (1991) 233 Cal.App.3d 407, 410-411.)

Knowledge
The defendant does not need to know which specific controlled substance is transported for sale:

> We see no grounds for construing knowledge of a drug's "narcotic character" to mean knowledge of its chemical composition or its peculiar intoxicating powers.

(*People v. Ochoa Romero* (1997) 55 Cal.App.4th 147, 153.)

Constructive Possession or Transportation

> It is well established that one may become criminally liable for possession for sale or for transportation of a controlled substance, based upon either actual or constructive possession of the substance. [Citations omitted.] Constructive possession exists where a defendant maintains some control or right to control contraband that is in the actual possession of another [. . .] Similarly, a defendant may be liable for constructive transportation of a controlled substance when his or her dominion and control are exercised through the acts of an agent.

(*People v. Morante* (1999) 20 Cal.4th 403, 417.)

Selling
In *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845, the Court of Appeal found:

> The evil which Health and Safety Code section 11351.5 is designed to proscribe is as surely present when a seller, rather than first obtaining cash with which to purchase other commodities or services, obtains those items and considerations directly by making payment with the contraband itself [. . ..]
>
> There is no indication that the Legislature sought to prohibit only sales for cash. The conclusion that sale includes transfers other than for money comports with the evident purposes of the California legislation, the commonly accepted meaning of the term and settled rules of statutory interpretation.

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Usable Quantity
As stated in the above quote, transportation requires "conveying a usable quantity of a controlled substance [. . ..]" (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682.) Sale of a controlled substance does not require possession of a usable amount. (*See People v. Peregrina-Larios* (1994) 22 Cal.app.4th 1522, 1524.)

Meaning of Administer
Health and Safety Code section 11002 defines "Administer" as follows:

> "Administer means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient for his immediate needs or to the body of a research subject by any of the following:
>
> (a) A practitioner or, in his presence, by his authorized agent.
> (b) The patient or research subject at the direction and in the presence of the practitioner.

Health & Safety Code Definition of "Administer" Applies
Section 11001 of the Health & Safety Code provides that "Unless the context otherwise requires, the definitions in this chapter [Division 10, Uniform Controlled Substances Act] govern the construction of this division."

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1746. Offering to Sell, Furnish, etc., Marijuana to Minor

The defendant is charged [in Count ___] with offering to (sell/furnish/ administer/give away) marijuana, a controlled substance, to someone under (18/14) years of age.

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

1. **The defendant offered to (sell/furnish/administer/give away) marijuana, a controlled substance, to _____** *<insert name of alleged recipient>***.**

2. **The defendant intended to (sell/furnish/administer/give away) the controlled substance.**

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

AND

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

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

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

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

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

BENCH NOTES

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

In element 4, give the alternative of "under 14 years of age" only if the defendant is charged with offering to furnish, administer, or give away marijuana to a minor under 14. (Health & Saf. Code, § 11361(a).)

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

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Health & Saf. Code, § 11361.
Age of Defendant Element of Offense ▸ *People v. Montalvo* (1971) 4 Cal.3d 328, 332.
No Defense of Good Faith Belief Offeree Over 18 ▸ *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760.
Specific Intent ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470.
Administering ▸ Health & Saf. Code, § 11002.

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

LESSER INCLUDED OFFENSES

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

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RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs
A defendant may be convicted of offering to sell even if there is no evidence that he or she delivered or ever possessed any controlled substance. (*People v. Jackson* (1963) 59 Cal.2d 468, 469; *People v. Brown* (1960) 55 Cal.2d 64, 68.)

No Defense of Good Faith Belief Over 18
"The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the offerer. It therefore does not give rise to a 'mistake of fact' defense to the intent element of the crime. [Citations omitted.]" (*People v. Williams* (1991) 233 Cal.App.3d 407, 410–411.)

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STAFF NOTES

Health & Saf. Code, §11361, in relevant part:

> (a) Every person 18 years of age or over [. . .] who unlawfully sells, or offers to sell, any marijuana to a minor, or who furnishes, administers, or gives, or offers to furnish, administer, or give any marijuana to a minor under 14 years of age, [. . .] shall be punished by imprisonment in the state prison for a period of three, five, or seven years.
>
> (b) Every person 18 years of age or over who furnishes, administers, or gives, or offers to furnish, administer, or give, any marijuana to a minor 14 years of age or older shall be punished by imprisonment in the state prison for a period of three, four, or five years.

Age of Defendant Element of Offense

In a case charging a violation of Health and Safety Code section 11353, the fact that the defendant is over 18 years old is an element of the offense that the prosecution must prove. (*People v. Montalvo* (1971) 4 Cal.3d 328, 332.) It is not an affirmative defense. (*Id.* at p. 333.)

No Good Faith Belief Defense as to Age of Offeree

> *People* v. *Lopez* (1969) 271 Cal.App.2d 754, is the controlling case on this issue. In *Lopez*, we held that a *Hernandez* defense is not available to a charge of furnishing marijuana to a minor. The *Lopez* decision pointed out that there is "nothing in the acts of the Legislature to indicate that Health and Safety Code section 11352 applies only when the offender knows he is dealing with a minor." (*Id*. at p. 760.) Instead, the sale-to-minor provisions "simply provide . . . greater punishment when the offeree is a minor. As a general proposition, it has been said that a mistake of fact relating only to the gravity of an offense will not shield a deliberate offender from the full consequences of the wrong actually committed." (*Id*. at pp. 760-761.)
>
> The specific intent for the crime of selling cocaine to a minor is the intent to sell cocaine, not the intent to sell it to a minor. [Citations omitted.] It follows that ignorance as to the age of the offeree neither disproves criminal intent nor negates an evil design on the part of the

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> offerer. It therefore does not give rise to a "mistake of fact" defense to the intent element of the crime. [Citations omitted.]

(*People v. Williams* (1991) 233 Cal.App.3d 407, 410-411.)

Knowledge
The defendant does not need to know which specific controlled substance is transported for sale:

> We see no grounds for construing knowledge of a drug's "narcotic character" to mean knowledge of its chemical composition or its peculiar intoxicating powers.

(*People v. Ochoa Romero* (1997) 55 Cal.App.4th 147, 153.)

Specific Intent
In *People v. Jackson* (1963) 59 Cal.2d 468, 469–470, the Supreme Court found fault with a jury instruction that did not include specific intent to make a sale as an element of making an offer to sell:

> This instruction is erroneous. It states that the only intent required is the intent to make an offer and that an intent to make a sale is not necessary. In *People v. Brown* (citation omitted) we held that "a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under section 11501." Persons who offer to sell narcotics with no intention of performing are not engaged in narcotics traffic.

No Requirement that Defendant Delivered or Possessed Drugs

> The evidence shows that defendant offered to sell heroin to Officer Lawrence, an undercover narcotics agent, that Officer Lawrence gave defendant $ 20, and that defendant did not deliver heroin or anything else.
>
> Defendant contends that section 11501 does not encompass an offer to sell a narcotic when nothing is delivered. It is settled, however, that delivery is not an essential element of the offense of offering to sell a narcotic.

(*People v. Jackson* (1963) 59 Cal.2d 468, 469; *see also People v. Brown* (1960) 55 Cal.2d 64, 68.)

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Health & Safety Code Definition of "Administer" Applies
Section 11001 of the Health & Safety Code provides that "Unless the context otherwise requires, the definitions in this chapter [Division 10, Uniform Controlled Substances Act] govern the construction of this division."

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1747. Employment of Minor to Sell, etc., Marijuana

The defendant is charged [in Count __] with (hiring/employing/using) someone under 18 years of age to (transport/carry/sell/give away/prepare for sale/peddle) marijuana, a controlled substance.

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

1. **The defendant (hired/employed/used) _____** *<insert name of person hired>***.**

2. **_____** *<insert name of person hired>* **was (hired/employed/used) to (transport/carry/sell/give away/prepare for sale/peddle) marijuana, a controlled substance.**

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

4. **At that time, _____** *<insert name of person hired>* **was under 18 years of age.**

AND

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

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

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

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

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therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]

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

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

BENCH NOTES

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

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

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Health & Saf. Code, § 11361(a).
Age of Defendant Element of Offense ▸ *People v. Montalvo* (1971) 4 Cal.3d 328, 332.
Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75.
Selling ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.

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

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STAFF NOTES

Health & Saf. Code, §11361, in relevant part:

> (a) Every person 18 years of age or over who hires, employs, or uses a minor in unlawfully transporting, carrying, selling, giving away, preparing for sale, or peddling any marijuana [. . .] shall be punished by imprisonment in the state prison for a period of three, five, or seven years.

Age of Defendant Element of Offense
In a case charging a violation of Health and Safety Code section 11353, the fact that the defendant is over 18 years old is an element of the offense that the prosecution must prove. (*People v. Montalvo* (1971) 4 Cal.3d 328, 332.) It is not an affirmative defense. (*Id.* at p. 333.)

Knowledge
The defendant does not need to know which specific controlled substance is transported for sale:

> We see no grounds for construing knowledge of a drug's "narcotic character" to mean knowledge of its chemical composition or its peculiar intoxicating powers.

(*People v. Ochoa Romero* (1997) 55 Cal.App.4th 147, 153.)

Selling
In *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845, the Court of Appeal found:

> The evil which Health and Safety Code section 11351.5 is designed to proscribe is as surely present when a seller, rather than first obtaining cash with which to purchase other commodities or services, obtains those items and considerations directly by making payment with the contraband itself [. . ..]
>
> There is no indication that the Legislature sought to prohibit only sales for cash. The conclusion that sale includes transfers other than for money comports with the evident purposes of the California legislation, the commonly accepted meaning of the term and settled rules of statutory interpretation.

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Meaning of Administer
Health and Safety Code section 11002 defines "Administer" as follows:

> "Administer means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient for his immediate needs or to the body of a research subject by any of the following:
>
> (a) A practitioner or, in his presence, by his authorized agent.
> (b) The patient or research subject at the direction and in the presence of the practitioner.

Health & Safety Code Definition of "Administer" Applies
Section 11001 of the Health & Safety Code provides that "Unless the context otherwise requires, the definitions in this chapter [Division 10, Uniform Controlled Substances Act] govern the construction of this division."

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1748. Inducing Minor to Use Marijuana

The defendant is charged [in Count __] with inducing someone under 18 years of age to use marijuana.

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

1. **The defendant (encouraged/persuaded/solicited/intimidated/induced) _____** *<insert name of person solicited>* **to use marijuana.**

2. **At that time, the defendant was at least 18 years of age or older.**

AND

3. **At that time, _____** *<insert name of person solicited>* **was under 18 years of age.**

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

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

<Defense: Good Faith Belief Over 18>
[The defendant is not guilty of this crime if (he/she) reasonably and actually believed that _____ *<insert name of person solicited>* **was at least 18 years of age. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that _____** *<insert name of person solicited>* **was at least 18 years of age. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

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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.

The court has a **sua sponte** duty to give the final bracketed paragraph if there is substantial evidence supporting the defense that the defendant had a reasonable and good faith belief that the person was over 18 years of age. (*People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037.)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850.)

AUTHORITY

Elements ▸ Health & Saf. Code, § 11361(a).
Age of Defendant Element of Offense ▸ *People v. Montalvo* (1971) 4 Cal.3d 328, 332.
Good Faith Belief Minor Over 18 Defense to Inducing or Soliciting ▸ *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037.

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

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STAFF NOTES

Health & Saf. Code, §11361, in relevant part:

> Every person 18 years of age or over [. . .] who induces a minor to use marijuana in violation of law shall be punished by imprisonment in the state prison for a period of three, five, or seven years.

Good Faith Belief Minor Over 18

> Contention: "The trial court erred by refusing appellant's requested jury instruction pertaining to the defense of reasonable belief that the victim-minors were adults." [. . .]
>
> It is significant to Goldstein's contention that Health and Safety Code sections 11361 and 11353 relate only to minors. [. . .] It is *not* a criminal offense to so "solicit, induce, encourage, and intimidate" adult persons.
>
> A clearly indicated defense of Goldstein at the trial was that he had entertained a good faith belief that the minors of the charged offenses were 18 years of age or older.
>
> He therefore requested that as to "Counts IV and XII" the court give the instruction: "It is a defense to the charge of furnishing marijuana to a minor that the defendant reasonably believed that the person was 18 years of age or older"; and that as to "Counts III, XI and XVI" it give the instruction: "It is a defense to the charge of furnishing the controlled substance of cocaine to a minor that the defendant reasonably believed that the person was 18 years of age or older."
>
> The requested instructions were rejected by the trial court. [. . .]
>
> "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense . . . . So far as I am aware it has never been suggested that these exceptions do not equally apply to the case of statutory offenses unless they are excluded expressly or by necessary implication." [Quoting *People* v. *Hernandez* (1964) 61 Cal.2d 529, 530] [. . . .]

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> Moreover, it appearing that Goldstein's defense to the instant charges was a good faith belief that the complaining witnesses were 18 years of age or older, the trial court was under a duty, *sua sponte*, to give correctly phrased instructions on that theory

(*People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036-1037.)

Age of Defendant Element of Offense

In a case charging a violation of Health and Safety Code section 11353, the fact that the defendant is over 18 years old is an element of the offense that the prosecution must prove. (*People v. Montalvo* (1971) 4 Cal.3d 328, 332.) It is not an affirmative defense. (*Id.* at p. 333.)

"Induce"

> The word "induce" means "To lead on; to influence; to prevail on; to move by persuasion or influence." The word "encourage" means "To give courage to; to inspire with courage, spirit, or hope; to raise the confidence of; to animate; hearten." (Webster's New International Dictionary, Second Edition Unabridged.)

(*People v. Drake* (1957) 151 Cal.App.2d 28, 39.)

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1760. Maintaining a Place for Controlled Substance Sale or Use

---

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

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

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

AND

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

BENCH NOTES

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

AUTHORITY

Elements ▸ Health & Saf. Code, § 11366.
Purpose Must Be Continuous or Repetitive Use of Place for Illegal Activity ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 72; *People v. Holland* (1958) 158 Cal.App.2d 583, 588–589.
Jury Must Be Instructed on Continuous or Repeated Use ▸ *People v. Shoals* (1992) 8 Cal.App.4th 475, 490.

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

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STAFF NOTES

Health & Saf. Code §11368:

> Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance which is (1) specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (13), (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b), (c), paragraph (1) or (2) of subdivision (d), or paragraph (3) of subdivision (e) of Section 11055, or (2) which is a narcotic drug classified in Schedule III, IV, or V, shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison.

Intent to Engage in "Continuous" Activity

> The proscribed "purpose" is one that contemplates a continuity of such unlawful usage; a single or isolated instance of the forbidden conduct does not suffice. Moreover, despite the prosecution's contrary argument, the requirement of a purpose for such sequential use is not limited to maintenance; it embraces both opening and maintenance. To "open" the place for a single sale or use is no more covered by the statute than to maintain it for such singular purpose; the Legislature set up no such artificial distinction. It obviously condemned either opening or maintaining for the purpose of repetitious or successive unlawful conduct.

(*People v. Horn* (1960) 187 Cal.App.2d 68, 72.)

In *People v. Horn, supra*, the court cited *People v. Holland* (1958) 158 Cal.App.2d 583, 588-589, which stated:

> There is no evidence that this barbecue stand was opened for the prohibited purpose. To constitute the offense of "maintaining" there must be some purpose of continuity in the use of the place for the proscribed illegal conduct. [Citations.] In *People v. Mehra, supra*, the court said, [. . .]
>
> "[T]here must be shown to establish the fact of maintaining a common nuisance, a series of sales or a single sale, accompanied by such attendant circumstances as reasonably raise the inference of the

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> purpose for which the possession of the intoxicating liquor is had, or possession, in connection with surrounding circumstances, such as the large quantity of liquor on hand, the various kinds of liquor, the containers in which it is kept, the character of the place, the manner in which it is fitted up, the use of passwords in gaining access to the premises, evidence of people visiting the place in unusual numbers or at unusual times, all of which may reasonably raise the inference of a purpose to sell and sufficiently support the charge of maintaining a common nuisance."
>
> So in *People* v. *Calvert, supra*, the court said (80 Cal.App. 52): "It is true that a single sale as such standing alone is not sufficient upon which to predicate a charge of nuisance. . . ."
>
> Here we have proof of a single sale by the appellant in the barbecue stand and no other evidence of any conduct with which the appellant is in any way connected which would furnish any ground for an inference that appellant was maintaining the stand for the purpose of selling narcotics. The two other sales of narcotics at the barbecue stand were not proved to have been made by appellant, by an employee of appellant or with the knowledge of the appellant. The testimony is clear that appellant was not seen by any witness at the time either of the other sales was made. In the only cases cited by the People a series of sales by the defendant and other circumstances personally brought home to the defendant's knowledge were proved which would reasonably support the inference that he was "maintaining" the place for the prohibited illegal purpose [Citations.] [. . .] From all of the cases herein cited on the subject the rule is clear that evidence of a single, isolated instance of the sale of narcotics, standing alone, without any other corroborating circumstances of which the defendant is shown to have any knowledge, is not legally sufficient to prove that he was "maintaining" the place at which the single sale was made for the purpose of selling narcotics.

(*See also People v. Clay* (1969) 273 Cal.App.2d 279, 283 [circumstances surrounding single transaction, including defendant’s statements that location was used for drug sales, sufficient to establish continuing purpose].)

> Jury Must Be Instructed on Continuous or Repeated Use
>
> [T]he courts have held that Health and Safety Code section 11366 and its predecessor, section 11557, are aimed at places intended for a continuing course of use or distribution.

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> This concept must be made clear to the fact finder. Therefore, we agree with appellant that defining "maintaining" and "opening" is necessary because the statute employs a technical, legal meaning of these terms which is not likely to be commonly understood.

(*People v. Shoals* (1992) 8 Cal.App.4th 475, 490.)

Sales Not Required

> Health and Safety Code section 11366 does not require that the place be maintained for the purpose of selling; it can be violated without selling, merely by providing a place for drug abusers to gather and share their experience.

(*People v. Green* (1988) 200 Cal.App.3d 538, 544.)

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1761. Possession of Controlled Substance While Armed With Firearm

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

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

1. **The defendant possessed a controlled substance.**

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

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

4. **The controlled substance that the defendant possessed was _____** *<insert type of controlled substance specified in Health & Saf. Code, § 11370.1>***.**

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

AND

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

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

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

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

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[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/other people).]

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

BENCH NOTES

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

AUTHORITY

Elements ▸ Health & Saf. Code, § 11370.1; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Knowledge ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75.
Usable Amount ▸ *People v. Piper* (1971) 19 Cal.3d 248, 250.
Loaded Firearm ▸ *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153.

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

LESSER INCLUDED OFFENSES

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

See also Firearm Possession instructions, 1810 to 1825.

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

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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.)

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STAFF NOTES

Health & Saf. Code § 11370.1:

(a) Notwithstanding Section 11350 or 11377 or any other provision of law, every person who unlawfully possesses any amount of a substance containing cocaine base, a substance containing cocaine, a substance containing heroin, a substance containing methamphetamine, a crystalline substance containing phencyclidine, a liquid substance containing phencyclidine, plant material containing phencyclidine, or a hand-rolled cigarette treated with phencyclidine while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years.

(1) As used in this subdivision, "armed with" means having available for immediate offensive or defensive use.

Elements
People v. Palaschak (9 Cal.4th 1236, 1242) provides the elements for simple possession of a controlled substance:

> The essential elements of possession of a controlled substance are "dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character. Each of these elements may be established circumstantially."

[Citations omitted.]

The knowledge requirement has also been expressed thus:

> In order to sustain a conviction of possession of narcotics it must be shown that the defendant had either physical or constructive possession, and that he was aware that the substance of which he had possession was a narcotic.

(*People v. Gorg* (1955) 45 Cal.2d 776, 780.)

Knowledge
The defendant does not need to know which specific controlled substance he possesses:

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> [K]nowledge for the purpose of conviction under Health and Safety Code section 11377, is knowledge of the controlled nature of the substance and not its precise chemical composition. Although the *Garringer* court dealt with mere possession rather than possession for sale, the knowledge element is the same.

(*People v. Guy* (1980) 107 Cal.App.3d 593, 601.)

Constructive Possession

This instruction follows the analysis in *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 (*citing Armstrong v Superior Court* (1990) 217 Cal.App.3d 535, 539–540):

> For purposes of drug transactions, the terms 'control' and 'right to control' are aspects of a single overriding inquiry into when the law may punish an individual who is exercising such a degree of intentional direction over contraband that he can be justifiably and fairly punished in the same manner as if he were indeed in actual physical possession of a controlled substance . . . *Armstrong* made clear that merely agreeing to buy contraband, without more, does *not* constitute constructive possession. It stated, "Likewise we reject the position that a verbal agreement or contract to purchase drugs will, alone, establish constructive possession. We have found no authority which has established constructive possession based upon a bare agreement to purchase illegal contraband. We thus conclude that in the prosecution of an individual for the offense of possession of narcotics for purposes of sale, the nature and terms of such purchase agreements are more appropriately factors in determining whether the defendant has exercised the requisite control over the illegal goods." [Emphasis in original.]

Firearm Defined

The definition of "firearm" is borrowed from instruction 875, Assault With a Deadly Weapon or Force Likely to Produce Great Bodily Injury, which is based on Penal Code section 12001(b):

> As used in this title, "firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

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Usable Amount
People v. Piper (1971) 19 Cal.App.3d 248, 250, held:

> The prosecution bears its burden when it shows the substance defendant possessed was marijuana and it was of a quantity which could be potentiated by consumption in any of the manners customarily employed by users, rather than useless traces or debris of narcotic.

The *Piper* court specifically rejected the notion that the usable amount must be enough to effect the user:

> [Defendant's] sole contention on appeal is the prosecution did not bear its burden of showing he possessed a "usable" quantity of marijuana because no quantitative analysis of the marijuana was made to establish the particular marijuana he possessed had a potential to produce a narcotic effect on one using it. The law regulating possession of marijuana draws not distinction between a high grade and a low grade plant . . . The legislative intent is to regulate the possession of marijuana in any form. Possession is not privileged because the particular plant may contain a low level of THC any more than it would be privileged to a person who has developed a high tolerance to the narcotic effect of marijuana.

Health and Safety Code section 11370.1 states that it applies to possession of "any amount" of a controlled substance. The Task Force has interpreted this as meaning a "usable amount," consistent with case law on simple possession. Staff found no cases on the issue. CALJIC uses the phrase "usable amount" but advices the trail judge that he or she may delete this phrase if the judge deems appropriate.

Loaded Firearm

> The term "loaded" HAS A COMMONLY UNDERSTOOD MEANING: "to put a load or charge in (a device or piece of equipment) a gun" or "to put a load on or in a carrier, device, or container; *esp*: to insert the charge or cartridge into the chamber of a firearm." (Webster's New Collegiate Dict. (1976) p. 674.)

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> 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. The shells here were placed in a separate storage compartment of the shotgun and were not yet "loaded" as the term is commonly understood.

(*People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [emphasis in original].)

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1762. Use of False Compartment to Conceal Controlled Substance

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The defendant is charged [in Count ___] with (possessing/using/controlling) a false compartment in a vehicle with the intent to (store/conceal/smuggle/transport) a controlled substance.

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

<A. Possessed, Used, Controlled>

1. **[The defendant (possessed/used/controlled) a false compartment in a vehicle with the intent to (store/conceal/smuggle/transport) a controlled substance in it.]**

[OR

<B. Designed, Built, etc.>

2. **][The defendant (designed/constructed/built/altered/fabricated/installed/attached) a false compartment (for/in/to) a vehicle with the intent to (store/conceal/smuggle/transport) a controlled substance in it.]**

A *false compartment* is any box, container, space, or enclosure (within/attached to) a vehicle that is intended or designed to (conceal[,]/hide[,]/[or] otherwise prevent discovery of) any controlled substance. A false compartment may be ((a/an) (false/modified/altered) fuel tank[,]/original factory equipment of a vehicle that is (modified/altered/changed)[,]/ [or] a compartment, space, or box that is added to, or made or created from, existing compartments, spaces, or boxes within a vehicle).

A *vehicle* includes any car, truck, bus, aircraft, boat, ship, yacht, or vessel.

[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/other people).]

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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 either optional paragraph A, B, or both, depending on the charged crime and the evidence proffered at trial.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11366.8.
False Compartment Does Not Require Modification ▸ *People v. Gonzalez* (2004) 116 Cal.App.4th 1405, 1414.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 117.

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STAFF NOTES

Health & Saf. Code § 11366.8:

(a) Every person who possesses, uses, or controls a false compartment with the intent to store, conceal, smuggle, or transport a controlled substance within the false compartment shall be punished by imprisonment in a county jail for a term of imprisonment not to exceed one year or in the state prison.

(b) Every person who designs, constructs, builds, alters, or fabricates a false compartment for, or installs or attaches a false compartment to, a vehicle with the intent to store, conceal, smuggle, or transport a controlled substance shall be punished by imprisonment in the state prison for 16 months or two or three years.

(c) The term “vehicle” means any of the following vehicles without regard to whether the vehicles are private or commercial, including, but not limited to, cars, trucks, buses, aircraft, boats, ships, yachts, and vessels.

(d) The term “false compartment” means any box, container, space, or enclosure that is intended for use or designed for use to conceal, hide, or otherwise prevent discovery of any controlled substance within or attached to a vehicle, including, but not limited to, any of the following:
   (1) False, altered, or modified fuel tanks.
   (2) Original factory equipment of a vehicle that is modified, altered or changed.
   (3) Compartment, space, or a box that is added to, or fabricated, made, or created from, existing compartments, spaces, or boxes within a vehicle.
   (4) As used in this subdivision, “armed with” means having available for immediate offensive or defensive use.

False Compartment Does Not Require Modification

The Thunderbird was registered to Salvador at an address in Placentia, California. During a subsequent search, two separate bundles of bills wrapped in clear plastic cellophane, in the total amount of $ 15,000, were found in a "dead space" behind a speaker mounted on the left rear passenger door. A "small amount" of heroin wrapped in plastic was seized from inside the front driver's side air conditioning vent hidden behind a paper bag. The front air

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> conditioning vents of the Thunderbird had been "modified" to provide "a really nice place to hide contraband" and "diminish the odor" of drugs concealed in the car. A "toggle switch," which is often used to "release an electric compartment" hidden in a vehicle, had been added to the Thunderbird under the steering wheel column. The officer offered the opinion that the Thunderbird had been equipped as a "load car" to "secrete drugs or currency" and "transport drugs from one location to another." . . .
>
> We find nothing in the language of section 11366.8 that requires a modification, fabrication or alteration of the "original factory equipment" of the vehicle, as Ruben asserts. Clearly a "false compartment" is not a space or area in a vehicle that is intended and normally used as a container or storage area, such as a glove compartment, console or trunk. A "false compartment" is, however, a space in a vehicle that is neither designed nor intended for storage or transportation of personal items, but is nevertheless used to conceal controlled substances, even without any modification of the physical configuration of the space.
>
> Ruben's claim that proof of a false compartment comes only with evidence of "an addition to" or "a modification of an enclosure" in a vehicle is based upon the three examples listed in section 11366.8, subdivision (d). However, the statute specifies that a false compartment includes but is not limited to those enumerated examples. Use of the language "including, but not limited to" in the statutory definition is a phrase of enlargement rather than limitation. [Citations.] The preceding, more expansive definition of the term false compartment in the statute brings within its scope any other space or enclosure in a vehicle that was not intended for use as a container but has been converted to that purpose to hold and hide controlled substances. The plain language of the statute does not demand evidence of a physical addition to the vehicle or modification of its structure to prove the element of a false compartment.

(*People v. Gonzalez* (Mar. 25, 2004) First District Court of Appeals, Nos. A099987 & A102435, 2004 DJDAR 3671, 3674.)

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1780. Possession of More Than $100,000 Related to Transaction Involving Controlled Substance: Proceeds

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The defendant is charged [in Count _____] with the unlawful possession of more than $100,000 obtained from a transaction involving a controlled substance.

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

1. **The defendant possessed more than $100,000 in (cash/ [and/or] _____** *<insert type[s] of negotiable instrument[s]>***).**

2. **The money was obtained from the (sale/possession for sale/transportation/manufacture/offer to sell/offer to manufacture) [of] _____** *<insert name[s] of controlled substance[s]>***, [a] controlled substance[s].**

AND

3. **The defendant knew that the money was obtained as a result of the (sale/possession for sale/transportation/manufacture/offer to sell/offer to manufacture) [of] a controlled substance.**

[In determining whether or not the defendant is guilty of this crime, you may consider, in addition to any other relevant evidence:

[Whether the defendant had paid employment.]

[The opinion of a controlled substances expert on the source of the money.]

[Documents or ledgers, if any, that show [the] sale[s] of [a] controlled substance[s].]]

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

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[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/other people).]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of this crime.

Give the bracketed paragraphs instructing that the jury may consider the defendant's employment, expert testimony, and ledgers if such evidence has been presented. If a controlled substances expert testifies, the court has a **sua sponte** duty to instruct the jury on evaluating the expert's testimony. (Pen. Code, § 1127b.) Give Instruction 450, Expert Witness Testimony.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11370.6.
Possession Has Same Meaning as in Drug Possession Cases ▸ *People v. Howard* (1995) 33 Cal.App.4th 1407, 1419, fn. 6.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Statute Constitutional ▸ *People v. Mitchell* (1994) 30 Cal.App.4th 783, 793; *People v. Granados* (1993) 16 Cal.App.4th 517, 519.
Instruction on Factor to Consider Constitutional ▸ *People v. Mitchell* (1994) 30 Cal.App.4th 783, 804–811.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 122.

RELATED ISSUES

No Requirement Defendant Be Involved in Drug Crime
Culpability under Health and Safety Code section 11370.6 does not require that the defendant possess a controlled substance or participate in a transaction involving controlled substances in any manner. (*People v. Mitchell* (1994) 30 Cal.App.4th 783, 797–798.) However, the defendant must have knowledge of the origin of the money. (*Id.* at p. 798.)

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STAFF NOTES

Health & Saf. Code § 11370.6:

(a) Every person who possesses any moneys or negotiable instruments in excess of one hundred thousand dollars ($100,000) which have been obtained as the result of the unlawful sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture any controlled substance listed in Section 11054, 11055, 11056, 11057, or 11058, with knowledge that the moneys or negotiable instruments have been so obtained, and any person who possesses any moneys or negotiable instruments in excess of one hundred thousand dollars ($100,000) which are intended by that person for the unlawful purchase of any controlled substance listed in Section 11054, 11055, 11056, 11057, or 11058 and who commits an act in substantial furtherance of the unlawful purchase, shall be punished by imprisonment in the county jail for a term not to exceed one year, or by imprisonment in the state prison for two, three, or four years.

(b) In consideration of the constitutional right to counsel afforded by the Sixth Amendment to the United States Constitution and Section 15 of Article 1 of the California Constitution, when a case charged under subdivision (a) involves an attorney who accepts a fee for representing a client in a criminal investigation or proceeding, the prosecution shall additionally be required to prove that the moneys or negotiable instruments were accepted by the attorney with the intent to participate in the unlawful conduct described in subdivision (a) or to disguise or aid in disguising the source of the funds or the nature of the criminal activity.

(c) In determining the guilt or innocence of a person charged under subdivision (a), the trier of fact may consider the following in addition to any other relevant evidence:

(1) The lack of gainful employment by the person charged.

(2) The expert opinion of a qualified controlled substances expert as to the source of the assets.

(3) The existence of documents or ledgers that indicate sales of controlled substances.

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Possession

Possession for the purpose of this offense has the same meaning as that given the term in offenses involving the possession of controlled substances. (*People v. Howard* (1995) 33 Cal.App.4th 1407, 1419 n. 6.) Thus the concept of constructive possession is applicable. The formulation of constructive possession here is taken from Instruction 1700, "Simple Possession of Controlled Substance."

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1781. Possession of More Than $100,000 Related to Transaction Involving Controlled Substance: Money to Purchase

---

The defendant is charged [in Count _____] with the unlawful possession of more than $100,000 intended for purchasing a controlled substance.

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

1. **The defendant possessed more than $100,000 in (cash/ [and/or] _____** *<insert type[s] of negotiable instrument[s]>***).**

2. **The defendant intended to use the (money/ [and/or] _____** *<insert type[s] of negotiable instrument[s]>***) to unlawfully purchase _____** *<insert name[s] of controlled substance[s]>***, [a] controlled substance[s].**

AND

3. **The defendant committed an act in substantial furtherance of the purchase.**

[In determining whether or not the defendant is guilty of this crime, you may consider, in addition to any other relevant evidence:

[Whether the defendant had paid employment.]

[The opinion of a controlled substances expert on the source of the money.]

[Documents or ledgers, if any, that show [the] sale[s] of [a] controlled substance[s].]]

[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/other people).]

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BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of this crime.

Give the bracketed paragraphs instructing that the jury may consider the defendant's employment, expert testimony, and ledgers if such evidence has been presented. If a controlled substances expert testifies, the court has a **sua sponte** duty to instruct the jury on evaluating the expert's testimony. (Pen. Code, § 1127b.) Give Instruction 450, Expert Witness Testimony.

AUTHORITY

Elements ▸ Health & Saf. Code, § 11370.6.
Possession Has Same Meaning as in Drug Possession Cases ▸ *People v. Howard* (1995) 33 Cal.App.4th 1407, 1419, fn. 6.
Constructive vs. Actual Possession ▸ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Statute Constitutional ▸ *People v. Mitchell* (1994) 30 Cal.App.4th 783, 793; *People v. Granados* (1993) 16 Cal.App.4th 517, 519.
Instruction on Factor to Consider Constitutional ▸ *People v. Mitchell* (1994) 30 Cal.App.4th 783, 804–811.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 122.

RELATED ISSUES

No Requirement Defendant Be Involved in Drug Crime
Culpability under Health and Safety Code section 11370.6 does not require that the defendant possess a controlled substance or participate in a transaction involving controlled substances in any manner. (*People v. Mitchell* (1994) 30 Cal.App.4th 783, 797–798.) However, the defendant must have knowledge of the origin of the money. (*Id.* at p. 798.)

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STAFF NOTES

Health & Saf. Code § 11370.6:

(a) Every person who possesses any moneys or negotiable instruments in excess of one hundred thousand dollars ($100,000) which have been obtained as the result of the unlawful sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture any controlled substance listed in Section 11054, 11055, 11056, 11057, or 11058, with knowledge that the moneys or negotiable instruments have been so obtained, and any person who possesses any moneys or negotiable instruments in excess of one hundred thousand dollars ($100,000) which are intended by that person for the unlawful purchase of any controlled substance listed in Section 11054, 11055, 11056, 11057, or 11058 and who commits an act in substantial furtherance of the unlawful purchase, shall be punished by imprisonment in the county jail for a term not to exceed one year, or by imprisonment in the state prison for two, three, or four years.

(b) In consideration of the constitutional right to counsel afforded by the Sixth Amendment to the United States Constitution and Section 15 of Article 1 of the California Constitution, when a case charged under subdivision (a) involves an attorney who accepts a fee for representing a client in a criminal investigation or proceeding, the prosecution shall additionally be required to prove that the moneys or negotiable instruments were accepted by the attorney with the intent to participate in the unlawful conduct described in subdivision (a) or to disguise or aid in disguising the source of the funds or the nature of the criminal activity.

(c) In determining the guilt or innocence of a person charged under subdivision (a), the trier of fact may consider the following in addition to any other relevant evidence:

(1) The lack of gainful employment by the person charged.

(2) The expert opinion of a qualified controlled substances expert as to the source of the assets.

(3) The existence of documents or ledgers that indicate sales of controlled substances.

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Possession

Possession for the purpose of this offense has the same meaning as that given the term in offenses involving the possession of controlled substances. (*People v. Howard* (1995) 33 Cal.App.4th 1407, 1419 n. 6.) Thus the concept of constructive possession is applicable. The formulation of constructive possession here is taken from Instruction 1700, "Simple Possession of Controlled Substance."

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1782. Attorney's Possession of More Than $100,000 Related to Transaction Involving Controlled Substance

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The defendant is charged [in Count _____] with being an attorney who knowingly accepted more than $100,000 from a client who obtained it from a transaction involving a controlled substance.

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

1. **The defendant, an attorney, accepted a fee of more than $100,000 in (cash/[and/or] _____** *<insert type[s] of negotiable instrument[s]>***) for representing a client in a criminal investigation or proceeding.**

2. **The money was obtained from the (sale/possession for sale/transportation/manufacture/offer to sell/offer to manufacture) [of] _____** *<insert name[s] of controlled substance[s]>***, [a] controlled substance[s].**

3. **The defendant knew that the (money/ [and/or] _____** *<insert type[s] of negotiable instrument[s]>***) (was/were) from the (sale/possession for sale/transportation/manufacture/offer to sell/offer to manufacture).**

AND

<A. Intent to Participate>

4. **[The defendant accepted the money with the intent to participate in the client's (sale/possession for sale/transportation/ manufacture/offer to sell/offer to manufacture) [of] a controlled substance.]**

[OR

<B. Intent to Disguise Source>

5. **][The defendant accepted the money with the intent to disguise or aid in disguising the source of the funds or the nature of the criminal activity.]**

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An *attorney* is someone licensed by [the] (California State Bar/_____ <*insert name of licensing state or country*>) to practice law.

[In determining whether or not the defendant is guilty of this crime, you may consider, in addition to any other relevant evidence:

> **[Whether the defendant had paid employment.]**
>
> **[The opinion of a controlled substances expert on the source of the money.]**
>
> [**Documents or ledgers, if any, that show [the] sale[s] of [a] controlled substance[s].]]**

[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/other people).]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct on the elements of this crime.

When an attorney is charged with unlawful possession of drug proceeds, the prosecution must prove the additional element that the attorney intended to aid the illegal activity or to disguise the source of the funds. (Health & Saf. Code, § 11370.6(b); *People v. Granados* (1993) 16 Cal.App.4th 517, 519.) Give either optional paragraph A, B, or both, depending on the charged crime and the evidence proffered at trial.

Give the bracketed paragraphs instructing that the jury may consider the defendant's employment, expert testimony, and ledgers if such evidence has been presented. If a controlled substances expert testifies, the court has a **sua sponte** duty to instruct the jury on evaluating the expert's testimony. (Pen. Code, § 1127b.) Give Instruction 450, Expert Witness Testimony.

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AUTHORITY

Elements ‣ Health & Saf. Code, § 11370.6(b).
Possession Has Same Meaning as in Drug Possession Cases ‣ *People v. Howard* (1995) 33 Cal.App.4th 1407, 1419, fn. 6.
Constructive vs. Actual Possession ‣ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556.
Statute Constitutional ‣ *People v. Mitchell* (1994) 30 Cal.App.4th 783, 793; *People v. Granados* (1993) 16 Cal.App.4th 517, 519.
Instruction on Factor to Consider Constitutional ‣ *People v. Mitchell* (1994) 30 Cal.App.4th 783, 804–811.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 122.

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STAFF NOTES

Health & Saf. Code § 11370.6:

(a) Every person who possesses any moneys or negotiable instruments in excess of one hundred thousand dollars ($100,000) which have been obtained as the result of the unlawful sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture any controlled substance listed in Section 11054, 11055, 11056, 11057, or 11058, with knowledge that the moneys or negotiable instruments have been so obtained, and any person who possesses any moneys or negotiable instruments in excess of one hundred thousand dollars ($100,000) which are intended by that person for the unlawful purchase of any controlled substance listed in Section 11054, 11055, 11056, 11057, or 11058 and who commits an act in substantial furtherance of the unlawful purchase, shall be punished by imprisonment in the county jail for a term not to exceed one year, or by imprisonment in the state prison for two, three, or four years.

(b) In consideration of the constitutional right to counsel afforded by the Sixth Amendment to the United States Constitution and Section 15 of Article 1 of the California Constitution, when a case charged under subdivision (a) involves an attorney who accepts a fee for representing a client in a criminal investigation or proceeding, the prosecution shall additionally be required to prove that the moneys or negotiable instruments were accepted by the attorney with the intent to participate in the unlawful conduct described in subdivision (a) or to disguise or aid in disguising the source of the funds or the nature of the criminal activity.

(c) In determining the guilt or innocence of a person charged under subdivision (a), the trier of fact may consider the following in addition to any other relevant evidence:

(1) The lack of gainful employment by the person charged.

(2) The expert opinion of a qualified controlled substances expert as to the source of the assets.

(3) The existence of documents or ledgers that indicate sales of controlled substances.

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Definition of Attorney
In the absence of any other indication by the statute or case law, attorney is here defined as someone duly admitted to the practice of law. (*See* Bus. & Prof. Code § 6064.)

Possession
Possession for the purpose of this offense has the same meaning as that given the term in offenses involving the possession of controlled substances. (*People v. Howard* (1995) 33 Cal.App.4th 1407, 1419 n. 6.) Thus the concept of constructive possession is applicable. The formulation of constructive possession here is taken from Instruction 1700, "Simple Possession of Controlled Substance."

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1800. 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) a weapon, specifically _____ *<insert type of weapon from Pen. Code, § 12020(a)>***.**

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) [a] _____** *<insert type of weapon from Pen. Code, § 12020(a)>***.**

2. **The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent) the _____** *<insert type of weapon from Pen. Code, § 12020(a)>***.**

[AND]

<Alternative 3A—object designed solely for use as weapon>
[3. The defendant knew that the object (was [a] _____ *<insert type of weapon from Pen. Code, § 12020(a), e.g., "cane sword">*/**could be used _____** *<insert description of weapon, e.g., "as a stabbing weapon," or "for purposes of offense or defense">***).]**

<Alternative 3B—object capable of innocent uses>
[3. The defendant possessed the object as a weapon. When deciding if the defendant possessed the object *as a weapon*, consider all the surrounding circumstances, including the time and place of possession. Consider also [the destination of the defendant[,]] [the alteration of the object from standard form[,]] [and] other facts, if any, that indicate that the object would be used for a dangerous, not harmless, purpose.]

