

# PROPERTY CRIMES CHECKLIST

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This outline is a checklist to facilitate spotting some of the more basic issues in the area of property crimes law. It is not meant to be a comprehensive discussion of property crimes. Always check cases cited for current validity.

## I. Crimes Against Property

### A. Theft

#### 1. Theft – Defined

The crime of theft may consist of theft by larceny, theft by trick and device, theft by embezzlement, or theft by false pretense. (Pen. Code, § 484; CALJIC No. 14.00; CALCRIM No. 1800-1807.)

##### a. Theft by Larceny – Defined

- Penal Code section 487; CALJIC No. 14.02; CALCRIM No. 1800

##### b. Theft by Trick and Device – Defined

- Penal Code section 487; CALJIC No. 14.05; CALCRIM No. 1805

##### c. Theft by Embezzlement – Defined

- Penal Code section 487; CALJIC No. 14.07; CALCRIM No. 1806

##### d. Theft by False Pretense – Defined

- Penal Code section 487; CALJIC No. 14.10; CALCRIM No. 1804

#### 2. Theft – Degrees

Theft is divided into two degrees, grand theft or petty theft. (Pen. Code, § 486; see CALJIC No. 14.20; CALCRIM No. 1801.)

Grand theft and petty theft are defined in Penal Code sections 487 through 488. (See also CALJIC Nos. 14.21-14.25; CALCRIM No. 1801.)

#### 3. Theft – Lesser Included Offenses

a. Petty theft (Pen. Code, § 488) is a lesser and necessarily included offense of grand theft. (*Gomez v. Superior Court* (1958) 50 Cal.2d 640, 643-647; *People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1116.)

#### 4. Theft – Miscellaneous Issues

a. Multiple convictions may not be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686.) Where a defendant is convicted of a greater and an included offense, the conviction for the included offense must be reversed. (*People v. Pearson* (1986) 42 Cal. 3d 351, 355; see also *People v. Foster* (May 22, 2003, H024229 [nonpub. opn.]) [appellant could not be convicted of petty theft with a prior because it was a lesser included offense to grand theft].)

b. If there is a question as to whether the offense is grand or petty theft, the court must instruct on the distinction (CALJIC Nos. 14.21.-14.25; CALCRIM No. 1801) and it is the duty of jurors to decide the degree (CALJIC No. 14.20; CALCRIM No. 1801).

c. In a series of takings from the same individual, there is a single theft if the takings are pursuant to one continuing impulse, intent, plan or scheme. If each taking is the result of a separate independent impulse or intent, there can be multiple counts. (*People v. Bailey* (1961) 55 Cal.2d 514, 519.) It has been held error not to give a *Bailey* type instruction where although there are multiple misappropriations, the evidence supports finding one intent and plan. (See, e.g., *People v. Sullivan* (1978) 80 Cal. App. 3d 16.)

d. In general, a thief can not be convicted of both theft and receiving or concealing stolen property. (Pen. Code, § 496, subd. (a); *People v. Jaramillo* (1976) 16 Cal.3d 752, 757; see CALJIC No. 17.03; CALCRIM 3516 [notes].)

NOTE: A defendant who is convicted of burglary is not convicted of theft. Accordingly, *Jaramillo's* prohibition on dual conviction does not apply. (See *post*, Subdivision (B)(4)(b).)

NOTE: Where a Vehicle Code section 10851, subdivision (a) conviction is based on post-theft driving (Veh. Code, § 10851, subd. (a)), a person may be convicted of both that crime and receiving the same vehicle as stolen property. (*People v. Garza* (2005) 35 Cal.4th 866; see also CALJIC No. 17.04; CALCRIM 1820 and 3516 [notes].)

e. Defendant cannot be convicted of both grand theft and embezzlement for a single act. (*People v. Foster* (May 22, 2003, H024229 [nonpub. opn.]).)

f. The court must instruct sua sponte that larceny requires the specific intent to deprive the owner permanently of his property. (*People v. Jaso* (1970) 4 Cal.App.3d 767, 771.)

But “an intent to take the property for so extended a period as to deprive the owner of a major portion of its value or enjoyment satisfies the ... intent requirement.” (*People v. Avery* (2002) 27 Cal.4th 49, 55; CALJIC No. 14.03; CALCRIM No. 1800.)

g. *People v. Davis* (1998) 19 Cal.4th 301, 305 suggests that an element of theft is that the taking be “by means of trespass” – i.e., without the owner’s consent.

h. The court must instruct sua sponte on the requirements of proof of a false pretense as stated in Penal Code section 532, subdivision (b). (*People v. Katcher* (1950) 97 Cal.App.2d 209, 216; CALJIC No. 14.14; CALCRIM 1804.)

