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## INVITATION TO COMMENT

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Title	Action Requested
<b>Criminal Jury Instructions (CALCRIM) Revisions</b>	<b>Review and submit comments by Friday, December 31, 2014</b>
Proposed Revisions and Additions	Proposed Effective Date
<b>Revise and Draft Jury Instructions</b>	<b>February 2015</b>
Recommended by	Contact
<b>Advisory Committee on Criminal Jury Instructions</b>	<b>Robin Seeley, Attorney, 415-865-7710</b>
<b>Hon. Sandy R. Kriegler, Chair</b>	<b>robin.seeley@jud.ca.gov</b>

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### **Summary**

Revised and new jury instructions reflecting recent developments in the law.

<b>Instruction Number</b>	<b>Instruction Title</b>
New 2024	False Personation
New 3412, 3413	Compassionate Use and Cooperative Collective/Marijuana
359	Corpus Delicti
402, 403, 3426	Natural and Probable Consequences Doctrine Series, Voluntary Intoxication: Effects on Homicide Cases
460, 1300	Attempt Other Than Attempted Murder, Criminal Threat
521, 601	First Degree Murder, Attempted Murder
540B	Felony Murder: First Degree—Cooparticipant Allegedly Committed Fatal Act
571, 627	Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another—Lesser Included Offense, Hallucination: Effect on Premeditation
592	Gross Vehicular Manslaughter
840	Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition
1005, 1021, 1036, 1051	Sex Crime by Fraud Series
1128	Engaging in Oral Copulation or Sexual Penetration With Child 10 Years of Age or Younger
1140	Showing or Sending Harmful Material to Seduce a Minor
1151	Pandering
1202	Kidnapping: For Ransom, Reward, or Extortion
1602	Robbery: Degrees
2350, 2351, 2352, 2360, 2361, 2362, 2363, 2370, 2375, 2376, 2377	Marijuana Series
2500	Illegal Possession, etc., of Weapon

<b>Instruction Number</b>	<b>Instruction Title</b>
2652	Resisting an Executive Officer in Performance of Duty
3160	Great Bodily Injury Enhancement
3517, 3518, 3519	Lesser Included Offense Instructions

## 2024. False Personation (Pen. Code, §§ 529(a), 530)

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The defendant is charged [in Count \_\_\_\_\_] with falsely impersonating another person in the other person's private or official capacity and performing certain acts [in violation of Penal Code section 529(a)][in violation of Penal Code section 530].

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

1. The defendant falsely impersonated another person in the other person's private or official capacity;  
AND
2. While falsely impersonating that person, the defendant:
  - [2A. Posted bail or acted as surety for anyone in any proceeding, before any judge or officer authorized to take that bail or surety(;/.)][or]
  - [2B1. Verified, published, acknowledged, or proved, in the name of that person, any written document;  
[AND]
  - [2B2. When the defendant did so, he intended that the written document be recorded, delivered, or used as though it were an authentic document(./;)] [or]
  - [2C. Did anything which, if done by the person being falsely impersonated, might cause (that person to be liable in a lawsuit or criminal prosecution/ [or] that person to pay any amount of money/ [or] that person to be subject to any charge, forfeiture, or penalty/ [or] the defendant or anyone else to receive a benefit as a result)(./;)] [or]

<Use the following paragraph for violations of Penal Code section 530>

  - [2D1. Received money or property;
  - 2D2. The defendant knew that the money or property were intended to be delivered to the person that (he/she) was falsely impersonating;
  - 2D3. The money or property was worth (more than \$950/\$950 or less);
  - 2D4. When the defendant acted, (he/she) intended to deprive the true owner of the money or property, or use it for (his/her) own benefit, or let someone else use it.]

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*New [insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

### AUTHORITY

- Elements ▶ Pen. Code, §§ 529(a), 530(b).

### RELATED ISSUES

Penal Code section 529(a)(3) does not require any specific mental state beyond intentionally falsely impersonating another. *People Rathert* (2000) 24 Cal.4th 200, 210 [99 Cal.Rptr.2d 779, 6 P.3d 700].

### LESSER INCLUDED OFFENSES

- A violation of Penal Code section 529(b) is a lesser included offense of section 529(a).

**2025–2039. Reserved for Future Use**

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

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**Possession or cultivation of marijuana is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or cultivated must be reasonably related to the patient’s current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.**

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

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*New January 2006; Revised June 2007, April 2010* *insert date of council approval*

### **BENCH NOTES**

#### ***Instructional Duty***

Pursuant to Health & Saf. Code, § 11362.5, defendants may raise a medical marijuana 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, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].)

If the evidence shows that a physician may have “approved” but not “recommended” the marijuana 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, 529-531, 538-539 [148 Cal.Rptr.3d 375].
- 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.).

### ***Secondary Sources***

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

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

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

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

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

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

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

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

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

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

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

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

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

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*New [insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

## **AUTHORITY**

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

### ***Secondary Sources***

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

**3414–3424. Reserved for Future Use**

### 359. Corpus Delicti: Independent Evidence of a Charged Crime

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**The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may rely on the defendant's out-of-court statements to convict (him/her) only if you first conclude that other evidence shows that the charged crime [or a lesser included offense] was committed.**

**That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.**

**This requirement of other evidence does not apply to proving the identity of the person who committed the crime [and the degree of the crime]. If other evidence shows that the charged crime [or a lesser included offense] was committed, the identity of the person who committed it [and the degree of the crime] may be proved by the defendant's statement[s] alone.**

**You may not convict the defendant unless the People have proved (his/her) guilt beyond a reasonable doubt.**

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

### BENCH NOTES

#### *Instructional Duty*

The court has a **sua sponte** duty to instruct on corpus delicti whenever an accused's extrajudicial statements form part of the prosecution's evidence. (*People v. Howk* (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426].)

The corpus delicti cannot be proved by statements made before or after the crime, but can be proved by statements made during the crime. (*People v. Carpenter* (1997) 15 Cal.4th 312, 394 [63 Cal.Rptr.2d 1, 935 P.2d 708].)

Give the bracketed language in the first paragraph if the court will be instructing on lesser included offenses.

An earlier version of this instruction was upheld in *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1496 [60 Cal.Rptr.3d 777]. A later case, *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1427-1429 [155 Cal.Rptr.3d 403], found fault with

the same earlier version of the instruction without referring to *Reyes*. The instruction has been modified in light of the discussion in *Rivas*.

### ***Related Instructions***

Since the corpus delicti instruction concerns statements of guilt by the defendant, this instruction must always be given along with CALCRIM No. 358, *Evidence of Defendant's Statements*. If the statements are reported oral statements, the bracketed cautionary paragraph in CALCRIM No. 358 must also be given.

## **AUTHORITY**

- Instructional Requirements ▶ *People v. Ray* (1996) 13 Cal.4th 313, 342 [52 Cal.Rptr.2d 296, 914 P.2d 846]; *People v. Jennings* (1991) 53 Cal.3d 334, 368 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Hawk* (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426].
- Burden of Proof ▶ *People v. Lara* (1994) 30 Cal.App.4th 658, 676.
- [This Earlier Version of This Instruction Correctly States the Law ▶ \*People v. Rosales\* \(2014\) 222 Cal.App.4th 1254, 1260-1261 \[166 Cal.Rptr.3d 620\]; \*People v. Reyes\* \(2007\) 151 Cal.App.4th 1491, 1496 \[60 Cal.Rptr.3d 777\].](#)
- Proof of Identity Independent of “Elements” ▶ *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1427-1429 [155 Cal.Rptr.3d 403].
- Corpus Delicti Rule Does Not Apply Generally to All Uncharged Acts ▶ *People v. Davis* (2008) 168 Cal.App.4th 617, 636 [86 Cal.Rptr.3d 55].

### ***Secondary Sources***

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Elements, §§ 45–52.

2 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 30, *Confessions and Admissions*, §§ 30.04[2], 30.57 (Matthew Bender).

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.04[2][c], Ch. 87, *Death Penalty*, § 87.13[17][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.01 (Matthew Bender).

## **COMMENTARY**

### ***Harm Caused by Criminal Conduct***

The instruction states that the other evidence need only “be enough to support a reasonable inference that someone’s criminal conduct caused an injury, loss, or harm.” This is based in part on *People v. Alvarez* (2002) 27 Cal.4th 1161, 1171 [119 Cal.Rptr.2d 903, 46 P.3d 372], in which the court stated that “[t]here is no requirement of independent evidence ‘of every physical act constituting an element of an offense,’ so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency.” (Citing *People v. Jones* (1998) 17 Cal.4th 279, 303 [70 Cal.Rptr.2d 793, 949 P.2d 890].)

### ***Scope of Corpus Delicti***

The following are not elements of a crime and need not be proved by independent evidence: the degree of the crime charged (*People v. Cooper* (1960) 53 Cal.2d 755, 765 [3 Cal.Rptr. 148, 349 P.2d 964]), the identity of the perpetrator (*People v. Westfall* (1961) 198 Cal.App.2d 598, 601 [18 Cal.Rptr. 356]), elements of the underlying felony when the defendant is charged with felony murder (*People v. Cantrell* (1973) 8 Cal.3d 672, 680–681 [105 Cal.Rptr. 792, 504 P.2d 1256], disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 324 [149 Cal.Rptr. 265, 583 P.2d 1308] and *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]), special circumstances when the defendant is charged with a felony-based special circumstance murder as listed in Penal Code section 190.2(a)(17) (Pen. Code, § 190.41; see *People v. Ray* (1996) 13 Cal.4th 313, 341, fn. 13 [52 Cal.Rptr.2d 296, 914 P.2d 846]), the knowledge and intent required for aider-abettor liability (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1128–1129 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Ott* (1978) 84 Cal.App.3d 118, 131 [148 Cal.Rptr. 479]), or facts necessary for a sentencing enhancement (see *People v. Shoemaker* (1993) 16 Cal.App.4th 243, 252–256 [20 Cal.Rptr.2d 36]).

## **RELATED ISSUES**

### ***Truth-in-Evidence Initiative***

The “truth-in-evidence” provision of the California Constitution abrogates the corpus delicti rule insofar as it restricts the admissibility of incriminatory extrajudicial statements by an accused. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1173–1174 [119 Cal.Rptr.2d 903, 46 P.3d 372]; see Cal. Const., art. I, § 28(d) [Proposition 8 of the June 8, 1982 General Election].) The constitutional provision, however, does not eliminate the rule insofar as it prohibits *conviction* when the only evidence that the crime was committed is the defendant’s own statements outside of court. Thus, the provision does not affect the rule to the extent it requires a jury instruction that no person may be convicted absent evidence of the crime independent of his or her out-of-court statements. (*People v. Alvarez, supra*, 27 Cal.4th at p. 1180.)

## 402. Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)

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The defendant is charged in Count[s] \_\_\_ with \_\_\_\_\_ <insert target offense> and in Counts[s] \_\_\_ with \_\_\_\_\_ <insert non-target offense>.

You must first decide whether the defendant is guilty of \_\_\_\_\_ <insert target offense>. If you find the defendant is guilty of this crime, you must then decide whether (he/she) is guilty of \_\_\_\_\_ <insert non-target offense>.

Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

To prove that the defendant is guilty of \_\_\_\_\_ <insert non-target offense>, the People must prove that:

1. The defendant is guilty of \_\_\_\_\_ <insert target offense>;
2. During the commission of \_\_\_\_\_ <insert target offense> a coparticipant in that \_\_\_\_\_ <insert target offense> committed the crime of \_\_\_\_\_ <insert non-target offense>;

AND

3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of \_\_\_\_\_ <insert non-target offense> was a natural and probable consequence of the commission of the \_\_\_\_\_ <insert target offense>.

A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

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.

**If the \_\_\_\_\_ <insert non-target offense> was committed for a reason independent of the common plan to commit the \_\_\_\_\_ <insert target offense>, then the commission of \_\_\_\_\_ <insert non-target offense> was not a natural and probable consequence of \_\_\_\_\_ <insert target offense>.**

**[Do not consider evidence of defendant's intoxication in deciding whether \_\_\_\_\_ <insert non-target offense> was a natural and probable consequence of \_\_\_\_\_ <insert target offense>.]**

To decide whether the crime of \_\_\_\_\_ <insert non-target offense> was committed, please refer to the separate instructions that I (will give/have given) you on that crime.

[The People allege that the defendant originally intended to aid and abet the commission of either \_\_\_\_\_ <insert target offense> or \_\_\_\_\_ <insert other target offense>. The defendant is guilty of \_\_\_\_\_ <insert non-target offense> if the People have proved that the defendant aided and abetted either \_\_\_\_\_ <insert target offense> or \_\_\_\_\_ <insert other target offense> and that \_\_\_\_\_ <insert non-target offense> was the natural and probable consequence of either \_\_\_\_\_ <insert target offense> or \_\_\_\_\_ <insert other target offense>. However, you do not need to agree on which of these two crimes the defendant aided and abetted.]

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*New January 2006; Revised June 2007, April 2010, February 2013, August 2014* [insert date of council approval]

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on that theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

The court has a **sua sponte** duty to identify and instruct on any target offense relied on by the prosecution as a predicate offense when substantial evidence supports the theory. Give all relevant instructions on the alleged target offense or offenses. The court, however, does not have to instruct on all potential target offenses supported by the evidence if the prosecution does not rely on those offenses. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013]; see *People v. Huynh* (2002) 99 Cal.App.4th 662, 677–678 [121 Cal.Rptr.2d 340] [no sua sponte duty to instruct on simple assault when prosecutor never asked court to consider it as target offense].)

The target offense is the crime that the accused parties intended to commit. The non-target is an additional unintended crime that occurs during the commission of the target.

Give the bracketed paragraph beginning, “Do not consider evidence of defendant’s intoxication,” when instructing on aiding and abetting liability for a non-target offense. (People v. Mendoza (1998) 18 Cal.4th 1114, 1134 [77 Cal.Rptr.2d 428, 959 P.2d 735].)

### **Related Instructions**

Give CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*, before this instruction.

This instruction should be used when the prosecution relies on the Natural and Probable Consequences Doctrine and charges both target and non-target crimes. If only non-target crimes are charged, give CALCRIM No. 403.

### **AUTHORITY**

- Aiding and Abetting Defined. ▶ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Natural and Probable Consequences, Reasonable Person Standard. ▶ *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].
- A Verdict of First Degree Murder May Not Be Based on the Natural and Probable Consequences Doctrine; Murder Under That Doctrine is Second Degree Murder. ▶ *People v. Chiu* (2014) 59 Cal. 4th 155, 166 [172 Cal.Rptr.3d 438, 325 P.3d 972].
- Reasonably Foreseeable Crime Need Not Be Committed for Reason Within Common Plan ▶ *People v. Smith*, 2014 WL 6477208 (Cal.), (2014) \_\_\_\_ Cal.4th \_\_\_\_, \_\_\_\_ [\_\_\_\_ Cal.Rptr.3d \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_].

### **Secondary Sources**

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Introduction to Crimes, §§ 82, 84, 88.

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[1A][a], 85.03[2][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.10[3] (Matthew Bender).

### **COMMENTARY**

In *People v. Prettyman* (1996) 14 Cal.4th 248, 268 [58 Cal.Rptr.2d 827, 926 P.2d 1013],

the court concluded that the trial court must sua sponte identify and describe for the jury any target offenses allegedly aided and abetted by the defendant.

Although no published case to date gives a clear definition of the terms “natural” and “probable,” nor holds that there is a sua sponte duty to define them, we have included a suggested definition. (See *People v. Prettyman*, *supra*, 14 Cal.4th at p. 291 (conc. & dis. opn. of Brown, J.); see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107–109 [17 Cal.Rptr.3d 710, 96 P.3d 30] [court did not err in failing to define “natural and probable”].)

## RELATED ISSUES

### ***Lesser Included Offenses***

The court has a duty to instruct on lesser included offenses that could be the natural and probable consequence of the intended offense when the evidence raises a question whether the greater offense is a natural and probable consequence of the original, intended criminal act. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586-1588 [11 Cal.Rptr.2d 231] [aider and abettor may be found guilty of second degree murder under doctrine of natural and probable consequences although the principal was convicted of first degree murder].)

### ***Specific Intent—Non-Target Crimes***

Before an aider and abettor may be found guilty of a specific intent crime under the natural and probable consequences doctrine, the jury must first find that the perpetrator possessed the required specific intent. (*People v. Patterson* (1989) 209 Cal.App.3d 610, 614 [257 Cal.Rptr. 407] [trial court erroneously failed to instruct the jury that they must find that the perpetrator had the specific intent to kill necessary for attempted murder before they could find the defendant guilty as an aider and abettor under the "natural and probable" consequences doctrine], disagreeing with *People v. Hammond* (1986) 181 Cal.App.3d 463 [226 Cal.Rptr. 475] to the extent it held otherwise.) However, it is not necessary that the jury find that the aider and abettor had the specific intent; the jury must only determine that the specific intent crime was a natural and probable consequence of the original crime aided and abetted. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1586–1587 [11 Cal.Rptr. 2d 231].)

### ***Target and Non-Target Offense May Consist of Same Act***

Although generally, non-target offenses charged under the natural and probable consequences doctrine will be different and typically more serious criminal acts than the target offense alleged, they may consist of the same act with differing mental states. (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1463–1466 [61 Cal.Rptr.2d 680] [defendants were properly convicted of attempted murder as natural and probable consequence of aiding and abetting discharge of firearm from vehicle. Although both

crimes consist of same act, attempted murder requires more culpable mental state].)

***Target Offense Not Committed***

The Supreme Court has left open the question whether a person may be liable under the natural and probable consequences doctrine for a non-target offense, if the target offense was not committed. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, fn. 4 [58 Cal.Rptr.2d 827, 926 P.2d 1013], but see *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1452 [105 Cal.Rptr.3d 575]; *People v. Laster* (1997) 52 Cal.App.4th 1450, 1464-1465 [61 Cal.Rptr.2d 680].)

See generally, the related issues under CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*.

### 403. Natural and Probable Consequences (Only Non-Target Offense Charged)

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[Before you may decide whether the defendant is guilty of \_\_\_\_\_ <insert non-target offense>, you must decide whether (he/she) is guilty of \_\_\_\_\_ <insert target offense>.]

To prove that the defendant is guilty of \_\_\_\_\_ <insert non-target offense>, the People must prove that:

1. The defendant is guilty of \_\_\_\_\_ <insert target offense>;
2. During the commission of \_\_\_\_\_ <insert target offense> a coparticipant in that \_\_\_\_\_ <insert target offense> committed the crime of \_\_\_\_\_ <insert non-target offense>;

AND

3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the \_\_\_\_\_ <insert non-target offense> was a natural and probable consequence of the commission of the \_\_\_\_\_ <insert target offense>.

A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

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. ~~If the \_\_\_\_\_ <insert non-target offense> was committed for a reason independent of the common plan to commit the \_\_\_\_\_ <insert target offense>, then the commission of \_\_\_\_\_ <insert non-target offense> was not a natural and probable consequence of \_\_\_\_\_ <insert target offense>.~~

[Do not consider evidence of defendant's intoxication in deciding whether \_\_\_\_\_ <insert non-target offense> was a natural and probable consequence of \_\_\_\_\_ <insert target offense>.]

To decide whether crime of \_\_\_\_\_ <insert non-target offense> was committed, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].

[The People are alleging that the defendant originally intended to aid and abet \_\_\_\_\_ <insert target offenses>.

If you decide that the defendant aided and abetted one of these crimes and that \_\_\_\_\_ <insert non-target offense> was a natural and probable consequence of that crime, the defendant is guilty of \_\_\_\_\_ <insert non-target offense>. You do not need to agree about which of these crimes the defendant aided and abetted.]

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*New January 2006; Revised June 2007, April 2010, August 2014* *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561 [199 Cal.Rptr. 60, 674 P.2d 1318].)

The court has a **sua sponte** duty to identify and instruct on any target offense relied on by the prosecution as a predicate offense when substantial evidence supports the theory. Give all relevant instructions on the alleged target offense or offenses. The court, however, does not have to instruct on all potential target offenses supported by the evidence if the prosecution does not rely on those offenses. (*People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013]; see *People v. Huynh* (2002) 99 Cal.App.4th 662, 677–678 [121 Cal.Rptr.2d 340] [no sua sponte duty to instruct on simple assault when prosecutor never asked court to consider it as target offense].)

The target offense is the crime that the accused parties intended to commit. The non-target is an additional unintended crime that occurs during the commission of the target.

**Do not** give the first bracketed paragraph in cases in which the prosecution is also pursuing a conspiracy theory.

Give the bracketed paragraph beginning, “Do not consider evidence of defendant’s intoxication,” when instructing on aiding and abetting liability for a non-target

offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134 [77 Cal.Rptr.2d 428, 959 P.2d 735].)

### ***Related Instructions***

Give CALCRIM No. 400, *Aiding and Abetting: General Principles*, and CALCRIM No. 401, *Aiding and Abetting: Intended Crimes*, before this instruction.

This instruction should be used when the prosecution relies on the Natural and Probable Consequences Doctrine and charges only non-target crimes. If both target and non-target crimes are charged, give CALCRIM No. 402.

### **AUTHORITY**

- Aiding and Abetting Defined ▶ *People v. Beeman* (1984) 35 Cal.3d 547, 560–561 [199 Cal.Rptr. 60, 674 P.2d 1318].
- Natural and Probable Consequences, Reasonable Person Standard ▶ *People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].
- No Unanimity Required ▶ *People v. Prettyman* (1996) 14 Cal.4th 248, 267–268 [58 Cal.Rptr.2d 827, 926 P.2d 1013].
- Presence or Knowledge Insufficient ▶ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557 fn.14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87, 926 P.2d 1013].
- Withdrawal ▶ *People v. Norton* (1958) 161 Cal.App.2d 399, 403 [327 P.2d 87]; *People v. Ross* (1979) 92 Cal.App.3d 391, 404–405 [154 Cal.Rptr. 783].
- Verdict of First Degree Murder May Not Be Based on the Natural and Probable Consequences Doctrine; Murder Under That Doctrine is Second Degree Murder ▶ *People v. Chiu* (June 2, 2014, S202724) \_\_\_ Cal.4th \_\_\_, 2014 WL 2450814.
- Reasonably Foreseeable Crime Need Not Be Committed for Reason Within Common Plan ▶ *People v. Smith*, 2014 WL 6477208 (Cal.), (2014) \_\_\_ Cal.4th \_\_\_, \_\_\_ [\_\_\_ Cal.Rptr.3d \_\_\_, \_\_\_ P.3d \_\_\_].