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

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4. The defendant intended to sell it.]

[A _____ *<insert type of weapon from Pen. Code, § 12020(a)>* **(means/includes)** _____ *<insert appropriate definition from Pen. Code, § 12020(c)>***.**

The People do not have to prove that the defendant used the object as a weapon.

*<Give only if alternative 3A is given.>***[The People do not have to prove that the defendant intended to use the object as a 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 _____ *<insert prohibited firearm from Pen. Code, § 12020(a)>* **need not 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/other people).]

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

<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) _____ *<insert type of weapon from Pen. Code, § 12020(a)>* **if** _____ *<insert exception from Pen. Code, § 12020(b)>***. 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)** _____ *<insert type of weapon from Pen. Code, § 12020(a)>***. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

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81 _____

BENCH NOTES

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

In element 1, insert one of the following weapons from Penal Code section 12020(a):

Firearms
short-barreled shotgun
short-barreled rifle
undetectable firearm
firearm that is not immediately recognizable as a firearm
unconventional pistol
cane gun, wallet gun, or zip gun

Firearm Equipment and Ammunition
camouflaging firearm container
ammunition that contains or consists of any fléchette dart
bullet containing or carrying an explosive agent
multiburst trigger activator
large-capacity magazine

Knives and Swords
ballistic knife
belt buckle knife
lipstick case knife
cane sword
shobi-zue
air gauge knife
writing pen knife

Martial Arts Weapons
nunchaku
shuriken

Other Weapons
metal knuckles
leaded cane

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metal military practice handgrenade or metal replica handgrenade instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag

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 "has no conceivable innocent function" (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1405), or when the item is specifically designed to be one of the weapons defined in Penal Code section 12020(c) (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547). On request, the court may give the bracketed sentence stating, "The People do not have to prove that the defendant intended to use the object as a weapon."

Select alternative 3B 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.) Do *not* give the bracketed sentence stating, "The People do not have to prove that the defendant intended to use the object as a weapon."

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.)

Following the elements, insert the appropriate definition of the alleged weapon from Penal Code section 12020(c). Subdivision (c) defines all the terms used in subdivision (a), *except* the following:

"firearm which is not immediately recognizable as a firearm" (no cases on meaning but see definition of firearm in Penal Code, § 12001(b));

"bullet containing or carrying an explosive agent" (see *People v. Lanham* (1991) 230 Cal.App.3d 1396, 1400 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn.6.]);

"metal military practice handgrenade or metal replica handgrenade" (no cases on meaning); and

"instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag" (see *People v. Fannin, supra,* 91 Cal.App.4th at p. 1402 [definition of "slungshot"]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [definition of this class of weapons]).

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For any of the weapons not defined in subdivision (c), 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.) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following weapons," inserting the items alleged.

If the defense presents 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 [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, "The defendant did not unlawfully . . . ." (see Pen. Code, § 12020(b)).

AUTHORITY

Elements ▸ Pen. Code, § 12020(a)(1) & (2).
Definitions ▸ Pen. Code, §§ 12020(c), 12001.
Exemptions ▸ Pen. Code, § 12020(b).
Need Not Prove Intent to Use ▸ *People v. Rubalcava* (2000) 23 Cal.4th 322, 328; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9.
Knowledge Required ▸ *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547.
Specific Intent Required for Offer to Sell ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470.
Innocent Object—Must Prove Possessed as Weapon ▸ *People v. Grubb* (1965) 63 Cal.2d 614, 620–621; *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404.
Definition of Blackjack, etc. ▸ *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402; *People v. Mulherin* (1934) 140 Cal.App. 212, 215.
Firearm Need Not Be Operable ▸ *People v. Favalora* (1974) 42 Cal.App.3d 988, 991.
Measurement of Sawed-Off Shotgun ▸ *People v. Rooney* (1993) 17 Cal.App.4th 1207, 1211–1213; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500.
Measurement of Fléchette Dart ▸ *People v. Olmsted* (2000) 84 Cal.App.4th 270, 275.
Constructive vs. Actual Possession ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn.6].

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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 161.

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.) However, interpreting 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.) Applying this holding to possession of other weapons prohibited under 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; *People v. Taylor* (2001) 93 Cal.App.4th 933, 941; *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 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 [possession of modified baseball bat].)

Prior to *People v. Rubalcava, supra,* 23 Cal.4th 322, some cases held that the prosecution did not have to prove that the defendant knew that the object was a

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weapon of a prohibited class. (*People v. Lanham* (1991) 230 Cal.App.3d 1396, 1401–1405 [exploding bullets—need not know exploding]; *People v. Valencia* (1989) 214 Cal.App.3d 1410, 1415 [sawed-off shotgun—need not know "sawed-off"]; *People v. Azevedo* (1984) 161 Cal.App.3d 235, 240 [same].) The Supreme Court has questioned the continuing validity of these holdings in light of its holding in *Rubalcava*. (*In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6.)

In element 3 of the instruction, the court should give alternative 3A 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 3B. The court may 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* (May 19, 2004) 2nd App. Dist., B166733, 2004 DJDAR 5927 [observing that, since *In re Jorge M.*, it is unclear if the prosecution must prove that the defendant knew shot-gun was "sawed off" but that failure to give instruction was harmless if error].)

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STAFF NOTES

Pen. Code, § 12020, in relevant part:

(a) Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison:

(1) Manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any cane gun or wallet gun, any undetectable firearm, any firearm which is not immediately recognizable as a firearm, any camouflaging firearm container, any ammunition which contains or consists of any flechette dart, any bullet containing or carrying an explosive agent, any ballistic knife, any multiburst trigger activator, any nunchaku, any short-barreled shotgun, any short-barreled rifle, any metal knuckles, any belt buckle knife, any leaded cane, any zip gun, any shuriken, any unconventional pistol, any lipstick case knife, any cane sword, any shobi-zue, any air gauge knife, any writing pen knife, any metal military practice handgrenade or metal replica handgrenade, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag.

(2) Commencing January 1, 2000, manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, or lends, any large-capacity magazine. [. . .]

However, a first offense involving any metal military practice handgrenade or metal replica handgrenade shall be punishable only as an infraction unless the offender is an active participant in a criminal street gang as defined in the Street Terrorism and Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1). A bullet containing or carrying an explosive agent is not a destructive device as that term is used in Section 12301.

(b) Subdivision (a) does not apply to any of the following:

[32 exceptions listed . . .]
(c) [25 definitions of terms used in subsection (a) . . .]

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Intent to Use as a Weapon Not an Element

"[T]he prosecution need not show the intent of the possessor to use an instrument in a violent manner." (*People v. Grubb* (1965) 63 Cal.2d 614, 620-621, fn. 9, citing *People v. McKinney* (1935) 9 Cal. App. 2d 523, 525.) "Proof of possession alone is sufficient." (*People v. McKinney, supra,* 9 Cal. App. 2d at p. 525.) “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.)

Analyzing subsection (4) of Penal Code section 12020(a), the Supreme Court recently stated:

> Here, the relevant language of section 12020 is unambiguous and establishes that carrying a concealed dirk or dagger does not require an intent to use the concealed instrument as a stabbing weapon. [. . .] Subdivision (a) of section 12020 describes a single criminal act--carrying a concealed dirk or dagger on the person--and makes no reference to any other act or consequence. Likewise, the definition of dirk or dagger in subdivision (c)(24) of that section focuses on the characteristics of the concealed instrument without explicitly or implicitly referring to the possessor's "intent to do a further act or achieve a future consequence." [Citation omitted.] Accordingly, defendant's intended use is not an element of the crime, and "no further mental state beyond willing commission of the act proscribed by law" is necessary. [Citation omitted.]

(*People v. Rubalcava* (2000) 23 Cal.4th 322, 328.)

Knowledge--Required

> By declining to make defendant's intended use of the instrument an element of the offense, we do not eliminate the mens rea requirement. Because the dirk or dagger portion of section 12020 criminalizes “traditionally lawful conduct,” we construe the statute to contain a "knowledge" element. [Citation omitted.] Thus, to commit the offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument "that is capable of ready use as a stabbing weapon." (§ 12020, subds. (a), (c)(24).) 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 therefore not guilty of violating section 12020.

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(*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332 [emphasis in original].)

> Because the metal knuckles portion of section 12020 criminalizes "traditionally lawful conduct," we construe the statute to contain a "knowledge" element. [Citation and quotation marks omitted.] Therefore, to commit the instant offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry upon his or her person an instrument which is worn for purposes of offense or defense. [Citations and quotation marks omitted, emphasis in original.] A defendant who does not know that he is carrying or wearing the weapon or that the instrument may be used for purposes of offense or defense is thus not guilty of violating section 12020.

(*People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [emphasis in original].)

> [Quoting *Rubalcava* above]. So it should be with a cane sword due to the obscure nature of its unlawful characteristic. In 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.

(*People v. Taylor* (2001) 93 Cal.App.4th 933, 941.)

Prior to *Rubalcava, supra,* several cases held that Penal Code section 12020 did not require that the defendant know the contraband nature of the weapon. (*People v. Lanham* (1991) 230 Cal. App. 3d 1396, 1401-1405 [exploding bullets]; *People v. Valencia* (1989) 214 Cal.App.3d 1410, 1415 [sawed-off shot gun]; *People* v. *Azevedo* (1984) 161 Cal.App.3d 235, 240 [sawed-off shot gun].) The Supreme Court has questioned the continuing validity of these holdings:

> This court, however, recently reached a contrary conclusion as to section 12020's prohibition on carrying a concealed dirk or dagger, holding it requires knowledge that the instrument has the characteristics making it a dirk or dagger, despite the absence of any language of mens rea in that statute. (*People v. Rubalcava* (2000) 23 Cal. 4th 322, 331-332.)

(*In re Jorge M.* (2000) 23 Cal.4th 866, 876 n.6.) The instruction has been drafted in accordance with *Rubalcava* to require that the defendant know that the object is

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a prohibited weapon or is capable of use in the prohibited manner with an explanation in the use notes.

Blackjack, Slungshot, Billy, Sandclub, Sap, or Sandbag
In *People v. Mulherin* (1934) 140 Cal.App. 212, 214-215, the court considered the definitions of this group of weapons:

> The Deadly Weapons Act provides that "Every person who, within the state of California, . . . possesses any instrument or weapon *of the kind* commonly known as a black-jack, slung-shot, billy, sand-club, sand-bag or metal knuckles . . . shall be guilty of a felony, and upon conviction thereof shall be punishable by imprisonment in a state prison for not less than one year nor more than five years." (Italics ours.) All the instruments mentioned, with the exception of metal knuckles, belong to a certain species of weapon having so many characteristics in common that their slight differences are unimportant. They are all, other than metal knuckles, short, easily concealed upon the person and so weighted as to constitute effective and silent weapons of attack. Any one of them, in our opinion, would be properly described by the general term, "sap", and we believe that a sand-bag, such as a piece of hose loaded with sand, is occasionally correctly described as a black-jack.
>
> The use of language as applied to these weapons, all of the same class, is rather indefinite. It is significant that the legislature did not prohibit possession of a black-jack as such, a slung-shot, as such, a billy, as such, or of a sand-club, a sand-bag or even metal knuckles, as it might have done, but instead, and very likely with appreciation of the difficulties of nomenclature, forbade ownership of any instrument or weapon "of the kind", as commonly known. The purpose undoubtedly was to outlaw instruments which are ordinarily used "for criminal and improper purposes" [citations omitted] and so we have in this act "a partial inventory of the arsenal of the 'public enemy', the 'gangster'" [citation omitted] and a prohibition against owning anything "of the kind".

As to the specific term “blackjack,” *People v. Mulherin, supra,* 140 Cal.App. at p. 214, stated, “the Encyclopedia Britannica, fourteenth edition, quoted in *People* v. *Brown*, 253 Mich. 537 [235 N.W. 245, 82 A. L. R. 341], defines a black-jack as ‘a bludgeon-like weapon consisting of a lead slug attached to a leather thong.’”

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In *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402, the court addressed the meaning of the term “slungshot”:

> California case law provides a clear definition of "slungshot." In *People v. Williams* (1929) 100 Cal. App. 149 (*Williams*), court adopted the following dictionary definition: "a small mass of metal or stone fixed on a flexible handle, strap or the like, used as a weapon." n1
>
> n1 Webster's Seventh New Collegiate Dictionary (1972) provides a nearly identical definition: "a striking weapon consisting of a small mass of metal or stone fixed on a flexible handle or strap." Merriam-Webster maintains the same version online, at (as of Aug. 30, 2001).

Objects that May Have Innocent Use

In *People v. Grubb* (1965) 63 Cal.2d 614, 620-621, the court considered whether a modified baseball bat was prohibited by Penal Code section 12020 as an object “*of the kind* commonly known” as a billy. The court concluded that, possession of an object with innocent uses is prohibited if the circumstances indicate it was possessed as a weapon:

> The Legislature here sought to outlaw the classic instruments of violence and their homemade equivalents; the Legislature sought likewise to outlaw possession of the sometimes-useful object when the attendant circumstances, including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicated that the possessor would use the object for a dangerous, not harmless, purpose. [Footnote and citation omitted.]
>
> Thus we hold that the statute embraces instruments other than those specially created or manufactured for criminal purposes; it specifically includes those objects "of the *kind* commonly known as a billy." (Pen. Code, § 12020; italics added.) The concomitant circumstances may well proclaim the danger of even the innocent-appearing utensil. The Legislature thus decrees as criminal the possession of ordinarily harmless objects when the circumstances of possession demonstrate an immediate atmosphere of danger. Accordingly the statute would encompass the possession of a table leg, in one sense an obviously useful item, when it is detached from the table and carried at night in a "tough" neighborhood to the scene

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> of a riot. On the other hand the section would not penalize the Little Leaguer at bat in a baseball game.

(*People v. Grubb* (1965) 63 Cal.2d 614, 620-621 [emphasis in original].)

As the court in *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404-1405, recognized,

> *Grubb* has been read to mean that "where the object may have a legitimate and lawful use, . . . there [must] be evidence tending to show that, at the time and place of the alleged illegal possession, the possessor contemplated the unlawful and not the lawful use." [Citations omitted.] There is some tension, however, between this reading and the *Grubb* court's statement in a footnote that "the prosecution need not show the intent of the possessor to use an instrument in a violent manner." [Citations omitted.]
>
> We believe the tension must be resolved as follows. Intent to use a weapon is not an element of the crime of weapon possession. "Proof of possession alone is sufficient." [Citation.] However, 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*. The only way to meet that burden is by evidence "indicat[ing] that the possessor *would use* the object for a dangerous, not harmless, purpose." (*Grubb*, *supra*, 63 Cal. 2d at pp. 620-621, italics added.) The evidence may be circumstantial, and may be rebutted by the defendant with evidence of "innocent usage." (*Id*. at p. 621.) The prosecution may not, however, merely show that the defendant had a table leg in his car while driving through a dangerous neighborhood, and require him to prove that he did not carry it as a weapon. Such a rule would turn the presumption of innocence on its head. Intended use is not an element of weapon possession, but the prosecution always bears the burden of proving that the defendant possessed a weapon. [. . .]
>
> On the other hand, when the defendant is charged with possessing a slungshot like the rawhide and metal device described in *Mulherin*, which had no conceivable innocent function, proof of mere possession is sufficient.

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Firearm Need Not be Operable
People v. Favalora (1974) 42 Cal.App.3d 988, 991, held that a sawed-off shot gun does not have to be operable to fall within the prohibition of Penal Code section 12020 (cited favorably in *People v. Nelums* (1982) 31 Cal.3d 355, 358.)

Constructive Possession
The language of the instruction is derived from the Task Force controlled substances instructions. (See also *People* v. *Azevedo* (1984) 161 Cal.App.3d 235, 242-243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876 n.6].)

Exceptions
Subsection (b) lists 32 exceptions to unlawful possession. These include possession by law enforcement agencies, martial arts schools, historical societies, motion picture or television production companies, and forensic laboratories. In addition, exceptions are provided for temporary possession for the purpose of disposing of the weapon with a law enforcement agency (Pen. Code, §§ 12020(b)(16), (17)) and for the possession of antiques, relics and curios (Pen. Code, §§ 12020(b)(5), (7), (15)). Several exceptions are also listed for the possession of large-capacity magazines.

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1801. Carrying Concealed Explosive or Dirk or Dagger

The defendant is charged [in Count __] with unlawfully carrying a concealed (explosive/dirk or dagger).

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

1. **The defendant carried on (his/her) person (an explosive/a dirk or dagger).**

2. **The defendant knew that (he/she) was carrying it.**

3. **It was substantially concealed on the defendant's person.**

AND

4. **The defendant knew that it (was an explosive/could readily be used as a stabbing weapon).**

The People do not have to prove that the defendant used or intended to use the alleged (explosive/dirk or dagger) as a weapon.

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

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

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

[A *dirk or dagger* is a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. *Great bodily injury* means significant or substantial physical injury.]

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[A (pocketknife/nonlocking folding knife/folding knife that is not prohibited by Penal Code section 653k) is not a *dirk or dagger* unless the blade of the knife is exposed and locked into position.]

[A knife carried in a sheath and worn openly suspended from the waist of the wearer is not *concealed*.]

<Give only if object may have innocent uses.>
[When deciding if the defendant knew the object (was an explosive/could be used as a stabbing weapon), consider all the surrounding circumstances, including the time and place of possession. Consider also (the destination of the defendant[,]/ the alteration of the object from standard form[,]) and other facts, if any.]

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

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant possessed multiple 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.) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following weapons," inserting the items alleged.

Give the bracketed paragraph that begins with "When deciding if" only if the object was not designed solely for use as a stabbing weapon but may have innocent uses. (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9.)

When instructing on the meaning of "explosive," if the explosive is listed in Health and Safety Code section 12000, the court may use the bracketed sentence stating, "_____ is an explosive." For example, "Nitroglycerine is an

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explosive." However, the court may not instruct the jury that the defendant used an explosive. For example, the court may not state, "The defendant used an explosive, nitroglycerine," or "The substance used by the defendant, nitroglycerine, was an explosive." (See *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26; *People v. Brown* (1988) 46 Cal.3d 432, 444–445.)

If the court gives the instruction on a "folding knife that is not prohibited by Penal Code section 653k," give a modified version of Instruction 1802, Possession, etc., of Switchblade Knife.

AUTHORITY

Elements ▸ Pen. Code, § 12020(a)(3) & (4).
Need Not Prove Intent to Use ▸ *People v. Rubalcava* (2000) 23 Cal.4th 322, 328.
Knowledge Required ▸ *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332.
Substantial Concealment ▸ *People v. Wharton* (1992) 5 Cal.App.4th 72, 75; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955.
Explosive Defined ▸ Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604.
Dirk or Dagger Defined ▸ Pen. Code, § 12020(c)(24).
Dirk or Dagger—No Length Requirement ▸ *In re Victor B.* (1994) 24 Cal.App.4th 521, 526.
Dirk or Dagger—Object Not Originally Designed as Knife ▸ *In re Victor B.* (1994) 24 Cal.App.4th 521, 525–526.
Dirk or Dagger—Capable of Ready Use ▸ *People v. Sisneros* (1997) 57 Cal.App.4th 1454, 1457.
Dirk or Dagger—Pocketknives ▸ *In re Luke W.* (2001) 88 Cal.App.4th 650, 655–656; *In re George W.* (1998) 68 Cal.App.4th 1208, 1215.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 162.

RELATED ISSUES

Knowledge Element
"[T]he relevant language of section 12020 is unambiguous and establishes that carrying a concealed dirk or dagger does not require an intent to use the concealed instrument as a stabbing weapon." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 328.) However, "to commit the offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument 'that is capable of ready use as a stabbing weapon.' (§ 12020, subds. (a), (c)(24).) A defendant who does not know

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that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is therefore not guilty of violating section 12020." (*Id.* at pp. 331–332 [emphasis in original].)

Definition of Dirk or Dagger
The current definition of "dirk or dagger" contained in Penal Code section 12020(c)(24) was enacted in 1995 and amended in 1997. Prior decisions interpreting the meaning of "dirk or dagger" should be viewed with caution. (See *People v. Mowatt* (1997) 56 Cal.App.4th 713, 719–720 [comparing old and new definitions]; *People v. Sisneros* (1997) 57 Cal.App.4th 1454, 1457 [same]; *In re George W.* (1998) 68 Cal.App.4th 1208, 1215 [discussing 1997 amendment].)

Dirk or Dagger—"Capable of Ready Use"
"[T]he 'capable of ready use' requirement excludes from the definition of dirk or dagger a device carried in a configuration that requires assembly before it can be utilized as a weapon." (*People v. Sisneros* (1997) 57 Cal.App.4th 1454, 1457.)

Dirk or Dagger—"Pocketknife"
"Although they may not have folding blades, small knives obviously designed to be carried in a pocket in a closed state, and which cannot be used until there have been several intervening manipulations, comport with the implied legislative intent that such knives do not fall within the definition of proscribed dirks or daggers but are a type of pocketknife excepted from the statutory proscription." (*In re Luke W.* (2001) 88 Cal.App.4th 650, 655–656.)

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STAFF NOTES

Pen. Code, § 12020, in relevant part:

(a) Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison:

(3) Carries concealed upon his or her person any explosive substance, other than fixed ammunition.

(4) Carries concealed upon his or her person any dirk or dagger.

[. . .]

(c) (24) As used in this section, a "dirk" or "dagger" means a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. A nonlocking folding knife, a folding knife that is not prohibited by Section 653k, or a pocketknife is capable of ready use as a stabbing weapon that may inflict great bodily injury or death only if the blade of the knife is exposed and locked into position. [. . .]

(d) Knives carried in sheaths which are worn openly suspended from the waist of the wearer are not concealed within the meaning of this section.

Health & Saf. Code, § 12000:

For the purposes of this part, "explosives" means any substance, or combination of substances, the primary or common purpose of which is detonation or rapid combustion, and which is capable of a relatively instantaneous or rapid release of gas and heat, or any substance, the primary purpose of which, when combined with others, is to form a substance capable of a relatively instantaneous or rapid release of gas and heat. "Explosives" includes, but is not limited to, any explosives as defined in Section 841 of Title 18 of the United States Code and published pursuant to Section 55.23 of Title 27 of the Code of Federal Regulations, and any of the following:

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(a) Dynamite, nitroglycerine, picric acid, lead azide, fulminate of mercury, black powder, smokeless powder, propellant explosives, detonating primers, blasting caps, or commercial boosters.

(b) Substances determined to be division 1.1, 1.2, 1.3, or 1.6 explosives as classified by the United States Department of Transportation.

(c) Nitro carbo nitrate substances (blasting agent) classified as division 1.5 explosives by the United States Department of Transportation.

(d) Any material designated as an explosive by the State Fire Marshal. The designation shall be made pursuant to the classification standards established by the United States Department of Transportation. The State Fire Marshal shall adopt regulations in accordance with the Government Code to establish procedures for the classification and designation of explosive materials or explosive devices that are not under the jurisdiction of the United States Department of Transportation pursuant to provisions of Section 841 of Title 18 of the United States Code and published pursuant to Section 55.23 of Title 27 of the Code of Federal Regulations that define explosives .

(e) Certain division 1.4 explosives as designated by the United States Department of Transportation when listed in regulations adopted by the State Fire Marshal.

(f) For the purposes of this part, "explosives" does not include any destructive device, as defined in Section 12301 of the Penal Code, nor does it include ammunition or small arms primers manufactured for use in shotguns, rifles, and pistols.

Intent to Use as a Weapon Not an Element

Here, the relevant language of section 12020 is unambiguous and establishes that carrying a concealed dirk or dagger does not require an intent to use the concealed instrument as a stabbing weapon. [. . .] Subdivision (a) of section 12020 describes a single criminal act--carrying a concealed dirk or dagger on the person--and makes no reference to any other act or consequence. Likewise, the definition of dirk or dagger in subdivision (c)(24) of that section focuses on the

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> characteristics of the concealed instrument without explicitly or implicitly referring to the possessor's "intent to do a further act or achieve a future consequence." [Citation omitted.] Accordingly, defendant's intended use is not an element of the crime, and "no further mental state beyond willing commission of the act proscribed by law" is necessary. [Citation omitted.]

(*People v. Rubalcava* (2000) 23 Cal.4th 322, 328.)

Knowledge

> By declining to make defendant's intended use of the instrument an element of the offense, we do not eliminate the mens rea requirement. Because the dirk or dagger portion of section 12020 criminalizes “traditionally lawful conduct,” we construe the statute to contain a "knowledge" element. [Citation omitted.] Thus, to commit the offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument "that is capable of ready use as a stabbing weapon." (§ 12020, subds. (a), (c)(24).) 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 therefore not guilty of violating section 12020.

(*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332 [emphasis in original].)

Substantial Concealment

> Defendant contends there is insufficient evidence of concealment because the tip of the knife was protruding from his pocket. We disagree. Only substantial concealment is required. (*People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [dirk with handle protruding from waistband found to be a concealed weapon].) "A defendant need not be totally successful in concealing a dirk to be guilty of violation of Penal Code section 12020, subdivision (a)." (*People v. Fuentes*, *supra*, 64 Cal.App.3d at p. 955.)
>
> Here, the jury was permitted to examine the knife, which our perusal discloses is approximately seven and three-eighths inches long. The jury was apprised that only one and one-half to two inches of the blade were protruding from defendant's pocket. These facts support a finding of substantial concealment.

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(*People v. Wharton* (1992) 5 Cal.App.4th 72, 75.)

Dirk or Dagger—No Length Requirement

> The statute itself has no length requirement. Many people carry knives with short blades for utility purposes. Such objects are not designed primarily for stabbing.

(*In re Victor B.* (1994) 24 Cal.App.4th 521, 526.)

Dirk or Dagger—Object Not Originally Designed as Knife

> To be classified as a dirk or dagger, an object need not fit the common perception of a knife. Many decidedly un-knife-like objects have satisfied the definition. To be considered a "dirk or dagger" as a matter of law, the court in *Forrest* held the object must have been designed for the primary purpose of stabbing. (*People v. Forrest*, *supra*, 67 Cal.2d at p. 481.) [. . .]
>
> The circumstances in which the object was found were sufficient to allow the court to conclude the object was a dirk or dagger. (See *People v. Grubb* (1965) 63 Cal.2d 614, 621.)

(*In re Victor B.* (1994) 24 Cal.App.4th 521, 525-527.) The court held that a modified car repair tool was a “dirk or dagger” “because it no longer had any use other than as a stabbing weapon.” (*Id*. at p. 526.)

In *People v. Grubb* (1965) 63 Cal.2d 614, 620-621, the court considered whether a modified baseball bat was prohibited by Penal Code section 12020 as an object “*of the kind* commonly known” as a billy. The court concluded that, possession of an object with innocent uses is prohibited if the circumstances indicate it was possessed as a weapon:

> The Legislature here sought to outlaw the classic instruments of violence and their homemade equivalents; the Legislature sought likewise to outlaw possession of the sometimes-useful object when the attendant circumstances, including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicated that the possessor would use the object for a dangerous, not harmless, purpose. [Footnote and citation omitted.]

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> Thus we hold that the statute embraces instruments other than those specially created or manufactured for criminal purposes; it specifically includes those objects "of the *kind* commonly known as a billy." (Pen. Code, § 12020; italics added.) The concomitant circumstances may well proclaim the danger of even the innocent-appearing utensil. The Legislature thus decrees as criminal the possession of ordinarily harmless objects when the circumstances of possession demonstrate an immediate atmosphere of danger. Accordingly the statute would encompass the possession of a table leg, in one sense an obviously useful item, when it is detached from the table and carried at night in a "tough" neighborhood to the scene of a riot. On the other hand the section would not penalize the Little Leaguer at bat in a baseball game.

(*People v. Grubb* (1965) 63 Cal.2d 614, 620-621 [emphasis in original].)

Dirk or Dagger—Capable of Ready Use

> Is a device that must be unscrewed a full five revolutions to expose the blade, then screwed five revolutions to attach the blade to the handle, capable of ready use as a stabbing weapon? We think not. [. . .] Were we to consider this device capable of ready use, we would be left to wonder what kind of knife, concealed on the person, is not so capable.
>
> The current version of the statute, by its requirement of ready capability, means to exclude certain devices from its proscription. We conclude that the "capable of ready use" requirement excludes from the definition of dirk or dagger a device carried in a configuration that requires assembly before it can be utilized as a weapon.

(*People v. Sisneros* (1997) 57 Cal.app.4th 1454, 1457.)

Dirk or Dagger—Closed Pocket Knife Not Prohibited

> It is undisputed appellant was asleep on the living room couch when the police officers entered to conduct the probation search. It is also undisputed during a patdown search police officers found a folding knife with a blade capable of locking into position in appellant's front pants pocket. However, there is no evidence in the record demonstrating or tending to suggest the blade of the folding knife in

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> appellant's pocket was exposed and locked into position--as opposed to being closed and retracted into its handle.
>
> As a result the record evidence is insufficient to establish appellant carried the concealed folding knife in such a way as to satisfy the controlling statutory definition of "dirk or dagger"--namely that the folding knife have its blade exposed and locked into position.

(*In re George W.* (1998) 68 Cal.app.4th 1208, 1214-1215.)

Dirk or Dagger—Meaning of "Pocket Knife"

> Section 12020 contains no definition for "pocketknife." We agree that a pocketknife is most commonly thought of as one in which the blade folds into its attached handle. However, the statute exempts from the "dirk or dagger" proscription both folding knives generally (unless they qualify as switchblades) and pocketknives. In construing a statute, every word thereof is, if possible, to be given meaning so as to avoid surplusage. [Citations omitted.] If the Legislature had intended pocketknives to be accorded their common meaning, it would not have been necessary to distinguish them from other folding knives, because, under their common meaning, they are already a species of folding knife. We conclude that the Legislature intended "pocketknife" to have a broader definition.
>
> In light of the legislative history of the 1997 amendment to section 12020, particularly as expressed in Assemblymember Martinez's letter, the apparent intent of the amendment was to avoid criminalizing the carrying of knives that are not capable of ready use because they are carried in a closed, secured state. The usual practice in interpreting criminal statutes requires a strict construction of "dirk or dagger." [Citations omitted.] Although they may not have folding blades, small knives obviously designed to be carried in a pocket in a closed state, and which cannot be used until there have been several intervening manipulations, comport with the implied legislative intent that such knives do not fall within the definition of proscribed dirks or daggers but are a type of pocketknife excepted from the statutory proscription.
>
> The object containing appellant's knife fits readily and compactly into the pocket of any article of clothing. And whether housed in a loose or tightfitting pocket, we conclude the knife blade cannot,

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> given its snug fit, be easily extracted from its slot without using both hands: one hand or a substitute vice-like mechanism must hold the container steady, while the finger and thumb of the other hand pull at the designated ridged circles. As such, it constitutes a pocketknife exception to section 12020, subdivision (a).

(*In re Luke W.* (2001) 88 Cal.App.4th 650, 655-656.)

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1802. Possession, etc., of Switchblade Knife

The defendant is charged [in Count __] with unlawfully (possessing in a vehicle/carrying on (his/her) person/selling/offering or exposing for sale/giving/lending/transferring) a switchblade knife.

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

1. **The defendant (possessed in the (passenger's/ [or] driver's) area of a motor vehicle in a (public place/place open to the public)/carried on (his/her) person/sold/offered or exposed for sale/gave/lent/transferred) a switchblade knife [to another person].**

2. **The blade of the knife was two or more inches long.**

3. **The defendant knew that (he/she) (possessed/carried/sold/offered or exposed for sale/gave/lent/transferred) it [to another person].**

[AND]

4. **The defendant knew that it had the characteristics of a switchblade.**

<Give element 5 only if defendant is charged with offering or exposing for sale.>
[AND

5. **The defendant intended to sell it.]**

A *switchblade* knife is a knife that looks like a pocketknife and has a blade that can be released automatically by a flick of a button, pressure on the handle, flip of the wrist or other mechanical device, or is released by the weight of the blade or any other mechanism. A *switchblade* includes a spring-blade knife, snap-blade knife, gravity knife, or any other similar type knife. A *switchblade* knife does not include a knife that opens with one hand utilizing thumb pressure applied solely to the blade of the knife or a thumb stud attached to the blade, if the knife has a detent or other mechanism that provides resistance that must be overcome in opening the blade or that biases the blade back toward its closed position.

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[The *(passenger's/ [or] driver's) area* means that part of a motor vehicle that is designed to carry the (driver/ [and] passengers), including the interior compartment or space within.]

The People do not have to prove that the defendant used or intended to use the alleged switchblade knife as a weapon.

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

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant possessed multiple 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.) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following switchblade knives," inserting the items alleged.

AUTHORITY

Elements ▸ Pen. Code, § 653k.
Need Not Prove Intent to Use ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 328; *People v. Mendoza* (1967) 251 Cal.App.2d 835, 842–843.
Knowledge Required ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332.
Specific Intent Required for Offer to Sell ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 172.

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RELATED ISSUES

Butterfly and Tekna® Knives Included
Butterfly and Tekna knives are prohibited switchblades under Penal Code section 653k. (*People v. Quattrone* (1989) 211 Cal.App.3d 1389, 1395.)

Broken-Spring Knife
Where the spring mechanism on the knife did not work, the court found insufficient evidence that the knife was a prohibited switchblade under Penal Code section 653k. (*In re Roderick S.* (1981) 125 Cal.App.3d 48, 52.)

Public Place
On the meaning of "public place," see *In re Danny H.* (2002) 104 Cal.App.4th 92, discussing the meaning of public place in Penal Code section 594.1

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STAFF NOTES

Pen. Code, § 653k, in relevant part:

> Every person who possesses in the passenger's or driver's area of any motor vehicle in any public place or place open to the public, carries upon his or her person, and every person who sells, offers for sale, exposes for sale, loans, transfers, or gives to any other person a switchblade knife having a blade two or more inches in length is guilty of a misdemeanor.
>
> For the purposes of this section, "switchblade knife" means a knife having the appearance of a pocketknife and includes a spring-blade knife, snap-blade knife, gravity knife or any other similar type knife, the blade or blades of which are two or more inches in length and which can be released automatically by a flick of a button, pressure on the handle, flip of the wrist or other mechanical device, or is released by the weight of the blade or by any type of mechanism whatsoever. "Switchblade knife" does not include a knife that opens with one hand utilizing thumb pressure applied solely to the blade of the knife or a thumb stud attached to the blade, provided that the knife has a detent or other mechanism that provides resistance that must be overcome in opening the blade, or that biases the blade back toward its closed position.
>
> For purposes of this section, "passenger's or driver's area" means that part of a motor vehicle which is designed to carry the driver and passengers, including any interior compartment or space therein.

Intent to Use as a Weapon Not an Element

> Possession of a switchblade knife with a blade over a certain length is specifically proscribed. . . . The motive for the possession is irrelevant.
>
> The only knowledge required is knowledge of the character of the object possessed; knowledge that the possession is illegal is unnecessary.

(*People v. Mendoza* (1967) 251 Cal.App.2d 835, 842–843.)

> Here, the relevant language of section 12020 is unambiguous and establishes that carrying a concealed dirk or dagger does not require an intent to use the concealed instrument as a stabbing weapon. [. . .]

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> Subdivision (a) of section 12020 describes a single criminal act--carrying a concealed dirk or dagger on the person--and makes no reference to any other act or consequence. Likewise, the definition of dirk or dagger in subdivision (c)(24) of that section focuses on the characteristics of the concealed instrument without explicitly or implicitly referring to the possessor's "intent to do a further act or achieve a future consequence." [Citation omitted.] Accordingly, defendant's intended use is not an element of the crime, and "no further mental state beyond willing commission of the act proscribed by law" is necessary. [Citation omitted.]

(*People v. Rubalcava* (2000) 23 Cal.4th 322, 328.)

Knowledge

> By declining to make defendant's intended use of the instrument an element of the offense, we do not eliminate the mens rea requirement. Because the dirk or dagger portion of section 12020 criminalizes “traditionally lawful conduct,” we construe the statute to contain a "knowledge" element. [Citation omitted.] Thus, to commit the offense, a defendant must still have the requisite *guilty mind*: that is, the defendant must knowingly and intentionally carry concealed upon his or her person an instrument "that is capable of ready use as a stabbing weapon." (§ 12020, subds. (a), (c)(24).) 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 therefore not guilty of violating section 12020.

(*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332 [emphasis in original].)

Butterfly Knives and Tekna Knives

> The butterfly knife sold by defendant has a fixed blade over two inches long. When not in use, a two-part handle is folded around the blade as a sheath and is secured by a latch at the base of the knife. To open, the latch is released, allowing the two halves of the sheath to swing down on pivots to form a handle exposing the blade. The handle may be secured manually or closed with the latch.
>
> The Tekna sheath-retracting knife has a fixed blade longer than two inches. A two-part plastic sheath protects the blade. The sheath is

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> spring activated and retracts into the handle when the user pushes a button at the bottom of the handle. . . .
>
> Penal Code section 653k defines an illegal switchblade as "a spring-blade knife, snap-blade knife, gravity knife or any other similar type knife, [having a blade or blades] which can be released automatically . . . by any type of mechanism whatsoever." The list of prohibited knives is not exhaustive. This language is intended to cover different types of knives which operate similarly to those expressly listed. Such an interpretation supports the People's contention that the term "released automatically" encompasses not only knives in which the *blade* is quickly released from the handle, but also the subject knives where the blade is "set free from constraint in a spontaneous manner" by the retraction or removal of the sheath. This would include both the butterfly and Tekna knives.

(*People v. Quattrone* (1989) 211 Cal.App.3d 1389, 1394–1395.)

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1810. Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction

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The defendant is charged [in Count __] with unlawfully possessing a firearm.

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

1. **The defendant (owned/purchased/received/possessed) a firearm.**

2. **The defendant knew that (he/she) (owned/purchased/received/ possessed) the firearm.**

[AND]

3. **The defendant had previously been convicted of (a felony/two offenses of brandishing a firearm/the crime of _____** *<insert misdemeanor offense from Pen. Code, § 12021(c) or Pen. Code, § 12001.6(a), (b), or (d), or a juvenile finding from Pen. Code, § 12021(e)>***).**

[AND]

<Alternative 4A—give only if the defendant is charged under Pen. Code, § 12021(c) .>

[4. The previous conviction was within 10 years of the date the defendant possessed the firearm.]

<Alternative 4B—give only if the defendant is charged under Pen. Code, § 12021(e).>

[4. The defendant was under 30 years old at the time (he/she) possessed the firearm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[A *juvenile court finding* is the same as a conviction.]

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[A conviction of _____ *<insert name of offense from other state or federal offense>* **is the same as a conviction for a felony.]**

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

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

[You may consider evidence, if any, that the defendant was previously convicted of a crime only in deciding whether the People have proved this element of the crime [or for the limited purpose of _____*<insert other permitted purpose, e.g., assessing defendant's credibility>*]**. Do not consider such evidence for any other purpose.]**

[The People allege that the defendant possessed the following firearms: _____ *<insert firearms when multiple firearms alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the firearms, and you all agree on which firearm (he/she) possessed.]**

<Defense: Momentary Possession>
[Even if you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period.**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it.**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm.**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more

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likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

<Defense: Justifiable Possession>

[Even if you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant).**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon.**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant does not stipulate to the prior conviction. (*People v. Sapp* (2003) 31 Cal.4th 240, 261; *People v. Valentine* (1986) 42 Cal.3d 170, 173.) If the defendant stipulates, use Instruction 1811, Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to

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Conviction. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.)

The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, Instruction 122, Union Of Act And Intent—General Intent. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924.) "Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185.) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Element 4 should only be given if the defendant is charged under Penal Code section 12021(c), possession within 10 years of a specified misdemeanor conviction, or Penal Code section 12021(e), possession by someone under 30 years old with a specified juvenile finding.

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "You may consider . . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.)

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192.) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814, which held that the defense of momentary possession applies to a charge of violating Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mowers* (2002) 28 Cal.4th 457, 478–481.) If sufficient

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evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 12021(h) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give Instruction 1814, Possession of Firearm by Person Prohibited by Statute—Self-Defense.

AUTHORITY

Elements ▸ Pen. Code, §§ 12021(a), (b), (c) & (e), 12021.1(a), 12001.6; *People v. Snyder* (1982) 32 Cal.3d 590, 592.
Defense of Justifiable Possession ▸ Pen. Code, § 12021(h).
Presenting Evidence of Prior Conviction to Jury ▸ *People v. Sapp* (2003) 31 Cal.4th 240, 261; *People v. Valentine* (1986) 42 Cal.3d 170, 173.
Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.
Accidental Possession ▸ *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.
Lack of Knowledge of Nature of Conviction Not a Defense ▸ *People v. Snyder* (1982) 32 Cal.3d 590, 593.
Momentary Possession Defense ▸ *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423.
Constructive vs. Actual Possession ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

RELATED ISSUES

Proof of Prior Conviction
The trial court "has two options when a prior conviction is a substantive element of a current charge: Either the prosecution proves each element of the offense to the jury, or the defendant stipulates to the conviction and the court 'sanitizes' the prior by telling the jury that the defendant has a prior felony conviction, without

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specifying the nature of the felony committed." (*People v. Sapp* (2003) 31 Cal.4th 240, 261; *People v. Valentine* (1986) 42 Cal.3d 170, 173.)