## 5. Theft – Defenses

### a. Theft – Claim of Right

A good faith claim of right to title or ownership of *specific* property taken from another can negate the element of felonious taking necessary to prove theft – i.e., the specific intent required. (*People v. Tufunga* (1999) 21 Cal.4th 935; see CALJIC No. 9.44; CALCRIM No. 1863.) If the defendant relies on a claim of right defense, which is supported by substantial evidence, the trial court must instruct sua sponte on the defense. (*People v. Creath* (1995) 31 Cal.App.4th 312, 319.)

As to embezzlement, if it appears the defendant is relying on the defense of openly and avowedly appropriating the property under a claim of title proffered in good faith (Pen. Code, § 511), the court must sua sponte instruct on the defense. (*People v. Stewart* (1976) 16 Cal.3d 133, 141-142.) However, if the defendant attempts to conceal the taking, either when it occurs or after it is discovered, the defense is not available. (*Id.* at p. 141.) The defense also does not apply if the defendant’s belief he acted lawfully is wholly unreasonable and in bad faith. (*Id.* at p. 140.)

### b. Theft – Claim of Authority

Claim of authority can negate fraudulent intent in an embezzlement case. (See *People v. Morley* (1928) 89 Cal.App. 451, 457.)

### c. Theft – Intent to Restore

Pursuant to Penal Code section 512, “[t]he fact that the accused intended to restore the property embezzled, is no ground of defense....” (See, e.g., *People v. Talbot* (1934) 220 Cal. 3.) However, Penal Code section 512 contains language arguably suggesting this defense may be brought where there was an intent to restore *and* where the property is actually restored before criminal charges are brought.

d. See *post*, Section II [Miscellaneous General Defenses]

## B. Burglary

### 1. Burglary – Defined

- Penal Code section 459; CALJIC Nos. 14.50, 14.58 [motor vehicle burglary]; CALCRIM No. 1700

### 2. Burglary – Degrees

Burglary is divided into two degrees, first degree and second degree, which are defined in Penal Code section 460. (See also CALJIC No. 14.51; CALCRIM No. 1701.)

### 3. Burglary – Lesser Included Offenses

a. Vehicle tampering (Veh. Code, § 10852) is a lesser included offense of burglary of a motor vehicle. (*People v. Mooney* (1983) 145 Cal.App.3d 502, 504-506.)

b. Attempted burglary (Pen. Code, §§ 664/459) is a lesser included offense of burglary. (*People v. Aguilar* (1989) 214 Cal.App.3d 1434, 1436, citing *People v. Lowen* (1895) 109 Cal. 381, 384.)

c. Burglary requires an intent to commit a felony or theft. Consequently, where burglary is predicated upon an intent to commit an offense for which there is a lesser included misdemeanor, failure to instruct on the misdemeanor (unless it is theft) may be reversible error. (*People v. Peters* (C008103 [nonpub. opn.]) [burglary conviction reversed for failure to instruct on misdemeanor false imprisonment as a lesser included offense of felony false imprisonment].)

### 4. Burglary – Miscellaneous Issues

a. Multiple convictions may not be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686.) Where a defendant is convicted of a

greater and an included offense, the conviction for the included offense must be reversed. (*People v. Pearson* (1986) 42 Cal. 3d 351, 355.)

b. In general, a thief can not be convicted of both theft and receiving or concealing stolen property under Penal Code section 496. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757; see CALJIC No. 17.03.) However, a defendant who is convicted of burglary is not convicted of theft. Accordingly, *Jaramillo's* prohibition on dual conviction is inapplicable. A defendant may lawfully be convicted of burglary and of receiving property that he stole during the burglary. However, punishment on one conviction must be stayed pursuant to Penal Code section 654's prohibition against dual punishment if there is a course of conduct undertaken with a single intent and objective. (*People v. Allen* (1999) 21 Cal.4th 846; *People v. Carr* (1998) 66 Cal.App.4th 109.)

c. One cannot be guilty of burglarizing one's own home. (*People v. Gauze* (1975) 15 Cal.3d 709, 714.)

