

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/Contents

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/Preface

Preface

The 2010 edition of the Mandatory Criminal Jury Instructions Handbook updates the previous text and covers legislation effective January 1, 2010, and case law through 176 CA4th and 46 C4th. This handbook supersedes previous editions, which may now be discarded.

This edition of the handbook incorporates references to the Judicial Council of California Criminal Jury Instructions (CALCRIM), which became effective in 2006. The Judicial Council instructions are endorsed by California Rules of Court 2.1050 which declares that the instructions are the official instructions for use in California. Rule 2.1050 further states that use of the Judicial Council instructions is "strongly encouraged."

This handbook provides California judges with a comprehensive update of the law for determining quickly and correctly what jury instructions they must give in criminal cases.

We hope you will find this handbook a useful practice tool, and we welcome your comments, criticisms, and suggestions for its improvement.

January 2010

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When Court Must Instruct Sua Sponte

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.1 I.
SCOPE OF CHAPTER

§1.1 I. SCOPE OF CHAPTER

This chapter briefly summarizes the substantive law of when the trial court must instruct the jury in a criminal trial sua sponte, *i.e.*, on its own motion, even without request. For further discussion, see 5 Witkin & Epstein, *California Criminal Law, Criminal Trial* §§606-668 (3d ed 2000); California Jury Instructions—Criminal, Appendix A (2009) (CALJIC). Chapter 2 provides in a list format a quick-reference system to the standard or model sua sponte instructions in CALCRIM and CALJIC.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.2 II. GENERAL RULE ON WHEN INSTRUCTIONS REQUIRED SUA SPONTE

§1.2 II. GENERAL RULE ON WHEN INSTRUCTIONS REQUIRED SUA SPONTE

The general rule is that in a criminal case the trial court must, on its own motion, even without request, instruct the jury on all general principles of law relevant to the issues raised by the evidence. People v Breverman (1998) 19 C4th 142, 154, 77 CR2d 870. The general principles of law governing the case are those commonly or closely and openly connected with the facts of the case before the court that are necessary for the jury's understanding of the case. 19 C4th at 154. This general rule stems from the criminal defendant's constitutional right to have a jury determine every material issue presented by the evidence. People v Prince (2007) 40 C4th 1179, 1264, 57 CR3d 543.

Although it may be general practice for courts to instruct the jury after argument, when to instruct the jury is a matter within the trial court's discretion, and the court may exercise its discretion in giving some instructions before closing argument and others after. People v Lamb (1988) 206 CA3d 397, 253 CR 465. See also People v Murillo (1996) 47 CA4th 1104, 1109, 55 CR2d 21 (court suggested that preferable method is to instruct jury after close of evidence, but before argument, reserving only concluding instructions to follow argument). The court is authorized by Pen C §1093(f) to instruct the jury at the beginning of and during trial as it deems necessary.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.3 III.
EVIDENCE SUFFICIENT TO REQUIRE INSTRUCTION SUA SPONTE

§1.3 III. EVIDENCE SUFFICIENT TO REQUIRE INSTRUCTION SUA SPONTE

The trial court must give a particular instruction sua sponte only if there is substantial evidence from which a jury composed of reasonable persons could find the facts underlying the instruction true. People v Breverman (1998) 19 C4th 142, 162, 77 CR2d 870. A sua sponte duty to instruct does not arise from the existence of any evidence, no matter how weak. 19 C4th at 162. The determination whether sufficient evidence supports an instruction must be made without reference to the credibility of that evidence. People v Salas (2006) 37 C4th 967, 982, 38 CR3d 624; People v Marshall (1996) 13 C4th 799, 847, 55 CR2d 347. Doubt as to the sufficiency of the evidence to require a particular instruction should be resolved in the defendant's favor. People v Tufunga (1999) 21 C4th 935, 944, 90 CR2d 143. However, the court need not give instructions based solely on conjecture and speculation. People v Day (1981) 117 CA3d 932, 936, 173 CR 9.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/ IV. SELECTED GENERAL PRINCIPLES OF LAW REQUIRING INSTRUCTION SUA SPONTE/§1.4 A. Elements of Offense Charged

IV. SELECTED GENERAL PRINCIPLES OF LAW REQUIRING INSTRUCTION SUA SPONTE

§1.4 A. Elements of Offense Charged

The trial court must give sua sponte instructions that delineate the elements of the offense charged. *People v Flood* (1998) 18 C4th 470, 480-482, 76 CR2d 180; *People v Reynolds* (1988) 205 CA3d 776, 252 CR 637 (knowledge of presence is element of possession offenses).

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.5 B. Intent of Offense Charged

§1.5 B. Intent of Offense Charged

Most crimes require either a general or specific intent. The court has a sua sponte duty to instruct on the required intent. People v Alvarez (1996) 14 C4th 155, 219-221, 58 CR2d 385 (specific intent); People v Jeffers (1996) 41 CA4th 917, 920-923, 49 CR2d 86 (general intent).

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.6 C. Defenses Relevant to Offense Charged

§1.6 C. Defenses Relevant to Offense Charged

The California Supreme Court held that the trial court must give instructions sua sponte on particular defenses and their relevance to the charged offense, but only if it appears that (1) the defendant is relying on such a defense, or (2) there is substantial evidence supportive of the defense and the defense is not inconsistent with the defendant's theory of the case. People v Sedeno (1974) 10 C3d 703, 716, 112 CR 1, overruled on other grounds in 19 C4th 142, 165; People v Barton (1995) 12 C4th 186, 195, 47 CR2d 569. Several cases decided after Sedeno have, however, called into question the first prong of the Sedeno test. In People v Burnham (1986) 176 CA3d 1134, 1139 n3, 222 CR 630, the court stated, "As to the first portion of the Sedeno rule 'if it appears that the defendant is relying on such a defense,' we assume that the Supreme Court did not intend to imply that mere reliance, without evidence to support the theory of defense, would give rise to a sua sponte duty to instruct." And more recent case law has been more emphatic in stating that the court is required to give a requested instruction on a defense only if substantial evidence supports the defense. See People v Wilson (2005) 36 C4th 309, 331, 30 CR3d 513; People v Panab (2005) 35 C4th 395, 484, 25 CR3d 672; People v Flood (1998) 18 C4th 470, 480, 76 CR2d 180. See also People v Shelmire (2005) 130 CA4th 1044, 1058-1059, 30 CR3d 696 (court reviewed post-Sedeno cases and concluded that the first prong of the Sedeno test has been effectively overruled).

Substantial evidence means evidence of a defense that, if believed by the jury, would be sufficient to raise a reasonable doubt as to the defendant's guilt. People v Salas (2006) 37 C4th 967, 982-983, 38 CR3d 624.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.7 D. Lesser Offenses to Offense Charged

§1.7 D. Lesser Offenses to Offense Charged

Penal Code §1159 provides that the jury may find the defendant guilty of any offense, the commission of which is necessarily included in the offense with which he or she is charged, or of an attempt to commit the offense.

An offense is a lesser included offense of another for purposes of Pen C §1159 if it meets one of the following two tests (People v Clark (1990) 50 C3d 583, 636, 268 CR 399):

(1) "*Legal elements*" test: The greater statutory offense cannot be committed without committing the lesser offense because all the elements of the lesser offense are included in the elements of the greater.

(2) "*Accusatory pleadings*" test: The charging allegations of the accusatory pleading include language describing the offense in such a way that if committed in that manner the lesser offense must necessarily be committed.

In other words, a lesser offense is necessarily included in the greater offense if either the statutory elements of the greater offense or the facts alleged in the accusatory pleading include all the elements of the lesser offense in such a way that the greater offense cannot be committed without committing the lesser offense. People v Padilla (2002) 98 CA4th 127, 137-138, 119 CR2d 457.

Sentence enhancement allegations are not considered to be part of the accusatory pleading and may not be used in determining lesser included offenses. People v Toro (1989) 47 C3d 966, 972, 254 CR 811; People v Wolcott (1983) 34 C3d 92, 98, 192 CR 748.

For a comprehensive discussion of the tests for determining when lesser included offenses exist in a case, see California Jury Instructions – Criminal, Appendix C (2009) (CALJIC).

The checklist of sua sponte instructions related to particular offenses in §§2.7-2.102 sets forth included offenses, but the list is not exhaustive. For general rules on when the court must instruct on offenses other than those charged, see §§1.8-1.11.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.8 1. When Instruction Required Sua Sponte

§1.8 1. When Instruction Required Sua Sponte

The trial court must sua sponte instruct fully on all lesser necessarily included offenses supported by the evidence. *People v Breverman* (1998) 19 C4th 142, 161, 77 CR2d 870. This rule and the rules set forth in §§1.9-1.11 apply to crimes divided into degrees. See *People v Maroney* (1895) 109 C 277, 41 P 1097.

Under this rule a trial court must instruct on every supportable theory of a lesser included offense, not just the theory or theories with the strongest evidentiary support or those on which the defendant has expressly relied. But a trial court need not instruct on theories that have no such evidentiary support. *People v Breverman, supra*, 19 C4th at 161.

Furthermore, under this rule, the court must instruct on a lesser included offense even when the defendant expressly objects to the giving of the instruction as a matter of trial tactics. *People v Barton* (1995) 12 C4th 186, 195, 47 CR2d 569. The *Barton* court held that, despite the defense objection, the sua sponte duty to instruct is still in effect and therefore a failure to instruct would be error. For example, a court must instruct on second degree murder sua sponte even over defendant's objection that he had an alibi defense when there was evidence that the murder might not have been premeditated or deliberate. *People v Daya* (1994) 29 CA4th 697, 712-714, 34 CR2d 884.

A court is under no duty to instruct on a lesser included offense that is barred by the statute of limitations. *People v Whitfield* (1993) 19 CA4th 1652, 1658, 24 CR2d 210. However, a defendant may request instructions on a time-barred lesser included offense if the greater offense is not time barred and the defendant waives the statute of limitations to the lesser offense. *Cowan v Superior Court* (1996) 14 C4th 367, 58 CR2d 458. A defendant forfeits the right to appeal a conviction on a time-barred lesser included offense when the charged offense was not time-barred and the defendant either acquiesced in or sought the instructions on the lesser included offense. *People v Stanfill* (1999) 76 CA4th 1137, 1150, 90 CR2d 885.

At a retrial, a court is not required to instruct on a lesser included offense for which the defendant was convicted in an earlier trial. *People v Carter* (1993) 19 CA4th 1236, 1254, 23 CR2d 888 (jury hung on greater offenses).

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/ 2. When Instruction Mandatory on Request/§1.9 a. Lesser Included Offenses

2. When Instruction Mandatory on Request

§1.9 a. Lesser Included Offenses

The court must give a requested instruction on a lesser included offense that any evidence tends to prove. *People v Noah* (1971) 5 C3d 469, 478, 96 CR 441. However, a request for instructions by either side has no real effect on the court's sua sponte duty to instruct on included offenses. *People v Turner* (1983) 145 CA3d 658, 678-679, 193 CR 614, disapproved on other grounds in 18 C4th 385, 411, and 21 C4th 413, 422. The court must instruct on included offenses whenever there is evidence that would support a conviction on the included offense rather than the charged offense. *People v Marshall* (1996) 13 C4th 799, 846, 55 CR2d 347.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.10 b. Lesser Related Offenses

§1.10 b. Lesser Related Offenses

In *People v Birks* (1998) 19 C4th 108, 77 CR2d 848, the Supreme Court overruled *People v Geiger* (1984) 35 C3d 510, 199 CR 45, and held that the defendant has no constitutional right to request instruction on uncharged lesser related offenses that are not necessarily included in the charged offense. The court noted that its decision does not prohibit the defendant and prosecution from agreeing that the defendant may be convicted of a lesser offense not necessarily included in the charged offense. *People v Birks, supra*, 19 C4th at 136 n19.

A trial court may instruct the jury on a lesser related offense in the absence of a request by defendant if the court notifies the defendant of the proposed instruction and neither the defendant nor the prosecution object. In this situation, the defendant must be regarded as having impliedly consented to the jury's consideration of the offense and waived any objection based on lack of notice. *People v Toro* (1989) 47 C3d 966, 254 CR 811.

A court may grant a defense request to instruct on a time-barred lesser related offense under *People v Geiger, supra*, if the greater offense is not time barred, the defendant waives the statute of limitations to the lesser offense, and the prosecution does not object. *Cowan v Superior Court* (1996) 14 C4th 367, 58 CR2d 458.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.11 3. When Error To Instruct

§1.11 3. When Error To Instruct

It is error to instruct on a lesser included offense when a defendant, if guilty at all, could only be guilty of the greater offense, *i.e.*, when the evidence, even construed most favorably to the defendant, would not support a finding of guilt of the lesser included offense but would support a finding of guilt of the offense charged. *People v Stewart* (2000) 77 CA4th 785, 795-796, 91 CR2d 888; *People v Tiner* (1970) 11 CA3d 428, 433, 89 CR 834. See also *People v Aguilar* (1989) 214 CA3d 1434, 1436, 263 CR 314 (trial court properly refused to instruct on attempted burglary in burglary prosecution when undisputed evidence showed completed entry).

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.12 V.
EFFECT OF FAILURE TO GIVE REQUIRED INSTRUCTION SUA SPONTE

§1.12 V. EFFECT OF FAILURE TO GIVE REQUIRED INSTRUCTION SUA SPONTE

The trial court's duty to give a required instruction sua sponte exists even when, as a matter of trial tactics, the defendant not only fails to request the instruction but also expressly objects to its being given; failure to give such an instruction is error. See *People v Sedeno* (1974) 10 C3d 703, 716, 112 CR 1, overruled on other grounds in 19 C4th 142, 165. However, if the defendant deliberately and expressly, as a matter of trial tactics, objects to the giving of a required lesser included offense instruction, the trial court's failure to give such an instruction will not necessitate reversal, because the error is invited. *People v Duncan* (1991) 53 C3d 955, 969, 281 CR 273; *People v Graham* (1969) 71 C2d 303, 317, 78 CR 217. Thus, it is very important that the court instruct on lesser included offenses when appropriate, despite defense objection, although when the court does not give a sua sponte instruction, it should be made clear in the record that defense counsel expressly objected to the instruction for tactical reasons and not out of ignorance or mistake. *People v Duncan, supra*. If defense counsel was ignorant of the choice between having the instruction and not having it, or mistakenly believed the court was not giving such a choice, invited error will not be found. If, however, the record shows a conscious choice, it need not additionally show that defense counsel correctly understood all the legal implications of the tactical choice. *People v Cooper* (1991) 53 C3d 771, 830, 281 CR 90. Many judges also get a personal waiver from the defendant in this situation.