Lack of Knowledge of Status of Conviction Not a Defense
"[R]egardless of what she reasonably believed, or what her attorney may have told her, defendant was deemed to know under the law that she was a convicted felon forbidden to possess concealable firearms. Her asserted mistake regarding her correct legal status was a mistake of law, not fact. It does not constitute a defense to section 12021." (*People v. Snyder* (1982) 32 Cal.3d 590, 593.)

Out-of-State Convictions
For an out-of-state conviction, it is sufficient if the offense is a felony under the laws of the "convicting jurisdiction." (*People v. Shear* (1999) 71 Cal.App.4th 278, 283.) The prosecution does not have to establish that the offense would be a felony under the laws of California. *(Ibid.)* Even if the convicting jurisdiction has restored the defendant's right to possess a firearm, the defendant may still be convicted of violating Penal Code section 12021. *(Ibid.)*

Pardons and Penal Code Section 1203.4 Motions
A pardon pursuant to Penal Code section 4852.17 restores a person's right to possess a firearm unless the person was convicted of a "felony involving the use of a dangerous weapon." (Pen. Code, § 4852.17.) The granting of a Penal Code section 1203.4 motion, however, does not restore the person's right to possess any type of firearm. (Pen. Code, § 1203.4(a); *People v. Frawley* (2000) 82 Cal.App.4th 784, 796.)

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STAFF NOTES

Pen. Code, § 12021, in relevant part:
*Note: Statute amended, effective 1/1/2004. Additions are marked with A><A, deletions with *** and brackets around deleted material.*

(a) (1) Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 12001.6, or who is addicted to the use of any narcotic drug, who owns [A> , purchases, receives, <A] or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

(2) Any person who has two or more convictions for violating paragraph (2) of subdivision (a) of Section 417 and who owns [A> , purchases, receives, <A] or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

(b) Notwithstanding subdivision (a), any person who has been convicted of a felony or of an offense enumerated in Section 12001.6, when that conviction results from certification by the juvenile court for prosecution as an adult in an adult court under Section 707 of the Welfare and Institutions Code, who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

(c) (1) Except as provided in subdivision (a) or paragraph (2) of this subdivision, any person who has been convicted of a misdemeanor violation of Section 71, 76, 136.1, 136.5, or 140, subdivision (d) of Section 148, Section 171b, 171c, 171d, 186.28, 240, 241, 242, 243, 244.5, 245, 245.5, * * * [246,] 246.3, 247, 273.5, 273.6, 417, 417.1, 417.2, 417.6, 422, 626.9, 646.9, 12023, or 12024, subdivision (b) or (d) of Section 12034, Section 12040, subdivision (b) of Section 12072, subdivision (a) of former Section 12100, Section 12220, 12320, or 12590, or Section 8100, 8101, or 8103 of the Welfare and Institutions Code, any firearm-related offense pursuant to Sections 871.5 and 1001.5 of the Welfare and Institutions Code, or of the conduct punished in paragraph (3) of subdivision * * * [(g)] of Section 12072, and who, within 10 years of the conviction, owns, [A> purchases, receives, <A] or has in his or her possession or under his or her custody or control, any firearm is guilty of a public

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offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($ 1,000), or by both that imprisonment and fine. [Notice to DOJ . . .]

(2) [Peace officer exemption on petition of court. . .]

(3) [General exemption on petition of court . . .]

(4) [Law enforcement immunity . . .]

(d) (1) Any person who, as an express condition of probation, is prohibited or restricted from owning, possessing, controlling, receiving, or purchasing a firearm and who owns, [A> purchases, receives, <A] or has in his or her possession or under his or her custody or control, any firearm but who is not subject to subdivision (a) or (c) is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($ 1,000), or by both that imprisonment and fine. [Notice to DOJ . . .]

(2) [Notice to defendant . . .]

(e) Any person who (1) is alleged to have committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, an offense described in subdivision (b) of Section 1203.073, or any offense enumerated in paragraph (1) of subdivision (c), [A> or any offense described in subdivision (a) of section 12025, subdivision (a) of section 12031, or subdivision (a) of section 12034, <A] and (2) is subsequently adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, an offense described in subdivision (b) of Section 1203.073, or any offense enumerated in paragraph (1) of subdivision (c) shall not own, or have in his or her possession or under his or her custody or control, any firearm until the age of 30 years. A violation of this subdivision shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($ 1,000), or by both that imprisonment and fine. [Notice to DOJ . . .]

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(f) [Limitation on use of federal convictions . . .]

(g) (1) Every person who purchases or receives, or attempts to purchase or receive, a firearm knowing that he or she is* * * [deleted: subject to a protective order as defined in Section 6218 of the Family Code, Section 136.2, or] [A> prohibited from doing so by <A] a temporary restraining order or injunction issued pursuant to Section 527.6 or 527.8 of the Code of Civil Procedure, [A> a protective order issued pursuant to section 136.2 or 646.91 of this code, or by a protective order issued pursuant to section 15657.03 of the welfare and institutions code, <A] is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($ 1,000), or by both that imprisonment and fine. * * * [notice limitation deleted]

(2) Every person who owns or possesses a firearm knowing that he or she is prohibited from * * *[deleted: subject to a protective order as defined in Section 6218 of the Family Code, Section 136.2, or] [A> doing so by <A] a temporary restraining order or injunction issued pursuant to Section 527.6 or 527.8 of the Code of Civil Procedure, [A> a protective order as defined in section 6218 of the family code, a protective order issued pursuant to section 136.2 or 646.91 of this code, or by a protective order issued pursuant to section 15657.03 of the welfare and institutions code <A], is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year, by a fine not exceeding one thousand dollars ($ 1,000), or by both that imprisonment and fine. * * * [notice limitation deleted]

(3) [Judicial Council forms . . .]

(4) [Probation limitation . . .]

(h) (1) A violation of subdivision (a), (b), (c), (d), or (e) is justifiable where all of the following conditions are met:

(A) The person found the firearm or took the firearm from a person who was committing a crime against him or her.

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(B) The person possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency's disposition according to law.

(C) If the firearm was transported to a law enforcement agency, it was transported in accordance with paragraph (18) of subdivision (a) of Section 12026.2.

(D) If the firearm is being transported to a law enforcement agency, the person transporting the firearm has given prior notice to the law enforcement agency that he or she is transporting the firearm to the law enforcement agency for disposition according to law.

(2) Upon the trial for violating subdivision (a), (b), (c), (d), or (e), the trier of fact shall determine whether the defendant was acting within the provisions of the exemption created by this subdivision.

(3) The defendant has the burden of proving by a preponderance of the evidence that he or she comes within the provisions of the exemption created by this subdivision.

(i) [Protocol . . .]

Pen. Code, § 12021.1, in relevant part:

(a) Notwithstanding subdivision (a) of Section 12021, any person who has been previously convicted of any of the offenses listed in subdivision (b) and who owns or has in his or her possession or under his or her custody or control any firearm is guilty of a felony. A dismissal of an accusatory pleading pursuant to Section 1203.4a involving an offense set forth in subdivision (b) does not affect the finding of a previous conviction. If probation is granted, or if the imposition or execution of sentence is suspended, it shall be a condition of the probation or suspension that the defendant serve at least six months in a county jail.

(b) As used in this section, a violent offense includes any of the following:

[28 violent felonies listed.]

(29) Any offense enumerated in subdivision (c) of Section 12001.6 if

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the person has two or more convictions for violating paragraph (2) of subdivision (a) of Section 417.

Pen. Code, § 12001.6, in relevant part:

As used in this chapter, an offense which involves the violent use of a firearm includes any of the following:

(a) A violation of paragraph (2) or (3) of subdivision (a) of Section 245 or a violation of subdivision (d) of Section 245.

(b) A violation of Section 246. [. . .]

(d) A violation of subdivision (c) of Section 417.

Elements—Knowledge but No Specific Intent

The elements of the offense proscribed by section 12021 are conviction of a felony and ownership, possession, custody or control of a firearm capable of being concealed on the person. [Citations omitted.] No specific criminal intent is required, and a general intent to commit the proscribed act is sufficient to sustain a conviction. [Citations omitted.] With respect to the elements of possession or custody, it has been held that knowledge is an element of the offense. [Citations omitted.]

(*People v. Snyder* (1982) 32 Cal.3d 590, 592.)

General Intent Required—Accidental Possession Insufficient

Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. (*People v. Snyder*, *supra*, 32 Cal. 3d at p. 598.) A person who commits a prohibited act "through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence" has not committed a crime. (§ 26.) Thus, a felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent.

Respondent argues the general intent requirement is satisfied by proof of knowledge. We agree knowledge plus physical possession

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> may ordinarily demonstrate an intent to exercise dominion and control, but knowledge does not conclusively demonstrate such intent as a matter of law. Otherwise, a felon would be strictly liable for the crime immediately upon finding a firearm, even if found under innocent circumstances.

(*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.)

The *Jeffers* court held that the trial court committed reversible error in failing to instruct on the joint union of general criminal intent and action, stating:

> Whether defendant had actual knowledge of the gun was not the only issue. The issue of whether defendant intentionally exercised control over the gun was very much in dispute under defendant's theory of the case. His knowledge was merely a part of the equation.

(*Id.* at p. 924.)

The court further held that a defendant would be entitled to a properly drafted pinpoint instruction on this issue, though the court found the instruction offered in the case before it “flawed in some respects.” (*Id.* at pp. 924-925.)

Proof of Prior Conviction

> This court's 1986 decision in *Valentine, supra*, 42 Cal.3d 170, interpreted article I, section 28, subdivision (f) of the California Constitution, added to the Constitution by Proposition 8, an initiative that the California electorate passed in 1982. It states: "When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court." (Cal. Const., art. I, § 28, subd. (f) (article I, section 28(f)).) *Valentine* concluded that the language was directed at *People v. Hall* (1980) 28 Cal.3d 143, which held that when an element of a charged offense requires proof that the defendant has a felony conviction, and the defendant offers to stipulate to the prior conviction, it is error to inform the jury either of the fact that the defendant has a prior felony conviction or the nature of the felony. (*Id.* at pp. 153-154.)
>
> *Valentine* held that article I, section 28(f) eliminated "the per se rule of *Hall*" by requiring that the jury be advised that the defendant has suffered a prior felony conviction if such felony conviction is an element of a current charge. (*Valentine, supra*, 42 Cal.3d at p. 173.)

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> But if the defendant offers to stipulate to a prior felony conviction, article I, section 28(f) allows evidence of the *nature* of that felony to be withheld from the jury. (*Valentine*, *supra*, at p. 173.) Thus, as the trial court properly ruled in this case, *Valentine* allows one of two alternatives when a defendant's prior felony conviction is an element of a charged crime: (1) The prosecution can prove the conviction in open court, and that proof can include both the fact that the defendant has previously been convicted of a felony offense as well as the nature of the felony involved; or (2) the defendant can stipulate to having a felony conviction and thereby keep from the jury the nature of the particular felony.

(*People v. Sapp* (2003) 31 Cal.4th 240, 261.)

Limiting Instruction

> [W]here the fact of a prior conviction is admitted solely to establish ex-felon status as an element of violation of section 12021, the trial court, at defendant's request, should give an instruction limiting the jury's consideration of the prior to that single purpose. The instruction should make clear that the nature of the prior conviction is irrelevant in this context, and that the jury should not speculate on the nature of the prior.

(*People v. Valentine* (1986) 42 Cal.3d 170, 182 n.7.)

> [W]hether to seek a limiting instruction is a tactical decision properly left to defense counsel, since defense counsel might conclude that the risk of a limiting instruction (unnecessarily highlighting a defendant's status as a felon) outweighed the questionable benefits such an instruction would provide.

(*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1141 [holding no sua sponte duty to give limiting instruction].)

Pardons and 1203.4 Motions

> Whenever a person is granted a full and unconditional pardon by the Governor, based upon a certificate of rehabilitation, the pardon shall entitle the person to exercise thereafter all civil and political rights of citizenship, including but not limited to: (1) the right to vote; (2) the right to own, possess, and keep any type of firearm that may

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> lawfully be owned and possessed by other citizens; except that this right shall not be restored, and Sections 12001 and 12021 shall apply, if the person was ever convicted of a felony involving the use of a dangerous weapon.

(Pen. Code, § 4852.17.)

> Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm capable of being concealed upon the person or prevent his or her conviction under Section 12021.

(Pen. Code, § 1203.4)

> We conclude that the Legislature intended the second half of the 1961 amendment to remain "permanently parallel" (*In re Jovan B.*, *supra*, 6 Cal. 4th at pp. 816-817, fn. 10) to section 12021, so that section 1203.4 would not afford a defense to any prosecution under section 12021 for possession of any weapon the Legislature might thereafter include within that section.

(*People v. Frawley* (2000) 82 Cal.App.4th 784, 796.)

Defenses: Momentary Possession

Previously there was a split in authority as to whether the defense of momentary possession applied to a violation of Penal Code section 12021. (See *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 [defense does apply]; *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1037-1038 [defense does not apply].) The Supreme Court recently approved of the holding in *Peple v. Hurtado, supra*, 47 Cal.App.4th at p. 814, that the defense does apply:

> We agree with the *Hurtado* court that recognition of a "momentary possession" defense serves the salutary purpose and sound public policy of encouraging disposal and discouraging retention of dangerous items such as controlled substances and firearms. (*Hurtado, supra,* 47 Cal. App. 4th at p. 814.) [. . .]
>
> We conclude that the defense of transitory possession devised in *Mijares* applies only to momentary or transitory possession of contraband for the purpose of disposal [. . ..]

(*People v. Martin* (2001) 25 Cal.4th 1180, 1191-1192.)

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People v. Martin, supra, 25 Cal.4th at pp. 1190-1191, explained this defense as follows:

> As aptly explained in *People v. Spry, supra,* 58 Cal. App. 4th at page 1369, "When a defendant relies on the *Mijares* defense, he or she essentially admits the commission of the offense of simple possession of narcotics: The defendant exercised control over the narcotics, he or she knew of its nature and presence, and possessed a usable amount. (CALJIC No. 12.00.) However, the defendant additionally asserts that he or she possessed the narcotics for the limited purpose of disposal, abandonment, or destruction. *Mijares* does not serve to negate an element of the offense of possession of narcotics. Instead, it offers a judicially created exception of lawful possession under certain specific circumstances as a matter of public policy, similar to the defenses of entrapment and necessity."

(See also Staff Notes to Instruction 1702, Legal Possession of Controlled Substance for further discussion of *People v. Mijares* (1971) 6 Cal.3d 415–423.)

The *Martin* court also resolved a conflict in appellate cases, holding that possession must be transitory in order for the defendant to invoke this defense:

> We conclude that the defense of transitory possession devised in *Mijares* applies only to momentary or transitory possession of contraband for the purpose of disposal, and that the trial court did not err in refusing defendant's requested instruction based on the holding in *Cole*. To the extent *People v. Cole, supra,* 202 Cal. App. 3d 1439, and *People v. Spry, supra,* 58 Cal. App. 4th 1345, n10 are inconsistent with the views expressed herein, they are disapproved.

Finally, in *People v. Martin* (2001) 25 Cal.4th 1180, 1192, n.10, the court noted that the central holding of *People v. Spry* (1997) 58 Cal.App.4th 1345, 1369, was that "*the defendant* bears the burden of establishing the *Mijares* affirmative defense of possession for the purpose of disposal by a preponderance of the evidence." (*People v. Martin* (2001) 25 Cal.4th 1180, 1192, n.10; *People v. Spry* (1997) 58 Cal.app.4th 1345, 1369.)

Although the *Martin* court disapproved of S*pry* to the extent that it allowed for more than momentary possession of contraband, the *Martin* court stated, "*Spry* is thus good authority for the proposition directly considered therein--the allocation

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of the burden of proof under the *Mijares* affirmative defense instruction [. . . .]" (*People v. Martin* (2001) 25 Cal.4th 1180, 1192, n.10.)

Similarly, in *People v. Mower* (2002) 28 Cal.4th 457, 480 n.8, the court noted that the defense of transitory possession requires the defendant to establish the facts in support of the defense by a preponderance of the evidence.

The definition of preponderance of the evidence used here was taken from Task Force Instruction 1275, Evidence of Uncharged Sex Offense.

Defenses: Justifiable Possession
Penal Code section 12021(h) provides that,

> (h) (1) A violation of subdivision (a), (b), (c), (d), or (e) is justifiable where all of the following conditions are met:
>
> (E) The person found the firearm or took the firearm from a person who was committing a crime against him or her.
>
> (F) The person possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency's disposition according to law.
>
> (G) If the firearm was transported to a law enforcement agency, it was transported in accordance with paragraph (18) of subdivision (a) of Section 12026.2.

Penal Code section 12026.2, in relevant part, states:

> (18) The transportation of a firearm by a person who finds the firearm and is transporting it to a law enforcement agency for disposition according to law, if he or she gives prior notice to the law enforcement agency that he or she is transporting the firearm to the law enforcement agency for disposition according to law.
>
> (b) In order for a firearm to be exempted under subdivision (a), while being transported to or from a place, the firearm shall be unloaded, kept in a locked container, as defined in subdivision (d), and the course of travel shall include only those deviations between authorized locations as are reasonably necessary under the circumstances.

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This defense is very similar to the momentary possession defense with the additional requirement that if the defendant is transporting the firearm to law enforcement for disposal, he or she must have given prior notice to the law enforcement agency. Staff found no published cases on this defense.

Defenses: Self-Defense

> [W]hen a member of one of the affected classes is in imminent peril of great bodily harm or reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate section 12021. As in all cases in which deadly force is used or threatened in self-defense, however, the use of the firearm must be reasonable under the circumstances and may be resorted to only if no other alternative means of avoiding the danger are available. In the case of a felon defending himself alone, such alternatives may include retreat where other persons would not be required to do so.

(*People v. King* (1978) 22 Cal.3d 12, 24.)

Constructive Possession

The language of the instruction is derived from the Task Force controlled substances instructions. (See also *People* v. *Azevedo* (1984) 161 Cal.App.3d 235, 242-243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876 n.6].)

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1811. Possession of Firearm by Person Prohibited Due to Conviction—Stipulation to Conviction

---

The defendant is charged [in Count __] with unlawfully possessing a firearm.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/purchased/received/possessed) a firearm.**

2. **The defendant knew that (he/she) (owned/purchased/received/ possessed) the firearm.**

[AND]

3. **The defendant had previously been convicted of (a/two) (felony/misdemeanor[s]).**

[AND]

<Alternative 4A—give only if the defendant is charged under Pen. Code, § 12021(c).>

[4. The previous conviction was within 10 years of the date the defendant possessed the firearm.]

<Alternative 4B—give only if the defendant is charged under Pen. Code, § 12021(e).>

[4. The defendant was under 30 years old at the time (he/she) possessed the firearm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not 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/other people).]

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The defendant and the People have stipulated, or agreed, that the defendant was previously convicted of a (felony/misdemeanor). This stipulation means that you must accept this fact as proved.

[Do not consider this fact for any other purpose [except for the limited purpose of _____*<insert other permitted purpose, e.g., determining the defendant's credibility>***]. Do not speculate about or discuss the nature of the conviction.]**

[The People allege that the defendant possessed the following firearms: _____ *<insert firearms when multiple firearms alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the firearms, and you all agree on which firearm (he/she) possessed.]**

<Defense: Momentary Possession>
[Even if you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period.**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it.).**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm.**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

<Defense: Justifiable Possession>
[Even if you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in

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possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant).**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon.**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant stipulates to the prior conviction. (*People v. Sapp* (2003) 31 Cal.4th 240, 261; *People v. Valentine* (1986) 42 Cal.3d 170, 173.) If the defendant does not stipulate, use Instruction 1810, Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.)

If the defendant has stipulated to the fact of the conviction, the court should sanitize all references to the conviction to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.) If the defendant agrees, the court should not

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read the portion of the information describing the nature of the conviction. Likewise, the court should ensure that the verdict forms do not reveal the nature of the conviction.

The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, Instruction 122, Union Of Act And Intent—General Intent. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924.) "Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185.) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Element 4 should only be given if the defendant is charged under Penal Code section 12021(c), possession within 10 years of a specified misdemeanor conviction, or Penal Code section 12021(e), possession by someone under 30 years old with a specified juvenile finding.

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "Do not consider this fact for any other purpose. . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.)

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192.) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814, which held that the defense of momentary possession applies to a charge of violating Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mowers* (2002) 28 Cal.4th 457, 478–481.) If sufficient

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evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 12021(h) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give Instruction 1814, Possession of Firearm by Person Prohibited by Statute—Self-Defense.

AUTHORITY

Elements ▸ Pen. Code, §§ 12021(a), (b), (c) & (e), 12021.1(a), 12001.6; *People v. Snyder* (1982) 32 Cal.3d 590, 592.
Defense of Justifiable Possession ▸ Pen. Code, § 12021(h).
Presenting Evidence of Prior Conviction to Jury ▸ *People v. Sapp* (2003) 31 Cal.4th 240, 261; *People v. Valentine* (1986) 42 Cal.3d 170, 173.
Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.
Accidental Possession ▸ *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.
Lack of Knowledge of Nature of Conviction Not a Defense ▸ *People v. Snyder* (1982) 32 Cal.3d 590, 593.
Momentary Possession Defense ▸ *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423.
Constructive vs. Actual Possession ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

RELATED ISSUES

See Instruction 1810, Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction.

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STAFF NOTES

See Notes to Instruction 1810.

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1812. Possession of Firearm by Person Prohibited by Court Order

The defendant is charged [in Count __] with unlawfully possessing a firearm.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/purchased/received/possessed) a firearm.**

2. **The defendant knew that (he/she) (owned/purchased/received/ possessed) the firearm.**

[AND]

3. **A court had ordered that the defendant not (own[,]/ purchase[,]/ receive[,]/ [or] possess) a firearm.**

<Give element 4 only if the defendant is charged under Pen. Code, § 12021(g).>
[AND

4. **The defendant knew of the court's order.]**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not 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/other people).]

[The defendant and the People have stipulated, or agreed, that a court ordered the defendant not to own, purchase, receive, or possess a firearm. This stipulation means that you must accept this fact as proved.]

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<Alternative A—limiting instruction when stipulation to order>
[Do not consider this fact for any other purpose [except for the limited purpose of _____*<insert other permitted purpose, e.g., determining the defendant's credibility>***]. Do not speculate about why the court's order was made.]**

<Alternative B—limiting instruction when no stipulation to order>
[You may consider evidence, if any, that a court ordered the defendant not to own, purchase, receive, or possess a firearm only in deciding whether the People have proved this element of the crime [or for the limited purpose of _____*<insert other permitted purpose, e.g., assessing defendant's credibility>***]. Do not consider such evidence for any other purpose.]**

[The People allege that the defendant possessed the following firearms: _____ *<insert firearms when multiple firearms alleged>*. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the firearms, and you all agree on which firearm (he/she) possessed.]

<Defense: Momentary Possession>
[Even if you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period.**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it.**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm.**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

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<Defense: Justifiable Possession>

[Even if you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant).**

[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon.**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, (he/she) had given prior notice to the agency that (he/she) would be delivering a firearm to the agency for disposal.]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant is charged under Penal Code section 12021(d)(1), possession by someone prohibited as a condition of probation following conviction for a crime not listed in other provisions of Penal Code section 12021, or Penal Code section 12021(g), possession by someone prohibited by a temporary restraining order or other protective order.

The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, Instruction 122, Union Of Act And Intent—General Intent. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924.) “Wrongful intent must be shown with

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regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185.) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Give element 4 only if the defendant is charged under Penal Code section 12021(g).

If the defendant has not stipulated to the probation order, do not give the bracketed paragraph that begins, "The defendant and the People have stipulated . . . ."

If the defendant does stipulate to the probation order, the court must give the bracketed paragraph that begins, "The defendant and the People have stipulated . . . ." The court must also sanitize all references to the probation order to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp, supra,* 31 Cal.4th at p. 261; *People v. Valentine, supra,* 42 Cal.3d at p. 173.) If the defendant agrees, the court must not read the portion of the information describing the nature of the conviction. Likewise, the court must ensure that the verdict forms do not reveal the nature of the conviction.

On request, the court should give the limiting instruction regarding the evidence of the probation condition. (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.) If the defendant does not stipulate to the probation condition, give alternative A. If the defendant does stipulate, give alternative B.

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192.) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47

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Cal.App.4th 805, 814, which held that the defense of momentary possession applies to a charge of violating Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mowers* (2002) 28 Cal.4th 457, 478–481.) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 12021(h) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give Instruction 1814, Possession of Firearm by Person Prohibited by Statute—Self-Defense.

AUTHORITY

Elements ▸ Pen. Code, § 12021(d) & (g); *People v. Snyder* (1982) 32 Cal.3d 590, 592.
Defense of Justifiable Possession ▸ Pen. Code, § 12021(h).
Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.
Accidental Possession ▸ *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.
Momentary Possession Defense ▸ *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423.
Constructive vs. Actual Possession ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

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STAFF NOTES

Pen. Code, § 12021, in relevant part:
*Note: Statute amended, effective 1/1/2004. Additions are marked with A><A, deletions with ***.*

(d) (1) Any person who, as an express condition of probation, is prohibited or restricted from owning, possessing, controlling, receiving, or purchasing a firearm and who owns, [A> purchases, receives, <A] or has in his or her possession or under his or her custody or control, any firearm but who is not subject to subdivision (a) or (c) is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($ 1,000), or by both that imprisonment and fine. [Notice to DOJ . . .]

[. . .]

(g) (1) Every person who purchases or receives, or attempts to purchase or receive, a firearm knowing that he or she is* * * [deleted: subject to a protective order as defined in Section 6218 of the Family Code, Section 136.2, or] [A> prohibited from doing so by <A] a temporary restraining order or injunction issued pursuant to Section 527.6 or 527.8 of the Code of Civil Procedure, [A> a protective order issued pursuant to section 136.2 or 646.91 of this code, or by a protective order issued pursuant to section 15657.03 of the welfare and institutions code, <A] is guilty of a public offense, which shall be punishable by imprisonment in a county jail not exceeding one year or in the state prison, by a fine not exceeding one thousand dollars ($ 1,000), or by both that imprisonment and fine. * * * [notice limitation deleted]

(2) Every person who owns or possesses a firearm knowing that he or she is prohibited from * * *[deleted: subject to a protective order as defined in Section 6218 of the Family Code, Section 136.2, or] [A> doing so by <A] a temporary restraining order or injunction issued pursuant to Section 527.6 or 527.8 of the Code of Civil Procedure, [A> a protective order as defined in section 6218 of the family code, a protective order issued pursuant to section 136.2 or 646.91 of this code, or by a protective order issued pursuant to section 15657.03 of the welfare and institutions code <A], is guilty of a public offense, which shall be punishable by imprisonment in a

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> county jail not exceeding one year, by a fine not exceeding one thousand dollars ($ 1,000), or by both that imprisonment and fine. * * * [notice limitation deleted]

See Staff Note to Instruction 1810.

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1813. Possession of Firearm by Person Addicted to a Narcotic Drug

The defendant is charged [in Count __] with unlawfully possessing a firearm.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/purchased/received/possessed) a firearm.**

2. **The defendant knew that (he/she) (owned/purchased/received/ possessed) the firearm.**

AND

3. **At the time the defendant (owned/purchased/received/possessed) the firearm, (he/she) was addicted to the use of a narcotic drug.**

_____ *<insert narcotic drug alleged>* **is a narcotic drug.**

A person is *addicted* to the use of a narcotic drug if:

1. **The person has become emotionally dependent on the drug in the sense that he or she experiences a compulsive need to continue its use.**

2. **The person has developed a tolerance to the drug's effects and therefore requires larger and more potent doses.**

AND

3. **The person has become physically dependent, suffering withdrawal symptoms if he or she is deprived of the drug.**

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion.] [A firearm need not 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.]

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[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/other people).]

[The People allege that the defendant possessed the following firearms: _____ *<insert firearms when multiple firearms alleged>*. **You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the firearms, and you all agree on which firearm (he/she) possessed.]**

<Defense: Momentary Possession>

[Even if you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. **(He/She) possessed the firearm only for a momentary or transitory period.**

2. **(He/She) possessed the firearm in order to (abandon[,]/ [or] dispose of[,]/ [or] destroy) it.**

AND

3. **(He/She) did not intend to prevent law enforcement officials from seizing the firearm.**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

<Defense: Justifiable Possession>

[Even if you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant).**

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[AND]

2. **(He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon.**

[AND

3. **If the defendant was transporting the firearm to a law enforcement agency, the defendant gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The court has a **sua sponte** duty to instruct on the union of general criminal intent and action, Instruction 122, Union Of Act And Intent—General Intent. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924.) "Wrongful intent must be shown with regard to the possession and custody elements of the crime of being a felon in possession of a firearm. . . . [A] felon who acquires possession of a firearm through misfortune or accident, but who has no intent to exercise control or to have custody, commits the prohibited act without the required wrongful intent." (*Id.* at p. 922.) The defendant is also entitled to a pinpoint instruction on unintentional possession if there is sufficient evidence to support the defense. (*Id.* at pp. 924–925.)

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185.) Give the bracketed paragraph beginning "The

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People allege that the defendant possessed the following firearms," inserting the items alleged.

Defenses—Instructional Duty
"[T]he defense of transitory possession devised in [*People v. Mijares* (1971) 6 Cal.3d 415, 420, 423] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192.) The court in *Martin, supra,* approved of *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814, which held that the defense of momentary possession applies to a charge of violating Penal Code section 12021. This is an affirmative defense and the defense bears the burden of establishing it by a preponderance of the evidence. (*People v. Mowers* (2002) 28 Cal.4th 457, 478–481.) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Momentary Possession."

Penal Code section 12021(h) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense and the defense bears the burden of establishing it by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, "Defense: Justifiable Possession."

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give Instruction 1814, Possession of Firearm by Person Prohibited by Statute—Self-Defense.

AUTHORITY

Elements ▸ Pen. Code, § 12021(a); *People v. Snyder* (1982) 32 Cal.3d 590, 592.
Narcotic Addict ▸ *People v. O'Neil* (1965) 62 Cal.2d 748, 754.
Defense of Justifiable Possession ▸ Pen. Code, § 12021(h).
Accidental Possession ▸ *People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.
Momentary Possession Defense ▸ *People v. Martin* (2001) 25 Cal.4th 1180, 1191–1192; *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814; *People v. Mijares* (1971) 6 Cal.3d 415, 420, 423.
Constructive vs. Actual Possession ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

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STAFF NOTES

Pen. Code, § 12021, in relevant part:
Note: Statute amended, effective 1/1/2004. Additions are marked with A><A.

> (a) (1) Any person [. . .] who is addicted to the use of any narcotic drug, who owns [A> , purchases, receives, <A] or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

Narcotic Addict

> The prosecution's burden is to show (1) that the defendant has become "emotionally dependent" on the drug in the sense that he experiences a compulsive need to continue its use, (2) that he has developed a "tolerance" to its effects and hence requires larger and more potent doses, and (3) that he has become "physically dependent" so as to suffer withdrawal symptoms if he is deprived of his dosage.

(*People v. O'Neil* (1965) 62 Cal.2d 748, 754.)

See Staff Notes to Instruction 1810.

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1814. Possession of Firearm by Person Prohibited by Statute: Self–Defense

The defendant is not guilty of unlawful possession of a firearm[, as charged in Count __,] if (he/she) temporarily possessed the firearm in (self-defense/defense of another). The defendant possessed the firearm in lawful (self-defense/defense of another) if:

1. **The defendant reasonably believed that (he/she/someone else/_____ <*insert name of third party*>) was in danger of suffering significant or substantial physical injury.**

2. **The defendant reasonably believed that (he/she/the other person) would suffer that injury immediately.**

3. **The defendant reasonably believed that the use of force was necessary to defend against the threat of that injury.**

4. **A firearm became available to the defendant without planning or preparation on (his/her) part.**

5. **The defendant possessed the firearm temporarily, that is, for a period no longer than was necessary [or appeared to have been necessary] for self-defense.**

6. **No other means of avoiding the danger of injury was available.**

AND

7. **The defendant's use of the firearm was reasonable under the circumstances.**

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed that (he/she/someone else) was in immediate danger of violence. Defendant's belief must have been reasonable and (he/she) must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, then the defendant did not act in lawful (self-defense/defense of another).

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When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger need not have actually existed.

[The defendant's belief that (he/she/someone else) was threatened may be reasonable even if (he/she) relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.]

[If you find that _____ *<insert name of person who allegedly threatened defendant>* **had threatened or harmed the defendant in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]**

[If _____ *<insert name of person who allegedly threatened defendant>* **had threatened or harmed the defendant in the past, the defendant may have been justified in acting more quickly or taking greater self-defense measures than if there had been no earlier threat or harm.]**

[If you find that the defendant knew that _____ *<insert name of person who allegedly threatened defendant>* **had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]**

[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with _____ *<insert name of person who allegedly threatened defendant>***, you may consider that threat in deciding whether the defendant was justified in acting in self-defense.]**

The People have the burden of proving beyond a reasonable doubt that the defendant did not temporarily possess the firearm in (self-defense/defense of another). If the People have not met this burden, you must find the defendant not guilty of this crime.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on self-defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence

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supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [discussing duty to instruct on defenses generally]; see also *People v. Lemus* (1988) 203 Cal.App.3d 470, 478 [if substantial evidence of self-defense exists, court must instruct sua sponte and let jury decide credibility of witnesses]; *People v. King* (1978) 22 Cal.3d 12, 24 [self-defense applies to charge under Pen. Code, § 12021].)

If this instruction is given with other self-defense instructions, the court should delete from the other instructions any portion stating that the defendant need not retreat. (*People v. King* (1978) 22 Cal.3d 12, 24 [if defendant is a convicted felon, he or she is obliged to try to retreat before using a firearm in self-defense].)

On defense request and when supported by sufficient evidence, the court must instruct that the jury may consider the effect of "antecedent threats and assaults against the defendant on the reasonableness of defendant's conduct." (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488.) The court must also instruct that the jury may consider previous threats or assaults by the aggressor against someone else or threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (See *People v. Pena* (1984) 151 Cal.App.3d 462, 475; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1068; see also Instruction 701, Justifiable Homicide: Self-Defense or Defense of Another.) If these instructions have already been given in Instruction 690 or 701, the court may delete them here.

Related Instructions
Instruction 690, Right to Self-Defense or Defense of Another (Non-Homicide).
Instruction 691, Right to Self-Defense: Mutual Combat or Initial Aggressor.
Instruction 692, Right to Self-Defense: May Not Be Contrived.
Instruction 693, Right to Self-Defense: Escalation to Deadly Force.
Instruction 701, Justifiable Homicide: Self-Defense or Defense of Another.

AUTHORITY

Temporary Possession of Firearm by Felon in Self-Defense ▸ *People v. King* (1978) 22 Cal.3d 12, 24.
Possession Must Be Brief and Not Planned ▸ *People v. McLindon* (1980) 114 Cal.App.3d 336, 340.
Instructional Requirements ▸ *People v. Moody* (1943) 62 Cal.App.2d 18; *People v. Myers* (1998) 61 Cal.App.4th 328, 335, 336.
Lawful Resistance ▸ Pen. Code, §§ 692, 693, 694; Civ. Code, § 50.

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Burden of Proof ▸ Pen. Code, § 189.5; *People v. Banks* (1976) 67 Cal.App.3d 379, 383–384.
Elements ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.
Imminence ▸ *People v. Aris* (1989) 215 Cal.App.3d 1178, 1187.
Reasonable Belief ▸ *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *People v. Clark* (1982) 130 Cal.App.3d 371, 377.

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, §§ 65, 66, 69, 70.
2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 175.

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STAFF NOTES

Firearm Possessed by Felon in Self-Defense

> [W]hen a member of one of the affected classes is in imminent peril of great bodily harm or reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate section 12021. As in all cases in which deadly force is used or threatened in self-defense, however, the use of the firearm must be reasonable under the circumstances and may be resorted to only if no other alternative means of avoiding the danger are available. In the case of a felon defending himself alone, such alternatives may include retreat where other persons would not be required to do so.

(*People v. King* (1978) 22 Cal.3d 12, 24.)

> Key points are that possession of a concealable firearm be brief and without predesign or prior possession. *King* clearly is not applicable here. Appellant's possession of the pistol was admittedly not brief and further it was not without design or prior possession. Appellant admitted that he had possession of the firearm for approximately five months and that he kept it by his bed for protection because he did not want to shoot anybody with his rifle.

(*People v. McLindon* (1980) 114 Cal.App.3d 336, 340 [footnote omitted].)

See Staff Notes to self-defense instructions, Instruction 690 and 701.

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1820. Carrying Concealed Firearm on Person

The defendant is charged [in Count __] with unlawfully carrying a concealed firearm on (his/her) person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant carried on (his/her) person a firearm capable of being concealed on a person.**

2. **The defendant knew that (he/she) was carrying a firearm.**

AND

3. **It was substantially concealed on the defendant's person.**

A *firearm capable of being concealed on a person* is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion and that has a barrel less than 16 inches in length. [A *firearm capable of being concealed on a 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.] [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.]

[A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[Firearms carried openly in belt holsters are not concealed.]

<Defense: Statutory Exemption>
[The defendant did not unlawfully carry a concealed firearm if _____
<insert defense from Pen. Code, § 12025.5, 12026, 12026.1, 12026.2, or 12027>.
The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully carried a concealed firearm. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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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. If the defendant is charged with any of the sentencing factors in Penal Code section 12025(b), the court must also give the appropriate instruction from Instructions 1830–1835. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

Exemptions and a justification for carrying a concealed firearm are stated in Penal Code sections 12025.5, 12026, 12026.1, 12026.2, and 12027. If sufficient evidence has been presented 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 [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, "The defendant did not unlawfully . . . ."

Penal Code section 12025(a) prohibits carrying a concealed "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."

Related Instructions
Instruction 1830, Carrying Firearm—Specified Convictions.
Instruction 1831, Carrying Firearm—Stolen Firearm.
Instruction 1832, Carrying Firearm—Active Participant in Criminal Street Gang.
Instruction 1833, Carrying Firearm—Not in Lawful Possession.
Instruction 1834, Carrying Firearm—Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness.
Instruction 1835, Carrying Concealed Firearm—Not Registered Owner and Weapon Loaded.
Instruction 1835A, Carrying Loaded Firearm—Not Registered Owner.

AUTHORITY

Elements ▸ Pen. Code, § 12025(a)(2) & (f).
Firearm Defined ▸ Pen. Code, § 12001.
Knowledge Required ▸ *People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030–1031; *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332.
Concealment Required ▸ *People v. Nelson* (1960) 185 Cal.App.2d 578, 580–581.

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Factors in Pen. Code, § 12025 (b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135.
Justifications and Exemptions ▸ Pen. Code, §§ 12025.5, 12026, 12026.1, 12026.2, 12027.
Need Not Be Operable ▸ *People v. Marroquin* (1989) 210 Cal.App.3d 77, 82.
Substantial Concealment ▸ *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [interpreting Pen. Code, § 12020(a)(4)]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [same].
Statute Is Not Unconstitutionally Vague ▸ *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154–159.

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, § 12025(b)(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.

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STAFF NOTES

Pen. Code, § 12025, in relevant part:

(a) A person is guilty of carrying a concealed firearm when he or she does any of the following:

(1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person.

(2) Carries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person.

(3) Causes to be carried concealed within any vehicle in which he or she is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person.

(b) Carrying a concealed firearm in violation of this section is punishable, as follows:

(1) Where the person previously has been convicted of any felony, or of any crime made punishable by this chapter, as a felony.

(2) Where the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.

(3) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony.

(4) Where the person is not in lawful possession of the firearm, as defined in this section, or the person is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.

(5) Where the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars

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($ 1,000), or by both that imprisonment and fine.

(6) By imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($ 1,000), or by both that fine and imprisonment if both of the following conditions are met:

(A) Both the pistol, revolver, or other firearm capable of being concealed upon the person and the unexpended ammunition capable of being discharged from that firearm are either in the immediate possession of the person or readily accessible to that person, or the pistol, revolver, or other firearm capable of being concealed upon the person is loaded as defined in subdivision (g) of Section 12031.

(B) The person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106, as the registered owner of that pistol, revolver, or other firearm capable of being concealed upon the person.

(7) In all cases other than those specified in paragraphs (1) to (6), inclusive, by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($ 1,000), or by both that imprisonment and fine. [. . .]

(f) Firearms carried openly in belt holsters are not concealed within the meaning of this section.

(g) For purposes of this section, "lawful possession of the firearm" means that the person who has possession or custody of the firearm either lawfully owns the firearm or has the permission of the lawful owner or a person who otherwise has apparent authority to possess or have custody of the firearm. A person who takes a firearm without the permission of the lawful owner or without the permission of a person who has lawful custody of the firearm does not have lawful possession of the firearm. [. . ..]

Justification—Pen. Code, § 12025.5, in relevant part:

(a) A violation of Section 12025 is justifiable when a person who possesses a firearm reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons

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who has or have been found to pose a threat to his or her life or safety. This section may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety. It is not the intent of the Legislature to limit, restrict, or narrow the application of current statutory or judicial authority to apply this or other justifications to defendants charged with violating Section 12025 or of committing other similar offenses.

