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ENDORSED
FILED
San Francisco County Superior Court

DEC 14 2017

CLERK OF THE COURT

BY: Marsha Smith
Deputy Clerk

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10 **Superior Court of California**
San Francisco County

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12 **People of the State of**
13 **California,**

14 **Plaintiff,**

15 **vs.**

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17 **Jose Ines Garcia Zarate,**

18 **Defendant.**

Court No: 15014736

Defendant's Motion For
New Trial

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Jan. 5, 2018
Date: ~~December 14, 2017~~
Time: ~~9:00AM~~ 10 AM
Dept: 13

19 Joes Ines Garcia Zarate moves for new trial based on this Court's
20 errors: 1) failing to instruct the jury on Mistake of Fact; 2) failing to
21 instruct the jury on the defense of Momentary Possession; and 3)
22 denying the defense request to admit Evidence Code section 1202
23 testimony of the defendant.

24 A new trial should be granted where "the court has misdirected the
25 jury in a matter of law or has erred in the decision of any question of law
26 arising during the course of the trial."¹ This occurred here.

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¹ Penal Code Section 1181(5); *People v. Hamilton* (2009) 45 Cal.4th 863.

1 A defendant has a federal and state constitutional right to present a
2 defense. Here, the defense argued that Garcia Zarate was not guilty of
3 any of the charged offenses, including Possession of Firearm by a Felon.
4 The core of the defense is the defendant's statements to law enforcement
5 officials, in which he explained that, after sitting on the bench on Pier 14
6 on the date at-issue, he noticed and came in contact with an unknown
7 item wrapped in a rag. He explained that the wrapped item then
8 exploded and he threw it in the water to stop it from continuing to shoot.

9 The defense requested the Court instruct the jury on CALCRIM 3406,
10 Mistake of Fact. The defense made this request to guide the jury,
11 because it directly addresses the knowledge requirement of the charge
12 and explains how the defense could concede that the defendant had
13 contact with the item but that he was not guilty of illegally possessing it.

14 During deliberations the jury asked a question requesting guidance
15 surrounding the implication of the "knowledge" element regarding intent
16 and asked for a definition of "possession." See at-issue jury questions
17 and response attached as Exhibit A.

18 The defense requested the Court respond, in part, by instructing the
19 jury with the bracketed momentary possession language in CALCRIM
20 2511. That request was denied, as was the initial request for CALCRIM
21 3406.

22 Both requested instructions should have been given.

23 And the defense twice requested that three short clips of an interview
24 conducted with ABC 7 News be admitted to impeach the defendant's
25 recorded police interrogation. The statements were admissible under
26 Evidence Code Section 1202, but both requests were denied
27
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1 **1. By failing to instruct on mistake of fact the Court**
2 **essentially mandated the verdict to Count 2.**

3 It was error to not instruct the jury on Mistake of Fact. The court has
4 a sua sponte duty² to instruct on Mistake of Fact if there “is substantial
5 evidence supporting the defense.”³ And the court must instruct on a
6 defense when the defendant requests it and substantial evidence
7 supports the defense.⁴

8 The substantial-evidence⁵ test does not allow the court to weigh
9 credibility. In determining whether the evidence is “sufficient” to instruct,
10 the trial court does not determine the credibility of the defense evidence.⁶

11 Specifically as to Mistake of Fact instruction (CALCRIM 3406) here it
12 would have clarified for the jury the interaction of intent and knowledge
13 required to find the defendant guilty of Possession of Firearm by a Felon.
14 The jury was not given that clarification. See instruction and Bench
15 Notes attached as Exhibit B.

16 The clarification was needed for jury guidance because it was based
17 on substantial evidence in defendant’s statement and a contested legal
18 issue. The defense argued that Garcia Zarate did not understand that the
19 item he found wrapped in rags was a firearm, and that when the firearm
20 discharged Garcia Zarate threw it in the bay to stop it from continuing to
21 discharge.