Because the trial court's duty to give instructions on particular defenses is more limited (see §1.6) than for lesser offenses, the court in *People v Sedeno, supra*, 10 C3d at 717 n7, suggests that when it appears there is substantial evidence that would support a defense inconsistent with that advanced by the defendant, the court should ascertain whether the defendant wants instructions on the alternative theory to ensure that the theory has not been inadvertently overlooked.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.13 A. Erroneous Reasonable Doubt Instruction

§1.13 A. Erroneous Reasonable Doubt Instruction

Error in instructing on the definition of reasonable doubt is reversible per se. *Sullivan v Louisiana* (1993) 508 US 275, 113 S Ct 2078, 124 L Ed 2d 182 (trial court gave constitutionally deficient instruction). The trial court's failure to instruct on reasonable doubt is likewise reversible per se. *People v Phillips* (1997) 59 CA4th 952, 69 CR2d 532; *People v Crawford* (1997) 58 CA4th 815, 821, 68 CR2d 546.

In charging the jury, the court may read Pen C §1096, CALCRIM 220, or CALJIC 2.90, and no further instruction on the presumption of innocence or defining reasonable doubt need be given. Pen C §1096a. Trial courts are discouraged from modifying the standard instruction on reasonable doubt (CALCRIM 220; CALJIC 2.90) because there is a risk that modifications will introduce inappropriate terms or concepts. *People v Brigham* (1979) 25 C3d 283, 290, 157 CR 905; *People v Garcia* (1975) 54 CA3d 61, 126 CR 275. Failure to instruct with CALCRIM 220 or CALJIC 2.90, however, is not federal constitutional error if the instructions given to the jury, taken as a whole, adequately inform the jury of the reasonable doubt standard and the due process requirement that guilt be determined only from the evidence presented at trial. *Victor v Nebraska* (1994) 511 US 1, 5-6, 114 S Ct 1239, 127 L Ed 2d 583; *People v Mayo* (2006) 140 CA4th 535, 543-550, 44 CR3d 497.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.14 B. Failure To Instruct on Lesser Included Offenses

§1.14 B. Failure To Instruct on Lesser Included Offenses

The failure to instruct sua sponte on a lesser included offense in a noncapital case is subject to the *Watson* standard of review (*People v Watson* (1956) 46 C2d 818, 299 P2d 243) requiring reversal only if it is reasonably probable that a result more favorable to the defendant would have been reached had the error not occurred. *People v Moye* (2009) 47 C4th 537, 555-558, 98 CR3d 113; *People v Breverman* (1998) 19 C4th 142, 165, 77 CR2d 870.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.15 C. Erroneous Instruction on Element of Offense

§1.15 C. Erroneous Instruction on Element of Offense

A jury instruction omitting or erroneously defining an element of the charged offense is subject to the *Chapman* harmless error standard (*Chapman v California* (1967) 386 US 18, 87 S Ct 824, 17 L Ed 2d 705). *People v Flood* (1998) 18 CA4th 470, 502, 76 CR2d 180 (instruction that particular element of offense has been established, thus removing it from jury's consideration); *People v Harris* (1994) 9 CA4th 407, 416, 37 CR2d 200 (misinstruction as to immediate presence element of robbery); *People v Dyer* (1988) 45 C3d 26, 64, 246 CR 209 (failure to instruct on intent element of aiding and abetting); *People v Lee* (1987) 43 C3d 666, 238 CR 406 (conflicting instructions regarding specific intent to kill in attempted murder case); *People v Avila* (1995) 35 CA4th 642, 654, 43 CR2d 853 (failure to instruct on asportation element of kidnapping). See also *Neder v U.S.* (1999) 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (*Chapman* applied to jury instruction that omits an element of an offense, in this case, the element of materiality in fraud offense); *Pope v Illinois* (1987) 481 US 497, 107 S Ct 1918, 95 L Ed 2d 439 (*Chapman* applied when jury instructed to use wrong standard in reviewing element of offense). However, instructional error that omits substantially all of the elements of an offense and does not require by other instructions that the jury find the existence of the facts necessary to conclude that the omitted elements have been proved requires reversal per se. *People v Cummings* (1993) 4 CA4th 1233, 1315, 18 CR2d 796 (failure to instruct on four of five elements of robbery amounts to structural defect requiring reversal). See also *People v Kobrin* (1995) 11 CA4th 416, 428, 45 CR2d 895 (failure to instruct on element of materiality in perjury trial not susceptible to harmless error analysis).

An erroneous instruction to the jury on an element of a charged offense that impermissibly shifts the burden of proof on that element is subject to the *Chapman* harmless error standard. *Rose v Clark* (1986) 478 US 570, 106 S Ct 3101, 92 L Ed 2d 460 (instruction contained rebuttable presumption that all homicides are malicious).

A jury instruction that takes an element of the charged offense from the jury and decides it adversely to the accused is reviewable under the *Chapman* standard. *People v Higareda* (1994) 24 CA4th 1399, 1406, 29 CR2d 763 (instruction removing force or fear element of robbery from jury harmless); *People v Jimenez* (1995) 33 CA4th 54, 62, 39 CR2d 12 (failure to instruct jury to determine whether driveway is public area for purposes of drug trafficking charge harmless). But see *People v Lawson* (1987) 189 CA3d 741, 234 CR 557 (instructing as a matter of law that an element of the crime has been established constituted an impermissible partial directed verdict requires reversal without regard to prejudice; court noted that this error may not always require per se reversal). Similarly, instructions that impose mandatory presumptions as to elements of an offense are reviewable under the *Chapman* standard. *Carella v California* (1989) 491 US 263, 109 S Ct 2419, 105 L Ed 2d 218 (per curiam) (erroneous conclusive presumption concerning intent element of theft); *People v Forrester* (1994) 30 CA4th 1697, 37 CR2d 19 (erroneous mandatory presumption involving intent element of charge of failure to appear).

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.16 D. Failure To Instruct on Element of Sentence Enhancement

§1.16 D. Failure To Instruct on Element of Sentence Enhancement

Due process and the Sixth Amendment require that any fact that increases the penalty for a crime beyond the statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v New Jersey* (2000) 530 US 466, 476, 490, 120 S Ct 2348, 147 L Ed 2d 435. In light of *Apprendi*, the California Supreme Court ruled that a trial court's failure to instruct the on an element of a sentence enhancement provision, other than one based on a prior conviction, that increases the penalty for the underlying crime beyond the statutory maximum is federal constitutional error and is subject to the *Chapman* harmless error standard (*Chapman v California* (1967) 386 US 18, 87 S Ct 824, 17 L Ed 2d 705). *People v Sengpadychith* (2001) 26 C4th 316, 324-326, 109 CR2d 851.

In *Sengpadychith*, the Court distinguished enhancement provisions that increase the maximum penalty for the charged crime from those that increase the mandatory minimum term of imprisonment for a crime punishable by life imprisonment. Since the latter do not increase the maximum life term of the underlying offense, failure to instruct on these enhancement provisions is subject to the less stringent *Watson* standard of review (*People v Watson* (1956) 46 C2d 818, 299 P2d 243), requiring reversal only if it is reasonably probable that a result more favorable to the defendant would have been reached had the error not occurred. 26 C4th at 327-328.

In *Blakely v Washington* (2004) 542 US 296, 301-308, 124 S Ct 2531, 159 L Ed 2d 403, the United States Supreme Court clarified that under *Apprendi*, the "statutory maximum" is the maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, it is not the maximum sentence that the judge may impose after finding additional facts, but the maximum that the judge may impose without any additional findings.

In 2007, the United States Supreme Court declared California's Determinate Sentencing Law (DSL), Pen C §§1170 et seq, unconstitutional under the Sixth Amendment right to a jury trial to the extent that it permits trial courts to impose an upper sentencing term based on facts found by the court by a preponderance of evidence, rather than by a jury beyond a reasonable doubt. *Cunningham v California* (2007) 549 US 270, 127 S Ct 856, 871, 166 L Ed 2d 856. Under California's DSL, an upper-term sentence may be imposed only when the trial judge finds an aggravating circumstance. 127 S Ct at 868; see Pen C §1170(b). Accordingly, the middle term prescribed in California's DSL, not the upper term, is the relevant statutory maximum. 127 S Ct at 868; *Blakely v Washington, supra*, 542 US at 303. Because the DSL allocates sole authority to judges to find facts that permit the imposing of an upper-term sentence, the system violates the Sixth Amendment. *Cunningham v California, supra*, 127 S Ct at 871. In response to *Cunningham*, urgency legislation was signed into law amending Pen C §1170 to provide that when a felony is punishable by a triad of terms of incarceration in state prison, the choice of the appropriate sentencing term rests within the sound discretion of the trial judge. See 2007 ch 3 (SB 40); Cal Rules of Ct 4.401-4.452 (rules amended to comply with *Cunningham* and SB 40).

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/1 When Court Must Instruct Sua Sponte/§1.17 E. Failure To Instruct on Defense

§1.17 E. Failure To Instruct on Defense

A trial court's refusal to instruct the jury on self-defense, when there was evidence worthy of the jury's consideration that the defendant was acting in self-defense, is reversible error per se and not subject to the harmless beyond a reasonable doubt standard. People v Lemus (1988) 203 CA3d 470, 478, 249 CR 897. See also People v May (1989) 213 CA3d 118, 128, 261 CR 502 (failure to instruct on Mayberry (People v Mayberry (1975) 15 C3d 143, 125 CR 745) defense, *i.e.*, reasonable belief in consent is reversible error).

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Sua Sponte Instructions

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1. [§2.7] Accessory to Felony (Pen C §32)

2. [§2.8] Arson Offenses (Pen C §§450-456)

3. Assault and Battery Offenses

a. [§2.9] Assault (Pen C §240)

b. [§2.10] Assault With Stun Gun or Less Lethal Weapon (Pen C §244.5(b))

c. [§2.11] Assault With Stun Gun or Less Lethal Weapon on Peace Officer or Firefighter (Pen C §244.5(c))

d. [§2.12] Assault With Deadly Weapon or Firearm, or by Means of Force Likely To Produce Great Bodily Injury (Pen C §245(a))

e. [§2.13] Assault With Deadly Weapon or Firearm, or by Means of Force Likely To Produce Great Bodily Injury on Peace Officer, Etc. (Pen C §§245(c)-(d)(1), 245.2, 245.3, 245.5(a)-(b))

f. [§2.14] Assault With Semiautomatic Firearm, Machine Gun, Assault Weapon, or .50 BMG Rifle (Pen C §245(a)(3), (b))

g. [§2.15] Assault With Semiautomatic Firearm, Machine Gun, Assault Weapon, or .50 BMG Rifle on Peace Officer, Etc. (Pen C §245(d)(2)-(3))

h. [§2.16] Assault With Intent To Commit Sex Offense (Pen C §220(a))

i. [§2.17] Assault With Intent To Commit Mayhem (Pen C §220(a))

j. [§2.18] Assault With Intent To Commit Sex Offense During First Degree Burglary (Pen C §220(b))

k. [§2.19] Aggravated Sexual Assault of Child (Pen C §269(a))

l. [§2.20] Assault on Child Under Eight Resulting in Death (Pen C §273ab)

m. [§2.21] Battery (Pen C §242)

n. [§2.22] Battery With Serious Bodily Injury (Pen C §243(d))

o. [§2.23] Battery on a Peace Officer, Firefighter, Etc. (Pen C §243(b)-(c))

p. [§2.24] Battery on Spouse, Former Spouse, Etc. (Pen C §243(e))

4. [[§2.25](#)] Bribery (Pen C §§67, 67.5(a), 68, 85, 86, 93, 137)
5. [[§2.26](#)] Burglary (Pen C §459)
6. [[§2.27](#)] Carjacking (Pen C §215)
7. [[§2.28](#)] Checks—Insufficient Funds (Pen C §476a)
8. [[§2.29](#)] Child, Elder, or Dependent Adult Abuse, Neglect, or Endangerment (Pen C §§273a(a), 368(b)(1))
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10. Child Pornography
 - a. [[§2.31](#)] Distributing Obscene Matter Showing Sexual Conduct by a Minor (Pen C §§311.1(a), 311.2(b)-(d))
 - b. [[§2.32](#)] Using Minor in Creating Pornography (Pen C §311.4(b)-(c))
11. [[§2.33](#)] Conspiracy (Pen C §182)
12. Controlled Substances Offenses
 - a. [[§2.34](#)] Marijuana (Health & S C §§11357-11361)
 - b. [[§2.35](#)] Restricted Drugs (Health & S C §§11350-11352, 11353-11355, 11366, 11368, 11377, 11378-11379, 11379.6, 11380, 11380.5, 11382, 11383, 11383.5, 11383.7)
 - c. [[§2.36](#)] Possession While Armed (Health & S C §11370.1)
 - d. [[§2.37](#)] Unlawful Possession of Funds in Excess of \$100,000 in Connection With Controlled Substances (Health & S C §11370.6)
13. Deadly Weapons, Firearms, and Destructive Devices
 - a. [[§2.38](#)] Possession Offenses (Pen C §§12020, 12021, 12021.1, 12023, 12024, 12025, 12031, 12303, 12303.2)
 - b. [[§2.39](#)] Use Offenses (Pen C §§246, 246.3, 247, 417, 417.3, 417.8, 12034, 12308-12310)
 - c. [[§2.40](#)] Illegal Possession of Ammunition (Pen C §12316(b)(1))
14. [[§2.41](#)] Dog or Mischievous Animal Attack (Pen C §§399, 399.5(a))
15. [[§2.42](#)] Driving Under Influence, Felony (Veh C §§23152, 23153)
16. [[§2.43](#)] Escape (Pen C §4532)
17. [[§2.44](#)] Extortion (Pen C §§518-523)
18. [[§2.45](#)] Failure To Stop After Vehicle Accident; Felony (Veh C §§20001-20003)
19. [[§2.46](#)] False Imprisonment by Violence or Menace (Pen C §§236-237)
20. [[§2.47](#)] Flight From Pursuing Peace Officer (Veh C §§2800.1-2800.3)
21. Forgery Offenses
 - a. [[§2.48](#)] Forgery (Pen C §470)
 - b. [[§2.49](#)] Possession of Forged or Unfinished Instrument With Intent To Defraud (Pen C §475)
 - c. [[§2.50](#)] Fictitious Instruments—Making, Possessing, Uttering (Pen C §476)
22. [[§2.51](#)] Gang Crime (Pen C §186.22(a))
23. [[§2.52](#)] Homicide Offenses