Exemption for Possession in Home or Business—Pen. Code, § 12026:

(a) Section 12025 shall not apply to or affect any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state, and who is not within the excepted classes prescribed by Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, who carries, either openly or concealed, anywhere within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident any pistol, revolver, or other firearm capable of being concealed upon the person.

(b) No permit or license to purchase, own, possess, keep, or carry, either openly or concealed, shall be required of any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state, and who is not within the excepted classes prescribed by Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, to purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident.

(c) Nothing in this section shall be construed as affecting the application of Section 12031.

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Authority to Transport Concealable Firearm—Pen. Code, § 12026.1, in relevant part:

> (a) Section 12025 shall not be construed to prohibit any citizen of the United States over the age of 18 years who resides or is temporarily within this state, and who is not within the excepted classes prescribed by Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, from transporting or carrying any pistol, revolver, or other firearm capable of being concealed upon the person, provided that the following applies to the firearm:
>
> (1) The firearm is within a motor vehicle and it is locked in the vehicle's trunk or in a locked container in the vehicle other than the utility or glove compartment.
>
> (2) The firearm is carried by the person directly to or from any motor vehicle for any lawful purpose and, while carrying the firearm, the firearm is contained within a locked container.

Additional Exemptions—See Pen. Code, §§ 12026.2, 12027
Penal Code section 12026.6 and 12027 provide additional exemptions for law enforcement officers and those engaged in lawful gun related activities such as sporting events, target practice and gun shows.

Firearm Defined—Pen. Code, § 12001, in relevant part:

> (a)(1) As used in this title, the terms "pistol," "revolver," and "firearm capable of being concealed upon the person" shall apply to and include any device designed to be used as a weapon, from which is expelled a projectile by the force of any explosion, or other form of combustion, and that has a barrel less than 16 inches in length. These terms also include any device that has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length.
>
> (2) As used in this title, the term "handgun" means any "pistol," "revolver," or "firearm capable of being concealed upon the person." [. . .]
>
> (d) For the purposes of Sections 12025 and 12031, the term "firearm" also shall include any rocket, rocket propelled projectile

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> launcher, or similar device containing any explosive or incendiary material whether or not the device is designed for emergency or distress signaling purposes. […]
>
> (f) Nothing shall prevent a device defined as a "handgun," "pistol," "revolver," or "firearm capable of being concealed upon the person" from also being found to be a short-barreled shotgun or a short-barreled rifle, as defined in Section 12020.

Factors in Subsection (b) are Sentencing Factors Not Elements

> The crime of carrying a concealed weapon within a vehicle is defined in subdivision (a)(1). The prior conviction referred to in subdivision (b)(1) is simply a sentencing factor which serves to elevate the offense from misdemeanor to felony; the prior conviction is not an element of the offense of carrying a concealed firearm within a vehicle proscribed in section 12025. [. . .]
>
> A criminal defendant is entitled to stipulate to the truth of a prior conviction alleged under subdivision (b)(1) and thereby preclude the jury from learning of the prior. The reason is that under subdivision (b)(1), the prior conviction is a sentencing factor, not an enhancement of the offense charged.

(*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

"For the reasons we have stated, we do not believe CALJIC No. 12.46 correctly states the law." (*Id.* at p. 137.)

Firearm Concealed is an Element of Offense

> "You are instructed that it is unlawful for any person within this state to carry upon his person any pistol, revolver, or other firearm *capable of being concealed upon the person* without having a license to carry such firearm." (Emphasis added.) [. . .]
>
> Penal Code, section 12025, provides that any person is guilty of a criminal offense if he "carries concealed upon his person or concealed within any vehicle which is under his control or direction any pistol, revolver, or other firearm capable of being concealed upon the person without having a license to carry such firearm . . . ." The instruction given by the court, and quoted above, obviously

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> omits the gravamen of an offense under Penal Code, section 12025, in that it fails to include as an element of the offense a carrying of a weapon "*concealed* upon his person or *concealed* within any vehicle which is under his control or direction." (Emphasis added.) [. . .]
>
> The People, while admitting the error in the instructions, assert that the error could not have caused a miscarriage of justice [. . ..]

(*People v. Nelson* (1960) 185 Cal.App.2d 578, 580-581.) The court reversed the conviction for manslaughter based on the erroneous instruction quoted above. (*Id.* at p. 583.)

Knowledge

> Defendant's first contention is that the trial court erred in failing to instruct the jury that knowledge of the concealed firearm was an element of the alleged violation of Penal Code section 12025. [. . .] Courts have assumed that, under the various statutes making criminal the possession of a weapon, knowledge of the presence and character of the object is an element of the offense. [Citations omitted.] None of those cases except *Gonzales* discusses the necessity of an instruction calling the jury's attention to this aspect of the case, and *Gonzales* did not decide it.
>
> [. . .] In the context of this case the absence of an instruction on the subject of knowledge could not have prejudiced defendant.

(*People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030-1031.)

In the context of Penal Code section 12020(a)(4), the Supreme Court recently ruled that the jury must be instructed on the knowledge element of possession of a concealed dirk or dagger. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332; see Staff Notes to Instruction 1801.)

Similarly, *In re Jorge M.* (2000) 23 Cal.4th 866, 887, the Supreme Court held that the Assault Weapons Control Act required proof that the defendant knew or should have know that the weapon was of a kind prohibited by the statute. In reaching this conclusion, the court questioned the continuing validity of previous appellate decisions holding that knowledge of the character of the prohibited object was not required. (*Id.* at p. 876 n.6.)

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Need Not be Operable

> [W]e conclude that a firearm, the generic term used to describe an object which may silence, maim, strike or destroy that which moves, breathes or exists, need not be operable to convict under Penal Code section 12025, subdivision (b). To engraft such a requirement would be inconsistent with the societal effort to curtail criminal conduct.

(*People v. Marroquin* (1989) 210 Cal.app.3d 77, 82.)

Substantial Concealment

> Defendant contends there is insufficient evidence of concealment because the tip of the knife was protruding from his pocket. We disagree. Only substantial concealment is required. (*People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [dirk with handle protruding from waistband found to be a concealed weapon].) "A defendant need not be totally successful in concealing a dirk to be guilty of violation of Penal Code section 12020, subdivision (a)." (*People v. Fuentes, supra*, 64 Cal.App.3d at p. 955.)
>
> Here, the jury was permitted to examine the knife, which our perusal discloses is approximately seven and three-eighths inches long. The jury was apprised that only one and one-half to two inches of the blade were protruding from defendant's pocket. These facts support a finding of substantial concealment.

(*People v. Wharton* (1992) 5 Cal.App.4th 72, 75.)

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1821. Carrying Concealed Firearm Within Vehicle

The defendant is charged [in Count __] with unlawfully carrying a concealed firearm within a vehicle.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant carried within a vehicle a firearm capable of being concealed on a person.**

2. **The defendant knew the firearm was in the vehicle.**

3. **The firearm was substantially concealed within the vehicle.**

AND

4. **The vehicle was under the defendant's control or direction.**

[A *firearm capable of being concealed on a person* is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion and that has a barrel less than 16 inches in length.] [A *firearm capable of being concealed on a 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.] [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.]

[A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[Firearms carried openly in belt holsters are not concealed.]

<Defense: Statutory Exemption>

[The defendant did not unlawfully carry a concealed firearm with in a vehicle if _____ *<insert defense from Pen. Code, § 12025.5, 12026, 12026.1, 12026.2, or 12027>*. **The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully carried a concealed firearm**

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within a vehicle. If the People have not met this burden, you must find the defendant not guilty of this crime.]

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 12025(b), the court must also give the appropriate instruction from Instructions 1830–1835. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

Exemptions and a justification for carrying a concealed firearm are stated in Penal Code sections 12025.5, 12026, 12026.1, 12026.2, and 12027. If sufficient evidence has been presented 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 [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, "The defendant did not unlawfully . . . ."

Penal Code section 12025(a) prohibits carrying a concealed "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."

Related Instructions
Instruction 1830, Carrying Firearm—Specified Convictions.
Instruction 1831, Carrying Firearm—Stolen Firearm.
Instruction 1832, Carrying Firearm—Active Participant in Criminal Street Gang.
Instruction 1833, Carrying Firearm—Not in Lawful Possession.
Instruction 1834, Carrying Firearm—Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness.
Instruction 1835, Carrying Concealed Firearm—Not Registered Owner and Weapon Loaded.
Instruction 1835A, Carrying Loaded Firearm—Not Registered Owner.

AUTHORITY

Elements ▸ Pen. Code, § 12025(a)(1) & (f).
Firearm Defined ▸ Pen. Code, § 12001.

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Knowledge Required ▸ *People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030–1031; *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332.
Concealment Required ▸ *People v. Nelson* (1960) 185 Cal.App.2d 578, 580–581.
Factors in Pen. Code, § 12025 (b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135.
Justifications and Exemptions ▸ Pen. Code, §§ 12025.5, 12026, 12026.1, 12026.2, 12027.
Need Not Be Operable ▸ *People v. Marroquin* (1989) 210 Cal.App.3d 77, 82.
Substantial Concealment ▸ *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [interpreting Pen. Code, § 12020(a)(4)]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [same].
Statute Is Not Unconstitutionally Vague ▸ *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154–159.

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, § 12025(b)(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

Gun in Unlocked Carrying Case Is Concealed
"If a firearm is transported in a vehicle in such a manner as to be invisible unless its carrying case is opened, it is concealed in the ordinary and usual meaning of the term." (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355.) Thus, carrying a firearm in an unlocked case in a vehicle violates Penal Code section 12025(a)(1). *(Ibid.)* However, Penal Code section 12026.1 makes it lawful to transport a firearm in a vehicle if it is in a *locked* case.

Not Necessary for Defendant to Possess or Control the Firearm
"The statute does not require that the defendant have the exclusive possession and control of the firearm." (*People v. Davis* (1958) 157 Cal.App.2d 33, 36.) The court in *People v. Davis, supra*, upheld the conviction where the defendant owned and controlled the vehicle and knew of the presence of the firearm below the seat, even

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though the weapon was placed there by someone else and belonged to someone else. *(Ibid.)*

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STAFF NOTES

Pen. Code, § 12025, in relevant part:

> (a) A person is guilty of carrying a concealed firearm when he or she does any of the following:
>
> (1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person.

See Staff Notes to Instruction 1820 for full statute and other case notes.

Not Necessary for Defendant to Possess or Control the Firearm

> The statute does not require that the defendant have the exclusive possession and control of the firearm. It is enough if a person carries concealed within a vehicle any firearm, that the vehicle is under the control or direction of such person, [and] that the firearm is capable of being concealed on the person [. . ..]

(*People v. Davis* (1958) 157 Cal.App.2d 33, 36.) Thus, the court upheld the conviction where the defendant owned and controlled the vehicle and knew of the presence of the firearm below the seat, even though the weapon was placed there by someone else and belonged to someone else. (*Ibid.*) Note that this ruling predates the amendment to Penal Code section 12025(a) that added subsection (3) making it illegal to "cause to be carried concealed within a vehicle" a firearm.

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1822. Carrying Concealed Firearm: Caused to Be Carried Within Vehicle

The defendant is charged [in Count __] with unlawfully causing a firearm to be carried concealed within a vehicle.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant caused a firearm capable of being concealed on a person to be concealed while it was carried within a vehicle.**

2. **The defendant knew that (he/she) caused the firearm to be concealed in the vehicle.**

3. **The firearm was substantially concealed within the vehicle.**

AND

4. **The defendant was in the vehicle during the time the firearm was concealed there.**

[A *firearm capable of being concealed on a person* is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion and that has a barrel less than 16 inches in length.] [A *firearm capable of being concealed on a 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.] [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.]

[A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

[Firearms carried openly in belt holsters are not concealed.]

[The People need not prove that the defendant initially brought the firearm into the vehicle.]

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<Defense: Statutory Exemption>
[The defendant did not unlawfully cause a firearm to be carried concealed within a vehicle if _____ *<insert defense from Pen. Code, § 12025.5, 12026, 12026.1, 12026.2, or 12027>*. **The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully caused a firearm to be carried concealed within a vehicle. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

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 12025(b), the court must also give the appropriate instruction from Instructions 1830–1835. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

Exemptions and a justification for carrying a concealed firearm are stated in Penal Code sections 12025.5, 12026, 12026.1, 12026.2, and 12027. 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 [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, "The defendant did not unlawfully . . . ."

Penal Code section 12025(a) prohibits carrying a concealed "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."

Related Instructions
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Instruction 1831, Carrying Firearm—Stolen Firearm.
Instruction 1832, Carrying Firearm—Active Participant in Criminal Street Gang.
Instruction 1833, Carrying Firearm—Not in Lawful Possession.
Instruction 1834, Carrying Firearm—Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness.
Instruction 1835, Carrying Concealed Firearm—Not Registered Owner and Weapon Loaded.
Instruction 1835A, Carrying Loaded Firearm—Not Registered Owner.

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AUTHORITY

Elements ▸ Pen. Code, § 12025(a)(3) & (f).
Firearm Defined ▸ Pen. Code, § 12001.
Knowledge Required ▸ *People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030–1031; *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332.
Concealment Required ▸ *People v. Nelson* (1960) 185 Cal.App.2d 578, 580–581.
Factors in Pen. Code, § 12025 (b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135.
Justifications and Exemptions ▸ Pen. Code, §§ 12025.5, 12026, 12026.1, 12026.2, 12027.
Need Not Be Operable ▸ *People v. Marroquin* (1989) 210 Cal.App.3d 77, 82.
Substantial Concealment ▸ *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [interpreting Pen. Code, § 12020(a)(4)]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [same].
Statute Is Not Unconstitutionally Vague ▸ *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154–159.

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, § 12025(b)(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

Defendant Need Not Bring Firearm Into Car
"Appellant caused the gun to be carried concealed in a vehicle in which he was an occupant, by concealing the gun between the seats. His conduct fits the language and purpose of the statute. The prosecution was not required to prove that appellant initially brought the gun into the car." (*People v. Padilla* (2002) 98 Cal.App.4th 127, 134.)

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STAFF NOTES

Pen. Code, § 12025, in relevant part:

> (a) A person is guilty of carrying a concealed firearm when he or she does any of the following:
>
> (3) Causes to be carried concealed within any vehicle in which he or she is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person.

See Staff Notes to Instruction 1820 for full statute and other case notes.

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1825. Carrying Loaded Firearm

The defendant is charged [in Count __] with unlawfully carrying a loaded firearm (on (his/her) person/in a vehicle).

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 *firearm* is any device designed to be used as a weapon, from which a projectile is expelled 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.]

As used here, a firearm is *loaded* if there is an unexpended cartridge or shell in the firing chamber or in a magazine, or in a 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 need not be in working order if it was designed to shoot and appears capable of shooting.]

[_____ *<insert location>* **is (an incorporated city/in an unincorporated area where it is unlawful to discharge a firearm).]**

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<Defense: Statutory Exemption>
[The defendant did not unlawfully carry a loaded firearm if _____ *<insert defense from Pen. Code, § 12031(b), (h)–(l)>***. 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.]**

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 12031(a)(2), the court must also give the appropriate instruction from Instructions 1830–1835. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

Exemptions and a justification for carrying a loaded firearm are stated in Penal Code section 12031(b) and (h) to *(l).* 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 [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
Instruction 1830, Carrying Firearm—Specified Convictions.
Instruction 1831, Carrying Firearm—Stolen Firearm.
Instruction 1832, Carrying Firearm—Active Participant in Criminal Street Gang.
Instruction 1833, Carrying Firearm—Not in Lawful Possession.
Instruction 1834, Carrying Firearm—Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness.
Instruction 1835, Carrying Concealed Firearm—Not Registered Owner and Weapon Loaded.
Instruction 1835A, Carrying Loaded Firearm—Not Registered Owner.

AUTHORITY

Elements ▸ Pen. Code, § 12031(a).
Firearm Defined ▸ Pen. Code, § 12001.

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Knowledge of Presence of Weapon Required ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332; *People v. Dillard* (1984) 154 Cal.App.3d 261, 268.
Knowledge Firearm Loaded Not Required ▸ *People v. Dillard* (1984) 154 Cal.App.3d 261, 266; *People v. Harrison* (1969) 1 Cal.App.3d 115, 120.
Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135.
Justifications and Exemptions ▸ Pen. Code, § 12031(b), (h)–*(l).*
Need Not Be Operable ▸ *People v. Taylor* (1984) 151 Cal.App.3d 432, 437.
"Loaded" Firearm ▸ *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 185–186.

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, § 12031(a)(2)(G).) 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.)

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, 957–958 [footnotes omitted].)

Taser®
"[A] Taser is a firearm and can be a loaded firearm within section 12031." (*People v. Heffner* (1977) 70 Cal.App.3d 643, 652.)

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STAFF NOTES

Pen. Code, § 12031, in relevant part:

(a)(1) A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

(2) Carrying a loaded firearm in violation of this section is punishable, as follows:

(A) Where the person previously has been convicted of any felony, or of any crime made punishable by this chapter, as a felony.

(B) Where the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.

(C) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony.

(D) Where the person is not in lawful possession of the firearm, as defined in this section, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony.

(E) Where the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($ 1,000), or by both that imprisonment and fine.

(F) Where the person is not listed with the Department of Justice pursuant to Section 11106, as the registered owner of the pistol, revolver, or other firearm capable of being concealed upon the person, by imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, or by a fine not to exceed one thousand dollars ($ 1,000), or both that fine and imprisonment.

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(G) In all cases other than those specified in subparagraphs (A) to (F), inclusive, as a misdemeanor, punishable by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($ 1,000), or by both that imprisonment and fine.

(3) For purposes of this section, "lawful possession of the firearm" means that the person who has possession or custody of the firearm either lawfully acquired and lawfully owns the firearm or has the permission of the lawful owner or person who otherwise has apparent authority to possess or have custody of the firearm. A person who takes a firearm without the permission of the lawful owner or without the permission of a person who has lawful custody of the firearm does not have lawful possession of the firearm. [. . .]

(b) Subdivision (a) shall not apply to any of the following: [exempt persons listed . . .]

(f) As used in this section, "prohibited area" means any place where it is unlawful to discharge a weapon.

(g) A firearm shall be deemed to be loaded for the purposes of this section when there is an unexpended cartridge or shell, consisting of a case that holds a charge of powder and a bullet or shot, in, or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm; except that a muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.

(h) Nothing in this section shall prevent any person engaged in any lawful business, including a nonprofit organization, or any officer, employee, or agent authorized by that person for lawful purposes connected with that business, from having a loaded firearm within the person's place of business, or any person in lawful possession of private property from having a loaded firearm on that property.

(i) Nothing in this section shall prevent any person from carrying a loaded firearm in an area within an incorporated city while engaged in hunting, provided that the hunting at that place and time is not prohibited by the city council.

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(j)(1) Nothing in this section is intended to preclude the carrying of any loaded firearm, under circumstances where it would otherwise be lawful, by a person who reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property. As used in this subdivision, "immediate" means the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance.

(2) A violation of this section is justifiable when a person who possesses a firearm reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order issued by a court against another person or persons who has or have been found to pose a threat to his or her life or safety. This paragraph may not apply when the circumstances involve a mutual restraining order issued pursuant to Division 10 (commencing with Section 6200) of the Family Code absent a factual finding of a specific threat to the person's life or safety. It is not the intent of the Legislature to limit, restrict, or narrow the application of current statutory or judicial authority to apply this or other justifications to defendants charged with violating Section 12025 or of committing other similar offenses.

Upon trial for violating this section, the trier of fact shall determine whether the defendant was acting out of a reasonable belief that he or she was in grave danger.

(k) Nothing in this section is intended to preclude the carrying of a loaded firearm by any person while engaged in the act of making or attempting to make a lawful arrest.

(l) Nothing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his or her place of residence, including any temporary residence or campsite. [. . ..]

Firearm Defined—Pen. Code, § 12001, in relevant part:

(b) As used in this title, "firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion.

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> (d) For the purposes of Sections 12025 and 12031, the term "firearm" also shall include 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. […]

Factors in Penal Code section 12025(b) are Sentencing Factors Not Elements

> The crime of carrying a concealed weapon within a vehicle is defined in subdivision (a)(1). The prior conviction referred to in subdivision (b)(1) is simply a sentencing factor which serves to elevate the offense from misdemeanor to felony; the prior conviction is not an element of the offense of carrying a concealed firearm within a vehicle proscribed in section 12025. [. . .]
>
> A criminal defendant is entitled to stipulate to the truth of a prior conviction alleged under subdivision (b)(1) and thereby preclude the jury from learning of the prior. The reason is that under subdivision (b)(1), the prior conviction is a sentencing factor, not an enhancement of the offense charged.

(*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

"For the reasons we have stated, we do not believe CALJIC No. 12.46 correctly states the law. (*Id.* at p. 137.)

Penal Code section 12031(a)(2) lists the same factors as does Penal Code section 12025(b).

Knowledge Firearm Loaded Not Required

> [W]e conclude that section 12031, subdivision (a), by necessary implication excludes knowledge or criminal intent as an element of the offense. [Citations omitted.] [. . .] In these cases it is the duty of the defendant to know what the facts are that involved or resulted from his acts or conduct. [Citation and quotation marks omitted.] Section 12031, subdivision (a), is, in our view, a quintessential public welfare statute which embraces a legislative judgment that in the interest of the larger good, the burden of acting at hazard is placed upon a person who, albeit innocent of criminal intent, is in a position to avert the public danger. [. . .]

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> To avoid the sanction of the law, appellant need only have taken care to make certain that the weapon he carried was in fact unloaded -- no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. [Citation and quotation marks omitted.]

(*People v. Dillard* (1984) 154 Cal.App.3d 261, 266-268.)

"Penal Code section 12031, subdivision (a), does not require knowledge that the gun was loaded, as the statute prohibits the carrying of a loaded firearm and does not specify knowledge it is loaded as an element of the crime." (*People v. Harrison* (1969) 1 Cal.App.3d 115, 120.)

However, in *In re Jorge M.* (2000) 23 Cal.4th 866, 887, the Supreme Court held that the Assault Weapons Control Act required proof that the defendant knew or should have know that the weapon was of a kind prohibited by the statute. In reaching this conclusion, the court questioned the continuing validity of previous appellate decisions holding that knowledge of the character of the prohibited object was not required, including *Harrison, supra*. (*Id.* at p. 876 n.6.)

Knowledge of Possession of Firearm Required

In the context of Penal Code section 12020(a)(4), the Supreme Court recently ruled that the jury must be instructed on the knowledge element of possession of a concealed dirk or dagger. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332; see Staff Notes to Instruction 1801; see also *In re Jorge M.* (2000) 23 Cal.4th 866, 887.) Similarly, *People v. Dillard* (1984) 154 Cal.App.3d 261, 268, quoted above, noted that "lack of knowledge of *possession*" of the firearm had been held to be a defense to similar charges.

Need Not be Operable

"A firearm need not be operable to convict under Penal Code section 12031, subdivision (a)." (*People v. Taylor* (1984) 151 Cal.App.3d 432, 437.)

Loaded Firearm

> The term "loaded" has a commonly understood meaning: "to put a load or charge in (a device or piece of equipment) a gun" or "to put a load on or in a carrier, device, or container; *esp*: to insert the charge or cartridge into the chamber of a firearm." (Webster's New Collegiate Dict. (1976) p. 674.)

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> 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. The shells here were placed in a separate storage compartment of the shotgun and were not yet "loaded" as the term is commonly understood.

(*People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [emphasis removed].)

Location—Judicial Notice

> [T]he trial court could take judicial notice of facts which were common knowledge within its territorial jurisdiction (Evid. Code, § 452, subd. (g)), provided it gave the parties notice of its intention to do so (Evid. Code, § 455, subd. (a)). 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, 957-958 [footnotes omitted].)

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1830. Carrying Firearm: Specified Convictions

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ___], you must then decide whether the People have proved the additional allegation that (he/she) had previously been convicted of (a felony/the crime of _____ *<insert weapons offense punishable as a felony, crime against the person or property, or a narcotics and dangerous drug violation>***).**

The People allege that the defendant was previously convicted of the following offense[s]:

> **[1.] A violation of _____** *<insert code section violated>***, on _____***<insert date>***, in the _____** *<insert name of court>***, in Case Number _____** *<insert docket or case number>***.***<Repeat for each prior conviction alleged.>*

[A conviction of _____ *<insert name of offense from other state or federal offense>* **is the same as a conviction for a felony.]**

[You may only consider the evidence presented on this additional allegation in deciding whether the People have proved that the defendant has previously been convicted of the offense[s] alleged [or for the limited purpose of _____*<insert other permitted purpose, e.g., assessing defendant's credibility>*]**. Do not consider such evidence for any other purpose.]**

The People have the burden of proving this allegation beyond a reasonable doubt. [You must consider each alleged conviction separately.] If the People have not met this burden [as to any alleged conviction], you must find that the alleged conviction has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (*People v. Hall* (1998) 67 Cal.App.4th128, 135.)

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Give this instruction if the defendant is charged under Penal Code section 12025(b)(1), 12025(b)(5), 12031(a)(2)(A), or 12031(a)(2)(E), and the defendant does not stipulate to the prior conviction. (*People v. Hall, supra*, 67 Cal.App.4th at p. 135.) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, Instruction 1821, 1822, or 1823, or carrying a loaded firearm, Instruction 1825. 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 defendant does stipulate to the prior conviction, this instruction should not be given and the prior conviction should not be disclosed to the jury unless the court admits it as otherwise relevant. (*People v. Hall, supra*, 67 Cal.App.4th at p. 135.)

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "You may only consider . . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th1137, 1139.)

AUTHORITY

Factors ▸ Pen. Code, §§ 12025(b)(1), 12025(b)(5), 12031(a)(2)(A), 12031(a)(2)(E).

Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135.

Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

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STAFF NOTES

Pen. Code, § 12025, in relevant part:

> (b) Carrying a concealed firearm in violation of this section is punishable, as follows:
>
> (1) Where the person previously has been convicted of any felony, or of any crime made punishable by this chapter, as a felony.
>
> [. . .]
>
> (5) Where the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($ 1,000), or by both that imprisonment and fine.

Pen. Code, § 12031, in relevant part:

> (2) Carrying a loaded firearm in violation of this section is punishable, as follows:
>
> (A) Where the person previously has been convicted of any felony, or of any crime made punishable by this chapter, as a felony. [. . .]
>
> (E) Where the person has been convicted of a crime against a person or property, or of a narcotics or dangerous drug violation, by imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($ 1,000), or by both that imprisonment and fine.

Factors in Penal Code section 12025(b) are Sentencing Factors Not Elements

> The crime of carrying a concealed weapon within a vehicle is defined in subdivision (a)(1). The prior conviction referred to in subdivision (b)(1) is simply a sentencing factor which serves to elevate the offense from misdemeanor to felony; the prior conviction is not an element of the offense of carrying a concealed firearm within a vehicle proscribed in section 12025. [. . .]

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> A criminal defendant is entitled to stipulate to the truth of a prior conviction alleged under subdivision (b)(1) and thereby preclude the jury from learning of the prior. The reason is that under subdivision (b)(1), the prior conviction is a sentencing factor, not an enhancement of the offense charged.

(*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

"For the reasons we have stated, we do not believe CALJIC No. 12.46 correctly states the law." (*Id.* at p. 137.)

Limiting Instruction

> [W]here the fact of a prior conviction is admitted solely to establish ex-felon status as an element of violation of section 12021, the trial court, at defendant's request, should give an instruction limiting the jury's consideration of the prior to that single purpose. The instruction should make clear that the nature of the prior conviction is irrelevant in this context, and that the jury should not speculate on the nature of the prior.

(*People v. Valentine* (1986) 42 Cal.3d 170, 182 n.7.)

> [W]hether to seek a limiting instruction is a tactical decision properly left to defense counsel, since defense counsel might conclude that the risk of a limiting instruction (unnecessarily highlighting a defendant's status as a felon) outweighed the questionable benefits such an instruction would provide.

(*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1141 [holding no sua sponte duty to give limiting instruction].)

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1831. Carrying Firearm: Stolen Firearm

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ___], you must then decide whether the People have proved the additional allegation that the firearm was stolen.

To prove this allegation, the People must prove that:

1. **The firearm the defendant (carried/ [or]caused to be carried concealed in a vehicle) was stolen.**

AND

2. **The defendant knew or had reasonable cause to believe the firearm was stolen.**

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(2) or 12031(a)(2)(B) and the defendant does not stipulate to the firearm being stolen. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135.) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, Instruction 1821, 1822, or 1823, or carrying a loaded firearm, Instruction 1825. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

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If the defendant does stipulate that the firearm was stolen, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

AUTHORITY

Factors ▸ Pen. Code, §§ 12025(b)(2), 12031(a)(2)(B).
Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

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STAFF NOTES

Pen. Code, § 12025, in relevant part:

> (b) Carrying a concealed firearm in violation of this section is punishable, as follows:
>
> (2) Where the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.

Pen. Code, § 12031, in relevant part:

> (2) Carrying a loaded firearm in violation of this section is punishable, as follows: [. . .]
>
> (B) Where the firearm is stolen and the person knew or had reasonable cause to believe that it was stolen, as a felony.

Factors in Penal Code section 12025(b) are Sentencing Factors Not Elements

> The crime of carrying a concealed weapon within a vehicle is defined in subdivision (a)(1). The prior conviction referred to in subdivision (b)(1) is simply a sentencing factor which serves to elevate the offense from misdemeanor to felony; the prior conviction is not an element of the offense of carrying a concealed firearm within a vehicle proscribed in section 12025. [. . .]
>
> A criminal defendant is entitled to stipulate to the truth of a prior conviction alleged under subdivision (b)(1) and thereby preclude the jury from learning of the prior. The reason is that under subdivision (b)(1), the prior conviction is a sentencing factor, not an enhancement of the offense charged.

(*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

"For the reasons we have stated, we do not believe CALJIC No. 12.46 correctly states the law." (*Id.* at p. 137.)

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1832. Carrying Firearm: Active Participant in Criminal Street Gang

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] __], you must then decide whether the People have proved the additional allegation that the defendant was an active participant in a criminal street gang.

To prove this allegation, the People must prove that:

1. **When the defendant (carried the firearm/ [or] caused the firearm to be carried concealed in a vehicle), the defendant was an active participant in a criminal street gang.**

2. **When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity.**

AND

3. **The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang [or committed the felonious gang-related conduct (himself/herself)].**

Active participation **means involvement with a criminal street gang in a way that is more than passive or in name only.**

[The People need not prove that the defendant devoted all or a substantial part of (his/her) time or efforts to the gang or that (he/she) was an actual member of the gang.]

A *criminal street gang* is any ongoing organization, association, or group of three or more persons:

1. **That has a common name or common identifying sign or symbol.**

2. **That has, as one [or more] of its chief activities, the commission of** _____ *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)>*. **The activity must be a primary aim of the group**

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rather than an occasional act committed by one or more persons who happen to be members of the group.

AND

3. **Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.**

A *pattern of criminal gang activity*, as used here, means:

1. **([The] commission of[,] [or]/ attempted commission of[,] [or]/ (Conspiracy/conspiracy) to commit[,] [or]/ (Solicitation/solicitation) to commit[,] [or]/ (Conviction/conviction) of[,] [or]/ (Having/having) a juvenile petition sustained for) [any combination of] two or more of the following crimes: _____** *<insert one or more crimes listed in Pen. Code, § 186.22(e)(1)–(25)>***.**

2. **At least one of those crimes was committed after September 26, 1988.**

3. **The most recent crime occurred within three years of one of the earlier crimes.**

AND

4. **The crimes were committed on separate occasions, or by two or more persons.**

[You cannot find that there was a pattern of criminal gang activity unless all of you agree that two or more crimes that satisfy these requirements were committed, but you need not all agree on which crimes were committed.]

As the term is used here, *willfully* means an act done willingly or on purpose.

Felonious criminal conduct* means committing or attempting to commit any of the following felonies: _____** *<insert any felonies that the defendant is alleged to have furthered, assisted, or promoted>.**

An active participant in gang activity committed _____ *<insert felony>* **if:**

<INSERT ELEMENTS OF FELONY, SUBSTITUTING "ACTIVE PARTICIPANT IN GANG ACTIVITY" FOR "DEFENDANT." Repeat this

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paragraph as necessary for other felonies alleged to have been committed by gang members.>

To prove that the defendant willfully assisted, furthered, or promoted this crime, the People must prove that:

1. **An active participant in gang activity committed _____** *<insert offense>***.**

2. **The defendant knew that the active participant intended to commit _____** *<insert offense>***.**

3. **Before or during the crime, the defendant intended to aid and abet the active participant in committing _____** *<insert offense>***.**

AND

4. **The defendant's words or conduct did in fact aid and abet the commission of the crime.**

Someone *aids and abets* a crime if he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

[The fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor. If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the mere presence at the scene of the crime or failure to prevent the crime does not by itself constitute aiding and abetting.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

1. **He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime.**

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2. **He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.**

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you must find the defendant not guilty under an aiding and abetting theory.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (*People v. Sengpadychith* (2001) 26 Cal.2d 316, 327; *People v. Robles* (2000) 23 Cal.4th 1106, 1115 [Pen. Code, § 12031(a)(2)(C) incorporates entire substantive gang offense defined in section 186.22(a)]; see *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(3) or 12031(a)(2)(C) and the defendant does not stipulate to being an active gang participant. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135.) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, Instruction 1821, 1822, or 1823, or carrying a loaded firearm, Instruction 1825. 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 defendant does stipulate that he or she is an active gang participant, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

In the paragraph defining “active participation” in a criminal street gang, if requested, give the bracketed sentence that begins, “The People need not prove that the defendant devoted all,” if there is no evidence that the defendant was a member of the gang or devoted a substantial amount of time to the gang. (See Pen. Code, § 186.22(i).)

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In element 1 of the paragraph defining a "pattern of criminal gang activity," insert one or more of the crimes listed in Penal Code section 186.22(e) that have been committed, attempted, or solicited two or more times. (See *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003 [two instances of same offense, or single incident with multiple participants committing one or more specified offenses, are sufficient].) Give on request the bracketed phrase "any combination of" if two or more different crimes are inserted in the blank.

Give on request either of the bracketed paragraph that begins "The fact that a person is present at the scene," or the bracketed section that begins "A person who aids and abets a crime is not guilty of that crime if . . .." (See *People v. Castenada* (2000) 23 Cal.4th 743, 749–750.)

At least one of the crimes alleged to be part of a pattern of criminal gang activity must have occurred after the "effective date" of the California Street Terrorism Enforcement and Prevention Act, September 26, 1988. *People v. Gardeley* (1996) 14 Cal.4th 605, 616, 625 [referring to Sept. 26, 1988, as the effective date].)

Related Instructions
Instruction 540, Participation in Criminal Street Gang.

AUTHORITY

Factors ▸ Pen. Code, §§ 12025(b)(3), 12031(a)(2)(C).
Elements of Gang Factor ▸ Pen. Code, § 186.22(a); *People v. Robles* (2000) 23 Cal.4th 1106, 1115.
Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135.
Active Participation Defined ▸ Pen. Code, § 186.22(i); *People v. Castenada* (2000) 23 Cal.4th 743, 747.
Criminal Street Gang Defined ▸ Pen. Code, § 186.22(f); see *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464–1465.
Pattern of Criminal Gang Activity Defined ▸ Pen. Code, § 186.22(e); *People v. Gardeley* (1996) 14 Cal.4th 605, 624–625; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1002–1003.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 23–28, 154, 185.

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RELATED ISSUES

Gang Expert Cannot Testify to Defendant's Knowledge or Intent
In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658, the court held it was error to permit a gang expert to testify that the defendant knew there was a loaded firearm in the vehicle:

> [The gang expert] testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action. . . . [The gang expert] simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact. [The expert's] beliefs were irrelevant.

(*Ibid*. [emphasis in original].)

See also the Commentary and Related Issues sections of the Bench Notes for Instruction 540, Participation in Criminal Street Gang.

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STAFF NOTES

Pen. Code, § 12025, in relevant part:

> (b) Carrying a concealed firearm in violation of this section is punishable, as follows:
>
> (3) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony.

Pen. Code, § 12031, in relevant part:

> (2) Carrying a loaded firearm in violation of this section is punishable, as follows: [. . .]
>
> (C) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act (Chapter 11 (commencing with Section 186.20) of Title 7 of Part 1), as a felony.

Factors in Penal Code section 12025(b) are Sentencing Factors Not Elements

> The crime of carrying a concealed weapon within a vehicle is defined in subdivision (a)(1). The prior conviction referred to in subdivision (b)(1) is simply a sentencing factor which serves to elevate the offense from misdemeanor to felony; the prior conviction is not an element of the offense of carrying a concealed firearm within a vehicle proscribed in section 12025. [. . .]
>
> A criminal defendant is entitled to stipulate to the truth of a prior conviction alleged under subdivision (b)(1) and thereby preclude the jury from learning of the prior. The reason is that under subdivision (b)(1), the prior conviction is a sentencing factor, not an enhancement of the offense charged.

(*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

"For the reasons we have stated, we do not believe CALJIC No. 12.46 correctly states the law." (*Id.* at p. 137.)

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Pen. Code, § 12031(a)(2)(C) Incorporates Entire Gang Offense

> [W]e construe section 12031(a)(2)(C)'s phrase "active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22" as referring to the substantive gang offense defined in section 186.22(a). We pointed out earlier that contrary to what section 12031(a)(2)(C) says, section 186.22(a) does not at all define the phrase "active participant in a criminal street gang." Instead, section 186.22(a) defines a substantive gang offense, setting forth the elements of that offense. Thus, carrying a loaded firearm in public becomes a felony under section 12031(a)(2)(C) when a defendant satisfies the elements of the offense described in section 186.22(a). Those elements are "actively participat[ing] in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity" and "willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang." (§ 186.22(a).)

(*People v. Robles* (2000) 23 Cal.4th 1106, 1115.)

The following Staff Notes are from Instruction 540, Participation in Criminal Street Gang:

Penal Code section 186.22(a) provides:

> (a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

Criminal Street Gang
Penal Code section 186.22(f) provides:

> (f) As used in this chapter, "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose

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> members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

"Primary Activities"
People v. Sengpadychith (2001) 26 Cal.2d 316, 323 [original italics]:

> The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group's "chief" or "principal' occupations." [Citation omitted.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . Sufficient proof of [a] gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statutes. Also sufficient might be expert testimony . . ..

Active Participation in Criminal Street Gang
Penal Code section 186.22(i) states what is *not* necessary for active participation in a criminal street gang:

> (i) In order to secure a conviction, or sustain a juvenile petition, pursuant to subdivision (a), it is not necessary for the prosecution to prove that the person devotes all, or a substantial part of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

Proposition 21 (approved March 7, 2000), section 35, stated:

> In . . . adding subdivision (i) to Section 186.22 of the Penal Code, it is the intent of the people to reaffirm the reasoning contained in footnote 4 of *In re Lincoln J.*, 223 Cal.App.3d 322 (1990) and to disapprove of the reasoning contained in *People v. Green*, 227 Cal.App.3d [692] (1991) (holding that proof that 'the person must devote all, or a substantial part of his or her efforts to the criminal street gang; is necessary in order to secure a conviction under subdivision (a) . . ..

Footnote 4 of *In re Lincoln J.* (1990) 223 Cal.App.3d 322, 330 states:

> [I]t is clear that no evidence was introduced to show that defendant was a member of BTR at the time of the charged offense . . ..

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> Membership in a criminal street gang, however, is not an element of the offense of active participation in a criminal street gang (§ 186.22(a)); "[a]ny person who actively participates in any criminal street gang . . ." can commit that offense regardless of whether that person is a "member" of such gang.

The court in *People v. Castenada* (2000) 23 Cal.4th 743, 748, also held that *Green* erred:

> In a footnote, the [*Scales*] high court mentioned this part of the trial court's jury instruction: " 'In determining whether he was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted *all, or a substantial part, of his time and efforts* to the Party.'" [Citation omitted.] Relying on the italicized language, the Court of Appeal in *Green* construed section 186.22(a)'s phrase "[a]ny person who actively participates in any criminal street gang" as meaning a person who devotes "all, or a substantial part, of his time and efforts to the criminal street gang." [Citation omitted.] *Green* erred in concluding that . . . *Scales* mandated this construction.

Castenada, supra, 23 Cal.4th at p. 747, defined active participation:

> The usual and ordinary meaning of "actively" is "being in a state of action; not passive or quiescent" [citation omitted], "characterized by action rather than contemplation or speculation" [citation omitted]. The usual and ordinary meaning of "participates" is "to take part in something (as an enterprise or activity)." [Citation omitted.] In summary, one "actively participates" in some enterprise or activity by taking part in it in a manner that is not passive. Thus, giving these words their usual and ordinary meaning, we construe the statutory language "actively participates in any criminal street gang" (§ 186.22(a)) as meaning involvement with a criminal street gang that is more than nominal or passive.

Pattern of Criminal Gang Activity

Penal Code section 186.22(e) provides:

> (e) As used in this chapter, "pattern of criminal gang activity" means the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these

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offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:
(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.
(2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8 of Part 1.
(3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1.
(4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code.
(5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.
(6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034.
(7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.
(8) The intimidation of witnesses and victims, as defined in Section 136.1.
(9) Grand theft, as defined in subdivision (a) or (c) of Section 487.
(10) Grand theft of any firearm, vehicle, trailer, or vessel.
(11) Burglary, as defined in Section 459.
(12) Rape, as defined in Section 261.
(13) Looting, as defined in Section 463.
(14) Money laundering, as defined in Section 186.10.
(15) Kidnapping, as defined in Section 207.
(16) Mayhem, as defined in Section 203.
(17) Aggravated mayhem, as defined in Section 205.
(18) Torture, as defined in Section 206.
(19) Felony extortion, as defined in Sections 518 and 520.
(20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594.
(21) Carjacking, as defined in Section 215.
(22) The sale, delivery, or transfer of a firearm, as defined in Section 12072.
(23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101.