22 When ruling on the instruction, the Court had a doubt that the
23 Mistake of Fact instruction could be applied to the charge of involuntary

24 ² A sua sponte duty means the court must do so whether or not it was asked
25 for.

26 ³ 2-3400 CALCRIM 3406 (2017).

27 ⁴ Id.

28 ⁵ Substantial evidence means evidence of a defense, which, if believed, would
be sufficient for a reasonable jury to find a reasonable doubt as to the
defendant’s guilt. *People v. Salas* (2006) 37 Cal.4th 967, 982–983.

⁶ Id. at 982.

1 manslaughter. Rather than omit the portion of the instruction dealing
2 with that charge alone, the Court declined to give the instruction at all.

3 But the jury went right to this issue in deliberations, asking if
4 possession coupled with knowledge of the item's true character alone
5 was enough to "demonstrate wrongful intent" (Exhibit A). The court's
6 answer that "it is sufficient if you find there is wrongful intent" fell short
7 of the admonition in CALCRIM 3406 that the defendant is not guilty if he
8 "did not have the intent or mental state required to commit the crime."

9 The defense argued that when the defendant came into possession of
10 the firearm he did not know its illicit nature. This was supported by
11 Garcia Zarate's taped statement to police. In refusing to instruct the jury
12 on Mistake of Fact, the Court limited the defense to using only Accident
13 for the possession charge. The questions the jury asked focused on the
14 intent and knowledge requirement which the Mistake of Fact defense
15 would have directly addressed.

16
17 **2. The Court erred by omitting the momentary possession**
18 **instruction in response to the jury's second question in**
19 **Exhibit A.**

20 The California Supreme Court authorized the defense of temporary or
21 momentary possession for disposal arose in the 1971 *People v. Mijares*
22 case.⁷ There, the "principal question presented [was] whether the act of
23 handling a narcotic for the sole purpose of disposal constitutes
24 'possession' within the meaning of" former Health and Safety Code
25 Section 11500.⁸ Mijares removed an object from the pocket of the
26 passenger in his car and threw it into a field. He then drove his friend,

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28 ⁷ *People v. Mijares* (1971) 6 Cal.3d 415.

⁸ *Id.*, at 417.

1 who was suffering from a heroin overdose, to a fire station. The victim
2 was taken away by ambulance.

3 Mijares shouted his license plate number to a fireman and left, only to
4 return in less than a minute and wait for the police. The authorities
5 recovered the object tossed into the field and concluded it contained
6 heroin and related paraphernalia.⁹ The Supreme Court noted that “in
7 throwing the heroin out of the car, [Mijares] maintained momentary
8 possession for the sole purpose of putting an end to the unlawful
9 possession of [the passenger].”¹⁰ But the physical control inherent
10 “during the brief moment involved in abandoning the narcotic” was not
11 possession under the statute.¹¹

12 The Court reasoned that if such transitory control constituted
13 possession, “manifest injustice to admittedly innocent individuals” could
14 result.¹² As an example, the court referred to the witness who saw the
15 defendant throw the object. Had she “briefly picked up the package and
16 identified the substance as heroin and then placed the outfit back on the
17 ground, during the time after she had realized its narcotic character she,
18 too, would have been guilty of possession under an unduly strict reading
19 [of the statute], notwithstanding the fact that her transitory handling of
20 the contraband might have been motivated solely by curiosity.”¹³ The
21 court refused to “read the possession statutes to authorize convictions
22 under such guileless circumstances.”¹⁴

25 ⁹ *Id.* at 417-418.

26 ¹⁰ *Mijares, supra*, 6 Cal.3d at 420.

27 ¹¹ *Id.*, at 422.

28 ¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

1 Momentary possession is applicable to many cases including, as
2 charged here, ex-felon in possession of a firearm.¹⁵ Specifically, the court
3 held that where sufficient evidence has been presented, the trial court
4 has a *sua sponte* duty to instruct the jury on Momentary Possession.