- a. [§2.53] Manslaughter, Involuntary (Pen C §192(b))
- b. [§2.54] Manslaughter, Voluntary (Pen C §192(a))
- c. [§2.55] Manslaughter, Attempted Voluntary (Pen C §§664, 192(a))
- d. [§2.56] Manslaughter, Vehicular (Pen C §§191.5, 192(c))
- e. [§2.57] Murder, First Degree—Premeditated (Pen C §189)
- f. [§2.58] Murder, First Degree—Felony Murder (Pen C §189)
- g. [§2.59] Murder, Second Degree (Pen C §189)
- h. [§2.60] Murder, Second Degree—Felony Murder (Pen C §189)
- i. [§2.61] Murder, Attempted (Pen C §§664, 189)
- j. [§2.62] Murder, Conspiracy To Commit (Pen C §§182, 187)
- 24. [§2.63] Human Trafficking (Pen C §236.1(a), (c))
- 25. [§2.64] Indecent Exposure, Felony (Pen C §314)
- 26. [§2.65] Intimidation of Witness (Pen C §§136, 136.1)
- 27. Kidnapping Offenses
 - a. [§2.66] Kidnapping (Pen C §207(a))
 - b. [§2.67] Kidnapping for Purpose of Child Molestation (Pen C §207(b))
 - c. [§2.68] Kidnapping With Intent To Commit Robbery or Sex Offense (Pen C §209(b))
 - d. [§2.69] Kidnapping for Ransom or Extortion (Pen C §209(a))
 - e. [§2.70] Kidnapping During Carjacking (Pen C §209.5(a))
- 28. [§2.71] Mayhem (Pen C §§203, 205)
- 29. [§2.72] Money Laundering (Pen C §186.10)
- 30. [§2.73] Pandering (Pen C §266i)
- 31. [§2.74] Perjury (Pen C §118)
- 32. [§2.75] Pimping (Pen C §266h)
- 33. [§2.76] Prison Offenses (Pen C §§404(a), 404.6, 4573.6, 4573.8, 4573.9, 4574)
- 34. [§2.77] Receiving Stolen Property (Pen C §496(a))
- 35. [§2.78] Reckless Driving Causing Specific Bodily Injuries (Veh C §23105)
- 36. [§2.79] Resisting Arrest (Pen C §§69, 148(b)-(d), 148.10)
- 37. [§2.80] Robbery (Pen C §§211, 212.5)
- 38. Sex Offenses
 - a. [§2.81] Annoying or Molesting Child (Pen C §647.6(b), (c)(1), (c)(2))
 - b. [§2.82] Contacting Minor or Communicating With Minor With Intent To Commit Sex Offense (Pen C §288.3(a))

- c. [§2.83] Arranging Meeting or Attending Meeting With Minor for Lewd Purpose (Pen C §288.4)
- d. [§2.84] Continuous Sexual Abuse of Child (Pen C §288.5(a))
- e. [§2.85] Harmful Matter Sent With Intent To Seduce Minor (Pen C §288.2(a), (b))
- f. [§2.86] Lewd Act With Child or Dependent Person (Pen C §288)
- g. [§2.87] Oral Copulation (Pen C §288a)
- h. [§2.88] Sexual Penetration (Pen C §§289, 264.1)
- i. [§2.89] Rape (Pen C §§261, 262, 264.1)
- j. [§2.90] Sexual Acts With Child 10 Years Old or Younger (Pen C §288.7)
- k. [§2.91] Sexual Battery (Pen C §243.4(a)-(d))
- l. [§2.92] Sodomy (Pen C §286)
- m. [§2.93] Unlawful Sexual Intercourse (Pen C §261.5)
- 39. [§2.94] Solicitation To Commit Felony (Pen C §§653f, 653j)
- 40. [§2.95] Speed Contest Causing Specified Bodily Injuries (Veh C §23109.1)
- 41. [§2.96] Stalking (Pen C §646.9)
- 42. [§2.97] Threats, Criminal (Pen C §422)
- 43. [§2.98] Theft, Grand (Pen C §§484, 484.1, 487, 487h)
- 44. [§2.99] Threatening Witnesses, Victims, or Informants (Pen C §140(a))
- 45. [§2.100] Torture (Pen C §206)
- 46. [§2.101] Trafficking of Personal Identifying Information (Pen C §530.5)
- 47. [§2.102] Vandalism, Felony (Pen C §594(a), (b)(1))

C. Miscellaneous Instructions

- 1. [§2.103] Accomplices
- 2. [§2.104] Aiders and Abettors
- 3. [§2.105] Admissions and Confessions (Oral)
- 4. [§2.106] Alibi
- 5. [§2.107] Burden of Proof
 - a. [§2.108] Reasonable Doubt—When Defendant Has Burden
 - b. [§2.109] Reasonable Doubt—When Prosecution Has Burden
 - c. [§2.110] Proof by Preponderance of the Evidence
- 6. [§2.111] Burglary
- 7. [§2.112] Cautionary Instructions
- 8. [§2.113] Circumstantial Evidence
- 9. [§2.114] Comment on Evidence

10. [§2.115] Compassionate Marijuana Use
11. [§2.116] Consciousness of Guilt
12. [§2.117] Conspiracy
13. [§2.118] Controlled Substances
14. [§2.119] Corpus Delicti
15. [§2.120] Corroborating Evidence
16. [§2.121] Death Penalty—Special Circumstances
17. [§2.122] Defenses
18. [§2.123] Definition of Terms
19. [§2.124] Duress
20. [§2.125] Entrapment
21. [§2.126] Evidence
22. [§2.127] Failure To Stop After Vehicle Accident
23. [§2.128] False Pretense, Proof of
24. [§2.129] Flight, Effect of
25. [§2.130] Honest but Unreasonable Belief
26. [§2.131] Imperfect Defense of Others
27. [§2.132] Insanity
28. [§2.133] Intoxication
29. [§2.134] Judicially Noticed Facts—Duty To Accept
30. [§2.135] Kidnapping for Extortion
31. [§2.136] Manslaughter
32. [§2.137] Mental Incapacity
33. [§2.138] Mistake of Fact
34. [§2.139] Multiple Defendants; Multiple Unlawful Acts
35. [§2.140] Murder
36. [§2.141] Necessity, Defense of
37. [§2.142] Nullification
38. [§2.143] Perjury
39. [§2.144] Privilege
40. [§2.145] Proximate Cause
41. [§2.146] Restraints on Defendant or Witness

42. [[§2.147](#)] Self-Defense
43. [[§2.148](#)] Sex Offender Registration
44. [[§2.149](#)] Sexually Violent Predator
45. [[§2.150](#)] Solicitation
46. [[§2.151](#)] Specific Intent
47. [[§2.152](#)] Syndromes, Expert Testimony on
48. [[§2.153](#)] Unconsciousness
49. [[§2.154](#)] Verdict
50. [[§2.155](#)] Victim Anonymity
51. [[§2.156](#)] Witnesses

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.1 I. SCOPE OF CHAPTER AND DIRECTIONS FOR USE

§2.1 I. SCOPE OF CHAPTER AND DIRECTIONS FOR USE

This chapter provides a quick-reference checklist of the instructions the trial court must give sua sponte in felony jury trials, keyed to the appropriate standard or model instructions in CALCRIM and CALJIC.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.2 A. Directions for Use

§2.2 A. Directions for Use

- (1) Section 2.4 lists general instructions to be given sua sponte in the guilt phase of all trials.
- (2) Sections 2.5-2.6 list instructions to be given sua sponte in the death penalty or insanity phase of a bifurcated trial.
- (3) Sections 2.7-2.102 contain instructions directly related to the particular offense, listing elements of the offense, specific intent or mental state, if any, and included offenses. Note that the listings of included offenses do not purport to be exhaustive.
- (4) Sections 2.103-2.156 list miscellaneous instructions that must be given sua sponte depending on the facts developed. All parts of these sections applicable to the case on trial should be consulted.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.3 B. Notes

§2.3 B. Notes

Numbers in the right margin refer to CALCRIM and CALJIC instructions.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.4 II. GENERAL INSTRUCTIONS FOR USE IN THE GUILT PHASE OF ALL CRIMINAL TRIALS

§2.4 II. GENERAL INSTRUCTIONS FOR USE IN THE GUILT PHASE OF ALL CRIMINAL TRIALS

	CALCRIM	CALJIC
(a) Pretrial instruction concerning basic functions, duties, and conduct of jury. <u>Pen C §1122(a)</u> .	100, 101, 102, 124	0.50
(b) Duties of judge and jury. <u>Pen C §1127</u> .	200	1.00
<i>Note:</i> A defendant may not successfully argue that the use of CALJIC 1.00 is improper because it prohibits jury nullification. <u>People v Como (2002) 95 CA4th 1088, 1090-1091, 115 CR2d 922</u> .		
(c) Instructions to be considered as a whole.	200	1.01
(d) Statements of counsel—stricken evidence, etc.	104, 222	1.02
(e) Juror forbidden to make any independent investigation.	101, 201	1.03
<i>Note:</i> Juror experiments, conducted in the jury room, do not violate CALJIC 1.03 if they are based on evidence received in court. Misconduct is not created by use of an exhibit but by its use in a manner outside the parameters of the evidence. <u>People v Cumpian (1991) 1 CA4th 307, 316, 1 CR2d 861</u> .		
(f) Jurors' submission of questions directed to witnesses.	106	
(g) Juror's use of notes. Although it did not decide whether it is required sua sponte, the court in <u>People v Whitt (1984) 36 C3d 724, 746, 205 CR 810</u> , stated that the better practice is to give a cautionary instruction on juror notetaking. See <u>Cal Rules of Ct 2.1031</u> encouraging all courts to permit juror notetaking as standard practice.	102, 202	1.05
(h) Right of defendant to proceed pro per.	107	
(i) Sign language or Cart interpreter in jury room	120, 3531	1.08
(j) Direct and circumstantial evidence.	223	2.00
<i>Note:</i> If crime is perjury (see §2.74), CALCRIM 2640 (CALJIC 7.23) should be given.		
(k) Sufficiency of circumstantial evidence—generally.	223, 224	2.01
<i>Note:</i> A sua sponte instruction is required when the case rests wholly or substantially on circumstantial evidence. <u>People v Yriagozen (1955) 45 C2d 46, 286 P2d 1</u> . This requirement is met in CALCRIM 223 and 224. See <u>People v Smith (2008) 168 CA4th 7, 14, 85 CR3d 180</u> .		
(l) Sufficiency of circumstantial evidence to prove specific intent or mental state.	225	2.02
(m) Believability of witnesses. <u>Pen C §1127</u> .	105, 226	2.20
(n) Sufficiency of testimony of one witness, even when the sole witness on the fact in question is the defendant. This instruction must be given in every case in which no corroborating evidence is required, but it should be modified when case involves testimony requiring corroboration (see §2.120). See <u>People v Chavez (1985) 39 C3d 823, 831, 218 CR 49</u> (accomplice testimony).	301	2.27
(o) Presumption of innocence—reasonable doubt—burden of proof. <u>Pen C §1096</u> . See also §§2.108-2.109. The court has a sua sponte duty to give the standard instruction on presumption of innocence and the prosecution's burden of proof beyond a reasonable doubt in its predeliberation charge to the jury. <u>People v Elquera (1992) 8 CA4th 1214, 1219, 10 CR2d 910</u> (giving instruction solely during voir dire is insufficient).	103, 220, 221	2.90

It is reversible error to fail to inform the jury that the prosecution has the burden of proof beyond a reasonable doubt on each element of the offense. People v Flores (2007) 147 CA4th 199, 212-215, 54 CR3d 98 (court had mentioned CALJIC 2.90 only once to all of the ultimate jurors and that was during the empanelling of the jury when not all jurors had been empanelled or sworn in).

(p) Concurrence of act and intent.

General intent 250 3.30

Note: General intent instruction is inadequate for violation of Pen C §290 sex offender registration because it fails to require actual knowledge of the registration requirement.

People v Jackson (2003) 109 CA4th 1625, 1634-1635, 1 CR3d 253.