- ***Secondary Sources***

1 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Introduction to Crimes, §§ 82, 84, 88.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, Challenges to Crimes, § 140.10[3] (Matthew Bender).

### COMMENTARY

In *People v. Prettyman* (1996) 14 Cal.4th 248, 268 [58 Cal.Rptr.2d 827, 926 P.2d 1013], the court concluded that the trial court must sua sponte identify and describe for the jury any target offenses allegedly aided and abetted by the defendant.

Although no published case to date gives a clear definition of the terms “natural” and “probable,” nor holds that there is a sua sponte duty to define them, we have included a suggested definition. (See *People v. Prettyman, supra*, 14 Cal.4th at p. 291 (conc. & dis. opn. of Brown, J.); see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107–109 [17 Cal.Rptr.3d 710, 96 P.3d 30] [court did not err in failing to define “natural and probable.”])

### RELATED ISSUES

See the Related Issues section under CALCRIM No. 401, *Aiding and Abetting*, and CALCRIM No. 402, *Natural and Probable Consequences Doctrine (Target and Non-Target Offenses Charged)*.

### 3426. Voluntary Intoxication (Pen. Code, § 22)

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

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

~~[Do not consider evidence of intoxication in deciding whether \_\_\_\_\_ *<insert non-target offense>* was a natural and probable consequence of \_\_\_\_\_ *<insert target offense>*.]~~

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

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

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

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*New January 2006; Revised August 2012, August 2013* *[insert date of council approval]*

## BENCH NOTES

### ***Instructional Duty***

The court has no sua sponte duty to instruct on voluntary intoxication; however, the trial court must give this instruction on request. (*People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364]; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].) Although voluntary intoxication is not an affirmative defense to a crime, the jury may consider evidence of voluntary intoxication and its effect on the defendant's required mental state. (Pen. Code, § 22; *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39] [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735] [relevant to mental state in aiding and abetting].)

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

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

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

~~Give the bracketed paragraph beginning, “Do not consider evidence of intoxication,” when instructing on aiding and abetting liability for a non-target offense. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134 [77 Cal.Rptr.2d 428, 959 P.2d 735].)~~

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

### ***Related Instructions***

CALCRIM No. 3427, *Involuntary Intoxication*.

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

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

## AUTHORITY

- Instructional Requirements ▶ Pen. Code, § 22; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].
- Effect of Prescription Drugs ▶ *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1328, fn. 32 [149 Cal.Rptr.3d 167].

## *Secondary Sources*

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

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

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

## RELATED ISSUES

### *Implied Malice*

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

### *Intoxication Based on Mistake of Fact Is Involuntary*

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

### *Premeditation and Deliberation*

“[T]he trial court has no sua sponte duty to instruct that voluntary intoxication may be considered in determining the existence of premeditation and deliberation.” (*People v. Hughes* (2002) 27 Cal.4th 287, 342 [116 Cal.Rptr.2d 401,

39 P.3d 432], citing *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see *People v. Castillo* (1997) 16 Cal.4th 1009, 1018 [68 Cal.Rptr.2d 648, 945 P.2d 1197] [counsel not ineffective for failing to request instruction specifically relating voluntary intoxication to premeditation and deliberation].)

***Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense***

Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness caused by voluntary intoxication is governed by Penal Code section 22, rather than by section 26 and is only a partial defense to a crime. (*People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [18 Cal.Rptr.2d 431] [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime]; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 423 [79 Cal.Rptr.2d 408, 966 P.2d 442] [“if the intoxication is voluntarily induced, it can never excuse homicide. Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication [citation].”].)

## 460. Attempt Other Than Attempted Murder (Pen. Code, § 21a)

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[The defendant is charged [in Count \_\_\_] with attempted \_\_\_\_\_ <insert target offense>.]

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

1. The defendant took a direct but ineffective step toward committing \_\_\_\_\_ <insert target offense>;

AND

2. The defendant intended to commit \_\_\_\_\_ <insert target offense>.

**A direct step** requires more than merely planning or preparing to commit \_\_\_\_\_ <insert target offense> or obtaining or arranging for something needed to commit \_\_\_\_\_ <insert target offense>. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to commit \_\_\_\_\_ <insert target offense>. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.

[A person who attempts to commit \_\_\_\_\_ <insert target offense> is guilty of attempted \_\_\_\_\_ <insert target offense> even if, after taking a direct step towards committing the crime, he or she abandoned further efforts to complete the crime or if his or her attempt failed or was interrupted by someone or something beyond his or her control. On the other hand, if a person freely and voluntarily abandons his or her plans before taking a direct step toward committing \_\_\_\_\_ <insert target offense>, then that person is not guilty of attempted \_\_\_\_\_ <insert target offense>.]

To decide whether the defendant intended to commit \_\_\_\_\_ <insert target offense>, please refer to the separate instructions that I (will give/have given) you on that crime.

[The defendant may be guilty of attempt even if you conclude that \_\_\_\_\_ <insert target offense> was actually completed.]

New January 2006; Revised August 2013 [insert date of council approval]

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to instruct on the elements of the crime of attempt when charged, or, if not charged, when the evidence raises a question whether all the elements of the charged offense are present. (See *People v. Breverman* (1998) 19 Cal.4th 142, 154 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

If the jury is instructed on attempted criminal threat, give the following third element, as required by *People v. Chandler* (2014) 60 Cal.4th 508, 525 [176 Cal.Rptr.3d 548, 332 P.3d 538] along with CALCRIM No. 1300, *Criminal Threat*.

3. The intended criminal threat was sufficient under the circumstances to cause a reasonable person to be in sustained fear.

If an attempted crime is charged, give the first bracketed paragraph and choose the phrase “this crime” in the opening line of the second paragraph. If an attempted crime is not charged but is a lesser included offense, omit the first bracketed paragraph and insert the attempted target offense in the opening line of the second paragraph.

Give the bracketed paragraph that begins with “A person who attempts to commit” if abandonment is an issue.

If the attempted crime is murder, do not give this instruction; instead give the specific instruction on attempted murder. (*People v. Santascoy* (1984) 153 Cal.App.3d 909, 918 [200 Cal.Rptr. 709]; see CALCRIM No. 600, *Attempted Murder*.)

Do not give this instruction if the crime charged is assault. There can be no attempt to commit assault, since an assault is by definition an attempted battery. (*In re James M.* (1973) 9 Cal.3d 517, 522 [108 Cal.Rptr. 89, 510 P.2d 33].)

If instructing on attempt to escape, see *People v. Bailey* (2012) 54 Cal.4th 740, 748-752 [143 Cal.Rptr.3d 647, 279 P.3d 1120] [specific intent to escape and intent to avoid further confinement required].

## AUTHORITY

- Attempt Defined ▶ Pen. Code, §§ 21a, 664; *People v. Toledo* (2001) 26 Cal.4th 221, 229–230 [109 Cal.Rptr.2d 315, 26 P.3d 1051].
- Conviction for Charged Attempt Even If Crime Is Completed ▶ Pen. Code, § 663.

### ***Secondary Sources***

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Elements, §§ 56-71.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.20 (Matthew Bender).

## **RELATED ISSUES**

### ***Insufficient Evidence of Attempt***

The court is not required to instruct on attempt as a lesser-included offense unless there is sufficient evidence that the crime charged was not completed. (*People v. Aguilar* (1989) 214 Cal.App.3d 1434, 1436 [263 Cal.Rptr. 314]; *People v. Llamas* (1997) 51 Cal.App.4th 1729, 1743–1744 [60 Cal.Rptr.2d 357]; *People v. Strunk* (1995) 31 Cal.App.4th 265, 271–272 [36 Cal.Rptr.2d 868].)

### ***Legal or Factual Impossibility***

Although legal impossibility is a defense to attempt, factual impossibility is not. (*People v. Cecil* (1982) 127 Cal.App.3d 769, 775–777 [179 Cal.Rptr. 736]; *People v. Meyer* (1985) 169 Cal.App.3d 496, 504–505 [215 Cal.Rptr. 352].)

### ***Solicitation***

Some courts have concluded that a mere solicitation is not an attempt. (*People v. Adami* (1973) 36 Cal.App.3d 452, 457 [111 Cal.Rptr. 544]; *People v. La Fontaine* (1978) 79 Cal.App.3d 176, 183 [144 Cal.Rptr. 729], overruled on other grounds in *People v. Lopez* (1998) 19 Cal.4th 282, 292-293 [79 Cal.Rptr.2d 195, 965 P.2d 713].) At least one court disagrees, stating that simply because “an invitation to participate in the defendant’s commission of a crime consists only of words does not mean it cannot constitute an ‘act’ toward the completion of the crime, particularly where the offense by its nature consists of or requires the requested type of participation.” (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1387 [119 Cal.Rptr.2d 199] [attempted lewd acts on a child under Pen. Code, § 288(c)(1)]; see *People v. Delvalle* (1994) 26 Cal.App.4th 869, 877 [31 Cal.Rptr.2d 725].)

***Specific Intent Crime***

An attempted offense is a specific intent crime, even if the underlying crime requires only general intent. (See *People v. Martinez* (1980) 105 Cal.App.3d 938, 942 [165 Cal.Rptr. 11].) However, an attempt is not possible if the underlying crime can only be committed unintentionally. (See *People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [59 Cal.Rptr.2d 798] [no attempted involuntary manslaughter].)

**461–499. Reserved for Future Use**

### 1300. Criminal Threat (Pen. Code, § 422)

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The defendant is charged [in Count \_\_\_] with having made a criminal threat [in violation of Penal Code section 422].

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

1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to \_\_\_\_\_ <insert name of complaining witness or member[s] of complaining witness's immediate family>;
2. The defendant made the threat (orally/in writing/by electronic communication device);
3. The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to \_\_\_\_\_ <insert name of complaining witness>];
4. The threat was so clear, immediate, unconditional, and specific that it communicated to \_\_\_\_\_ <insert name of complaining witness> a serious intention and the immediate prospect that the threat would be carried out;
5. The threat actually caused \_\_\_\_\_ <insert name of complaining witness> to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];

AND

6. \_\_\_\_\_'s <insert name of complaining witness> fear was reasonable under the circumstances.

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

In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances.

Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].

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

*Sustained fear* means fear for a period of time that is more than momentary, fleeting, or transitory.

[An immediate ability to carry out the threat is not required.]

[An *electronic communication device* includes, but is not limited to: a telephone, cellular telephone, pager, computer, video recorder, or fax machine.]

[*Immediate family* means (a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers and sisters related by blood or marriage; or (c) any person who regularly lives in the other person's household [or who regularly lived there within the prior six months].]

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New January 2006; Revised August 2006; June 2007 [[insert date of council approval](#)]

## BENCH NOTES

### *Instructional Duty*

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

A specific crime or the elements of any specific Penal Code violation that might be subsumed within the actual words of any threat need not be identified for the jury. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 758 [102 Cal.Rptr.2d 269].) The threatened acts or crimes may be described on request depending on the nature of the threats or the need to explain the threats to the jury. (*Id.* at p. 760.)

When the threat is conveyed through a third party, give the appropriate bracketed language in element three. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913 [112 Cal.Rptr.2d 311]; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861–862 [123 Cal.Rptr.2d 193] [insufficient evidence minor intended to convey threat to victim].)

Give the bracketed definition of “electronic communication” on request. (Pen. Code, § 422; 18 U.S.C., § 2510(12).)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, the bracketed phrase in element 5 and the final bracketed paragraph defining “immediate family” should be given on request. (See Pen. Code, § 422; Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

[If instructing on attempted criminal threat, give the third element in the bench notes of CALCRIM No. 460, \*Attempt Other Than Attempted Murder\*. \(\*People v. Chandler\* \(2014\) 60 Cal.4th 508, 525 \[176 Cal.Rptr.3d 548, 332 P.3d 538\].](#)

## AUTHORITY

- Elements ▶ Pen. Code, § 422; *In re George T.* (2004) 33 Cal.4th 620, 630 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f).
- Sufficiency of Threat Based on All Surrounding Circumstances ▶ *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [69 Cal.Rptr.2d 728]; *People v. Butler* (2000) 85 Cal.App.4th 745, 752–753 [102 Cal.Rptr.2d 269]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218–1221 [62 Cal.Rptr.2d 303]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137–1138 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013–1014 [109 Cal.Rptr.2d 464]; see *People v. Garrett* (1994) 30 Cal.App.4th 962, 966–967 [36 Cal.Rptr.2d 33].
- Crime that Will Result in Great Bodily Injury Judged on Objective Standard ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 [6 Cal.Rptr.3d 628].
- Threat Not Required to Be Unconditional ▶ *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76]; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [38 Cal.Rptr.2d 328].
- Conditional Threat May Be True Threat, Depending on Context ▶ *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1540 [70 Cal.Rptr.2d 878].
- Immediate Ability to Carry Out Threat Not Required ▶ *People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [88 Cal.Rptr.2d 252].
- Sustained Fear ▶ *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139–1140 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1024 [109

Cal.Rptr.2d 464]; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155–1156 [40 Cal.Rptr.2d 7].

- Verbal Statement, Not Mere Conduct, Is Required ▶ *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441–1442 [106 Cal.Rptr.2d 773].
- Statute Not Unconstitutionally Vague ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 684–686 [6 Cal.Rptr.3d 628].
- [Attempted Criminal Threats ▶ \*People v. Chandler\* \(2014\) 60 Cal.4th 508, 525 \[176 Cal.Rptr.3d 548, 332 P.3d 538\]](#) .

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. 200012) Crimes Against Public Peace and Welfare, § ~~2224~~30.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.11A[1] (Matthew Bender).

## COMMENTARY

This instruction uses the current nomenclature “criminal threat,” as recommended by the Supreme Court in *People v. Toledo* (2001) 26 Cal.4th 221, 224, fn. 1 [109 Cal.Rptr.2d 315, 26 P.3d 1051] [previously called “terrorist threat”]. (See also Stats. 2000, ch. 1001, § 4.)

## LESSER INCLUDED OFFENSES

- Attempted Criminal Threat ▶ See Pen. Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 230–231 [109 Cal.Rptr.2d 315, 26 P.3d 1051].
- Threatening a public officer of an educational institution in violation of Penal Code section 71 may be a lesser included offense of a section 422 criminal threat under the accusatory pleadings test. (*In re Marcus T.* (2001) 89 Cal.App.4th 468, 472–473 [107 Cal.Rptr.2d 451].) But see *People v. Chaney* (2005) 131 Cal.App.4th 253, 257–258 [31 Cal.Rptr.3d 714], finding that a violation of section 71 is not a lesser included offense of section 422 under the accusatory pleading test when the pleading does not specifically allege the intent to cause (or attempt to cause) a public officer to do (or refrain from doing) an act in the performance of official duty.

## RELATED ISSUES

### ***Ambiguous and Equivocal Poem Insufficient to Establish Criminal Threat***

In *In re George T.* (2004) 33 Cal.4th 620, 628–629 [16 Cal.Rptr.3d 61, 93 P.3d 1007], a minor gave two classmates a poem containing language that referenced school shootings. The court held that “the text of the poem, understood in light of the surrounding circumstances, was not ‘as unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat.’ ” (*Id.* at p. 638.)

### ***Related Statutes***

Other statutes prohibit similar threatening conduct against specified individuals. (See, e.g., Pen. Code, §§ 76 [threatening elected public official, judge, etc., or staff or immediate family], 95.1 [threatening jurors after verdict], 139 [threatening witness or victim after conviction of violent offense], 140 [threatening witness, victim, or informant].)

### ***Unanimity Instruction***

If the evidence discloses a greater number of threats than those charged, the prosecutor must make an election of the events relied on in the charges. When no election is made, the jury must be given a unanimity instruction. (*People v. Butler* (2000) 85 Cal.App.4th 745, 755, fn. 4 [102 Cal.Rptr.2d 269]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, 1539 [70 Cal.Rptr.2d 878].)

### ***Whether Threat Actually Received***

If a threat is intended to and does induce a sustained fear, the person making the threat need not know whether the threat was actually received. (*People v. Teal* (1998) 61 Cal.App.4th 277, 281 [71 Cal.Rptr.2d 644].)

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

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<Select the appropriate section[s]. Give the final paragraph in every case.>

<Give if multiple theories alleged.>

**[The defendant has been prosecuted for first degree murder under (two/\_\_\_ <insert number>) theories: (1) \_\_\_\_\_ <insert first theory, e.g., “the murder was willful, deliberate, and premeditated”> [and] (2) \_\_\_\_\_ <insert second theory, e.g., “the murder was committed by lying in wait”> [\_\_\_\_\_ <insert additional theories>].**

**Each theory of first degree murder has different requirements, and I will instruct you on (both/all \_\_\_ <insert number>).**

**You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.]**

<A. Deliberation and Premeditation>

**[The defendant is guilty of first degree murder if the People have proved that (he/she) acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if (he/she) intended to kill. The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant *acted with premeditation* if (he/she) decided to kill before completing the act[s] that caused death.**

**The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.]**

<B. Torture>

**[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by torture. The defendant murdered by torture if:**

1. (He/She) willfully, deliberately, and with premeditation intended to inflict extreme and prolonged pain on the person killed while that person was still alive;
2. (He/She) intended to inflict such pain on the person killed for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason;
3. The acts causing death involved a high degree of probability of death;

AND

4. The torture was a cause of death.]

[A person commits an act *willfully* when he or she does it willingly or on purpose. A person *deliberates* if he or she carefully weighs the considerations for and against his or her choice and, knowing the consequences, decides to act.

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

~~An act is done with premeditation if the decision to commit the act is made before the act is done.]~~

[There is no requirement that the person killed be aware of the pain.]

[A finding of torture does not require that the defendant intended to kill.]

<C. Lying in Wait>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if:

1. (He/She) concealed (his/her) purpose from the person killed;
2. (He/She) waited and watched for an opportunity to act;

AND

3. Then, from a position of advantage, (he/she) intended to and did make a surprise attack on the person killed.

The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. [*Deliberation* means carefully weighing the considerations for and against a choice and, knowing the consequences, deciding to act. An act is done with *premeditation* if the decision to commit the act is made before the act is done.]

[A person can conceal his or her purpose even if the person killed is aware of the person's physical presence.]

[The concealment can be accomplished by ambush or some other secret plan.]]

<D. Destructive Device or Explosive>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a destructive device or explosive.]

[An *explosive* is any substance, or combination of substances, (1) whose main or common purpose is to detonate or rapidly combust and (2) which is capable of a relatively instantaneous or rapid release of gas and heat.]

[An *explosive* is [also] any substance whose main purpose is to be combined with other substances to create a new substance that can release gas and heat rapidly or relatively instantaneously.]

[ \_\_\_\_\_ <insert type of explosive from Health & Saf. Code, § 12000> is an *explosive*.]

[A *destructive device* is \_\_\_\_\_ <insert definition supported by evidence from Pen. Code, § 16460>.]

[ \_\_\_\_\_ <insert type of destructive device from Pen. Code, § 16460> is a *destructive device*.]

<E. Weapon of Mass Destruction>

[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using a weapon of mass destruction.

[ \_\_\_\_\_ <insert type of weapon from Pen. Code, § 11417(a)(1)> is a *weapon of mass destruction*.]

[ \_\_\_\_\_ <insert type of agent from Pen. Code, § 11417(a)(2)> is a *chemical warfare agent*.]

*<F. Penetrating Ammunition>*

**[The defendant is guilty of first degree murder if the People have proved that when the defendant murdered, (he/she) used ammunition designed primarily to penetrate metal or armor to commit the murder and (he/she) knew that the ammunition was designed primarily to penetrate metal or armor.]**

*<G. Discharge From Vehicle>*

**[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by shooting a firearm from a motor vehicle. The defendant committed this kind of murder if:**

- 1. (He/She) shot a firearm from a motor vehicle;**
- 2. (He/She) intentionally shot at a person who was outside the vehicle;**

**AND**

- 3. (He/She) intended to kill that person.**

**A *firearm* is any device designed to be used as a weapon, from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.**

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

*<H. Poison>*

**[The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using poison.**

**[*Poison* is a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.]**

**[ \_\_\_\_\_ *<insert name of substance>* is a *poison*.]**

**[The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, *First or Second Degree Murder With Malice Aforethought*.]**

**The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder.**

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*New January 2006; Revised August 2006; June 2007, April 2010, October 2010, February 2012, February 2013 [insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Before giving this instruction, the court must give CALCRIM No. 520, *Murder With Malice Aforethought*. Depending on the theory of first degree murder relied on by the prosecution, give the appropriate alternatives A through H.

The court **must give** the final paragraph in every case.

If the prosecution alleges two or more theories for first degree murder, give the bracketed section that begins with “The defendant has been prosecuted for first degree murder under.” If the prosecution alleges felony murder in addition to one of the theories of first degree murder in this instruction, give CALCRIM No. 548, *Murder: Alternative Theories*, instead of the bracketed paragraph contained in this instruction.

When instructing on torture or lying in wait, give the bracketed sections explaining the meaning of “deliberate” and “premeditated” if those terms have not already been defined for the jury.

When instructing on murder by weapon of mass destruction, explosive, or destructive device, the court may use the bracketed sentence stating, “\_\_\_\_\_ is a weapon of mass destruction” or “is a chemical warfare agent,” only if the device used is listed in the code section noted in the instruction. For example, “Sarin is a chemical warfare agent.” However, the court may not instruct the jury that the defendant used the prohibited weapon. For example, the court may not state, “the defendant used a chemical warfare agent, sarin,” or “the material used by the defendant, sarin, was a chemical warfare agent.” (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25–26 [39 Cal.Rptr.2d 257].)