5 In determining whether the evidence is “sufficient” to present the
6 instruction the trial court does not determine the credibility of the
7 defense evidence.¹⁶

8 Momentary Possession is outlined in bracketed language of CALCRIM
9 2511. (See Exhibit C.) The instruction explains that momentary
10 possession is a complete defense to felon in possession of a firearm if the
11 defense proves 1) the defendant possessed the firearm only for a
12 momentary or transitory period; 2) he possessed the firearm to abandon
13 or dispose of it; and 3) he did not intend to prevent law enforcement
14 officials from seizing the firearm.

15 And that is just what the defense consistently argued: Garcia Zarate
16 had only momentary possession of the firearm. This was directly
17 supported by evidence, particularly by Garcia Zarate’s post-arrest
18 statements to law enforcement. In those statements, he continually
19 explained that he did not know the item in the rag was a firearm when he
20 contacted it and it fired. In response to the question “why did you throw
21 the gun,” Garcia Zarate responded “because if not it was going to keep
22 firing by itself...so I was trying to prevent the gun from shooting” (RT 88,
23 89)” “so [I had] no choice but to get rid of it, cause if [I] had not it would
24 have continued firing” (RT 116). See redacted transcript sections
25 attached as Exhibit D.

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28 ¹⁵ See *People v. Martin* (2001) 25 Cal.4th 1180; see also *People v. Hurtado*
(1996) 47 Cal.App.4th 805.

¹⁶ *Id.* at 982.

1 As in *Mijares*, even *knowingly* possessing a prohibited item
2 temporarily, to dispose of it, does not warrant an automatic conviction of
3 possession. The Momentary Possession instruction exists to prevent
4 what the court called “an unduly strict reading” of the statute that would
5 make someone guilty immediately upon realizing its illicit character.
6 Absent that instruction, that is the only option before the jury.

7 The Court’s refusal to provide the jury the Momentary Possession
8 instruction – even in response to the jury’s specific request for guidance
9 on this very issue, was error.

10 To the extent the court felt that the third element could not be met
11 (whether Garcia Zarate intended to prevent the police from seizing the
12 weapon), that question of fact is reserved for the jury to resolve; per
13 *Salas*, it is not the role of the Court to evaluate the credibility of
14 defendant’s stated intent to “prevent the gun from shooting” in
15 determining the sufficiency of the evidence to warrant a jury instruction.

16
17 **3. Admitting testimony under evidence code section 1202**
18 **would have supported defense argument.**

19 The prosecution presented, in its case-in-chief, defendant’s post-arrest
20 interrogation statement. In response, the defense renewed its pretrial
21 request to introduce three clips from the defendant’s televised interview
22 with ABC News that contained contradictory statements.

23 The first proffered clip featured Garcia Zarate explaining that he first
24 noticed the gun-wrapped bundle with his feet, and then, when he picked
25 up the bundle, the wrapped firearm discharged. This differs from the
26 admitted interrogation segments in which Garcia Zarate indicated that
27 the firearm discharged when he stepped on it.

28 The second clip shows Garcia Zarate explaining why he shot the gun
“at” the “young lady.” Garcia Zarate explained that the firing happened

1 accidentally when he grabbed the bundle. The officers were not satisfied
2 with Garcia Zarate's answer to the "why-did-he-shoot-at-her" question
3 during the interrogation, and the answer in clip 2 contradicts the
4 shooting-at-seals statement provided during the interrogation.

5 The third proffered clip presents Garcia Zarate's timeline: first
6 stepping on the bundle, then picking it up, and finally discharging a
7 round from the bundle's contents. This timeline contradicts the
8 statement played for the jury where Garcia Zarate indicated the gun
9 discharged when he kicked it and that he "don't no remember" why he
10 shot at the girl.