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> (24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.
> (25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.

The "effective date of this chapter" (see opening paragraph of § 186.22(e) above) is September 26, 1988. *People v. Gardeley* (1996) 14 Cal.4th 605, 616, 625 [referring to Sept. 26, 1988 without citation of authority].)

Willfully Promote, Further, or Assist Felonious Criminal Conduct
A defendant must "willfully promote[], further[], or assist[] in any felonious criminal conduct by members of [the] gang." (Pen. Code, § 186.22(a).)

The instruction keeps the term "promoted," but could use "contributed to" if that term is considered to be simpler. (See *People v. Ngoun* (2001) 88 Cal.App.4th 432, 436 [" 'promote' means to contribute to the progress or growth of; . . . [a]n active gang member who directly perpetrates a gang-related offense 'contributes' to the accomplishment of the offense no less than does an active gang member who aids and abets or who is otherwise connected to such conduct"].) Instruction 501, Aiding and Abetting, includes "promote."

The court in *People v. Castenada* (2000) 23 Cal.4th 743, 748, held that someone violating section 186.22(a) has aided and abetted a felony offense by a gang member:

> [S]ection 186.22(a) limits liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members, as the Court of Appeal in *Green* . . . acknowledged. . . . The [STEP bill] sponsor's reply appears to state . . . what we have concluded here: a person liable under section 186.22(a) must aid and abet a separate felony offense committed by gang members.

See also *People v. Green* (1991) 227 Cal.App.3d 692, 703–704 [person liable under § 186.22(a) is also liable as an aider and abettor; it follows that the phrase "willfully promotes, furthers, or assists" in any felonious criminal conduct by gang members is well defined by the courts].)

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People v. Ngoun (2001) 88 Cal.App.4th 432, 436, 437 held that *Castenada* should not be read to strictly limit liability to aiders and abettors, but also includes direct perpetrators:

> [Penal Code section 186.22(a)] applies to the perpetrator of felonious gang-related criminal conduct as well as to the aider and abettor. . . . As we read *Castenada*, it does not stand for the proposition that only an aider and abettor is subject to liability under section 186.22, subdivision (a) and, for reasons we have expressed, it would be a misconstruction of the statutory language and a perversion of the legislative intent to read the subdivision in such a narrow manner. We would suggest that the CALJIC committee review, with the aim of revising, this instruction.

Felonious Criminal Conduct

People v. Green (1991) 227 Cal.App.3d 692, 704 construed "felonious criminal conduct":

> We therefore construe the provision ["felonious criminal conduct"] to cover only conduct which is clearly felonious, i.e., conduct which amounts to the commission of an offense punishable by imprisonment in state prison.

Willful

This instruction uses our accepted definition of "willfully" from Penal Code section 7(a), but excludes the phrase "break the law" because the defendant must willfully promote felonious criminal conduct. (See Pen. Code, § 186.22(a).)

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1833. Carrying Firearm: Not in Lawful Possession

The People have also alleged that the defendant did not lawfully possess the firearm at issue in this case. If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ___], you must then decide whether the People have proved this additional allegation.

To prove this allegation, the People must prove that the defendant did not lawfully possess the firearm.

A person *lawfully possesses a firearm* if he or she either lawfully owns the firearm or has the permission of (the lawful owner/ [or] a person who otherwise has apparent authority over the firearm). A person does not have lawful possession of a firearm if he or she takes it without the permission of the lawful owner or custodian of the firearm.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(4) or 12031(a)(2)(D) and the defendant does not stipulate to unlawful possession. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135.) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, Instruction 1821, 1822, or 1823, or carrying a loaded firearm, Instruction 1825. The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved.

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If the defendant does stipulate to unlawful possession, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

AUTHORITY

Factors ▸ Pen. Code, §§ 12025(b)(2), 12031(a)(2)(D).
Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

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STAFF NOTES

Pen. Code, § 12025, in relevant part:

> (b) Carrying a concealed firearm in violation of this section is punishable, as follows: [. . .]
>
> (4) Where the person is not in lawful possession of the firearm, as defined in this section, or the person is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony. [. . .]
>
> (g) For purposes of this section, "lawful possession of the firearm" means that the person who has possession or custody of the firearm either lawfully owns the firearm or has the permission of the lawful owner or a person who otherwise has apparent authority to possess or have custody of the firearm. A person who takes a firearm without the permission of the lawful owner or without the permission of a person who has lawful custody of the firearm does not have lawful possession of the firearm. [. . ..]

Pen. Code, § 12031, in relevant part:

> (2) Carrying a loaded firearm in violation of this section is punishable, as follows: [. . .]
>
> (D) Where the person is not in lawful possession of the firearm, as defined in this section, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony. [. . .]
>
> (3) For purposes of this section, "lawful possession of the firearm" means that the person who has possession or custody of the firearm either lawfully acquired and lawfully owns the firearm or has the permission of the lawful owner or person who otherwise has apparent authority to possess or have custody of the firearm. A person who takes a firearm without the permission of the lawful owner or without the permission of a person who has lawful custody of the firearm does not have lawful possession of the firearm.

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Factors in Penal Code section 12025(b) are Sentencing Factors Not Elements

> The crime of carrying a concealed weapon within a vehicle is defined in subdivision (a)(1). The prior conviction referred to in subdivision (b)(1) is simply a sentencing factor which serves to elevate the offense from misdemeanor to felony; the prior conviction is not an element of the offense of carrying a concealed firearm within a vehicle proscribed in section 12025. [. . .]
>
> A criminal defendant is entitled to stipulate to the truth of a prior conviction alleged under subdivision (b)(1) and thereby preclude the jury from learning of the prior. The reason is that under subdivision (b)(1), the prior conviction is a sentencing factor, not an enhancement of the offense charged.

(*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

"For the reasons we have stated, we do not believe CALJIC No. 12.46 correctly states the law." (*Id.* at p. 137.)

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1834. Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness

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If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)[,]/ causing a firearm to be carried concealed within a vehicle[,]/ [or] carrying a loaded firearm) [under Count[s] ___], you must then decide whether the People have proved the additional allegation that the defendant was prohibited by law from possessing a firearm.

To prove this allegation, the People must prove that:

<Alternative 1A—prohibited due to mental illness or SVP status>

[1. The defendant _____ *<insert description from Welf. & Inst. Code, § 8100 or 8103>***.]**

<Alternatives 1B & 2B—prohibited by court order. Give both elements 1B and 2B in cases involving restraining orders. For probation orders, give only 1B.>

[1. A court had ordered that the defendant not (own[,]/ purchase[,]/ receive[,]/ [or] possess) a firearm.]

[AND

2. The defendant knew about the court's order.]

<Alternatives 1C & 2C—prohibited due to conviction. Give both elements 1C and 2C in cases involving misdemeanor convictions or juvenile findings. For all other cases involving prior convictions, give 1C only.>

[1. The defendant had previously been convicted of (a felony/two offenses of brandishing a firearm/the crime of _____ *<insert misdemeanor offense from Pen. Code, § 12021(c) or 12001.6(a), (b), or (d), or a juvenile finding from Pen. Code, § 12021(e)>***).]**

[AND

2. (The previous conviction was within 10 years of the date the defendant possessed the firearm./The defendant was less than 30 years old at the time (he/she) possessed the firearm.)]

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[A juvenile court finding is the same as a conviction.]

[A conviction of _____ *<insert name of offense from other state or federal offense>* **is the same as a conviction for a felony.]**

[You may consider evidence, if any, that (the defendant was previously convicted of a crime/a court ordered the defendant not to (own[,]/ purchase[,]/ receive[,]/ [or] possess) a firearm) only in deciding whether the People have proved this element of the charged crime [or for the limited purpose of _____*<insert other permitted purpose, e.g., assessing defendant's credibility>*]**. Do not consider such evidence for any other purpose.]**

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(4) or 12031(a)(2)(D) and the defendant does not stipulate that he or she is prohibited from possessing a firearm. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135.) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, Instruction 1821, 1822, or 1823, or carrying a loaded firearm, Instruction 1825. 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 defendant does stipulate that he or she is prohibited from possessing a firearm, this instruction should not be given and that information should not be disclosed to the jury unless the court admits the information as otherwise relevant. (See *People v. Hall, supra*, 67 Cal.App.4th at p. 135.)

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When giving alternative 1B, only give element 2B if the prosecution alleges that the defendant was prohibited from possessing a firearm under Penal Code section 12021(g).

When giving alternative 1C, only give element 2C if the prosecution alleges that the defendant was prohibited from possessing a firearm under Penal Code section 12021(c), possession within ten years of a specified misdemeanor conviction, or Penal Code section 12021(e), possession by someone under 30 years old with a specified juvenile finding.

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "You may consider . . . ." (*People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.)

AUTHORITY

Factors ▸ Pen. Code, §§ 12025(b)(4), 12031(a)(2)(D).
Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135.
Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

RELATED ISSUES

See Related Issues section of Bench Notes for Instruction 1810, Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction.

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STAFF NOTES

Pen. Code, § 12025, in relevant part:

> (b) Carrying a concealed firearm in violation of this section is punishable, as follows: [. . .]
>
> (4) Where the person is not in lawful possession of the firearm, as defined in this section, or the person is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony. [. . .]

Pen. Code, § 12031, in relevant part:

> (2) Carrying a loaded firearm in violation of this section is punishable, as follows: [. . .]
>
> (D) Where the person is not in lawful possession of the firearm, as defined in this section, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony. [. . .]

Welfare and Institutions Code sections 8100 and 8103 prohibit possession of firearms by persons under the care of a mental health facility, including those found to be 5150, SVPs, or mentally disordered offenders.

Factors in Penal Code section 12025(b) are Sentencing Factors Not Elements

> The crime of carrying a concealed weapon within a vehicle is defined in subdivision (a)(1). The prior conviction referred to in subdivision (b)(1) is simply a sentencing factor which serves to elevate the offense from misdemeanor to felony; the prior conviction is not an element of the offense of carrying a concealed firearm within a vehicle proscribed in section 12025. [. . .]
>
> A criminal defendant is entitled to stipulate to the truth of a prior conviction alleged under subdivision (b)(1) and thereby preclude the jury from learning of the prior. The reason is that under subdivision

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> (b)(1), the prior conviction is a sentencing factor, not an enhancement of the offense charged.

(*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

"For the reasons we have stated, we do not believe CALJIC No. 12.46 correctly states the law." (*Id.* at p. 137.)

Limiting Instruction

> [W]here the fact of a prior conviction is admitted solely to establish ex-felon status as an element of violation of section 12021, the trial court, at defendant's request, should give an instruction limiting the jury's consideration of the prior to that single purpose. The instruction should make clear that the nature of the prior conviction is irrelevant in this context, and that the jury should not speculate on the nature of the prior.

(*People v. Valentine* (1986) 42 Cal.3d 170, 182 n.7.)

> [W]hether to seek a limiting instruction is a tactical decision properly left to defense counsel, since defense counsel might conclude that the risk of a limiting instruction (unnecessarily highlighting a defendant's status as a felon) outweighed the questionable benefits such an instruction would provide.

(*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1141 [holding no sua sponte duty to give limiting instruction].)

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1835A. Carrying Loaded Firearm: Not Registered Owner

If you find the defendant guilty of unlawfully carrying a loaded firearm [under Count ___], you must then decide whether the People have proved the additional allegation that the defendant was not the registered owner of the firearm.

To prove this allegation, the People must prove that the defendant is not listed with the Department of Justice as the registered owner of the firearm.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

Give this instruction if the defendant is charged under Penal Code section 12031(a)(2)(F) and the defendant does not stipulate that he or she was not the registered owner. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135.) This instruction **must** be given with the appropriate instruction defining the elements of carrying a loaded firearm, Instruction 1825. 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 defendant does stipulate that he or she was not the registered owner, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall*, *supra*, 67 Cal.App.4th at p. 135.)

AUTHORITY

Factors ▸ Pen. Code, § 12031(a)(2)(F).

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Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

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STAFF NOTES

Pen. Code, § 12031, in relevant part:

> (2) Carrying a loaded firearm in violation of this section is punishable, as follows: [. . .]
>
> (F) Where the person is not listed with the Department of Justice pursuant to Section 11106, as the registered owner of the pistol, revolver, or other firearm capable of being concealed upon the person, by imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, or by a fine not to exceed one thousand dollars ($ 1,000), or both that fine and imprisonment.

Factors in Penal Code section 12025(b) are Sentencing Factors Not Elements

> The crime of carrying a concealed weapon within a vehicle is defined in subdivision (a)(1). The prior conviction referred to in subdivision (b)(1) is simply a sentencing factor which serves to elevate the offense from misdemeanor to felony; the prior conviction is not an element of the offense of carrying a concealed firearm within a vehicle proscribed in section 12025. [. . .]
>
> A criminal defendant is entitled to stipulate to the truth of a prior conviction alleged under subdivision (b)(1) and thereby preclude the jury from learning of the prior. The reason is that under subdivision (b)(1), the prior conviction is a sentencing factor, not an enhancement of the offense charged.

(*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

"For the reasons we have stated, we do not believe CALJIC No. 12.46 correctly states the law." (*Id.* at p. 137.)

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1835B. Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded

---

If you find the defendant guilty of unlawfully (carrying a concealed firearm (on (his/her) person/within a vehicle)/causing a firearm to be carried concealed within a vehicle) [under Count ___], you must then decide whether the People have proved the additional allegation that the defendant was not the registered owner of the firearm and (the firearm was loaded/the defendant possessed the firearm with ammunition).

To prove this allegation, the People must prove that:

1. **The defendant is not listed with the Department of Justice as the registered owner of the firearm.**

AND

<Alternative 2A—firearm loaded>
[2. The firearm was loaded.]

<Alternative 2B—ammunition nearby>
[2. The firearm and unexpended ammunition capable of being discharged from that firearm were either in the defendant's immediate possession or readily accessible to (him/her).]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the sentencing factor. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt].)

Give this instruction if the defendant is charged under Penal Code section 12025(b)(6) and the defendant does not stipulate that the firearm was loaded or

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possessed with ammunition and that he or she was not the registered owner. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135.) This instruction **must** be given with the appropriate instruction defining the elements of carrying a concealed firearm, Instruction 1821, 1822, or 1823. 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 defendant does stipulate to this sentencing factor, this instruction should not be given and that information should not be disclosed to the jury. (See *People v. Hall, supra,* 67 Cal.App.4th at p. 135.)

AUTHORITY

Factors ▸ Pen. Code, § 12025(b)(6).
Factors in Pen. Code, § 12025(b) Sentencing Factors, Not Elements ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154, 185.

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STAFF NOTES

Pen. Code, § 12025, in relevant part:

> (b) Carrying a concealed firearm in violation of this section is punishable, as follows: [. . .]
>
> (6) By imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($ 1,000), or by both that fine and imprisonment if both of the following conditions are met:
>
> (A) Both the pistol, revolver, or other firearm capable of being concealed upon the person and the unexpended ammunition capable of being discharged from that firearm are either in the immediate possession of the person or readily accessible to that person, or the pistol, revolver, or other firearm capable of being concealed upon the person is loaded as defined in subdivision (g) of Section 12031.
>
> (B) The person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106, as the registered owner of that pistol, revolver, or other firearm capable of being concealed upon the person.

Factors in Penal Code section 12025(b) are Sentencing Factors Not Elements

> The crime of carrying a concealed weapon within a vehicle is defined in subdivision (a)(1). The prior conviction referred to in subdivision (b)(1) is simply a sentencing factor which serves to elevate the offense from misdemeanor to felony; the prior conviction is not an element of the offense of carrying a concealed firearm within a vehicle proscribed in section 12025. [. . .]
>
> A criminal defendant is entitled to stipulate to the truth of a prior conviction alleged under subdivision (b)(1) and thereby preclude the jury from learning of the prior. The reason is that under subdivision (b)(1), the prior conviction is a sentencing factor, not an enhancement of the offense charged.

(*People v. Hall* (1998) 67 Cal.App.4th 128, 135.)

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"For the reasons we have stated, we do not believe CALJIC No. 12.46 correctly states the law." (*Id.* at p. 137.)

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1840. Armed Criminal Action

The defendant is charged [in Count __] with carrying a loaded firearm with intent to commit a felony.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant carried a firearm.**

2. **The defendant knew that (he/she) was carrying the firearm.**

3. **When the defendant carried the firearm, (he/she) intended to commit _____** *<insert felony alleged>***.**

[AND]

4. **The firearm was loaded.**

<See Commentary regarding element 5.>
[AND

5. **The defendant knew that the firearm was loaded.]**

A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled through a barrel by the force of an explosion or other form of combustion.

As used here, a firearm is *loaded* if the firearm and ammunition capable of being discharged from the firearm are in the immediate possession of the same person.

<See Commentary regarding this paragraph.>
[A firearm need not be in working order if it was designed to shoot and appears capable of shooting.]

<See Commentary regarding this paragraph.>
[A person *carries* a firearm when he or she has the firearm on his or her person or has it available for use in either offense or defense.]

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A person intends to commit _____ *<insert felony alleged>* **if he or she intends to:**

<INSERT ELEMENTS OF INTENDED FELONY; FOR THE ELEMENTS OF ANY INTENDED CRIME, SEE THE APPROPRIATE INSTRUCTION FOR THAT CRIME.>

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code, § 12023.
Firearm Defined ▸ Pen. Code, § 12001(b).
Loaded Defined ▸ Pen. Code, § 12001(j).
Knowledge of Presence of Weapon Required ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 194.

COMMENTARY

There are no published cases on this statute. Thus, it is unclear if the firearm must be operable or if the defendant must know the firearm is "loaded." It is also unclear if the statute requires that the defendant carry the firearm on his or her person or if it is sufficient if the defendant "has the firearm available." (See *People v. Wandick* (1986) 227 Cal.App.3d 918, 928 [discussing definition of "armed" in Pen. Code, § 12022(a)].) The instruction has been drafted to provide the court options on these issues. If these issues are present in the case, the court must decide whether to give bracketed element 5 and which of the bracketed paragraphs and are appropriate.

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STAFF NOTES

Pen. Code, § 12023:

> (a) Every person who carries a loaded firearm with the intent to commit a felony is guilty of armed criminal action.
>
> (b) Armed criminal action is punishable by imprisonment in a county jail not exceeding one year, or in the state prison.

Firearm Defined—Pen. Code, § 12001, in relevant part:

> (b) As used in this title, "firearm" means any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion. [. . .]
>
> (j) For purposes of Section 12023, a firearm shall be deemed to be "loaded" whenever both the firearm and the unexpended ammunition capable of being discharged from the firearm are in the immediate possession of the same person.

Knowledge of Possession of Firearm Required

In the context of Penal Code section 12020(a)(4), the Supreme Court recently ruled that the jury must be instructed on the knowledge element of possession of a concealed dirk or dagger. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332; see Staff Notes to Instruction 1801.)

Similarly, *In re Jorge M.* (2000) 23 Cal.4th 866, 887, the Supreme Court held that the Assault Weapons Control Act required proof that the defendant knew or should have know that the weapon was of a kind prohibited by the statute. In reaching this conclusion, the court questioned the continuing validity of previous appellate decisions holding that knowledge of the character of the prohibited object was not required. (*Id.* at p. 876 n.6.)

Unresolved Issues

As noted in the commentary, it is unclear if the firearm must be operable or if the defendant must know the firearm is “loaded” as defined by the statute. (Cf. Notes to Instructions 1820 and 1825, discussing Pen. Code, §§ 12025 and 12031.)

It is also unclear if the statute requires that the defendant carry the firearm on his or her person or if it is sufficient if the defendant “has the firearm available.” The

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commentary to CALJIC states that the CALJIC committee believes that the definition of "armed" as used in Penal Code section 12022(a) apples. (*People v. Wandick* (1986) 227 Cal.App.3d 918, 928.) *People v. Wandick, supra,* held that "[a] person is armed with a deadly weapon when he simply carries such weapon or has it available for use in either offense or defense." (*Id.* at pp. 927-928.) CALJIC concludes that this definition applies in part because of the title of the statute, "Armed criminal action." However, the statute itself does not use the word "armed" but, rather, uses the word "carries." Thus, it is not clear that *Wandick*'s holding, that the term "armed" includes both carrying and having the weapon nearby, applies to the meaning of the term "carries" as used in the statute.

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1841. Possession of Ammunition by Person Prohibited From Possessing Firearm Due to Conviction or Mental Illness

---

The defendant is charged [in Count __] with unlawfully possessing ammunition.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/possessed/had under (his/her) custody or control) ammunition.**

2. **The defendant knew (he/she) (owned/possessed/had under (his/her) custody or control) the ammunition.**

[AND]

<Alternative 3A—prohibited due to mental illness or SVP status>
[3. The defendant _____ *<insert description from Welf. & Inst. Code, § 8100 or 8103>***.]**

<Alternative 3B—prohibited due to conviction. Give both element 3B and element 4 in cases involving misdemeanor convictions or juvenile findings. For all other cases involving prior convictions, give 3B only.>
[3. The defendant had previously been convicted of (a felony/a misdemeanor/two offenses of brandishing a firearm/the crime of _____ *<insert misdemeanor offense from Pen. Code, § 12021(c) or 12001.6(a), (b), or (d), or a juvenile finding from Pen. Code, § 12021(e)>***).]**

[AND

4. **(The previous conviction was within 10 years of the date the defendant possessed the ammunition./The defendant was less than 30 years old at the time (he/she) possessed the ammunition.)]**

Ammunition **means a bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence.** ***Ammunition*** **includes reloaded ammunition.**

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[A juvenile court finding is the same as a conviction.]

[A conviction of _____ *<insert name of offense from other state or federal offense>* **is the same as a conviction for a felony.]**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through (another person/other people).]

[The defendant and the People have stipulated, or agreed, that the defendant was previously convicted of a (felony/misdemeanor). This stipulation means that you must accept this fact as proved.]

<Alternative A—limiting instruction when stipulation as to conviction>
[Do not consider this fact for any other purpose [except for the limited purpose of _____*<insert other permitted purpose, e.g., determining the defendant's credibility>***]. Do not speculate about or discuss the nature of the conviction.]**

<Alternative B—limiting instruction when no stipulation as to conviction>
[You may consider evidence, if any, that the defendant was previously convicted of a crime only in deciding whether the People have proved this element of the charged crime [or for the limited purpose of _____*<insert other permitted purpose, e.g., assessing defendant's credibility>***]. Do not consider such evidence for any other purpose.]**

<Defense: Justifiable Possession>
[Even if you conclude that the defendant possessed ammunition, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the ammunition. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the ammunition/took the ammunition from a person who was committing a crime against the defendant).**

AND

2. **(He/She) possessed the ammunition no longer than was necessary to deliver or transport the ammunition to a law enforcement agency for that agency to dispose of the ammunition.**

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The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Penal Code section 12316(d) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing the defense by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph on the defense of justifiable possession.

Give element 4 only if the prosecution alleges that the defendant was prohibited from possessing firearms under Penal Code section 12021(c), possession within 10 years of a specified misdemeanor conviction, or Penal Code section 12021(e), possession by someone under 30 years old with a specified juvenile finding.

If the defendant has not stipulated to the conviction, do not give the bracketed paragraph that begins, "The defendant and the People have stipulated," and insert the full name of the offense in element 3B.

If the defendant does stipulate to the conviction, the court must give the bracketed paragraph that begins, "The defendant and the People have stipulated," and in element 3B select the word "felony" or "misdemeanor." The court must sanitize all references to the conviction to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp* (2003) 31 Cal.4th 240, 261; *People v. Valentine* (1986) 42 Cal.3d 170, 173.) If the defendant agrees, the court must not read the portion of the information describing the nature of the conviction. Likewise, the court must ensure that the verdict forms do not reveal the nature of the conviction.

On request, the court should give the limiting instruction regarding the evidence of the conviction. (*People v. Valentine, supra,* 42 Cal.3d at p. 182, fn. 7.) There is no

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sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.) If the defendant does not stipulate to the conviction, give alternative A. If the defendant does stipulate, give alternative B.

AUTHORITY

Elements ▸ Pen. Code, § 12316(b)(1).
Ammunition Defined ▸ Pen. Code, § 12316(b)(2).
Knowledge ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332.
Justifiable Possession ▸ Pen. Code, § 12316(d).
Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.
Constructive vs. Actual Possession ▸ See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 160.

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STAFF NOTES

Pen. Code, § 12316, in relevant part:

(b)(1) No person prohibited from owning or possessing a firearm under Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code shall own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition.

(2) For purposes of this subdivision, "ammunition" shall include, but not be limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence.

(3) A violation of this subdivision is punishable by imprisonment in a county jail not to exceed one year or in the state prison, by a fine not to exceed one thousand dollars ($ 1,000), or by both the fine and imprisonment. [. . .]

(d)(1) A violation of paragraph (1) of subdivision (b) is justifiable where all of the following conditions are met:

(A) The person found the ammunition or reloaded ammunition or took the ammunition or reloaded ammunition from a person who was committing a crime against him or her.

(B) The person possessed the ammunition or reloaded ammunition no longer than was necessary to deliver or transport the ammunition or reloaded ammunition to a law enforcement agency for that agency's disposition according to law.

(C) The person is prohibited from possessing any ammunition or reloaded ammunition solely because that person is prohibited from owning or possessing a firearm only by virtue of Section 12021.

(2) Upon the trial for violating paragraph (1) of subdivision (b), the trier of fact shall determine whether the defendant is subject to the exemption created by this subdivision.

(3) The defendant has the burden of proving by a preponderance of

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the evidence that he or she is subject to the exemption provided by this subdivision.

Knowledge of Possession Required

In the context of Penal Code section 12020(a)(4), the Supreme Court recently ruled that the jury must be instructed on the knowledge element of possession of a concealed dirk or dagger. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332; see Staff Notes to Instruction 1801.)

Similarly, *In re Jorge M.* (2000) 23 Cal.4th 866, 887, the Supreme Court held that the Assault Weapons Control Act required proof that the defendant knew or should have know that the weapon was of a kind prohibited by the statute. In reaching this conclusion, the court questioned the continuing validity of previous appellate decisions holding that knowledge of the character of the prohibited object was not required. (*Id.* at p. 876 n.6.)

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1842. Possession of Ammunition by Person Prohibited From Possessing Firearm Due to Court Order

---

The defendant is charged [in Count __] with unlawfully possessing ammunition.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/possessed/had under (his/her) custody or control) ammunition.**

2. **The defendant knew (he/she) (owned/possessed/had under (his/her) custody or control) the ammunition.**

[AND]

[3. A court had ordered that the defendant not (own[,]/ purchase[,]/ receive[,]/ [or] possess) a firearm.]

<Give element 4 in cases involving restraining orders.>
[AND

4 The defendant knew of the court's order.]

Ammunition **means a bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence.** ***Ammunition*** **includes reloaded ammunition.**

[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/other people).]

[The defendant and the People have stipulated, or agreed, that a court ordered the defendant not to (own[,]/ purchase[,]/ receive[,]/ [or] possess) a firearm. This stipulation means that you must accept this fact as proved.]

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<Alternative A—limiting instruction when stipulation as to order>
[Do not consider this fact for any other purpose [except for the limited purpose of _____*<insert other permitted purpose, e.g., determining the defendant's credibility>***]. Do not speculate about why the court's order was made.]**

<Alternative B—limiting instruction when no stipulation as to order>
[You may consider evidence, if any, that a court ordered the defendant not to own, purchase, receive, or possess a firearm only in deciding whether the People have proved this element of the charged crime [or for the limited purpose of _____*<insert other permitted purpose, e.g., assessing defendant's credibility>***]. Do not consider such evidence for any other purpose.]**

<Defense: Justifiable Possession>
[Even if you conclude that the defendant possessed ammunition, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the ammunition. In order to establish this defense, the defendant must prove that:

1. **(He/She) (found the ammunition/took the ammunition from a person who was committing a crime against the defendant).**

AND

2. **(He/She) possessed the ammunition no longer than was necessary to deliver or transport the ammunition to a law enforcement agency for that agency to dispose of the ammunition.**

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

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Penal Code section 12316(d) states that a violation of the statute is "justifiable" if the listed conditions are met. This is an affirmative defense and the defense bears the burden of establishing the defense by a preponderance of the evidence. *(Ibid.)* If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph on the defense of justifiable possession.

Use this instruction only if the prosecution alleges that the defendant was prohibited from possessing firearms under Penal Code section 12021(d)(1), possession by someone prohibited as a condition of probation who was convicted of a crime not listed in other provisions of Penal Code section 12021, or under Penal Code section 12021(g), possession by someone prohibited by a temporary restraining order or other protective order.

Give element 4 only if the prosecution alleges that the defendant was prohibited from possessing firearms under Penal Code section 12021(g).

If the defendant has not stipulated to the probation order, do not give the bracketed paragraph that begins, "The defendant and the People have stipulated."

If the defendant does stipulate to the probation order, the court must give the bracketed paragraph that begins, "The defendant and the People have stipulated." The court must also sanitize all references to the probation order to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp* (2003) 31 Cal.4th 240, 261; *People v. Valentine* (1986) 42 Cal.3d 170, 173.) If the defendant agrees, the court must not read the portion of the information describing the nature of the conviction. Likewise, the court must ensure that the verdict forms do not reveal the nature of the conviction.

On request, the court should give the limiting instruction regarding the evidence of the probation condition. (*People v. Valentine, supra,* 42 Cal.3d at p. 182, fn. 7.) There is no sua sponte duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.) If the defendant does not stipulate to the probation condition, give alternative A. If the defendant does stipulate, give alternative B.

AUTHORITY

Elements ▸ Pen. Code, § 12316(b)(1).
Ammunition Defined ▸ Pen. Code, § 12316(b)(2).
Knowledge ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332.
Justifiable Possession ▸ Pen. Code, § 12316(d).

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Limiting Instruction on Prior Conviction ▸ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139.

Constructive vs. Actual Possession ▸ See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6].

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 160.

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STAFF NOTES

Pen. Code, § 12316, in relevant part:

(b)(1) No person prohibited from owning or possessing a firearm under Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code shall own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition.

(2) For purposes of this subdivision, "ammunition" shall include, but not be limited to, any bullet, cartridge, magazine, clip, speed loader, autoloader, or projectile capable of being fired from a firearm with a deadly consequence.

(3) A violation of this subdivision is punishable by imprisonment in a county jail not to exceed one year or in the state prison, by a fine not to exceed one thousand dollars ($ 1,000), or by both the fine and imprisonment. [. . .]

(d)(1) A violation of paragraph (1) of subdivision (b) is justifiable where all of the following conditions are met:

(A) The person found the ammunition or reloaded ammunition or took the ammunition or reloaded ammunition from a person who was committing a crime against him or her.

(B) The person possessed the ammunition or reloaded ammunition no longer than was necessary to deliver or transport the ammunition or reloaded ammunition to a law enforcement agency for that agency's disposition according to law.

(C) The person is prohibited from possessing any ammunition or reloaded ammunition solely because that person is prohibited from owning or possessing a firearm only by virtue of Section 12021.

(2) Upon the trial for violating paragraph (1) of subdivision (b), the trier of fact shall determine whether the defendant is subject to the exemption created by this subdivision.

(3) The defendant has the burden of proving by a preponderance of

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the evidence that he or she is subject to the exemption provided by this subdivision.

Knowledge of Possession Required

In the context of Penal Code section 12020(a)(4), the Supreme Court recently ruled that the jury must be instructed on the knowledge element of possession of a concealed dirk or dagger. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332; see Staff Notes to Instruction 1801.)

Similarly, *In re Jorge M.* (2000) 23 Cal.4th 866, 887, the Supreme Court held that the Assault Weapons Control Act required proof that the defendant knew or should have know that the weapon was of a kind prohibited by the statute. In reaching this conclusion, the court questioned the continuing validity of previous appellate decisions holding that knowledge of the character of the prohibited object was not required. (*Id.* at p. 876 n.6.)

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1845. Possession, etc., of Assault Weapon

The defendant is charged [in Count __] with unlawfully (possessing/manufacturing/causing to be manufactured/distributing/ transporting/importing/keeping for sale/offering or exposing for sale/giving/lending) an assault weapon, specifically _____ *<insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>***.**

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) an assault weapon, specifically [a] _____** *<insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>***.**

2. **The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) it.**

AND

3. **The defendant knew or reasonably should have known that it had characteristics that made it an assault weapon.**

A _____ *<insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>* **is an *assault weapon*.**

[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/other people).]

[The People allege that the defendant possessed the following weapons: _____ *<insert types of weapons when multiple items alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of these weapons, and you all agree on which weapon[s] (he/she) possessed.]**

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<Defense: Permit, Registration, or Exemption From Statute>
[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/distribute/transport/import/keep for sale/offer or expose for sale/give/lend) an assault weapon if (he/she) (had registered the weapon/had a valid permit to (possess/manufacture/sell) the weapon/_____ *<insert exemption from Pen. Code, § 12280(e)–(r)>***). The People have the burden of proving beyond a reasonable doubt that the defendant did not (register the weapon/have a valid permit to (possess/manufacture/sell) the weapon/_____** *<insert exemption from Pen. Code, § 12280(e)–(r)>***). If the People have not met this burden, you must find the defendant not guilty of this crime.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple 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.) Give the bracketed paragraph that begins, "The People allege that the defendant possessed the following weapons," inserting the items alleged.

Registration and permitting procedures are contained in Penal Code sections 12285 to 12287. Exemptions to the statute are stated in Penal Code section 12280(e) to (r). The existence of a statutory exemption is an affirmative defense. (*People v. Jimenez, supra,* 8 Cal.App.4th at pp. 395–397.) If the defense presents sufficient evidence to raise a reasonable doubt about the existence of a legal basis for his or her 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 [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, "The defendant did not unlawfully . . . ."

The jury must decide if the weapon possessed was an assault weapon. (See *People v. Flood* (1998) 18 Cal.4th 470, 482.) When instructing on the definition of assault weapon, the court should not state that the weapon possessed by the defendant was an assault weapon. Where indicated in the instruction, the court may insert a

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weapon listed in Penal Code section 12276 or a description of a weapon from section 12276.1.

If the defendant is charged with both a separate count and an enhancement for violating Penal Code section 12280 while committing another crime, give this instruction and Instruction 1846, Possession, etc., of Assault Weapon While Committing Other Offense: Pen. Code, §12280 Charged as Separate Count and as Enhancement. (Pen. Code, § 12280(d); *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398.) If the defendant is only charged with an enhancement under Penal Code section 12280(d) and not with a separate count for violating Penal Code section 12280, give only Instruction 1847, Possession, etc., of Assault Weapon While Committing Other Offense: Pen. Code, §12280 Charged Only as Enhancement.

AUTHORITY

Elements ▸ Pen. Code, § 12280(a)(1) & (2).
Assault Weapon Defined ▸ Pen. Code, §§ 12276, 1227.1; see also *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1142–1145 [discussing statutory definition of assault weapon, amendments to statute and petition procedure by which the Attorney General may have weapon listed].
Permits and Registration ▸ Pen. Code, §§ 12285–12287.
Exemptions ▸ Pen. Code, § 11280(e)–(r).
Knowledge Required ▸ *In re Jorge M.* (2000) 23 Cal.4th 866, 887.
Permits, Registration, and Exemptions Are Affirmative Defenses ▸ *People v. Jimenez* (1992) 8 Cal.App.4th 391, 395–397.
Constructive vs. Actual Possession ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6].
Statute Constitutional ▸ *Silviera v. Lockyer* (2002) 312 F.3d 1052, 1056; *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 478.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 165–166.

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STAFF NOTES

Pen. Code, § 12280, in relevant part:

(a) (1) Any person who, within this state, manufactures or causes to be manufactured, distributes, transports, or imports into the state, keeps for sale, or offers or exposes for sale, or who gives or lends any assault weapon, except as provided by this chapter, is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for four, six, or eight years.

(2) In addition and consecutive to the punishment imposed under paragraph (1), any person who transfers, lends, sells, or gives any assault weapon to a minor in violation of paragraph (1) shall receive an enhancement of one year.

(b) Except as provided in Section 12288, and in subdivisions (c) and (d), any person who, within this state, possesses any assault weapon, except as provided in this chapter, is guilty of a public offense and upon conviction shall be punished by imprisonment in the state prison, or in a county jail, not exceeding one year. However, if the person presents proof that he or she lawfully possessed the assault weapon prior to June 1, 1989, or prior to the date it was specified as an assault weapon, and has since registered any other lawfully obtained firearm specified by Section 12276 or 12276.5 pursuant to Section 12285 or relinquished them pursuant to Section 12288, a first-time violation of this subdivision shall be an infraction punishable by a fine of up to five hundred dollars ($ 500), but not less than three hundred fifty dollars ($ 350), if the person has otherwise possessed the firearm in compliance with subdivision (c) of Section 12285. In these cases, the assault weapon shall be destroyed pursuant to Section 12028.

(c) A first-time violation of subdivision (b) shall be an infraction punishable by a fine of up to five hundred dollars ($ 500), if the person was found in possession of no more than two firearms in compliance with subdivision (c) of Section 12285 and the person meets all of the following conditions:

(1) The person proves that he or she lawfully possessed the assault weapon prior to the date it was defined as an assault weapon pursuant to Section 12276.1.

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(2) The person is not found in possession of a firearm specified as an assault weapon pursuant to Section 12276 or Section 12276.5.

(3) The person has not previously been convicted of violating this section.

(4) The person was found to be in possession of the assault weapons within one year following the end of the one-year registration period established pursuant to subdivision (a) of Section 12285.

(5) The person relinquished the firearms pursuant to Section 12288.

(d) Notwithstanding Section 654 or any other provision of law, any person who commits another crime while violating this section may receive an additional, consecutive punishment of one year for violating this section in addition and consecutive to the punishment, including enhancements, which is prescribed for the other crime. . . .

[Subdivisions (e) to (r) list exemptions.]

(s) As used in this chapter, the date a firearm is an assault weapon is the earliest of the following:

(1) The effective date of an amendment to Section 12276 that adds the designation of the specified firearm.

(2) The effective date of the list promulgated pursuant to Section 12276.5 that adds or changes the designation of the specified firearm.

(3) The operative date of Section 12276.1, as specified in subdivision (d) of that section.

Pen. Code, § 12276:

As used in this chapter, "assault weapon" shall mean the following designated semiautomatic firearms:

(a) All of the following specified rifles:

(1) All AK series including, but not limited to, the models

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identified as follows:

(A) Made in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S, and 86S.

(B) Norinco 56, 56S, 84S, and 86S.

(C) Poly Technologies AKS and AK47.

(D) MAADI AK47 and ARM.

(2) UZI and Galil.

(3) Beretta AR-70.

(4) CETME Sporter.

(5) Colt AR-15 series.

(6) Daewoo K-1, K-2, Max 1, Max 2, AR 100, and AR 110C.

(7) Fabrique Nationale FAL, LAR, FNC, 308 Match, and Sporter.

(8) MAS 223.

(9) HK-91, HK-93, HK-94, and HK-PSG-1.

(10) The following MAC types:

(A) RPB Industries Inc. sM10 and sM11.

(B) SWD Incorporated M11.

(11) SKS with detachable magazine.

(12) SIG AMT, PE-57, SG 550, and SG 551.

(13) Springfield Armory BM59 and SAR-48.

(14) Sterling MK-6.

(15) Steyer AUG.

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(16) Valmet M62S, M71S, and M78S.

(17) Armalite AR-180.

(18) Bushmaster Assault Rifle.

(19) Calico M-900.

(20) J & R ENG M-68.

(21) Weaver Arms Nighthawk.

(b) All of the following specified pistols:

(1) UZI.

(2) Encom MP-9 and MP-45.

(3) The following MAC types:

(A) RPB Industries Inc. sM10 and sM11.

(B) SWD Incorporated M-11.

(C) Advance Armament Inc. M-11.

(D) Military Armament Corp. Ingram M-11.

(4) Intratec TEC-9.

(5) Sites Spectre.

(6) Sterling MK-7.

(7) Calico M-950.

(8) Bushmaster Pistol.

(c) All of the following specified shotguns:

(1) Franchi SPAS 12 and LAW 12.

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(2) Striker 12.

(3) The Streetsweeper type S/S Inc. SS/12.

(d) Any firearm declared by the court pursuant to Section 12276.5 to be an assault weapon that is specified as an assault weapon in a list promulgated pursuant to Section 12276.5.

(e) The term "series" includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer.

(f) This section is declaratory of existing law, as amended, and a clarification of the law and the Legislature's intent which bans the weapons enumerated in this section, the weapons included in the list promulgated by the Attorney General pursuant to Section 12276.5, and any other models which are only variations of those weapons with minor differences, regardless of the manufacturer. The Legislature has defined assault weapons as the types, series, and models listed in this section because it was the most effective way to identify and restrict a specific class of semiautomatic weapons.

Pen. Code, § 12276.1, in relevant part:

(a) Notwithstanding Section 12276, "assault weapon" shall also mean any of the following:

(1) A semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and any one of the following:

(A) A pistol grip that protrudes conspicuously beneath the action of the weapon.

(B) A thumbhole stock.

(C) A folding or telescoping stock.

(D) A grenade launcher or flare launcher.