d. It is error to instruct the jury that it is first degree burglary as a matter of law. (*People v. Jarrell* (1987) 196 Cal.App.3d 604, 607.)

e. Where the house is not inhabited, the crime is at most second degree burglary. (See *People v. Cardona* (1983) 142 Cal.App.3d 481, 483 [second degree burglary where occupants moved the day before and the house therefore was "uninhabited"]; see also *People v. Thomas* (May 19, 2003, F039577 [nonpub. opn.]) [Court of Appeal reduced appellant's first degree burglary convictions to second degree where the victim was dead when appellant entered the house]; see also *People v. Laws* (May 19, 2003, F039880 [nonpub. opn.]) [first degree burglary conviction reduced to second degree where sole occupant of home murdered two days before appellant removed property from the residence].)

## 5. Burglary – Defenses

### a. Burglary – Consent

Consent can be defense to burglary if the defendant has "an unconditional possessory right to enter." (*People v. Frye* (1998) 18 Cal.4th 894, 954.)

b. See *post*, Section II [Miscellaneous General Defenses]

## C. Receiving Stolen Property

### 1. Receiving Stolen Property – Defined

Penal Code section 496; CALJIC No. 14.65; CALCRIM No. 1750

## 2. Receiving Stolen Property – Miscellaneous Issues

a. Possession/receipt of more than one item of stolen property at the same time constitutes a single offense. (*People v. Smith* (1945) 26 Cal.2d 854.)

b. In general, a thief can not be convicted of both theft and receiving or concealing stolen property under Penal Code section 496. (*People v. Jaramillo* (1976) 16 Cal.3d 752, 757.)

## 3. Receiving Stolen Property – Defenses

### a. Receiving Stolen Property – Innocent Intent

There is no general criminal intent if the defendant receives the stolen property with the intent to return it to the owner or law enforcement. (*People v. Osborne* (1978) 77 Cal.App.3d 472, 477-478; CALJIC No. 14.66; CALCRIM No. 1751.)

### b. Receiving Stolen Property – Impossibility

If the defendant has the required criminal intent but other elements of the offense are lacking for reasons unknown to him, the defendant can only be convicted of attempt. (*People v. Rojas* (1961) 55 Cal.2d 252, 257-258 [since the property was not stolen, defendants were guilty of attempted receipt of stolen property].)

### c. Receiving Stolen Property – Voluntary Intoxication

Evidence of voluntary intoxication may be introduced to negate the knowledge element in a receiving stolen property case. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 983; Pen. Code, § 22, subd. (b); CALJIC Nos. 4.20-4.21; CALCRIM No. 3426.)

d. See *post*, Section II [Miscellaneous General Defenses]

## D. Extortion

### 1. Extortion – Defined

• Penal Code sections 518-519; CALJIC Nos. 14.70-14.79; CALCRIM Nos. 1830-1832

## 2. Extortion – Defenses

- a. See *post*, Section II [Miscellaneous General Defenses]

## E. Arson

### 1. Arson – Defined

- Penal Code sections 451-452; CALJIC Nos. 14.80-14.82; CALCRIM Nos. 1500-1515

### 2. Attempted Arson – Defined

- Penal Code section 455; CALJIC No. 14.84; CALCRIM No. 1520

### 3. Arson – Lesser Included Offenses

- a. Unlawfully causing a fire (Pen. Code, § 452) may be a lesser included offense of arson. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 175.)

### 4. Arson – Miscellaneous Issues

- a. Multiple convictions may not be based on necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686.) Where a defendant is convicted of a greater and an included offense, the conviction for the included offense must be reversed. (*People v. Pearson* (1986) 42 Cal. 3d 351, 355.)
- b. The “currently used” language of Penal Code section 451, subdivision (b) requires the prosecution to prove that the current occupants intend to continue living in the dwelling for it to be considered “inhabited” during their temporary absence. (*People v. Jones* (1988) 199 Cal.App.3d 543, 548.)

### 5. Arson – Defenses

- a. See *post*, Section II [Miscellaneous Possible Defenses]

## F. Malicious Mischief

### 1. Vandalism – Defined

Penal Code section 594; CALJIC No. 14.95; CALCRIM Nos. 2900 & 2901

## 2. Vandalism – Lesser Included Offenses

a. Misdemeanor vandalism (Pen. Code, § 594, subd.(b)(2)(A)) is a lesser included offense of felony vandalism (Pen. Code, § 594, subd.(b)(1)).

