

Judicial Council of California

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INVITATION TO COMMENT

Title	Action Requested
Criminal Jury Instructions (CALCRIM) Revisions	Review and submit comments by Friday, June 22, 2018
Proposed Revisions and Additions	Proposed Effective Date
Revise and Draft Jury Instructions	September 20, 2018
Recommended by	Contact
Advisory Committee on Criminal Jury Instructions Hon. René Auguste Chouteau, Chair	Kara Portnow, Attorney, 415-865-4961 kara.portnow@jud.ca.gov

Summary

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

CALCRIM - INVITATION TO COMMENT

MAY 22-JUNE 22, 2018

Instruction Number	Instruction Title
580	Involuntary Manslaughter
800	Aggravated Mayhem
1520	Attempted Arson
1600	Robbery
1820	Unlawful Taking or Driving of Vehicle
2181	Evading Peace Officer: Reckless Driving
2350, 2351, 2361, 2363	Marijuana instructions related to H&S 11360
NEW 2364	Felony Penalty Allegations for H&S 11360 offenses
2352	Possession of Marijuana for Sale (H&S 11359)
2370	Marijuana Cultivation (H&S 11358)
2375 & 2376	Simple Possession (H&S 11357)
NEW 3415	Lawful Use Defense (H&S 11362.1)
2330, 2384, 2390, 2391, 2392, 2393, 2410, 2748, 3403, 3406, 3412, 3413	Marijuana Cannabis: nomenclature and clerical changes only
DELETED: 2360, 2362, 2377	Infractions after Prop 64
3550	Pre-Deliberation Instructions

580. Involuntary Manslaughter: Lesser Included Offense (Pen. Code, § 192(b))

When a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter.

The difference between other homicide offenses and involuntary manslaughter depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another, and done in conscious disregard of that risk, is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life is involuntary manslaughter.

The defendant committed involuntary manslaughter if:

- 1. The defendant committed (a crime/ [or] a lawful act in an unlawful manner);**
- 2. The defendant committed the (crime/ [or] act) with criminal negligence;**

AND

- 3. The defendant's acts caused the death of another person.**

[The People allege that the defendant committed the following crime[s]:
_____ *<insert misdemeanor[s]/infraction[s]/noninherently dangerous (felony/felonies)>*.

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

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

***Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when:**

1. He or she acts in a reckless way that creates a high risk of death or great bodily injury;

AND

2. A reasonable person would have known that acting in that way would create such a risk.

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

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

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

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

[The People allege that the defendant committed the following (crime[s]/ [and] lawful act[s] with criminal negligence): _____ <insert alleged predicate acts when multiple acts alleged>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant committed at least one of these alleged acts and you all agree that the same act or acts were proved.]

In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with intent to kill or with conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.

New January 2006; Revised April 2011, February 2013, September 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on involuntary manslaughter as a lesser included offense of murder when there is sufficient evidence that the defendant lacked malice. (*People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465–1467 [280 Cal.Rptr. 609], overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

When instructing on involuntary manslaughter as a lesser offense, the court has a **sua sponte** duty to instruct on both theories of involuntary manslaughter (misdemeanor/infracton/noninherently dangerous felony and lawful act committed without due caution and circumspection) if both theories are supported by the evidence. (*People v. Lee* (1999) 20 Cal.4th 47, 61 [82 Cal.Rptr.2d 625, 971 P.2d 1001].) In element 2, instruct on either or both of theories of involuntary manslaughter as appropriate.

The court has a **sua sponte** duty to specify the predicate misdemeanor, infracton or noninherently dangerous felony alleged and to instruct on the elements of the predicate offense(s). (*People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409]; *People v. Burroughs* (1984) 35 Cal.3d 824, 835 [201 Cal.Rptr. 319, 678 P.2d 894], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

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

In cases involving vehicular manslaughter (Pen. Code, § 192(c)), there is a split in authority on whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].) A unanimity instruction is

included in a bracketed paragraph, should the court determine that such an instruction is appropriate.

AUTHORITY

- Involuntary Manslaughter Defined ▶ Pen. Code, § 192(b).
- Due Caution and Circumspection ▶ *People v. Penny* (1955) 44 Cal.2d 861, 879–880 [285 P.2d 926]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Criminal Negligence Requirement; This Instruction Upheld ▶ *People v. Butler* (2010) 187 Cal.App.4th 998, 1014 [114 Cal.Rptr.3d 696].
- Unlawful Act Not Amounting to a Felony ▶ *People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].
- Unlawful Act Must Be Dangerous Under the Circumstances of Its Commission ▶ *People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374]; *People v. Cox* (2000) 23 Cal.4th 665, 674 [97 Cal.Rptr.2d 647, 2 P.3d 1189].
- Proximate Cause ▶ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274]; *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Lack of Due Caution and Circumspection Contrasted With Conscious Disregard of Life ▶ *People v. Watson* (1981) 30 Cal.3d 290, 296–297 [179 Cal.Rptr. 43, 637 P.2d 279]; *People v. Evers* (1992) 10 Cal.App.4th 588, 596 [12 Cal.Rptr.2d 637].
- Inherently Dangerous Assaultive Felonies ▶ *People v. Bryant* (2013) 56 Cal.4th 959, 964 [157 Cal.Rptr.3d 522, 301 P.3d 1136]; *People v. Brothers* (2015) 236 Cal.App.4th 24, 33–34 [186 Cal.Rptr.3d 98].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against the Person, §§ 220–234.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, §§ 140.02[4], 140.04, Ch. 142, *Crimes Against the Person*, §§ 142.01[3][d.1], [e], 142.02[1][a], [b], [e], [f], [2][b], [3][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

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

There is no crime of attempted involuntary manslaughter. (*People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798]; *People v. Broussard* (1977) 76 Cal.App.3d 193, 197 [142 Cal.Rptr. 664].)

Aggravated assault is not a lesser included offense of involuntary manslaughter. (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1140 [84 Cal.Rptr.3d 676].)

RELATED ISSUES

Imperfect Self-Defense and Involuntary Manslaughter

Imperfect self-defense is a “mitigating circumstance” that “reduce[s] an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that otherwise inheres in such a homicide.” (*People v. Rios* (2000) 23 Cal.4th 450, 461 [97 Cal.Rptr.2d 512, 2 P.3d 1066] [citations omitted, emphasis in original].) However, evidence of imperfect self-defense may support a finding of *involuntary* manslaughter, where the evidence demonstrates *the absence of* (as opposed to *the negation of*) the elements of malice. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675] [discussing dissenting opinion of Mosk, J.].) Nevertheless, a court should not instruct on involuntary manslaughter unless there is evidence supporting the statutory elements of that crime.

See also the Related Issues section to CALCRIM No. 581, *Involuntary Manslaughter: Murder Not Charged*.

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

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

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

1. The defendant unlawfully and maliciously (disabled or disfigured someone permanently/ [or] deprived someone else of a limb, organ, or part of (his/her) body);
2. When the defendant acted, (he/she) intended to (permanently disable or disfigure the other person/ [or] deprive the other person of a limb, organ, or part of (his/her) body);

AND

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

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

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

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

New January 2006; Revised August 2015, September 2018

BENCH NOTES

Instructional Duty

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

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

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

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

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

AUTHORITY

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

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person §§ 89-91.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.16[2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Mayhem ▶ *People v. Robinson* (2014) 232 Cal.App.4th 69, 77-80 [180 Cal.Rptr.3d 796].
- Attempted Aggravated Mayhem ▶ Pen. Code, §§ 205, 663.
- Assault ▶ Pen. Code, § 240.
- ~~Battery with Serious Bodily Injury ▶ Pen. Code, § 243(d); *People v. Ausbie* (2004) 123 Cal.App.4th 855 [20 Cal.Rptr.3d 371].~~
- Battery ▶ Pen. Code, § 242.

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

RELATED ISSUES

Victim Must Be Alive

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

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

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

1520. Attempted Arson (Pen. Code, § 455)

The defendant is charged [in Count ___] with the crime of attempted arson [in violation of Penal Code section 455].

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

1. The defendant attempted to set fire to or burn [or counseled, helped, or caused the attempted burning of] (a structure/forest land/property);

AND

2. (He/She) acted willfully and maliciously.

A person *attempts to set fire to or burn* (a structure/forest land/property) when he or she places any flammable, explosive, or combustible material or device in or around it with the intent to set fire to it.

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

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

[A *structure* is any (building/bridge/tunnel/power plant/commercial or public tent).]

[*Forest land* is any brush-covered land, cut-over land, forest, grasslands, or woods.]

[*Property* means personal property or land other than forest land.]

New January 2006; Revised September 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime. Attempted arson is governed by Penal Code section 455, not the general attempt statute found in section 664. (*People v. Alberts* (1995) 32 Cal.App.4th 1424, 1427–1428 [37 Cal.Rptr.2d 401] [defendant was convicted under §§ 451 and 664; the higher sentence was reversed because § 455 governs attempted arson].)

AUTHORITY

- Elements ▶ Pen. Code, § 455.
- Structure, Forest Land, and Maliciously Defined ▶ Pen. Code, § 450.
- This Instruction Upheld ▶ *People v. Rubino* (2017) 18 Cal.App.5th 407, 412-413 [227 Cal.Rptr.3d 75].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 238–242.

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

1521–1529. Reserved for Future Use

1600. Robbery (Pen. Code, § 211)

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

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

- 1. The defendant took property that was not (his/her) own;**
- 2. The property was in the possession of another person;**
- 3. The property was taken from the other person or (his/her) immediate presence;**
- 4. The property was taken against that person's will;**
- 5. The defendant used force or fear to take the property or to prevent the person from resisting;**

AND

- 6. When the defendant used force or fear, (he/she) intended (to deprive the owner of the property permanently/ [or] to remove the property 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).**

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

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

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

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

[The property taken can be of any value, however slight.] [Two or more people may possess something at the same time.]

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

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

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

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

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

New January 2006; Revised August 2009, October 2010, April 2011, August 2013, August 2014, March 2017, September 2018

BENCH NOTES

Instructional Duty

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

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

There is no sua sponte duty to define the terms “possession,” “fear,” and “immediate presence.” (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [51 Cal.Rptr. 238, 414 P.2d 366] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d

1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary below.

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

Give the bracketed definition of “against a person’s will” on request.

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

AUTHORITY

- Elements. ▶ Pen. Code, § 211.
- Fear Defined. ▶ Pen. Code, § 212; see *People v. Cuevas* (2001) 89 Cal.App.4th 689, 698 [107 Cal.Rptr.2d 529] [victim must actually be afraid].
- Immediate Presence Defined. ▶ *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376].
- Intent. ▶ *People v. Green* (1980) 27 Cal.3d 1, 52–53 [164 Cal.Rptr. 1, 609 P.2d 468], overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99]; see *Rodriguez v. Superior Court* (1984) 159 Cal.App.3d 821, 826 [205 Cal.Rptr. 750] [same intent as theft].
- Intent to Deprive Owner of Main Value. ▶ See *People v. Avery* (2002) 27 Cal.4th 49, 57–58 [115 Cal.Rptr.2d 403, 38 P.3d 1] [in context of theft]; *People v. Zangari* (2001) 89 Cal.App.4th 1436, 1447 [108 Cal.Rptr.2d 250] [same].
- Possession Defined. ▶ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13–14 [82 Cal.Rptr.2d 413, 971 P.2d 618].
- Constructive Possession by Employee. ▶ *People v. Scott* (2009) 45 Cal.4th 743, 751 [89 Cal.Rptr.3d 213, 200 P.3d 837].
- Constructive Possession by Subcontractor/Janitor. ▶ *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 523 [3 Cal.Rptr.3d 835].
- Constructive Possession by Person With Special Relationship. ▶ *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1369–1370 [109 Cal.Rptr.3d 479].