## AUTHORITY

- Types of Statutory First Degree Murder ▶ Pen. Code, § 189.
- Armor Piercing Ammunition Defined ▶ Pen. Code, § 16660.
- Destructive Device Defined ▶ Pen. Code, § 16460.
- For Torture, Act Causing Death Must Involve a High Degree of Probability of Death ▶ *People v. Cook* (2006) 39 Cal.4th 566, 602 [47 Cal.Rptr.3d 22, 139 P.3d 492].
- Mental State Required for Implied Malice ▶ *People v. Knoller* (2007) 41 Cal.4th 139, 143 [59 Cal.Rptr.3d 157, 158 P.3d 731].
- Explosive Defined ▶ Health & Saf. Code, § 12000; *People v. Clark* (1990) 50 Cal.3d 583, 604 [268 Cal.Rptr. 399, 789 P.2d 127].
- Weapon of Mass Destruction Defined ▶ Pen. Code, § 11417.
- Discharge From Vehicle ▶ *People v. Chavez* (2004) 118 Cal.App.4th 379, 386–387 [12 Cal.Rptr.3d 837] [drive-by shooting clause is not an enumerated felony for purposes of the felony murder rule].
- Lying in Wait Requirements ▶ *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1139 [17 Cal.Rptr.2d 375, 847 P.2d 55]; *People v. Webster* (1991) 54 Cal.3d 411, 448 [285 Cal.Rptr. 31, 814 P.2d 1273]; *People v. Poindexter* (2006) 144 Cal.App.4th 572, 582-585 [50 Cal.Rptr.3d 489]; *People v. Laws* (1993) 12 Cal.App.4th 786, 794–795 [15 Cal.Rptr.2d 668].
- Poison Defined ▶ *People v. Van Deleer* (1878) 53 Cal. 147, 149.
- Premeditation and Deliberation Defined ▶ [\*People v. Pearson\* \(2013\) 56 Cal.4th 393, 443-444 \[154 Cal.Rptr.3d 541, 297 P.3d 793\]](#); *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].
- Torture Requirements ▶ *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101 [259 Cal.Rptr. 630, 774 P.2d 659], habeas corpus granted in part on other grounds in *In re Bittaker* (1997) 55 Cal.App.4th 1004 [64 Cal.Rptr.2d 679]; *People v. Wiley* (1976) 18 Cal.3d 162, 168–172 [133 Cal.Rptr. 135, 554 P.2d 881]; see also *People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739] [comparing torture murder with torture].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Crimes Against the Person, §§ ~~117.02–162~~.

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

## LESSER INCLUDED OFFENSES

- Murder ▶ Pen. Code, § 187.
- Voluntary Manslaughter ▶ Pen. Code, § 192(a).
- Involuntary Manslaughter ▶ Pen. Code, § 192(b).
- Attempted First Degree Murder ▶ Pen. Code, §§ 663, 189.
- Attempted Murder ▶ Pen. Code, §§ 663, 187.

## RELATED ISSUES

### ***Premeditation and Deliberation—Anderson Factors***

Evidence in any combination from the following categories suggests premeditation and deliberation: (1) events before the murder that indicate planning; (2) motive, specifically evidence of a relationship between the victim and the defendant; and (3) method of the killing that is particular and exacting and evinces a preconceived design to kill. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942].) Although these categories have been relied on to decide whether premeditation and deliberation are present, an instruction that suggests that each of these factors *must* be found in order to find deliberation and premeditation is not proper. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1020–1021 [245 Cal.Rptr. 185, 750 P.2d 1342].) *Anderson* also noted that the brutality of the killing alone is not sufficient to support a finding that the killer acted with premeditation and deliberation. Thus, the infliction of multiple acts of violence on the victim without any other evidence indicating premeditation will not support a first degree murder conviction. (*People v. Anderson, supra*, 70 Cal.2d at pp. 24–25.) However, “[t]he *Anderson* guidelines are descriptive, not normative.” (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 [9 Cal.Rptr.2d 577, 831 P.2d 1159].) The holding did not alter the elements of murder or substantive law but was intended to provide a “framework to aid in appellate review.” (*Ibid.*)

### ***Premeditation and Deliberation—Heat of Passion Provocation***

Provocation may reduce murder from first to second degree. (*People v. Thomas* (1945) 25 Cal.2d 880, 903 [156 P.2d 7] [provocation raised reasonable doubt about premeditation or deliberation, “leaving the homicide as murder of the

second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation”]; see *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 [126 Cal.Rptr.2d 889] [evidence of hallucination is admissible at guilt phase to negate deliberation and premeditation and to reduce first degree murder to second degree murder.] There is, however, no sua sponte duty to instruct the jury on this issue. (*People v. Middleton* (1997) 52 Cal.App.4th 19, 31–33 [60 Cal.Rptr.2d 366], disapproved on other grounds in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752 [3 Cal.Rptr.3d 676, 74 P.3d 771].) On request, give CALCRIM No. 522, *Provocation: Effect on Degree of Murder*.

### ***Torture—Causation***

The finding of murder by torture encompasses the totality of the brutal acts and circumstances that led to a victim’s death. “The acts of torture may not be segregated into their constituent elements in order to determine whether any single act by itself caused the death; rather, it is the continuum of sadistic violence that constitutes the torture [citation].” (*People v. Proctor* (1992) 4 Cal.4th 499, 530–531 [15 Cal.Rptr.2d 340, 842 P.2d 1100].)

### ***Torture—Instruction on Voluntary Intoxication***

“[A] court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the specific intent to inflict cruel suffering.” (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1242 [278 Cal.Rptr. 640, 805 P.2d 899]; see CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.)

### ***Torture—Pain Not an Element***

All that is required for first degree murder by torture is the calculated *intent to cause pain* for the purpose of revenge, extortion, persuasion, or any other sadistic purpose. There is no requirement that the victim actually suffer pain. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1239 [278 Cal.Rptr. 640, 805 P.2d 899].)

### ***Torture—Premeditated Intent to Inflict Pain***

Torture-murder, unlike the substantive crime of torture, requires that the defendant acted with deliberation and premeditation when inflicting the pain. (*People v. Pre* (2004) 117 Cal.App.4th 413, 419–420 [11 Cal.Rptr.3d 739]; *People v. Mincey* (1992) 2 Cal.4th 408, 434–436 [6 Cal.Rptr.2d 822, 827 P.2d 388].)

### ***Lying in Wait—Length of Time Equivalent to Premeditation and Deliberation***

In *People v. Stanley* (1995) 10 Cal.4th 764, 794 [42 Cal.Rptr.2d 543, 897 P.2d 481], the court approved this instruction regarding the length of time a person lies in wait: “[T]he lying in wait need not continue for any particular time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.”

***Discharge From a Vehicle—Vehicle Does Not Have to Be Moving***

Penal Code section 189 does not require the vehicle to be moving when the shots are fired. (Pen. Code, § 189; see also *People v. Bostick* (1996) 46 Cal.App.4th 287, 291 [53 Cal.Rptr.2d 760] [finding vehicle movement is not required in context of enhancement for discharging firearm from motor vehicle under Pen. Code, § 12022.55].)

**601. Attempted Murder: Deliberation and Premeditation (Pen. Code, §§ 21a, 189, 664(a))**

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**If you find the defendant guilty of attempted murder [under Count \_\_\_], you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation.**

(The defendant/ \_\_\_\_\_ <insert name or description of principal if not defendant>) **acted willfully if (he/she) intended to kill when (he/she) acted.**  
(The defendant/ \_\_\_\_\_ <insert name or description of principal if not defendant>) **deliberated if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill.**  
(The defendant/ \_\_\_\_\_ <insert name or description of principal if not defendant>) **acted with premeditation if (he/she) decided to kill before completing the act[s] that caused death.** ~~premeditated if (he/she) decided to kill before acting.~~

[The attempted murder was done willfully and with deliberation and premeditation if either the defendant or \_\_\_\_\_ <insert name or description of principal> or both of them acted with that state of mind.]

The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.

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

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*New January 2006; Revised February 2013* *[insert date of council approval]*

**BENCH NOTES**

***Instructional Duty***

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

the sentencing enhancement. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 475–476, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; Pen. Code, § 664(a).) Give this instruction when an enhancement for deliberation and premeditation is charged.

This instruction **must** be given with CALCRIM No. 600, *Attempted Murder*.

When a charged attempted murder also forms the basis for a charge of provocative act murder, the court must take care to clarify that the defendant must have personally premeditated and deliberated an attempted murder in order to be convicted of *first degree murder* resulting from attempted murder under the provocative act doctrine. As described in CALCRIM No. 560, *Homicide: Provocative Act by Defendant*, the mental state for first degree murder under the provocative act murder doctrine requires that the defendant “personally premeditated and deliberated the attempted murder that provoked a lethal response.” (*People v. Gonzalez* (2012) 54 Cal.4th 643, 662 [142 Cal.Rptr.3d 893, 278 P.3d 1242].)

## AUTHORITY

- Willful, Deliberate, and Premeditated Murder ▶ Pen. Code, § 189.
- Willful, Deliberate, and Premeditated Attempted Murder ▶ Pen. Code, § 664(a).
- Premeditation and Deliberation Defined ▶ *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 [73 Cal.Rptr. 550, 447 P.2d 942]; *People v. Bender* (1945) 27 Cal.2d 164, 183–184 [163 P.2d 8]; *People v. Daugherty* (1953) 40 Cal.2d 876, 901–902 [256 P.2d 911].
- Attempted Premeditated Murder and the Natural and Probable Consequences Doctrine ▶ *People v. Favor* (2012) 54 Cal.4th 868, 879 [143 Cal.Rptr.3d 659, 279 P.3d 1131].

## Secondary Sources

1 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Elements, §§ ~~53–67~~56–57.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.02[3]; Ch. 141, *Conspiracy, Solicitation, and Attempt*, §§ 141.20[2], 141.21; Ch. 142, *Crimes Against the Person*, § 142.01[1][e], [g], [3][e] (Matthew Bender).

## RELATED ISSUES

### ***Accomplice Liability***

An aider and abettor is subject to this penalty provision where the principal attempted a willful, deliberate, and premeditated murder even though the accomplice did not personally deliberate or premeditate. (*People v. Lee* (2003) 31 Cal.4th 613, 622–623 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Laster* (1997) 52 Cal.App.4th 1450, 1473 [61 Cal.Rptr.2d 680].) The accomplice must still share the intent to kill. (*People v. Lee, supra*, 31 Cal.4th at pp. 623–624.)

See the Related Issues Section to CALCRIM No. 521, *Murder: Degrees* for discussion of “deliberate and premeditated.”

**540B. Felony Murder: First Degree—Coparticipant Allegedly Committed Fatal Act (Pen. Code, § 189)**

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*<Give the following introductory sentence when not giving CALCRIM No. 540A.>*  
[The defendant is charged [in Count \_\_\_] with murder, under a theory of felony murder.]

The defendant may [also] be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the *perpetrator*.

To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

1. The defendant (committed [or attempted to commit][,]/ [or] aided and abetted[,]/ [or] was a member of a conspiracy to commit) \_\_\_\_\_ *<insert felony or felonies from Pen. Code, § 189>*;
2. The defendant (intended to commit[,]/ [or] intended to aid and abet the perpetrator in committing[,]/ [or] intended that one or more of the members of the conspiracy commit) \_\_\_\_\_ *<insert felony or felonies from Pen. Code, § 189>*;
3. If the defendant did not personally commit [or attempt to commit] \_\_\_\_\_ *<insert felony or felonies from Pen. Code, § 189>*, then a perpetrator, (whom the defendant was aiding and abetting/ [or] with whom the defendant conspired), **personally** committed [or attempted to commit] \_\_\_\_\_ *<insert felony or felonies from Pen. Code, § 189>*;

**AND**

4. While committing [or attempting to commit] \_\_\_\_\_ *<insert felony or felonies from Pen. Code, § 189>*, the **[defendant or]** perpetrator caused the death of another person.

A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

To decide whether (the defendant/ [and] the perpetrator) committed [or attempted to commit] \_\_\_\_\_ *<insert felony or felonies from Pen. Code, §*

189>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]. [To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I (will give/have given) you on aiding and abetting.] [To decide whether the defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I (will give/have given) you on conspiracy.] You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

*<Make certain that all appropriate instructions on all underlying felonies, aiding and abetting, and conspiracy are given.>*

[The defendant must have (intended to commit[,]/ [or] aid and abet[,]/ [or] been a member of a conspiracy to commit) the (felony/felonies) of \_\_\_\_\_  
*<insert felony or felonies from Pen. Code, § 189>* before or at the time that (he/she) caused the death.]

[It is not required that the person die immediately, as long as the act causing death occurred while the defendant was committing the (felony/felonies).]

[It is not required that the person killed be the (victim/intended victim) of the (felony/felonies).]

[It is not required that the defendant be present when the act causing the death occurs.]

[You may not find the defendant guilty of felony murder unless all of you agree that the defendant or a perpetrator caused the death of another. You do not all need to agree, however, whether the defendant or a perpetrator caused that death.]

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*New January 2006; Revised April 2010, August 2013* *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. The court also has a **sua sponte** duty to instruct on the elements of any underlying felonies. (*People v. Cain* (1995) 10 Cal.4th 1, 36 [40 Cal.Rptr.2d 481, 892 P.2d 1224].)

If the facts raise an issue whether the homicidal act caused the death, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*.

If the prosecution’s theory is that the defendant, as well as the perpetrator, committed or attempted to commit the underlying felony or felonies, then select “committed [or attempted to commit]” in element 1 and “intended to commit” in element 2. In addition, in the paragraph that begins with “To decide whether,” select both “the defendant and the perpetrator.” Give all appropriate instructions on any underlying felonies with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state “the defendant and the perpetrator each committed [the crime] if . . . .”

If the prosecution’s theory is that the defendant aided and abetted or conspired to commit the felony, select one or both of these options in element 1 and the corresponding intent requirements in element 2. In addition, in the paragraph that begins with “To decide whether,” select “the perpetrator” in the first sentence. Give the second and/or third bracketed sentences. Give all appropriate instructions on any underlying felonies and on aiding and abetting and/or conspiracy with this instruction. The court may need to modify the first sentence of the instruction on an underlying felony if the defendant is not separately charged with that offense. The court may also need to modify the instruction to state “the perpetrator committed,” rather than “the defendant,” in the instructions on the underlying felony.

If the defendant was a nonkiller who fled, leaving behind an accomplice who killed, see *People v. Cavitt* (2004) 33 Cal.4th 187, 206, fn. 7 [14 Cal.Rptr.3d 281, 91 P.3d 222] [continuous transaction] and the discussion of *Cavitt* in *People v. Wilkins* (2013) 56 Cal.4th 333, 344 [153 Cal.Rptr.3d 519, 295 P.3d 903].

If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. (*People v. Hudson* (1955) 45 Cal.2d 121, 124–127 [287 P.2d 497]; *People v. Silva* (2001) 25 Cal.4th 345, 371 [106 Cal.Rptr.2d 93, 21 P.3d 769].) Give the bracketed sentence that begins with “The defendant must have (intended to commit.” For an instruction specially tailored to robbery-murder cases, see *People v. Turner* (1990) 50 Cal.3d 668, 691 [268 Cal.Rptr. 706, 789 P.2d 887].

Give the bracketed sentence that begins with “It is not required that the person die immediately” on request if relevant based on the evidence.

The felony-murder rule does not require that the person killed be the victim of the underlying felony. (*People v. Johnson* (1972) 28 Cal.App.3d 653, 658 [104 Cal.Rptr. 807] [accomplice]; *People v. Welch* (1972) 8 Cal.3d 106, 117–119 [104 Cal.Rptr. 217, 501 P.2d 225] [innocent bystander]; *People v. Salas* (1972) 7 Cal.3d 812, 823 [103 Cal.Rptr. 431, 500 P.2d 7] [police officer].) Give the bracketed sentence that begins with “It is not required that the person killed be” on request.

Give the last bracketed sentence, stating that the defendant need not be present, on request.

If the prosecutor is proceeding under both malice and felony-murder theories, give CALCRIM No. 548, *Murder: Alternative Theories*. If the prosecutor is relying only on a theory of felony murder, no instruction on malice should be given. (See *People v. Cain* (1995) 10 Cal.4th 1, 35–37 [40 Cal.Rptr.2d 481, 892 P.2d 1224] [error to instruct on malice when felony murder only theory].)

There is **no** sua sponte duty to clarify the logical nexus between the felony and the homicidal act. If an issue about the logical nexus requirement arises, the court may give the following language:

**There must be a logical connection between the cause of death and the \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189> [or attempted \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189>]. The connection between the cause of death and the \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189> [or attempted \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189>] must involve more than just their occurrence at the same time and place.]**

*People v. Cavitt* (2004) 33 Cal.4th 187, 203–204 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Wilkins* (2013) 56 Cal.4th 333, 347 [153 Cal.Rptr.3d 519, 295 P.3d 903].

#### ***Related Instructions—Other Causes of Death***

This instruction should be used only when the prosecution alleges that a coparticipant in the felony committed the act causing the death.

When the alleged victim dies during the course of the felony as a result of a heart attack, a fire, or a similar cause, rather than as a result of some act of force or violence committed against the victim by one of the participants, give CALCRIM No. 540C, *Felony Murder: First Degree—Other Acts Allegedly Caused Death*. (Cf. *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d

542]; *People v. Stamp* (1969) 2 Cal.App.3d 203, 209–211 [82 Cal.Rptr. 598]; *People v. Hernandez* (1985) 169 Cal.App.3d 282, 287 [215 Cal.Rptr. 166]; but see *People v. Gunnerson* (1977) 74 Cal.App.3d 370, 378–381 [141 Cal.Rptr. 488] [simultaneous or coincidental death is not killing].)

If the evidence indicates that someone other than the defendant or a coparticipant committed the fatal act, then the crime is not felony murder. (*People v. Washington* (1965) 62 Cal.2d 777, 782–783 [44 Cal.Rptr. 442, 402 P.2d 130]; *People v. Caldwell* (1984) 36 Cal.3d 210, 216 [203 Cal.Rptr. 433, 681 P.2d 274]; see also *People v. Gardner* (1995) 37 Cal.App.4th 473, 477 [43 Cal.Rptr.2d 603].) Liability may be imposed, however, under the provocative act doctrine. (*Pizano v. Superior Court of Tulare County* (1978) 21 Cal.3d 128, 134 [145 Cal.Rptr. 524, 577 P.2d 659]; see CALCRIM No. 560, *Homicide: Provocative Act by Defendant*.)

### ***Related Instructions***

CALCRIM No. 400 et seq., *Aiding and Abetting: General Principles*.

CALCRIM No. 415 et seq., *Conspiracy*.

## **AUTHORITY**

- Felony Murder: First Degree ▶ Pen. Code, § 189.
- Specific Intent to Commit Felony Required ▶ *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140 [124 Cal.Rptr.2d 373, 52 P.3d 572].
- Infliction of Fatal Injury ▶ *People v. Alvarez* (1996) 14 Cal.4th 155, 222–223 [58 Cal.Rptr.2d 385, 926 P.2d 365].
- Defendant Must Join Felonious Enterprise Before or During Killing of Victim ▶ *People v. Pulido* (1997) 15 Cal.4th 713, 726 [63 Cal.Rptr.2d 625, 936 P.2d 1235].
- Logical Nexus Between Felony and Killing ▶ *People v. Dominguez* (2006) 39 Cal.4th 1141 [47 Cal.Rptr.3d 575, 140 P.3d 866]; *People v. Cavitt* (2004) 33 Cal.4th 187, 197–206 [14 Cal.Rptr.3d 281, 91 P.3d 222].
- Merger Doctrine Does Not Apply to First Degree Felony Murder ▶ *People v. Farley* (2009) 46 Cal.4th 1053, 1118–1120 [96 Cal.Rptr.3d 191, 210 P.3d 361].

### ***Secondary Sources***

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Introduction to Crimes, §§ 98, 109.

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 151–168, 178.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.10[3][b], Ch. 142, *Crimes Against the Person*, § 142.01[1][e], [2][b] (Matthew Bender).

## RELATED ISSUES

### ***Conspiracy Liability—Natural and Probable Consequences***

In the context of nonhomicide crimes, a coconspirator is liable for any crime committed by a member of the conspiracy that was a natural and probable consequence of the conspiracy. (*People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 842–843 [68 Cal.Rptr.2d 388].) This is analogous to the rule in aiding and abetting that the defendant may be held liable for any unintended crime that was the natural and probable consequence of the intended crime. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531 [26 Cal.Rptr.2d 323].) In the context of felony murder, the Supreme Court has explicitly held that the natural and probable consequences doctrine does not apply to a defendant charged with felony murder based on aiding and abetting the underlying felony. (See *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1658 [285 Cal.Rptr. 523].) The court has not explicitly addressed whether the natural and probable consequences doctrine continues to limit liability for felony murder where the defendant’s liability is based solely on being a member of a conspiracy.

In *People v. Pulido* (1997) 15 Cal.4th 713, 724 [63 Cal.Rptr.2d 625, 936 P.2d 1235], the court stated in dicta, “[f]or purposes of complicity in a cofelon’s homicidal act, the conspirator and the abettor stand in the same position. [Citation; quotation marks omitted.] In stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement (conspirators) from those who intentionally assisted without such agreement (aiders and abettors). [Citations].” In the court’s two most recent opinions on felony-murder complicity, the court refers to the liability of “cofelons” or “accomplices” without reference to whether liability is based on directly committing the offense, aiding and abetting the offense, or conspiring to commit the offense. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197–205 [14 Cal.Rptr.3d 281, 91 P.3d 222]; *People v. Billa* (2003) 31 Cal.4th 1064, 1072 [6 Cal.Rptr.3d 425, 79 P.3d 542].) On the other hand, in both of these cases, the defendants were present at the scene of the felony and directly committed the felonious acts. (*People v. Cavitt, supra*, 33 Cal.4th at p. 194; *People v. Billa, supra*, 31 Cal.4th at p. 1067.) Thus, the court has not had occasion recently to

address a situation in which the defendant was convicted of felony murder based solely on a theory of coconspirator liability.

The requirement for a logical nexus between the felony and the act causing the death, articulated in *People v. Cavitt, supra*, 33 Cal.4th at p. 193, may be sufficient to hold a conspiring defendant liable for the resulting death under the felony-murder rule. However, *Cavitt* did not clearly answer this question. Nor has any case explicitly held that the natural and probable consequences doctrine does not apply in the context of felony murder based on conspiracy.

Thus, if the trial court is faced with a factual situation in which the defendant's liability is premised solely on being a member of a conspiracy in which another coparticipant killed an individual, the committee recommends that the court do the following: (1) give optional element on logical connection provided above; (2) request briefing and review the current law on conspiracy liability and felony murder; and (3) at the court's discretion, add as an additional element: "The act causing the death was a natural and probable consequence of the plan to commit \_\_\_\_\_ <insert felony or felonies from Pen. Code, § 189>."

See the Related Issues section of CALCRIM No. 540A, *Felony Murder: First Degree—Defendant Allegedly Committed Fatal Act*.

**571. Voluntary Manslaughter: Imperfect Self-Defense or Imperfect Defense of Another—Lesser Included Offense (Pen. Code, § 192)**

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A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because (he/she) acted in (imperfect self-defense/ [or] imperfect defense of another).