Specific intent 251 3.31

General and specific intent together 252

Mental state 251 3.31.5

(q) Jury not to take cue from judge (not given if judge comments on evidence; see §2.114). 3530 17.30

(r) Judge's comments on the evidence. 3530 17.32

(s) All instructions not necessarily applicable. 200 17.31

(t) Individual opinion required—duty to deliberate. 3550 17.40

(u) How jurors should approach their task. 3550 17.41

(v) Jury must not consider penalty—noncapital case. 200 17.42

(w) Questions and readback during deliberation. 3550 17.43

(x) Availability of written copy of instructions. Pen C §1093(f). 200 17.45

(y) Admonition against disclosure of jury balloting. 3550 17.47

(z) Concluding instructions. 3550 17.50

(aa) Substitution of juror during deliberations. 3575 17.51

(bb) Substitution of juror for penalty phase 3576 17.51.1

(cc) Separation admonition. 124 17.52

(dd) Admonition to alternative jurors. 3577 17.53

(ee) Prohibition of electronic communication devices during deliberations. 17.54

(ff) Post-verdict juror admonition/order. CCP §§206, 237. 3590 17.60

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/ III. USING SPECIFIC INSTRUCTIONS DEPENDING ON TYPE OF CASE/ A. Death Penalty and Insanity Trials/§2.5 1. Death Penalty Trials

III. USING SPECIFIC INSTRUCTIONS DEPENDING ON TYPE OF CASE

A. Death Penalty and Insanity Trials

§2.5 1. Death Penalty Trials

	CALCRIM	CALJIC
(1) <i>Special circumstances</i>		
(a) Introductory instruction (to be used when the murder was committed before June 6, 1990).	700, 701	8.80
(b) Introductory instruction (to be used when the murder was committed on or after June 6, 1990).	700, 702, 703	8.80.1
<i>Note:</i> The court has no sua sponte duty to define reckless indifference to life if the prosecution presents that theory to the jury. <u>People v Estrada (1995) 11 C4th 568, 578, 46 CR2d 586.</u>		
(c) Other special circumstances (see §2.121).	720-751	8.81.1-8.82
(2) <i>Sufficiency of circumstantial evidence</i>		
(a) Generally (if case rests wholly or substantially on circumstantial evidence).	704	8.83
(b) To prove specific intent or mental state.	705	8.83.1
(3) <i>Jury must not consider penalty.</i>	706	8.83.2
(4) <i>Corroboration of accomplice testimony.</i>	707, 708	8.83.3
(5) <i>Death penalty trial</i>		
(a) Introduction to penalty phase.	760	8.84
(b) Duty of jury.	761	8.84.1
<i>Note:</i> This instruction should be used instead of CALJIC 1.00 at the penalty phase of death penalty trial. See <u>People v Babbitt (1988) 45 C3d 660, 718 n26, 248 CR 69.</u>		
(c) Factors to consider.	763	8.85
(d) Evidence of other violent crimes—proof beyond a reasonable doubt.	764	8.87
(e) Conviction of other felony crimes—proof beyond a reasonable doubt.	765	8.86
(f) Mental retardation hearing. <u>Pen C §1376.</u>	775	8.84.01- 8.84.03
(g) Concluding instructions.	766	8.88

§2.6 2. Insanity Trials

	CALCRIM	CALJIC
(1) <i>Defense of insanity</i>	3450	4.00
(2) <i>Insanity resulting from use of drugs or intoxicants</i>	3450	4.02
(3) <i>Effect of Verdict</i>	3450	4.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/ B. Instructions Relating to Selected Particular Offenses/§2.7 1. Accessory to Felony (Pen C §32)

B. Instructions Relating to Selected Particular Offenses

§2.7 1. Accessory to Felony (Pen C §32)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i> —courts of appeal are divided on whether the judge has a sua sponte duty to instruct on the elements of the underlying felony. See <u><i>People v Magee</i> (2003) 107 CA4th 188, 193, 131 CR2d 834</u> (court has duty to instruct on all elements of the offense, including the underlying felony which itself is an element of the crime); but see <u><i>People v Shields</i> (1990) 222 CA3d 1, 271 CR 228</u> (no such duty).	440	6.40
(2) <i>Specific intent</i> —to allow principal to avoid or escape from arrest, trial, conviction, or punishment.	Included in 440	Included in 6.40
<i>Mental state:</i> Knowledge that principal has committed, been charged with, or been convicted of, a felony.	Included in 440	Included in 6.40
<i>Note:</i> Specific intent needed to become an accessory under <u>Pen C §32</u> may not be negated by an actual but unreasonable belief of duress. <u><i>People v Jacobs</i> (1991) 230 CA3d 1337, 281 CR 733</u> .		
(3) <i>Included offense</i> —None.		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.8 2. Arson Offenses (Pen C §§450-456)

§2.8 2. Arson Offenses (Pen C §§450-456)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Arson causing great bodily injury or burning of inhabited structure or property. <u>Pen C §451(a)-(d)</u> . <i>Note:</i> The definition of property for purposes of arson is broad enough to include trash, and arson is committed if the trash did not belong to defendant. <u>In re L.T. (2002) 103 CA4th 262, 265, 126 CR2d 778.</u>	1501, 1502	14.80
(b) Aggravated arson. <u>Pen C §451.5</u> .	1500	14.81
(c) Unlawfully causing a fire (felony). <u>Pen C §452(a)-(c)</u> .	1530, 1531	14.82
(d) Arson burning own personal property with intent to defraud. <u>Pen C §451(d)</u> .	1515	14.83
(e) Attempted arson. <u>Pen C §455</u> .	1520	14.84
(f) Unlawfully causing a fire (misdemeanor). <u>Pen C §452(d)</u> .	1532	14.85 or 14.86
(g) Possession, manufacture, or disposal of flammable, explosive, or combustible material or incendiary device. <u>Pen C §453(a)</u> . <i>Note:</i> CALJIC 1.24 must be given when possession is alleged.	1550	14.88
(h) Finding re pecuniary gain; use when it is alleged the offense was committed for pecuniary gain under <u>Pen C §456(b)</u> .	1551	14.90
(2) <i>Intent</i> All of the above offenses are general intent only (CALJIC 3.30; <u>People v Atkins (2001) 25 CA4th 76, 83-84, 104 CR2d 738</u> , except the following:		
(a) Arson burning own personal property (<u>Pen C §451(d)</u>). <i>Specific intent</i> —to defraud.	Included in 1515	Included in 14.83
(b) Attempted arson (<u>Pen C §455</u>). <i>Specific intent</i> —to set fire to or burn a structure, forest land, or property of another.	Included in 1520	Included in 14.84
(c) Possession, manufacture, or disposal of flammable or combustible material or incendiary device (<u>Pen C §453(a)</u>). <i>Specific intent</i> —to willfully and maliciously use material or device to set fire to or burn a structure, forest land, or property. <u>Penal Code §453</u> does not require intent to affect property belonging to another. <u>People v Morse (2004) 116 CA4th 1160, 1166, 11 CR3d 9</u> .	Included in 1550	Included in 14.88
(d) Aggravated arson (<u>Pen C §451.5</u>). <i>Specific intent</i> —to cause injury to others or to cause damage to structures or property.	1500	Included in 14.81
(3) <i>Included offenses</i>		
(a) Attempt. <u>Pen C §663</u> or <u>§455</u> .	460 or 1520	6.00 or 14.84
(b) Unlawfully causing fire of forest land under <u>Pen C §452(c)</u> is lesser included offense to arson of forest land under <u>Pen C §451(c)</u> . <u>People v Hooper (1986) 181 CA3d 1174, 1181, 226 CR 810</u> .		
(c) Unlawfully causing fire to structure may be lesser included offense to arson of a structure. <u>People v Schwartz (1992) 2 CA4th 1319, 1324, 3 CR2d 816</u> .		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/ 3. Assault and Battery Offenses/§2.9 a. Assault (Pen C §240)

3. Assault and Battery Offenses

§2.9 a. Assault (Pen C §240)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Assault. <u>Pen C §240</u> .	915	9.00, 9.01
(b) Assault—conditional threat.	915, 916	9.00.1, 9.00, 9.01

The "present ability" element of the crime of assault is satisfied when a defendant has attained the means and location to strike "immediately," which means that the defendant must have the ability to inflict injury on the present occasion; the defendant need not have the ability to inflict injury instantaneously. People v Chance (2008) 44 C4th 1164, 81 CR3d 723 (defendant had present ability to inflict injury when he pointed loaded gun at a place where he believed officer would appear).

(2) <i>General intent only</i>	250	3.30
<i>Mental state:</i> knowledge of facts that would lead a reasonable person to realize that a battery would directly, naturally, and probably result from the act.	Included in 915	Included in 9.00
(3) <i>Included offense</i> — None.		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.10 b. Assault With Stun Gun or Less Lethal Weapon (Pen C §244.5(b))

§2.10 b. Assault With Stun Gun or Less Lethal Weapon (Pen C §244.5(b))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	876	9.02.2, 9.00, 9.01
(2) <i>General intent only</i>		3.30
<i>Mental state:</i> knowledge of facts that would lead a reasonable person to realize that a battery would directly, naturally, and probably result from the act.	Included in 876	Included in 9.00
(3) <i>Included offense</i> — Simple assault. Pen C <u>§240</u> .	915	9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.11 c. Assault With Stun Gun or Less Lethal Weapon on Peace Officer or Firefighter (Pen C §244.5(c))

§2.11 c. Assault With Stun Gun or Less Lethal Weapon on Peace Officer or Firefighter (Pen C §244.5(c))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	861	9.20.2, 9.00, 9.01
(a) "Peace officer" defined.	Included in 861	1.26
(b) "Firefighter" defined.	Included in 861	1.27
(2) <i>General intent only</i>	250	3.30
Mental state: knowledge or should have knowledge that person is peace officer or firefighter.	Included in 861	Included in 9.20.2
(3) <i>Included offenses</i>		
(a) Assault with stun gun or less lethal weapon (<u>Pen C §244.5(b)</u>)	876	9.02.2, 9.00, 9.01
(b) Simple assault. <u>Pen C §240</u>	915	9.00, 9.01
(c) Assault on peace officer or firefighter. <u>Pen C §241(c)</u> .	900	16.100

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.12 d. Assault With Deadly Weapon or Firearm, or by Means of Force Likely To Produce Great Bodily Injury (Pen C §245(a))

§2.12 d. Assault With Deadly Weapon or Firearm, or by Means of Force Likely To Produce Great Bodily Injury (Pen C §245(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	875, 915	9.02, 9.00, 9.01
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offense</i> Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01

Note: The offense of brandishing a weapon under Pen C §417 is a lesser related, but not lesser included offense of assault with a deadly weapon. People v Steele (2000) 83 CA4th 212, 217, 99 CR2d 458.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.13 e. Assault With Deadly Weapon or Firearm, or by Means of Force Likely To Produce Great Bodily Injury on Peace Officer, Etc. (Pen C §§245(c)-(d)(1), 245.2, 245.3, 245.5(a)-(b))

§2.13 e. Assault With Deadly Weapon or Firearm, or by Means of Force Likely To Produce Great Bodily Injury on Peace Officer, Etc. (Pen C §§245(c)-(d)(1), 245.2, 245.3, 245.5(a)-(b))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	860, 862- 863, 915, 875	9.20, 9.00, 9.01, 9.02
(a) "Peace officer" defined.	Included in 860	1.26
(b) "Firefighter" defined.	Included in 860	1.27
(c) "Custodial officer" defined.	Included in 862	
(2) <i>General intent only</i>	250	3.30
Mental state: knowledge or should have knowledge that person is peace officer, etc.	Included in 860	Included in 9.20
(3) <i>Included offenses</i>		
(a) Assault with deadly weapon. <u>Pen C §245(a)</u> ; <i>People v Hood</i> (1969) 1 C3d 444, 450, 82 CR 618.	875, 915	9.02, 9.00, 9.01
(b) Simple assault. <u>Pen C §240</u> ; <i>People v Hood, supra</i> .	915	9.00, 9.01
(c) Assault on peace officer, firefighter, or parking control officer. <u>Pen C §241(b)-(c)</u> .	900, 901	16.100

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.14 f. Assault With Semiautomatic Firearm, Machine Gun, Assault Weapon, or .50 BMG Rifle (Pen C §245(a)(3), (b))

§2.14 f. Assault With Semiautomatic Firearm, Machine Gun, Assault Weapon, or .50 BMG Rifle (Pen C §245(a)(3), (b))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	875, 915	9.02.1, 9.00, 9.01
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offense</i>		
(a) Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.15 g. Assault With Semiautomatic Firearm, Machine Gun, Assault Weapon, or .50 BMG Rifle on Peace Officer, Etc. (Pen C §245(d)(2)-(3))

§2.15 g. Assault With Semiautomatic Firearm, Machine Gun, Assault Weapon, or .50 BMG Rifle on Peace Officer, Etc. (Pen C §245(d)(2)-(3))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	860, 915	9.20.1, 9.00, 9.01, 9.02
(a) "Peace officer" defined.	Included in 860, 900, 945	1.26
(b) "Firefighter" defined.	Included in 860, 900	1.27
(2) <i>General intent only</i>	250	3.30
Mental state: knowledge or should have knowledge that person is peace officer, etc.	Included in 860	Included in 9.20.1
(3) <i>Included offenses</i>		
(a) Simple assault. <u>Pen C §240</u> .	915	9.00, 9.01
(b) Assault on peace officer. <u>Pen C §241(c)</u> .	900, 901	16.100
(c) Assault with machine gun, etc. <u>Pen C §245(a)(3)</u> , (b).	875, 915	9.02.1, 9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.16 h. Assault With Intent To Commit Sex Offense (Pen C §220(a))

§2.16 h. Assault With Intent To Commit Sex Offense (Pen C §220(a))

	CALCRIM	CALJIC
<i>(1) Elements of offense</i>		
<i>Note:</i> In addition to instructing on the elements for assault, the court must instruct on the elements of the intended crime. <u>People v May (1989) 213 CA3d 118, 129, 261 CR 502.</u>		
(a) Assault with intent to commit rape or spousal rape (including in-concert offense).	890, 1000-1001	9.09, 9.00, 9.01, 10.00, 10.01
(b) Assault with intent to commit sodomy (including in-concert offense).	890, 1030-1031, 1090-1092	9.09, 9.00, 9.01, 10.20-10.21, 10.47-10.48
(c) Assault with intent to commit oral copulation (including in-concert offense).	892, 1015-1016, 1080-1082	9.09, 9.00, 9.01, 10.10-10.12, 10.45-10.46
(d) Assault with intent to commit sexual penetration (including in-concert offense).	890, 1045-1046, 1100-1102	9.09, 9.00, 9.01, 10.30-10.31, 10.49-10.50
(e) Assault with intent to commit lewd and lascivious act.	890, 1110-1112	9.09, 9.00, 9.01, 10.41-10.42.5
<i>(2) Intent</i>		
<i>Specific intent</i> – to commit designated sex offense.	890	Included in 9.09
<i>(3) Included offenses</i>		
(a) Attempt to commit designated sex offense. <u>Pen C §663.</u>	460	6.00
(b) Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01
<i>Note:</i> Attempted sexual battery (<u>Pen C §§664, 243.4</u>) is not a necessarily included offense of assault to commit rape. <u>People v Dixon (1999) 75 CA4th 935, 940, 89 CR2d 602.</u>		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.17 i. Assault With Intent To Commit Mayhem (Pen C §220(a))

§2.17 i. Assault With Intent To Commit Mayhem (Pen C §220(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	891	9.09, 9.00, 9.01, 9.30- 9.31
(2) <i>Specific intent</i> — to commit mayhem.	Included in 891	Included in 9.09
(3) <i>Included offenses</i>		
(a) Attempted mayhem. <u>Pen C §§633, 203.</u>	460	6.00
(b) Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.18 j. Assault With Intent To Commit Sex Offense During First Degree Burglary (Pen C §220(b))

§2.18 j. Assault With Intent To Commit Sex Offense During First Degree Burglary (Pen C §220(b))