- Felonious Taking Not Satisfied by Theft by False Pretense. ▶ *People v. Williams* (2013) 57 Cal.4th 776, 784-789 [161 Cal.Rptr.3d 81, 305 P.3d 1241].
- Constructive Possession and Immediate Presence of Funds in Account of Robbery Victims Using ATM ▶ *People v. Mullins* (2018) 19 Cal.App.5th 594, 603 [228 Cal.Rptr.3d 198].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property, § 85.

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

COMMENTARY

The instruction includes definitions of “possession,” “fear,” and “immediate presence” because those terms have meanings in the context of robbery that are technical and may not be readily apparent to jurors. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403 [187 Cal.Rptr. 39]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 52 [216 Cal.Rptr. 221].)

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

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

Immediate presence was defined in the instruction because its definition is related to the use of force and fear and to the victim’s ability to control the property. This

definition may not be readily apparent to jurors.

LESSER INCLUDED OFFENSES

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

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

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

RELATED ISSUES

Asportation—Felonious Taking

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

Claim of Right

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

Fear

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

Force—Amount

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

Force—When Applied

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

Immediate Presence

Property that is 80 feet away or around the corner of the same block from a forcibly held victim is not too far away, as a matter of law, to be outside the victim's immediate presence. (*People v. Harris* (1994) 9 Cal.4th 407, 415–419 [37 Cal.Rptr.2d 200, 886 P.2d 1193]; see also *People v. Prieto* (1993) 15 Cal.App.4th

210, 214 [18 Cal.Rptr.2d 761] [reviewing cases where victim is distance away from property taken].) Property has been found to be within a person's immediate presence when the victim is lured away from his or her property and force is subsequently used to accomplish the theft or escape (*People v. Webster* (1991) 54 Cal.3d 411, 440–442 [285 Cal.Rptr. 31, 814 P.2d 1273]) or when the victim abandons the property out of fear (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1348–1349 [15 Cal.Rptr.2d 46].)

Multiple Victims

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

Value

The property taken can be of small or minimal value. (*People v. Simmons* (1946) 28 Cal.2d 699, 705 [172 P.2d 18]; *People v. Thomas* (1941) 45 Cal.App.2d 128, 134–135 [113 P.2d 706].) The property does not have to be taken for material gain. All that is necessary is that the defendant intended to permanently deprive the person of the property. (*People v. Green* (1980) 27 Cal.3d 1, 57 [164 Cal.Rptr. 1, 609 P.2d 468], disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 [226 Cal.Rptr. 112, 718 P.2d 99].)

**1820. Unlawful Taking or Driving of Vehicle (Veh. Code, § 10851(a),
(b))**

The defendant is charged [in Count __] with unlawfully taking or driving a vehicle [in violation of Vehicle Code section 10851].

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

<Alternative A—joyriding>

[1. The defendant ~~took or~~ drove someone else's vehicle without the owner's consent;

AND

2. When the defendant drove the vehicle ~~did so~~, (he/she) intended to deprive the owner of possession or ownership of the vehicle for any period of time(;/.)]

[OR]

<Alternative B—theft with intent to temporarily deprive>

[1. The defendant took someone else's vehicle without the owner's consent;

AND

2. When the defendant took the vehicle, (he/she) intended to temporarily deprive the owner of possession or ownership of the vehicle(;/.)]

[OR]

<Alternative C—theft with intent to permanently deprive>

[1. The defendant took someone else's vehicle without the owner's consent;

2. When the defendant took the vehicle, (he/she) intended to permanently deprive the owner of possession or ownership of the vehicle;

AND

3. The vehicle was worth more than \$950.]

[Even if you conclude that the owner had allowed the defendant or someone else to take or drive the vehicle before, you may not conclude that the owner consented to the driving or taking on _____ <insert date of alleged crime> based on that previous consent alone.]

[A *taking* requires that the vehicle be moved for any distance, no matter how small.]

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

<Sentencing Factor: Ambulance, Police Vehicle, Fire Dept. Vehicle>

[If you find the defendant guilty of unlawfully taking or driving a vehicle, you must then decide whether the People have proved the additional allegation that the defendant took or drove an emergency vehicle on call. To prove this allegation, the People must prove that:

1. The vehicle was (an ambulance/a distinctively marked law enforcement vehicle/a distinctively marked fire department vehicle);
2. The vehicle was on an emergency call when it was taken;

AND

3. The defendant knew that the vehicle was on an emergency call.

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

<Sentencing Factor: Modified for Disabled Person>

[If you find the defendant guilty of unlawfully taking or driving a vehicle, you must then decide whether the People have proved the additional allegation

that the defendant took or drove a vehicle modified for a disabled person. To prove this allegation, the People must prove that:

1. The vehicle was modified for the use of a disabled person;
2. The vehicle displayed a distinguishing license plate or placard issued to disabled persons;

AND

3. The defendant knew or reasonably should have known that the vehicle was so modified and displayed the distinguishing plate or placard.

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

New January 2006; Revised September 2018

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 that the vehicle was an emergency vehicle or was modified for a disabled person, the court has a **sua sponte** duty to instruct on the sentencing factor. (Veh. Code, § 10851(b); see Veh. Code, § 10851(d) [fact issues for jury].)

If the defendant is charged with unlawfully driving or taking an automobile and with receiving the vehicle as stolen property, and there is evidence of only one act or transaction, the trial court has a **sua sponte** duty to instruct the jury that the defendant cannot be convicted of both stealing the vehicle and receiving a stolen vehicle. (*People v. Black* (1990) 222 Cal.App.3d 523, 525 [271 Cal.Rptr. 771]; *People v. Strong* (1994) 30 Cal.App.4th 366, 376 [35 Cal.Rptr.2d 494].) In such cases, give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*.

Similarly, a defendant cannot be convicted of grand theft of a vehicle and unlawfully taking the vehicle in the absence of any evidence showing a substantial break between the taking and the use of the vehicle. (*People v. Kehoe* (1949) 33

Cal.2d 711, 715 [204 P.2d 321]; see *People v. Malamut* (1971) 16 Cal.App.3d 237, 242 [93 Cal.Rptr. 782] [finding substantial lapse between theft and driving].) In such cases, give CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*.

The bracketed paragraph that begins with “Even if you conclude that” may be given on request if there is evidence that the owner of the vehicle previously agreed to let the defendant or another person drive or take the vehicle. (Veh. Code, § 10851(c).)

The bracketed sentence defining “taking” may be given on request if there is a question whether a vehicle that was taken was moved any distance. (*People v. White* (1945) 71 Cal.App.2d 524, 525 [162 P.2d 862].)

The definition of “vehicle” may be given on request. (See Veh. Code, § 670 [“vehicle” defined].)

AUTHORITY

- Elements ▶ Veh. Code, § 10851(a), (b); *De Mond v. Superior Court* (1962) 57 Cal.2d 340, 344 [368 P.2d 865].
- Ambulance Defined ▶ Veh. Code, § 165(a).
- Owner Defined ▶ Veh. Code, § 460.
- Application to Trolley Coaches ▶ Veh. Code, § 21051.
- Expiration of Owner’s Consent to Drive ▶ *People v. Hutchings* (1966) 242 Cal.App.2d 294, 295 [51 Cal.Rptr. 415].
- Taking Defined ▶ *People v. White* (1945) 71 Cal.App.2d 524, 525 [162 P.2d 862] [any removal, however slight, constitutes taking]; *People v. Frye* (1994) 28 Cal.App.4th 1080, 1088 [34 Cal.Rptr.2d 180] [taking is limited to removing vehicle from owner’s possession].
- Vehicle Value Must Exceed \$950 for Felony Taking With Intent to Permanently Deprive ▶ *People v. Page* (2017) 3 Cal.5th 1175, 1183-1187 [225 Cal.Rptr.3d 786, 406 P.3d 319].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Property, §§ 66–71.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10A, Ch. 143, *Crimes Against Property*, § 143.01[1][j], [2][c], [4][c] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Unlawful Driving or Taking of Vehicle ▶ Pen. Code, § 664; Veh. Code, § 10851(a), (b).

RELATED ISSUES

Other Modes of Transportation

The “joyriding” statute, Penal Code section 499b, now only prohibits the unlawful taking of bicycles, motorboats, or vessels. The unlawful taking or operation of an aircraft is a felony, as prohibited by Penal Code section 499d.

Community Property

A spouse who takes a community property vehicle with the intent to temporarily, not permanently, deprive the other spouse of its use is not guilty of violating Vehicle Code section 10851. (*People v. Llamas* (1997) 51 Cal.App.4th 1729, 1739–1740 [60 Cal.Rptr.2d 357].)

Consent Not Vitiating by Fraud

The fact that an owner’s consent was obtained by fraud or misrepresentation does not supply the element of nonconsent. (*People v. Cook* (1964) 228 Cal.App.2d 716, 719 [39 Cal.Rptr. 802].)

Theft-Related Convictions

A person cannot be convicted of taking a vehicle and receiving it as stolen property unless the jury finds that the defendant unlawfully drove the vehicle, as opposed to unlawfully taking it, and there is other evidence that establishes the elements of receiving stolen property. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757–759 [129 Cal.Rptr. 306, 548 P.2d 706]; *People v. Cratty* (1999) 77 Cal.App.4th 98, 102–103 [91 Cal.Rptr.2d 370]; *People v. Strong* (1994) 30 Cal.App.4th 366, 372–374 [35 Cal.Rptr.2d 494].)

2181. Evading Peace Officer: ~~Reckless Driving~~ (Veh. Code, §§ 2800.1(a), 2800.2)

The defendant is charged [in Count __] with evading a peace officer [~~with wanton disregard for safety~~] [in violation of Vehicle Code section[s] (2800.1(a)/ ~~and~~ [or] 2800.2)].

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

1. A peace officer driving a motor vehicle was pursuing the defendant;
2. The defendant, who was also driving a motor vehicle, willfully fled from, or tried to elude, the officer, intending to evade the officer(./);

<Give the appropriate paragraph[s] of element 3 when the defendant is charged with a violation of Vehicle Code section 2800.2>

[3A. During the pursuit, the defendant drove with willful or wanton disregard for the safety of persons or property;]

[OR]

[3B. During the pursuit, the defendant caused damage to property while driving;]

[OR]

[3C. During the pursuit, the defendant committed three or more violations, each of which would make the defendant eligible for a traffic violation point;]

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

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

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) and he or she intentionally ignores that risk. 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 it has features that are reasonably noticeable to other drivers, including a red lamp, siren, and at least one other feature that makes it look different from vehicles that are not used for law enforcement purposes.

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.