If you conclude the defendant acted in complete (self-defense/ [or] defense of another), (his/her) action was lawful and you must find (him/her) not guilty of any crime. The difference between complete (self-defense/ [or] defense of another) and (imperfect self-defense/ [or] imperfect defense of another) depends on whether the defendant's belief in the need to use deadly force was reasonable.

The defendant acted in (imperfect self-defense/ [or] imperfect defense of another) if:

1. The defendant actually believed that (he/she/ [or] someone else/ \_\_\_\_\_ <insert name of third party>) was in imminent danger of being killed or suffering great bodily injury;

AND

2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;

BUT

3. At least one of those beliefs was unreasonable.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

*<The following definition may be given if requested>*

**[A danger is imminent if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate**

**and present, so that it must be instantly dealt with. It may not be merely prospective or in the near future.]**

**[Imperfect self-defense does not apply when the defendant, through his own wrongful conduct, has created circumstances that justify his adversary's use of force.]**

**[If you find that \_\_\_\_\_ <insert name of decedent/victim> threatened or harmed the defendant [or others] in the past, you may consider that information in evaluating the defendant's beliefs.]**

**[If you find that the defendant knew that \_\_\_\_\_ <insert name of decedent/victim> had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs.]**

**[If you find that the defendant received a threat from someone else that (he/she) reasonably associated with \_\_\_\_\_ <insert name of decedent/victim>, you may consider that threat in evaluating the defendant's beliefs.]**

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

**The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in (imperfect self-defense/ [or] imperfect defense of another). If the People have not met this burden, you must find the defendant not guilty of murder.**

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

## **BENCH NOTES**

### ***Instructional Duty***

The court has a **sua sponte** duty to instruct on voluntary manslaughter on either theory, heat of passion or imperfect self-defense, when evidence of either is “substantial enough to merit consideration” by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 153–163 [77 Cal.Rptr.2d 870, 960 P.2d 1094]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531].

See discussion of imperfect self-defense in related issues section of CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

### ***Perfect Self-Defense***

Most courts hold that an instruction on imperfect self-defense **is required** in every case in which a court instructs on perfect self-defense. If there is substantial evidence of a defendant's belief in the need for self-defense, there will *always* be substantial evidence to support an imperfect self-defense instruction because the reasonableness of that belief will always be at issue. (See *People v. Ceja* (1994) 26 Cal.App.4th 78, 85–86 [31 Cal.Rptr.2d 475], overruled in part by *People v. Blakeley* (2000) 23 Cal.4th 82, 91 [96 Cal.Rptr.2d 451, 999 P.2d 675]; see also *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 [12 Cal.Rptr.2d 825].) The court in *People v. Rodriguez* disagreed, however, and found that an imperfect self-defense instruction was not required sua sponte on the facts of the case where the defendant's version of the crime “could only lead to an acquittal based on justifiable homicide,” and when the prosecutor's version of the crime could only lead to a conviction of first degree murder. (See *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1275 [62 Cal.Rptr.2d 345]; see also *People v. Williams* (1992) 4 Cal.4th 354, 362 [14 Cal.Rptr.2d 441, 841 P.2d 961] [in a rape prosecution, the court was not required to give a mistake of fact instruction where the two sides gave wholly divergent accounts with no middle ground to support a mistake of fact instruction].)

In evaluating whether the defendant actually believed in the need for self-defense, the jury may consider the effect of antecedent threats and assaults against the defendant, including threats received by the defendant from a third party that the defendant reasonably associated with the aggressor. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337].) If there is sufficient evidence, the court should give the bracketed paragraphs on prior threats or assaults on request.

### ***Related Instructions***

CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

CALCRIM 3470, *Right to Self-Defense or Defense of Another (Non-Homicide)*.

CALCRIM 3471, *Right to Self-Defense: Mutual Combat or Initial Aggressor*.

CALCRIM 3472, *Right to Self-Defense: May Not Be Contrived*.

## **AUTHORITY**

- Elements ▶ Pen. Code, § 192(a).
- Imperfect Self-Defense Defined ▶ *People v. Flannel* (1979) 25 Cal.3d 668, 680–683 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Barton* (1995) 12 Cal.4th 186, 201 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *In re Christian S.* (1994) 7 Cal.4th 768, 773 [30 Cal.Rptr.2d 33, 872 P.2d 574]; see *People v. Uriarte*

(1990) 223 Cal.App.3d 192, 197–198 [272 Cal.Rptr. 693] [insufficient evidence to support defense of another person].

- Imperfect Defense of Others ▶ *People v. Randle* (2005) 35 Cal.4th 987, 995–1000 [28 Cal.Rptr.3d 725, 111 P.3d 987], overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172 [91 Cal.Rptr.3d 106, 203 P.3d 425].
- Imperfect Self-Defense May be Available When Defendant Set in Motion Chain of Events Leading to Victim’s Attack, but Not When Victim was Legally Justified in Resorting to Self-Defense ▶ *People v. Enraca* (2012) 53 Cal.4th 735, 761 [137 Cal.Rptr.3d 117, 269 P.3d 543]; *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179–1180 [39 Cal.Rptr.3d 433].
- Imperfect Self-Defense Does Not Apply When Defendant’s Belief in Need for Self-Defense is Entirely Delusional ▶ *People v. Elmore* (2014) 59 Cal.4th 121, 145 [172 Cal.Rptr.3d 413, 325 P.3d 951].
- This Instruction Upheld ▶ *People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306 [132 Cal.Rptr.3d 248]; *People v. Genovese* (2008) 168 Cal.App.4th 817, 832 [85 Cal.Rptr.3d 664].
- Defendant Relying on Imperfect Self-Defense Must Actually, Although Not Reasonably, Associate Threat With Victim (*People v. Minifie* (1996) 13 Cal.4th 1055, 1069 [56 Cal.Rptr.2d 133, 920 P.2d 1337][in dicta].)

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. 200012) Crimes Against the Person, §~~§~~ 240242-244.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.11[1][c], [2][a] (Matthew Bender).

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

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

## **LESSER INCLUDED OFFENSES**

- Attempted Voluntary Manslaughter ▶ *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 822 [217 Cal.Rptr. 581]; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1024–1026 [162 Cal.Rptr. 748].

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

## RELATED ISSUES

### ***Battered Woman’s Syndrome***

Evidence relating to battered woman’s syndrome may be considered by the jury when deciding if the defendant actually feared the batterer and if that fear was reasonable. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082–1089 [56 Cal.Rptr.2d 142, 921 P.2d 1].)

### ***Blakeley Not Retroactive***

The decision in *Blakeley*—that one who, acting with conscious disregard for life, unintentionally kills in imperfect self-defense is guilty of voluntary manslaughter—may not be applied to defendants whose offense occurred prior to *Blakeley*’s June 2, 2000, date of decision. (*People v. Blakeley* (2000) 23 Cal.4th 82, 91–93 [96 Cal.Rptr.2d 451, 999 P.2d 675].) If a defendant asserts a killing was done in an honest but mistaken belief in the need to act in self-defense and the offense occurred prior to June 2, 2000, the jury must be instructed that an unintentional killing in imperfect self-defense is involuntary manslaughter. (*People v. Johnson* (2002) 98 Cal.App.4th 566, 576–577 [119 Cal.Rptr.2d 802]; *People v. Blakeley, supra*, 23 Cal.4th at p. 93.)

### ***Inapplicable to Felony Murder***

Imperfect self-defense does not apply to felony murder. “Because malice is irrelevant in first and second degree felony murder prosecutions, a claim of imperfect self-defense, offered to negate malice, is likewise irrelevant.” (See *People v. Tabios* (1998) 67 Cal.App.4th 1, 6–9 [78 Cal.Rptr.2d 753]; see also *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1666 [285 Cal.Rptr. 523]; *People v. Loustauanau* (1986) 181 Cal.App.3d 163, 170 [226 Cal.Rptr. 216].)

### ***Fetus***

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

See also the Related Issues Section to CALCRIM No. 505, *Justifiable Homicide: Self-Defense or Defense of Another*.

***Reasonable Person Standard Not Modified by Evidence of Mental Impairment***  
In *People v. Jefferson* (2004) 119 Cal.App.4th 508, 519 [14 Cal.Rptr.3d 473], the court rejected the argument that the reasonable person standard for self-defense should be the standard of a mentally ill person like the defendant. “The common law does not take account of a person’s mental capacity when determining whether he has acted as the reasonable person would have acted. The law holds ‘the mentally deranged or insane defendant accountable for his negligence as if the person were a normal, prudent person.’ (Prosser & Keeton, Torts (5th ed. 1984) § 32, p. 177.)” (*Ibid.*; see also Rest.2d Torts, § 283B.)

## 627. Hallucination: Effect on Premeditation

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**A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he or she is seeing or hearing [or otherwise perceiving] something that is not actually present or happening.**

**You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation.**

**The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant not guilty of first degree murder.**

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*New January 2006* *[insert date of council approval]*

### BENCH NOTES

#### *Instructional Duty*

The court has a **sua sponte** duty to give defense instructions supported by substantial evidence and not inconsistent with the defendant's theory of the case. (See *People v. Baker* (1999) 74 Cal.App.4th 243, 252 [87 Cal.Rptr.2d 803]; *People v. Barton* (1995) 12 Cal.4th 186, 195 [47 Cal.Rptr.2d 569, 906 P.2d 531].)

“[E]vidence of a hallucination—a perception with no objective reality—is inadmissible to negate malice so as to mitigate murder to voluntary manslaughter but is admissible to negate deliberation and premeditation so as to reduce first degree murder to second degree murder.” (*People v. Padilla* (2002) 103 Cal.App.4th 675, 677 [126 Cal.Rptr.2d 889].)

### AUTHORITY

- Hallucination Evidence ▶ *People v. Padilla* (2002) 103 Cal.App.4th 675, 677 [126 Cal.Rptr.2d 889].
- Hallucination Alone Not a Basis for Imperfect Self-Defense ▶ *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437 [38 Cal.Rptr.3d 404].

- Imperfect Self-Defense Does Not Apply When Defendant's Belief in Need for Self-Defense is Entirely Delusional ▶ *People v. Elmore* (2014) 59 Cal.4th 121, 145 [172 Cal.Rptr.3d 413, 325 P.3d 951].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Crimes Against the Person, § ~~169~~107-108.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications*, § 73.03 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.01[1][g] (Matthew Bender).

**628–639. Reserved for Future Use**

**592. Gross Vehicular Manslaughter (Pen. Code § 192(c)(1))**

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*<If gross vehicular manslaughter is a charged offense, give alternative A; if this instruction is being given as a lesser included offense, give alternative B.>*

*<Introductory Sentence: Alternative A—Charged Offense>*

**[The defendant is charged [in Count \_\_\_] with gross vehicular manslaughter [in violation of Penal Code section 192(c)(1)].]**

*<Introductory Sentence: Alternative B—Lesser Included Offense>*

**[Gross vehicular manslaughter is a lesser crime than gross vehicular manslaughter while intoxicated.]**

**To prove that the defendant is guilty of gross vehicular manslaughter, the People must prove that:**

- 1. The defendant (drove a vehicle/operated a vessel);**
- 2. While (driving that vehicle/operating that vessel), the defendant committed (a/an) (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death);**
- 3. The defendant committed the (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) with gross negligence;**

**AND**

- 4. The defendant’s grossly negligent conduct caused the death of another person.**

**~~[The People allege that the defendant committed the following (misdemeanor[s]/ [and] infraction[s]): \_\_\_\_\_ <insert misdemeanor[s]/ infraction[s]>.~~**

**~~Instruction[s] \_\_\_ tell[s] you what the People must prove in order to prove that the defendant committed \_\_\_\_\_ <insert misdemeanor[s]/infraction[s]>.]~~**

**~~[The People [also] allege that the defendant committed the following otherwise lawful act(s) that might cause death: \_\_\_\_\_ <insert act[s]>~~**

~~alleged~~>.]

**Gross negligence** involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross 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 gross negligence when the way he or she acts is so different from how 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.

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

[A person facing a sudden and unexpected emergency situation not caused by that person's own negligence is required only to use the same care and judgment that an ordinarily careful person would use in the same situation, even if it appears later that a different course of action would have been safer.]

[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.]

~~[The People allege that the defendant committed the following (misdemeanor[s][,]/ [and] infraction[s][,]/ [and] otherwise lawful act[s] that might cause death): \_\_\_\_\_ <insert alleged predicate acts when multiple acts alleged>.]~~**[The People allege that the defendant committed the following**

(misdemeanor[s]/ [and] infraction[s]): \_\_\_\_\_ <insert misdemeanor[s]/  
infraction[s]>.

Instruction[s] \_\_\_\_\_ tell[s] you what the People must prove in order to prove that  
the defendant committed \_\_\_\_\_ <insert misdemeanor[s]/infraction[s]>.

[The People [also] allege that the defendant committed the following  
otherwise lawful act(s) that might cause death: \_\_\_\_\_ <insert act[s]/  
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  
(misdemeanors[,]/ [or] infractions[,]/ [or] otherwise lawful acts that might  
cause death) and you all agree on which (misdemeanor[,]/ [or] infraction[,]/  
[or] otherwise lawful act that might cause death) the defendant committed.]

[The People have the burden of proving beyond a reasonable doubt that the  
defendant committed gross vehicular manslaughter. If the People have not  
met this burden, you must find the defendant not guilty of that crime. You  
must consider whether the defendant is guilty of the lesser crime[s] of  
\_\_\_\_\_ <insert lesser offense[s]>.]

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*New January 2006*

## BENCH NOTES

### *Instructional Duty*

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

The court has a **sua sponte** duty to specify the predicate misdemeanor(s) or infraction(s) 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].) In element 2, instruct on either theory of vehicular manslaughter (misdemeanor/infraction or lawful act committed with negligence) as appropriate. The court **must** also give the appropriate instruction on the elements of the the predicate misdemeanor or infraction.

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. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, harmless error if was required].) A unanimity instruction is included in a bracketed paragraph for the court to use at its discretion.

If there is sufficient evidence and the defendant requests it, the court should instruct on the imminent peril/sudden emergency doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) Give the bracketed sentence that begins with “A person facing a sudden and unexpected emergency.”

## AUTHORITY

- Gross Vehicular Manslaughter ▶ Pen. Code, § 192(c)(1).
- Gross Vehicular Manslaughter During Operation of a Vessel ▶ Pen. Code, § 192.5(a).
- Unlawful Act 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].
- Specifying Predicate Unlawful Act ▶ *People v. Milham* (1984) 159 Cal.App.3d 487, 506 [205 Cal.Rptr. 688].
- Elements of Predicate Unlawful Act ▶ *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Unanimity Instruction ▶ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].

- Gross Negligence ▶ *People v. Bennett* (1992) 54 Cal.3d 1032, 1036 [2 Cal.Rptr.2d 8, 819 P.2d 849].
- Causation ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Imminent Peril/Sudden Emergency Doctrine ▶ *People v. Boulware* (1940) 41 Cal.App.2d 268, 269 [106 P.2d 436].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Crimes Against the Person, §§ ~~238-245~~262-268.

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*, § 140.04, Ch. 142, *Crimes Against the Person*, § 142.02[1][a], [2][c], [4] (Matthew Bender).

### **LESSER INCLUDED OFFENSES**

- Vehicular Manslaughter With Ordinary Negligence ▶ Pen. Code, § 192(c)(2); see *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1165–1166 [123 Cal.Rptr.2d 322].
- Manslaughter During Operation of a Vessel Without Gross Negligence ▶ Pen. Code, § 192.5(b).

### **RELATED ISSUES**

#### ***Predicate Act Need Not Be Inherently Dangerous***

“[T]he offense which constitutes the ‘unlawful act’ need not be an inherently dangerous misdemeanor or infraction. Rather, to be an ‘unlawful act’ within the meaning of section 192(c)(1), the offense must be dangerous under the circumstances of its commission. An unlawful act committed with gross negligence would necessarily be so.” (*People v. Wells* (1996) 12 Cal.4th 979, 982 [50 Cal.Rptr.2d 699, 911 P.2d 1374].)

#### ***Lawful Act in an Unlawful Manner: Negligence***

The statute uses the phrase “lawful act which might produce death, in an unlawful manner.” (Pen. Code, § 192(c)(1).) “[C]ommitting a lawful act in an unlawful

manner simply means to commit a lawful act with negligence, that is, without reasonable caution and care.” (*People v. Thompson* (2000) 79 Cal.App.4th 40, 53 [93 Cal.Rptr.2d 803].) Because the instruction lists the negligence requirement as element 3, the phrase “in an unlawful manner” is omitted from element 2 as repetitive.

**840. Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition (Pen. Code, § 273.5(a))**

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The defendant is charged [in Count \_\_] with inflicting an injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child) that resulted in a traumatic condition [in violation of Penal Code section 273.5(a)].

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

1. The defendant willfully [and unlawfully] inflicted a physical injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child)/someone with whom (he/she) had, or previously had, an engagement or dating relationship);

[AND]

2. The injury inflicted by the defendant resulted in a traumatic condition.

<Give element 3 when instructing on self-defense or defense of another>

[AND]

3. The defendant did not act (in self-defense/ [or] in defense of someone else).]

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

A *traumatic condition* is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force.

[The term *cohabitants* means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as **(husband and**

**wifespouses**/domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

[A person may cohabit simultaneously with two or more people at different locations, during the same time frame, if he or she maintains substantial ongoing relationships with each person and lives with each person for significant periods.]

[A person is considered to be the (mother/father) of another person's child if the alleged male parent is presumed under law to be the natural father. \_\_\_\_\_ <insert name of presumed father> is presumed under law to be the natural father of \_\_\_\_\_ <insert name of child>.]

[A traumatic condition is the *result of* an injury if:

1. The traumatic condition was the natural and probable consequence of the injury;
2. The injury was a direct and substantial factor in causing the condition;

AND

3. The condition would not have happened without the injury.

*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.

*A substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that resulted in the traumatic condition.]

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New January 2006; Revised June 2007, August 2012, [insert date of council approval]

## BENCH NOTES

### *Instructional Duty*

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

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590-591 [35 Cal.Rptr. 401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 865–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Give the bracketed paragraph that begins, “A traumatic condition is the *result of an injury* if . . . .”

If there is sufficient evidence that an alleged victim’s injuries were caused by an accident, the court has a **sua sponte** duty to instruct on accident. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390 [88 Cal.Rptr.2d 111].) Give CALCRIM No. 3404, *Accident*.

Give the bracketed language “[and unlawfully]” in element 1 if there is evidence that the defendant acted in self-defense.

Give the third bracketed sentence that begins “A person may cohabit simultaneously with two or more people,” on request if there is evidence that the defendant cohabited with two or more people. (See *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].)

Give on request the bracketed paragraph that begins “A person is considered to be the (mother/father)” if an alleged parental relationship is based on the statutory presumption that the male parent is the natural father. (See Pen. Code, § 273.5(d); see also *People v. Vega* (1995) 33 Cal.App.4th 706, 711 [39 Cal.Rptr.2d 479] [parentage can be established without resort to any presumption].)

If the defendant is charged with an enhancement for a prior conviction for a similar offense within seven years and has not stipulated to the prior conviction, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*. If the court has granted a bifurcated trial, see CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If there is evidence that the traumatic condition resulted from strangulation or suffocation, consider instructing according to the special definition provided in Pen. Code, § 273.5(c).

[The amendment to Penal Code section 273.5\(b\) adding “someone with whom the offender has, or previously had, an engagement or dating relationship as defined in Penal Code section 243\(f\)\(10\)” to the list of potential victims became effective on January 1, 2014.](#)

## AUTHORITY

- Elements ▶ Pen. Code, § 273.5(a).
- Traumatic Condition Defined ▶ Pen. Code, § 273.5(c); *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Willful Defined ▶ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Cohabitant Defined ▶ *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000 [252 Cal.Rptr. 729]; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319 [249 Cal.Rptr. 806].
- Direct Application of Force ▶ *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Duty to Define Traumatic Condition ▶ *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874 [200 P.2d 134].
- Strangulation and Suffocation ▶ Pen. Code, § 273.5(d).
- General Intent Crime ▶ See *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055 [84 Cal.Rptr.2d 221]; *People v. Campbell* (1999) 76 Cal.App.4th 305, 307–309 [90 Cal.Rptr.2d 315]; contra, *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402 [7 Cal.Rptr.2d 495] [dictum].
- Simultaneous Cohabitation ▶ *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].

### *Secondary Sources*

1 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Crimes Against the Person, §§ ~~63~~, ~~64~~–67.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.13[3] (Matthew Bender).

## LESSER INCLUDED OFFENSES

- Attempted Infliction of Corporal Punishment on Spouse ▶ Pen. Code, §§ 664, 273.5(a); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1627, 1628 [47

Cal.Rptr.2d 769] [attempt requires intent to cause traumatic condition, but does not require a resulting “traumatic condition”].

- Misdemeanor Battery ▶ Pen. Code, §§ 242, 243(a); see *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Battery Against Spouse, Cohabitant, or Fellow Parent ▶ Pen. Code, § 243(e)(1); see *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Simple Assault ▶ Pen. Code, §§ 240, 241(a); *People v. Van Os* (1950) 96 Cal.App.2d 204, 206 [214 P.2d 554].

## RELATED ISSUES

### ***Continuous Course of Conduct***

Penal Code section 273.5 is aimed at a continuous course of conduct. The prosecutor is not required to choose a particular act and the jury is not required to unanimously agree on the same act or acts before a guilty verdict can be returned. (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224–225 [206 Cal.Rptr. 516].)

### ***Multiple Acts of Abuse***

A defendant can be charged with multiple violations of Penal Code section 273.5 when each battery satisfies the elements of section 273.5. (*People v. Healy* (1993) 14 Cal.App.4th 1137, 1140 [18 Cal.Rptr.2d 274].)

### ***Prospective Parents of Unborn Children***

Penal Code section 273.5(a) does not apply to a man who inflicts an injury upon a woman who is pregnant with his unborn child. “A pregnant woman is not a ‘mother’ and a fetus is not a ‘child’ as those terms are used in that section.” (*People v. Ward* (1998) 62 Cal.App.4th 122, 126, 129 [72 Cal.Rptr.2d 531].)

### ***Termination of Parental Rights***

Penal Code section 273.5 “applies to a man who batters the mother of his child even after parental rights to that child have been terminated.” (*People v. Mora* (1996) 51 Cal.App.4th 1349, 1356 [59 Cal.Rptr.2d 801].)

