

One Minute Brief

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NUMBER: 2025-07

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DATE: July 30, 2025

TOPIC: First-Degree Burglary Person-Present

ISSUE: What proof is required for first-degree burglary, person-present?

Penal Code section 667.5(c)(21) provides that “[a]ny burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary” is a violent felony and a strike offense.

Penal Code section 460(a) defines “[e]very burglary of an inhabited dwelling house, vessel, as defined in the Harbors and Navigation Code, which is inhabited and designed for habitation, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, or trailer coach, as defined by the Vehicle Code, or the inhabited portion of any other building, is burglary of the first degree.”

A defendant convicted of a first-degree burglary with a P.C. 667.5 person-present enhancement only receives 15% custody credit for the present offense and, further, is subject to enhanced sentences on future convictions based on the strike conviction. The presence of a P.C. 667.5(c) violent felony offense also excludes the defendant from parole consideration under Prop 57.

The elements require:

- Entry of an inhabited dwelling or vessel;
- Intent to commit theft or a felony;
- Presence of a non-accomplice in the residence at some point during the commission of the burglary.

Non-Accomplice Present:

The person-present element does not require the defendant to know that the occupant is present. *People v. Munguia* (2016) 7 Cal.App.5th 103.

The person-present element does not require any contact between the defendant and the occupant of the residence. *People v. Munguia* (2016) 7 Cal.App.5th 103.

The person-present element can be met when a resident returns home while the burglary is in progress. Assuming the requisite intent is present, the burglary is technically complete upon entry, as the elements of the offense have been satisfied, even if the resident enters the premises at a later point. *People v. Munguia* (2016) 7 Cal.App.5th 103.

Inhabited Dwelling:

Burglary of vehicles in the underground parking garage of an apartment complex where the apartment manager was present in the building met the elements for first-degree burglary of a residence with a person present. The garage was “functionally interconnected,” meaning it was used in related or complementary ways. It was “contiguous” meaning adjacent, adjoining, and in actual close contact to the residential structure. It is not necessary that there be interconnecting doors. *People v. Debouver* (2016) 1 Cal.App.5th 972.

Defendant’s entry into a garage used as a guest room supported the person-present finding because the garage was physically attached to the main residence where the owners were sleeping and the garage and main residence shared the same roof. *People v. Harris* (2014) 224 Cal.App.4th 86.

Open carports on the ground floor of a four-story apartment complex were “functionally interconnected to and immediately contiguous to” the apartments used for “residential activities” such that burglary of a vehicle in the carport underneath the building qualified as first-degree burglary, person-present. *People v. Thorn* (2009) 176 Cal.App.4th 255.

A motel room that the victim had rented for a single night to use as a temporary habitation was an “inhabited dwelling” although it was not the victim’s primary residence. *People v. Villalobos* (2006) 145 Cal.App.4th 310.

Insufficient evidence: Evidence that victim was in the hallway *outside* of his apartment while defendant committed a burglary inside the apartment was *not* sufficient to find the victim was “present in the residence” for purposes of first-degree burglary, person-present. *People v. Singleton* (2007) 155 Cal.App.4th 1332.

Practice Tip:

There is no pattern jury instruction for the 667.5(c)(21) enhancement. Use the generic instruction for sentencing enhancements found in CALJIC 17.24.1 and CALCRIM 3250.

BOTTOM LINE: The person-present finding is supported when a non-accomplice is present within the inhabited dwelling at any time prior to the conclusion of a burglary.

This information was current as of publication date. It is not intended as legal advice. It is recommended that readers check for subsequent developments and consult legal advisors to ensure currency after publication. Local policies and procedures regarding application should be observed.