New January 2006; Revised August 2006, September 2018

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 [76 Cal.Rptr.2d 180, 957 P.2d 869].) The court must instruct the jury in the appropriate definition of “peace officer” from the statute. (*Ibid.*) It is an 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].) If the witness is a police officer, give the bracketed sentence that begins with “A person employed as a police officer.” If the witness is another type of peace officer, give the bracketed sentence that begins with “A person employed by.”

~~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.~~

On request, the court must give CALCRIM No. 3426, *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 [168 Cal.Rptr. 80].)

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

AUTHORITY

- Elements ▶ Veh. Code, §§ 2800.1(a), 2800.2.
- Willful or Wanton Disregard ▶ *People v. Schumacher* (1961) 194 Cal.App.2d 335, 339–340 [14 Cal.Rptr. 924].
- Three Violations or Property Damage as Wanton Disregard—Definitional ▶ *People v. Taylor* (2018) 19 Cal.App.5th 1195, 1202-1203 [228 Cal.Rptr.3d 575].

- *People v. Pinkston* (2003) 112 Cal.App.4th 387, 392–393 [5 Cal.Rptr.3d 274].
- Distinctively Marked Vehicle ▶ *People v. Hudson* (2006) 38 Cal.4th 1002, 1010–1011 [44 Cal.Rptr.3d 632, 136 P.3d 168].
- Distinctive Uniform ▶ *People v. Estrella* (1995) 31 Cal.App.4th 716, 724 [37 Cal.Rptr.2d 383]; *People v. Mathews* (1998) 64 Cal.App.4th 485, 491 [75 Cal.Rptr.2d 289].
- Jury Must Determine If Status as Peace Officers ▶ *People v. Flood* (1998) 18 Cal.4th 470, 482 [76 Cal.Rptr.2d 180, 957 P.2d 869].
- Red Lamp, Siren, Additional Distinctive Feature of Car, and Distinctive Uniform Must Be Proved ▶ *People v. Hudson* (2006) 38 Cal.4th 1002, 1013 [44 Cal.Rptr.3d 632, 136 P.3d 168]; *People v. Acevedo* (2003) 105 Cal.App.4th 195, 199 [129 Cal.Rptr.2d 270]; *People v. Brown* (1989) 216 Cal.App.3d 596, 599–600 [264 Cal.Rptr. 906].
- Defendant Need Not Receive Violation Points for Conduct ▶ *People v. Leonard* (2017) 15 Cal.App.5th 275, 281 [222 Cal.Rptr3d 868].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 260.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.22[1][a][iv] (Matthew Bender).

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

LESSER INCLUDED OFFENSES

- Misdemeanor Evading a Pursuing Peace Officer ▶ Veh. Code, § 2800.1; *People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680–1681 [17 Cal.Rptr.2d 278].
- Failure to Yield ▶ Veh. Code, § 21806; *People v. Diaz* (2005) 125 Cal.App.4th 1484, 1491 [23 Cal.Rptr.3d 653]. (Lesser included offenses may not be used for the requisite “three or more violations.”)

RELATED ISSUES

Inherently Dangerous Felony

A violation of Vehicle Code section 2800.2 is not an inherently dangerous felony supporting a felony murder conviction. (*People v. Howard* (2005) 34 Cal.4th 1129, 1139 [23 Cal.Rptr.3d 306, 104 P.3d 107].)

See the Related Issues section to CALCRIM No. 2182, *Evading Peace Officer: Misdemeanor*.

**2350. Sale, Furnishing, Administering or Importingetc., of
MarijuanaCannabis (Health & Saf. Code, § 11360(a))**

The defendant is charged [in Count ___] with [~~unlawfully~~] (selling[.]/[or] furnishing[.]/ [or] administering/importing) , ~~marijuana~~cannabis, a controlled substance [in violation of Health and Safety Code section 11360(a)].

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

1. The defendant [~~unlawfully~~] (sold[.]/ [or] furnished[.]/ [or] administered[.]/ [or] imported into California) a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;

[AND]

4. The controlled substance was ~~marijuana~~cannabis(;/.)

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

[AND]

5. The controlled substance was in a usable amount(./;)]

<Sentencing Factor on defendant's age>

If you find the defendant guilty of this crime [as charged in Count[s] ___], you must then decide whether the People have proved the additional allegation that when the defendant (sold[.]/ [or] furnished[.]/ [or] administered[.]/ [or] imported into California) cannabis, (he/she) was 18 years of age or older.

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

[*Selling* for the purpose of this instruction means exchanging the marijuanacannabis 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.]

Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant *Cannabis sativa L.* with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. Industrial hemp may include the seeds of the plant; 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 produced from the seeds.]

~~[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]~~

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

[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.]

BENCH NOTES

Instructional Duty

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

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

~~When instructing on the definition of “marijuana,” the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)~~

If any penalty allegations under Health & Safety Code section 11360(a)(3) are charged, give CALCRIM No. 2364, as appropriate.

Defenses—Instructional Duty

If a medical ~~marijuana~~cannabis defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

Give CALCRIM No. 3415, *Legal Use Defense*, on request if supported by substantial evidence.

If the medical marijuana instructions are given, then also give the bracketed word “unlawfully” in the first paragraph and element 1.

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11360(a); *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906 [121 Cal.Rptr. 363].
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Administering ▶ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering ▶ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Compassionate Use Defense Generally ▶ *People v. Wright* (2006) 40 Cal.4th 81 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 [33 Cal.Rptr.3d 859]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375]
- Definition of Cannabis ▶ Health & Saf. Code, §11018.
- Definition of Industrial Hemp ▶ Health & Saf. Code, §11018.5.

Secondary Sources

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

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

LESSER INCLUDED OFFENSES

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

2351. Offering to Sell, Furnish, etc., MarijuanaCannabis (Health & Saf. Code, § 11360)

The defendant is charged [in Count ____] with offering to [~~unlawfully~~] (sell[,]/ [or] furnish[,]/ [or] administer[,]/ [or] import) ~~marijuana~~ cannabis, a controlled substance [in violation of Health and Safety Code section 11360].

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

1. The defendant [~~unlawfully~~] offered to (sell[,]/ [or] furnish[,]/ [or] administer[,]/ [or] import into California) ~~marijuana~~cannabis, a controlled substance;

AND

2. When the defendant made the offer, (he/she) intended to (sell[,]/ [or] furnish[,]/ [or] administer[,]/ [or] import) the controlled substance.

<Sentencing Factor on defendant's age>

If you find the defendant guilty of this crime [as charged in Count[s] ____], you must then decide whether the People have proved the additional allegation that when the defendant offered to (sell[,]/ [or] furnish[,]/ [or] administer[,]/ [or] import) cannabis, (he/she) was 18 years of age or older.

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

[*Selling* for the purpose of this instruction means exchanging ~~marijuana~~cannabis 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.]

Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant Cannabis sativa L. with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. Industrial hemp may include the seeds of the plant; 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 produced from the seeds.]

~~[Marijuana means all or part of the Cannabis sativa L. plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]~~

[The People do not need to prove that the defendant actually possessed the marijuanacannabis.]

New January 2006; Revised December 2008, February 2015, September 2018

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].)~~

If any of the penalty allegations under Health & Safety Code section 11360(a)(3) are charged, give CALCRIM No. 2364, as appropriate.

Defenses – Instructional Duty

If a medical ~~marijuana~~ cannabis defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

Give CALCRIM No. 3415, *Legal Use Defense*, on request if supported by substantial evidence.

~~If the medical marijuana instructions are given, then also give the bracketed word “unlawfully” in the first paragraph and element 1.~~

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11360; *People v. Van Alstyne* (1975) 46 Cal.App.3d 900, 906 [121 Cal.Rptr. 363].
- Specific Intent ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Administering ▶ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering ▶ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Compassionate Use Defense Generally ▶ *People v. Wright* (2006) 40 Cal.4th 81 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 [33 Cal.Rptr.3d 859]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].
- Definition of Cannabis ▶ Health & Saf. Code, §11018.

- Definition of Industrial Hemp ▶ Health & Saf. Code, §11018.5

Secondary Sources

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

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

~~LESSER INCLUDED OFFENSES~~

- ~~Simple Possession of Marijuana~~ ▶ ~~Health & Saf. Code, § 11357.~~
- ~~Possession for Sale of Marijuana~~ ▶ ~~Health & Saf. Code, § 11359.~~

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs

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

2361. Transporting for Sale or Giving Away MarijuanaCannabis: More Than 28.5 Grams (Health & Saf. Code, § 11360(a))

The defendant is charged [in Count _____] with [~~unlawfully~~] (giving away/ [or] transporting for sale) more than 28.5 grams of marijuana cannabis, a controlled substance [in violation of Health and Safety Code section 11360(a)].

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

1. The defendant [~~unlawfully~~] (gave away/ [or] transported for sale) a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. The controlled substance was marijuanacannabis;

AND

5. The marijuana possessed by the defendant weighed more than 28.5 grams

<Sentencing Factor on defendant's age>

If you find the defendant guilty of this crime [as charged in Count[s] _____], you must then decide whether the People have proved the additional allegation that when the defendant (gave away/ [or] transported for sale) cannabis, (he/she) was 18 years of age or older.

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

Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant *Cannabis sativa L.* with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. Industrial hemp may include the seeds of the plant; 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 produced from the seeds.]

[Cannabis does not include the weight of any other ingredient combined with cannabis to prepare topical or oral administrations, food, drink, or other product.]

~~[*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 for sale from one location to another, even if the distance is short.]

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

[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.]

New January 2006; Revised April 2010, October 2010, April 2011, February 2015, August 2016, September 2018

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 marijuanacannabis].)

If any of the penalty allegations under Health & Safety Code section 11360(a)(3) are charged, give CALCRIM No. 2364, as appropriate.

Defenses—Instructional Duty

If a medical marijuanacannabis defense applies under the Compassionate Use Act or the Medical Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

Give CALCRIM No. 3415, *Legal Use Defense*, on request, if supported by substantial evidence.

~~If the medical marijuana instructions are given, then also give the bracketed word “unlawfully” in the first paragraph and element 1.~~

Related Instructions

Use this instruction when the defendant is charged with transporting or giving away more than 28.5 grams of marijuanacannabis. For offering to transport or give away more than 28.5 grams of marijuanacannabis, use CALCRIM No. 2363, *Offering to Transport or Give Away MarijuanaCannabis: More Than 28.5 Grams*. ~~For transporting or giving away 28.5 grams or less, use CALCRIM No. 2360, *Transporting or Giving Away MarijuanaCannabis: Not More Than 28.5 Grams—Misdemeanor*. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.~~

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11360(a).

- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana/Cannabis ▶ Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation ▶ *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Primary Caregiver ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant’s Burden of Proof on Compassionate Use Defense ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 292–294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].
- Prior Version of this Instruction Upheld ▶ *People v. Busch* (2010) 187 Cal.App.4th 150, 155-156 [113 Cal.Rptr.3d 683].
- Definition of Cannabis ▶ Health & Saf. Code, §11018.
- Definition of Industrial Hemp ▶ Health & Saf. Code, §11018.5.

Secondary Sources

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

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

~~LESSER INCLUDED OFFENSES~~

- ~~Transporting, Giving Away, etc., Not More Than 28.5 Grams of Marijuana~~ ▶ Health & Saf. Code, § 11360(b).