### 1005. Rape by Fraud (Pen. Code, § 261(a)(5))

---

The defendant is charged [in Count \_\_\_] with rape by fraud [in violation of Penal Code section 261(a)(5)].

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

1. The defendant had sexual intercourse with a woman;
2. ~~He~~ The defendant and the woman were not married to each other at the time of the intercourse;
3. The woman submitted to the intercourse because she believed the defendant was someone else known to the woman she knew, other than the defendant, her husband;

AND

4. The defendant tricked her, lied to her, [used an artifice or pretense,] or concealed information from her, intending to make her believe he was someone she knew, while intending to hide his own identity ~~they were married to each other.~~

*Sexual intercourse* means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]

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New January 2006, [insert date of council approval]

### BENCH NOTES

#### *Instructional Duty*

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

Penal Code section 261(a)(5) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].

### AUTHORITY

- Elements ▶ Pen. Code, § 261(a)(5).
- Penetration Defined ▶ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Sex Offenses and Crimes Against Decency, §§ ~~1–8, 13~~16–17.

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

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

## COMMENTARY

Gender-specific language is used because rape usually occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

## LESSER INCLUDED OFFENSES

- Attempted Rape ▶ Pen. Code, §§ 663, 261.

## RELATED ISSUES

See the Related Issues section to CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.

## 1006–1014. Reserved for Future Use

## 1021. Oral Copulation by Fraud (Pen. Code, § 288a(a), (j))

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The defendant is charged [in Count \_\_\_] with oral copulation by fraud [in violation of Penal Code section 288a(j)].

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

1. The defendant committed an act of oral copulation with someone else;
2. The other person submitted to the oral copulation because (he/she) believed the ~~person~~ defendant was someone (he/she) knew, other than the defendant. (his/her) spouse;

AND

3. The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe they were married to each other (he/she) was someone (he/she) knew, while intending to hide (his/her) own identity.

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

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New January 2006, [insert date of council approval]

### BENCH NOTES

#### *Instructional Duty*

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

Penal Code section 288a(a) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].

### AUTHORITY

- Elements ▶ Pen. Code, § 288a(a), (j).

- Oral Copulation Defined ▶ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].

### ***Secondary Sources***

2 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Sex Offenses and Crime Against Decency, §§ ~~31–34~~8.

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

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

### **LESSER INCLUDED OFFENSES**

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

### **RELATED ISSUES**

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

### 1036. Sodomy by Fraud (Pen. Code, § 286(j))

---

The defendant is charged [in Count \_\_\_] with sodomy by fraud [in violation of Penal Code section 286(j)].

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

1. The defendant committed an act of sodomy with someone else;
2. The other person submitted to the sodomy because (~~she/he~~/she) believed the defendant was someone (he/she) knew, other than the defendant (her/his) spouse;

AND

3. The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe that he was someone (he/she) knew, while intending to hide his own identity, they were married to each other.

*Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]

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New January 2006, [insert date of council approval]

### BENCH NOTES

#### *Instructional Duty*

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

Penal Code section 286(j) was amended effective September 9, 2013, in response to *People v. Morales* (2013) 212 Cal.App.4th 583 [150 Cal.Rptr.3d 920].

#### *Related Instructions*

CALCRIM No. 1031, *Sodomy in Concert*, may be given in conjunction with this instruction if appropriate.

### AUTHORITY

- Elements ▶ Pen. Code, § 286(j).
- Sodomy Defined ▶ Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Sex Offenses and Crimes Against Decency, §§ ~~2630, 28~~.

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

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

## **LESSER INCLUDED OFFENSES**

- Attempted Sodomy by Fraud ▶ Pen. Code, §§ 664, 286(j).

## **RELATED ISSUES**

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*.

## 1051. Sexual Penetration by Fraud (Pen. Code, § 289(f))

---

The defendant is charged [in Count \_\_] with sexual penetration by fraud [in violation of Penal Code section 289(f)].

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

1. The defendant committed an act of sexual penetration with another person;
2. At the time of the act, the defendant and the other person were not married to each other;
3. The penetration was accomplished by using (a/an) (foreign object[,]/ [or] substance[,]/ [or] instrument[,]/ [or] device[,]/ [or] unknown object);
4. The other person submitted to the act because (he/she) believed the person (committing the act/causing the act to be committed) someone (he/she) knew, other than the defendant, was (his/her) spouse;

AND

5. The defendant tricked, lied, [used an artifice or pretense,] or concealed information, intending to make the other person believe that (he/she) was someone (he/she) knew, while intending to hide (his/her) own identity~~they were married to each other.~~

*Sexual penetration* means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) for the purpose of sexual abuse, arousal, or gratification.

[A *foreign object, substance, instrument, or device* includes any part of the body except a sexual organ.] [An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object was used to accomplish the penetration.]

**[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]**

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New January 2006, [\[insert date of council approval\]](#)

## BENCH NOTES

### *Instructional Duty*

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

[Penal Code section 289\(f\) was amended effective September 9, 2013, in response to \*People v. Morales\* \(2013\) 212 Cal.App.4th 583 \[150 Cal.Rptr.3d 920\].](#)

### *Related Instructions*

CALCRIM No. 1046, *Sexual Penetration in Concert*, may be given in conjunction with this instruction if appropriate.

## AUTHORITY

- Elements ▶ Pen. Code, § 289(f).
- Foreign Object, Substance, Instrument, or Device Defined ▶ Pen. Code, § 289(k)(2); see *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [a finger is a “foreign object”].
- Sexual Penetration Defined ▶ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not the vagina].
- Unknown Object Defined ▶ Pen. Code, § 289(k)(3).
- Sexual Abuse Defined ▶ *People v. White* (1986) 179 Cal.App.3d 193, 205–206 [224 Cal.Rptr. 467].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (~~3d~~ 4th ed. ~~2000~~ 2012) Sex Offenses and Crimes Against Decency, § ~~4758~~, 49.

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

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

### **LESSER INCLUDED OFFENSES**

- Assault ▶ Pen. Code, § 240.
- Attempted Sexual Penetration by Fraud ▶ Pen. Code, §§ 664, 289(f).
- Battery ▶ Pen. Code, § 242.

### **RELATED ISSUES**

See the Related Issues section under CALCRIM No. 1045, *Sexual Penetration by Force, Fear, or Threats*.

**1052–1059. Reserved for Future Use**

**1128. Engaging in Oral Copulation or Sexual Penetration With Child 10 Years of Age or Younger (Pen. Code, § 288.7(b))**

---

The defendant is charged [in Count \_\_] with engaging in (oral copulation/ [or] sexual penetration) with a child 10 years of age or younger [in violation of Penal Code section 288.7(b)].

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

1. The defendant engaged in an act of (oral copulation/ [or] sexual penetration) with \_\_\_\_\_ <insert name of complaining witness>;
2. When the defendant did so, \_\_\_\_\_ <insert name of complaining witness> was 10 years of age or younger;
3. At the time of the act, the defendant was at least 18 years old.

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

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

[*Sexual penetration* means (penetration, however slight, of the genital or anal opening of the other person/ [or] causing the other person to penetrate, however slightly, the defendant's or someone else's genital or anal opening/ [or] causing the other person to penetrate, however slightly, his or her own genital or anal opening) by any foreign object, substance, instrument, device, or any unknown object for the purpose of sexual abuse, arousal, or gratification.]

[Penetration for *sexual abuse* means penetration for the purpose of causing pain, injury, or discomfort.]

[An *unknown object* includes any foreign object, substance, instrument, or device, or any part of the body, including a penis, if it is not known what object penetrated the opening.]

**[A foreign object, substance, instrument, or device includes any part of the body except a sexual organ.]**

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*New August 2009; Revised April 2010, February 2013* *[insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

## **AUTHORITY**

- Elements ▶ Pen. Code, § 288.7(b).
- Sexual Penetration Defined ▶ Pen. Code, § 289(k)(1); see *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371 [108 Cal.Rptr.2d 235] [penetration of genital opening refers to penetration of labia majora, not vagina].
- Unknown Object Defined ▶ Pen. Code, § 289(k)(3).
- Foreign Object, Substance, Instrument, or Device Defined ▶ Pen. Code, § 289(k)(2); *People v. Wilcox* (1986) 177 Cal.App.3d 715, 717 [223 Cal.Rptr. 170] [finger is “foreign object”].
- Oral Copulation Defined ▶ *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242–1243 [11 Cal.Rptr.2d 884].
- Calculating Age ▶ Fam. Code, § 6500; *People v. Cornett* (2012) 53 Cal.4th 1261, 1264, 1275 [139 Cal.Rptr.3d 837, 274 P.3d 456] [“10 years of age or younger” means “under 11 years of age”]; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Sexual Abuse Defined ▶ *People v. White* (1986) 179 Cal.App.3d 193, 205-206 [224 Cal.Rptr. 467].

## **LESSER INCLUDED OFFENSE**

- *Attempted Sexual Penetration. People v. Ngo* (2014) 225 Cal.App.4th 126, 158-161 [170 Cal.Rptr.3d 90].

*Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d~~ 4th ed. ~~2008-supp~~ 2012.) Sex Offenses and Crimes Against Decency, § ~~58~~ 33, 48.

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

**1140. Showing Distributing, Sending, or Exhibiting or Sending Harmful Material ~~to Seduce a Minor~~ (Pen. Code, § 288.2(a)(1) & (b)(2))**

The defendant is charged [in Count \_\_] with (~~showing~~exhibiting[,]/ sending[,]/ distributing[,]/ [or] offering to ~~show~~exhibit or distribute) harmful material to a minor [or to a person the defendant believed was a minor] [in violation of Penal Code section 288.2].

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

*<Give paragraph 1A for violations of Penal Code section 288.2(a)(1)>*

**1A.** The defendant (~~showed~~exhibited[,]/ sent[,]/ caused to be sent[,]/ distributed[,]/ [or] offered to ~~show~~exhibit or distribute) harmful material depicting a minor or minors engaging in sexual conduct to a minor to another person {by any means, including (physical delivery[,]/ telephone[,]/ in person[,]/ electronic mail[,]/ the Internet[,]/ [or] a commercial online service/ ~~\_\_\_\_\_~~ *<insert other means>*);]

*<Give paragraph 1B for violations of Penal Code section 288.2(a)(2)>*

**1B.** The defendant (exhibited[,]/ sent[,]/ caused to be sent[,]/ distributed[,]/ [or] offered to exhibit or distribute) harmful material to another person by any means;

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

*<Alternative 3A—Pen. Code, § 288.2(a)>*

~~**3.** When the defendant acted, (he/she) (knew the other person was a minor/ [or] failed to use reasonable care to determine the minor's actual age);]~~

*<Alternative 3B—Pen. Code, § 288.2(b)>*

**3.** When the defendant acted, (he/she) knew, should have known, or believed that the other person was a minor;]

4. When the defendant acted, (he/she) intended to ~~sexually~~ arouse, appeal to, or gratify the lust, passions, or sexual desires of (himself/herself) or of the ~~minor~~other person;

[AND]

5. When the defendant acted, (he/she) intended ~~to seduce the~~ to engage in sexual intercourse, sodomy, or oral copulation with the other person or to have either person touch an intimate body part of the other person ~~minor. (s/.)~~

*<Give element 6 when instructing on “offered to show or distribute” in element 1.>*

[AND]

- ~~6. When the defendant acted, (he/she) intended to show or distribute the material to the minor.]~~

You must decide whether the material at issue in this case meet[s] the definition of harmful material. Material is *harmful* if, when considered as a whole:

1. It shows or describes sexual conduct in an obviously offensive way;
2. A reasonable person would conclude that it lacks serious literary, artistic, political, or scientific value for minors;

AND

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

For the purpose of this instruction, an *intimate body part* includes the sexual organ, anus, groin, or buttocks of any person, or the breasts of a female.

*A prurient interest* is a shameful or morbid interest in nudity, sex, or excretion.

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

*Applying contemporary statewide standards* means using present-day standards and determining the effect of the material on all those whom it is likely to reach within the state, in other words, its impact on the average person in the statewide community. The *average adult person* is a hypothetical person who represents the entire community, including both men and women; religious and nonreligious people; and adults of varying ages, educational and economic levels, races, ethnicities, and points of view. The *contemporary statewide standard* means what is acceptable to the statewide community as a whole, not what some person or persons may believe the community ought to accept. The test you must apply is not what you find offensive based on your own personal, social, or moral views. Instead, you must make an objective determination of what would offend the statewide community as a whole.

[You may consider evidence of local community standards in deciding what the contemporary statewide standard is. However, you may not use the standard of a local community, by itself, to establish the contemporary statewide standard.]

The material is not harmful unless a reasonable person would conclude that, taken as a whole, it lacks serious literary, artistic, political, or scientific value **for minors**. When deciding whether the material is harmful, do not weigh its value against its prurient appeal.

[The depiction of nudity, by itself, does not make material harmful. In order for material containing nudity to be harmful, it must depict sexual activity and it must meet the requirements for harmful material listed above.]

[The depiction of sexual activity, by itself, does not make material harmful. In order for material depicting sexual activity to be harmful, it must meet the requirements for harmful material listed above.]

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

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

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

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

**[In deciding the material's nature and whether it lacks serious literary, artistic, political, or scientific value, consider whether the circumstances of its (production[,]/ presentation[,]/ sale[,]/ dissemination[,]/ distribution[,]/ publicity) indicate that the material was being commercially exploited because of its prurient appeal. You must determine the weight, if any, to give this evidence.]**

**[In deciding whether, applying contemporary statewide standards, the material appeals to a prurient interest, you may consider whether similar material is openly shown in the community. You must determine the weight, if any, to give this evidence.]**

**[Harmful material may be sent or distributed by live or recorded telephone messages.]**

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

*<Defense: Parent providing sex education>*

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

*<Defense: Legitimate scientific or educational purpose>*

**[The defendant is not guilty of this crime if (he/she) was engaging in legitimate scientific or educational activities. The People have the burden of proving beyond a reasonable doubt that the defendant was not acting for a legitimate scientific or educational purpose. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

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*New January 2006, [\[insert date of council approval\]](#)*

## BENCH NOTES

### *Instructional Duty*

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

If the defendant is charged with a violation of Penal Code section 288.2(a)(2)(b), do NOT give the bracketed phrase “depicting a minor or minors engaging in sexual conduct.” ~~“by (electronic mail[,]/ the Internet[,]/ [or] a commercial online service)” in element 1 and give alternative 3B in element 3. If the defendant is charged with Penal Code section 288.2(a), do not give the bracketed language in element 1 and give alternative 3A in element 3.~~

~~Give bracketed element 6 if the prosecution alleges that the defendant offered to show or distribute the material to a minor.~~

Give the bracketed sentence 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].)

Penal Code section 288.2(a) was amended effective January 1, 2014.

Give any of the other bracketed paragraphs on request.

### *Defenses—Instructional Duty*

If there is sufficient evidence that the defendant was “acting in aid of legitimate sex education,” the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, § 288.2(egf).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479 [122 Cal.Rptr.2d 326, 49 P.3d 1067].)

If there is sufficient evidence that the defendant was engaging in legitimate scientific or educational activities, the court has a **sua sponte** duty to instruct on that defense. (See Pen. Code, § 288.2(dg).) It is unclear who bears the burden of proof and what standard of proof applies to this defense. In the absence of statutory authority or case law stating that the defendant must prove the defense by a preponderance of the evidence, the committee has drafted the instruction to provide that the prosecution must prove beyond a reasonable doubt that the defense does not apply. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–479

[122 Cal.Rptr.2d 326, 49 P.3d 1067]; see also *People v. Woodward* (2004) 116 Cal.App.4th 821, 840–841 [10 Cal.Rptr.3d 779] [“legitimate” does not require definition and the trial court erred in giving amplifying instruction based on *People v. Marler* (1962) 199 Cal.App.2d Supp. 889 [18 Cal.Rptr. 923]].)

## AUTHORITY

- Elements ▶ Pen. Code, § ~~288.2(a)(1) & (ba)(2)~~288.2(a) & (b).
- Harmful Matter Defined ▶ Pen. Code, § 313.
- Know Character of Matter ▶ Pen. Code, § 313(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725] [no error in instructing that it was unnecessary to establish that the accused had knowledge that material was legally obscene].
- Means of Distribution ▶ Pen. Code, § ~~288.2(a)(1) & (ba)(2)~~288.2(a) & (b).
- Contemporary Community Standards ▶ See *Roth v. United States* (1957) 354 U.S. 476, 489–490 [77 S.Ct. 1304, 1 L.Ed.2d 1498] [quoting trial court instruction].
- ~~Seduce Defined ▶ *People v. Jensen* (2003) 114 Cal.App.4th 224, 239–240 [7 Cal.Rptr.3d 609]; *People v. Hsu* (2000) 82 Cal.App.4th 976, 992 [99 Cal.Rptr. 2d 184].~~
- Prurient Interest Defined ▶ *Bloom v. Municipal Court* (1976) 16 Cal.3d 71, 77 [127 Cal.Rptr. 317, 545 P.2d 229] [quoting former section 311].
- Taken or Considered as a Whole ▶ *People v. Goulet* (1971) 21 Cal.App.3d Supp. 1, 3 [98 Cal.Rptr. 782]; *Kois v. Wisconsin* (1972) 408 U.S. 229, 231 [92 S.Ct. 2245, 33 L.Ed.2d 312].
- Matter Designed for Deviant Sexual Group ▶ Pen. Code, § 313(a)(1); see *People v. Young* (1977) 77 Cal.App.3d Supp. 10, 14–15 [143 Cal.Rptr. 604].
- Commercial Exploitation Is Probative of Matter’s Nature ▶ Pen. Code, § 313(a)(2); *People v. Kuhns* (1976) 61 Cal.App.3d 735, 748–753 [132 Cal.Rptr. 725].
- Similar Matter Shown in Community ▶ *In re Harris* (1961) 56 Cal.2d 879, 880 [16 Cal.Rptr. 889, 366 P.2d 305]; *People v. Heller* (1979) 96 Cal.App.3d Supp. 1, 7 [157 Cal.Rptr. 830].
- Obscenity Contrasted With Sex ▶ *Roth v. United States* (1957) 354 U.S. 476, 487 [77 S.Ct. 1304, 1 L.Ed.2d 1498].
- Obscenity Contrasted With Nudity ▶ *People v. Noroff* (1967) 67 Cal.2d 791, 795–796 [63 Cal.Rptr. 575, 433 P.2d 479]; *In re Panchot* (1968) 70 Cal.2d 105, 108–109 [73 Cal.Rptr. 689, 448 P.2d 385].

- Defense of Sex Education ▶ Pen. Code, § 288.2([ef](#)).
- Defense of Legitimate Scientific or Educational Activity ▶ Pen. Code, § 288.2([dg](#)).
- [Prior Version of This Instruction is Was Correct](#) ▶ *People v. Richardson* (2007) 151 Cal.App.4th 790, 803 [60 Cal.Rptr.3d 458].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d~~[4th](#) ed. ~~2000~~[2012](#)) Sex Offenses and Crimes Against Decency, § [12508](#).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.21[1][d][iii], [2][c], Ch. 144, *Crimes Against Order*, § 144.10[2] (Matthew Bender).

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

## LESSER INCLUDED OFFENSES

[Under prior version of Penal Code section 288.2, in effect until December 31, 2013, the following were held to be lesser included offenses:](#)

- Attempted Distribution of Harmful Matter to Minor ▶ Pen. Code, §§ 664, 288.2; see, e.g., *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 185 [94 Cal.Rptr.2d 453].
- Misdemeanor Distribution of Harmful Matter ▶ Pen. Code, § 313.1(a); *People v. Jensen* (2003) 114 Cal.App.4th 224, 244 [7 Cal.Rptr.3d 609].

## RELATED ISSUES

### *Telephone, Cable, or ISPs*

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

***Expert Testimony Not Required***

Neither the prosecution nor the defense is required to introduce expert witness testimony regarding the harmful nature of the matter. (Pen. Code, § 312.1 [abrogating *In re Giannini* (1968) 69 Cal.2d 563, 574 [72 Cal.Rptr. 655, 446 P.2d 535]].)

## 1151. Pandering (Pen. Code, § 266i)

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The defendant is charged [in Count \_\_\_\_\_] with pandering [in violation of Penal Code section 266i].

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

*<Alternative 1A—persuaded/procured>*

[1. The defendant **successfully** (persuaded/procured)  
\_\_\_\_\_ *<insert name>* to **become** a prostitute(;/.)]

*<Alternative 1B—promises/threats/violence used to cause person to become prostitute>*

[1. The defendant used (promises[,]/ threats[,]/ violence[,]/ [or] any device or scheme) to (cause/persuade/encourage/induce)  
\_\_\_\_\_ *<insert name>* to become a prostitute **although the defendant's efforts need not have been successful**(;/.)]

*<Alternative 1C—arranged/procured a position>*

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

*<Alternative 1D—promises/threats/violence used to cause person to remain>*

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

*<Alternative 1E—used fraud>*

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

*<Alternative 1F—received money>*

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

**[AND]**

**2. The defendant intended to influence \_\_\_\_\_ <insert name> to be a prostitute(;/.)**

*<Give element 3 when defendant charged with pandering a minor.>*

**[AND]**

**3. \_\_\_\_\_ <insert name> was (over the age of 16 years old/under the age of 16) at the time the defendant acted.]**

**[It does not matter whether \_\_\_\_\_ <insert name> was (a prostitute already/ [or] an undercover police officer).]**

**A *prostitute* is a person who engages in sexual intercourse or any lewd act with another person in exchange for money [or other compensation]. Pandering requires that an intended act of prostitution be with someone other than the defendant. A *lewd act* means physical contact of the genitals, buttocks, or female breast of either the prostitute or customer with some part of the other person's body for the purpose of sexual arousal or gratification.**

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

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

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*New January 2006; Revised April 2011, February 2012, August 2012, [insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

In element 1, give the appropriate alternative A-F depending on the evidence in the case. (See *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12, 24, 27–28 [117 P.2d 437] [statutory alternatives are not mutually exclusive], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44].)

The committee included “persuade” and “arrange” as options in element one because the statutory language, “procure,” may be difficult for jurors to understand.

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

Give the bracketed paragraph defining duress on request if there is sufficient evidence that duress was used to procure a person for prostitution. (Pen. Code, § 266i(a)(5); see *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071] [definition of “duress”].)