11 The statements in these three clips were admissible under Evidence
12 Code 1202 because they would have impeached the credibility of the
13 hearsay interrogation statements admitted into evidence. Admission of
14 Garcia Zarate's contradictory statement for this offered purpose is
15 authorized by the language of section 1202.¹⁷

16 Had the proffered clips been admitted, they would have specifically
17 provided supported the defense that Garcia Zarate 1) did not know the
18 item in the rag was a firearm, 2) interacted with item while in the rag, 3)
19 was surprised when the item exploded, and 4) threw the item in the
20 water to get it to stop discharging.

21 The Court erred in refusing to allow these clips to be played for the
22 jury as impeachment evidence.

23
24 ¹⁷ *People v. Baldwin* (2010) 189 Cal. App. 4th 991, 1002–05 (2010), as
25 *modified on denial of reh'g* (Nov. 18, 2010); Evidence Code 1202 provides:
26 "Evidence of a statement or other conduct by a declarant that is
27 inconsistent with a statement by such declarant received in evidence as
28 hearsay evidence is not inadmissible for the purpose of attacking the
credibility of the declarant . . ."

1 **Conclusion**

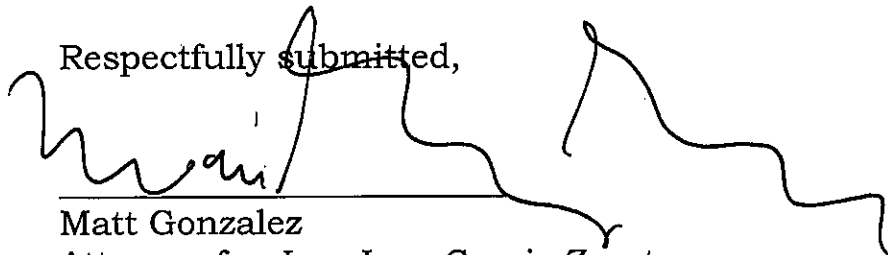
2 The court in *Mijares* outlined a situation it feared would result if a
3 possession statute were construed too strictly — that a person picks up
4 an unknown object, learns its illicit nature, and regardless of how brief
5 his later possession is, he is immediately guilty of possessing it. That fear
6 was realized here.

7 The court erred on three issues with a direct and perceptible effect on
8 the outcome of the case: 1) omitting the Mistake of Fact instruction, 2)
9 omitting the Momentary Possession instruction, and 3) excluding the
10 contradictory (to the admitted interrogation) testimony (admissible under
11 Evidence Code section 1202) that most directly explains supported
12 transitory possession. All this deprived the jury and Garcia Zarate of a
13 fair hearing on his momentary possession, resulting (as evidenced by the
14 jury instruction) in a de facto directed verdict.

15 Thus, Garcia Zarate requests that a new trial be granted for the
16 charge of Possession of Firearm by a Felon.

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18 Dated: December 14, 2017

Respectfully submitted,



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21 Matt Gonzalez
22 Attorney for Jose Ines Garcia Zarate
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Exhibit A

Superior Court of California
City and County of San Francisco
Jury Request Form

Honorable SAMUEL K. FENG Judge Presiding
Department: 13

People Of The State Of California

CTNO: 15014736

vs.

JOSE GARCIA-ZARATE

Defendant

WE, the jury in the above-entitled action, request the following:

1) Request clarification of charge 1 on page 1 of the jury instructions
What is the definition of possession?

2) Is there any time requirement for possession?

3) Page 13 of jury instructions states that wrongful intent is required for charge 2.

Are the points #1 (line 3) and #2 (line 10) on p. 39 sufficient to demonstrate wrongful intent?

COURT RESPONSE:

1) Please refer to Calcrim 700; lines 26-28, on page 2; and lines 1-2 on pg 3.

DATE: November 28, 2017

REQUEST NO: ~~15014736~~ 9

BY:

PRESIDING JUROR

2) No;

3) It is sufficient if you find there is wrongful intent.