RELATED ISSUES

~~See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.~~

2363. Offering or Attempting to Transport for Sale or Offering to Give Away Marijuana Cannabis: More Than 28.5 Grams (Health & Saf. Code, § 11360(a))

The defendant is charged [in Count ____] with [~~un~~lawfully] (offering to give away/ [or] offering to transport for sale/ [or] attempting to transport for sale) more than 28.5 grams of ~~marijuana~~ cannabis, controlled substance [in violation of Health and Safety Code section 11360(a)].

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

1. The defendant [~~un~~lawfully] (offered to give away/ [or] offered to transport for sale/ [or] attempted to transport for sale) ~~marijuana~~ cannabis, a controlled substance, in an amount weighing more than 28.5 grams;

AND

2. When the defendant made the (offer/ [or] attempt), (he/she) intended to (give away/ [or] transport for sale) the controlled substance.

<Sentencing Factor on defendant's age>

If you find the defendant guilty of this crime [as charged in Count[s] ____], you must then decide whether the People have proved the additional allegation that when the defendant (offered to give away/ [or] offered to transport for sale/ [or] attempted to transport for sale) cannabis, (he/she) was 18 years of age or older.

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

Cannabis 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. [Cannabis also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant *Cannabis sativa L.* with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. Industrial hemp may include the seeds of the plant; 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 produced from the seeds.]

[Cannabis does not include the weight of any other ingredient combined with cannabis to prepare topical or oral administrations food, drink, or other product.]

~~**[*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 for sale from one location to another, even if the distance is short.]

[The People do not need to prove that the defendant actually possessed the marijuanacannabis.]

New January 2006; Revised April 2010, February 2015, August 2016, September 2018

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].)~~

Also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, if the defendant is charged with attempt to transport.

Defenses—Instructional Duty

If a medical ~~marijuana~~cannabis defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

Give CALCRIM No. 3415, *Legal Use Defense*, on request if supported by substantial evidence.

If any of the penalty allegations under Health & Safety Code section 11360(a)(3) are charged, give CALCRIM No. 2364, as appropriate.

If the medical ~~marijuana~~ instructions are given, then, in element 1, also give the bracketed word “unlawfully.”

Related Instruction

Use this instruction when the defendant is charged with offering to transport or give away more than 28.5 grams of ~~marijuana~~cannabis. For transporting or giving away more than 28.5 grams of ~~marijuana~~cannabis, use CALCRIM No. 2361, *Transporting for Sale or Giving Away ~~Marijuana~~Cannabis: More Than 28.5 Grams*. For offering to transport or give away 28.5 grams or less of ~~marijuana~~, use ~~CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*~~. For transporting or giving away 28.5 grams or less, use ~~CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*~~.

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11360(a).
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].

- Specific Intent ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Medical ~~Marijuana~~Cannabis ▶ Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation ▶ *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Primary Caregiver ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant’s Burden of Proof on Compassionate Use Defense ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].
- Definition of Cannabis ▶ Health & Saf. Code, §11018.
- Definition of Industrial Hemp ▶ Health & Saf. Code, §11018.5.

Secondary Sources

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

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

~~LESSER INCLUDED OFFENSES~~

- ~~Offering to Transport or Giving Away Not More Than 28.5 Grams of Marijuana~~ ▶ Health & Saf. Code, § 11360(b).

RELATED ISSUES

~~See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.~~

~~2364~~2365–2369. Reserved for Future Use

2364. Felony Cannabis Penalty Allegations (Health & Saf. Code, § 11360(a)(3))

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

To prove (this/these) allegation[s] [for each crime], the People must prove that:

<Give the following paragraph if the defendant is charged under Health & Safety Code section 11360(a)(3)(A)>

[__]. The defendant has at least one prior conviction for _____ <insert description of offense requiring registration pursuant to Penal Code section 290(c) or for an offense specified in Penal Code section 667(e)(2)(C)(iv)>(./;)]

<Give the following paragraph if the defendant is charged under Health & Safety Code section 11360(a)(3)(B)>

[__]. The defendant has at least two prior convictions for _____ <insert description of offense specified in Health & Safety Code sections 11360(a) and 11360(a)(2)>(./;)]

<Give the following paragraph if the defendant is charged under Health & Safety Code section 11360 (a)(3)(C):

[__]. When committing that crime, the defendant knew that (he/she) was selling, furnishing, administering, giving away, attempting to sell, or offering to sell, furnish, administer, or give away cannabis to a person under the age of 18 years(./;)]

<Give the following paragraphs if the defendant is charged under Health & Safety Code section 11360(a)(3)(D)>

[__]. The defendant (imported/[or] offered to import/[or] attempted to import) (more than 28.5 grams of cannabis/more than 4 grams of concentrated cannabis) into California (./;)]

[OR]

[____. The defendant (transported for sale/ [or] offered to transport for sale/ [or] attempted to transport for sale) (more than 28.5 grams of cannabis/more than 4 grams of concentrated cannabis) out of California.]

[Selling for the purpose of this instruction means exchanging the cannabis 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.]

Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, § 11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant Cannabis sativa L. with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. It may include the seeds of the plant; 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 produced from the seeds.]

[Cannabis does not include the weight of any other ingredient combined with cannabis to prepare topical or oral administrations, food, drink, or other product.]

[Concentrated cannabis means the separated resin, whether crude or purified, from cannabis.]

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

[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.]

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

New September 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of an enhancement. (See, e.g., *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324] [statute defines enhancement, not separate offense].)

Give all relevant bracketed definitions.

Related Instructions

CALCRIM No. 2361, *Transporting or Giving Away Cannabis: More Than 28.5 Grams*.

CALCRIM No. 2363, *Offering or Attempting to Transport for Sale or Offering to Give Away Cannabis: More Than 28.5 Grams*.

AUTHORITY

- Enhancements ▶ Health & Saf. Code, § 11360(a)(3).
- Enhancement, Not Substantive Offense ▶ *People v. Wallace* (2003) 109 Cal.App.4th 1699, 1702 [1 Cal.Rptr.3d 324].
- Definition of Cannabis ▶ Health & Saf. Code, §11018.
- Definition of Industrial Hemp ▶ Health & Saf. Code, §11018.5.

2365-2369. Reserved for Future Use

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

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

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

1. The defendant [~~unlawfully~~] possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. ___ When the defendant possessed the controlled substance, (he/she) intended (to sell it/ [or] that someone else sell it);
- 4.5. ___ The controlled substance was marijuana cannabis;

[AND]

6. ___ The controlled substance was in a usable amount (./;)

<Sentencing Factor on defendant's age>

If you find the defendant guilty of this crime [as charged in Count[s] ___], you must then decide whether the People have proved the additional allegation that when the defendant possessed cannabis for sale, (he/she) was 18 years of age or older.

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

[If you find the defendant guilty of this crime [as charged in Count[s] ___], and you find that the defendant was 18 years of age or older, then you must decide whether the People have proved the following allegation[s]. [You must decide whether the People have proved (this/these) allegation[s] and return a separate finding for each allegation.]

To prove (this/these) allegation[s] [for each crime], the People must prove that:

<Insert the appropriate bracketed paragraphs if the defendant is charged under one of the paragraphs of Health and Safety Code section 11359(c) and sequentially number them as appropriate>

[____ . When the defendant possessed cannabis, (he/she) knew that (he/she) was (selling/ [or] attempting to sell) cannabis to another person under the age of 18 years(./;)]

[____ . The defendant has at least two prior convictions for possession of cannabis for sale(./;)]

[____ . The defendant has at least one prior conviction for (_____) <insert description of offense requiring registration pursuant to Penal Code section 290 or for an offense specified in clause (iv) of subparagraph (c) of paragraph (2) of subdivision (e) of Penal Code section 667.>](./;)]

<Insert the following bracketed paragraphs if defendant is charged with violating Health and Safety Code section 11359(d)>

[____ . The defendant was 21 years of age or older when (he/she) (hired/employed/used) a person 20 years of age or younger to [unlawfully] (cultivate[,/ [or] transport[,/ [or] carry[,/ [or] sell[,/ [or] offer to sell[,/ [or] give away[,/ [or] prepare for sale[,/ [or] peddle) cannabis(./;)]

AND

When the defendant (hired/employed/used) a person 20 years of age or younger to [unlawfully] (cultivate[,/ [or] transport[,/ [or] carry[,/ [or] sell[,/ [or] offer to sell[,/ [or] give away[,/ [or] prepare for sale[,/ [or] peddle) cannabis, (he/she) knew that person's age and the tasks that the person would be doing(./;)]

Selling for the purpose of this instruction means exchanging the marijuana cannabis 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.

Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant Cannabis sativa L. with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. Industrial hemp may include the seeds of the plant; 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 produced from the seeds.]

[~~Marijuana means all or part of the Cannabis sativa L. plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination].~~

[~~The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]~~

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

New January 2006; Revised December 2008, October 2010, February 2015, February 2016, September 2018

BENCH NOTES

Instructional Duty

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

Give the appropriate bracketed elements if the offense is charged as a felony.

~~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].)~~

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

Give CALCRIM No. 3415, *Legal Use Defense*, on request if supported by substantial evidence.

~~If the medical marijuana instructions are given, then also give the bracketed word “unlawfully” in the first paragraph and element 1.~~

If the defendant is charged with prior convictions under subdivisions (c)(1) or (2) of section 11359, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial* or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*, as appropriate.

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11359.

- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Compassionate Use Defense Generally ▶ *People v. Wright* (2006) 40 Cal.4th 81 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747 [33 Cal.Rptr.3d 859]; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375]
- Specific Intent to Sell Personally or That Another Will Sell Required ▶ *People v. Parra* (1999) 70 Cal. App. 4th 222, 226 [70 Cal.App.4th 222] and *People v. Consuegra* (1994) 26 Cal. App. 4th 1726, 1732, fn. 4 [32 Cal.Rptr.2d 288].
- Definition of MarijuanaCannabis” Defined ▶ Health & Saf. Code, § 11018.
- Definition of Industrial Hemp ▶ Health & Saf. Code, §11018.5

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 90, 101.

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

~~LESSER INCLUDED OFFENSES~~

- ~~Simple Possession of MarijuanaCannabis. Health & Saf. Code, § 11357, *People v. Walker* (2015) 237 Cal.App.4th 111 [187 Cal.Rptr.3d 606] [duty to instruct extends to infraction for possessing less than 28.5 g] [reversible error not to instruct on simple possession of marijuanacannabis, an infraction, in case charged as possession of marijuanacannabis for sale].~~

2353–2359. Reserved for Future Use

**2370. Planting, etc., MarijuanaCannabis (Health & Saf. Code, §§
11358(c)-(d))**

The defendant is charged [in Count ___] with [~~unlawfully~~] (planting[,] [or]/ cultivating[,] [or]/ harvesting[,] [or]/ drying[,] [or]/ processing) more than six living marijuanacannabis plants, [or any part thereof,] a controlled substance [in violation of Health and Safety Code section 11358 _____ *<insert appropriate subsection[s] of statute((d))>*].