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 necessary for the jury’s understanding of the case, the court must instruct **sua sponte** on a defense theory in evidence, for example, that nude modeling does not constitute an act of prostitution and that an act of procuring a person solely for the purpose of nude modeling does not violate either the pimping or pandering statute. (*People v. Hill* (1980) 103 Cal.App.3d 525, 536–537 [163 Cal.Rptr. 99].)

## AUTHORITY

- Elements ▶ Pen. Code, § 266i.
- Prostitution Defined ▶ Pen. Code, § 647(b); *People v. Hill* (1980) 103 Cal.App.3d 525, 534–535 [163 Cal.Rptr. 99]; *People v. Romo* (1962) 200 Cal.App.2d 83, 90–91

[19 Cal.Rptr. 179]; *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 431–433 [lewd act requires touching between prostitute and customer].

- Procurement Defined ▶ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 12 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697] and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301 fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44].
- Proof of Actual Prostitution Not Required ▶ *People v. Osuna* (1967) 251 Cal.App.2d 528, 531–532 [59 Cal.Rptr. 559].
- Duress Defined ▶ *People v. Leal* (2004) 33 Cal.4th 999, 1004–1010 [16 Cal.Rptr.3d 869, 94 P.3d 1071]; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 [216 Cal.Rptr. 221]; *People v. Cochran* (2002) 103 Cal.App.4th 8, 13–14 [126 Cal.Rptr.2d 416].
- Good Faith Belief That Minor Is 18 No Defense to Pimping and Pandering ▶ *People v. Branch* (2010) 184 Cal.App.4th 516, 521-522 [109 Cal.Rptr.3d 412].
- Specific Intent Crime ▶ *People v. Zambia* (2011) 51 Cal.4th 965, 980 [127 Cal.Rptr.3d 662, 254 P.3d 965].
- Victim May [Appear to] Be a Prostitute Already ▶ *People v. Zambia* (2011) 51 Cal.4th 965, 981 [127 Cal.Rptr.3d 662, 254 P.3d 965].
- Pandering Requires Services Procured for Person Other Than Defendant ▶ *People v. Dixon* (2011) 191 Cal.App.4th 1154, 1159-1160 [119 Cal.Rptr.3d 901].
- Encouraging Person to Become Prostitute Need Not Be Successful ▶ *People v. Zambia* (2011) 51 Cal.4th 965, 980 [127 Cal.Rptr.3d 662, 254 P.3d 965].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Sex Offenses and Crimes Against Decency, §§ ~~8570–78~~.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.11[3] (Matthew Bender).

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

### **LESSER INCLUDED OFFENSES**

- Attempted Pandering ▶ Pen. Code, §§ 664, 266i; *People v. Charles* (1963) 218 Cal.App.2d 812, 819 [32 Cal.Rptr. 653]; *People v. Benenato* (1946) 77 Cal.App.2d 350, 366–367 [175 P.2d 296], disapproved on other grounds in *In re Wright* (1967) 65 Cal.2d 650, 654–655, fn. 3 [56 Cal.Rptr. 110, 422 P.2d

998].

There is no crime of aiding and abetting prostitution. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 385 [108 Cal.Rptr.2d 809].)

### **RELATED ISSUES**

See Related Issues section to CALCRIM No. 1150, *Pimping*.

**1202. Kidnapping: For Ransom, Reward, or Extortion (Pen. Code, § 209(a))**

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The defendant is charged [in Count \_\_\_] with kidnapping for the purpose of (ransom[,]/ [or] reward[,]/ [or] extortion) [that resulted in (death[,]/ [or] bodily harm[,]/ [or] exposure to a substantial likelihood of death)] [in violation of Penal Code section 209(a)].

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

1. The defendant (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ [or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed) another person;

*<Alternative 2A—held or detained>*

2. The defendant held or detained the other person;

*<Alternative 2B—intended to hold or detain that person>*

2. When the defendant acted, (he/she) intended to hold or detain the other person;

3. The defendant did so (for ransom[,]/ [or] for reward[,]/ [or] to commit extortion[,]/ [or] to get money or something valuable);

[AND]

4. The other person did not consent to being (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ [or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed)(;/.)

*<Give element 5 if instructing on reasonable belief in consent>*

[AND]

5. The defendant did not actually and reasonably believe that the other person consented to being (kidnapped[,]/ [or] abducted[,]/ [or] seized[,]/ [or] confined[,]/ [or] concealed[,]/ [or] carried away[,]/ [or] inveigled[,]/ [or] enticed[,]/ [or] decoyed).

[It is not necessary that the person be moved for any distance.]

**[In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]**

*<Defense: Good Faith Belief in Consent>*

**[The defendant is not guilty of kidnapping if (he/she) reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

*<Defense: Consent Given>*

**[The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if (he/she) (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient mental capacity to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

**[Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed his or her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it.]**

**[Someone intends to commit *extortion* if he or she intends to: (1) obtain a person's property with the person's consent and (2) obtain the person's consent through the use of force or fear.]**

**[Someone intends to commit *extortion* if he or she: (1) intends to get a public official to do an official act and (2) uses force or fear to make the official do the act.] [An *official act* is an act that a person does in his or her official capacity using the authority of his or her public office.]**

*<Sentencing Factor>*

**[If you find the defendant guilty of kidnapping for (ransom [,]/ [or] reward[,]/ [or] extortion), you must then decide whether the People have proved the additional allegation that the defendant (caused the kidnapped person to (die/suffer bodily harm)/ [or] intentionally confined the kidnapped person in a way that created a substantial risk of death).**

**[Bodily harm means any substantial physical injury resulting from the use of force that is more than the force necessary to commit kidnapping.]**

**[The defendant caused \_\_\_\_\_’s <insert name of allegedly kidnapped person> (death/bodily harm) if:**

- 1. A reasonable person in the defendant’s position would have foreseen that the defendant’s use of force or fear could begin a chain of events likely to result in \_\_\_\_\_’s <insert name of allegedly kidnapped person> (death/bodily harm);**
- 2. The defendant’s use of force or fear was a direct and substantial factor in causing \_\_\_\_\_’s <insert name of allegedly kidnapped person> (death/bodily harm);**

**AND**

- 3. \_\_\_\_\_’s <insert name of allegedly kidnapped person> (death/bodily harm) would not have happened if the defendant had not used force or fear to hold or detain \_\_\_\_\_ <insert name of allegedly kidnapped person>.**

**A substantial factor is more than a trivial or remote factor. However, it need not have been the only factor that caused \_\_\_\_\_’s <insert name of allegedly kidnapped person> (death/bodily harm).]**

**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.]**

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*New January 2006; Revised April 2011* *[insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

If the prosecution alleges that the kidnapping resulted in death or bodily harm, or exposed the victim to a substantial likelihood of death (see Pen. Code, § 209(a)), the court has a **sua sponte** duty to instruct on the sentencing factor. (See *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762] [bodily harm

defined]); see also *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1318 [76 Cal.Rptr.2d 160] [court must instruct on general principles of law relevant to issues raised by the evidence].) The court must also give the jury a verdict form on which the jury can indicate whether this allegation has been proved. If causation is an issue, the court has a **sua sponte** duty to give the bracketed section that begins “The defendant caused.” (See Pen. Code, § 209(a); *People v. Monk* (1961) 56 Cal.2d 288, 296 [14 Cal.Rptr. 633, 363 P.2d 865]; *People v. Reed* (1969) 270 Cal.App.2d 37, 48–49 [75 Cal.Rptr. 430].)

Give the bracketed definition of “consent” on request.

Give alternative 2A if the evidence supports the conclusion that the defendant actually held or detained the alleged victim. Otherwise, give alternative 2B. (See Pen. Code, § 209(a).)

“Extortion” is defined in Penal Code section 518. If the kidnapping was for purposes of extortion, give one of the bracketed definitions of extortion on request. Give the second definition if the defendant is charged with intending to extort an official act. (*People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 382]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141] [defining “official act”].) Extortion may also be committed by using “the color of official right” to make an official do an act. (Pen. Code, § 518; see *Evans v. United States* (1992) 504 U.S. 255, 258 [112 S.Ct. 1881, 119 L.Ed.2d 57]; *McCormick v. United States* (1990) 500 U.S. 257, 273 [111 S.Ct. 1807, 114 L.Ed.2d 307] [both discussing common law definition].) It appears that this type of extortion rarely occurs in the context of kidnapping, so it is excluded from this instruction.

### ***Defenses—Instructional Duty***

The court has a **sua sponte** duty to instruct on the defense of consent if there is sufficient evidence to support the defense. (See *People v. Davis* (1995) 10 Cal.4th 463, 516–518 [41 Cal.Rptr.2d 826, 896 P.2d 119] [approving consent instruction as given]; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [when court must instruct on defenses].) Give the bracketed paragraph on the defense of consent. On request, if supported by the evidence, also give the bracketed paragraph that begins with “Consent may be withdrawn.” (See *People v. Camden* (1976) 16 Cal.3d 808, 814 [129 Cal.Rptr. 438, 548 P.2d 1110].)

The defendant’s reasonable and actual belief in the victim’s consent to go with the defendant may be a defense. (See *People v. Greenberger* (1997) 58 Cal.App.4th

298, 375 [68 Cal.Rptr.2d 61]; *People v. Isitt* (1976) 55 Cal.App.3d 23, 28 [127 Cal.Rptr. 279] [reasonable, good faith belief that victim consented to movement is a defense to kidnapping].)

### ***Related Instructions***

For the elements of extortion, see CALCRIM No. 1830, *Extortion by Threat or Force*.

## **AUTHORITY**

- Elements ▶ Pen. Code, § 209(a).
- Requirement of Lack of Consent ▶ *People v. Eid* (2010) 187 Cal.App.4th 859, 878 [114 Cal.Rptr.3d 520].
- Extortion ▶ Pen. Code, § 518; *People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628]; see *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1229–1230 [277 Cal.Rptr. 382].
- Amount of Physical Force Required ▶ *People v. Chacon* (1995) 37 Cal.App.4th 52, 59 [43 Cal.Rptr.2d 434]; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686 [168 Cal.Rptr. 762].
- Bodily Injury Defined ▶ *People v. Chacon* (1995) 37 Cal.App.4th 52, 59; *People v. Schoenfeld* (1980) 111 Cal.App.3d 671, 685–686; see *People v. Reed* (1969) 270 Cal.App.2d 37, 48–50 [75 Cal.Rptr. 430] [injury reasonably foreseeable from defendant’s act].
- Control Over Victim When Intent Formed ▶ *People v. Martinez* (1984) 150 Cal.App.3d 579, 600–602 [198 Cal.Rptr. 565] [disapproved on other ground in *People v. Hayes* (1990) 52 Cal.3d 577, 627–628, fn. 10 [276 Cal.Rptr. 874, 802 P.2d 376].]
- No Asportation Required ▶ *People v. Macinnes* (1973) 30 Cal.App.3d 838, 844 [106 Cal.Rptr. 589]; see *People v. Rayford* (1994) 9 Cal.4th 1, 11–12, fn. 8 [36 Cal.Rptr.2d 317, 884 P.2d 1369]; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1227 [277 Cal.Rptr. 382].
- Official Act Defined ▶ *People v. Mayfield* (1997) 14 Cal.4th 668, 769–773 [60 Cal.Rptr.2d 1, 928 P.2d 485]; *People v. Norris* (1985) 40 Cal.3d 51, 55–56 [219 Cal.Rptr. 7, 706 P.2d 1141].

### ***Secondary Sources***

1 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Crimes Against the Person, §§ ~~266301–273302~~.

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

## COMMENTARY

A trial court may refuse to define “reward.” There is no need to instruct a jury on the meaning of terms in common usage. Reward means something given in return for good or evil done or received, and especially something that is offered or given for some service or attainment. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 367–368 [68 Cal.Rptr.2d 61].) In the absence of a request, there is also no duty to define “ransom.” The word has no statutory definition and is commonly understood by those familiar with the English language. (*People v. Hill* (1983) 141 Cal.App.3d 661, 668 [190 Cal.Rptr. 628].)

## LESSER INCLUDED OFFENSES

- False Imprisonment ▶ Pen. Code, §§ 236, 237; *People v. Chacon* (1995) 37 Cal.App.4th 52, 65 [43 Cal.Rptr.2d 434]; *People v. Magana* (1991) 230 Cal.App.3d 1117, 1121 [281 Cal.Rptr. 338]; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547 [90 Cal.Rptr. 866].
- Extortion ▶ Pen. Code, § 518.
- Attempted Extortion ▶ Pen. Code, §§ 664, 518.
- Multiple Convictions of Lesser Included Offenses of Pen. Code, § 209(a) Possible ▶ *People v. Eid* (2014) 59 Cal.4th 650, 655-658 [174 Cal.Rptr.3d 82, 328 P.3d 69].

If the prosecution alleges that the kidnapping resulted in death or bodily harm, or exposed the victim to a substantial likelihood of death (see Pen. Code, § 209(a)), then kidnapping for ransom without death or bodily harm is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the allegation has been proved.

Simple kidnapping under section 207 of the Penal Code is not a lesser and necessarily included offense of kidnapping for ransom, reward, or extortion. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 368, fn. 56 [68 Cal.Rptr.2d 61] [kidnapping for ransom can be accomplished without asportation while simple kidnapping cannot]; see *People v. Macinnes* (1973) 30 Cal.App.3d 838, 843–844 [106 Cal.Rptr. 589]; *People v. Bigelow* (1984) 37 Cal.3d 731, 755, fn. 14 [209 Cal.Rptr. 328, 691 P.2d 994].)

## RELATED ISSUES

### ***Extortion Target***

The kidnapped victim may also be the person from whom the defendant wishes to extort something. (*People v. Ibrahim* (1993) 19 Cal.App.4th 1692, 1696–1698 [24 Cal.Rptr.2d 269].)

### ***No Good-Faith Exception***

A good faith exception to extortion or kidnapping for ransom does not exist. Even actual debts cannot be collected by the reprehensible and dangerous means of abducting and holding a person to be ransomed by payment of the debt. (*People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677–1678 [15 Cal.Rptr.2d 305].)

## 1602. Robbery: Degrees (Pen. Code, § 212.5)

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**Robbery is divided into two degrees. If you conclude that the defendant committed a robbery, you must then decide the degree.**

**To prove that the defendant is guilty of first degree robbery, the People must prove that:**

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

**[The robbery was committed while the person robbed was using or had just used an ATM machine and was still near the machine.]**

**[The robbery was committed while the person robbed was performing (his/her) duties as the driver of or was a passenger on (a/an) (bus/taxi/cable car/streetcar/trackless trolley/\_\_\_\_\_ <other kind of vehicle used to transport people.>.)**

**All other robberies are of the second degree.**

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

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*New January 2006, [insert date of council approval]*

### **BENCH NOTES**

#### ***Instructional Duty***

The court has a **sua sponte** duty to give an instruction if first degree robbery has been charged, or if the prosecution is seeking a first degree conviction based on the facts. Give one of the three bracketed paragraphs defining the elements of first degree robbery.

## AUTHORITY

- Determination of Degrees ▶ Pen. Code, § 212.5.
- Floating Home Defined ▶ Health & Saf. Code, § 18075.55(d).
- Trailer Coach Defined ▶ Veh. Code, § 635; Health & Saf. Code, § 18009.3.
- Vessel Defined ▶ Harb. & Nav. Code, § 21.
- Inhabitation ▶ *People v. Jackson* (1992) 6 Cal.App.4th 1185, 1188 [8 Cal.Rptr.2d 239].
- Inhabited Jail Cell ▶ *People v. McDade* (1991) 230 Cal.App.3d 118, 127-128

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Crimes Against Property, § ~~888~~886.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.10[1][a][i], [3] (Matthew Bender).

## RELATED ISSUES

### ***Hotel Room***

A hotel room is an “inhabited dwelling house” for purposes of first degree robbery. (*People v. Fleetwood* (1985) 171 Cal.App.3d 982, 987–988 [217 Cal.Rptr. 612].)

### ***Robbery in One’s Own Residence***

A robbery committed in one’s own residence is still first degree robbery. (Pen. Code, § 212.5; *People v. Alvarado* (1990) 224 Cal.App.3d 1165, 1169 [274 Cal.Rptr. 452] [defendant robbed two salesmen after bringing them back to his hotel room]; *People v. McCullough* (1992) 9 Cal.App.4th 1298, 1300 [12 Cal.Rptr.2d 341].)

**2350. Sale, Furnishing, etc., of Marijuana (Health & Saf. Code, § 11360(a))**

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The defendant is charged [in Count \_\_\_] with **[unlawfully]** (selling/furnishing/administering/importing) marijuana, 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/furnished/administered/imported into California) a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;

[AND]

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

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

[AND]

5. The controlled substance was in a usable amount.]

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

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

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

**[*Marijuana* means all or part of the *Cannabis sativa L.* plant, whether growing or not, including the seeds and resin extracted from any part of the plant. [It also includes every compound, manufacture, salt, derivative, mixture, or 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.]**

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*New January 2006; Revised December 2008, October 2010, August 2014* *[insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

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].)

### ***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, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 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.

~~Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.~~

## 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, 529-531, 538-539 \[148 Cal.Rptr.3d 375\].](#)

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. 2000) Crimes Against Public Peace and Welfare, §§ ~~115-94-100~~.

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., Marijuana (Health & Saf. Code, § 11360)**

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The defendant is charged [in Count \_\_\_] with offering to **[unlawfully]** (sell/furnish/administer/import) marijuana, 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/furnish/administer/import into California) marijuana, a controlled substance;

AND

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

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

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

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

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

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New January 2006; Revised December 2008 **[insert date of council approval]**

## BENCH NOTES

### *Instructional Duty*

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

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, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 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.

~~Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.~~

## 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, 529-531, 538-539 \[148 Cal.Rptr.3d 375\].](#)

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (~~3d~~4th ed. ~~2000~~2012) Crimes Against Public Peace and Welfare, §§ ~~115-94-100~~.

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].)

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

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The defendant is charged [in Count \_\_\_] with **[unlawfully]** possessing for sale marijuana, 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;
5. The controlled substance was marijuana;

**AND**

6. The controlled substance was in a usable amount.

*Selling* for the purpose of this instruction means exchanging the marijuana for money, services, or anything of value.

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

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

from), 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.]

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*New January 2006; Revised December 2008, October 2010* *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

When 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, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 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.

~~Until courts of review provide further clarification, the court will have to determine whether under the facts of a given case the compassionate use defense should apply pursuant to Health & Saf. Code, §§ 11362.765 and 11362.775.~~

## AUTHORITY

- Elements ▶ Health & Saf. Code, § 11359.
- “Marijuana” defined ▶ Health & Saf. Code, § 11018.
- 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, 529-531, 538-539 [148 Cal.Rptr.3d 375].

## Secondary Sources

2 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Crimes Against Public Peace and Welfare, §§ ~~90-68-93~~.

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 Marijuana ▶ Health & Saf. Code, § 11357.

**2353–2359. Reserved for Future Use**

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

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The defendant is charged [in Count \_\_\_] with **[unlawfully]** (giving away/transporting) 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) 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 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.]

~~<Defense: Compassionate Use>~~

~~[Possession or transportation of marijuana is not *unlawful* if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.~~

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

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*New January 2006; Revised April 2010, October 2010* *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

When 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, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 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.

~~The medical marijuana defense is available in some cases where a defendant is charged with transportation. (*People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531] (Medical Marijuana Program applies retroactively and defense may apply to transportation of marijuana); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.~~

~~If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.” If the evidence shows that a physician may have “approved” but not “recommended” the marijuana use, give the bracketed phrase “or approved” in the paragraph on medical marijuana. (*People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)~~

### ***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, 529-531, 538-539 [148 Cal.Rptr.3d 375].

## Secondary Sources

2 *Witkin & Epstein, California Criminal Law* (~~3d~~ 4th ed. ~~2000~~2012) Crimes Against Public Peace and Welfare, §§ ~~115-94~~ 101.

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 intent to sell or distribute. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129].) Transportation also does not require personal possession by the defendant. (*Ibid.*) “Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt . . . .” (*Id.* at pp. 135–136.)

Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [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).

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

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The defendant is charged [in Count \_\_\_\_\_] with **[unlawfully]** (giving away/transporting) more than 28.5 grams of marijuana, 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/transported) a controlled substance;
2. The defendant knew of its presence;
3. The defendant knew of the substance's nature or character as a controlled substance;
4. The controlled substance was marijuana;

AND

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

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

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

~~<Defense: Compassionate Use>~~

~~[Possession or transportation of marijuana is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.~~

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

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

## BENCH NOTES

### *Instructional Duty*

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

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, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 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.

The medical marijuana defense is available in some cases when the defendant is charged with transportation. (*People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531] (Medical Marijuana Program applies retroactively and defense may apply to transportation of marijuana); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense when defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.” If the evidence shows that a physician may have “approved” but not “recommended” the marijuana use, give the bracketed phrase “or approved” in the paragraph on medical marijuana. (*People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)

### ***Related Instructions***

Use this instruction when the defendant is charged with transporting or giving away more than 28.5 grams of marijuana. For offering to transport or give away more than 28.5 grams of marijuana, use CALCRIM No. 2363, *Offering to Transport or Give Away Marijuana: More Than 28.5 Grams*. 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*. 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 ▶ 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, 529-531, 538-539 [148 Cal.Rptr.3d 375].
- This Instruction Upheld. *People v. Busch* (2010) 187 Cal.App.4th 150, 155-156 [113 Cal.Rptr.3d 683].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Crimes Against Public Peace and Welfare, §§ ~~115-94-101~~.

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*.

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

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The defendant is charged [in Count \_\_\_] with **[unlawfully]** (offering to give away/offering to transport/attempting to transport) 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/attempted to transport) 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) 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 from one location to another, even if the distance is short.]

~~<Defense: Compassionate Use>~~

~~[Possession or transportation of marijuana is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also~~

~~consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.~~

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

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

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*New January 2006; Revised April 2010* *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

When 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, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 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*.

~~The medical marijuana defense is available in some cases when the defendant is charged with transportation. (*People v. Wright* (2006) 40 Cal.4th 81, 87–88 [51 Cal.Rptr.3d 80, 146 P.3d 531] (Medical Marijuana Program applies retroactively and defense may apply to transportation of marijuana); *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550 [66 Cal.Rptr.2d 559].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense when defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.~~

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.” ~~If the evidence shows that a physician may have “approved” but not “recommended” the marijuana use, give the bracketed phrase “or approved” in the paragraph on medical marijuana. (*People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)~~

### ***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, 529-531, 538-539 [148 Cal.Rptr.3d 375].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Crimes Against Public Peace and Welfare, §~~§~~ 115-94-101.