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Exhibit B

2-3400 CALCRIM 3406

Judicial Council of California Criminal Jury Instructions (CALCRIM) > Series 3400 DEFENSES
AND INSANITY > A. GENERAL DEFENSES

3406 Mistake of Fact

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

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

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

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

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

BENCH NOTES

Instructional Duty

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

When the court concludes that the defense is supported by substantial evidence and is inconsistent with the defendant's theory of the case, however, it should ascertain whether defendant wishes instruction on this alternate theory. (*People v. Gonzales (1999) 74 Cal.App.4th 382, 389-390 [88 Cal.Rptr.2d 1111]*; *People v. Breverman (1998) 19 Cal.4th 142, 157 [77 Cal.Rptr.2d 870, 960 P.2d 1094]*.)

Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas (2006) 37 Cal.4th 967, 982-983 [38 Cal.Rptr.3d 624, 127 P.3d 40]*.)

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

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

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

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

AUTHORITY

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

Secondary Sources

- 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Defenses, § 39.
- 3 Millman, Sevilla & Tarlow, *California Criminal Defense Practice, Ch. 73, Defenses and Justifications, § 73.06* (Matthew Bender).

RELATED ISSUES

Mistake of Fact Based on Involuntary Intoxication

A mistake of fact defense can be based on involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 829–833 [194 Cal.Rptr. 633].) In *Scott*, the court held that the defendant was entitled to an instruction on mistake of fact, as a matter of law, where the evidence established that he unknowingly and involuntarily ingested a hallucinogen. As a result he acted under the delusion that he was a secret agent in a situation

where it was necessary to steal vehicles in order to save his own life and possibly that of the President. The court held that although defendant's mistake of fact was irrational, it was reasonable because of his delusional state and had the mistaken facts been true, his actions would have been justified under the doctrine of necessity. The court also stated that mistake of fact would not have been available if defendant's mental state had been caused by voluntary intoxication. (*Id.* at pp. 829–833; see also *People v. Kelly* (1973) 10 Cal.3d 565, 573 [111 Cal.Rptr. 171, 516 P.2d 875] [mistake of fact based on voluntary intoxication is not a defense to a general intent crime].)

Mistake of Fact Based on Mental Disease

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

CALCRIM

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Exhibit C

2-2500 CALCRIM 2511

Judicial Council of California Criminal Jury Instructions (CALCRIM) > Series 2500 WEAPONS >
B. POSSESSION OF FIREARM BY PERSON PROHIBITED

**2511 Possession of Firearm by Person Prohibited Due to Conviction—
Stipulation to Conviction (Pen. Code, §§ 29800, 29805, 29820, 29900)**

The defendant is charged [in Count _____] with unlawfully possessing a firearm [in violation of _____ <insert appropriate code section[s]>].

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

1. The defendant (owned/purchased/received/possessed) a firearm;
2. The defendant knew that (he/she) (owned/purchased/received/possessed) the firearm;

[AND]

3. The defendant had previously been convicted of (a/two) (felony/misdemeanor[s])(;/.)

[AND]

<Alternative 4A—give only if the defendant is charged under Pen. Code, § 29805.>

- [4. The previous conviction was within 10 years of the date the defendant possessed the firearm.]

<Alternative 4B—give only if the defendant is charged under Pen. Code, § 29820.>

- [4. The defendant was under 30 years old at the time (he/she) possessed the firearm.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion. [The frame or receiver of such a *firearm* is also a *firearm* for the purpose of this instruction.]]

<Do not use the language below unless the other instruction defines *firearm* in the context of a crime charged pursuant to Pen. Code, § 29800.>

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

[A *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 defendant and the People have stipulated, or agreed, that the defendant was previously convicted of (a/two) (felony/misdemeanor[s]). This stipulation means that you must accept this fact as proved.

2-2500 CALCRIM 2511

[Do not consider this fact for any other purpose [except for the limited purpose of _____ <insert other permitted purpose, e.g., determining the defendant's credibility>]. Do not speculate about or discuss the nature of the conviction.]