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

1. The defendant [~~unlawfully~~] (planted[,] [or]/ cultivated[,] [or]/ harvested[,] [or]/ dried[,] [or]/ processed) ~~one or~~ more than six marijuanacannabis plants;

AND

2. The defendant knew that the substance (he/she) (planted[,] [or]/ cultivated[,] [or]/ harvested[,] [or]/ dried[,] [or]/ processed) was marijuanacannabis(./;)

<Sentencing Factor on defendant's age>

If you find the defendant guilty of this crime [as charged in Count[s] _____], you must then decide whether the People have proved the additional allegation that when the defendant (planted[,] [or]/ cultivated[,] [or]/ harvested[,] [or]/ dried[,] [or]/ processed) more than six cannabis plants, (he/she) was 18 years of age or older.

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

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

To prove (this/these) allegation[s] [for each crime], the People must prove that:

<Give the next paragraph if defendant is charged with violating a subsection of Health & Safety Code section 11358(d)>

[____ . (The defendant's conduct caused _____ <insert description of statutory violation specified in Health & Safety Code section 11358(d)(3)>/
The defendant intentionally or with gross negligence caused substantial environmental harm to public lands or other public resources;)]

<Give the appropriate paragraphs below if defendant has prior convictions specified in Health & Safety Code section 11358(d)(1-2)>

[____ . The defendant has at least two prior convictions for _____ <insert description of prior convictions for this crime> (./;)]

[____ . The defendant has at least one prior conviction for _____ <insert description of offense[s] specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code>.]

[Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant Cannabis sativa L. with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. It may include the seeds of the plant; 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 produced from the seeds.]

[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.}}~~

New January 2006; Revised June 2007, April 2010, February 2015, September 2018

BENCH NOTES

Instructional Duty

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

~~When instructing on the definition of “marijuana,” the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)~~

Defenses—Instructional Duty

A medical marijuana defense under the Compassionate Use Act or the Medical Marijuana Program Act may be raised to a charge of violating Health and Safety Code section 11358. (See Health & Saf. Code, §§ 11362.5, 11362.775.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

Give CALCRIM No. 3415, *Legal Use Defense*, on request if supported by substantial evidence.~~If the medical marijuana instructions are given, then also give the bracketed word “unlawfully” in the first paragraph and element 1.~~

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11358.
- Harvesting ▶ *People v. Villa* (1983) 144 Cal.App.3d 386, 390 [192 Cal.Rptr. 674].

- Aider and Abettor Liability ▶ *People v. Null* (1984) 157 Cal.App.3d 849, 852 [204 Cal.Rptr. 580].
- Medical ~~Marijuana~~Cannabis ▶ Health & Saf. Code, §§ 11362.5, 11362.775.
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Amount Must Be Reasonably Related to Patient’s Medical Needs ▶ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].
- Primary Caregiver ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant’s Burden of Proof on Compassionate Use Defense ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].
- “Cannabis” Defined Definition of Cannabis ▶ Health & Saf. Code, §11018.
- Definition of Industrial Hemp ~~Defined~~ ▶ Health & Saf. Code, §11018.5.

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 136-146.

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

LESSER INCLUDED OFFENSES

- Simple Possession of ~~Marijuana~~Cannabis ▶ Health & Saf. Code, § 11357.

RELATED ISSUES

Aider and Abettor Liability of Landowner

In *People v. Null* (1984) 157 Cal.App.3d 849, 852 [204 Cal.Rptr. 580], the court held that a landowner could be convicted of aiding and abetting cultivation of ~~marijuana~~cannabis 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.*)

2371–2374. Reserved for Future Use

2375. Simple Possession of Marijuana Cannabis or Concentrated Cannabis: Misdemeanor (Health & Saf. Code, § 11357(eb))

The defendant is charged [in Count _____] with [~~unlawfully~~] possessing (more than 28.5 grams of marijuana/cannabis/more than 8 grams of concentrated cannabis), a controlled substance [in violation of Health and Safety Code section 11357(eb)].

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

1. The defendant [~~unlawfully~~] possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. The controlled substance was marijuana(cannabis/concentrated cannabis) ;

AND

5. The marijuana-(cannabis/concentrated cannabis) possessed by the defendant weighed more than (28.5 grams/8 grams-);

<Sentencing Factor on defendant's age>

If you find the defendant guilty of this crime [as charged in Count[s] _____], you must then decide whether the People have proved the additional allegation that when the defendant possessed (cannabis/concentrated cannabis), (he/she) was 18 years of age or older.

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

[Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant *Cannabis sativa L.* with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. Industrial hemp may include the seeds of the plant; 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 produced from the seeds.]

[Cannabis does not include the weight of any other ingredient combined with cannabis to prepare topical or oral administrations food, drink, or other product.]

~~[*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.]]~~

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

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

New January 2006; Revised June 2007, April 2010, October 2010, April 2011, February 2015; September 2018.

BENCH NOTES

Instructional Duty

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

~~When instructing on the definition of “marijuana,” the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)~~

Defenses—Instructional Duty

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

Give CALCRIM No. 3415, *Legal Use Defense*, on request if supported by substantial evidence

~~If the medical marijuana/cannabis instructions are given, then, in element 1, also give the bracketed word “unlawfully.”~~

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11357(eb); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- ~~“Marijuana Definition of Cannabis” Defined~~ ▶ Health & Saf. Code, § 11018.
- Definition of Industrial Hemp ▶ Health & Saf. Code, § 11018.5.
- Definition of Concentrated Cannabis ▶ Health & Saf. Code, § 11006.5.
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].

- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical ~~Marijuana~~Cannabis ▶ Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821].
- Amount Must Be Reasonably Related to Patient’s Medical Needs ▶ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].
- Primary Caregiver ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061]. Defendant’s Burden of Proof on Compassionate Use Defense. *People v. Mentch* (2008) 45 Cal.4th 274, 292–294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].
- ~~This~~ Prior Version of this Instruction Upheld ▶ *People v. Busch* (2010) 187 Cal.App.4th 150, 160 [113 Cal.Rptr.3d 683].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 76-77.

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

2376. Simple Possession of MarijuanaCannabis or Concentrated Cannabis on School Grounds: Misdemeanor (Health & Saf. Code, § 11357(dc))

The defendant is charged [in Count ____] with [~~unlawfully~~] possessing ~~marijuana~~(cannabis/concentrated cannabis), a controlled substance, on the grounds of a school [in violation of Health and Safety Code section 11357(dc)].

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

1. The defendant [~~unlawfully~~] possessed a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. The controlled substance was ~~marijuana~~(cannabis/concentrated cannabis);
5. The ~~marijuana~~(cannabis/concentrated cannabis) was in a usable amount but not more than (28.5 grams/8 grams)~~-in weight~~;
6. ~~The defendant was at least 18 years old;~~

AND

- 7.6. The defendant possessed the ~~marijuana~~(cannabis/concentrated cannabis) 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.

<Sentencing Factor on defendant's age>

If you find the defendant guilty of this crime [as charged in Count[s] ____], you must then decide whether the People have proved the additional allegation that when the defendant possessed (cannabis/concentrated cannabis), (he/she) was 18 years of age or older.

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.

[Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant *Cannabis sativa L.* with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. Industrial hemp may include the seeds of the plant; 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 produced from the seeds.]

~~[*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.]]~~

[Cannabis does not include the weight of any other ingredient combined with cannabis to prepare topical or oral administrations, food, drink, or other product.]

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

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

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

New January 2006; Revised June 2007, April 2010, October 2010, February 2015, September 2018

BENCH NOTES

Instructional Duty

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

~~When instructing on the definition of “marijuana,” the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)~~

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.”

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11357(~~dc~~); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- ~~“Definition of MarijuanaCannabis” Defined~~ ▶ Health & Saf. Code, § 11018.
- Definition of Concentrated Cannabis ▶ Health & Saf. Code, § 11006.5.
- Definition of Industrial Hemp ▶ Health & Saf. Code, § 11018.5.
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical ~~MarijuanaCannabis~~ ▶ Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821 [27 Cal.Rptr.3d 336].
- Amount Must Be Reasonably Related to Patient’s Medical Needs ▶ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].
- Primary Caregiver ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant’s Burden of Proof on Compassionate Use Defense ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 76-77.

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

3415. Lawful Use Defense (Health & Saf. Code, § 11362.1)

It is lawful for a person 21 years of age or older to do any of the following:

[(Possess[,]/ [or] process[,]/ [or] transport[,]/ [or] purchase[,]/ [or] obtain[,]/ [or] give away to persons 21 years of age or older), without receiving compensation, no more than 28.5 grams of cannabis [that is not in the form of concentrated cannabis.]]

[(Possess[,]/ [or] process[,]/ [or] transport[,]/ [or] purchase[,]/ [or] obtain[,]/ [or] give away to persons 21 years of age or older) without receiving compensation, no more than eight grams of cannabis in the form of concentrated cannabis, including concentrated cannabis contained in cannabis products.]

[(Possess[,]/ [or] plant[,]/ [or] cultivate[,]/ [or] harvest[,]/ [or] dry[,]/ [or] process) no more than six living cannabis plants and possess the cannabis produced by those plants.]

[Smoke or ingest cannabis or cannabis products.]

[(Possess[,]/ [or] transport[,]/ [or] purchase[,]/ [or] obtain[,]/ [or] use[,]/ [or] manufacture[,]/ [or] give away to persons 21 years of age or older without receiving compensation) cannabis accessories.]

The People have the burden of proving beyond a reasonable doubt that the defendant did not lawfully (possess[,]/ [or] transport[,]/ [or] purchase[,]/ [or] obtain[,]/ [or] give away[,]/ [or] plant[,]/ [or] cultivate[,]/ [or] harvest[,]/ [or] dry[,]/ [or] process) (cannabis[,]/ [or] concentrated cannabis[,]/ [or] cannabis products.) If the People have not met this burden, you must find the defendant not guilty of this crime.

[*Cannabis* 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant *Cannabis sativa L.*

with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. It may include the seeds of the plant; 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 produced from the seeds.]

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

New September 2018

BENCH NOTES

Instructional Duty

Pursuant to Health & Saf. Code, § 11362.1, certain activities involving cannabis are lawful. Give the relevant bracketed paragraphs on defense request.

This instruction does not apply to offenses charged under Health & Saf. Code, §§ 11362.2, 11362.3, and 11362.4, nor to any of the offenses enumerated in Health & Saf. Code § 11362.45.

AUTHORITY

- Elements. Health & Saf. Code, §§ 11362.1, 11362.2, 11362.3, 11362.4, 11362.45.
- Definition of Cannabis. Health & Saf. Code, § 11018.
- Definition of Industrial Hemp. Health & Saf. Code, § 11018.5.

2330. Manufacturing a Controlled Substance (Health & Saf. Code, § 11379.6(a) & (b))

The defendant is charged [in Count ____] with [unlawfully] (manufacturing/compounding/converting/producing/deriving/processing/preparing) _____ *<insert concentrated cannabis or a controlled substance from Health & Saf. Code, §§ 11054, 11055, 11056, 11057, or 11058>*, a controlled substance [in violation of Health and Safety Code section 11379.6/section 11362.3].

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 do not need to 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 do not need to 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.]]

New January 2006; Revised September 2018

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 do not need to 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.3d 1493, 1503–1504 [267 Cal.Rptr. 841]; *People v. Lancellotti* (1993) 19 Cal.App.4th 809, 813 [23 Cal.Rptr.2d 640].) 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, 992 [103 Cal.Rptr.2d 817].)