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*.

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

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The defendant is charged [in Count \_\_\_] with **[unlawfully]** (offering to give away/offering to transport/attempting to transport) more than 28.5 grams of marijuana, 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] (offered to give away/offered to transport/attempted to transport) marijuana, a controlled substance, in an amount weighing more than 28.5 grams;

AND

2. When the defendant made the (offer/attempt), (he/she) intended to (give away/transport) 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 from one location to another, even if the distance is short.]*

*<Defense: Compassionate Use>*

~~**[Possession or transportation of marijuana is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or transport marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed or transported must be reasonably related to the patient's current medical needs. In deciding if marijuana was transported for medical purposes, also**~~

~~consider whether the method, timing, and distance of the transportation were reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or transport marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.~~

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

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

---

*New January 2006; Revised April 2010* *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

When 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, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 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*.

~~The medical marijuana defense is available in some cases when the defendant is charged with 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].) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense when defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].) If the defendant meets this burden, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions.~~

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.” ~~If the evidence shows that a physician may have “approved” but not “recommended” the marijuana use, give the bracketed phrase “or approved” in the paragraph on medical marijuana. (*People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)~~

### ***Related Instructions***

Use this instruction when the defendant is charged with offering to transport or give away more than 28.5 grams of marijuana. For transporting or giving away more than 28.5 grams of marijuana, use CALCRIM No. 2361, *Transporting or Giving Away Marijuana: More Than 28.5 Grams*. For offering to transport or give away 28.5 grams or less of marijuana, use 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 ▶ 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, 529-531, 538-539 [148 Cal.Rptr.3d 375].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d-4th~~ ed. ~~2000~~2012) Crimes Against Public Peace and Welfare, §§ ~~115-94-101~~.

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*.

## **2364–2369. Reserved for Future Use**

**2370. Planting, etc., Marijuana (Health & Saf. Code, § 11358)**

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The defendant is charged [in Count \_\_\_] with [unlawfully] (planting[,] [or]/ cultivating[,] [or]/ harvesting[,] [or]/ drying[,] [or]/ processing) marijuana, a controlled substance [in violation of Health and Safety Code section 11358].

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 marijuana plants;

AND

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

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

~~<Defense: Compassionate Use>~~

~~[Possession or cultivation of marijuana is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.]~~

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

New January 2006; Revised June 2007, April 2010 [insert date of council approval]

## BENCH NOTES

### *Instructional Duty*

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

When 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*

~~The 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 ~~possession~~ 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, 529-531, 538-539 [148 Cal.Rptr.3d 375]. ~~*People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].)~~ If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the ~~possession~~ conduct may have been lawful ~~under the act~~, 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*.~~ the bracketed paragraph of medical marijuana instructions.

If the medical marijuana instructions are given, then also give the bracketed word “unlawfully” in the first paragraph and element 1. ~~If the evidence shows that a physician may have “approved” but not “recommended” the marijuana use, give the bracketed phrase “or approved” in the paragraph on medical marijuana. (*People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)~~

## 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 ▶ 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, 529-531, 538-539 [148 Cal.Rptr.3d 375].

### *Secondary Sources*

2 Witkin & Epstein, California Criminal Law (~~3d ed~~[4th ed.](#), ~~2000~~[2012](#)) Crimes Against Public Peace and Welfare, § ~~136-146~~[§ 70, 111](#).

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 ▶ 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 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: Misdemeanor (Health & Saf. Code, § 11357(c))**

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The defendant is charged [in Count \_\_\_\_\_] with **[unlawfully]** possessing more than 28.5 grams of marijuana, a controlled substance [in violation of Health and Safety Code section 11357(c)].

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;

**AND**

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

**[*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.]

~~<Defense: Compassionate Use>~~

~~[Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defense must produce evidence tending to show that (his/her) possession or cultivation of marijuana was (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.~~

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

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New January 2006; Revised June 2007, April 2010, October 2010, April 2011 [*insert date of council approval*]

## BENCH NOTES

### *Instructional Duty*

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

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, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 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*. ~~The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [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 when defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act, the court has a sua sponte duty to give the bracketed paragraph of medical marijuana instructions.~~

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.” ~~If the evidence shows that a physician may have “approved” but not “recommended” the marijuana use, give the bracketed phrase “or approved” in the paragraph on medical marijuana. (*People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)~~

## AUTHORITY

- Elements ▶ Health & Saf. Code, § 11357(c); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- “Marijuana” Defined ▶ Health & Saf. Code, § 11018.
- 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.
- 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, 529-531, 538-539 [148 Cal.Rptr.3d 375].
- 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 (~~3d~~4th ed. ~~2000~~2012) Crimes Against Public Peace and Welfare, §§ ~~64-92~~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 Marijuana on School Grounds:  
Misdemeanor (Health & Saf. Code, § 11357(d))**

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The defendant is charged [in Count \_\_\_\_] with **[unlawfully]** possessing marijuana, a controlled substance, on the grounds of a school [in violation of Health and Safety Code section 11357(d)].

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;
5. The marijuana was in a usable amount but not more than 28.5 grams in weight;
6. The defendant was at least 18 years old;

**AND**

7. The defendant possessed the marijuana on the grounds of or inside a school providing instruction in any grade from kindergarten through 12, when the school was open for classes or school-related programs.

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

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

seeds of the plant; any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake; or the sterilized seed of the plant, which is incapable of germination.]]

[The People 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.]

~~<Defense: Compassionate Use>~~

~~[Possession or cultivation of marijuana is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate marijuana for personal medical purposes [or as the primary caregiver of a patient with a medical need] when a physician has recommended [or approved] such use. The amount of marijuana possessed or cultivated must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.~~

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

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*New January 2006; Revised June 2007, April 2010, October 2010* *[insert date of council approval]*

## BENCH NOTES

### ***Instructional Duty***

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

When 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, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 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*. The medical marijuana defense may be raised to a charge of violating Health and Safety Code section 11357. (See Health & Saf. Code, § 11362.5.) However, there are no cases on whether the defense applies to the charge of possession on school grounds. In general, the burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant’s testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish “medical necessity”].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act, the court has a **sua sponte** duty to give the bracketed paragraph of medical marijuana instructions if the court concludes that the defense applies to possession on school grounds.

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.” ~~If the evidence shows that a physician may have~~

~~“approved” but not “recommended” the marijuana use, give the bracketed phrase “or approved” in the paragraph on medical marijuana. *People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)~~

## AUTHORITY

- Elements ▶ Health & Saf. Code, § 11357(d); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- “Marijuana” Defined ▶ Health & Saf. Code, § 11018.
- 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, 529-531, 538-539 [148 Cal.Rptr.3d 375].

## Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

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

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

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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.]

~~<Defense: Compassionate Use>~~

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

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

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New January 2006; Revised June 2007 *[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

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

### *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, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 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*.

“Concentrated cannabis or hashish is included within the meaning of ‘marijuana’ as the term is used in the Compassionate Use Act of 1996.” (86 Ops.Cal.Atty.Gen. 180, 194 (2003).) ~~The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226]~~

~~[defendant need not establish “medical necessity”].) If the defendant introduces substantial evidence, sufficient to raise a reasonable doubt that the possession may have been lawful under the act, the court has a sua sponte duty to give the bracketed paragraph of medical marijuana instructions.~~

If the medical marijuana instructions are given, then, in element 1, also give the bracketed word “unlawfully.” ~~If the evidence shows that a physician may have “approved” but not “recommended” the marijuana use, give the bracketed phrase “or approved” in the paragraph on medical marijuana. (*People v. Jones, supra*, 112 Cal.App.4th at p. 347 [“approved” distinguished from “recommended”].)~~

## AUTHORITY

- Elements ▶ Health & Saf. Code, § 11357(a); *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [40 Cal.Rptr.2d 722, 893 P.2d 717].
- “Concentrated Cannabis” Defined ▶ Health & Saf. Code, § 11006.5.
- Knowledge ▶ *People v. Romero* (1997) 55 Cal.App.4th 147, 151–153, 157, fn. 3 [64 Cal.Rptr.2d 16]; *People v. Winston* (1956) 46 Cal.2d 151, 158 [293 P.2d 40].
- Constructive vs. Actual Possession ▶ *People v. Barnes* (1997) 57 Cal.App.4th 552, 556 [67 Cal.Rptr.2d 162].
- Usable Amount ▶ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Medical Marijuana ▶ Health & Saf. Code, § 11362.5.
- Burden of Proof for Defense of Medical Use ▶ *People v. Mower* (2002) 28 Cal.4th 457, 460 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Frazier* (2005) 128 Cal.App.4th 807, 820–821 [27 Cal.Rptr.3d 336].
- Amount Must Be Reasonably Related to Patient’s Medical Needs ▶ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].
- Primary Caregiver ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- ~~Defendant’s Burden of Proof on Compassionate Use Defense ▶ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J).~~
- Medical Marijuana Program Act Defense ▶ *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 538-539 [148 Cal.Rptr.3d 375].

*Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 64–92.

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

## 2500. Illegal Possession, etc., of Weapon

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

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

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

[AND]

<Alternative 3A—object capable of innocent uses>

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

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

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

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

**[AND**

**4. The defendant intended to sell it.]**

*<Give only if alternative 3B is given.>*

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

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

*<Give only if the weapon used has specific characteristics of which the defendant must have been aware.>*

**[A \_\_\_\_\_ <insert type of weapon specified in element 3B> is \_\_\_\_\_ <insert defining characteristics of weapon>.**

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

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

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

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

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

on which weapon (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/**bought/received**).

*<Defense: Statutory Exemptions>*

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

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*New January 2006; Revised August 2006, April 2008, February 2012, *[insert date of council approval]**

## BENCH NOTES

### *Instructional Duty*

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

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

~~\_\_\_\_\_ *Firearms*~~

~~short barreled shotgun~~

~~short barreled rifle~~

~~undetectable firearm~~

~~firearm that is not immediately recognizable as a firearm~~

~~unconventional pistol~~

~~cane gun, wallet gun, or zip gun~~

~~*Firearm Equipment and Ammunition*~~

~~camouflaging firearm container~~

~~ammunition that contains or consists of any fléchette dart~~

~~bullet containing or carrying an explosive agent~~

~~multiburst trigger activator~~

~~large capacity magazine~~

~~large capacity magazine conversion kit~~

~~———— Knives and Swords~~

~~———— ballistic knife~~

~~———— belt buckle knife~~

~~———— lipstick case knife~~

~~———— cane sword~~

~~shobi-zue~~

~~air gauge knife~~

~~writing pen knife~~

~~———— Martial Arts Weapons~~

~~———— nunchaku~~

~~———— shuriken ————~~

~~———— Other Weapons~~

~~metal knuckles~~

~~leaded cane~~

~~metal military practice handgrenade or metal replica handgrenade~~

~~instrument or weapon of the kind commonly known as a blackjack,~~

~~—slungshot, billy, sandclub, sap, or sandbag~~

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

Select alternative 3B if the object “has no conceivable innocent function” (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1405 [111 Cal.Rptr.2d 496]), or when the item is specifically designed to be one of the weapons defined in the Penal Code (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]).

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

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

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was “fragmented as to time . . . [or] space,” the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning “The People allege that the defendant possessed the following weapons,” inserting the items alleged. Also make the appropriate adjustments to the language of the instruction to refer to multiple weapons or objects.

### ***Defenses—Instructional Duty***

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

## **AUTHORITY**

Elements ▶ Pen. Code, §§ 19200, 20310, 20410, 20510, 20610, 20710, 20910, 21110, 21810, 22010, 22210, 24310, 24410, 24510, 24610, 24710, 30210, 31500, [32310](#), [32311](#), 32900, 33215, 33600.

- Need Not Prove Intent to Use ▶ *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].
- Knowledge Required ▶ *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Specific Intent Required for Offer to Sell ▶ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].
- Specific Intent Includes Knowledge of Forbidden Characteristics of Weapon ▶ *People v. King* (2006) 38 Cal.4th 617, 627–628 [42 Cal.Rptr.3d 743, 133 P.3d 636].
- Innocent Object—Must Prove Possessed as Weapon ▶ *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100]; *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].
- Definition of Blackjack, etc. ▶ *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].

- Firearm Need Not Be Operable ▶ *People v. Favalora* (1974) 42 Cal.App.3d 988, 991 [117 Cal.Rptr. 291].
- Measurement of Sawed-Off Shotgun ▶ *People v. Rooney* (1993) 17 Cal.App.4th 1207, 1211–1213 [21 Cal.Rptr.2d 900]; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500 [87 Cal.Rptr. 537].
- Measurement of Fléchette Dart ▶ *People v. Olmsted* (2000) 84 Cal.App.4th 270, 275 [100 Cal.Rptr.2d 755].
- Constructive vs. Actual Possession ▶ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Knowledge of Specific Characteristics of Weapon ▶ *People v. King* (2006) 38 Cal.4th 617, 628 [42 Cal.Rptr.3d 743, 133 P.3d 636].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (~~3d~~4th ed. ~~2000~~2012) Crimes Against Public Peace and Welfare, § ~~161~~211-212.

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

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

## COMMENTARY

### *Element 3—Knowledge*

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

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

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

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

In element 3 of the instruction, the court should give alternative 3B if the object has no innocent uses, inserting the appropriate description of the weapon. If the object has innocent uses, the court should give alternative 3A. The court may choose not to give element 3 if the court concludes that a previous case holding that the prosecution does not need to prove knowledge is still valid authority. However, the committee would caution against this approach in light of *Rubalcava* and *In re Jorge M.* (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 904–905 [13 Cal.Rptr.3d 442] [observing that, since *In re Jorge M.*, it is unclear if the prosecution must prove that the defendant knew shotgun was “sawed off” but that failure to give instruction was harmless if error].)

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

**2652. Resisting an Executive Officer in Performance of Duty (Pen. Code, § 69)**

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**The defendant is charged [in Count \_\_] with resisting an executive officer in the performance of that officer's duty [in violation of Penal Code section 69].**

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

- 1. The defendant [unlawfully] used force [or violence] to resist an executive officer;**
- 2. When the defendant acted, the officer was performing (his/her) lawful duty;**

**AND**

- 3. When the defendant acted, (he/she) knew the executive officer was performing (his/her) duty.**

**An *executive officer* is a government official who may use his or her own discretion in performing his or her job duties. [(A/An) \_\_\_\_\_ <insert title, e.g., peace officer, commissioner, etc.> is an *executive officer*.]**

**[A sworn member of \_\_\_\_\_ <insert name of agency that employs peace officer>, authorized by \_\_\_\_\_ <insert appropriate section from Pen. Code, § 830 et seq.> to \_\_\_\_\_ <describe statutory authority>, is a *peace officer*.]**

**[The duties of (a/an) \_\_\_\_\_ <insert title of officer specified in Pen. Code, § 830 et seq.> include \_\_\_\_\_ <insert job duties>.]**

*<When lawful performance is an issue, give the following paragraph and Instruction 2670, Lawful Performance: Peace Officer.>*

**[A peace officer is not lawfully performing his or her duties if he or she is (unlawfully arresting or detaining someone/ [or] using unreasonable or excessive force in his or her duties). Instruction 2670 explains (when an arrest or detention is unlawful/ [and] when force is unreasonable or excessive)**

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*New January 2006*

## BENCH NOTES

### *Instructional Duty*

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

In order to be “performing a lawful duty,” an executive officer, including a peace officer, must be acting lawfully. (*In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217 [275 Cal.Rptr. 729, 800 P.2d 1159].) The court has a **sua sponte** duty to instruct on lawful performance and the defendant’s reliance on self-defense as it relates to the use of excessive force when this is an issue in the case. (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [175 Cal.Rptr. 651]; *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47 [173 Cal.Rptr. 663]; *People v. White* (1980) 101 Cal.App.3d 161, 167–168 [161 Cal.Rptr. 541].)

If there is an issue in the case as to the lawful performance of a duty by a peace officer, give the last bracketed paragraph and CALCRIM No. 2670, *Lawful Performance: Peace Officer*.

If a different executive officer was the alleged victim, the court will need to draft an appropriate definition of lawful duty if this is an issue in the case.

## AUTHORITY

- Elements ▶ Pen. Code, § 69.
- General Intent Offense ▶ *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9 [182 Cal.Rptr. 757].
- Lawful Performance Element to Resisting Officer ▶ *In re Manuel G.* (1997) 16 Cal.4th 805, 816 [66 Cal.Rptr.2d 701, 941 P.2d 880].

### *Secondary Sources*

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Governmental Authority, § 119.

1 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 11, *Arrest*, § 11.06[3] (Matthew Bender).

3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 73, *Defenses and Justifications*, § 73.15[2] (Matthew Bender).

## LESSER INCLUDED OFFENSES

Penal Code section 148(a) is not a lesser included offense of this crime under the statutory elements test, but may be one under the accusatory pleading test. *People v. Smith* (2013) 57 Cal.4th 232, 241-242 [159 Cal.Rptr.3d 57, 303 P.3d 368]; may be a lesser included offense of this crime, see *People v. Lacefield* (2007) 157 Cal.App.4th 249, 259 [68 Cal.Rptr.3d 508], which found that the trial court had a *sua sponte* duty to instruct on the lesser included offense defined by Penal Code section 148(a)(1), disagreeing with see also *People v. Belmares* (2003) 106 Cal.App.4th 19, 26 [130 Cal.Rptr.2d 400] and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532 [29 Cal.Rptr.3d 586].

**3160. Great Bodily Injury (Pen. Code, §§ 667.5(c)(8), 667.61(e)(3), 1192.7(c)(8), 12022.7, 12022.8)**

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**If you find the defendant guilty of the crime[s] charged in Count[s] \_\_[, ] [or of attempting to commit (that/those) crime[s]] [ or the lesser crime[s] of \_\_\_\_\_ <insert name[s] of alleged lesser offense[s]>], you must then decide whether[, for each crime,] the People have proved the additional allegation that the defendant personally inflicted great bodily injury on \_\_\_\_\_ <insert name of injured person> in the commission [or attempted commission] of that crime. [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]**

**[The People must also prove that \_\_\_\_\_ <insert name of injured person> was not an accomplice to the crime.]**

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

**[Committing the crime of \_\_\_\_\_ <insert sexual offense charged> is not by itself the infliction of great bodily injury.]**

*<Group Assault>*

**[If you conclude that more than one person assaulted \_\_\_\_\_ <insert name of injured person> and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on \_\_\_\_\_ <insert name of injured person> if the People have proved that:**

- 1. Two or more people, acting at the same time, assaulted \_\_\_\_\_ <insert name of injured person> and inflicted great bodily injury on (him/her);**
- 2. The defendant personally used physical force on \_\_\_\_\_ <insert name of injured person> during the group assault;**

**AND**

**[3A. The amount or type of physical force the defendant used on \_\_\_\_\_ <insert name of injured person> was enough that it alone could have caused \_\_\_\_\_ <insert name of injured person> to suffer great bodily injury(;/.)]**

[OR]

**[3B. The physical force that the defendant used on \_\_\_\_\_ <insert name of injured person> was sufficient in combination with the force used by the others to cause \_\_\_\_\_ <insert name of injured person> to suffer great bodily injury.]**

**The defendant must have applied substantial force to \_\_\_\_\_ <insert name of injured person>. If that force could not have caused or contributed to the great bodily injury, then it was not substantial.]**

**[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:**

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

**AND**

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

*<If there is an issue in the case over whether the defendant inflicted the injury “in the commission of” the offense, see Bench Notes.>*

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

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*New January 2006; Revised June 2007* *[insert date of council approval]*

## **BENCH NOTES**

### ***Instructional Duty***

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

Give the bracketed sentence that begins with “Committing the crime of” if the defendant is charged with a sexual offense. (*People v. Escobar* (1992) 3 Cal.4th

740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100] [injury must be more than that which is present in every offense of rape].)

The bracketed section beneath the heading “Group Assault” is designed to be used in cases where the evidence shows a group assault.

If the court gives the bracketed sentence instructing that the People must prove that the person assaulted “was not an accomplice to the crime,” the court should also give the bracketed definition of “accomplice.” (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322].) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*. The court should review that instruction and determine whether any of these additional paragraphs should be given.

The jury must determine whether an injury constitutes “great bodily injury.” (*People v. Escobar* (1992) 3 Cal.4th 740, 750 [12 Cal.Rptr.2d 586, 837 P.2d 1100]; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498 [255 Cal.Rptr. 903] [reversible error to instruct that a bone fracture is a significant or substantial injury].)

If there is an issue in the case over whether the defendant inflicted the injury “in the commission of” the offense, the court may give CALCRIM No. 3261, *In Commission of Felony: Defined—Escape Rule*. (See *People v. Jones* (2001) 25 Cal.4th 98, 109 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].)

There is a conflict in authority about whether this enhancement applies in vehicular manslaughter cases. Until the Supreme Court provides further guidance, the trial court must decide which opinion to follow. (See *People v. Hale* (2014) 225 Cal.App.4th 268, 275 [170 Cal.Rptr.3d 166][Penal Code section 12077.7(g) precludes application of the enhancement], disagreeing with *People v. Julian* (2011) 198 Cal.App.4th 1524, 1529-1530 [131 Cal.Rptr.3d 561][applying section 12077.7(g) would cause a defendant to benefit from the death of one of his victims and rejecting that result as grotesque].)

## AUTHORITY

- Enhancements ▶ Pen. Code, §§ 667.5(c)(8), 667.61(e)(3), 12022.7, 12022.8.
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f); *People v. Escobar* (1992) 3 Cal.4th 740, 749–750 [12 Cal.Rptr.2d 586, 837 P.2d 1100].