	CALCRIM	CALJIC
<i>(1) Elements of offense</i>		
<i>Note:</i> In addition to instructing on the elements for assault and first degree burglary, the court must instruct on the elements of the intended crime.		
(a) Assault with intent to commit rape or spousal rape (including in-concert offense) during first degree burglary.	890, 1700-1701, 1000-1001	9.10, 9.00, 9.01, 14.50-14.54, 10.00, 10.01
(b) Assault with intent to commit sodomy (including in-concert offense) during first degree burglary.	890, 1700-1701, 1030-1031, 1090-1092	9.10, 9.00, 9.01, 14.50-14.54, 10.20-10.21, 10.47-10.48
(c) Assault with intent to commit oral copulation (including in-concert offense) during first degree burglary.	890, 1700-1701, 1015-1016, 1080-1082	9.10, 9.00, 9.01, 10.10-10.12, 14.50-14.54, 10.45-10.46
(d) Assault with intent to commit sexual penetration (including in-concert offense) during first degree burglary.	890, 1700-1701, 1045-1046, 1100-1102	9.10, 9.00, 9.01, 10.30-10.31, 14.50-14.54, 10.49-10.50
(e) Assault with intent to commit lewd and lascivious act during first degree burglary.	890, 1700-1701, 1110-1112	9.10, 9.00, 9.01, 14.50-14.54, 10.41-10.42.5
<i>(2) Specific intent — to commit designated sex offense.</i>	Included in 890	Included in 9.10
<i>(3) Included offense</i>		
(a) Attempted burglary. <u>Pen C §§663, 459.</u>	460	6.00
(b) Attempted sex offense. <u>Pen C §§663, 261, 264.1, 286, 288, 288a, 289.</u>	460	6.00
(c) Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.19 k. Aggravated Sexual Assault of Child (Pen C §269(a))

§2.19 k. Aggravated Sexual Assault of Child (Pen C §269(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1123	10.55
<i>Note:</i> Duress may be proved by a showing of psychological coercion without any other showing of force or threat. Victim's age and relationship to the defendant may be considered in proving the element of duress. <u><i>People v Cochran</i> (2002) 103 CA4th 8, 13-14, 126 CR2d 416.</u>		
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offense</i> Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.20 I. Assault on Child Under Eight Resulting in Death (Pen C §273ab)

§2.20 l. Assault on Child Under Eight Resulting in Death (Pen C §273ab)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	820	9.36.5
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offenses</i>		
(a) Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01
(b) Assault by means of force likely to produce great bodily injury. <u>Pen C §245(a)(1). <i>People v Basuta</i> (2001) 94 CA4th 370, 391-392, 114 CA2d 285.</u>	875, 915	9.02, 9.00, 9.01

Note: Involuntary manslaughter (Pen C §192(b)) is not a lesser included offense of Pen C §273ab. *Orlina v Superior Court* (1999) 73 CA4th 258, 261, 86 CR2d 384.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.21 m. Battery (Pen C §242)

§2.21 m. Battery (Pen C §242)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	926, 960	16.140, 16.141
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offense</i>		
Simple assault. <u>Pen C §240; <i>People v Lopez</i> (1975) 47 CA3d 8, 15, 120 CR 562.</u>	915	9.00, 9.01

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.22 n. Battery With Serious Bodily Injury (Pen C §243(d))

§2.22 n. Battery With Serious Bodily Injury (Pen C §243(d))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	925	9.12
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offenses</i>		
(a) Battery. <u>Pen C §242.</u>	926, 960	16.140, 16.141
(b) Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.23 o. Battery on a Peace Officer, Firefighter, Etc. (Pen C §243(b)-(c))

§2.23 o. Battery on a Peace Officer, Firefighter, Etc. (Pen C §243(b)-(c))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	945, 946	9.22
(a) "Peace officer" defined.	Included in 945	1.26
(b) "Firefighter" defined.	Included in 900	1.27
(c) "Custodial officer" defined.	Included in 946	
(2) <i>General intent only</i> Mental state: knowledge or should have knowledge that person is peace officer, etc.	250	3.30
(3) <i>Included offenses</i>		
(a) Battery. <u>Pen C §242</u> ; <u>People v Curtis (1969) 70 C2d 347, 354, 74 CR 713.</u>	926, 960	16.140, 16.141
(b) Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01
(c) Resisting, obstructing police officer. <u>Pen C §148</u> ; <u>People v Perkins (1970) 9 CA3d 1048, 88 CR 720.</u>	2656	16.102
(d) Battery against peace officer (misdemeanor). <u>Pen C §243(b).</u>		16.101
(e) Assault on peace officer. <u>Pen C §241(c).</u>	900, 901	16.100

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.24 p. Battery on Spouse, Former Spouse, Etc. (Pen C §243(e))

§2.24 p. Battery on Spouse, Former Spouse, Etc. (Pen C §243(e))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	841	16.140.1
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offenses</i>		
(a) Battery. <u>Pen C §242.</u>	926, 960	16.140, 16.141
(b) Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.25 4. Bribery (Pen C §§67, 67.5(a), 68, 85, 86, 93, 137)

§2.25 4. Bribery (Pen C §§67, 67.5(a), 68, 85, 86, 93, 137)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Bribery of an executive officer. <u>Pen C §67</u> .	2600	7.00
(b) Bribery of a ministerial officer. <u>Pen C §67.5(a)</u> .	2601, 2602	7.01
(c) Asking or receiving bribe by public official. <u>Pen C §§68, 86, 93</u> .	2603	7.02
(d) Bribery of a legislative officer. <u>Pen C §85</u> .		7.02.1
(e) Bribery of a witness. <u>Pen C §137(a)</u> .	2610	7.03
(f) Use of force or threat of force in attempt to induce false testimony. <u>Pen C §137(b)</u> .	2620	7.03.1
(g) Use of fraud in attempt to induce false testimony. <u>Pen C §137(b)</u> .	2621	7.03.2
(h) Offering bribe to witness to dissuade attendance at judicial proceeding. <u>Pen C §138(a)</u> .	2611	7.12
(i) Receipt of bribe by witness. <u>Pen C §138(b)</u> .	2612	7.13
(j) "Bribe" defined; other definitions.	2603, 2610-2612	7.05-7.09
(k) "Witness" and "person about to be called as a witness" defined.	2610-2612	7.03.3
(2) <i>Specific intent</i>		
(a) Corrupt intent to influence a public official in his or her official capacity.	Included in 2600-2601	Included in 7.01-7.02
(b) Corrupt intent to act on understanding that his or her official action will be influenced.	Included in 2600-2601	Included in 7.02
(c) Influencing or inducing false testimony.	Included in 2610, 2621	Included in 7.03-7.03.2
(d) Dissuading witness from attending judicial proceeding.	Included in 2611	Included in 7.12
(e) Corrupt intent to give false testimony or fail to appear at hearing.	Included in 2612	Included in 7.13
(3) <i>Included offense</i> — None.		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.26 5. Burglary (Pen C §459)

§2.26 5. Burglary (Pen C §459)

	CALCRIM	CALJIC
(1) <i>Elements and degrees of offense</i> Burglary defined; degrees of burglary defined; vehicular burglary defined.	1700-1701	14.50-14.51 or 14.58
(2) <i>Specific intent</i> —to commit larceny or any felony. Entry into a bedroom of a single-family house with the requisite intent can support a burglary conviction if the intent was formed after the defendant entered the house. <i>People v Sparks</i> (2002) 28 CA4th 71, 120 CR2d 508. For aiders and abettors, see §2.104.	Included in 1700	Included in 14.50
(3) <i>Included offenses</i>		
(a) Attempted burglary. <u>Pen C §§663, 459.</u>	460	6.00
(b) Tampering with vehicle. <u>Veh C §10852; People v Mooney</u> (1983) 145 CA3d 502, 193 CR 381. (See also §2.111, "Burglary.")	1821	16.620

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.27 6. Carjacking (Pen C §215)

§2.27 6. Carjacking (Pen C §215)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i> <i>Note:</i> The felonious taking element of carjacking requires asportation or movement of the car. <u><i>People v Lopez</i> (2003) 31 C4th 1051, 6 CR3d 432.</u> <i>Note:</i> When the victim of carjacking is an infant too young to give or withhold consent, the taking is against the will of the infant if it is without lawful consent. <u><i>People v Hill</i> (2000) 23 C4th 853, 859-861, 98 CR2d 254.</u> <i>Note:</i> The felonious taking required for a carjacking (Pen C §215) can occur when the victim remains with the car. <u><i>People v Duran</i> (2001) 88 CA4th 1371, 1375-1377, 106 CR2d 812.</u>	1650	9.46
(2) <i>Specific intent</i> — to permanently or temporarily deprive.	Included in 1650	Included in 9.46
(3) <i>Included offense</i> Attempt. Pen C §§663, 215. <i>Note:</i> Theft (Pen C §484) is not a necessarily included offense of carjacking. <u><i>People v Ortega</i> (1998) 19 C4th 686, 693, 80 CR2d 489.</u> <i>Note:</i> The unlawful taking of an automobile (Veh C §10851) is not a lesser included offense of carjacking (<u><i>People v Montoya</i> (2004) 33 C4th 1031, 1034-1036, 16 CR3d 902.</u>), nor is attempted grand theft auto because it requires an intent to permanently deprive while carjacking does not (<u><i>People v Marquez</i> (2007) 152 CA4th 1064, 1068, 62 CR3d 31.</u>).	460	6.00

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.28 7. Checks--
Insufficient Funds (Pen C §476a)

§2.28 7. Checks—Insufficient Funds (Pen C §476a)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1970, 1971	15.20-15.30
(2) <i>Specific intent</i> —to defraud with knowledge of insufficient funds.	Included in 1970	Included in 15.20
(3) <i>Included offense</i> Theft. <u>Pen C §484</u> .	1800	14.00 et seq

Note: Theft (Pen C §484) may, but need not, be included. Penal Code §476a is complete when check issued with intent to defraud. Loss or detriment, required in offense of theft, is not required in §476a offense.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.29 8. Child, Elder, or Dependent Adult Abuse, Neglect, or Endangerment (Pen C §§273a(a), 368(b)(1))

§2.29 8. Child, Elder, or Dependent Adult Abuse, Neglect, or Endangerment (Pen C §§273a(a), 368(b)(1))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i> <u>Penal Code §368</u> (elder abuse) may be violated by a continuous course of conduct. <i>People v Rae</i> (2002) 102 CA4th 116, 123, 125 CR2d 312.	821, 830	9.37-9.38
(2) <i>Intent</i> — General intent. However, the mens rea required for indirect infliction of abuse under <u>Pen C §273a(a)</u> is criminal negligence. <i>People v Valdez</i> (2002) 27 C4th 778, 787-792, 118 CR2d 3; <i>People v Sargent</i> (1999) 19 C4th 1206, 1219, 81 CR2d 835.	Included in 821, 830	Included in 9.37-9.38
(3) <i>Included offenses</i>		
(a) Attempt. <u>Pen C §663</u> .	460	6.00
(b) Misdemeanor child or elder abuse. <u>Pen C §§273a(b), 368(c)</u> .	823, 831	16.170, 16.172
The court must instruct sua sponte on misdemeanor elder abuse, as a lesser included offense of felony elder abuse, when there is evidence that the abuse was not likely to produce great bodily harm or death. <i>People v Racy</i> (2007) 148 CA4th 1327, 1334-1335, 56 CR3d 455.		
(c) Failure to prevent abuse. A noncustodial defendant can be found guilty of <u>Pen C §368(b)</u> or (c) based on the failure to prevent a third person from abusing an elder or dependent adult if the defendant has a duty and ability to control that person's conduct. <i>People v Heitzman</i> (1994) 9 C4th 189, 212, 37 CR2d 236.	830	9.39

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.30 9. Child, Spouse, and Cohabitant Beating (Pen C §§273d, 273.5)

§2.30 9. Child, Spouse, and Cohabitant Beating (Pen C §§273d, 273.5)

	CALCRIM	CALJIC
<i>(1) Elements of offense</i>		
(a) Child beating. <u>Pen C §273d.</u>	822	9.36
(b) Corporal punishment. Parent claims right to discipline by corporal punishment. <u>People v Whitehurst (1992) 9 CA4th 1045, 1049, 1051, 12 CR2d 33.</u>	3405	4.80
(c) Current or former spouse or cohabitant beating. <u>Pen C §273.5.</u>	840	9.35
(d) Spouse or cohabitant beating with prior conviction. <u>Pen C §273.5(e).</u>	840	9.35.01
<i>Note:</i> A person can cohabit with two or more people at different locations during the same period, if he or she maintains substantial ongoing relationships with each and lives with each for significant periods. <u>People v Moore (1996) 44 CA4th 1323, 1335, 52 CR2d 256.</u>	840	
<i>(2) General intent only.</i> <u>People v Thurston (1999) 71 CA4th 1050, 1054-1055, 84 CR2d 221</u> (defendant's argument that use of the word willfully indicated a specific intent crime was rejected; crime proscribing willful behavior is general intent crime).	250	3.30
<i>(3) Included offenses</i>		
(a) Attempt. <u>Pen C §663.</u>	460	6.00
(b) Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01
(c) Battery. <u>Pen C §242.</u>	926, 960	16.140, 16.141
(d) <u>Penal Code §243(e)(1)</u> (battery against cohabitant) is a lesser included offense of <u>Pen C §273.5.</u> <u>People v Jackson (2000) 77 CA4th 574, 91 CR2d 805.</u>	841	16.140.1
<i>Note:</i> Causing a child to suffer (<u>Pen C §273a</u> —either felony or misdemeanor) is not necessarily a lesser included offense of felony infliction of injury on a child (<u>Pen C §273d</u>). <u>People v Mousabeck (2007) 157 CA4th 975, 981-982, 68 CR3d 877.</u>		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/ 10. Child Pornography/§2.31 a. Distributing Obscene Matter Showing Sexual Conduct by a Minor (Pen C §§311.1(a), 311.2(b)-(d))

10. Child Pornography

§2.31 a. Distributing Obscene Matter Showing Sexual Conduct by a Minor (Pen C §§311.1(a), 311.2(b)-(d))