AUTHORITY

- Elements. Health & Saf. Code, §§ 11379.6(a) & (b), 11054–11058, 11362.3(a)(6).
- Knowledge of Controlled Substance. *People v. Coria* (1999) 21 Cal.4th 868, 874 [89 Cal.Rptr.2d 650, 985 P.2d 970].
- Initial or Intermediary Stages. *People v. Jackson* (1990) 218 Cal.App.3d 1493, 1503–1504 [267 Cal.Rptr. 841]; *People v. Lancellotti* (1993) 19 Cal.App.4th 809, 813 [23 Cal.Rptr.2d 640]; *People v. Heath* (1998) 66 Cal.App.4th 697, 703–704 [78 Cal.Rptr.2d 240].
- Precursor Chemicals. *People v. Pierson* (2000) 86 Cal.App.4th 983, 992 [103 Cal.Rptr.2d 817].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 112.

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

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 [33 Cal.Rptr.2d 155]; *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1208 [10 Cal.Rptr.2d 363].) 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 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 [33 Cal.Rptr.2d 155]; *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1208 [10 Cal.Rptr.2d 363].)

2384. Inducing Minor to Violate Controlled Substance Laws (Health & Saf. Code, §§ 11353, 11354, 11380(a))

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> [in violation of _____ <insert appropriate code section[s]>].

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

- 1. The defendant 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] a controlled substance;**

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 2B and the definition of analog substance below instead of paragraph 2A.>

- 2A. The controlled substance was _____ <insert type of controlled substance>;**

- 2B. The controlled substance was an analog of _____ <insert type of controlled substance>;**

- 3. The defendant intended that _____ <insert name of person solicited> would commit that crime;**

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

AND

- 5. At that time, _____ <insert name of person solicited> was under 18 years of age.**

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

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

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

[OR]

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

To decide whether the defendant intended that _____ <insert name of person solicited> would commit the crime of _____ <insert description of Health and Safety Code violation alleged>, please refer to the separate instructions that I (will give/have given) you on that crime.

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.]

<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.]

New January 2006; Revised February 2014, September 2017, September 2018

BENCH NOTES

Instructional Duty

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

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~~ cannabis.”

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 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

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 [182 Cal.Rptr. 207].)

AUTHORITY

- Elements ▶ Health & Saf. Code, §§ 11353, 11354, 11380(a).
- Age of Defendant Element of Offense ▶ *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Good Faith Belief Minor Over 18 Defense to Inducing or Soliciting ▶ *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037 [182 Cal.Rptr. 207].
- Definition of Analog Controlled Substance ▶ Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis, supra*, 57 Cal.4th at p. 362, fn. 5.

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 124, 125.

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

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.12, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[1][a], [3][a] (Matthew Bender).

2385–2389. Reserved for Future Use

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

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

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

1. The defendant [unlawfully] (sold/furnished/administered/gave away) marijuanacannabis, a controlled substance, to _____
<insert name of alleged recipient>;
2. The defendant knew of the presence of the controlled substance;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. At that time, the defendant was 18 years of age or older;

[AND]

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

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

[AND]

6. The marijuanacannabis was in a usable amount.]

[Selling for the purpose of this instruction means exchanging the marijuanacannabis 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.]

[Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant Cannabis sativa L. with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. It may include the seeds of the plant; 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 produced from the seeds.]

~~Marijuana means all or part of the Cannabis sativa L. plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]~~

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

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

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

New January 2006; Revised October 2010, September 2018

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 marijuanacannabis to a minor under 14. (Health & Saf. Code, § 11361(a).)

Sale of a controlled substance does not require a usable amount. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges sales, do not use bracketed element 6 or the definition of usable amount. There is no case law on whether furnishing, administering, or giving away require usable quantities. (See *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907] [transportation requires usable quantity]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567] [same].) Element 6 and the bracketed definition of usable amount are provided here for the court to use at its discretion.

When instructing on the definition of “marijuanacannabis,” 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 marijuanacannabis].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

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

- Usable Amount ▶ *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- “Cannabis” Defined. Health & Saf. Code, §11018.

Secondary Sources

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

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

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

LESSER INCLUDED OFFENSES

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

RELATED ISSUES

No Defense of Good Faith Belief Over 18

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

**2391. Offering to Sell, Furnish, etc., MarijuanaCannabis to Minor
(Health & Saf. Code, § 11361)**

The defendant is charged [in Count ___] with offering to (sell/furnish/administer/give away) ~~marijuana~~cannabis, a controlled substance, to someone under (18/14) years of age [in violation of Health and Safety Code section 11361].

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

1. The defendant [unlawfully] offered to (sell/furnish/administer/give away) ~~marijuana~~cannabis, a controlled substance, to _____
<insert name of alleged recipient>;
2. When the defendant made the offer, (he/she) 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~~cannabis 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.]

[Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant *Cannabis sativa*

L. with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. It may include the seeds of the plant; 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 produced from the seeds.]

~~[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted there from), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]~~

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

[The People do not need to prove that the defendant actually possessed the marijuanacannabis.]

New January 2006; Revised September 2018

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 marijuanacannabis to a minor under 14. (Health & Saf. Code, § 11361(a).)

~~When instructing on the definition of “marijuanacannabis,” 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 marijuanacannabis].)~~

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11361.
- Age of Defendant Element of Offense ▶ *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- No Defense of Good Faith Belief Offeree Over 18 ▶ *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454]; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760 [77 Cal.Rptr. 59].
- Specific Intent ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Administering ▶ Health & Saf. Code, § 11002.
- “Cannabis” Defined. Health & Saf. Code, §11018.

Secondary Sources

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

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

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

LESSER INCLUDED OFFENSES

- Offering to Sell to Person Not a Minor ▶ Health & Saf. Code, § 11360.
- Simple Possession of ~~Marijuana~~Cannabis ▶ Health & Saf. Code, § 11357.
- Possession for Sale of ~~Marijuana~~Cannabis ▶ Health & Saf. Code, § 11359.
- “Cannabis” Defined. Health & Saf. Code, §11018.

RELATED ISSUES

No Requirement That Defendant Delivered or Possessed Drugs

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

See the Related Issues section to CALCRIM No. 2390, *Sale, Furnishing, etc., of Marijuana* Cannabis to Minor.

2392. Employment of Minor to Sell, etc., MarijuanaCannabis (Health & Saf. Code, § 11361(a))

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) marijuanacannabis, a controlled substance [in violation of Health and Safety Code section 11361(a)].

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) marijuanacannabis, 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 marijuanacannabis for money, services, or anything of value.]

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

[Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant *Cannabis sativa* L. with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. Industrial hemp may include the seeds of the plant; 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 produced from the seeds.]

~~**[*Marijuana* means all or part of the *Cannabis sativa* L. plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]**~~

[The People do not need to prove that the defendant knew which specific controlled substance 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.]

New January 2006; Revised September 2018

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~~**cannabis**,” 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~~**cannabis**].)

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11361(a).
- Age of Defendant Element of Offense ▶ *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Knowledge ▶ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling ▶ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- “Cannabis” Defined. Health & Saf. Code, §11018.

Secondary Sources

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

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

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

2393. Inducing Minor to Use MarijuanaCannabis (Health & Saf. Code, § 11361(a))

The defendant is charged [in Count __] with inducing someone under 18 years of age to use ~~marijuana~~cannabis [in violation of Health and Safety Code section 11361(a)].

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

1. The defendant [unlawfully] (encouraged/persuaded/solicited/intimidated/induced) _____ <insert name of person solicited> to use ~~marijuana~~cannabis;
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.

[Cannabis 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.]

<If applicable, give the definition of industrial hemp: Health & Saf. Code, §11018.5>

[Cannabis does not include industrial hemp. Industrial hemp means a fiber or oilseed crop, or both, that only contain types of the plant Cannabis sativa L. with no more than three-tenths of 1 percent tetrahydrocannabinol from the dried flowering tops, whether growing or not. It may include the seeds of the plant; 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 produced from the seeds.]

~~[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.]

New January 2006; Revised September 2018

BENCH NOTES

Instructional Duty

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

Give the bracketed paragraph about calculating age if requested. (Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].)

Defenses—Instructional Duty

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 [182 Cal.Rptr. 207].)

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11361(a).
- Age of Defendant Element of Offense ▶ *People v. Montalvo* (1971) 4 Cal.3d 328, 332 [93 Cal.Rptr. 581, 482 P.2d 205].
- Good Faith Belief Minor Over 18 Defense to Inducing or Soliciting ▶ *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1036–1037 [182 Cal.Rptr. 207].

- “Cannabis” Defined. Health & Saf. Code, §11018.

Secondary Sources

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

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

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

2394–2399. Reserved for Future Use

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

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

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

1. The defendant [unlawfully] possessed an object used for unlawfully injecting or smoking a controlled substance;
2. The defendant knew of the object's presence;

AND

3. The defendant knew it to be an object used for unlawfully injecting or smoking a controlled substance.

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

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

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

<Defense: Authorized Possession for Personal Use>

[The defendant did not unlawfully possess [a] hypodermic (needle[s]/ [or] syringe[s]) if (he/she) was legally authorized to possess (it/them). The defendant was legally authorized to possess (it/them) if:

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

[AND]

2. (He/She) obtained (it/them) from _____ <insert source authorized by Health & Safety Code section 11364(c)> .]

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

New January 2006; Revised October 2010, April 2011, August 2015, September 2018

BENCH NOTES

Instructional Duty

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

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

Defenses—Instructional Duty

Section 11364 does not apply to possession of hypodermic needles or syringes for personal use if acquired from an authorized source. The defendant need only raise a reasonable doubt about whether his or her possession of these items was lawful. (See *People v. Mower* (2002) 28 Cal.4th 457, 479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If there is sufficient evidence, the court has a **sua sponte** duty to instruct on this defense. (See *People v. Fuentes* (1990) 224 Cal.App.3d 1041, 1045 [274 Cal.Rptr. 17] [authorized possession of hypodermic is an affirmative defense]; *People v. Mower*, at pp. 478–481 [discussing affirmative defenses generally and the burden of proof].) Give the bracketed word “unlawfully” in element 1 and the bracketed paragraph on that defense.

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11364.

- Statute Constitutional ▶ *People v. Chambers* (1989) 209 Cal.App.3d Supp. 1, 4 [257 Cal.Rptr. 289].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Unanimity ▶ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Authorized Possession Defense ▶ Health & Saf. Code, § 11364(c).

Secondary Sources

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

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

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

RELATED ISSUES

MarijuanaCannabis Paraphernalia Excluded

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

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

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

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

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

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

[AND]

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

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

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

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

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

AND

5. The controlled substance was a usable amount.]

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

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

[OR]

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

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

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

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) possessed.]

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

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

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

[Agreeing to buy a controlled substance does not, by itself, mean that a person has control over that substance.]

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

<A. Defense: Prescription>

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

<B. Defense: Conduct Authorized>

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

*New January 2006; Revised October 2010, February 2014, September 2017,
September 2018*

BENCH NOTES

Instructional Duty

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

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

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483];

People v. Rowland (1999) 75 Cal.App.4th 61, 65 [88 Cal.Rptr.2d 900].) Give the bracketed paragraph that begins with “The People allege that the defendant possessed,” inserting the items alleged.