## 3. Vandalism – Miscellaneous Issues

a. This offense is a misdemeanor unless the amount of damage is \$400 or more. (Pen. Code, § 594, subd.(b)(1) & (2)(A).)

b. Prosecution can not charge felony vandalism based on aggregate damage done to the property of multiple victims. (See *In re David* (1997) 52 Cal.App.4th 304, 310-311.)

## 4. Vandalism – Defenses

a. See *post*, Section II [Miscellaneous General Defenses]

# **II. Miscellaneous General Defenses**

## **A. Voluntary Intoxication**

Evidence of voluntary intoxication may be introduced to negate specific intent. (Pen. Code, § 22, subd. (b); CALJIC Nos. 4.20-4.21; CALCRIM No. 3426; *People v. Ricardi* (1990) 221 Cal.App.3d 249, 256.)

## **B. Involuntary Intoxication**

Involuntary intoxication may be introduced to negate specific or general criminal intent. (Pen. Code, § 26, subd. (4); CALJIC No. 4.23; CALCRIM No. 3427.)

## **C. Unconsciousness**

Unconsciousness is generally a complete defense to a crime. (Pen. Code, § 26, subd. (4); *People v. Heffington* (1973) 32 Cal.App.3d 1, 8; CALJIC Nos. 4.30-4.31; CALCRIM No. 3425.) However, unconsciousness caused by voluntary intoxication is only a partial defense to a crime – e.g., it can only negate specific intent under Penal Code section 22.

(*People v. Kelly* (1973) 10 Cal.3d 565, 573 [voluntary intoxication is not a defense to a general intent crime even if the intoxication results in unconsciousness]; see also *Heffington, supra*, 32 Cal.App.3d at p. 8; *People v. Walker* (1993) 14 Cal.App.4th 1615, 1621.)

#### D. Mental Impairment

Evidence of mental impairment is relevant to the defendant's ability to form the requisite mental state. (Pen. Code, § 28; *People v. Reyes* (1997) 52 Cal.App.4th 975, 983-985.) However, jurors may not consider evidence of impairment for general intent crimes unless there is a specific mental state required, such as knowledge. (*Ibid.* [receiving stolen property].)

#### E. Mistake

A good faith mistake of fact, even if unreasonable, can negate specific intent. However, a good faith mistake of fact must be reasonable to negate general criminal intent. (Pen. Code, § 26, subd. (3); CALJIC Nos. 4.35-4.36; CALCRIM No. 3406.) The mistake of fact may be caused by involuntary intoxication. (*People v. Scott* (1983) 146 Cal.App.3d 823, 831.)

A good faith mistake of law may in some circumstances negate specific intent. (*People v. Goodin* (1902) 136 Cal. 455, 458-459; *People v. Holmes* (1910) 13 Cal.App. 212, 217.)

#### F. Accident

Evidence of accident can negate specific or general criminal intent. (Pen. Code, § 26, subd.(5); CALJIC No. 4.45; CALCRIM No. 3404.)

#### G. Duress

This defense applies when the threat of danger is immediate and accompanied by a demand to commit the crime – i.e., there is no time to form criminal intent. (*People v. Heath* (1989) 207 Cal.App.3d 892, 899-901; Pen. Code, § 26, subd.(6); CALJIC No. 4.40; CALCRIM 3402.) This defense does not apply to the threat of future danger of loss of life. (*People v. Otis* (1959) 174 Cal.App.2d 119, 125-126.)

#### H. Necessity

This defense is distinguished from duress in that it applies when the threat of harm is in

the immediate future; i.e., there is time to reflect and weigh alternatives. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1009-1013; CALJIC No. 4.43; CALCRIM No. 3403.)

### I. Entrapment

This defense applies where law enforcement conduct would likely induce a normally law-abiding citizen to commit the crime. (*People v. Grantham* (1972) 26 Cal.App.3d 661, 665; CALJIC Nos. 4.60-4.61.5; CALCRIM No. 3408.)

### J. Statute of Limitations

Criminal proceedings must be terminated if prosecution of the defendant is not commenced within the period of time provided by the applicable statute of limitations. (*People v. Zamora* (1976) 18 Cal.3d 538; Pen. Code, §§ 799-805; CALJIC Nos. 4.70-4.74; CALCRIM No. 3410.)