[The People allege that the defendant (owned/purchased/received/possessed) the following firearms: _____ <insert description of each firearm when multiple firearms alleged>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (owned/purchased/received/possessed) at least one of the firearms, and you all agree on which firearm (he/she) (owned/purchased/received/possessed).]

<Defense: Momentary Possession>

[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that:

1. (He/She) possessed the firearm only for a momentary or transitory period;
2. (He/She) possessed the firearm in order to (abandon[.]/ [or] dispose of[.]/ [or] destroy) it;

AND

3. (He/She) did not intend to prevent law enforcement officials from seizing the firearm.

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true. If the defendant has not met this burden, (he/she) has not proved this defense.]

<Defense: Justifiable Possession>

[If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove that (he/she) was justified in possessing the firearm. In order to establish this defense, the defendant must prove that:

1. (He/She) (found the firearm/took the firearm from a person who was committing a crime against the defendant);

[AND]

2. (He/She) possessed the firearm no longer than was necessary to deliver or transport the firearm to a law enforcement agency for that agency to dispose of the weapon(;/.)

[AND]

3. If the defendant was transporting the firearm to a law enforcement agency, (he/she) gave prior notice to the law enforcement agency that (he/she) would be delivering a firearm to the agency for disposal.]]

The defendant has the burden of proving each element of this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each element of the defense is true.

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New January 2006; Revised April 2010, February 2012, August 2013

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Use this instruction only if the defendant stipulates to the prior conviction. (*People v. Sapp (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]*; *People v. Valentine (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913]*.) If the defendant does not stipulate, use CALCRIM No. 2510, Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction. (*People v. Sapp, supra, 31 Cal.4th at p. 261; People v. Valentine, supra, 42 Cal.3d at p. 173.*)

If the defendant has stipulated to the fact of the conviction, the court should sanitize all references to the conviction to prevent disclosure of the nature of the conviction to the jury. (*People v. Sapp, supra, 31 Cal.4th at p. 261; People v. Valentine, supra, 42 Cal.3d at p. 173.*) If the defendant agrees, the court should not read the portion of the information describing the nature of the conviction. Likewise, the court should ensure that the verdict forms do not reveal the nature of the conviction.

The court has a **sua sponte** duty to instruct on the union of act and specific intent or mental state. (*People v. Alvarez (1996) 14 Cal.4th 155, 220 [58 Cal.Rptr.2d 385, 926 P.2d 365]*.) Therefore, because of the knowledge requirement in element 2 of this instruction, the court must give CALCRIM No. 251, Union of Act and Intent: Specific Intent or Mental State, together with this instruction. Nevertheless, the knowledge requirement in element 2 does not require any "specific intent."

If the prosecution alleges under a single count that the defendant possessed multiple firearms and the possession was "fragmented as to time ... [or] space," the court has a **sua sponte** duty to instruct on unanimity. (*People v. Wolfe (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483]*.) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following firearms," inserting the items alleged.

Element 4 should be given only if the defendant is charged under Penal Code section 29805, possession within 10 years of a specified misdemeanor conviction, or Penal Code section 29820, possession by someone under 30 years old with a specified juvenile finding.

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

On request, the court should give the limiting instruction regarding the evidence of the prior conviction that begins, "Do not consider this fact for any other purpose" (*People v. Valentine (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]*.) There is no **sua sponte** duty to give the limiting instruction, and the defense may prefer that no limiting instruction be given. (*People v. Griggs (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380]*.)

Defenses—Instructional Duty

"[T]he defense of transitory possession devised in [*People v. Mijares (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115]*] applies only to momentary or transitory possession of contraband for the purpose of disposal." (*People v. Martin (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]*.) The court in *Martin, supra*, approved of *People v. Hurtado (1996) 47 Cal.App.4th 805, 814 [54*

2-2500 CALCRIM 2511

Cal.Rptr.2d 853], which held that the defense of momentary possession applies to a charge of violating now-repealed Penal Code section 12021. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (People v. Mower (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067].) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, “Defense: Momentary Possession.”