(E) A flash suppressor.

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(F) A forward pistol grip.

(2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.

(3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

(4) A semiautomatic pistol that has the capacity to accept a detachable magazine and any one of the following:

(A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.

(B) A second handgrip.

(C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning his or her hand, except a slide that encloses the barrel.

(D) The capacity to accept a detachable magazine at some location outside of the pistol grip.

(5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.

(6) A semiautomatic shotgun that has both of the following:

(A) A folding or telescoping stock.

(B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.

(7) A semiautomatic shotgun that has the ability to accept a detachable magazine.

(8) Any shotgun with a revolving cylinder.

Petition by Attorney General

Penal Code section 12276.5 allows the Attorney General to petition the court for a declaration that a new firearm is equivalent to a weapon listed as an assault weapon and should be treated as an assault weapon.

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Permits and Registration
Permitting procedures for possession of assault weapons are contained in Penal Code section 12285 to 12287.

Knowledge Required

> Although the [Assault Weapon Control Act] can be characterized as a remedial law aimed at protecting public welfare, its text, history and surrounding statutory context provide no compelling evidence of legislative intent to exclude all scienter from the offense defined in section 12280(b). Section 20's generally applicable presumption that a penal law requires criminal intent or negligence, the severity of the felony punishment imposed for violation of section 12280(b), and the significant possibility innocent possessors would become subject to that weighty sanction were the statute construed as dispensing entirely with mens rea, convince us section 12280(b) was not intended to be a strict liability offense. The gravity of the public safety threat addressed in the AWCA, however, together with the substantial number of prosecutions to be expected under it and the potential difficulty of routinely proving actual knowledge on the part of defendants, convince us section 12280(b) was not intended to contain such an actual knowledge element. Consequently, we construe section 12280(b) as requiring knowledge of, or negligence in regard to, the facts making possession criminal. In a prosecution under section 12280(b), that is to say, the People bear the burden of proving the defendant *knew or reasonably should have known* the firearm possessed the characteristics bringing it within the AWCA.

(*In re Jorge M.* (2000) 23 Cal.4th 866, 887 [emphasis in original, footnote omitted].)

Permits, Registration and Exemptions Are Affirmative Defenses

> A reading of section 12280, subdivision (e), in context, convinces us the factual exceptions in subdivision (e) constitute affirmative defenses on which defendant has the burden of proof. . . .
>
> Section 12280, subdivision (b), which is part of the Roberti-Roos Assault Weapons Control Act of 1989, provides that a person who possesses an assault weapon is guilty of a public offense unless "the person presents proof that he or she lawfully possessed the assault weapon prior to June 1, 1989 ... and has since either registered the

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> firearm ... or relinquished [it] ...." That subdivision clearly requires long- term possessors of assault weapons to affirmatively prove they fall within the exception of the subdivision. The exception in subdivision (e) provides another exonerating window period for those assault weapon possessors who could have, but did not, register their weapons in 1990. A commonsense interpretation of the statute leads us to conclude the affirmative duty placed on a defendant to prove prior possession and registration in subdivision (b) is also applicable to subdivision (e).

(*People v. Jimenez* (1992) 8 Cal.App.4th 391, 395–397 [note the statute has been amended and the subdivisions renumbered since this case was issued].)

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1846. Possession, etc., of Assault Weapon While Committing Other Offense: Pen. Code, §12280 Charged as Separate Count and as Enhancement

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If you find the defendant guilty of both (possessing/manufacturing/causing to be manufactured/distributing/transporting/importing/keeping for sale/offering or exposing for sale/giving/lending) an assault weapon [under Count __] and the crime of _____ *<insert other offense alleged>***[under Count __], you must then decide whether the People have proved the additional allegation that (he/she) committed the first crime while committing the second one.**

To prove this allegation, the People must prove that the defendant (possessed/manufactured/caused to be manufactured/distributed/ transported/imported/kept for sale/offered or exposed for sale/gave/lent) an assault weapon while committing the crime of _____ *<insert other offense alleged>***.**

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt]; *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398 [enhancement under Pen. Code, §12280 must be pleaded and proved].)

Give this instruction if the defendant is charged with a separate count for violating Penal Code section 12280 and an enhancement for violating Penal Code section 12280 while committing another crime. (Pen. Code, § 12280(d); *People v. Jimenez, supra,* 8 Cal.App.4th at p. 398.) This instruction **must** be given with Instruction 1845, Possession, etc., of Assault Weapon, and the appropriate instruction defining the elements of the other offense charged.

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The court must provide the jury with a verdict form on which the jury will indicate if the sentencing enhancement has been proved.

If the defendant is not charged with a separate count for violating Penal Code section 12280 but is charged only with the enhancement, do not give this instruction. Give Instruction 1847, Possession, etc., of Assault Weapon While Committing Other Offense: Pen. Code, §12280 Charged Only as Enhancement.

AUTHORITY

Enhancement ▸ Pen. Code, § 12280(d); *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398.

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STAFF NOTES

Pen. Code, § 12280, in relevant part:

> (d) Notwithstanding Section 654 or any other provision of law, any person who commits another crime while violating this section may receive an additional, consecutive punishment of one year for violating this section in addition and consecutive to the punishment, including enhancements, which is prescribed for the other crime. . . .

Enhancement Must be Pled and Proved

> Section 12280, subdivision (c) provides:
>
> [quoting text above]
>
> A. *Pleading and Proof Requirements*
>
> Defendant first contends the subdivision (c) enhancement was improper because it was not pleaded and he was not notified of the potential additional punishment he faced pursuant to subdivision (c). The People respond section 12280, subdivision (c) is not an enhancement which must be pleaded and proven. Rather, under subdivision (c), the court at sentencing must find that defendant committed another crime while violating section 12280. We conclude the facts giving rise to a section 12280, subdivision (c) enhancement must be pleaded and proved but any error in failing to plead in this case was harmless.
>
> An enhancement is an additional term of imprisonment added to the base term. (Cal. Rules of Court, rule 405(c).) It imposes an additional penalty when a crime is committed under specified circumstances. [Citation.]. To avoid due process violations, the facts giving rise to a sentence enhancement must be alleged in the accusatory pleading so that defendant can prepare his defense. [Citation.] Under these rules, section 12280, subdivision (c) is an enhancement which must be pleaded.

(*People v. Jimenez* (1992) 8 Cal.App.4th 391, 398.)

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1847. Possession, etc., of Assault Weapon While Committing Other Offense: Pen. Code, §12280 Charged Only as Enhancement

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If you find the defendant guilty of the crime of _____ *<insert other offense alleged>* **[under Count __], you must then decide whether the People have proved the additional allegation that (he/she) committed that offense while unlawfully (possessing/manufacturing/causing to be manufactured/distributing/transporting/importing/keeping for sale/offering or exposing for sale/giving/lending) an assault weapon, specifically _____** *<insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>***.**

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) an assault weapon, specifically [a] _____** *<insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>***.**

2. **The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) it.**

3. **The defendant knew or reasonably should have known that it had characteristics that made it an assault weapon.**

AND

4. **The defendant (possessed/manufactured/caused to be manufactured/distributed/transported/imported/kept for sale/offered or exposed for sale/gave/lent) the assault weapon while committing the crime of _____** *<insert other offense alleged>***.**

A _____ *<insert type of weapon from Pen. Code, § 12276 or description from § 12276.1>* **is an *assault weapon*.**

[Two or more people may possess something at the same time.]

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[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/other people).]

[The People allege that the defendant possessed the following weapons: _____ *<insert types of weapons when multiple items alleged>***. You may not find this additional allegation true unless all of you agree that the People have proved that the defendant possessed at least one of these weapons, and you all agree on which weapon (he/she) possessed.]**

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved.

<Defense: Permit, Registration, or Exemption From Statute>
[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/distribute/transport/import/keep for sale/offer or expose for sale/give/lend) an assault weapon if (he/she) (had registered the weapon/had a valid permit to (possess/manufacture/sell) the weapon/_____ *<insert exemption from Pen. Code, § 12280(e)–(r)>***). The People have the burden of proving beyond a reasonable doubt that the defendant did not (register the weapon/have a valid permit to (possess/manufacture/sell) the weapon/_____** *<insert exemption from Pen. Code, § 12280(e)–(r)>***). If the People have not met this burden, you must find the defendant not guilty of this allegation.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the enhancement. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [any fact, other than prior conviction, that increases the maximum penalty for a crime must be charged, submitted to a jury, and proved beyond a reasonable doubt]; *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398 [enhancement under Pen. Code, §12280 must be pleaded and proved].)

Give this instruction if the defendant is charged with an enhancement for violating Penal Code section 12280 while committing another crime but is not charged with a separate count for violating Penal Code section 12280. (Pen. Code, § 12280(d); *People v. Jimenez, supra,* 8 Cal.App.4th at p. 398.) The court must provide the

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jury with a verdict form on which the jury will indicate if the sentencing enhancement has or has not been proved.

If the defendant has been charged with a separate count for violating Penal Code section 12280 and with the enhancement, do not give this instruction. Give Instruction 1846, Possession, etc., of Assault Weapon While Committing Other Offense: Pen. Code, §12280 Charged as Separate Count and as Enhancement.

If the prosecution alleges under a single enhancement 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.) Give the bracketed paragraph that begins, "The People allege that the defendant possessed the following weapons," inserting the items alleged.

Registration and permitting procedures are contained in Penal Code sections 12285 to 12287. Exemptions to the statute are stated in Penal Code section 12280(e) to (r). The existence of a statutory exemption is an affirmative defense. (*People v. Jimenez, supra,* 8 Cal.App.4th at pp. 395–397.) 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 [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, "The defendant did not unlawfully. . . ."

The jury must decide if the weapon possessed was an assault weapon. (See *People v. Flood* (1998) 18 Cal.4th 470, 482.) When instructing on the definition of assault weapon, the court should not state that the weapon possessed by the defendant was an assault weapon. Where indicated in the instruction, the court may insert a weapon listed in Penal Code section 12276 or a description of a weapon from section 12276.1.

AUTHORITY

Enhancement ▸ Pen. Code, § 12280(d); *People v. Jimenez* (1992) 8 Cal.App.4th 391, 398.

Assault Weapon Defined ▸ Pen. Code, §§ 12276, 1227.1; see also *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1142–1145 [discussing statutory definition of assault weapon, amendments to statute and petition procedure by which the Attorney General may have weapon listed].

Permits and Registration ▸ Pen. Code, §§ 12285–12287.

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Exemptions ▸ Pen. Code, § 11280(e)–(r).
Knowledge Required ▸ *In re Jorge M.* (2000) 23 Cal.4th 866, 887.
Permits, Registration, and Exemptions Are Affirmative Defenses ▸ *People v. Jimenez* (1992) 8 Cal.App.4th 391, 395–397.
Constructive vs. Actual Possession ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6].
Statute Constitutional ▸ *Silviera v. Lockyer* (2002) 312 F.3d 1052, 1056; *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 478.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 165–166.

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STAFF NOTES

Pen. Code, § 12280, in relevant part:

> (d) Notwithstanding Section 654 or any other provision of law, any person who commits another crime while violating this section may receive an additional, consecutive punishment of one year for violating this section in addition and consecutive to the punishment, including enhancements, which is prescribed for the other crime. . . .

Enhancement Must be Pled and Proved

> Section 12280, subdivision (c) provides:
>
> [quoting text above]
>
> A. *Pleading and Proof Requirements*
>
> Defendant first contends the subdivision (c) enhancement was improper because it was not pleaded and he was not notified of the potential additional punishment he faced pursuant to subdivision (c). The People respond section 12280, subdivision (c) is not an enhancement which must be pleaded and proven. Rather, under subdivision (c), the court at sentencing must find that defendant committed another crime while violating section 12280. We conclude the facts giving rise to a section 12280, subdivision (c) enhancement must be pleaded and proved but any error in failing to plead in this case was harmless.
>
> An enhancement is an additional term of imprisonment added to the base term. (Cal. Rules of Court, rule 405(c).) It imposes an additional penalty when a crime is committed under specified circumstances. [Citation.]. To avoid due process violations, the facts giving rise to a sentence enhancement must be alleged in the accusatory pleading so that defendant can prepare his defense. [Citation.] Under these rules, section 12280, subdivision (c) is an enhancement which must be pleaded.

(*People v. Jimenez* (1992) 8 Cal.App.4th 391, 398.)

See Notes to Instruction 1845.

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1870. Possession of Destructive Device

The defendant is charged [in Count __] with unlawfully possessing a destructive device.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed a destructive device.**

2. **The defendant knew (he/she) possessed it.**

AND

3. **The defendant knew that what (he/she) possessed was a destructive device.**

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>***.]**

[A _____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

[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/other people).]

[The People allege that the defendant possessed the following destructive devices: _____ *<insert types of destructive devices when multiple items alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the alleged devices, and you all agree on which alleged device (he/she) possessed.]**

<Defense: Permit>
[The defendant did not unlawfully possess a destructive device if (he/she) had a valid permit to do so. The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid permit. If the People

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have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (*People v. Heideman* (1976) 58 Cal.App.3d 321, 333.) Give the bracketed paragraph that begins, "The People allege that the defendant possessed the following destructive devices," inserting the items alleged.

Penal Code section 12305 allows for the possession of a destructive device with a permit. The existence of a valid permit is an affirmative defense. (*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–629.) If there is sufficient evidence to raise a reasonable doubt about the existence of a permit, 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 [discussing affirmative defenses generally and the burden of proof].)

Give the bracketed definition of "destructive device," inserting the appropriate definition from Penal Code section 12301. If the case involves a specific device listed in Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive

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charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8.)

AUTHORITY

Elements ▸ Pen. Code, § 12303.
Destructive Device Defined ▸ Pen. Code, § 12301.
Permit Exemption ▸ Pen. Code, § 12305; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–628.
Knowledge ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332; *In re Jorge M.* (2000) 23 Cal.4th 866, 887; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619.
Constructive vs. Actual Possession ▸ See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

RELATED ISSUES

Tracer Ammunition
Penal Code section 12301 states that "destructive device" includes "that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns." In *People v. Miller* (1999) 69 Cal.App.4th 190, 213, the court held that "proof of the purpose for which tracer ammunition was manufactured is an affirmative defense to the charge of possessing a destructive device, and not an element of the offense."

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STAFF NOTES

Pen. Code, § 12303:

Any person, firm, or corporation who, within this state, possesses any destructive device, other than fixed ammunition of a caliber greater than .60 caliber, except as provided by this chapter, is guilty of a public offense and upon conviction thereof shall be punished by imprisonment in the county jail for a term not to exceed one year, or in state prison, or by a fine not to exceed ten thousand dollars ($ 10,000) or by both such fine and imprisonment.

Pen. Code, § 12301, "Destructive device"; "Explosive":

(a) The term "destructive device," as used in this chapter, shall include any of the following weapons:

(1) Any projectile containing any explosive or incendiary material or any other chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns.

(2) Any bomb, grenade, explosive missile, or similar device or any launching device therefor.

(3) Any weapon of a caliber greater than 0.60 caliber which fires fixed ammunition, or any ammunition therefor, other than a shotgun (smooth or rifled bore) conforming to the definition of a "destructive device" found in subsection (b) of Section 179.11 of Title 27 of the Code of Federal Regulations, shotgun ammunition (single projectile or shot), antique rifle, or an antique cannon. For purposes of this section, the term "antique cannon" means any cannon manufactured before January 1, 1899, which has been rendered incapable of firing or for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade. The term "antique rifle" means a firearm conforming to the definition of an "antique firearm" in Section 179.11 of Title 27 of the Code of Federal Regulations.

(4) Any rocket, rocket-propelled projectile, or similar device of a diameter greater than 0.60 inch, or any launching device therefor, and any rocket, rocket-propelled projectile, or similar device

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containing any explosive or incendiary material or any other chemical substance, other than the propellant for such device, except such devices as are designed primarily for emergency or distress signaling purposes.

(5) Any breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.

(6) Any sealed device containing dry ice (CO[2]) or other chemically reactive substances assembled for the purpose of causing an explosion by a chemical reaction.

(b) The term "explosive," as used in this chapter, shall mean any explosive defined in Section 12000 of the Health and Safety Code.

Pen. Code, § 12305, "Permits," in relevant part:

(a) Every dealer, manufacturer, importer, and exporter of any destructive device, or any motion picture or television studio using destructive devices in the conduct of its business, shall obtain a permit for the conduct of that business from the Department of Justice.

(b) Any person, firm, or corporation not mentioned in subdivision (a) shall obtain a permit from the Department of Justice in order to possess or transport any destructive device. No permit shall be issued to any person who meets any of the following criteria:

(1) Has been convicted of any felony.

(2) Is addicted to the use of any narcotic drug.

(3) Is a person in a class prohibited by Section 8100 or 8103 of the Welfare and Institutions Code or Section 12021 or 12021.1 of this code.

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Knowledge

> [T]he evidence clearly supports the inferences that she was in actual or constructive possession of the articles charged in the three counts under which she stands convicted; that it also shows that she had knowledge of the nature and character of the articles; and that it accordingly supports her convictions in these respects.

(*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [violation of Penal Code, § 12303.3].)

In the context of Penal Code section 12020(a)(4), the Supreme Court recently ruled that the jury must be instructed on the knowledge element of possession of a concealed dirk or dagger. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332; see Staff Notes to Instruction 1801.)

Similarly, *In re Jorge M.* (2000) 23 Cal.4th 866, 887, the Supreme Court held that the Assault Weapons Control Act required proof that the defendant knew or should have know that the weapon was of a kind prohibited by the statute. In reaching this conclusion, the court questioned the continuing validity of previous appellate decisions holding that knowledge of the character of the prohibited object was not required. (*Id.* at p. 876 n.6.)

Definition of Bomb

The following definition of "bomb" was approved of in *People v. Morse* (1992) 2 Cal.App.4th 620, 647 n8: "A 'bomb' is a device carrying an explosive charge fused to detonate under certain conditions."

Other cases have held that the term "bomb" is not vague and is understood in is "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25.) "Persons of common intelligence know what a bomb is." (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.)

A bomb must be capable of exploding when detonated. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) The device does not have to be a "projectile-type bomb" as used in the military. (*People v. Quinn, supra,* 57 Cal.App.3d at p. 258.)

Constructive Possession

The language of the instruction is derived from the Task Force controlled substances instructions. (See also *People* v. *Azevedo* (1984) 161 Cal.App.3d 235,

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242-243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876 n.6]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619.)

Existence of Permit Affirmative Defense

> The existence of a recorded permit in any of these names would require the People to eliminate each codefendant as the holder. The burden of proving such negatives is precisely what the rule of convenience is designed to avoid. [Citation omitted.] In the implausible -- if not preposterous -- event that appellant had an exonerating permit, the fact was "peculiarly within her knowledge" and there was nothing "harsh or unfair" in making her bear the burden of proving it. [Citation omitted.] The trial court did not err in refusing her instructions to the effect that the People bore the burden of proving the contrary.

(*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 629.)

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1871. Carrying or Placing Explosive or Destructive Device on Common Carrier

The defendant is charged [in Count __] with (carrying/ [or] placing) (an explosive/ [or] a destructive device) on a (common carrier/ (boat/plane/car/bus/_____ *<insert type of other vehicle>***) that transports paying passengers).**

To prove that the defendant is guilty of this crime, the People must prove that:

<Alternative 1A—carried or placed on common carrier>

[1. The defendant willfully (carried/ [or] placed) (an explosive/ [or] a destructive device) on a (boat/plane/car/bus/_____ *<insert type of other vehicle>***) that transports paying passengers.**

<Alternative 1B—carried or placed in baggage while on common carrier>

[1. The defendant willfully (carried/ [or] placed) (an explosive/ [or] a destructive device) in (hand baggage[,]/ a roll[,]/ (or another/a) container) while on board a (boat/plane/car/bus/_____ *<insert type of other vehicle>***) that transports paying passengers.**

<Alternative 1C—placed in baggage to be checked on common carrier>

[1. The defendant willfully placed (an explosive/ [or] a destructive device) in baggage that was later checked with a common carrier.

AND

2. The defendant knew that the object that (he/she) (carried/ [or] placed) was (an explosive/ [or] a destructive device).

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.

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

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[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[A _____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive*.]**

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>*.**]**

[A _____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

[A *common carrier* is a person or business that publicly offers to carry persons, property, or messages.][A person or business that publicly offers to carry only telegraphic messages is not a common carrier.]

[_____ *<insert type or name of common carrier>* **is a *common carrier*.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

Similarly, in the definition of "common carrier," the court may instruct generally that a type of vehicle is a common carrier. For example, "a Greyhound bus is a common carrier." The court may not instruct that the particular vehicle in the case was a common carrier. For example, the court may not instruct that "the defendant

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was on a common carrier, a Greyhound bus," or "the vehicle in this case, a Greyhound bus, is a common carrier."

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8.)

AUTHORITY

Elements ▸ Pen. Code, § 12303.1.
Explosive Defined ▸ Health & Saf. Code, § 12000.
Destructive Device Defined ▸ Pen. Code, § 12301.
Knowledge ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332; *In re Jorge M.* (2000) 23 Cal.4th 866, 887; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

LESSER INCLUDED OFFENSES

Possession of Destructive Device ▸ Pen. Code, § 12303.

RELATED ISSUES

Gasoline Not an Explosive
"Under the statutory definition of explosive, the nature of the substance, not the manner in which a substance is used, is determinative." (*People v. Clark* (1990) 50 Cal.3d 583, 604 [gasoline, by its nature, not an explosive even where used to ignite a fire].)

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STAFF NOTES

Pen. Code, § 12303.1:

Every person who willfully does any of the following is guilty of a felony and is punishable by imprisonment in the state prison for two, four, or six years:

(a) Carries any explosive or destructive device on any vessel, aircraft, car, or other vehicle that transports passengers for hire.

(b) Places or carries any explosive or destructive device, while on board any such vessel, aircraft, car or other vehicle, in any hand baggage, roll, or other container.

(c) Places any explosive or destructive device in any baggage which is later checked with any common carrier.

Civ. Code, § 2168, Common Carrier Defined:

Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry.

Health & Safety Code, § 12000, "Explosives":

For the purposes of this part, "explosives" means any substance, or combination of substances, the primary or common purpose of which is detonation or rapid combustion, and which is capable of a relatively instantaneous or rapid release of gas and heat, or any substance, the primary purpose of which, when combined with others, is to form a substance capable of a relatively instantaneous or rapid release of gas and heat. "Explosives" includes, but is not limited to, any explosives as defined in Section 841 of Title 18 of the United States Code and published pursuant to Section 55.23 of Title 27 of the Code of Federal Regulations, and any of the following:

(a) Dynamite, nitroglycerine, picric acid, lead azide, fulminate of mercury, black powder, smokeless powder, propellant explosives, detonating primers, blasting caps, or commercial boosters.

(b) Substances determined to be division 1.1, 1.2, 1.3, or 1.6

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explosives as classified by the United States Department of Transportation.

(c) Nitro carbo nitrate substances (blasting agent) classified as division 1.5 explosives by the United States Department of Transportation.

(d) Any material designated as an explosive by the State Fire Marshal. The designation shall be made pursuant to the classification standards established by the United States Department of Transportation. The State Fire Marshal shall adopt regulations in accordance with the Government Code to establish procedures for the classification and designation of explosive materials or explosive devices that are not under the jurisdiction of the United States Department of Transportation pursuant to provisions of Section 841 of Title 18 of the United States Code and published pursuant to Section 55.23 of Title 27 of the Code of Federal Regulations that define explosives .

(e) Certain division 1.4 explosives as designated by the United States Department of Transportation when listed in regulations adopted by the State Fire Marshal.

(f) For the purposes of this part, "explosives" does not include any destructive device, as defined in Section 12301 of the Penal Code, nor does it include ammunition or small arms primers manufactured for use in shotguns, rifles, and pistols.

Pen. Code, § 12301, "Destructive device"; "Explosive":
See Notes to Instruction 1870.

No Cases on Statute
Staff located no published cases discussing this statute.

Knowledge

[T]he evidence clearly supports the inferences that she was in actual or constructive possession of the articles charged in the three counts under which she stands convicted; that it also shows that she had knowledge of the nature and character of the articles; and that it accordingly supports her convictions in these respects.

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(*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [violation of Penal Code, § 12303.3].)

In the context of Penal Code section 12020(a)(4), the Supreme Court recently ruled that the jury must be instructed on the knowledge element of possession of a concealed dirk or dagger. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332; see Staff Notes to Instruction 1801.)

Similarly, *In re Jorge M.* (2000) 23 Cal.4th 866, 887, the Supreme Court held that the Assault Weapons Control Act required proof that the defendant knew or should have know that the weapon was of a kind prohibited by the statute. In reaching this conclusion, the court questioned the continuing validity of previous appellate decisions holding that knowledge of the character of the prohibited object was not required. (*Id.* at p. 876 n.6.)

Definition of Bomb

The following definition of “bomb” was approved of in *People v. Morse* (1992) 2 Cal.App.4th 620, 647 n8: "A 'bomb' is a device carrying an explosive charge fused to detonate under certain conditions.”

Other cases have held that the term “bomb” is not vague and is understood in is “common, accepted, and popular sense.” (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25.) “Persons of common intelligence know what a bomb is.” (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.)

A bomb must be capable of exploding when detonated. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) The device does not have to be a “projectile-type bomb” as used in the military. (*People v. Quinn, supra,* 57 Cal.App.3d at p. 258.)

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1872. Possession of Explosive or Destructive Device in Specified Place

The defendant is charged [in Count __] with recklessly or maliciously possessing (an explosive/ [or] a destructive device) (in[,]/ on[,]/ [or] near) _____ *<insert type of place alleged from Pen. Code, § 12303.2>*.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant recklessly or maliciously possessed (an explosive/ [or] a destructive device).**

AND

2. **At the time the defendant possessed the (substance/ [or] device), (he/she) was**

   <2A.>
   [on a public street or highway](;[or]/.)

   <2B.>
   [in or near any (theater[,]/ hall[,]/ school[,]/ college[,]/ church[,]/ hotel[,]/ [or] other public building/ [or] private habitation](;[or]/.)

   <2C.>
   [in, on, or near any (plane[,]/ passenger train[,]/ car[,]/ cable road or cable car[,]/ boat carrying paying passengers)](; or/.)

   <2D.>
   [in, on, or near any other public place ordinarily passed by human beings].

A person acts *recklessly* when (1) he or she is aware that his or her actions present a substantial and unjustifiable risk, (2) he or she ignores that risk, and (3) ignoring the risk is grossly different from what a reasonable person would have done in the same situation.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the intent to annoy or injure someone else.

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[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[A _____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive*.]**

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>*.**]**

[A _____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

[The People need not prove that the (explosive/ [or] destructive device) was set to explode.]

[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/other people).]

[The People allege that the defendant possessed the following (explosive[s]/ [or] destructive device[s]): _____ *<insert types of explosives or destructive devices when multiple items alleged>*. **You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the alleged items and you all agree on which alleged item (he/she) possessed.]**

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (*People v.*

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Heideman (1976) 58 Cal.App.3d 321, 333.) Give the bracketed paragraph that begins, "The People allege that the defendant possessed the following," inserting the items alleged. The jury does not have to be unanimous about whether the defendant acted recklessly or maliciously. *(Ibid.)* The jury also does not have to agree on whether the item was an explosive or a destructive device. (*People v. Westoby* (1976) 63 Cal.App.3d 790, 797; see also *People v. Quinn, supra,* 57 Cal.App.3d at p. 257 [a bomb may be an explosive and may be a destructive device].)

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8.)

AUTHORITY

Elements ▸ Pen. Code, § 12303.2.
Explosive Defined ▸ Health & Saf. Code, § 12000.
Destructive Device Defined ▸ Pen. Code, § 12301.
Recklessly Defined ▸ *People v. Heideman* (1976) 58 Cal.App.3d 321, 334; *In re Steven S.* (1994) 25 Cal.App.4th 598, 614–615; Model Pen. Code, § 2.02(2)(c).
Maliciously Defined ▸ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550; see also *People v. Heideman* (1976) 58 Cal.App.3d 321, 335.

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Constructive vs. Actual Possession ▸ See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619.
Unanimity ▸ *People v. Heideman* (1976) 58 Cal.App.3d 321, 333.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

LESSER INCLUDED OFFENSES

Possession of Destructive Device ▸ Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.
Possession of Explosive ▸ Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.

RELATED ISSUES

Gasoline Not an Explosive
"Under the statutory definition of explosive, the nature of the substance, not the manner in which a substance is used, is determinative." (*People v. Clark* (1990) 50 Cal.3d 583, 604 [gasoline, by its nature, not an explosive even where used to ignite a fire].)

Need Not Be Set to Explode
"One need not possess a destructive device already set to explode in order to violate Penal Code section 12303.2." (*People v. Westoby* (1976) 63 Cal.App.3d 790, 795.) Thus, the defendant in *Westoby* was guilty of possessing a destructive device even though the battery wires were not connected on the pipe bomb. *(Ibid.)* Similarly, in *People v. Heideman* (1976) 58 Cal.App.3d 321, 335–336, the defendant was guilty of illegally possessing dynamite even though he did not have the blasting caps necessary to ignite the dynamite. (See also *People v. Morse* (1992) 2 Cal.App.4th 630, 646–647 [instruction on this point proper].)

Felony Murder
Penal Code section 12303.2 is an inherently dangerous felony supporting a conviction for second degree felony murder. (*People v. Morse* (1992) 2 Cal.App.4th 630, 646.) However, in *People v. Morse, supra,* 2 Cal.App.4th at pp. 654–655, the trial court erred in instructing that if the jury convicted the defendant of second degree murder on the basis of felony murder, the murder was then elevated to first degree murder based on the use of a destructive device. *(Ibid.)*

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Multiple Charges Based on Multiple Explosives or Destructive Devices
The defendant may be charged with multiple counts of violating Penal Code section 12303.2 based on possession of multiple explosives or destructive devices. (*People v. DeGuzman* (2003) 113 Cal.App.4th 538, 548.)

Maliciously—People v. Heideman
In *People v. Heideman* (1976) 58 Cal.App.3d 321, the defendant offered to commit murder for hire using explosives and possessed the explosives. (*Id.* at pp. 327–329.) The defendant asserted that he did not actually intend to physically injure anyone but simply to defraud the individuals offering to pay for the murders. (*Id.* at pp. 330–331.) On appeal, the defendant contended that the court had improperly instructed on the meaning of "recklessness," which the prosecution conceded. (*Id.* at p. 334.) Noting that the "[d]efendant admitted that his purpose in storing the dynamite in his room was to carry out a nefarious scheme to defraud his victims," the court found sufficient evidence to establish malice. (*Id.* at p. 335.) The court stated that under the facts of the case before it, the term "maliciously" did not "require an actual intent to physically injure, intimidate or terrify others." *(Ibid.)* Accordingly, the court found that the error in the instruction on "recklessness" was harmless given that there was sufficient evidence to support the higher culpability standard of malice. *(Ibid.)* The committee did not incorporated the language from *Heideman* in the definition of "maliciously" in this instruction because the committee concluded that this case reflects unique facts and that the language quoted is dicta, not essential to the ruling of the case.

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STAFF NOTES

Pen. Code, § 12303.2:

> Every person who recklessly or maliciously has in his possession any destructive device or any explosive on a public street or highway, in or near any theater, hall, school, college, church, hotel, other public building, or private habitation, in, on, or near any aircraft, railway passenger train, car, cable road or cable car, vessel engaged in carrying passengers for hire, or other public place ordinarily passed by human beings is guilty of a felony, and shall be punishable by imprisonment in the state prison for a period of two, four, or six years.

Health & Safety Code, § 12000, "Explosives":
See Notes to Instruction 1871.

Pen. Code, § 12301, "Destructive device"; "Explosive":
See Notes to Instruction 1870.

Definition of Reckless

> [O]ver defense objections, the jury was instructed (No. 23a),as indicated below, concerning the definition of recklessness n7 [. . . .]
>
> n7 "Recklessly means not recking, careless, heedless, inattentive, indifferent to consequences. . . ." This definition was based on Black's Law Dictionary.
>
> The People concede the error in the instruction that failed to indicate that recklessness requires a conscious disregard of probable consequences [. . . .]

(*People v. Heideman* (1976) 58 Cal.App.3d 321, 334.)

> The word "reckless" appears throughout the Penal Code in many different contexts. (§ 190.2, subd. (d) [murder by aiding and abetting certain felonies "with reckless indifference to human life"], 452 [unlawfully causing a fire when a person "recklessly sets fire to or burns or causes to be burned, any structure, forest land or property"], 549 [solicitation of workers' compensation claim with "reckless disregard" for whether claimant intends to violate Insurance Code],

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> 11172, subd. (a) [false report of child abuse made with "reckless disregard of the truth or falsity of the report"], 11413, subd. (a) [arson or explosion "in reckless disregard of terrorizing another"], 12303.2 ["recklessly" possessing destructive device in public or private place or on common carrier vehicle], 1000.6, subd. (d), 12028.5, subd. (a)(1), 13700, subd. (a) [definitions of domestic violence and abuse as including "recklessly" causing or attempting to cause or placing in apprehension of bodily injury].)
>
> In one context--unlawfully causing a fire (§ 452)--the Legislature has provided a specific definition: " 'Recklessly' means a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property. The risk shall be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. . .." (§ 450, subd. (f).)
>
> This definition derives from the Model Penal Code (*In re Stonewall F.* (1989) 208 Cal.App.3d 1054, 1066, fn. 10), which defines recklessness as follows: "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." (Model Pen. Code, § 2.02, subd. (2)(c).)
>
> By virtue of our Legislature's repeated inclusion of the word "reckless" in the penal statutes, and the adoption of the Model Penal Code definition in one of those statutes, the word has acquired a peculiar meaning in the law of California--the meaning adopted by the drafters of the Model Penal Code. The phrase "reckless disregard" is to be construed according to that meaning. (§ 7, subd. 16; *People v. Mirmirani*, *supra*, 30 Cal.3d at p. 384.) Thus, no further statutory definition is necessary.

(*In re Steven S.* (1994) 25 Cal.App.4th 598, 614-615.)

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The definition used in the instruction is a modified version of the definition of "recklessness" from Task Force Instruction 1060, Unlawfully Causing a Fire.

Definition of Malicious

The first sentence of the definition of "maliciously" is taken from Task Force Instruction 915, Mayhem. Note the discussion of *People v. Heideman* (1976) 58 Cal.App.3d 321, 335, in the Related Issues section. The full quote from *Heideman* follows:

> In view of the inherently dangerous nature of an explosive substance and the public places in which the statute prohibits possession, we do not interpret "maliciously" within the terms of the statute to require an actual intent to physically injure, intimidate or terrify others.

(*People v. Heideman* (1976) 58 Cal.App.3d 321, 335.)

The quoted language is contained in the comparable CALJIC instruction.

Definition of Bomb

The following definition of "bomb" was approved of in *People v. Morse* (1992) 2 Cal.App.4th 620, 647 n8: "A 'bomb' is a device carrying an explosive charge fused to detonate under certain conditions."

Other cases have held that the term "bomb" is not vague and is understood in is "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25.) "Persons of common intelligence know what a bomb is." (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.)

A bomb must be capable of exploding when detonated. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) The device does not have to be a "projectile-type bomb" as used in the military. (*People v. Quinn, supra,* 57 Cal.App.3d at p. 258.)

Unanimity

> As to the requirement of unanimity, we adopt the well reasoned position of the People in their brief, with appropriate editorial modifications: If a defendant has been prosecuted for violation of a statute under which any one of several different acts could constitute the offense, the jury must be told that a verdict of guilty must be supported by a unanimous finding that one of the acts was

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> committed. [Citations omitted.] [. . .]
>
> There is no merit to the argument that the jury should have been instructed to agree unanimously about defendant's mens rea before finding him guilty. In the context of the offense charged, a person who possesses an explosive either maliciously or recklessly is equally culpable because in either case he creates an unacceptably high risk of harm to the community.

(*People v. Heideman* (1976) 58 Cal.App.3d 321, 333.)

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1873. Possession, Explosion, etc., of Explosive or Destructive Device With Intent to Injure

---

The defendant is charged [in Count __] with (possessing/exploding/igniting/ [or] attempting to (explode/ [or] ignite)) (a destructive device/ [or] an explosive) with intent (to injure, intimidate, or terrify another person/ [or] to wrongfully injure or destroy someone else's property).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (possessed/exploded/ignited/ [or] attempted to (explode/ [or] ignite)) (a destructive device/ [or] an explosive).**

AND

2. **At the time the defendant acted, (he/she) intended (to injure, intimidate, or terrify another person/ [or] to wrongfully injure or destroy someone else's property).**

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[A _____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive*.]**

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>*.**]**

[A _____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

[Two or more people may possess something at the same time.]

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[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/other people).]

[The People allege that the defendant possessed the following (explosive[s]/ [or] destructive device[s]): _____ *<insert types of explosives or destructive devices when multiple items alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant possessed at least one of the alleged items, and you all agree on which alleged item (he/she) possessed.]**

[To prove that the defendant is guilty of attempting to (explode/ [or] ignite) (a destructive device/ [or] an explosive), the People must prove that:

1. **The defendant took a direct but ineffective step toward (exploding/ [or] igniting) (a destructive device/ [or] an explosive).**

AND

2. **The defendant intended to (explode/ [or] ignite) (a destructive device/ [or] an explosive).**

A *direct step* requires more than merely planning or preparing to (explode/ [or] ignite) (a destructive device/ [or] an explosive) or obtaining or arranging for something needed to (explode/ [or] ignite) (a destructive device/ [or] an explosive). A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to (explode/ [or] ignite) (a destructive device/ [or] an explosive). It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

[A person who attempts to (explode/ [or] ignite) (a destructive device/ [or] an explosive) is guilty of this crime even if, after taking a direct step towards committing the crime, he or she abandoned further efforts to complete the crime or his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward (exploding/ [or] igniting) (a destructive device/ [or] an explosive), then that person is not guilty of this crime.]]

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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.

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. (*People v. Heideman* (1976) 58 Cal.App.3d 321, 333.) Give the bracketed paragraph that begins, "The People allege that the defendant possessed the following," inserting the items alleged. The jury also does not have to agree on whether the item was an explosive or a destructive device. (*People v. Westoby* (1976) 63 Cal.App.3d 790, 797; see also *People v. Quinn, supra,* 57 Cal.App.3d at p. 257 [a bomb may be an explosive and may be a destructive device].)

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8.)

If the prosecution alleges that the defendant attempted to explode or ignite a destructive device or explosive, give the bracketed paragraphs on attempt. Give the bracketed paragraph on withdrawal if appropriate based on the evidence.

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AUTHORITY

Elements ▸ Pen. Code, § 12303.3.
Explosive Defined ▸ Health & Saf. Code, § 12000.
Destructive Device Defined ▸ Pen. Code, § 12301.
Must Intend to Harm Another Person ▸ *People v. Godwin* (1995) 31 Cal.App.4th 1112, 1118.
Constructive vs. Actual Possession ▸ See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619.
Unanimity ▸ *People v. Heideman* (1976) 58 Cal.App.3d 321, 333.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

LESSER INCLUDED OFFENSES

Possession of Destructive Device ▸ Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.
Possession of Explosive ▸ Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.

RELATED ISSUES

Gasoline Not an Explosive
"Under the statutory definition of explosive, the nature of the substance, not the manner in which a substance is used, is determinative." (*People v. Clark* (1990) 50 Cal.3d 583, 604 [gasoline, by its nature, not an explosive even where used to ignite a fire].)

Multiple Charges Based on Multiple Explosives or Destructive Devices
The defendant may be charged with multiple counts of violating Penal Code section 12303.3 based on possession of multiple explosives or destructive devices. (*People v. DeGuzman* (2003) 113 Cal.App.4th 538, 548.)

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STAFF NOTES

Pen. Code, § 12303.3:

> Every person who possesses, explodes, ignites, or attempts to explode or ignite any destructive device or any explosive with intent to injure, intimidate, or terrify any person, or with intent to wrongfully injure or destroy any property, is guilty of a felony, and shall be punished by imprisonment in the state prison for a period of three, five, or seven years.

Health & Safety Code, § 12000, "Explosives":
See Notes to Instruction 1871.

Pen. Code, § 12301, "Destructive device"; "Explosive":
See Notes to Instruction 1870.

Must Intend to Harm Another—"Wrongfully"

> During jury deliberations the court received a question from the jury asking for a clarification of the word, "wrongfully." The court stated it intended to tell the jury that "wrongful" meant "without legal justification." [. . .]
>
> Appellant contends the jury should have been instructed that "wrongfully" required the intent to injure or destroy the property of another or an intent to infringe upon the legal rights of another. [. . .]
>
> We agree that the court's instruction that "wrongfully" meant "without legal justification" permitted the jury to convict the defendant if it found defendant only intended to injure himself or only intended to injure his own personal property. [. . .]
>
> We conclude that Penal Code section 12303.3 seeks to punish and thereby discourage possession or ignition of explosives which are intended to injure other people but don't succeed in injuring them, which intend to terrorize or intimidate other people but do not injure them, or to injure or destroy other persons' property. It is not aimed at imposing added punishment for the possession or ignition of devices intended solely to injure the perpetrator or his own property beyond what he would face for simple possession of those

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> explosives (Pen. Code, § 12303) or possession on certain common carriers or vehicles (Pen. Code, § 12303.1) or possession in certain public places (Pen. Code, § 12303.2).

(*People v. Godwin* (1995) 31 Cal.App.4th 1112, 1116-1118 [defendant exploded pipe bomb to put himself in the hospital because he was homeless and destitute].)