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

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

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

AUTHORITY

- Elements ▶ Pen. Code, § 4573.6; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717]; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–948 [173 Cal.Rptr. 688].
- Knowledge ▶ *People v. Carrasco, supra*, 118 Cal.App.3d at pp. 944–947.
- Usable Amount ▶ *People v. Carrasco, supra*, 118 Cal.App.3d at p. 948.
- Prescription Defense ▶ Health & Saf. Code, §§ 11350, 11377.
- Prescription ▶ Health & Saf. Code, §§ 11027, 11164, 11164.5.
- Persons Authorized to Write Prescriptions ▶ Health & Saf. Code, § 11150.
- Prescription Defense Applies ▶ *People v. Fenton* (1993) 20 Cal.App.4th 965, 969 [25 Cal.Rptr.2d 52].
- Authorization Is Affirmative Defense ▶ *People v. George* (1994) 30 Cal.App.4th 262, 275–276 [35 Cal.Rptr.2d 750]; *People v. Cardenas, supra*, 53 Cal.App.4th at pp. 245–246.

- Jail Defined ▶ *People v. Carter* (1981) 117 Cal.App.3d 546, 550 [172 Cal.Rptr. 838].
- Knowledge of Location as Penal Institution ▶ *People v. Seale* (1969) 274 Cal.App.2d 107, 111 [78 Cal.Rptr. 811].
- “Adjacent to” and “Grounds” Not Vague ▶ *People v. Seale, supra*, 274 Cal.App.2d at pp. 114–115.
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Unanimity ▶ *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].
- Definition of Analog Controlled Substance ▶ Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for “Expressly Listed” Controlled Substance ▶ *People v. Davis, supra*, 57 Cal.4th at p. 362, fn. 5.

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, § 161.

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

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 94, *Prisoners’ Rights*, § 94.04 (Matthew Bender).

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

RELATED ISSUES

Inmate Transferred to Mental Hospital

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

Use of Controlled Substance Insufficient to Prove Possession

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

Posting of Prohibition

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

Possession of Multiple Items at One Time

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

Administrative Punishment Does Not Bar Criminal Action

“The protection against multiple punishment afforded by the Double Jeopardy Clause . . . is not implicated by prior prison disciplinary proceedings” (*Taylor v. Hamlet* (N.D. Cal. 2003) 2003 U.S. Dist. LEXIS 19451; see also *People v. Ford* (1959) 175 Cal.App.2d 37, 39 [345 P.2d 354] [Pen. Code, § 654 not implicated].)

Medical Use of ~~Marijuana~~ Cannabis

The medical ~~marijuana~~-cannabis defense provided by Health and Safety Code section 11362.5 is not available to a defendant charged with violating Penal Code section 4573.6. (*Taylor v. Hamlet*, *supra*, 2003 U.S. Dist. LEXIS 19451.) However, the common law defense of medical necessity may be available. (*Ibid.*)

2749–2759. Reserved for Future Use

3403. Necessity

The defendant is not guilty of _____ <insert crime[s]> if (he/she) acted because of legal necessity.

In order to establish this defense, the defendant must prove that:

1. (He/She) acted in an emergency to prevent a significant bodily harm or evil to (himself/herself/ [or] someone else);
2. (He/She) had no adequate legal alternative;
3. The defendant's acts did not create a greater danger than the one avoided;
4. When the defendant acted, (he/she) actually believed that the act was necessary to prevent the threatened harm or evil;
5. A reasonable person would also have believed that the act was necessary under the circumstances;

AND

6. The defendant did not substantially contribute to the emergency.

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 six listed items is true.

New January 2006; Revised April 2008, September 2018

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the

defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of necessity, which, if believed, would be sufficient for a reasonable jury to find that the defendant has shown the defense to be more likely than not.

Related Instructions

If the threatened harm was immediate and accompanied by a demand to commit the crime, the defense of duress may apply. (See CALCRIM No. 3402, *Duress or Threats*.)

AUTHORITY

- Instructional Requirements ▶ *People v. Pena* (1983) 149 Cal.App.3d Supp. 14 [197 Cal.Rptr. 264]; *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035 [48 Cal.Rptr.2d 877]; *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135–1136 [64 Cal.Rptr. 2d 654].
- Burden of Proof ▶ *People v. Waters* (1985) 163 Cal.App.3d 935, 938 [209 Cal.Rptr. 661]; *People v. Condley* (1977) 69 Cal.App.3d 999, 1008 [138 Cal.Rptr. 515].
- Difference Between Necessity and Duress ▶ *People v. Heath* (1989) 207 Cal.App.3d 892, 897–902 [255 Cal.Rptr. 120].

Secondary Sources

1 Witkin and Epstein, *California Criminal Law* (3d ed. 2000) Defenses, §§ 55–60.

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, §§ 73.05[2], 73.18 (Matthew Bender).

RELATED ISSUES

Duress Distinguished

Although a defendant's evidence may raise both necessity and duress defenses, there is an important distinction between the two concepts. With necessity, the threatened harm is in the immediate future, thereby permitting a defendant to balance alternative courses of conduct. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1009–1013 [138 Cal.Rptr. 515].) Necessity does not negate any element of the crime, but rather represents a public policy decision not to punish a defendant despite proof of the crime. (*People v. Heath* (1989) 207 Cal.App.3d 892, 901 [255 Cal.Rptr. 120].) The duress defense, on the other hand, does negate an element of the crime. The defendant does not have the time to form the criminal intent because of the immediacy of the threatened harm. (*Ibid.*)

Abortion Protests

The defense of necessity is not available to one who attempts to interfere with another person's exercise of a constitutional right (e.g., demonstrators at an abortion clinic). (*People v. Garziano* (1991) 230 Cal.App.3d 241, 244 [281 Cal.Rptr. 307].)

Economic Necessity

Necessity caused by economic factors is valid under the doctrine. A homeless man was entitled to an instruction on necessity as a defense to violating an ordinance prohibiting sleeping in park areas. Lack of sleep is arguably a significant evil and his lack of economic resources prevented a legal alternative to sleeping outside. (*In re Eichorn* (1998) 69 Cal.App.4th 382, 389–391 [81 Cal.Rptr.2d 535].)

Medical Necessity

There is a common law and statutory defense of medical necessity. The common law defense contains the same requirements as the general necessity defense. (See *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1538 [66 Cal.Rptr.2d 559].) The statutory defense relates specifically to the use of ~~marijuana-cannabis~~ and is based on Health and Safety Code section 11362.5, the "Compassionate Use Act," but see *Gonzales v. Raich* (2005) 545 U.S. 1 [125 S.Ct. 2195, 162 L.Ed.2d 1] [medical necessity defense not available].

3406. Mistake of Fact

The defendant is not guilty of _____ <insert crime[s]> if (he/she) did not have the intent or mental state required to commit the crime because (he/she) [reasonably] did not know a fact or [reasonably and] mistakenly believed a fact.

If the defendant's conduct would have been lawful under the facts as (he/she) [reasonably] believed them to be, (he/she) did not commit _____ <insert crime[s]>.

If you find that the defendant believed that _____ <insert alleged mistaken facts> [and if you find that belief was reasonable], (he/she) did not have the specific intent or mental state required for _____ <insert crime[s]>.

If you have a reasonable doubt about whether the defendant had the specific intent or mental state required for _____ <insert crime[s]>, you must find (him/her) not guilty of (that crime/those crimes).

New January 2006; Revised April 2008, December 2008, August 2014, September 2018

BENCH NOTES

Instructional Duty

The court must instruct on a defense when the defendant requests it and there is substantial evidence supporting the defense. The court has a **sua sponte** duty to instruct on a defense if there is substantial evidence supporting it and either the defendant is relying on it or it is not inconsistent with the defendant's theory of the case.

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389–390 [88 Cal.Rptr.2d 111]; *People v. Breverman* (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's

guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983 [38 Cal.Rptr.3d 624, 127 P.3d 40].)

If the defendant is charged with a general intent crime, the trial court must instruct with the bracketed language requiring that defendant’s belief be both actual and reasonable.

If the mental state element at issue is either specific criminal intent or knowledge, do not use the bracketed language requiring the belief to be reasonable. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6 [61 Cal.Rptr.2d 39]; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425–1426 [51 Cal.Rptr.3d 263].)

Mistake of fact is not a defense to the following crimes under the circumstances described below:

1. Involuntary manslaughter (*People v. Velez* (1983) 144 Cal.App.3d 558, 565–566 [192 Cal.Rptr. 686] [mistake of fact re whether gun could be fired]).
2. Furnishing ~~marijuana~~cannabis to a minor (Health & Saf. Code, § 11352; *People v. Lopez* (1969) 271 Cal.App.2d 754, 760–762 [77 Cal.Rptr. 59]).
3. Selling narcotics to a minor (Health & Saf. Code, § 11353; *People v. Williams* (1991) 233 Cal.App.3d 407, 410–411 [284 Cal.Rptr. 454] [specific intent for the crime of selling narcotics to a minor is the intent to sell cocaine, not to sell it to a minor]).
4. Aggravated kidnapping of a child under the age of 14 (Pen. Code, § 208(b); *People v. Magpuso* (1994) 23 Cal.App.4th 112, 118 [28 Cal.Rptr.2d 206]).
5. Unlawful sexual intercourse or oral copulation by person 21 or older with minor under the age of 16 (Pen. Code, §§ 261.5(d), 288a(b)(2); *People v. Scott* (2000) 83 Cal.App.4th 784, 800–801 [100 Cal.Rptr.2d 70]).
6. Lewd and lascivious conduct with a child under the age of 14 (Pen. Code, § 288(a); *People v. Olsen* (1984) 36 Cal.3d 638, 645–646 [205 Cal.Rptr. 492, 685 P.2d 52]).

AUTHORITY

- Instructional Requirements. ▶ Pen. Code, § 26(3).
- Burden of Proof. ▶ *People v. Mayberry* (1975) 15 Cal.3d 143, 157 [125 Cal.Rptr 745, 542 P.2d 1337].
- This Defense Applies to Attempted Lewd and Lascivious Conduct With Minor Under 14. ▶ *People v. Hanna* (2013) 218 Cal.App.4th 455, 461 [160 Cal.Rptr.3d 210].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Defenses, § 39.

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

RELATED ISSUES

Mistake of Fact Based on Involuntary Intoxication

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would not have been available if defendant's mental state had been caused by voluntary intoxication. (*Id.* at pp. 829–833; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

Mistake of fact is not a defense to general criminal intent if the mistake is based on mental disease. (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1084 [225 Cal.Rptr. 885]; see *People v. Castillo* (1987) 193 Cal.App.3d 119, 124–125 [238 Cal.Rptr. 207].) In *Gutierrez*, the defendant was charged with inflicting cruel injury on a child, a general intent crime, because she beat her own children under the delusion that they were evil birds she had to kill. The defendant's abnormal mental state was caused in part by mental illness. (*People v. Gutierrez, supra*, 180 Cal.App.3d at pp. 1079–1080.) The court concluded that evidence of her mental illness was properly excluded at trial because mental illness could not form the basis of her mistake of fact defense. (*Id.* at pp. 1083–1084.)

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

Possession or cultivation of marijuanacannabis is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuanacannabis (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 marijuanacannabis 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 marijuanacannabis 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 marijuanacannabis.]