- Great Bodily Injury May Be Established by Pregnancy or Abortion ▶ *People v. Cross* (2008) 45 Cal.4th 58, 68 [82 Cal.Rptr.3d 373, 190 P.3d 706].
- Must Personally Inflict Injury ▶ *People v. Lee* (2003) 31 Cal.4th 613, 631 [3 Cal.Rptr.3d 402, 74 P.3d 176]; *People v. Cole* (1982) 31 Cal.3d 568, 571 [183 Cal.Rptr. 350, 645 P.2d 1182]; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 627 [236 Cal.Rptr. 404] [Pen. Code, § 12022.8].
- Sex Offenses—Injury Must Be More Than Incidental to Offense ▶ *People v. Escobar* (1992) 3 Cal.4th 740, 746 [12 Cal.Rptr.2d 586, 837 P.2d 1100].
- Group Beating Instruction ▶ *People v. Modiri* (2006) 39 Cal.4th 481, 500–501 [46 Cal.Rptr.3d 762].
- This Instruction Is Correct In Defining Group Beating ▶ *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1418 [66 Cal.Rptr.3d 795].
- Accomplice Defined ▶ See Pen. Code, § 1111; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1167–1168 [123 Cal.Rptr.2d 322]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- “In Commission of” Felony ▶ *People v. Jones* (2001) 25 Cal.4th 98, 109–110 [104 Cal.Rptr.2d 753, 18 P.3d 674]; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1014 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *People v. Taylor* (1995) 32 Cal.App.4th 578, 582 [38 Cal.Rptr.2d 127].
- This Instruction Correctly Omits Requirement Of Intent to Inflict GBI ▶ *People v. Poroj* (2010) 190 Cal.App.4th 165, 176 [117 Cal.Rptr.3d 884].

### *Secondary Sources*

3 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Punishment, §§ ~~288–291~~350–351.

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. 91, *Sentencing*, § 91.35 (Matthew Bender).

## RELATED ISSUES

### *Specific Intent Not Required*

Penal Code section 12022.7 was amended in 1995, deleting the requirement that the defendant act with “the intent to inflict such injury.” (Stats. 1995, ch. 341, § 1;

see also *People v. Carter* (1998) 60 Cal.App.4th 752, 756 [70 Cal.Rptr.2d 569] [noting amendment].)

***Instructions on Aiding and Abetting***

In *People v. Magana* (1993) 17 Cal.App.4th 1371, 1378–1379 [22 Cal.Rptr.2d 59], the evidence indicated that the defendant and another person both shot at the victims. The jury asked for clarification of whether the evidence must establish that the bullet from the defendant’s gun struck the victim in order to find the enhancement for personally inflicting great bodily injury true. (*Id.* at p. 1379.) The trial court responded by giving the instructions on aiding and abetting. (*Ibid.*) The Court of Appeal reversed, finding the instructions erroneous in light of the requirement that the defendant must personally inflict the injury for the enhancement to be found true. (*Id.* at p. 1381.)

***Sex Offenses—Examples of Great Bodily Injury***

The following have been held to be sufficient to support a finding of great bodily injury: transmission of a venereal disease (*People v. Johnson* (1986) 181 Cal.App.3d 1137, 1140 [225 Cal.Rptr. 251]); pregnancy (*People v. Sargent* (1978) 86 Cal.App.3d 148, 151 [150 Cal.Rptr. 113]); and a torn hymen (*People v. Williams* (1981) 115 Cal.App.3d 446, 454 [171 Cal.Rptr. 401]).

***Enhancement May be Applied Once Per Victim***

The court may impose one enhancement under Penal Code section 12022.7 for each injured victim. (Pen. Code, § 12022.7(h); *People v. Ausbie* (2004) 123 Cal.App.4th 855, 864 [20 Cal.Rptr.3d 371].)

**3517. Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged and the Jury Receives Guilty and Not Guilty Verdict Forms for Greater and Lesser Offenses (Non-Homicide)**

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If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

[Now I will explain to you ~~which charges~~ the crimes are affected by this instruction [including lesser crimes of the lesser crimes].:]

[\_\_\_\_\_ <insert crime> is a lesser crime of  
\_\_\_\_\_ <insert crime> [charged in Count \_\_\_\_].]

[\_\_\_\_\_ <insert crime> is a lesser crime of  
\_\_\_\_\_ <insert crime> [charged in Count \_\_\_\_].]

[\_\_\_\_\_ <insert crime> is a lesser crime of  
\_\_\_\_\_ <insert crime> [charged in Count \_\_\_\_].]

It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

*<Give the following paragraphs if the jury has separate guilty and not guilty forms for both greater and lesser offenses pursuant to Stone v. Superior Court. >*

**[[For (the/any) count in which a greater and lesser crime is charged,] (Y/y)ou will receive verdict forms of guilty and not guilty for the greater crime and also verdict forms of guilty and not guilty for the lesser crime. Follow these directions before you give me any completed and signed, final verdict form. Return any unused verdict forms to me, unsigned.**

- 1. If all of you agree the People have proved that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any other verdict form [for that count].**

2. **If all of you cannot agree whether the People have proved that the defendant is guilty of the greater crime, inform me only that you cannot reach an agreement and do not complete or sign any verdict form [for that count].**
3. **If all of you agree that the People have not proved that the defendant is guilty of the greater crime and you also agree that the People have proved that (he/she) is guilty of the lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for guilty of the lesser crime.**
4. **If all of you agree the People have not proved that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for not guilty of the lesser crime.**
5. **If all of you agree the People have not proved that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, complete and sign the verdict form for not guilty of the greater crime and inform me only that you cannot reach an agreement about the lesser crime.]**

*<Give the following paragraphs if the jury has a combined verdict form for both greater and lesser offenses.>*

**[[For (the/any) charge with a lesser crime,] (Y/y)ou will receive a form for indicating your verdict on both the greater crime and the lesser crime. The greater crime is listed first. When you have reached a verdict, have the foreperson complete the form, sign, and date it. Follow these directions before writing anything on the form.**

1. **If all of you agree that the People have proved that the defendant is guilty of the greater crime as charged, (write “guilty” in the blank/circle the word “guilty”/check the box for “guilty”) for that crime, then sign, date, and return the form. Do not (write/circle/check) anything for the lesser crime.**
2. **If all of you cannot agree whether the People have proved that the defendant is guilty of the greater crime as charged, inform me only that you cannot reach an agreement and do not write anything on the verdict form.**

3. If all of you agree that the People have not proved that the defendant is guilty of the greater crime and you also agree that the People have proved that (he/she) is guilty of the lesser crime, (write “not guilty” in the blank/circle the words “not guilty”/check the box for “not guilty”) for the greater crime and (write “guilty” in the blank/circle the word “guilty”/check the box for “guilty”) for the lesser crime. You must not (write/circle/check) anything for the lesser crime unless you have (written/circled/checked) “not guilty” for the greater crime.
4. If all of you agree that the People have not proved that the defendant is guilty of either the greater or the lesser crime, (write “not guilty” in the blank/circle the words “not guilty”/check the box for “not guilty”) for both the greater crime and the lesser crime.
5. If all of you agree that the People have not proved that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, (write “not guilty” in the blank/circle the words “not guilty”/check the box for “not guilty”) for the greater crime, then sign, date, and return the form. Do not (write/circle/check) anything for the lesser crime, and inform me only that you cannot reach an agreement about that crime.]

Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

~~<Give the following paragraph if the court is instructing on a lesser included offense within another lesser included offense.>~~

~~[Follow these directions when you decide whether a defendant is guilty or not guilty of \_\_\_\_\_<insert crime>, which is a lesser crime of \_\_\_\_\_<insert crime>.]~~

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*New January 2006; Revised August 2006, June 2007, February 2012, August 2012,  
[insert date of council approval]*

## BENCH NOTES

### *Instructional Duty*

If lesser included crimes are not charged separately and the jury receives only one verdict form for each count, the court should use CALCRIM 3518 instead of this instruction. For separately charged greater and lesser included offenses, use CALCRIM 3519. In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a **sua sponte** duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)

In *Stone v. Superior Court*, *supra*, 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser included offenses. The court later referred to this “as a judicially declared rule of criminal procedure.” (*People v. Kurtzman* (1988) 46 Cal.3d 322, 328 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. (*Ibid.*) If the court chooses not to follow the procedure suggested in *Stone*, the court may give CALCRIM No. 3518 in place of this instruction.

**Do not** give this instruction for charges of murder or manslaughter; instead give the appropriate homicide instruction for lesser included offenses: CALCRIM No. 640, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide*, CALCRIM No. 641, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not To Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses*, CALCRIM No. 642, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide*, or CALCRIM No. 643, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses*.

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra*, 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court’s instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the “lone verdict of conviction of the lesser included offense” in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra*, 13 Cal.4th at p. 307; Pen. Code, § 1023.)

The court may not control the sequence in which the jury considers the offenses. (*People v. Kurtzman, supra*, 46 Cal.3d at p. 330.)

## AUTHORITY

- Lesser Included Offenses—Duty to Instruct ▶ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Lesser Included Offenses—Standard ▶ *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense ▶ Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Retrial on Greater ▶ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser If Jury Deadlocked on Greater ▶ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater ▶ *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

## Secondary Sources

5 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Criminal Trial, §§ ~~630, 631~~708-712.

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

## RELATED ISSUES

### ***Duty to Instruct on Lesser***

The court has a **sua sponte** duty to instruct “on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

### ***Acquittal of Greater Does Not Bar Retrial of Lesser***

Where the jury acquits of a greater offense but deadlocks on the lesser, retrial of the lesser is not barred. (*People v. Smith* (1983) 33 Cal.3d 596, 602 [189 Cal.Rptr. 862, 659 P.2d 1152].)

### ***Lesser Included Offenses Barred by Statute of Limitations***

The defendant may waive the statute of limitations to obtain a jury instruction on a lesser offense that would otherwise be time-barred. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373 [58 Cal.Rptr.2d 458, 926 P.2d 438].) However, the court has no sua sponte duty to instruct on a lesser that is time-barred. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283 [182 Cal.Rptr. 354, 643 P.2d 971].) If the court instructs on an uncharged lesser offense that is time-barred without obtaining an explicit waiver from the defendant, it is unclear if the defendant must object at that time in order to raise the issue on appeal or if the defendant may raise the issue for the first time on appeal. (See *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1145–1151 [90 Cal.Rptr.2d 885] [reasoning criticized in *People v. Smith* (2002) 98 Cal.App.4th 1182, 1193–1194 [120 Cal.Rptr.2d 185]].) The better

practice is to obtain an explicit waiver on the statute of limitations when instructing on a time-barred lesser.

***Conviction of Greater and Lesser***

The defendant cannot be convicted of a greater and a lesser included offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [83 Cal.Rptr. 411, 463 P.2d 763].) If the evidence supports the conviction on the greater offense, the conviction on the lesser included offense should be set aside. (*Ibid.*)

**3518. Deliberations and Completion of Verdict Forms: For Use When Lesser Included Offenses and Greater Crimes Are Not Separately Charged and the Jury Is Given Only One Not Guilty Verdict Form for Each Count (Non-Homicide)**

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If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

[Now I will explain to you ~~the crimes which charges are~~ affected by this instruction [including lesser crimes of the lesser crimes]:]

[\_\_\_\_\_ <insert crime> is a lesser crime of \_\_\_\_\_ <insert crime> [charged in Count \_\_\_\_].]

[\_\_\_\_\_ <insert crime> is a lesser crime of \_\_\_\_\_ <insert crime> [charged in Count \_\_\_\_].]

[\_\_\_\_\_ <insert crime> is a lesser crime of \_\_\_\_\_ <insert crime> [charged in Count \_\_\_\_].]

It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime.

[[For count[s] \_\_\_\_,] (Y/you) will receive (a/multiple) verdict form[s]. Follow these directions before you give me any completed and signed final verdict form. Return any unused verdict forms to me, unsigned.

1. If all of you agree the People have proved that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any other verdict form [for that count].
2. If all of you agree the People have not proved that the defendant is guilty of the greater crime and also agree the People have proved that (he/she) is guilty of (the/a) lesser crime, complete and sign the verdict form for guilty of the lesser crime. Do not complete or sign any other verdict form[s] [for that count].

3. If all of you agree the People have not proved that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty.
4. If all of you cannot agree whether the People have proved that the defendant is guilty of a charged or lesser crime, inform me only that you cannot reach agreement [as to that count] and do not complete or sign any verdict form [for that count].]

Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

~~<Give the following paragraph if the court is instructing on a lesser included offense within another lesser included offense.>~~

~~[Follow these directions when you decide whether a defendant is guilty or not guilty of \_\_\_\_\_<insert crime>, which is a lesser crime of \_\_\_\_\_<insert crime>.]~~

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New January 2006; Revised August 2006, June 2007, April 2010, February 2012, August 2012, {insert date of council approval}

## BENCH NOTES

### *Instructional Duty*

If lesser crimes are not charged separately and the jury receives separate not guilty and guilty verdict forms for each count, the court should use CALCRIM 3517 instead of this instruction. For separately charged greater and lesser included offenses, use CALCRIM 3519.

In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a **sua sponte** duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of lesser included offense unless it has concluded that defendant is not guilty of greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render verdict of partial acquittal on greater

offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)

In *Stone v. Superior Court, supra*, 31 Cal.3d at p. 519, the Supreme Court suggested that the trial court provide the jury with verdict forms of guilty/not guilty on each of the charged and lesser included offenses. The court later referred to this “as a judicially declared rule of criminal procedure.” (*People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].) However, this is not a mandatory procedure. (*Ibid.*) If the court chooses to follow the procedure suggested in *Stone*, the court should give CALCRIM No. 3517 in place of this instruction.

**Do not** give this instruction for charges of murder or manslaughter; instead give the appropriate homicide instruction for lesser included offenses:

CALCRIM No. 640, *Deliberations and Completion of Verdict Forms: For Use When Defendant is Charged With First Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide*, CALCRIM No. 641, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses*, CALCRIM No. 642, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide*, or CALCRIM No. 643, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses*.

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra*, 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court’s instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the “lone verdict of conviction of the lesser included offense” in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra*, 13 Cal.4th at p. 307; Pen. Code, § 1023.)

The court may not control the sequence in which the jury considers the offenses. (*People v. Kurtzman, supra*, 46 Cal.3d at p. 330.)

## AUTHORITY

- Lesser Included Offenses—Duty to Instruct ▶ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Lesser Included Offenses—Standard ▶ *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense ▶ Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Retrial on Greater ▶ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser If Jury Deadlocked on Greater ▶ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater ▶ *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

### *Secondary Sources*

5 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Criminal Trial, §§ ~~630, 631~~708-712.

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

## RELATED ISSUES

### *Duty to Instruct on Lesser*

The court has a **sua sponte** duty to instruct “on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate

interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

### ***Acquittal of Greater Does Not Bar Retrial of Lesser***

When the jury acquits of a greater offense but deadlocks on the lesser, retrial of the lesser is not barred. (*People v. Smith* (1983) 33 Cal.3d 596, 602 [189 Cal.Rptr. 862, 659 P.2d 1152].)

### ***Lesser Included Offenses Barred by Statute of Limitations***

The defendant may waive the statute of limitations to obtain a jury instruction on a lesser offense that would otherwise be time-barred. (*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 373 [58 Cal.Rptr.2d 458, 926 P.2d 438].) However, the court has no sua sponte duty to instruct on a lesser that is time-barred. (*People v. Diedrich* (1982) 31 Cal.3d 263, 283 [182 Cal.Rptr. 354, 643 P.2d 971].) If the court instructs on an uncharged lesser offense that is time-barred without obtaining an explicit waiver from the defendant, it is unclear if the defendant must object at that time in order to raise the issue on appeal or if the defendant may raise the issue for the first time on appeal. (See *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1145–1151 [90 Cal.Rptr.2d 885] [reasoning criticized in *People v. Smith* (2002) 98 Cal.App.4th 1182, 1193–1194 [120 Cal.Rptr.2d 185]].) The better practice is to obtain an explicit waiver on the statute of limitations when instructing on a time-barred lesser.

### ***Conviction of Greater and Lesser***

The defendant cannot be convicted of a greater and a lesser included offense. (*People v. Moran* (1970) 1 Cal.3d 755, 763 [83 Cal.Rptr. 411, 463 P.2d 763].) If the evidence supports the conviction on the greater offense, the conviction on the lesser included offense should be set aside. (*Ibid.*)

**3519. Deliberations and Completion of Verdict Forms: Lesser Offenses—For Use When Lesser Included Offenses and Greater Crimes Are Separately Charged (Non-Homicide)**

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If all of you find that the defendant is not guilty of a greater charged crime, you may find (him/her) guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct.

[Now I will explain to you ~~which charges are~~ the crimes affected by this instruction [including lesser crimes of the lesser crimes]:]

[\_\_\_\_\_ <insert crime>, as charged in Count \_\_\_\_, is a lesser crime to \_\_\_\_\_ <insert crime> [as charged in Count \_\_\_\_].]  
[\_\_\_\_\_ <insert crime>, as charged in Count \_\_\_\_, is a lesser crime to \_\_\_\_\_ <insert crime> [as charged in Count \_\_\_\_].]  
[\_\_\_\_\_ <insert crime>, as charged in Count \_\_\_\_, is a lesser crime to \_\_\_\_\_ <insert crime> [as charged in Count \_\_\_\_].]

It is up to you to decide the order in which you consider each greater and lesser crime and the relevant evidence, but I can accept a verdict of guilty of the lesser crime only if you have found the defendant not guilty of the greater crime.

[[For (the/any) count in which a greater and lesser crime is charged,] (Y/y)ou will receive verdict forms of guilty and not guilty for [each/the] greater crime and lesser crime. Follow these directions before you give me any completed and signed, final verdict form. Return any unused verdict forms to me, unsigned.

1. If all of you agree the People have proved that the defendant is guilty of the greater crime, complete and sign the verdict form for guilty of that crime. Do not complete or sign any verdict form for the [corresponding] lesser crime.
2. If all of you cannot agree whether the People have proved that the defendant is guilty of the greater crime, inform me of your disagreement and do not complete or sign any verdict form for that

crime or the [corresponding] lesser crime.

3. If all of you agree the People have not proved that the defendant is guilty of the greater crime and also agree the People have proved that (he/she) is guilty of the lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for guilty of the [corresponding] lesser crime. Do not complete or sign any other verdict forms [for those charges].
4. If all of you agree the People have not proved that the defendant is guilty of the greater or lesser crime, complete and sign the verdict form for not guilty of the greater crime and the verdict form for not guilty of the [corresponding] lesser crime.
5. If all of you agree the People have not proved that the defendant is guilty of the greater crime, but all of you cannot agree on a verdict for the lesser crime, complete and sign the verdict form for not guilty of the greater crime and inform me about your disagreement on the lesser crime.]

Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].

~~<Give the following paragraph if the court is instructing on a lesser included offense within another lesser included offense.>~~

~~[Follow these directions when you decide whether a defendant is guilty or not guilty of \_\_\_\_\_<insert crime>, which is a lesser crime of \_\_\_\_\_<insert crime>.]~~

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*New June 2007; Revised August 2012, insert date of council approval*

## BENCH NOTES

### *Instructional Duty*

In all cases in which one or more lesser included offenses are submitted to the jury, whether charged or not, the court has a sua sponte duty to instruct on the applicable procedures. (*People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094] [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 [334 P.2d 852] [duty to instruct that if jury has reasonable doubt of greater offense, must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-

310 [52 Cal.Rptr.2d 282, 914 P.2d 832] [duty to instruct that jury cannot convict of a lesser included offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809] [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280] [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense]).

Whenever greater and lesser included crimes are separately charged the court must use this instruction instead of CALCRIM 3517 or 3518.

**Do not** give this instruction for charges of murder or voluntary manslaughter; give CALCRIM No. 640, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide*, CALCRIM No. 641, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With First Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses*, CALCRIM No. 642, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Not Guilty Forms for Each Level of Homicide*, or CALCRIM No. 643, *Deliberations and Completion of Verdict Forms: For Use When Defendant Is Charged With Second Degree Murder and Jury Is Given Only One Not Guilty Verdict Form for Each Count; Not to Be Used When Both Voluntary and Involuntary Manslaughter Are Lesser Included Offenses*.

The court should tell the jury it may not return a guilty verdict on a lesser included offense unless it has found the defendant not guilty of the greater offense. (*People v. Fields, supra*, 13 Cal.4th at pp. 310–311.) If the jury announces that it is deadlocked on the greater offense but, despite the court’s instructions, has returned a guilty verdict on the lesser included offense, the court should again instruct the jury that it may not convict of the lesser included offense unless it has found the defendant not guilty of the greater offense. (*Ibid.*) The court should direct the jury to reconsider the “lone verdict of conviction of the lesser included offense” in light of this instruction. (*Ibid.*; Pen. Code, § 1161.) If the jury is deadlocked on the greater offense but the court nevertheless records a guilty verdict on the lesser included offense and then discharges the jury, retrial on the greater offense will be barred. (*People v. Fields, supra*, 13 Cal.4th at p. 307; Pen. Code, § 1023.)

The court may not control the sequence in which the jury considers the offenses. (*People v. Kurtzman, supra*, 46 Cal.3d at p. 330.)

## AUTHORITY

- Lesser Included Offenses—Duty to Instruct ▶ Pen. Code, § 1159; *People v. Breverman* (1998) 19 Cal.4th 142, 162 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Lesser Included Offenses—Standard ▶ *People v. Birks* (1998) 19 Cal.4th 108, 117 [77 Cal.Rptr.2d 848, 960 P.2d 1073].
- Reasonable Doubt as to Degree or Level of Offense ▶ Pen. Code, § 1097; *People v. Dewberry* (1959) 51 Cal.2d 548, 555–557 [334 P.2d 852].
- Conviction of Lesser Precludes Retrial on Greater ▶ Pen. Code, § 1023; *People v. Fields* (1996) 13 Cal.4th 289, 309–310 [52 Cal.Rptr.2d 282, 914 P.2d 832]; *People v. Kurtzman* (1988) 46 Cal.3d 322, 329 [250 Cal.Rptr. 244, 758 P.2d 572].
- Court May Ask Jury to Reconsider Conviction on Lesser If Jury Deadlocked on Greater ▶ Pen. Code, § 1161; *People v. Fields* (1996) 13 Cal.4th 289, 310 [52 Cal.Rptr.2d 282, 914 P.2d 832].
- Must Permit Partial Verdict of Acquittal on Greater ▶ *People v. Marshall* (1996) 13 Cal.4th 799, 826 [55 Cal.Rptr.2d 347, 919 P.2d 1280]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 [183 Cal.Rptr. 647, 646 P.2d 809].

### *Secondary Sources*

5 Witkin & Epstein, California Criminal Law (~~3d~~4th ed. ~~2000~~2012) Criminal Trial, §§ ~~630, 631~~708-712.

6 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Judgment, § 61.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.03[2][g], 85.05, 85.20 (Matthew Bender).

## RELATED ISSUES

### *Duty to Instruct on Lesser*

The court has a **sua sponte** duty to instruct “on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.] Just as the People have no legitimate

interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154–155 [77 Cal.Rptr.2d 870, 960 P.2d 1094].)

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## **3520–3529. Reserved for Future Use**