Definition of Bomb

The following definition of "bomb" was approved of in *People v. Morse* (1992) 2 Cal.App.4th 620, 647 n8: "A 'bomb' is a device carrying an explosive charge fused to detonate under certain conditions."

Other cases have held that the term "bomb" is not vague and is understood in is "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25.) "Persons of common intelligence know what a bomb is." (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.)

A bomb must be capable of exploding when detonated. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) The device does not have to be a "projectile-type bomb" as used in the military. (*People v. Quinn, supra,* 57 Cal.App.3d at p. 258.)

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1874A. Sale or Transportation of Destructive Device

The defendant is charged [in Count __] with (selling/transporting) a destructive device.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (sold/transported) a destructive device.**

2. **The defendant knew (he/she) (sold/transported) it.**

AND

3. **The defendant knew that what (he/she) (sold/transported) was a destructive device.**

[As used here, *selling* means exchanging something for money, services, or anything of value.]

[A person *transports* something if he or she carries or moves it from one location to another even if the distance is small.]

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>*.**]**

[A _____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to (sell/transport) it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through (another person/other people).]

<Defense: Statutory Exception>
[The defendant did not unlawfully (sell/transport) a destructive device if (he/she) was legally authorized to do so. The People have the burden of proving beyond a reasonable doubt that the defendant was not legally

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authorized to (sell/transport) a destructive device. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Penal Code section 12303.6 allows for the sale, offer to sell, or transportation of a destructive device "as provided by this chapter." As with a permit for possession, the existence of a legally valid basis for the defendant to sell or transport a destructive device is an affirmative defense. (See *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–629.) If there is 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 [discussing affirmative defenses generally and the burden of proof].)

Depending on the device used, give the bracketed definitions of "destructive device," inserting the appropriate definition from Penal Code section 12301. If the case involves a specific device listed in Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8.)

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AUTHORITY

Elements ▸ Pen. Code, § 12303.6.
Destructive Device Defined ▸ Pen. Code, § 12301.
Knowledge ▸ See *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619; *People v. Guy* (1980) 107 Cal.App.3d 593.
Constructive vs. Actual Possession ▸ See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

LESSER INCLUDED OFFENSES

Possession of Destructive Device ▸ Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.

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STAFF NOTES

Pen. Code, § 12303.6:

> Any person, firm, or corporation who, within this state, sells, offers for sale, or knowingly transports any destructive device, other than fixed ammunition of a caliber greater than .60 caliber, except as provided by this chapter, is guilty of a felony and is punishable by imprisonment in the state prison for two, three or four years.

Staff located no published cases discussing this provision.

Health & Safety Code, § 12000, "Explosives":
See Notes to Instruction 1871.

Pen. Code, § 12301, "Destructive device"; "Explosive":
See Notes to Instruction 1870.

Knowledge

> [T]he evidence clearly supports the inferences that she was in actual or constructive possession of the articles charged in the three counts under which she stands convicted; that it also shows that she had knowledge of the nature and character of the articles; and that it accordingly supports her convictions in these respects.

(*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [violation of Penal Code, § 12303.3].)

In the context of possession, sale and transportation of controlled substance, the courts have held that the defendant must know that the substance is a controlled substance, though it is not necessary for the defendant to know which controlled substance is involved. (*People v. Guy* (1980) 107 Cal.App.3d 593, 601; *see also People v. Romero* (1997) 55 Cal.App.4th 147, 151-153, 157.)

Specific Intent—Offer to Sell
In *People v. Jackson* (1963) 59 Cal.2d 468, 469–470, the Supreme Court found fault with a jury instruction that did not include specific intent to make a sale as an element of making an offer to sell a controlled substance:

> This instruction is erroneous. It states that the only intent required is the intent to make an offer and that an intent to make a sale is not

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> necessary. In *People v. Brown* (citation omitted) we held that "a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under section 11501." Persons who offer to sell narcotics with no intention of performing are not engaged in narcotics traffic.

Affirmative Defense

> The existence of a recorded permit in any of these names would require the People to eliminate each codefendant as the holder. The burden of proving such negatives is precisely what the rule of convenience is designed to avoid. [Citation omitted.] In the implausible -- if not preposterous -- event that appellant had an exonerating permit, the fact was "peculiarly within her knowledge" and there was nothing "harsh or unfair" in making her bear the burden of proving it. [Citation omitted.] The trial court did not err in refusing her instructions to the effect that the People bore the burden of proving the contrary.

(*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 629.)

Definition of Bomb

The following definition of "bomb" was approved of in *People v. Morse* (1992) 2 Cal.App.4th 620, 647 n8: "A 'bomb' is a device carrying an explosive charge fused to detonate under certain conditions."

Other cases have held that the term "bomb" is not vague and is understood in is "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25.) "Persons of common intelligence know what a bomb is." (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.)

A bomb must be capable of exploding when detonated. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) The device does not have to be a "projectile-type bomb" as used in the military. (*People v. Quinn, supra,* 57 Cal.App.3d at p. 258.)

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1874B. Offer to Sell Destructive Device

The defendant is charged [in Count __] with offering to sell a destructive device.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant offered to sell a destructive device.**

AND

2. **The defendant intended to sell a destructive device.**

[As used here, *selling* means exchanging something for money, services, or anything of value.]

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>***.]**

[A _____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

<Defense: Statutory Exception>
[The defendant did not unlawfully offer to sell a destructive device if (he/she) was legally authorized to do so. The People have the burden of proving beyond a reasonable doubt that the defendant was not legally authorized to offer to sell a destructive device. If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Penal Code section 12303.6 allows for the sale, offer to sell, or transportation of a destructive device "as provided by this chapter." As with a permit for possession, the existence of a legally valid basis for the defendant to offer to sell a destructive

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device is an affirmative defense. (See *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–629.) If there is 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 [discussing affirmative defenses generally and the burden of proof].)

Depending on the device used, give the bracketed definitions of "destructive device," inserting the appropriate description from Penal Code section 12301. If the case involves a specific device listed in Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8.)

AUTHORITY

Elements ▸ Pen. Code, § 12303.6.
Destructive Device Defined ▸ Pen. Code, § 12301.
Specific Intent Required for Offer to Sell ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470.
Knowledge ▸ See *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619; *People v. Guy* (1980) 107 Cal.App.3d 593.
Constructive vs. Actual Possession ▸ See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

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LESSER INCLUDED OFFENSES

Possession of Destructive Device ▸ Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.

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STAFF NOTES

Pen. Code, § 12303.6:

> Any person, firm, or corporation who, within this state, sells, offers for sale, or knowingly transports any destructive device, other than fixed ammunition of a caliber greater than .60 caliber, except as provided by this chapter, is guilty of a felony and is punishable by imprisonment in the state prison for two, three or four years.

Staff located no published cases discussing this provision.

Health & Safety Code, § 12000, "Explosives":
See Notes to Instruction 1871.

Pen. Code, § 12301, "Destructive device"; "Explosive":
See Notes to Instruction 1870.

Knowledge

> [T]he evidence clearly supports the inferences that she was in actual or constructive possession of the articles charged in the three counts under which she stands convicted; that it also shows that she had knowledge of the nature and character of the articles; and that it accordingly supports her convictions in these respects.

(*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619 [violation of Penal Code, § 12303.3].)

In the context of possession, sale and transportation of controlled substance, the courts have held that the defendant must know that the substance is a controlled substance, though it is not necessary for the defendant to know which controlled substance is involved. (*People v. Guy* (1980) 107 Cal.App.3d 593, 601; *see also People v. Romero* (1997) 55 Cal.App.4th 147, 151-153, 157.)

Specific Intent—Offer to Sell
In *People v. Jackson* (1963) 59 Cal.2d 468, 469–470, the Supreme Court found fault with a jury instruction that did not include specific intent to make a sale as an element of making an offer to sell a controlled substance:

> This instruction is erroneous. It states that the only intent required is the intent to make an offer and that an intent to make a sale is not

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> necessary. In *People v. Brown* (citation omitted) we held that "a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under section 11501." Persons who offer to sell narcotics with no intention of performing are not engaged in narcotics traffic.

Affirmative Defense

> The existence of a recorded permit in any of these names would require the People to eliminate each codefendant as the holder. The burden of proving such negatives is precisely what the rule of convenience is designed to avoid. [Citation omitted.] In the implausible -- if not preposterous -- event that appellant had an exonerating permit, the fact was "peculiarly within her knowledge" and there was nothing "harsh or unfair" in making her bear the burden of proving it. [Citation omitted.] The trial court did not err in refusing her instructions to the effect that the People bore the burden of proving the contrary.

(*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 629.)

Definition of Bomb

The following definition of "bomb" was approved of in *People v. Morse* (1992) 2 Cal.App.4th 620, 647 n8: "A 'bomb' is a device carrying an explosive charge fused to detonate under certain conditions."

Other cases have held that the term "bomb" is not vague and is understood in is "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25.) "Persons of common intelligence know what a bomb is." (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.)

A bomb must be capable of exploding when detonated. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) The device does not have to be a "projectile-type bomb" as used in the military. (*People v. Quinn, supra,* 57 Cal.App.3d at p. 258.)

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1875. Explosion of Explosive or Destructive Device With Intent to Murder

The defendant is charged [in Count __] with (exploding/igniting/ [or] attempting to (explode/ [or] ignite)) (a destructive device/ [or] an explosive) with intent to commit murder.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (exploded/ignited/ [or] attempted to (explode/ [or] ignite)) (a destructive device/ [or] an explosive).**

AND

2. **When the defendant did so, (he/she) acted with the intent to murder someone.**

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[A _____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive*.]**

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>*.**]**

[A _____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

[To prove that the defendant is guilty of attempting to (explode/ [or] ignite) (a destructive device/ [or] an explosive), the People must prove that:

1. **The defendant took a direct but ineffective step toward (exploding/ [or] igniting) (a destructive device/ [or] an explosive).**

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AND

2. **The defendant intended to (explode/ [or] ignite) (a destructive device/ [or] an explosive).**

A *direct step* requires more than merely planning or preparing to (explode/ [or] ignite) (a destructive device/ [or] an explosive) or obtaining or arranging for something needed to (explode/ [or] ignite) (a destructive device/ [or] an explosive). A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to (explode/ [or] ignite) (a destructive device/ [or] an explosive). It is a direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

[A person who attempts to (explode/ [or] ignite) (a destructive device/ [or] an explosive) is guilty of this crime even if, after taking a direct step toward committing the crime, he or she abandoned further efforts to complete the crime or his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward (exploding/ [or] igniting) (a destructive device/ [or] an explosive), then that person is not guilty of this crime.]]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

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If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8.)

If the prosecution alleges that the defendant attempted to explode or ignite a destructive device or explosive, give the bracketed paragraphs on attempt. Give the bracketed paragraph on withdrawal if appropriate based on the evidence.

Related Instructions
If the jury is not otherwise instructed on murder or attempted murder, give a modified version of Instruction 720, Murder With Malice Aforethought.

AUTHORITY

Elements ▸ Pen. Code, § 12308.
Explosive Defined ▸ Health & Saf. Code, § 12000.
Destructive Device Defined ▸ Pen. Code, § 12301.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

LESSER INCLUDED OFFENSES

Possession of Destructive Device ▸ Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.
Possession of Explosive ▸ Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.

RELATED ISSUES

Gasoline Not an Explosive
"Under the statutory definition of explosive, the nature of the substance, not the manner in which a substance is used, is determinative." (*People v. Clark* (1990) 50 Cal.3d 583, 604 [gasoline, by its nature, not an explosive even where used to ignite a fire].)

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Multiple Charges Based on Multiple Victims Appropriate
The defendant may be charged with multiple counts of violating Penal Code section 12308 based on multiple victims, even if he or she used only one explosive device. (*People v. Ramirez* (1992) 6 Cal.App.4th 1762, 1766–1767.)

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STAFF NOTES

Pen. Code, § 12308:

> Every person who explodes, ignites, or attempts to explode or ignite any destructive device or any explosive with intent to commit murder is guilty of a felony, and shall be punished by imprisonment in the state prison for life with the possibility of parole.

Health & Safety Code, § 12000, "Explosives":
See Notes to Instruction 1871.

Pen. Code, § 12301, "Destructive device"; "Explosive":
See Notes to Instruction 1870.

Definition of Bomb
See Notes to Instruction 1870.

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1876. Explosion of Explosive or Destructive Device Causing Bodily Injury

The defendant is charged [in Count __] with (exploding/ [or] igniting) (a destructive device/ [or] an explosive) causing bodily injury to another person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and maliciously (exploded/ [or] ignited) (a destructive device/ [or] an explosive).**

AND

2. **The explosion caused bodily injury to another person.**

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.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the intent to annoy or injure someone else.

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[A _____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive*.]**

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>*.**]**

[A _____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

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[An act causes bodily injury if the injury is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable and prudent 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 bodily injury. An act causes bodily injury only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (See *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [causation issue in homicide].) If the evidence indicates that there was only one cause of 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 injury, the court should also give the "substantial factor" instruction and definition in the second bracketed paragraph. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular

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sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov*, *supra*, 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8.)

AUTHORITY

Elements ▸ Pen. Code, § 12309.
Explosive Defined ▸ Health & Saf. Code, § 12000.
Destructive Device Defined ▸ Pen. Code, § 12301.
Maliciously Defined ▸ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550; see also *People v. Heideman* (1976) 58 Cal.App.3d 321, 335.
Must Injure Another Person ▸ *People v. Teroganesian* (1995) 31 Cal.App.4th 1534, 1538.
General Intent Crime ▸ See *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1970–1971.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

LESSER INCLUDED OFFENSES

Possession of Destructive Device ▸ Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.
Possession of Explosive ▸ Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.

RELATED ISSUES

Gasoline Not an Explosive
"Under the statutory definition of explosive, the nature of the substance, not the manner in which a substance is used, is determinative." (*People v. Clark* (1990) 50 Cal.3d 583, 604 [gasoline, by its nature, not an explosive even where used to ignite a fire].)

Maliciously—People v. Heideman
In *People v. Heideman* (1976) 58 Cal.App.3d 321, the defendant offered to commit murder for hire using explosives and possessed the explosives. (*Id.* at pp. 327–329.) The defendant asserted that he did not actually intend to physically injure anyone but simply to defraud the individuals offering to pay for the

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murders. (*Id.* at pp. 330–331.) On appeal, the defendant contended that the court had improperly instructed on the meaning of "recklessness," which the prosecution conceded. (*Id.* at p. 334.) Noting that the "[d]efendant admitted that his purpose in storing the dynamite in his room was to carry out a nefarious scheme to defraud his victims," the court found sufficient evidence to establish malice. (*Id.* at p. 335.) The court stated that under the facts of the case before it, the term "maliciously" did not "require an actual intent to physically injure, intimidate or terrify others." *(Ibid.)* Accordingly, the court found that the error in the instruction on "recklessness" was harmless given that there was sufficient evidence to support the higher culpability standard of malice. *(Ibid.)* The committee did not incorporate the language from *Heideman* in the definition of "maliciously" in this instruction because the committee concluded that this case reflects unique facts and that the language quoted is dicta, not essential to the ruling of the case.

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STAFF NOTES

Pen. Code, § 12309:

> Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes bodily injury to any person is guilty of a felony, and shall be punished by imprisonment in the state prison for a period of five, seven, or nine years.

Health & Safety Code, § 12000, "Explosives":
See Notes to Instruction 1871.

Pen. Code, § 12301, "Destructive device"; "Explosive":
See Notes to Instruction 1870.

Definition of Malicious
The first sentence of the definition of "maliciously" is taken from Task Force Instruction 915, Mayhem.

General Intent Crime
Penal Code section 12310 provides that when a person willfully and maliciously explodes a destructive device causing death or great bodily injury, he or she shall be punished with life without parole. In *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1970-1971, the court held that this statute did not require specific intent to kill on the part of either an aider and abettor or a principal.

Causation
The bracketed paragraphs and use notes on causation are from Task Force Instruction 720, Murder.

Must Injure Another Person
"We agree with appellant's assertion that the crime defined by Penal Code section 12309 requires the infliction of injury upon another person [. . ..]" (*People v. Teroganesian* (1995) 31 Cal.App.4th 1534, 1538.)

Definition of Bomb
See Notes to Instruction 1870.

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Compared with Pen. Code, § 12310

> In *People v. Poulin* (1972) 27 Cal. App. 3d 54, 59-61, the court determined that the term "great bodily injury" within the meaning of Penal Code section 12310 was not unconstitutionally vague. In so doing, the court noted that Penal Code section 12309 contained language that was substantially the same but spoke only of bodily injury rather than great bodily injury and that "[t]he legislative intent behind enactment of Penal Code sections 12309 and 12310 was to devise two degrees of punishment for persons who explode or ignite any destructive device or explosive resulting in personal injury to another: the higher punishment under section 12310 is where the victim suffers 'great bodily injury'; the lesser punishment under section 12309 is where the victim suffers merely bodily injury.' " (27 Cal. App. 3d at p. 60.)

(*People v. Teroganesian* (1995) 31 Cal.App.4th 1534, 1538.)

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1877. Explosion of Explosive or Destructive Device Causing Death, Mayhem, or Great Bodily Injury

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The defendant is charged [in Count __] with (exploding/ [or] igniting) (a destructive device/ [or] an explosive) causing (death[,]/ mayhem[,]/ [or] great bodily injury) to another person.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant willfully and maliciously (exploded/ [or] ignited) (a destructive device/ [or] an explosive).**

AND

2. **The explosion caused (death[,]/ mayhem[,]/ [or] great bodily injury) to another person.**

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.

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the intent to annoy or injure someone else.

[*Great bodily injury* means significant or substantial physical injury.]

[*Mayhem* means unlawfully:

<A. Removing Body Part>
[Removing a part of someone's body](;[or]/.)

<B. Disabling Body Part>
[Disabling or making useless a part of someone's body](;[or]/.)

<C. Disfigurement>
[Permanently disfiguring someone](;[or]/.)

<D. Tongue Injury>
[Cutting or disabling someone's tongue](;[or]/.)

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<E. Slitting Nose, Ear, or Lip>
[Slitting someone's (nose[,]/ear[,]/ [or] lip)](; or/.)

<F. Significant Eye Injury>
[Putting out a person's eye or injuring a person's eye in a way that significantly reduces that person's ability to see.]]

[A disfiguring injury may be *permanent* even though it can be repaired by medical procedures.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[A _____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive*.]**

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>*.**]**

[A _____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

[An act causes (death[,]/ mayhem[,]/ [or] great bodily injury) if the (death/injury) is the direct, natural, and probable consequence of the act. A *natural and probable consequence* is one that a reasonable and prudent 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[,]/ mayhem[,]/ [or] great bodily injury). An act causes (death/injury) only if it is a substantial factor in causing the (death/injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/injury).]

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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.

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (See *People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [causation issue in homicide].) If the evidence indicates that there was only one cause of 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 injury, the court should also give the "substantial factor" instruction and definition in the second bracketed paragraph. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747.)

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8.)

AUTHORITY

Elements ▸ Pen. Code, § 12310.
Explosive Defined ▸ Health & Saf. Code, § 12000.
Destructive Device Defined ▸ Pen. Code, § 12301.

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Maliciously Defined ▸ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550; see also *People v. Heideman* (1976) 58 Cal.App.3d 321, 335.
Must Injure Another Person ▸ See *People v. Teroganesian* (1995) 31 Cal.App.4th 1534, 1538.
General Intent Crime ▸ See *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1970–1971.
Great Bodily Injury Defined ▸ *People v. Poulin* (1972) 27 Cal.App.3d 54, 61.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

LESSER INCLUDED OFFENSES

Possession of Destructive Device ▸ Pen. Code, § 12303; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.
Possession of Explosive ▸ Health & Saf. Code, § 12305; *People v. Westoby* (1976) 63 Cal.App.3d 790, 795.
Explosion of a Destructive Device Causing Injury ▸ Pen. Code, § 12309; see *People v. Poulin* (1972) 27 Cal.App.3d 54, 60.

RELATED ISSUES

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"Under the statutory definition of explosive, the nature of the substance, not the manner in which a substance is used, is determinative." (*People v. Clark* (1990) 50 Cal.3d 583, 604 [gasoline, by its nature, not an explosive even where used to ignite a fire].)

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In *People v. Heideman* (1976) 58 Cal.App.3d 321, the defendant offered to commit murder for hire using explosives and possessed the explosives. (*Id.* at pp. 327–329.) The defendant asserted that he did not actually intend to physically injure anyone but simply to defraud the individuals offering to pay for the murders. (*Id.* at pp. 330–331.) On appeal, the defendant contended that the court had improperly instructed on the meaning of "recklessness," which the prosecution conceded. (*Id.* at p. 334.) Noting that the "[d]efendant admitted that his purpose in storing the dynamite in his room was to carry out a nefarious scheme to defraud his victims," the court found sufficient evidence to establish malice. (*Id.* at p. 335.) The court stated that under the facts of the case before it, the term "maliciously" did not "require an actual intent to physically injure, intimidate or terrify others." *(Ibid.)* Accordingly, the court found that the error in

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the instruction on “recklessness” was harmless given that there was sufficient evidence to support the higher culpability standard of malice. *(Ibid.)* The committee did not incorporate the language from *Heideman* in the definition of “maliciously” in this instruction because the committee concluded that this case reflects unique facts and that the language quoted is dicta, not essential to the ruling of the case.

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STAFF NOTES

Pen. Code, § 12310:

> (a) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes the death of any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life without the possibility of parole.
>
> (b) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life.

Health & Safety Code, § 12000, "Explosives":
See Notes to Instruction 1871.

Pen. Code, § 12301, "Destructive device"; "Explosive":
See Notes to Instruction 1870.

Definition of Malicious
The first sentence of the definition of “maliciously” is taken from Task Force Instruction 915, Mayhem.

General Intent Crime
In *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1970-1971, the court held that this statute did not require specific intent to kill on the part of either an aider and abettor or a principal.

Mayhem
The definition of mayhem is taken from Task Force Instruction 915, Mayhem.

Great Bodily Injury

> As noted above, other sections of the Penal Code have used the term "great bodily injury," this term being sufficiently explained by judicial interpretation.
>
> In *People* v. *Wells* (1971) 14 Cal.App.3d 348, the court cited with approval and adopted the definition of "great bodily harm" found in *Froedge* v. *State* (1968) 249 Ind. 438, as follows: "*Great bodily*

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> *harm* defines itself and *means great* as distinguished from *slight, trivial, minor*, or *moderate harm*, and as such *does not include mere bruises as are likely to be inflicted* in a simple assault and battery. . . . Whether the evidence describing such harm or injury is within the meaning of the statute . . . is generally a question of fact for the jury." (*Id*. at p. 359, fn. 8; italics in original.)
>
> By reference to this judicial determination regarding a statute (Pen. Code, § 245) involving the same terminology, the meaning of "great bodily injury" under Penal Code section 12310 can be adequately ascertained. [. . .]
>
> The cases hold that as the statute does not provide a definition of "great bodily injury" it is the duty of the court to provide guidelines for the jury in this respect. In *People* v. *Richardson, supra*, 23 Cal.App.3d 403, 411, the court approved the instruction given in *People* v. *Wells, supra*, 14 Cal.App.3d 348, 360, to the effect that the term refers to significant or substantial injury or damage and does not refer to trivial or insignificant injury, and added "It seems it would be correct to exclude 'moderate harm' as well."

(*People v. Poulin* (1972) 27 Cal.App.3d 54, 61.)

Causation
The bracketed paragraphs and use notes on causation are from Task Force Instruction 720, Murder.

Must Injure Another Person
“We agree with appellant's assertion that the crime defined by Penal Code section 12309 requires the infliction of injury upon another person [. . ..]” (*People v. Teroganesian* (1995) 31 Cal.App.4th 1534, 1538.)

Definition of Bomb
See Notes to Instruction 1870.

Compared with Pen. Code, § 12310

> In *People v. Poulin* (1972) 27 Cal. App. 3d 54, 59-61, the court determined that the term "great bodily injury" within the meaning of Penal Code section 12310 was not unconstitutionally vague. In so doing, the court noted that Penal Code section 12309 contained language that was substantially the same but spoke only of bodily

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> injury rather than great bodily injury and that "[t]he legislative intent behind enactment of Penal Code sections 12309 and 12310 was to devise two degrees of punishment for persons who explode or ignite any destructive device or explosive resulting in personal injury to another: the higher punishment under section 12310 is where the victim suffers 'great bodily injury'; the lesser punishment under section 12309 is where the victim suffers merely bodily injury.' " (27 Cal. App. 3d at p. 60.)

(*People v. Teroganesian* (1995) 31 Cal.App.4th 1534, 1538.)

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1878. Possession of Materials to Make Destructive Device or Explosive

The defendant is charged [in Count __] with unlawfully possessing [a] (substance[,]/ material[,]/ [or] a combination of substances or materials) with the intent to make (a destructive device/ [or] an explosive).

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant possessed [a] (substance[,]/ material[,]/ [or] a combination of substances or materials).**

AND

2. **When the defendant possessed (that/those) item[s], (he/she) intended to make (a destructive device/ [or] an explosive).**

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is also any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[A _____ *<insert type of explosive from Health & Saf. Code, § 12000>* **is an *explosive*.]**

[A *destructive device* is _____ *<insert definition from Pen. Code, § 12301>*.**]**

[A _____ *<insert type of destructive device from Pen. Code, § 12301>* **is a *destructive device*.]**

[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/other people).]

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<Defense: Permit>

[The defendant did not unlawfully possess [a] (substance[,]/ material[,]/ [or] a combination of substances or materials) if (he/she) had a valid permit to make (a destructive device/ [or] an explosive). The People have the burden of proving beyond a reasonable doubt that the defendant did not have a valid permit to make (a destructive device/ [or] an explosive). If the People have not met this burden, you must find the defendant not guilty of this crime.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

The existence of a valid permit is an affirmative defense to a violation of Penal Code section 12312. (*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–629.) If there is sufficient evidence to raise a reasonable doubt about the existence of a permit, 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 [discussing affirmative defenses generally and the burden of proof].)

Depending on the device or substance used, give the bracketed definitions of "explosive" or "destructive device," inserting the appropriate definition from Penal Code section 12301. If the case involves a specific device listed in Health and Safety Code section 12000 or Penal Code section 12301, the court may instead give the bracketed sentence stating that the listed item "is an explosive" or "is a destructive device." For example, "A grenade is a destructive device." However, the court may not instruct the jury that the defendant used a destructive device. For example, the court may not state that "the defendant used a destructive device, a grenade," or "the device used by the defendant, a grenade, was a destructive device." (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26.)

If the device used is a bomb, the court may insert the word "bomb" in the bracketed definition of destructive device without further definition. (*People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) Appellate courts have held that the term "bomb" is not vague and is understood in its "common, accepted, and popular sense." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 258; *People v. Dimitrov, supra,* 33 Cal.App.4th at p. 25.) If the court wishes to define the term "bomb," the court may use the following definition: "A bomb is a device carrying an explosive charge fused to blow up or detonate under certain conditions." (See *People v. Morse* (1992) 2 Cal.App.4th 620, 647, fn. 8.)

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AUTHORITY

Elements ▸ Pen. Code, § 12312.
Explosive Defined ▸ Health & Saf. Code, § 12000.
Destructive Device Defined ▸ Pen. Code, § 12301.
Permit Exemption ▸ Pen. Code, § 12305; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 627–628.
Substance or Material ▸ *People v. Yoshimura* (1976) 62 Cal.App.3d 410, 415.
Constructive vs. Actual Possession ▸ See *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 168–169.

RELATED ISSUES

"Substance" or "Material" Not Unconstitutionally Vague

> Section 12312 provides that possession of a "substance" or "material" is punishable only if the possession is with the specific intent to make a destructive device or explosive. . . . When the statute is thus read as a whole, the vagueness of the meaning of "substance" and "material" is eliminated, and the terms are seen to refer to constituent or necessary items in the construction of nonlicensed destructive devices and explosives.

(*People v. Yoshimura* (1976) 62 Cal.App.3d 410, 415.)

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STAFF NOTES

Pen. Code, § 12312:

> Every person who possesses any substance, material, or any combination of substances or materials, with the intent to make any destructive device or any explosive without first obtaining a valid permit to make such destructive device or explosive, is guilty of a felony, and is punishable by imprisonment in the state prison for two, three, or four years.

Health & Safety Code, § 12000, "Explosives":
See Notes to Instruction 1871.

Pen. Code, § 12301, "Destructive device"; "Explosive":
See Notes to Instruction 1870.

Definition of Bomb
See Notes to Instruction 1870.

Constructive Possession
The language of the instruction is derived from the Task Force controlled substances instructions. (See also *People* v. *Azevedo* (1984) 161 Cal.App.3d 235, 242-243 [questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876 n.6]; *People v. Yoshimura* (1979) 91 Cal.App.3d 609, 619.)

Existence of Permit Affirmative Defense

> The existence of a recorded permit in any of these names would require the People to eliminate each codefendant as the holder. The burden of proving such negatives is precisely what the rule of convenience is designed to avoid. [Citation omitted.] In the implausible -- if not preposterous -- event that appellant had an exonerating permit, the fact was "peculiarly within her knowledge" and there was nothing "harsh or unfair" in making her bear the burden of proving it. [Citation omitted.] The trial court did not err in refusing her instructions to the effect that the People bore the burden of proving the contrary.

(*People v. Yoshimura* (1979) 91 Cal.App.3d 609, 629.)

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Substance or Material Not Unconstitutionally Vague

> Section 12312 provides that possession of a "substance" or "material" is punishable only if the possession is with the specific intent to make a destructive device or explosive. The possession and the specific intent are not merely coincidental to each other. Innocent possession of a "substance" or "material" is not made punishable under the statute, nor is the mere intent to make a destructive device or explosive forbidden. Rather, possession is criminal conduct only where it is predicated and dependent upon the actor's specific intent to make that possession an integral step in the construction of an explosive or destructive device. It would be absurd to interpret "substance" or "material" other than as referring to an item which is either necessary to the creation of, or an actual part of, an explosive or destructive device. When the statute is thus read as a whole, the vagueness of the meaning of "substance" and "material" is eliminated, and the terms are seen to refer to constituent or necessary items in the construction of nonlicensed destructive devices and explosives.

(*People v. Yoshimura* (1976) 62 Cal.App.3d 410, 415.)

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1980. Bookmaking

The defendant is charged [in Count __] with bookmaking.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant engaged in bookmaking.**

AND

2. **When the defendant acted, (he/she) knew that (he/she) was engaging in bookmaking.**

Bookmaking **includes the taking of bets, either orally or recorded in writing. The defendant need not be involved in betting as a business or occupation. The taking of one bet is sufficient.**

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something valuable). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ *<insert description of event from Pen. Code, § 337a>*.**] [It is not necessary that the event that was bet on actually take place.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code § 337a, subd. 1; *People v. Burch* (1953) 118 Cal.App.2d 122, 124; *People v. Ghio* (1927) 82 Cal.App. 28, 32–33.
Knowledge Required ▸ *People v. Coppla* (1950) 100 Cal.App.2d 766, 768.

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Bookmaking Defined ▸ *People v. Thompson* (1962) 206 Cal.App.2d 734, 739; *People v. Fontes* (1970) 7 Cal.App.3d 650, 653–654; *People v. Bradford* (1949) 95 Cal.App.2d 372, 377–378.
Bet Defined ▸ *People v. Oreck* (1946) 74 Cal.App.2d 215, 220.
Writing Not Required ▸ Pen. Code, § 337a, subd. 1; *People v. Burch* (1953) 118 Cal.App.2d 122, 124.
One Bet Sufficient ▸ *People v. Buckman* (1960) 186 Cal.App.2d 38, 50.
Event Need Not Occur ▸ *People v. Ghio* (1927) 82 Cal.App. 28, 32–33.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 278.

COMMENTARY

As a result of statutory amendments, the committee believes that there is no longer a distinction between the elements of this crime and the offense of accepting a bet. (Pen. Code § 337a, subd. 6; see Instruction 1986, Betting or Wagering.)

RELATED ISSUES

Cash Not Required
A bet does not require that the defendant receive cash. (*People v. Raze* (1949) 91 Cal.App.2d 918, 922.) It is sufficient if the defendant received something of value equivalent to money. *(Ibid.)*

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STAFF NOTES

Pen. Code § 337a, in relevant part:

Every person,

1. Who engages in pool selling or bookmaking, with or without writing, at any time or place; or

2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or enclosure, of any kind, or any part thereof, with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

3. Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

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> 5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, enclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivision 1, 2, 3 or 4 of this section; or
>
> 6. Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, is punishable by imprisonment in the county jail for a period of not more than one year or in the state prison.

Violation of On Subdivision Sufficient

> Section 337a of the Penal Code contains six subdivisions and is so framed that one set or series of acts might constitute a violation of each or all of said subdivisions. By its provisions the following acts are made felonies: In subdivision 1, book-making or pool-selling; in subdivision 2, occupying a room with book-making paraphernalia for the purpose of recording bets on races; 3, receiving bets on races; 4, recording bets on races; 5, owner permitting room or building to be used for any of the preceding purposes; 6, making or accepting bets on races. Each of these constitutes a separate offense as if it had been enacted in a separate section of the code.

(*People v. Ghio* (1927) 82 Cal.App. 28, 32.)

> Section 337a of the Penal Code contains six subdivisions, and is so framed that one set or series of acts may constitute a violation of each or all of said subdivisions, and a violation of each subdivision constitutes a separate offense.

(*People v. Allen* (1953) 115 Cal.App.2d 745, 747.)

Bookmaking and Pool-Selling Commonly Understood

> We are satisfied that the terms "pool-selling" and "bookmaking" are so well understood that no person of ordinary intelligence can misunderstand the import and meaning of the terms and the scope of

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> the acts prohibited by the penal statute into which they have been incorporated. It would appear that these terms are of general use and that they have a well-accepted and recognized meaning throughout many jurisdictions, and especially among those dealing with the prohibition and regulation of betting on horse races or other contests of skill. . . .
>
> [W]e are convinced that the term "bookmaking" here under consideration and as used in the statute must be held to clearly mean the making of a betting book. That although not defined in the statute the terms "pool-selling" and "book-making" are commonly known and understood, and not therefore subject to the stigma of indefiniteness claimed by appellant. To hold otherwise would require the courts to shut their eyes and ears to the everyday happenings of contemporary life. This they cannot and will not do.

(*People v. Bradford* (1949) 95 Cal.App.2d 372, 377–378.)

Bookmaking—Meaning

> Bookmaking is the making of a betting book and includes the taking of bets. [Citation.] The taking of one bet is sufficient to justify a conviction [citation] and the bet may be oral and need not be recorded [citation].

(*People v. Thompson* (1962) 206 Cal.App.2d 734, 739.)

"[B]ookmaking, means simply the making of a betting book." (*People v. Cahan* (1954) 126 Cal.App.2d 785, 793.)

"While in the course of book-making one or more of these subdivisions may be violated, subdivision 1 prohibits the general activity of book-making, and may be violated irrespective of explicit violations of other subdivisions." (*People v. Conti* (1967) 253 Cal.App.2d 733, 737.)

Definition of Bookmaker from OED
"3. A professional betting man."

Writing Not Required

> Subdivision 1 of section 337a of the Penal Code reads in part as follows: "Every person, 1. Who engages in . . . bookmaking, with or

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> without writing, at any time or place . . . Is punishable by imprisonment in the county jail or state prison for a period of not less than thirty days and not exceeding one year." The provision quoted states clearly that the offense of bookmaking can take place without a writing. There is no requirement that the bet be recorded. . . . Under the old decisions, it was necessary that a writing be made. The term itself implies that some written memoranda be used. However, the Legislature, in order to cope with the clever devices and subterfuges employed, amended the section and gave a new meaning to the word bookmaking . . . It is clear, therefore, that oral bookmaking is as much a violation of the statute as is written bookmaking. In view of the express mandate of the Legislature, in giving a new definition to the term 'bookmaking,' many of the opinions rendered by our courts must now be disregarded."

(*People v. Burch* (1953) 118 Cal.App.2d 122, 124.)

Knowledge

> Defendant's guilt of bookmaking and pool selling necessarily depended upon this knowledge. If he did not know that he was in possession of such memoranda and papers he could not be guilty of bookmaking or pool selling. There was not the slightest evidence that defendant engaged in bookmaking, the making of a book of bets, or in pool selling, the selling or distribution of shares or chances in a wagering pool, or that he aided and abetted another in so doing. It is, of course, not the law that mere aiding in an unlawful act, without guilty knowledge, is of itself an offense.

(*People v. Coppla* (1950) 100 Cal.App.2d 766, 768.)

Distinguished From Recording a Bet

> From the clear and definite wording of subdivision 4, it is apparent that the Legislature intended to make the recording or registering of a bet a crime. There is no qualification stated in regard to such an act. It is quite immaterial whether or not the recorder is the bookmaker or connected with the bookmaker with whom the bet is placed. Financial interest in the bet is not an element of the crime, and the provisions specifically include one who acts gratuitously.

(*People v. Jerman* (1946) 29 Cal.2d 189, 195.)

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“Engaged In”

> Penal Code, section 337a, subdivision 1, provides that every person who engages in bookmaking is guilty of a public offense. Bookmaking is the making of a book of bets. To engage in is to be occupied in, to be employed in.

(*People v. Nocita* (1954) 123 Cal.App.2d 55, 59.)

Bet—Meaning

> [A] bet is a wager or agreement between two or more persons that a sum of money or other valuable thing, contributed by those taking part, shall become the property of one or the other of them, depending on the happening of some future event, at present uncertain. (12 Cal.Jur. p. 1088, § 1.)

(*People v. Oreck* (1946) 74 Cal.App.2d 215, 220.)

“[T]he words "bets or wagers" used in the context of the statute conveyed a clear meaning to the jurors . . ..” (*People v. Fontes* (1970) 7 Cal.App.3d 650, 653.)

Bookmaking—CALJIC Definition Approved

> T]he court gave to the jury another instruction, being CALJIC No. 727 (now No. 12.56), defining the term "bookmaking" as meaning "a procedure that involves the taking and receiving of bets or wagers upon the results . . . of a . . . contest of . . . speed or power of endurance of horses, and the recording or registering of such bets or wagers . . . ." and including a statement that ". . . the term may include or mean also the keeping or occupying of any room, building or automobile wherein books or papers or devices or paraphernalia are kept for the purpose of registering or recording real or purported bets or wagers upon the results or purported results of any real or purported trial or contest of skill, speed or power of endurance, participated in by horses." With this added instruction the jury cannot have been misled . . ..

(*People v. Fontes* (1970) 7 Cal.App.3d 650, 653–654.)

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One Bet is Sufficient

> As to the extent of their activities in the business of bookmaking, it is not necessary to show more than one bet, or that the parties were actually occupied or employed in making a book or string of bets. An unbroken line of authorities hold that to constitute a violation of Penal Code section 337a, a volume of gambling or betting is not required and that the acceptance of even a single wager in contravention of the statute will suffice.

(*People v. Buckman* (1960) 186 Cal.App.2d 38, 50.)

Event Does Not Need to Happen

"The language of section 337a of the Penal Code included 'purported' as well as actual contests of speed." (*People v. Ghio* (1927) 82 Cal.App. 28, 32–33 [approving a jury instruction that: "It is not necessary, in connection with any one of these counts, that the prosecution shall prove that there was any actual horse race run"].)

Cash Not Required

> That he did not receive cash is of no consequence. He pretended and purported to receive the equivalent of money, a profit which the officer had made on another race which was held by his associate who was taking wagers on the same premises. The court was warranted in inferring that appellant and his two associates were acting in concert operating a bookmaking establishment and that money held by appellant's associate was held by appellant.

(*People v. Raze* (1949) 91 Cal.App.2d 918, 922.)

Meeting of the Minds Not Required—Undercover Officer

> The words "bet" and "wager" as used in section 337a of the Penal Code do not require the kind of agreement contemplated by the law of contracts under which there must be an actual meeting of the minds of the contracting parties in order to form an agreement. So to hold would be to allow the escape from punishment of the defendants in all cases in which others might feign to be their accomplices and in which no evidence against the defendant exists except that coming from feigned accomplices.

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(*People v. Ghio* (1927) 82 Cal.App. 28, 34–35.)

Lay Off Person

A "lay off" person, who underwrites or insures a small bookmaker against losses on some portion of the bookmaker's bets, is guilty of violating P.C. 337a, even though he or she deals only with bookmakers and not with betters. (*People v. Oreck* (1946) 74 Cal.App.2d 215, 218.)

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1981. Pool Selling

The defendant is charged [in Count __] with pool selling.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant sold or distributed shares or chances in a betting pool.**

AND

2. **When (he/she) acted, the defendant knew that (he/she) was selling or distributing shares or chances in a betting pool.**

The defendant need not be involved in selling or distributing shares or chances as a business or occupation. A single act that violates the statute is sufficient. [It is not necessary that the event that is the subject of a betting pool actually take place.]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code § 337a, subd. 1; *Finster v. Keller* (1971) 18 Cal.App.3d 836, 846.
Knowledge Required ▸ *People v. Coppla* (1950) 100 Cal.App.2d 766, 768.
Pool Selling Defined ▸ *Finster v. Keller* (1971) 18 Cal.App.3d 836, 846; *People v. Coppla* (1950) 100 Cal.App.2d 766, 768.
One Bet Sufficient ▸ Pen. Code, § 337a, subd. 11.
Event Need Not Occur ▸ *People v. Ghio* (1927) 82 Cal.App. 28, 32–33.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 279.