	CALCRIM	CALJIC
<i>(1) Elements of offense</i>		
(a) Distributing obscene matter depicting minor engaging in sexual conduct. <u>Pen C §311.1(a)</u> .	1141	10.80
(b) Distributing obscene matter depicting minor engaging in sexual conduct for commercial consideration. <u>Pen C §311.2(a)</u> .	1141	10.80
(c) Distributing obscene matter depicting minor in sexual conduct to person 18 years of age or older. <u>Pen C §311.2(c)</u> .		10.81
(d) Distributing obscene matter depicting minor in sexual conduct to person under 18 years of age. <u>Pen C §311.2(d)</u> .		10.81
(e) "Obscene" defined.	Included in 1141	16.182
(f) "Matter" defined.	Included in 1141	16.182
(g) "Average adult person" defined.	Included in 1141	16.184
(h) "Contemporary community standard" defined.	Included in 1141	16.186
<i>(2) Intent</i>		
(a) Possession with specific intent to distribute, exhibit, or exchange obscene matter.	Included in 1141	Included in 10.80-10.81
(b) Preparation or publication of obscene matter with specific intent to distribute, exhibit, or exchange obscene matter.	Included in 1141	Included in 10.80-10.81
(c) Sending or bringing obscene matter into state with specific intent to distribute, exhibit, or exchange obscene matter.	Included in 1141	Included in 10.80-10.81
<i>Note:</i> No published case has held that distributing or showing obscene material requires specific intent.		
<i>(3) Included offenses</i>		
(a) Attempted distribution of obscene matter. <u>Pen C §§664, 311.1(a), 311.2(c)-(d)</u> .	460	6.00
(b) Attempted distribution of obscene matter for commercial consideration. <u>Pen C §§664, 311.2(b)</u> .	460	6.00

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.32 b. Using Minor in Creating Pornography (Pen C §311.4(b)-(c))

§2.32 b. Using Minor in Creating Pornography (Pen C §311.4(b)-(c))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Using, promoting, employing, or inducing minor to pose or model for purpose of producing child pornography. <u>Pen C §311.4(c)</u> .		10.82
(b) Using, promoting, employing, or inducing minor to pose or model for purpose of producing child pornography for commercial consideration. <u>Pen C §311.4(b)</u> .		10.80
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offense</i> — None.		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.33 11. Conspiracy (Pen C §182)

§2.33 11. Conspiracy (Pen C §182)

(1) *Elements of offense*

CALCRIM	CALJIC
415, 417, 418, 420	6.10, 6.11, 6.12-6.26

Notes: Penal Code §182.5 creates a separate conspiracy offense for actively participating in a criminal street gang with knowledge of its activities and willfully promoting, furthering, assisting or benefiting from any felonious criminal conduct by members of the gang that is punishable under Pen C §182. See §2.51 for gang crime instructions.

When the evidence warrants, the court has a sua sponte duty to instruct on single versus multiple conspiracies.

People v Jasso (2006) 142 CA4th 1213, 1220, 1223, 48 CR3d 697.

17.05, 17.05.1

(2) *Specific intent* — (1) to agree or conspire to commit a crime, and (2) to commit the crime. (See also §2.11Z, "Conspiracy.")

Included in 415	Included in 6.10
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(3) *Included offense* — None.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/ 12. Controlled Substances Offenses/§2.34 a. Marijuana (Health & S C §§11357-11361)

12. Controlled Substances Offenses

§2.34 a. Marijuana (Health & S C §§11357-11361)

	CALCRIM	CALJIC
<i>(1) Elements of offense</i>		
(a) Possession of concentrated cannabis. <u>Health & S C §11357(a)</u> .	2377	12.20
(b) Possession for sale. <u>Health & S C §11359</u> .	2352	12.21
(c) Sale. <u>Health & S C §11360(a)</u> .	2350	12.22
(d) Give away or transport. <u>Health & S C §11360(a)</u> .	2361, 2363	12.22.5
(e) Offer to sell. <u>Health & S C §11360</u> .	2351	12.23
(f) Cultivation. <u>Health & S C §11358</u> .	2370	12.24
(g) Offenses involving minors. <u>Health & S C §11361</u> .	2390-2393	12.25-12.29
(h) Marijuana defined.	Included in 2350 and in instructions of other marijuana offenses	12.31
(i) Simple possession. <u>Health & S C §11357</u> .	2375, 2376	16.030
<i>(2) Intent</i>		
All of the above offenses are general intent only (CALJIC 3.30), except the following:		
(a) Possession for sale: specific intent—to sell.	Included in 2352	Included in 12.21
(b) Offer to sell: specific intent—to sell, furnish, administer, or give away.	Included in 2351, 2391	Included in 12.23, 12.26
(c) Give away or transport: specific intent—to give away or transport.	Included in 2361, 2363	Included in 12.22.5
(d) Mental state: knowledge of presence of the drug and its narcotic character.	Included in 2375 and in instructions of other marijuana offenses	Included in 12.20- 12.22.5, 12.24-12.25
<i>(3) Included offenses</i>		
(a) Attempt. <u>Pen C §663</u> .	460	6.00
(b) Sale and offer to sell include simple possession and possession for sale.	2352, 2375, 2376	12.21, 16.030
(c) Possession for sale and cultivation include simple possession.	2375, 2376	16.030

(See also §2.118, "Controlled Substances.")

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.35 b. Restricted Drugs (Health & S C §§11350-11352, 11353-11355, 11366, 11368, 11377, 11378-11379, 11379.6, 11380, 11382, 11383, 11383.5, 11383.7)

§2.35 b. Restricted Drugs (Health & S C §§11350-11352, 11353-11355, 11366, 11368, 11377, 11378-11379, 11379.6, 11380, 11382, 11383, 11383.5, 11383.7)

	CALCRIM	CALJIC
<i>(1) Elements of offense</i>		
(a) Possession. <u>Health & S C §§11350, 11377.</u>	2304	12.00
(b) Possession for sale. <u>Health & S C §§11351, 11351.5, 11378, 11378.5.</u>	2302	12.01
(c) Sale. <u>Health & S C §§11352, 11379.</u>	2300	12.02
(d) Offer to sell. <u>Health & S C §§11352, 11379.</u>	2301	12.03
(e) Sale of substance in lieu of. <u>Health & S C §§11355, 11382.</u>	2315, 2316	12.04
(f) Forgery of prescription. <u>Health & S C §11368.</u>	2320, 2321	12.05
(g) Offenses involving minors. <u>Health & S C §§11353-11354, 11380.</u>	2380, 2381-2384	12.10-12.11, 12.12-12.13, 12.15-12.17
(h) Opening or maintaining place for controlled substance sale or use. <u>Health & S C §11366.</u>	2440	12.08
(i) Manufacturing or offering to manufacture controlled substance. <u>Health & S C §11379.6(a)-(b).</u>	2330, 2331	12.09.1
(j) Possession with intent to manufacture. <u>Health & S C §§11383(a)-(d), 11383.5(a)-(f).</u>	2335-2338	12.09.2-12.09.5
(k) Possession with intent to sell for purpose of manufacture (<u>Health & S C §11383.7(a)-(b).</u>)		12.09.6-12.09.8
"Possession" defined.	Included in 2304	1.24
<i>(2) Intent</i>		
All of the above offenses are general intent only (CALJIC 3.30), except the following:		
(a) Possession for sale: specific intent—to sell. The specific intent for the crime of selling cocaine to a minor (<u>Health & S C §11353</u>) is the intent to sell cocaine rather than the intent to sell it to a minor; therefore, ignorance of the age of the offeree does not negate the required intent. <u>People v Williams (1991) 233 CA3d 407, 284 CR 454.</u>	Included in 2302	Included in 12.01
(b) Offer to sell: specific intent—to sell, furnish, administer, or give away.	Included in 2301, 2380, 2381	Included in 12.03, 12.11
(c) Opening or maintaining place: specific intent—to repeatedly sell, give away, or use narcotics.	Included in 2440	Included in 12.08
(d) Manufacture: specific intent to manufacture, etc.	Included in 2330, 2331	Included in 12.09.1
(e) Possession with intent to manufacture: specific intent—to manufacture the specified substances.	Included in 2335-2338	Included in 12.09.2-12.09.5
(f) Furnishing or offering to furnish to minor: specific intent—to furnish to minor.	Included in 2381	Included in 12.15
(g) Mental state: knowledge of presence of the drug and its narcotic character.	Included in 2304, 2302, 2380, 2382, 2381	Included in 12.00-12.02, 12.10, 12.12, 12.15
(h) Mental state: knowledge of the character of the substance being manufactured.	Included in 2330, 2331	Included in 2.09.1
<i>(3) Included offenses</i>		

(a) Attempt. <u>Pen C §663.</u>	460	6.00
(b) Sale and offer to sell include simple possession and possession for sale.	2352, 2375, 2376	12.21, 16.030
(c) Possession for sale or with intent to manufacture includes simple possession.	2377, 2375, 2376	12.20, 16.030

Note: Possession for sale is not a necessarily included offense of transportation of narcotics because one may be able to transport drugs without necessarily possessing them. People v Watterson (1991) 234 CA3d 942, 947, 286 CR 13.

Both simple possession and possession for sale may be lesser included offenses of sale of cocaine. People v Tinajero (1993) 19 CA4th 1541, 1546, 24 CR2d 298. But see People v Peregrina-Larios (1994) 22 CA4th 1522, 1524, 28 CR2d 316 (simple possession of a controlled substance is not a necessarily included offense of selling or offering to sell because possession contains elements that a sales offense does not: the knowing possession of a usable quantity).
(See also §2.118, "Controlled Substances.")

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.36 c. Possession While Armed (Health & S C §11370.1)

§2.36 c. Possession While Armed (Health & S C §11370.1)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
Possession while armed. <u>Health & S C §11370.1.</u>	2303	12.52
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offenses.</i> See possession offenses in <u>§§2.34-2.35.</u>		

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.37 d. Unlawful Possession of Funds in Excess of \$100,000 in Connection With Controlled Substances (Health & S C §11370.6)

§2.37 d. Unlawful Possession of Funds in Excess of \$100,000 in Connection With Controlled Substances (Health & S C §11370.6)

(1) *Elements of offense*

	CALCRIM	CALJIC
(a) Nonattorney defendant. <u>Health & S C §11370.6(a)</u> .	2430, 2431	12.35, 12.37
(b) Attorney defendant. <u>Health & S C §11370.6(a)-(b)</u> .	2430-2432	12.36-12.37

(2) *Intent*

(a) Nonattorney defendant.

Specific intent – to purchase controlled substances with funds. Included in 2431 Included in 12.35

Mental state – knowledge of how funds were obtained. Included in 2430 Included in 12.35

(b) Attorney defendant.

Specific intent – to violate Health & S C §11370.6(a), or disguise or aid in disguising source of funds or the nature of criminal activity. Included in 2432 Included in 12.36

(3) *Included offense* – None.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/ 13. Deadly Weapons, Firearms, and Destructive Devices/§2.38 a. Possession Offenses (Pen C §§12020, 12021, 12021.1, 12023, 12024, 12025, 12031, 12303, 12303.2)

13. Deadly Weapons, Firearms, and Destructive Devices

§2.38 a. Possession Offenses (Pen C §§12020, 12021, 12021.1, 12023, 12024, 12025, 12031, 12303, 12303.2)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Possession of certain deadly weapons or explosives. <u>Pen C §12020(a)(1)-(2)</u> .	2500	12.40
(b) Carrying concealed dirk, dagger, or explosive substance. <u>Pen C §12020(a)(3)-(4)</u> .	2501	12.41
(c) Possession of firearm by felon—no stipulation of status. <u>Pen C §§12021(a)-(c), 12021.1(a)</u> .	2510	12.43
(d) Possession of firearm by felon—status stipulated. <u>Pen C §§12021(a)-(c), 12021.1(a)</u> .	2511	12.44
(e) Possession of firearm by person prohibited by court order. <u>Pen C §12021(d), (g)</u> .	2512	
(f) Possession of firearm by narcotics addict. <u>Pen C §12021(a)(1)</u> .	2513	12.45
(g) Carrying concealable firearm on the person. <u>Pen C §12025(a)(2)</u>	2520	12.47.1
(h) Carrying concealable firearm in vehicle controlled by defendant. <u>Pen C §12025(a)(1)</u>	2521	12.46.1
(i) Carrying concealable firearm-caused to be carried in vehicle in which defendant is occupant. <u>Pen C §12025(a)(3)</u> .	2522	12.47.6
(j) Carrying concealable firearm by felon. <u>Pen C §12025(a), (b)(1)</u> .	2540	12.46
(k) Carrying stolen concealable firearm. <u>Pen C §12025(a), (b)(2)</u> .	2541	12.46.1, 12.47.1, 12.47.6
(l) Carrying concealable firearm by gang member. <u>Pen C §12025(a), (b)(3)</u> .	2542	12.46.1, 12.47.1, 12.47.6
(m) Carrying concealed firearm by person not in lawful possession. <u>Pen C §12025(a), (b)(4)</u> .	2544	12.47.1
(n) Carrying concealed firearm—possession prohibited due to conviction, court order, or mental illness. <u>Pen C §12025(a), (b)(4)</u> .	2544	12.46.1, 12.47.1, 12.47.6
(o) Possession of concealable firearm by a person convicted of crime against person or property or drug offense. <u>Pen C §12025(a), (b)(5)</u> .	2540	12.47
(p) Carrying concealable firearm in vehicle occupied by felon. <u>Pen C §12025(a)(3), (b)(1), (b)(5)</u> .	2510	12.47.5
(q) Carrying concealable, unregistered loaded firearm. <u>Pen C §12025(a), (b)(6)</u> .	2546	12.47.2
(r) Carrying loaded firearm by felon. <u>Pen C §12031(a)(1), (a)(2)(A)</u> .	2540	12.54
(s) Carrying stolen loaded firearm. <u>Pen C §12031(a)(1), (a)(2)(B)</u> .	2541	12.54
(t) Carrying loaded firearm by gang member. <u>Pen C §12031(a)(1), (a)(2)(C)</u> .	2542	12.54.1
(u) Carrying loaded firearm by person not in lawful possession. <u>Pen C §12031(a)(1), (a)(2)(D)</u> .	2544	12.47.1
(v) Carrying loaded firearm—possession prohibited due to conviction, court order, or mental illness. <u>Pen C</u>	2544	12.54

§12031(a)(1), (a)(2)(D).