New February 2015; Revised September 2018

BENCH NOTES

Instructional Duty

Pursuant to Health & Saf. Code, § 11362.5, defendants may raise a medical marijuanacannabis defense in appropriate cases. The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].)

If the evidence shows that a physician may have “approved” but not “recommended” the marijuanacannabis use, give the bracketed phrase “or approved” in the first paragraph of this instruction. (*People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)

AUTHORITY

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New February 2015; Revised August 2015, September 2018

BENCH NOTES

Instructional Duty

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

AUTHORITY

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

Secondary Sources

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

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

3414–3424. Reserved for Future Use

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

The defendant is charged [in Count ____] with [unlawfully] (giving away/transporting for sale) 28.5 grams or less of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(b)].

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

1. The defendant [unlawfully] (gave away/transported for sale) a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. The controlled substance was marijuana;

AND

5. The marijuana was in a usable amount but not more than 28.5 grams in weight.

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

[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.] [It does not include the mature stalks of the plant; fiber produced from the stalks; oil or cake made from the seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

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

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

[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.]

New January 2006; Revised April 2010, October 2010, February 2015, August 2016

BENCH NOTES

Instructional Duty

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

When instructing on the definition of “marijuana,” the court may choose to give just the first bracketed sentence or may give the first bracketed sentence with either or both of the bracketed sentences following. The second and third sentences should be given if requested and relevant based on the evidence. (See Health & Saf. Code, § 11018 [defining marijuana].)

Defenses—Instructional Duty

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

If the medical marijuana instructions are given, then also give the bracketed word “unlawfully” in the first paragraph and element 1.

Related Instructions

Use this instruction when the defendant is charged with transporting or giving away 28.5 grams or less of marijuana. For offering to transport or give away 28.5 grams or less of marijuana, use CALCRIM No. 2362, *Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*. For transporting or giving away more than 28.5 grams, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*.

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11360(b).
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Medical Marijuana ▶ Health & Saf. Code, § 11362.5.
- Primary Caregiver ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant’s Burden of Proof on Compassionate Use Defense ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 292–294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- Compassionate Use Defense to Transportation ▶ *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].

Secondary Sources

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

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

RELATED ISSUES

Transportation

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

Medical Marijuana Not a Defense to Giving Away

The medical marijuana defense provided by Health and Safety Code section 11362.5 is not available to a charge of sales under Health and Safety Code section 11360. (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1165–1167 [128 Cal.Rptr.2d 844]; *People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1389 [70 Cal.Rptr.2d 20].) The defense is not available even if the marijuana is provided to someone permitted to use marijuana for medical reasons (*People v. Galambos, supra*, 104 Cal.App.4th at pp. 1165–1167) or if the marijuana is provided free of charge (*People ex rel. Lungren v. Peron, supra*, 59 Cal.App.4th at p. 1389).

TO BE DELETED**2362. Offering to Transport or Give Away Marijuana: Not More Than 28.5 Grams—Misdemeanor (Health & Saf. Code, § 11360(b))**

The defendant is charged [in Count ____] with [unlawfully] (offering to give away/offering to transport for sale/attempting to transport for sale) 28.5 grams or less of marijuana, a controlled substance [in violation of Health and Safety Code section 11360(b)].

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

1. The defendant [unlawfully] (offered to give away/offered to transport for sale/attempted to transport for sale) marijuana, a controlled substance, in an amount weighing 28.5 grams or less;

AND

2. When the defendant made the (offer/attempt), (he/she) intended to (give away/transport for sale) the controlled 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.]]

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

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

New January 2006; Revised April 2010, February 2015, August 2016

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].)

Also give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, if the defendant is charged with attempt to transport.

Defenses—Instructional Duty

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.”

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 CALCRIM No. 2360, *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 CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*. For transporting or giving away more than 28.5 grams, use CALCRIM No. 2361, *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 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Specific Intent ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Medical Marijuana ▶ Health & Saf. Code, § 11362.5.
- Compassionate Use Defense to Transportation ▶ *People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Primary Caregiver ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant’s Burden of Proof on Compassionate Use Defense ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].

Secondary Sources

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

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

RELATED ISSUES

See the Related Issues section to CALCRIM No. 2360, *Transporting or Giving Away Marijuana: Not More Than 28.5 Grams—Misdemeanor*.

TO BE DELETED

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

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

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

1. The defendant [unlawfully] possessed concentrated cannabis;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as concentrated cannabis;

AND

4. The concentrated cannabis was in a usable amount.

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

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

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

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

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

New January 2006; Revised June 2007, February 2015, August 2015

BENCH NOTES

Instructional Duty

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

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

Defenses—Instructional Duty

If a medical marijuana defense applies under the Compassionate Use Act or the Medical Marijuana Program Act (See Health & Saf. Code, §§ 11362.5, 11362.775.), the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that the conduct was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the conduct may have been lawful, the court has a **sua sponte** duty to give the relevant defense instruction: CALCRIM No. 3412, *Compassionate Use Defense*, or CALCRIM No. 3413, *Collective or Cooperative Cultivation Defense*.

“[C]oncentrated 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, 186 (2003).)

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.”

AUTHORITY

- Elements ▶ Health & Saf. Code, § 11357(a); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- “Concentrated Cannabis” Defined ▶ Health & Saf. Code, § 11006.5.
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].

- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical Marijuana ▶ Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821 [27 Cal.Rptr.3d 336].
- Amount Must Be Reasonably Related to Patient’s Medical Needs ▶ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].
- Primary Caregiver ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant’s Burden of Proof on Compassionate Use Defense ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 292–294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.). Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 538–539 [148 Cal.Rptr.3d 375].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 85–113, 136–151

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

3550. Pre-Deliberation Instructions

When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard.

It is your duty to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you.

Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other.

As I told you at the beginning of the trial, do not talk about the case or about any of the people or any subject involved in it with anyone, including, but not limited to, your spouse or other family, or friends, spiritual leaders or advisors, or therapists. You must discuss the case only in the jury room and only when all jurors are present. Do not discuss your deliberations with anyone. Do not communicate using: _____ <insert currently popular social media> during your deliberations.

It is very important that you not use the Internet (, a dictionary/[, or _____ <insert other relevant source of information>) in any way in connection with this case during your deliberations.

[During the trial, several items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. (These exhibits will be sent into the jury room with you when you begin to deliberate./ If you wish to see any exhibits, please request them in writing.)]

If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer so it may take some time. You should

continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court.

Do not reveal to me or anyone else how the vote stands on the (question of guilt/[or] issues in this case) unless I ask you to do so.

Your verdict [on each count and any special findings] must be unanimous. This means that, to return a verdict, all of you must agree to it. [Do not reach a decision by the flip of a coin or by any similar act.]

<During a retrial, give the following paragraph on request to inform jury about prior proceedings without introducing extraneous matters>

[Sometimes issues are tried in separate trials. The only issue in this trial is whether the People have proved the charge[s] of _____ <insert description of charge[s]> [in Count[s] _____]. Do not speculate about whether the defendant was already found guilty for (his/her) conduct or may be found guilty in the future in another trial. Do not consider any potential punishment.]

It is not my role to tell you what your verdict should be. [Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.]

You must reach your verdict without any consideration of punishment.

You will be given [a] verdict form[s]. As soon as all jurors have agreed on a verdict, the foreperson must date and sign the appropriate verdict form[s] and notify the bailiff. [If you are able to reach a unanimous decision on only one or only some of the (charges/ [or] defendants), fill in (that/those) verdict form[s] only, and notify the bailiff.] Return any unsigned verdict form.

New January 2006; Revised April 2008, October 2010, April 2011, September 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct that the jury's verdict must be unanimous. Although there is no sua sponte duty to instruct on the other topics relating to deliberations, there is authority approving such instructions. (See *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997]; *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426]; *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].)

If the court automatically sends exhibits into the jury room, give the bracketed sentence that begins with “These exhibits will be sent into the jury room.” If not, give the bracketed phrase that begins with “You may examine whatever exhibits you think.”

Give the bracketed sentence that begins with “Do not take anything I said or did during the trial” unless the court will be commenting on the evidence. (See Pen. Code, §§ 1127, 1093(f).)

Give the bracketed paragraph that begins with “Sometimes issues are tried in separate trials” if requested. (*People v. Hicks* (2017) 4 Cal.5th 203, 205 [226 Cal.Rptr.3d 565, 407 P.3d 409].)

AUTHORITY

- Exhibits ▶ Pen. Code, § 1137.
- Questions ▶ Pen. Code, § 1138.
- Verdict Forms ▶ Pen. Code, § 1140.
- Unanimous Verdict ▶ Cal. Const., art. I, § 16; *People v. Howard* (1930) 211 Cal. 322, 325 [295 P. 333]; *People v. Kelso* (1945) 25 Cal.2d 848, 853–854 [155 P.2d 819]; *People v. Collins* (1976) 17 Cal.3d 687, 692 [131 Cal.Rptr. 782, 552 P.2d 742].
- Duty to Deliberate ▶ *People v. Gainer* (1977) 19 Cal.3d 835, 856 [139 Cal.Rptr. 861, 566 P.2d 997].
- Judge’s Conduct as Indication of Verdict ▶ *People v. Hunt* (1915) 26 Cal.App. 514, 517 [147 P. 476].
- Keep an Open Mind ▶ *People v. Selby* (1926) 198 Cal. 426, 439 [245 P. 426].
- Do Not Consider Punishment ▶ *People v. Nichols* (1997) 54 Cal.App.4th 21, 24 [62 Cal.Rptr.2d 433].
- Hung Jury ▶ *People v. Gainer* (1977) 19 Cal.3d 835, 850-852 [139 Cal.Rptr. 861, 566 P.2d 997]; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118-1121 [117 Cal.Rptr.2d 715].
- This Instruction Upheld ▶ *People v. Santiago* (2010) 178 Cal.App.4th 1471, 1475-1476 [101 Cal.Rptr.3d 257].
- Special Instruction for Retrial Jury ▶ *People v. Hicks* (2017) 4 Cal.5th 203, 205 [226 Cal.Rptr.3d 565, 407 P.3d 409].

Secondary Sources

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000), §§ 643-644.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02, 85.03[1], 85.05[1] (Matthew Bender).

RELATED ISSUES

Admonition Not to Discuss Case with Anyone

In *People v. Danks* (2004) 32 Cal.4th 269, 298–300 [8 Cal.Rptr.3d 767, 82 P.3d 1249], a capital case, two jurors violated the court’s admonition not to discuss the case with anyone by consulting with their pastors regarding the death penalty. The Supreme Court stated:

It is troubling that during deliberations not one but two jurors had conversations with their pastors that ultimately addressed the issue being resolved at the penalty phase in this case. Because jurors instructed not to speak to anyone about the case except a fellow juror during deliberations may assume such an instruction does not apply to confidential relationships, we recommend the jury be expressly instructed that they may not speak to anyone about the case, except a fellow juror during deliberations, and that this includes, but is not limited to, spouses, spiritual leaders or advisers, or therapists. Moreover, the jury should also be instructed that if anyone, other than a fellow juror during deliberations, tells a juror his or her view of the evidence in the case, the juror should report that conversation immediately to the court.

(*Id.* at p. 306, fn. 11.)

The court may, at its discretion, add the suggested language to the fourth paragraph of this instruction.

3551–3574. Reserved for Future Use