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STAFF NOTES

Pen. Code § 337a, subd. (1):

> Who engages in pool selling or bookmaking, with or without writing, at any time or place . . . is punishable by imprisonment in the county jail for a period of not more than one year on in the state prison.

Definition of Pool-Selling

"Pool selling is the selling or distribution of shares or chances in a wagering pool." (*Finster v. Keller* (1971) 18 Cal.App.3d 836, 846; *People v. Coppla* (1950) 100 Cal.App.2d 766, 768.)

Book-Making and Pool-Selling Commonly Understood

> We are satisfied that the terms "pool-selling" and "bookmaking" are so well understood that no person of ordinary intelligence can misunderstand the import and meaning of the terms and the scope of the acts prohibited by the penal statute into which they have been incorporated. It would appear that these terms are of general use and that they have a well-accepted and recognized meaning throughout many jurisdictions, and especially among those dealing with the prohibition and regulation of betting on horse races or other contests of skill. . . .
>
> [W]e are convinced that the term "bookmaking" here under consideration and as used in the statute must be held to clearly mean the making of a betting book. That although not defined in the statute the terms "pool-selling" and "book-making" are commonly known and understood, and not therefore subject to the stigma of indefiniteness claimed by appellant. To hold otherwise would require the courts to shut their eyes and ears to the everyday happenings of contemporary life. This they cannot and will not do.

(*People v. Bradford* (1949) 95 Cal.App.2d 372, 377–378.)

Knowledge

> Defendant's guilt of bookmaking and pool selling necessarily depended upon this knowledge. If he did not know that he was in possession of such memoranda and papers he could not be guilty of

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> bookmaking or pool selling. There was not the slightest evidence that defendant engaged in bookmaking, the making of a book of bets, or in pool selling, the selling or distribution of shares or chances in a wagering pool, or that he aided and abetted another in so doing. It is, of course, not the law that mere aiding in an unlawful act, without guilty knowledge, is of itself an offense.

(*People v. Coppla* (1950) 100 Cal.App.2d 766, 768.)

"Engaged In"

> Penal Code, section 337a, subdivision 1, provides that every person who engages in bookmaking is guilty of a public offense. Bookmaking is the making of a book of bets. To engage in is to be occupied in, to be employed in.

(*People v. Nocita* (1954) 123 Cal.App.2d 55, 59.)

Bet—Meaning

> [A] bet is a wager or agreement between two or more persons that a sum of money or other valuable thing, contributed by those taking part, shall become the property of one or the other of them, depending on the happening of some future event, at present uncertain. (12 Cal.Jur. p. 1088, § 1.)

(*People v. Oreck* (1946) 74 Cal.App.2d 215, 220.)

"[T]he words "bets or wagers" used in the context of the statute conveyed a clear meaning to the jurors . . .." (*People v. Fontes* (1970) 7 Cal.App.3d 650, 653.)

Single Act Sufficient for Engagement

> This section shall apply not only to persons who may commit any of the acts designated in subdivisions 1 to 6 inclusive of this section, as a business or occupation, but shall also apply to every person or persons who may do in a single instance any one of the acts specified in said subdivisions 1 to 6 inclusive.

(Pen. Code, § 337a, subd. 11.)

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1982. Keeping a Place for Recording Bets

The defendant is charged [in Count __] with keeping a place for the purpose of recording [or registering] bets or shares in a betting pool.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant kept or occupied a place for any period of time.**

2. **The place contained [(a/an)] (book[,]/ [or] paper[,]/ [or] apparatus[,]/ [or] device[,]/ [or] paraphernalia) to record [or register] bets or shares in a betting pool.**

3. **The defendant kept or occupied the place for the purpose of recording [or registering] bets or shares in a betting pool.**

AND

4. **The defendant possessed the (book[,]/ [or] paper[,]/ [or] apparatus[,]/ [or] device[,]/ [or] paraphernalia) for the purpose of recording [or registering] bets or shares in a betting pool.**

As used here, a *place* means the whole or part of any (room[,]/ [or] building[,]/ [or] stand[,]/ [or] shed[,]/ [or] tenement[,]/ [or] tent[,]/ [or] booth[,]/ [or] float[,]/ [or] vessel[,]/ [or] vehicle[,]/ [or] enclosure) of any kind.

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something valuable). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ *<insert description of event from Pen. Code, § 337a>*.**] [It is not necessary that the event that was bet on actually take place.]**

***Recording [or registering]* a bet means making a notation on paper, or using any other material or device, to allow winnings on the bet to be distributed in the future. [*Recording [or registering]* a bet does not require the type of registering or recording that occurs in a legitimate business establishment.]**

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39 **[It is not required that any bets actually be made.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code, § 337a, subd. 2; *Finster v. Keller* (1971) 18 Cal.App.3d 836, 847–848; *People v. Cuda* (1960) 178 Cal.App.2d 397, 414.
Place Applies to Vehicle ▸ *People v. Roche* (1945) 68 Cal.App.2d 665, 669–670.
Bet Defined ▸ *People v. Oreck* (1946) 74 Cal.App.2d 215, 220.
Actual Bet Not Required ▸ *People v. Cuda* (1960) 178 Cal.App.2d 397, 414.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 280.

RELATED ISSUES

Ownership Not Required
Test is occupancy, rather than ownership, of the premises for the illegal purposes. (*People v. Reyes* (1976) 62 Cal.App.3d 53, 69.)

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STAFF NOTES

Pen. Code, § 337a, subd. (2):

> Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or enclosure, of any kind, or any part thereof, with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, or any purported wager or wagers, or of selling pools, or purported pools, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever . . . is punishable by imprisonment in the county jail for a period of not more than one year or in the state prison.

Elements

We interpret subdivision 2 of Penal Code section 337a to mean that the place occupied is one in which the paraphernalia for recording bets or selling pools is used for that purpose. (*People* v. *Jerman*, 29 Cal.2d 189; *People* v. *Greco*, 47 Cal.App.2d 628, 632.)

The keeping of premises in which were present the forms in their unfilled-in state would not of itself constitute a violation of Penal Code section 337a, subdivision 2. The violation requires that the premises be kept for the purpose of recording bets or selling pools therein. The mere possession of paraphernalia of a nature adapted to the recording of a bet or of a chance in a pool-selling scheme has not been penalized, nor has the keep of premises containing such paraphernalia unless it be for the purpose of recording bets or selling pools within the premises.

For a violation of Penal Code section 337a, subdivision 2, it is essential that the person charged (1) keep or occupy the room, (2) that the room contain specified paraphernalia, and (3) that the occupancy and paraphernalia are for the purpose of recording or registering bets. (*People* v. *Foreman*, 112 Cal.App.2d 616, 619; *People* v. *Woods*, 35 Cal.2d 504, 508.)

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(*Finster v. Keller* (1971) 18 Cal.App.3d 836, 847–848.)

Actual Bet Not Necessary

> The offense denounced by subdivision 2 is the *occupancy* of a place with the necessary equipment for recording or registering bets and *not* the actual making of bets. There is *no* requirement that there be a recordation of a bet in order to have a violation of subdivision 2. So long as a place is occupied for the purpose of recording or registering bets a violation of subdivision 2 is consummated.

(*People v. Allen* (1953) 115 Cal.App.2d 745, 747.)

> It is the occupancy of the room or enclosure with betting paraphernalia for the purpose mentioned that constitutes the offense, not the actual making of bets, and the purpose for which the premises is being used and occupied need not be established by direct evidence, but may be gathered from all the surrounding circumstances shown by the evidence [citations].

(*People v. Cuda* (1960) 178 Cal.App.2d 397, 414 [quotation marks and citation omitted].)

Need Not Possess All Items in Statute

> The statute does not require that the accused possess every item enumerated in the statute to be guilty of the offense. The items are in the disjunctive. He could therefore be convicted with only a book, or a paper or an apparatus or a device or paraphernalia if the evidence showed that it was used by him in bookmaking.

(*People v. Cuda* (1960) 178 Cal.App.2d 397, 414 [quotation marks and citation omitted].)

Applies to Vehicle

> In his reply brief the defendant makes the contention for the first time that the statute has no application to the occupancy of an automobile. A similar question was involved in *People* v. *Chase*, 117 Cal.App.Supp. 775. At page 778 the court said: "Appellants

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> contend that a ship does not come within the provisions of this section of the code, relying on the rule of *ejusdem generis* to cut down the meaning of the word 'places' so as to exclude ships from its purview. Many cases are cited in which general terms have been limited by reference to preceding particular terms, but we do not deem it necessary to review them, because we can discern no genus of places broad enough to include all rooms, and buildings that might not also include ships. The word 'building' in its primary sense means merely, 'that which is built' (Webster's Dictionary), but usually indicates some sort of edifice or structure located on or affixed to land. It has been held to include a railroad car, which, while located on land, is certainly not affixed to it. [Citations.] The word 'room' is defined to mean, 'Space inclosed or set apart by a partition; an apartment or chamber.' (Webster's Dictionary.) A room may as well be on a ship as on shore; in fact, the spaces assigned to passengers on a ship are known as staterooms. In view of the manifest purpose of section 318 to further the suppression of gambling and prostitution, we cannot think the legislature intended to draw any fine distinctions as to the nature of the places put under its ban, and we hold that the words enumerating those places are used in their most general sense, and as so used include ships. See *Coleman* v. *State*, 13 Ala. 602, and *Dickey* v. *State*, 68 Ala. 508, holding that a steamboat or ferry-boat is a place, within the meaning of a statute prohibiting gambling in public places." We think the reasoning of the court in that case is directly determinative of the point which the defendant presents in this case.

(*People v. Roche* (1945) 68 Cal.App.2d 665, 669–670.)

Bet—Defined

See Notes to Instruction 1980.

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1983. Receiving or Holding Bets

The defendant is charged [in Count __] with (receiving[,]/ [or] holding[,]/ [or] forwarding) bets.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (received[,]/ [or] held[,]/ [or] forwarded) money [or something valuable].**

AND

2. **The defendant knew that it was given to (him/her) as a bet.**

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something valuable). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ *<insert description of event from Pen. Code, § 337a>*.**] [It is not necessary that the event that was bet on actually take place.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code § 337a, subd. 3; *People v. Gaspard* (1960) 177 Cal.App.2d 487, 488.
Must Receive Money or Thing of Value ▸ *People v. Gaspard* (1960) 177 Cal.App.2d 487, 488; *People v. Chavez* (1950) 100 Cal.App.2d 356, 359.
Bet Defined ▸ *People v. Oreck* (1946) 74 Cal.App.2d 215, 220.
Event Need Not Occur ▸ *People v. Chavez* (1950) 100 Cal.App.2d 356, 359.

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2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 281.

RELATED ISSUES

Cash Not Required

A bet does not require that the defendant receive cash. (*People v. Raze* (1949) 91 Cal.App.2d 918, 922.) It is sufficient if the defendant received something of value equivalent to money. *(Ibid.)*

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STAFF NOTES

Pen. Code § 337a, subd. (3):

> Who, whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever . . . is punishable by imprisonment in the county jail for a period of not more than one year or in the state prison.

Elements—Must Receive Money or Thing of Value
"The only requirement of Penal Code, § 337a, subd. 3, is that the accused receive money as a bet on a race or a purported race." (*People v. Gaspard* (1960) 177 Cal.App.2d 487, 488.)

> [A] violation of subdivision 3 of section 337a, is committed when money is received as a wager on a race. . . . The only requirement is that he receive money as a wager on a race or a purported race, and it is not necessary to prove that the race was actually run.

(*People v. Chavez* (1950) 100 Cal.App.2d 356, 359 [internal quotation marks and citations omitted].)

Cash Not Required
See Notes to 1980.

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1984. Recording Bets

The defendant is charged [in Count __] with recording [or registering] a bet.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant recorded [or registered] a bet.**

AND

2. **When the defendant acted, (he/she) knew that (he/she) was recording or registering a bet.**

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something valuable). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ *<insert description of event from Pen. Code, § 337a>*.**] [It is not necessary that the event that was bet on actually take place.]**

***Recording [or registering]* a bet means making a notation on paper, or using any other material or device, to allow winnings on the bet to be distributed in the future. [*Recording [or registering]* a bet does not require the type of registering or recording that occurs in a legitimate business establishment.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code § 337a, subd. 4; *People v. Allen* (1953) 115 Cal.App.2d 745, 747.
Knowledge Required ▸ See *People v. Coppla* (1950) 100 Cal.App.2d 766, 768.

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Bet Defined ▸ *People v. Oreck* (1946) 74 Cal.App.2d 215, 220.
Event Need Not Occur ▸ *People v. Warnick* (1948) 86 Cal.App.2d 900, 902.
Recording a Bet ▸ *People v. Ross* (1950) 100 Cal.App.2d 116, 121.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 281.

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STAFF NOTES

Pen. Code § 337a, subd. (4):

> Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever . . . is punishable by imprisonment in the county jail for a period of not more than one year or in the state prison.

Elements

"[T]he gist of the offense prohibited in subdivision 4 is the distinct act of *recording a bet* in violation of such provision." (*People v. Allen* (1953) 115 Cal.App.2d 745, 747 [italics in original].)

Bookmaking Distinguished From Recording a Bet

> From the clear and definite wording of subdivision 4, it is apparent that the Legislature intended to make the recording or registering of a bet a crime. There is no qualification stated in regard to such an act. It is quite immaterial whether or not the recorder is the bookmaker or connected with the bookmaker with whom the bet is placed. Financial interest in the bet is not an element of the crime, and the provisions specifically include one who acts gratuitously.

(*People v. Jerman* (1946) 29 Cal.2d 189, 195.)

Meaning of Record

> Recording or registering a bet does not necessarily mean the type of registering or recording that occurs in a legitimate business establishment. It must be considered in regard to the type of business in which it is used. Thus, the bringing of the markers to the room, the checking of them against the rundown sheet, the recording of the winners and the amounts of their winnings on the recapitulation sheet, are enough to constitute registering or recording under the Penal Code.

(*People v. Ross* (1950) 100 Cal.App.2d 116, 121.)

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Knowledge—In Context of Bookmaking

> Defendant's guilt of bookmaking and pool selling necessarily depended upon this knowledge. If he did not know that he was in possession of such memoranda and papers he could not be guilty of bookmaking or pool selling. There was not the slightest evidence that defendant engaged in bookmaking, the making of a book of bets, or in pool selling, the selling or distribution of shares or chances in a wagering pool, or that he aided and abetted another in so doing. It is, of course, not the law that mere aiding in an unlawful act, without guilty knowledge, is of itself an offense.

(*People v. Coppla* (1950) 100 Cal.App.2d 766, 768.)

Bet—Defined
See Notes to 1980.

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1985. Permitting Place to Be Used for Betting Activities

The defendant is charged [in Count __] with permitting a place to be used for betting activities.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant owned, rented, or occupied a place.**

2. **The defendant allowed the place to be used for (bookmaking[,]/ [or] pool selling[,]/ [or] recording [or registering] bets[,]/ [or] receiving, holding, or forwarding bets).**

AND

3. **The defendant knew that the place was being used for that purpose.**

As used here, a *place* means the whole or part of any (room[,]/ [or] building[,]/ [or] stand[,]/ [or] shed[,]/ [or] tenement[,]/ [or] tent[,]/ [or] booth[,]/ [or] float[,]/ [or] vessel[,]/ [or] vehicle[,]/ [or] enclosure) of any kind.

[*Bookmaking* includes the taking of bets, either orally or recorded in writing. The defendant need not be involved in betting as a business or occupation. The taking of one bet is sufficient.]

[*Pool selling* means selling or distributing shares or chances in a betting pool. The defendant need not be involved in selling or distributing shares or chances as a business or occupation. A single act that violates the statute is sufficient. [It is not necessary that the event that is the subject of a betting pool actually take place.]]

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something valuable). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ *<insert description of event from Pen. Code, § 337a>*.**] [It is not necessary that the event that was bet on actually take place.]**

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[*Recording [or registering]* a bet means making a notation on paper, or using any other material or device, to allow winnings on the bet to be distributed in the future. [*Recording [or registering]* a bet does not require the type of registering or recording that occurs in a legitimate business establishment.]]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code § 337a, subd. 5.
Knowledge Required ▸ See *People v. Coppla* (1950) 100 Cal.App.2d 766, 768.
"Place" Applies to Vehicle ▸ *People v. Roche* (1945) 68 Cal.App.2d 665, 669–670.
Bookmaking Defined ▸ *People v. Thompson* (1962) 206 Cal.App.2d 734, 739; *People v. Fontes* (1970) 7 Cal.App.3d 650, 653–654; *People v. Bradford* (1949) 95 Cal.App.2d 372, 377–378.
Pool Selling Defined ▸ *Finster v. Keller* (1971) 18 Cal.App.3d 836, 846; *People v. Coppla* (1950) 100 Cal.App.2d 766, 768.
Bet Defined ▸ *People v. Oreck* (1946) 74 Cal.App.2d 215, 220.
Writing Not Required ▸ Pen. Code, § 337a, subd. 1; *People v. Burch* (1953) 118 Cal.App.2d 122, 124.
One Bet Sufficient ▸ *People v. Buckman* (1960) 186 Cal.App.2d 38, 50.
Event Need Not Occur ▸ *People v. Ghio* (1927) 82 Cal.App. 28, 32–33.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 280.

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STAFF NOTES

Pen. Code § 337a, subd. (5):

> Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, enclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivision 1, 2, 3 or 4 of this section . . . is punishable by imprisonment in the county jail for a period of not more than one year or in the state prison.

See Staff Notes to 1980 to 1982.

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1986. Betting or Wagering

The defendant is charged [in Count __] with (making[,]/ [or] offering[,]/ or accepting) a bet.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (made[,]/ [or] offered[,]/ or accepted) a bet.**

AND

2. **The defendant knew that (he/she) was (making[,]/ [or] offering[,]/ or accepting) a bet.**

A *bet* is a wager or agreement between two or more people that if an uncertain future event happens, the loser will (pay money to the winner/ [or] give the winner something valuable). [A bet includes a wager made on the outcome of any actual or purported event, including but not limited to any kind of sporting contest [or _____ *<insert description of event from Pen. Code, § 337a>*.**] [It is not necessary that the event that was bet on actually take place.]**

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements ▸ Pen. Code § 337a, subd. 6.
Knowledge Required ▸ See *People v. Coppla* (1950) 100 Cal.App.2d 766, 768.
Bet Defined ▸ *People v. Oreck* (1946) 74 Cal.App.2d 215, 220.
Event Need Not Occur ▸ *People v. Ghio* (1927) 82 Cal.App. 28, 32–33.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 281.

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RELATED ISSUES

Cash Not Required

A bet does not require that the defendant receive cash. (*People v. Raze* (1949) 91 Cal.App.2d 918, 922.) It is sufficient if the defendant received something of value equivalent to money. *(Ibid.)*

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STAFF NOTES

Pen. Code § 337a, subd. (6):

> Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, is punishable by imprisonment in the county jail for a period of not more than one year or in the state prison.

One Bet Sufficient and Need Not Be for Hire

> It is unnecessary that there be a volume of gambling or business of gambling. One instance of accepting a wager under the prohibited circumstances constitutes a violation of the code section. *In re Roberts*, 157 Cal. 472, relied upon by defendant, is inapplicable herein for the reason that since the decision in such case the statute has been amended so that it is no longer required that in order to constitute a violation of section 337a there must be proof that the wager was for gain, hire or reward. Under the law as it now stands the acceptance of the bet is the offense, irrespective of the gain to defendant.

(*People v. Burch* (1953) 118 Cal.App.2d 122, 125.)

See Staff Notes to 1980.

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1990. Failing to Maintain Control of a Dangerous Animal

The defendant is charged [in Count __] with causing (injury/death) by failing to maintain control of a dangerous animal.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/ [or] had custody or control of) a dangerous animal.**

2. **The defendant knew that the animal was dangerous.**

<Alternative 3A—allowed to run free>
[3. The defendant willfully allowed the animal to run free.]

<Alternative 3B—failed to use ordinary care>
[3. The defendant failed to use ordinary care in keeping the animal.]

[AND]

4. **The animal (killed/caused serious bodily injury to) _____** *<insert name of person allegedly attacked>* **while the defendant (allowed it to run free/failed to use ordinary care in keeping it).**

[AND

5. **_____** *<insert name of person allegedly attacked>* **took all the precautions that a reasonable person would have taken in the same situation.]**

[If the People have proved that _____ *<insert name of person allegedly attacked>* **was (under the age of five years/incapable of taking reasonable precautions because _____** *<insert reason for incapacity>***), then the People need not prove element 5 and you do not have to find that (he/she) took all the precautions that a reasonable person would have taken in the same situation.]**

An animal is *dangerous* if its individual behavior shows viciousness.

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[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.]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person *fails to use ordinary care* if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[*Serious bodily injury* means a serious impairment of physical condition, including[, but not limited to, the following:] (loss of consciousness[,]/ [and] concussion[,]/ [and] bone fracture[,]/ [and] protracted loss or impairment of function of any bodily member or organ[,]/ [and] a wound requiring extensive suturing[,]/ [and] serious disfigurement).]

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

In element 3, give either alternative 3A or 3B as appropriate based on the facts of the case. When giving alternative 3A, also give the definition of "willfully." When giving alternative 3B, also give the definition of "ordinary care."

The first bracketed paragraph is for use when the victim is by law incapable of being held to the ordinary standard of care under the law of negligence. (See *People v. Berry* (1992) 1 Cal.App.4th 778, 785–786 [children under five are deemed incapable of negligent acts.]) If the parties agree that the alleged victim was under five years old or incapable of taking responsible precautions, the court may omit element 5 and not give the bracketed paragraph.

AUTHORITY

Elements ▸ Pen. Code, § 399.
Victim Incapable of Negligence Due to Lack of Capacity ▸ *People v. Berry* (1992) 1 Cal.App.4th 778, 785–786.
Definition of Dangerous Animal ▸ *Sea Horse Ranch v. Superior Court* (1994) 24 Cal.App.4th 446, 460.

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Negligence—Ordinary Care ▸ Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282.
Serious Bodily Injury Defined ▸ Pen. Code, § 243(f)(4).

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Public, § 440.

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STAFF NOTES

Pen. Code § 399:

> (a) If any person owning or having custody or control of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and the animal, while so at large, or while not kept with ordinary care, kills any human being who has taken all the precautions that the circumstances permitted, or which a reasonable person would ordinarily take in the same situation, is guilty of a felony.
>
> (b) If any person owning or having custody or control of a mischievous animal, knowing its propensities, willfully suffers it to go at large, or keeps it without ordinary care, and the animal, while so at large, or while not kept with ordinary care, causes serious bodily injury to any human being who has taken all the precautions that the circumstances permitted, or which a reasonable person would ordinarily take in the same situation, is guilty of a misdemeanor or a felony.

Mischievous animal/Dangerous Animal
"Mischievous animal" is the language of the statute. "Mischievous" traditionally meant: "Of persons or animals, or their dispositions: producing or designing mischief or harm; inflicting damage or injury; having a harmful influence or intent." (See Oxford English Dictionary (1989) 2nd Ed.) This meaning is now "rare" in modern usage, having been replaced with: "Of persons, their conduct, etc: Disposed to or characterized by acts of playful malice or petty annoyance." (*Ibid*.)

Thus the predominant modern meaning of the word no longer conveys the seriousness of the danger that must be posed by the animal under the statute. Therefore, in order not to mislead the jury, the statutory term, "mischievous," has been replaced with a modern plain meaning equivalent, "dangerous." "Dangerous" is a term used by several courts of appeal for describing mischievous animals under the statute. (*People v. Berry* (1992) 1 Cal.App.4th 778, 786.) ["a 'mischievous' animal is one that may be dangerous to others if allowed to run free or kept in a negligent manner"]; (*Sea Horse Ranch v. Superior Court* (1994) 24 Cal.App.4th 446, 460.) ["wild animals are considered inherently dangerous"].)

Definition of Dangerous animal
"Wild animals are considered inherently dangerous; a domesticated animal is only classified as mischievous if its individual behavior demonstrates viciousness." (*Sea Horse Ranch v. Superior Court* (1994) 24 Cal.App.4th 446, 460.)

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Go at Large/Run Free
The statutory language is "willfully suffers [the animal] to go at large." "Willfully allow the animal to run free" is a plain language version based on the language of a Court of Appeal case: "[A] 'mischievous' animal is one that may be dangerous to others if allowed to run free or kept in a negligent manner." (*People v. Berry* (1992) 1 Cal.App.4th 778, 786.)

Definition of Serious Bodily Injury
As stated in the Staff Notes for Instruction 851, "Battery Causing Serious Bodily Injury," the definition of "serious bodily injury" comes from Penal Code section 243(f)(4):

> "Serious bodily injury" means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness, concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement.

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1991. Negligent Control of Attack Dog

The defendant is charged [in Count __] with failing to use ordinary care in (owning/ [or] controlling) an attack dog.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant (owned/ [or] had custody or control of) a dog trained to fight, attack, or kill.**

2. **The defendant knew or reasonably should have known that the dog was vicious or dangerous.**

3. **The defendant failed to use ordinary care in (owning/ [or] controlling) the dog.**

[AND]

4. **As a result of the defendant's failure to use ordinary care, the dog (bit someone on two separate occasions/caused substantial physical injury to _____** *<insert name[s] of person[s] allegedly attacked>***).**

[AND

5. **_____** *<insert name[s] of person[s] allegedly attacked>* **took all the precautions that a reasonable person would have taken in the same situation.]**

[If the People have proved that _____ *<insert name[s] of person[s] allegedly attacked>* **(was/were) (under the age of five years/ [or] incapable of taking reasonable precautions because _____** *<insert reason for incapacity>***), then the People need not prove element 5 and you do not have to find that (he/she/they) took all the precautions that a reasonable person would have taken in the same situation.]**

Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person *fails to use ordinary care* if he or she (does something that a reasonably careful person would not do in the

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same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

The first bracketed paragraph is to be used when the victim is by law incapable of being held to the ordinary standard of care under the law of negligence. (See *People v. Berry* (1992) 1 Cal.App.4th 778, 785–786 [children under five are deemed incapable of negligent acts.]) If the parties agree that the alleged victim was under five years old or incapable of taking responsible precautions, the court may omit element 5 and not give the bracketed paragraph.

Penal Code section 399.5(c) states that "nothing in this section shall authorize the bringing of an action pursuant to" three listed situations. If any of these defenses are raised, give Instruction 1992, Negligent Control of Attack Dog: Defenses.

AUTHORITY

Elements ▸ Pen. Code, § 399.5.
Victim Incapable of Negligence Due to Lack of Capacity ▸ *People v. Berry* (1992) 1 Cal.App.4th 778, 785–786.

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Public, § 366.

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STAFF NOTES

Pen. Code § 399.5:

(a) Any person owning or having custody or control of a dog trained to fight, attack, or kill is guilty of a felony or a misdemeanor, punishable by imprisonment in the state prison for two, three, or four years, or in a county jail not to exceed one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment, if, as a result of that person's failure to exercise ordinary care, the dog bites a human being, on two separate occasions or on one occasion causing substantial physical injury. No person shall be criminally liable under this section, however, unless he or she knew or reasonably should have known of the vicious or dangerous nature of the dog, or if the victim failed to take all the precautions that a reasonable person would ordinarily take in the same situation.

(b) Following the conviction of an individual for a violation of this section, the court shall hold a hearing to determine whether conditions of the treatment or confinement of the dog or other circumstances existing at the time of the bite or bites have changed so as to remove the danger to other persons presented by the animal. The court, after hearing, may make any order it deems appropriate to prevent the recurrence of such an incident, including, but not limited to, the removal of the animal from the area or its destruction if necessary.

(c) Nothing in this section shall authorize the bringing of an action pursuant to subdivision (a) based on a bite or bites inflicted upon a trespasser, upon a person who has provoked the dog or contributed to his or her own injuries, or by a dog used in military or police work if the bite or bites occurred while the dog was actually performing in that capacity. As used in this subdivision, "provocation" includes, but is not limited to, situations where a dog held on a leash by its owner or custodian reacts in a protective manner to a person or persons who approach the owner or custodian in a threatening manner.

(d) Nothing in this section shall be construed to affect the liability of the owner of a dog under Section 399 or any other provision of law.

(e) This section shall not apply to a veterinarian or an on-duty animal control officer while in the performance of his or her duties, or to a peace

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officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, if he or she is assigned to a canine unit.

Defenses

Penal Code section 399.5 subdivision (c) states: "nothing in this section shall authorize the bringing of an action pursuant to" the three situations listed as possible affirmative defenses, A through C. If the facts are undisputed and establish one of these defenses, the statute appears to authorize dismissal of the action on these grounds. If there is a factual dispute about whether any of these three defenses has been established, it appears the issue may be submitted to the jury.

Because the three situations do not negate the elements of the crime, but rather appear to function as excuses, they appear to be affirmative defenses that the defendant must establish by a preponderance of the evidence. (See *People v. George* (1994) 30 Cal.App.4th 262, 275 ["where a statute first defines an offense in unconditional terms and then specifies an exemption to its operation, the exception is an affirmative defense to be raised and proved by the defendant"]; see also 4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Pretrial Proceedings, § 202, pp. 407- 408.) The corresponding CALJIC treats these as affirmative defenses with the burden of proof by a preponderance of the evidence on the defense. There are no published cases on these defenses.

Substantial Physical Injury

There appears to be no statutory or case law definition of this term. Since great bodily injury is defined as "significant or substantial physical injury," Staff has chosen not to further define the term "substantial physical injury."

Trespasser

Case law generally describes the right to eject a "trespasser" without defining the term. The crime of trespass is defined in various code sections. For example, see Penal Code section 602(j) [entering lands for purpose of injuring property or property rights, or to interfere with business], 602(n) [refusing to leave property on request of a peace officer, owner, owner's agent, or person in lawful possession], and 602.5 [entering or remaining in dwelling house or residence without consent of owner, agent, or person in lawful possession].

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1992. Negligent Control of Attack Dog: Defenses

You must find the defendant not guilty of failing to use ordinary care in (owning/ [or] controlling) an attack dog if:

<Alternative A—trespassing>
[_____ *<insert name[s] of person[s] allegedly attacked>* **(was/were) trespassing at the time (he/she/they) (was/were) bitten by the dog][; or/.]**

<Alternative B—provocation>
[_____ *<insert name[s] of person[s] allegedly attacked>* **provoked the dog or otherwise contributed to (his/her/their) own injuries][; or/.]**

<Alternative C—dog doing military or police work>
[The dog was being used in military or police work and the biting occurred while the dog was actually performing in that capacity.]

[A *trespasser* is someone who (enters a residence without the consent of the (owner/owner's agent/person who lawfully possesses the property)[,]/ [or] enters land (enclosed by a fence/ [or] posted with "no trespassing" signs) and refuses to leave the property when requested to do so by the (owner/owner's agent/person who lawfully possesses the property)[,]/ [or] _____ *<insert other definition of trespasser, see Pen. Code, § 602, et seq.>***).]**

[*Provoking* includes, but is not limited to, approaching, in a threatening manner, the owner or custodian of a dog held on a leash so that the dog reacts in a protective manner.]

<Alternative A—reasonable doubt standard>
[The People have the burden of proving beyond a reasonable doubt that (_____ *<insert name[s] of person[s] allegedly attacked>* **(was/were) not trespassing[,]/ [or] [_____** *<insert name[s] of person[s] allegedly attacked>***] did not provoke the dog[,]/ [or] the dog was not being used in military or police work). If the People have not met this burden, you must find the defendant not guilty of this crime.]**

<Alternative B—preponderance standard>
[The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the

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evidence, the defendant must prove that it is more likely than not that (_____ <*insert name[s] of person[s] allegedly attacked*> (was/were) trespassing[,]/ [or] [_____ <*insert name[s] of person[s] allegedly attacked*>] provoked the dog[,]/ [or] the dog was being used in military or police work). If the defendant has not met this burden, (he/she) has not proved this defense.]

BENCH NOTES

Instructional Duty

Penal Code section 399.5(c) states that "nothing in this section shall authorize the bringing of an action pursuant" to this statute in the three situations described above: i.e., the bitten trespasser; the injured party who provokes the dog or who contributes to his or her own injuries; or the police or military dog performing in that capacity. No case presently addresses the issue of who must bear the burden of proving the existence or nonexistence of these facts.

Because the very bringing of a prosecution is barred under the circumstances stated in subdivision (c), it appears the Legislature intended to place these factual situations outside the scope of its criminal prohibition. This is to be contrasted with affirmative defenses such as entrapment, where the defendant's conduct is within the statute's facial reach but subject to an exception to the general rule based on considerations other than guilt or innocence. (See *People v. Mower* (2002) 28 Cal.4th 457, 476–483 [discussing at length affirmative defenses and burdens of proof]; 4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Pretrial Proceedings, § 202.) That being so, the burden of proving beyond a reasonable doubt the nonexistence of the subdivision (c) circumstances would properly be placed on the prosecution. (See *People v. Mower, supra,* 28 Cal.4th at p. 482.) However, there must still be sufficient evidence to permit a reasonable jury to have a reasonable doubt about whether one or more of the circumstances existed before an instruction on this issue would be required.

Alternative instructions on both the reasonable doubt and preponderance of the evidence standards have been included for the court to use at its discretion.

AUTHORITY

Defenses ▸ Pen. Code, § 399.5(c).

3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Public, § 366.

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STAFF NOTES

Defenses

Penal Code section 399.5 subdivision (c) states: "nothing in this section shall authorize the bringing of an action pursuant to" the three situations listed as possible affirmative defenses, A through C. If the facts are undisputed and establish one of these defenses, the statute appears to authorize dismissal of the action on these grounds. If there is a factual dispute about whether any of these three defenses has been established, it appears the issue may be submitted to the jury.

Because the three situations do not negate the elements of the crime, but rather appear to function as excuses, they appear to be affirmative defenses. (See *People v. George* (1994) 30 Cal.App.4th 262, 275 ["where a statute first defines an offense in unconditional terms and then specifies an exemption to its operation, the exception is an affirmative defense to be raised and proved by the defendant"]; see also 4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Pretrial Proceedings, § 202, pp. 407- 408.) The corresponding CALJIC treats these as affirmative defenses with the burden of proof by a preponderance of the evidence on the defense. There are no published cases on these defenses.

Trespasser

Case law generally describes the right to eject a "trespasser" without defining the term. The crime of trespass is defined in various code sections. For example, see Penal Code section 602(k) [entering lands for purpose of injuring property or property rights, or to interfere with business], 602(o) [refusing to leave property on request of a peace officer, owner, owner's agent, or person in lawful possession], and 602.5 [entering or remaining in dwelling house or residence without consent of owner, agent, or person in lawful possession].

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1995. Vandalism

The defendant is charged [in Count __] with vandalism.

To prove that the defendant is guilty of this crime, the People must prove that:

1. **The defendant maliciously (defaced with graffiti or with other inscribed material[,]/ [or] damaged[,]/ [or] destroyed) (real/ [or] personal) property.**

[AND]

2. **The defendant (did not own the property/owned the property with someone else).**

[AND

3. **The amount of damage caused by the vandalism was ($400 or more/ less than $400).]**

Someone acts *maliciously* when he or she intentionally does a wrongful act or when he or she acts with the intent to annoy or injure someone else.

***Graffiti or other inscribed material* includes an unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property.**

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 a felony for causing $400 or more in damage and the court is *not* instructing on the misdemeanor offense, give element 3 selecting the "$400 or more" language. If the court *is* instructing on both the felony and the misdemeanor offenses, do not give element 3 but do give Instruction 1996,

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Vandalism: Amount of Damage, with this instruction. (Pen. Code, § 594(b)(1).) The court should also give Instruction 1996 if the defendant is charged with causing more than $10,000 in damage under Penal Code section 594(b)(1).

If the defendant is charged with only a misdemeanor, give element 3 with the "less than $400" language.

In element 2, give the alternative language "owned the property with someone else" if there is evidence that the property was owned by the defendant jointly with someone else. (*People v. Kahanic* (1987) 196 Cal.App.3d 461, 466 [Pen. Code, § 594 includes damage by spouse to spousal community property].)

AUTHORITY

Elements ▸ Pen. Code, § 594.
Malicious Defined ▸ Pen. Code, § 7, subd. 4; *People v. Lopez* (1986) 176 Cal.App.3d 545, 550.
Damage to Jointly Owned Property ▸ *People v. Kahanic* (1987) 196 Cal.App.3d 461, 466.

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 243–245.

LESSER INCLUDED OFFENSES

This offense is a misdemeanor unless the amount of damage is $400 or more. (Pen. Code, § 594(b)(1) & (2)(A).) If the defendant is charged with a felony, then the misdemeanor offense is a lesser included offense. When instructing on both the felony and misdemeanor, the court must provide the jury with a verdict form on which the jury will indicate if the amount of damage has or has not been proved to be $400 or more. If the jury finds that the damage has not been proved to be $400 or more, then the offense should be set at a misdemeanor.

RELATED ISSUES

Lack of Permission Not an Element
The property owner's lack of permission is not an element of vandalism. (*In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1014.)

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Damage Need Not Be Permanent
To "deface" under Penal Code section 594 does not require that the defacement be permanent. (*In re Nicholas Y.* (2000) 85 Cal.App.4th 941, 944 [writing on a glass window with a marker pen was defacement under the statute].)

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STAFF NOTES

Pen. Code, § 594, in relevant part:

(a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:

(1) Defaces with graffiti or other inscribed material.

(2) Damages.

(3) Destroys.

Whenever a person violates this subdivision with respect to real property, vehicles, signs, fixtures, furnishings, or property belonging to any public entity, as defined by Section 811.2 of the Government Code, or the federal government, it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property.

(b)(1) If the amount of defacement, damage, or destruction is four hundred dollars ($400) or more, vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars ($10,000), or if the amount of defacement, damage, or destruction is ten thousand dollars ($10,000) or more, by a fine of not more than fifty thousand dollars ($50,000), or by both that fine and imprisonment.

(2)(A) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

(B) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), and the defendant has been previously convicted of vandalism or affixing graffiti or other inscribed material under Section 594, 594.3, 594.4, 640.5, 640.6, or 640.7, vandalism is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than five thousand dollars ($5,000), or by both that fine and imprisonment. . . .

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> (e) As used in this section, the term "graffiti or other inscribed material" includes any unauthorized inscription, word, figure, mark, or design, that is written, marked, etched, scratched, drawn, or painted on real or personal property.

Maliciously

The definition of acting maliciously is taken from Instruction 915, Mayhem, which is derived from the general definition of “maliciously” in Penal Code section 7(4).

Permissive Inference
Penal Code section 594 was amended in 1993 to add this provision:

> Whenever a person violates this subdivision with respect to real property, vehicles, signs, fixtures, furnishings, or property belonging to any public entity, as defined by Section 811.2 of the Government Code, or the federal government, it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property.

(Pen. Code, §594(a).)

The only case to have considered this amendment is *In re Rudy L.* (1994) 29 Cal.App.4th 1007. The defense in *In re Rudy L.* argued that this amendment established that lack of consent by the owner of the property was an element of vandalism. The court reviewed the legislative history of the amendment and found nothing explaining why the Legislature had added this provision. The court concluded:

> On balance, we hold the better construction of section 594(a) is that it does not now and did not before amendment make lack of permission an element of vandalism. While this construction does render some of the language in the amended statute surplusage, an undesirable result [citation] it is consistent with legislative intent as expressed in the language of the statute. [Citations.]

(*Id.* at pp. 1013–1014.)

Given that lack of consent is not an element of the crime, it would be confusing rather than helpful to instruct the jurors that they may infer that the defendant did not have the owner’s consent to deface the property.

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This leaves the inference that the defendant "did not own the property." Since this is an element of the offense which the prosecution must prove beyond a reasonable doubt, it seems unwise to instruct the jurors that they may infer that the defendant did not own the property merely from the nature of the property. (See *Francis v. Franklin* (1985) 471 U.S. 307, 314-315 ["[a] permissive inference violates the Due Process Clause . . . if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury."].)

CALJIC instructs the jury in the permissive inference only regarding "property belonging to any public entity." However, since the prosecution must still prove that the property "belonged" to a public entity and consent is not an element, this instruction does not appear necessary or useful.

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1996. Vandalism: Amount of Damage

If you find the defendant guilty of vandalism [in Count[s] __], you must then decide whether the People have proved that the amount of damage caused by the vandalism [(in each count/in Count[s]__)] was $400 or more. [If you decide that the amount of damage was $400 or more, you must then determine whether the People have proved that the damage [(in each count/in Count[s]__)] was also $10,000 or more.]

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.

BENCH NOTES

Instructional Duty
If the defendant is charged with felony vandalism, the court has a **sua sponte** duty to instruct on this allegation.

This instruction **must** be given with Instruction 1995, Vandalism.

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 that the damage was $400 or more and, if appropriate, $10,000 or more.

AUTHORITY

Elements ▸ Pen. Code, § 594(b)(1).

2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, §§ 243–245.

RELATED ISSUES

Damage Cannot Be Aggregated
The prosecution cannot charge a felony for vandalism based on the aggregate damage done to property owned by multiple victims. (*In re David* (1997) 52 Cal.App.4th 304, 310–311.)

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STAFF NOTES

Pen. Code § 594(b)(1):

> (b)(1) If the amount of defacement, damage, or destruction is four hundred dollars ($400) or more, vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars ($10,000), or if the amount of defacement, damage, or destruction is ten thousand dollars ($10,000) or more, by a fine of not more than fifty thousand dollars ($50,000), or by both that fine and imprisonment.

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