(w) Possession of loaded firearm by a person convicted of crime against person or property or drug offense. Pen C §12031(a)(1), (a)(2)(E). 2540 12.54

(x) Carrying loaded firearm with intent to commit felony. Pen C §12023. 2590 12.53

(y) Possession of deadly weapon with intent to assault another. Pen C §12024. 915, 2503 9.00, 16.293

(z) "Deadly weapon" defined. 2503 12.42

(aa) Possession of destructive device. Pen C §§12303, 12303.2. 2570, 2572 12.55, 12.55.2

(bb) "Destructive device" defined. 2570 12.56

(cc) "Concealable firearm" defined. 2530 12.48

(2) *Intent*

All of the above offenses are general intent only (CALJIC 3.30; see, e.g., People v Gaitan (2001) 92 CA4th 540, 547, 111 CR2d 885), except the following:

(a) Carrying loaded firearm with intent to commit felony. Pen C §12023. Included in 2590 Included in 12.53

(b) Possession of deadly weapon with intent to assault another. Pen C §12024. Included in 2503 Included in 16.293

(c) Carrying of loaded firearm by gang member to promote, further, or assist in felonious criminal conduct by members of gang. Pen C §12031(a)(1), (a)(2)(C). Included in 2542 Included in 12.54.1

See People v Robles (2000) 23 C4th 1106, 1114-1115, 99 CR2d 120 (Pen C §12031(a)(1), (a)(2)(C) incorporates all the elements of the substantive gang offense described in Pen C §186.22(a)).

Mental state: In Pen C §12020(a)(4) cases (carrying concealed dirk or dagger), the defendant must knowingly and intentionally carry a concealed instrument that is capable of ready use as a stabbing weapon. Included in 2501 Included in 12.41

Mental state: In Pen C §12020(a)(1) cases (possession of certain deadly weapons), defendant must have knowledge of the weapon's illegal characteristics. People v King (2006) 38 C4th 617, 626-628, 42 CR3d 743. Included in 2500 Included in 12.40

Note: CALCRIM 2514 (CALJIC 12.50) is used when use of firearm by convicted felon in self-defense is indicated by evidence.

Note: Momentary possession of a firearm by a convicted felon for the sole purpose of disposal is not unlawful. People v Hurtado (1996) 47 CA4th 805, 54 CR2d 853. But see People v Pepper (1996) 41 CA4th 1029, 48 CR2d 877 (felon charged with possessing cannot claim transitory possession for disposal as a defense).

Note: The crimes of carrying a loaded firearm or a concealed firearm while being an active criminal street gang participant (Pen C §§12025(b)(3), 12031(a)(2)(C)) do not require proof that the firearm possession was connected with the underlying gang participation. People v Schoppe-Rico (2006) 140 CA4th 1370, 1378-1383, 44 CR3d 896.

(3) *Included offense*

Carrying concealable firearm concealed in vehicle or on person by any person without a license. Pen C §12025(a)-(b). 2520-2522, 2545 16.460

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.39 b. Use Offenses (Pen C §§246, 246.3, 247, 417, 417.3, 417.8, 12034, 12308-12310)

§2.39 b. Use Offenses (Pen C §§246, 246.3, 247, 417, 417.3, 417.8, 12034, 12308-12310)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Shooting at inhabited dwelling. <u>Pen C §246</u> . "Willfully and maliciously" defined.	965 Included in 965	9.03 1.20, 1.22
(b) Shooting at unoccupied aircraft. <u>Pen C §247(a)</u> . "Willfully and maliciously" defined.	967 Included in 967	9.03.1 1.20, 1.22
(c) Discharging firearm at unoccupied motor vehicle or uninhabited structure. <u>Pen C §247(b)</u> .	966	9.03.2
(d) Grossly negligent discharge of firearm. <u>Pen C §246.3(a)</u> .	970	9.03.3
(e) Exploding/igniting destructive device. <u>Pen C §§12308-12310</u> . "Destructive device" defined. "Willfully" and "gross negligence" defined.	2576-2578 2570 2577-2578	12.55.5- 12.55.7 12.56 1.20, 3.36
(f) Permitting shooting from vehicle. <u>Pen C §12034(b)</u> . "Knowingly" defined.	969 250	9.04 1.21
(g) Shooting from vehicle at person. <u>Pen C §12034(c)</u> . "Willfully and maliciously" defined.	968 Included in 968	9.05 1.20, 1.22
(h) Shooting from vehicle. <u>Pen C §12034(d)</u> . "Willfully and maliciously" defined.	968 Included in 968	9.06 1.20, 1.22
(i) Exhibiting firearm in presence of motor vehicle occupant. <u>Pen C §417.3</u> .	980	9.07
(j) Exhibiting firearm in presence of peace officer. <u>Pen C §417(c)</u> .	981	9.21
(k) Exhibiting firearm or deadly weapon with intent to resist peace officer. <u>Pen C §417.8</u> .	982	9.21.1
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offense</i> – see possession offenses in <u>§2.38</u> . A violation of <u>Pen C §417</u> (brandishing a weapon) is a lesser included offense of <u>Pen C §417.3</u> (brandishing weapon while in a vehicle). <u>People v Howard</u> (2002) 100 CA4th 94, 99-100, 121 CR2d 892. Grossly negligent discharge of a firearm (<u>Pen C §246.3</u>) is a lesser included offense of discharging a firearm at an occupied building (<u>Pen C §246</u>). <u>People v Overman</u> (2005) 126 CA4th 1344, 1360-1362, 24 CR3d 798. <i>Note:</i> Assault with a firearm (<u>Pen C §245(a)(2)</u>) is not a lesser included offense of discharging a firearm from a vehicle (<u>Pen C §12034(c)</u>). <u>People v Lucas</u> (2007) 41 C4th 362, 366-371, 60 CR3d 31. <i>Note:</i> Assault with a deadly weapon is not a lesser necessarily included offense of <u>Pen C §246</u> . <u>In re Daniel R.</u> (1993) 20 CA4th 239, 247, 24 CR2d 414.	983, 984	16.290

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.40 c. Illegal Possession of Ammunition (Pen C §12316(b)(1))

§2.40 c. Illegal Possession of Ammunition (Pen C §12316(b)(1))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	2591, 2592	12.49
(2) <i>General intent only</i>	250	3.30
Defense of justification. <u>Pen C §12316(d)(1)</u> .	2591	12.49.5
(3) <i>Included offense</i> — None.		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.41 14. Dog or Mischievous Animal Attack (Pen C §§399, 399.5(a))

§2.41 14. Dog or Mischievous Animal Attack (Pen C §§399, 399.5(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Mischievous animal attack causing serious bodily injury or death (<u>Pen C §399</u>).	2950	12.97
(b) Dog attack (<u>Pen C §399.5(a)</u>).	2951	12.98
(2) <i>Mental state:</i> knowledge of animal's dangerous propensities.	Included in 2950, 2951	Included in 12.97-12.98
(3) <i>Included offense</i> — None.		
(4) <i>Affirmative defenses</i> — <i>i.e.</i> , trespassing, provocation, police dog.	2952	12.98.1

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.42 15. Driving Under Influence, Felony (Veh C §§23152, 23153)

§2.42 15. Driving Under Influence, Felony (Veh C §§23152, 23153)

	CALCRIM	CALJIC
<i>(1) Elements of offense</i>		
(a) Driving under the influence causing injury. <u>Veh C §23153(a)</u> .	2100	12.60, 12.61
(b) Driving under the influence; prior convictions. <u>Veh C §§23152(a), (c), 23550, 23550.5</u> .	2110, 2125, 2126	12.65, 12.61
(c) Driving under the influence causing injury; prior convictions. <u>Veh C §§23153(a), 23550.5, 23566</u> .	2100-2101, 2125, 2126	12.67, 12.61
(d) Driving with 0.08% alcohol causing injury. <u>Veh C §23153(b)</u> .	2101, 2111	12.60.1, 12.61.1
(e) Driving with 0.08% alcohol; prior convictions. <u>Veh C §§23152(b), 23550, 23550.5</u> .	2125, 2126, 2101, 2111	12.66, 12.61.1
(f) Driving with 0.08% alcohol causing injury; prior convictions. <u>Veh C §§23153(b), 23550.5, 23566</u> .	2125, 2126, 2101, 2111	12.68, 12.61.1
(g) "Driver" and "Driving" defined.	2241	1.28
<p>The court must specify the Vehicle Code offense allegedly constituting the forbidden act. <u>People v Minor (1994) 28 CA4th 431, 438-439, 33 CR2d 641</u>. When the act forbidden by law is speeding, the court must define "speeding." <u>People v Ellis (1999) 69 CA4th 1334, 82 CR2d 409</u>. See <u>Veh C §22350</u> for the statutory definition of speeding.</p> <p>The presumption of <u>Veh C §23610(a)(1)</u> that a blood alcohol level of under .05% means that the person was not intoxicated is rebuttable. <u>People v Gallardo (1994) 22 CA4th 489, 27 CR2d 502</u>.</p>		
<i>(2) Intent</i>		
<i>General intent</i> —to commit act that violates law or to fail to perform duty required by law.		Included in 12.60- 12.60.1
<i>(3) Included offense</i>		
Misdemeanor driving under the influence or with 0.08% alcohol (<u>Veh C §23152</u>).	2110-2112	16.830- 16.830.1

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.43 16. Escape (Pen C §4532)

§2.43 16. Escape (Pen C §4532)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Escape. <u>Pen C §4532</u> .	2760	7.30
(b) When escape by force or violence charged. When an escapee's force or violence is directed against a person, it is equivalent to battery (<u>Pen C §242</u>) as defined in CALJIC 16.141. <u>People v Lozano (1987) 192 CA3d 618, 626, 237 CR 612</u> .	2761	7.31
(c) Escape by force or violence following remand or arrest (<u>Pen C §836.6(c)</u>).	2763	7.32
(d) Defense of necessity. See also <u>§2.141</u> .	2764	4.44
(e) Parolee as prisoner—lawful custody defined.		7.30.1
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offense</i>		
(a) Attempt. <u>Pen C §§663, 4532</u> .	460, 2760, 2761	6.00, 7.30, 7.31
(b) Misdemeanor escape following arrest (<u>Pen C §836.6(a)-(b)</u>) is lesser included offense of felony escape following arrest (<u>Pen C §836.6(c)</u>).	2762	16.115

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.44 17. Extortion (Pen C §§518-523)

§2.44 17. Extortion (Pen C §§518-523)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Extortion. <u>Pen C §§518, 509.</u>	1830	14.70-14.71
(b) Extortion—obtaining signature. <u>Pen C §522.</u>	1832, 1830	14.76, 14.70-14.71
(c) Extortion—sending threatening letter. <u>Pen C §523.</u>	1831, 1830	14.77, 14.70
(d) Definitions.	1830	14.72-14.74
(2) <i>Intent</i>		
All of the above offenses are general intent only (CALCRIM 250; CALJIC 3.30), except the following:		
(a) <u>Pen C §518</u> —to induce the other person to consent to the defendant's obtaining his property.	Included in 1830	Included in 14.70
(b) <u>Pen C §523</u> —to extort money or property from another person.	Included in 1831	Included in 14.77
(3) <i>Included offense</i>		
Attempt. <u>Pen C §524.</u>	460	6.00

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.45 18. Failure To Stop After Vehicle Accident; Felony (Veh C §§20001-20003)

§2.45 18. Failure To Stop After Vehicle Accident; Felony (Veh C §§20001-20003)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Felony hit-and-run resulting in injury or death.	2140-2142	12.70
(b) When driver not criminally liable because unconscious or disabled.	2140	12.72
(c) Definitions.	2140, 2141	12.73-12.80
(2) <i>Mental state:</i> knowledge	251	3.31.5
(3) <i>Included offense</i>		
Misdemeanor hit-and-run involving property damage. <u>Veh C §20002.</u>	2150, 2151	16.650- 16.652

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.46 19. False Imprisonment by Violence or Menace (Pen C §§236-237)

§2.46 19. False Imprisonment by Violence or Menace (Pen C §§236-237)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1240	9.60
(2) <i>General intent only. <u>People v Olivencia</u> (1988) 204 CA3d 1391, 1397, 251 CR 880.</i>	250	3.30
(3) <i>Included offenses</i>		
(a) Attempt. <u>Pen C §§663, 236-237.</u>	460	6.00
(b) Misdemeanor false imprisonment. <u>Pen C §§236-237;</u> see <u>People v Hendrix</u> (1992) 8 CA4th 1458, 1462, 1463, 10 CR2d 922; <u>People v Babich</u> (1993) 14 CA4th 801, 18 CR2d 60.	1242	16.135

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.47 20. Flight From Pursuing Peace Officer (Veh C §§2800.1-2800.3)

§2.47 20. Flight From Pursuing Peace Officer (Veh C §§2800.1-2800.3)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Flight/reckless driving. <u>Veh C §§2800.1, 2800.2.</u>	2181	12.85
<i>Note:</i> <u>Vehicle Code §2800.2</u> is not a felony that is inherently dangerous to life under the second degree felony murder rule. <u>People v Howard</u> (2005) 34 C4th 1129, 1135-1139, 23 CR3d 306.		
(b) Flight causing serious bodily injury. <u>Veh C §2800.3.</u>	2180	12.86
(c) "Peace officer" defined.	Included in 2180, 2181	1.26
(d) "Distinctively marked" vehicle defined. The court has a sua sponte duty to give this definition to the jury. <u>People v Hudson</u> (2006) 38 C4th 1002, 1012-1013, 44 CR3d 632.	2180-2182	12.87
(2) <i>Specific intent</i> — to evade	Included in 2180, 2181	Included in 12.85-12.86
(3) <i>Included offenses</i>		
(a) Evading a police officer under <u>Veh C §2800.1</u> is a lesser included offense of <u>Veh C §2800.3</u> (evading a police officer, causing serious injury or death). <u>People v Sewell</u> (2000) 80 CA4th 690, 697, 95 CR2d 600, disapproved on other grounds in 34 C4th 1129, 1139 n5.	2182	16.890
(b) Attempt.	460	6.00

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/ 21. Forgery Offenses/
§2.48 a. Forgery (Pen C §470)