Penal Code section 29850 states that a violation of the statute is “justifiable” if the listed conditions are met. This is an affirmative defense, and the defense bears the burden of establishing it by a preponderance of the evidence. (*Ibid.*) If sufficient evidence has been presented, the court has a **sua sponte** duty to give the bracketed paragraph, “Defense: Justifiable Possession.”

If there is sufficient evidence that the defendant possessed the firearm only in self-defense, the court has a **sua sponte** duty to give CALCRIM No. 2514, Possession of Firearm by Person Prohibited by Statute—Self-Defense.

AUTHORITY

- Elements. Pen. Code, §§ 23515, 29800, 29805, 29820, 29900; People v. Snyder (1982) 32 Cal.3d 590, 592 [186 Cal.Rptr. 485, 652 P.2d 42].
- Defense of Justifiable Possession. Pen. Code, § 29850.
- Presenting Evidence of Prior Conviction to Jury. People v. Sapp (2003) 31 Cal.4th 240, 261 [2 Cal.Rptr.3d 554, 73 P.3d 433]; People v. Valentine (1986) 42 Cal.3d 170, 173 [228 Cal.Rptr. 25, 720 P.2d 913].
- Limiting Instruction on Prior Conviction. People v. Valentine (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; People v. Griggs (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Accidental Possession. People v. Jeffers (1996) 41 Cal.App.4th 917, 922 [49 Cal.Rptr.2d 86].
- Lack of Knowledge of Nature of Conviction Not a Defense. People v. Snyder (1982) 32 Cal.3d 590, 593 [186 Cal.Rptr. 485, 652 P.2d 42].
- Momentary Possession Defense. People v. Martin (2001) 25 Cal.4th 1180, 1191–1192 [108 Cal.Rptr.2d 599, 25 P.3d 1081]; People v. Hurtado (1996) 47 Cal.App.4th 805, 814 [54 Cal.Rptr.2d 853]; People v. Mijares (1971) 6 Cal.3d 415, 420, 423 [99 Cal.Rptr. 139, 491 P.2d 1115].
- 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].
- Possession of Frame or Receiver Sufficient but not Necessary For Crimes Charged Under [Now-Superseded] Section 12021. People v. Arnold (2006) 145 Cal.App.4th 1408, 1414 [52 Cal.Rptr.3d 545].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 233–237.

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

2-2500 CALCRIM 2511

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice, Ch. 93, Disabilities Flowing From Conviction, § 93.06* (Matthew Bender).

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

RELATED ISSUES

See *CALCRIM No. 2510, Possession of Firearm by Person Prohibited Due to Conviction—No Stipulation to Conviction*.

LESSER INCLUDED OFFENSES

Neither possessing firearm after conviction of felony nor possessing firearm after conviction of specified violent offense is a lesser included offense of the other. (*People v. Sanders (2012) 55 Cal.4th 731, 739–740 [149 Cal.Rptr.3d 26, 288 P.3d 83]*).

CALCRIM

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Exhibit D

1	SFPD-2: On the pier? The gun	SFPD-2: On the pier? The gun
2	was on the pier?	was on the pier?
3	SUSPECT: Mm.	SUSPECT: Mm.
4	OC: ¿La pistola estaba en	OC: Was the gun on the
5	el muelle?	pier?
6	SUSPECT: Sí.	SUSPECT: Yes.
7	OC: Yes.	OC: Yes.
8	SFPD-2: After, after you	SFPD-2: After, after you
9	fired,	fired,
10	OC: Despues que disparó	OC: After you fired
11	SFPD-2: Why did you throw the	SFPD-2: Why did you throw the
12	gun?	gun?
13	OC: ¿Por qué tiró la	OC: Why did you throw the
14	pistola?	gun?
15	SUSPECT: Porque si no se iba a	SUSPECT: Because if not it was
16	seguir disparando	going to keep firing
17	sola.	by itself.
18	OC: Because, uh,	OC: Because, uh,
19	SUSPECT: Sin que yo la	SUSPECT: Without me grabing it
20	agarrara porque yo la	because I was trying
21	trataba de detener,	to hold it back,
22	porque le digo que	because I'm telling
23	estaba envuelta en	it was wrapped up in
24	un, como en una	a, like in a
25	OC: So I was trying to	OC: So I was trying to
26	prevent the gun from	prevent the gun from
27		
28		

GEORGE
GASCON
DISTRICT
ATTORNEY

1	shooting.	shooting.
2	SUSPECT: Sí.	SUSPECT: Yes.
3	OC: From continuing	OC: From continuing
4	shooting by itself.	shooting by itself.
5	Cause like I said, I	Cause like I said, I
6	I saw it in-	I saw it in-
7	SUSPECT: Entonces	SUSPECT: So then
8	OC: In a rag.	OC: In a rag.
9	SUSPECT: Cuando estaba ahí	SUSPECT: When I was near by
10	cercas.	there.
11	OC: When I was near by.	OC: When I was near by.
12	SUSPECT: Ahí, este, había ya	SUSPECT: There, uhm, like
13	como todo el mundo	everyone was already
14	viendo todo eso ahí.	there watching this.
15	OC: ¿Okay, lo puede mirar	OC: Okay, can you look at
16	a él?	him?
17	SUSPECT: So yo la	SUSPECT: So I
18	SFPD-1: Señor.	SFPD-1: Sir.
19	OC: Señor.	OC: Sir.
20	SUSPECT: Sí.	SUSPECT: Yes.
21	SFPD-2: Mírame por favor.	SFPD-2: Look at me please.
22	OC: ¿Puede mirarlo?	OC: Can you look at him?
23	SFPD-2: Okay, I understand	SFPD-2: Okay, I understand
24	you're scared.	you're scared.
25	OC: Yo entiendo que usted	OC: I understand that you
26	SFPD-2: Okay, the truth is	SFPD-2: Okay, the truth is
27		
28		

1	pistola?	
2	SUSPECT: Mm, sí.	SUSPECT: Mm, yes.
3	OC: Yeah.	OC: Yeah.
4	SUSPECT: Sí, porque	SUSPECT: Yes, because
5	OC: Yes because	OC: Yes because
6	SUSPECT: Porque al dejarla ahí	SUSPECT: Because by leaving it
7	sonando, pues, no me	there just going off,
8	quedaba otra cosa que	well, I didn't have
9	recorrerla pa' abajo.	any other choice but
10		to throw it down.
11	OC: Yeah, so	OC: Yeah, so
12	SUSPECT: Pa' que se cayera	SUSPECT: So that it would fall
13	porque seguía sola	down because it kept
14	disparando.	going off by itself.
15		
16	OC: So he	OC: So he
17	SUSPECT: Sin que yo la	SUSPECT: Without me
18	OC: So he had	OC: So he had
19	SUSPECT: agarrara.	SUSPECT: grabbing it.
20	OC: So he had no choice	OC: So he had no choice
21	but to get rid of it,	but to get rid of it,
22	cause if he had not	cause if he had not
23	it would have	it would have
24	continued firing.	continued firing.
25	SFPD-1: Okay. Does he	SFPD-1: Okay. Does he
26	remember, we know	remember, we know
27	what kind of gun it	what kind of gun it
28		

1 **Proof of Service**

2 I, the undersigned, say:

3 I am over eighteen and not a party to the above action. My business
4 address is 555 Seventh Street, San Francisco, California 94103.

5 On _____, I personally served copies of the attached on:

6
7 Diana Garcia
8 San Francisco District Attorney
850 Bryant Street, 3rd floor
San Francisco, CA 94103

9 I declare under penalty of perjury that the foregoing is true and
10 correct.

11 Executed on _____ in San Francisco, California.

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