21. Forgery Offenses

§2.48 a. Forgery (Pen C §470)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1900-1905	15.00-15.05
(2) <i>Specific intent</i>		
(a) Forged signature or counterfeiting: Intent to defraud with knowledge of falsity.	Included in 1900-1904	Included in 15.00
(b) Uttering false instruments: Intent to defraud, intent that instrument be deemed true and genuine, and knowledge of falsity.	Included in 1905	Included in 15.01
(c) Intent to defraud defined.	Included in 1900-1904	15.26
(3) <i>Included offense</i>		
Attempted forgery. <u>Pen C §§663, 470.</u>	460	6.00

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.49 b. Possession of Forged or Unfinished Instrument With Intent To Defraud (Pen C §475)

§2.49 b. Possession of Forged or Unfinished Instrument With Intent To Defraud (Pen C §475)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1930-1932	15.07
(2) <i>Specific intent</i>		
(a) To pass forged or counterfeited bill or note, or to permit, cause, or procure the same to be uttered or passed with intent to defraud.	Included in 1930, 1932	Included in 15.07
(b) To fill up and complete blank or unfinished note or bill, or to permit, cause, or procure the same to be uttered or passed with intent to defraud.	Included in 1931	Included in 15.07
(3) <i>Included offense</i> — None.		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.50 c. Fictitious Instruments--Making, Possessing, Uttering (Pen C §476)

§2.50 c. Fictitious Instruments—Making, Possessing, Uttering (Pen C §476)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1935	15.08
(2) <i>Specific intent</i> — to defraud knowing the instrument to be fictitious.	Included in 1935	Included in 15.08
(3) <i>Included offense</i> Attempt. <u>Pen C §663.</u>	460	6.00

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.51 22. Gang Crime (Pen C §186.22(a))

§2.51 22. Gang Crime (Pen C §186.22(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1400	6.50
"Aiding and abetting" defined.	Included in 1400	3.01
"Active participation" defined.	Included in 1400	Included in 6.50
"Criminal street gang" defined.	Included in 1400	Included in 6.50
"Pattern of criminal gang activity" defined.	Included in 1400	Included in 6.50
<i>Note:</i> Must be supplemented by an instruction defining the felony involved.		
(2) <i>Specific intent</i> — to promote, further, or assist in felonious criminal conduct by members of gang.	Included in 1400	Included in 6.50
(3) <i>Included offense</i> — None.		
<i>Note:</i> The predicate offenses that establish a pattern of criminal gang activity are not lesser included offenses of <u>Pen C §186.22(a)</u> . <u><i>People v Burnell</i> (2005) 132 CA4th 938, 944-946, 34 CR3d 40.</u>		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.52 23. Homicide Offenses

§2.52 23. Homicide Offenses

Note: Some judges no longer instruct sua sponte with CALJIC 4.21, 4.21.1, or 3.32 in homicide cases following *People v Saille* (1991) 54 C3d 1103, 1120, 2 CR2d 364. However, other judges take a more cautious approach and continue to give these instructions sua sponte when the evidence warrants.

CALCRIM	CALJIC
625, 3426, 3428	

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.53 a. Manslaughter, Involuntary (Pen C §192(b))

§2.53 a. Manslaughter, Involuntary (Pen C §192(b))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	580-582	8.45-8.47
(2) <i>Intent</i>		
(a) Intent to kill not required. General intent in commission of misdemeanor. Criminal negligence in commission of lawful act.	Included in 580	Included in 8.45-8.46
(b) Unconsciousness due to voluntary intoxication indicated by evidence.	626	8.47
(c) Voluntary intoxication relevant to intent.	625, 3426	4.21-4.21.1
(d) Mental disease, defect, or disorder indicated by evidence.	3428	3.32
(e) Actual but unreasonable belief in necessity to defend indicated by evidence.	571	5.17

(3) *Included offense* — None.

(See also §2.136, "Manslaughter.")

Note: Aggravated assault (Pen C §245(a)(1)) is not a lesser included offense of involuntary manslaughter. People v Murray (2008) 167 CA4th 1133, 84 CR3d 676.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.54 b. Manslaughter, Voluntary (Pen C §192(a))

§2.54 b. Manslaughter, Voluntary (Pen C §192(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	570-572	8.40
(2) <i>Intent</i>		
(a) Intent to kill or in conscious disregard for life and the knowledge that such conduct endangers the life of another. <u><i>People v Blakeley</i> (2000) 23 C4th 82, 87-91, 96 CR2d 451;</u> <u><i>People v Lasko</i> (2000) 23 C4th 101, 107-111, 96 CR2d 441.</u> If the offense occurred before June 2, 2000, the date of <i>Blakely</i> and <i>Lasko</i> decisions, the jury must be instructed than an unintentional killing in unreasonable self-defense is involuntary manslaughter. <u><i>People v Johnson</i> (2002) 98 CA4th 566, 569, 119 CR2d 802.</u> But if the defense is heat of passion or sudden quarrel, regardless of the date of the offense, an instruction on voluntary manslaughter may include either intent to kill or conscious disregard found in revised CALJIC instruction 8.40. <u><i>People v Parras</i> (2007) 152 CA4th 219, 223-227, 60 CR3d 850;</u> <u><i>People v Johnson</i> (2002) 98 CA4th 566, 577, 119 CR2d 802.</u>	Included in 572	Included in 8.40
	571	8.40
(b) Sudden quarrel or heat of passion and provocation indicated by evidence. Legally adequate provocation may occur over a considerable period of time, and defendant is entitled to an instruction to that effect if the evidence warrants it. <u><i>People v Wharton</i> (1991) 53 C3d 522, 570-572, 280 CR 631.</u>	Included in 570	8.42, 8.44
(c) Voluntary intoxication relevant to intent.	625	4.21-4.21.1
(d) Mental disease, defect, or disorder indicated by evidence.	3428	3.32
(e) Actual but unreasonable belief in necessity to defend indicated by evidence.	Included in 571	5.17
(3) <i>Included offense</i> Attempted voluntary manslaughter. <u>Pen C §663.</u> <i>Note:</i> Involuntary manslaughter is not a lesser included offense of voluntary manslaughter. <u><i>People v Orr</i> (1994) 22 CA4th 780, 784, 27 CR2d 553.</u> (See also <u>§2.136</u> , "Manslaughter.")	460	6.00

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.55 c. Manslaughter, Attempted Voluntary (Pen C §§664, 192(a))

§2.55 c. Manslaughter, Attempted Voluntary (Pen C §§664, 192(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	603, 604	8.41
(2) <i>Specific intent — to kill. <u>People v Montes (2003) 112 CA4th 1543, 1549-1550, 5 CR3d 800.</u></i>	Included in 603, 604	Included in 8.41
(3) <i>Included offense — None.</i>		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.56 d. Manslaughter, Vehicular (Pen C §§191.5, 192(c))

§2.56 d. Manslaughter, Vehicular (Pen C §§191.5, 192(c))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Gross vehicular manslaughter not involving drugs or alcohol. <u>Pen C §192(c)(1)</u> .	592	8.90
(b) Gross vehicular manslaughter while intoxicated. Involving <u>Veh C §§23140, 23152, 23153</u> violation. <u>Pen C §191.5(a)</u> .	590	8.93
(c) Vehicular manslaughter with ordinary negligence while intoxicated. <u>Pen C §191.5(b)</u> .	591	8.93
(d) Accident or collision staged for financial gain resulting in death. <u>Pen C §192(c)(3)</u> .	594	8.93.5
(e) Definitions	Included in 590-594	8.91-8.92, 8.94-8.97
(2) <i>Intent</i>		
(a) General intent in commission of misdemeanor or infraction; criminal or gross negligence in commission of lawful act.	253, 582, 593, 590	3.36, 8.91, 8.94
(b) Staged accident/collision (<u>Pen C §192(c)(3)</u>) – specific intent to defraud.	Included in 594	Included in 8.93.5
(c) If the trial includes crimes requiring both general and specific intent, or a particular mental state and defense of voluntary intoxication.	625, 3426	4.21.1
(3) <i>Included offenses</i>		
(a) Misdemeanor vehicle manslaughter (ordinary negligence without intoxication). <u>Pen C §192(c)(2)</u> ; <u>People v Rodgers (1949) 94 CA2d 166, 210 P2d 71</u> .	593	Included in 8.90-8.91
(b) Driving under the influence causing injury (<u>Veh C §23153</u>) is a lesser included offense of vehicular manslaughter while intoxicated (<u>Pen C §191.5(a)-(b)</u>); <u>People v Miranda (1994) 21 CA4th 1464, 26 CR2d 610</u>) as well as vehicular manslaughter without gross negligence (<u>Pen C §192(c)(2)</u> ; <u>People v Binkard (2007) 155 CA4th 1143, 1150, 66 CR3d 675</u>).		
(c) Gross vehicular manslaughter without intoxication (<u>Pen C §192(c)(1)</u>) and vehicular manslaughter with ordinary negligence while intoxicated (<u>Pen C §191.5(b)</u>) are lesser included offenses of gross vehicular manslaughter while intoxicated (<u>Pen C §191.5(a)</u>). <u>People v Miranda, supra</u> ; <u>People v Verlinde (2002) 100 CA4th 1146, 1165, 123 CR2d 322</u> .		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.57 e. Murder, First Degree--Premeditated (Pen C §189)

§2.57 e. Murder, First Degree — Premeditated (Pen C §189)

	CALCRIM	CALJIC
<i>(1) Elements and degrees of offense</i>		
(a) Definition of implied malice.	520, 521	8.10-8.11, 8.20, 8.70- 8.71
(b) Penalty phase instructions: See <u>§2.121</u> , "Death Penalty — Special Circumstances."		
<i>Note:</i> Other types of first degree murder are defined in CALJIC 8.22-8.25.1.		
<i>(2) Mental state</i>		
(a) Willful, deliberate, and premeditated killing with malice aforethought.	521	3.31, 8.20
(b) Sudden quarrel or heat of passion and provocation indicated by evidence.	570	8.50, 8.43
(c) Actual but unreasonable belief in necessity to defend indicated by evidence.	571	5.17, 8.50
(d) Mental disease, defect, or disorder indicated by evidence.	3428	3.32
<i>(3) Special finding—Hate crime murder. <u>Pen C §§190.03, 422.55.</u></i>		
(a) Instruction to be used when crime committed before January 1, 2005.		8.28
(b) Instruction to be used when crime committed on or after January 1, 2005.	523	8.28.1
<i>(4) Included offenses</i>		
(a) Second degree murder. <u>Pen C §189.</u>	521	8.30-8.31
<i>Note:</i> A court must instruct on second degree murder sua sponte even over defendant's objection that he had an alibi defense when there was evidence that the murder might not have been premeditated or deliberate. <u>People v Daya (1994) 29 CA4th 697, 712-714, 34 CR2d 884.</u>		
(b) Voluntary manslaughter. <u>Pen C §192(a).</u>	570-572	8.40
<i>Note:</i> In a murder case, if the defendant is found not to have the intent unlawfully to kill, the only supportable verdict would be involuntary manslaughter or an acquittal. <u>People v Saille (1991) 54 C3d 1103, 1117, 2 CR2d 364</u> (no reduction of murder to voluntary manslaughter in this situation).		
<i>Note:</i> A court is not required to instruct sua sponte on manslaughter as a lesser included offense of murder of a fetus. <u>People v Brown (1995) 35 CA4th 1585, 1592, 42 CR2d 155.</u>		
(c) Involuntary manslaughter. <u>Pen C §192(b).</u>	580-582, 626	8.45-8.47
<i>Note:</i> Gross vehicular manslaughter while intoxicated (<u>Pen C §191.5</u>) is not a lesser included offense of murder. <u>People v Sanchez (2001) 24 C4th 983, 987-989, 103 CR2d 698.</u> <i>Sanchez</i> did not address other forms of vehicular manslaughter, but it did emphasize that use of a vehicle is one of two statutory elements of <u>Pen C §191.5</u> that need not be proved for murder. 24 C4th at 988-989.		
(d) Attempted premeditated murder. <u>Pen C §§664, 189.</u>	600-601	8.66-8.67
(e) Attempted murder. <u>Pen C §§663, 189.</u>	600	8.66
A violation of <u>Pen C §273ab</u> (child abuse homicide) is not a		

lesser included offense of Pen C §187 (murder). *People v Malfavon* (2002) 102 CA4th 727, 743-744, 125 CR2d 618. (See §2.140, "Murder.")

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.58 f. Murder, First Degree--Felony Murder (Pen C §189)

§2.58 f. Murder, First Degree—Felony Murder (Pen C §189)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i> <i>Note:</i> CALJIC 8.21 must be supplemented by an instruction defining the felony. For definition of first degree felony murder in connection with a conspiracy or involving an aider and abettor, see CALJIC 8.26-8.27, respectively. When killer is not perpetrator of underlying felony.	520, 540A 560, 561	8.10, 8.21 8.12
<i>Note:</i> A separate and independent provocative act is not required under the provocative act theory of murder when the underlying felony is attempted murder. <i>People v Gallegos</i> (1997) 54 CA4th 453, 63 CR2d 382. Burglary felony murder is committed when the defendant approaches the victim's house with the intent to commit burglary and shoots and kills the victim outside the house before entering to commit the burglary because the killing and the burglary are part of one continuous transaction. <i>People v Horning</i> (2004) 34 C4th 871, 903, 22 CR3d 305.		
(2) <i>Specific intent</i> —to commit the particular felony.	540A	8.21
(3) <i>Included offenses</i>		
(a) Second degree murder. <u>Pen C §189</u> .	521	8.30-8.31
(b) Voluntary manslaughter. <u>Pen C §192(a)</u> .	570-572	8.40
(c) Involuntary manslaughter. <u>Pen C §192(b)</u> .	580-582	8.45-8.46
<i>Note:</i> Under <i>People v Saille</i> (1991) 54 C3d 1103, 2 CR2d 364, defendant is not entitled to sua sponte instructions on unconsciousness due to voluntary intoxication in a prosecution for drunk driving murder. <i>People v Ricardi</i> (1992) 9 CA4th 1427, 1432, 12 CR2d 364.		
(d) The underlying felony. <i>Note:</i> When a victim is killed in the course of a robbery, the court has a sua sponte duty to instruct the jury that in order to find the defendant guilty on a felony-murder theory, the jury must find that the defendant became an aider and abettor before the victim was killed. <i>People v Esquivel</i> (1994) 28 CA4th 1386, 1399, 34 CR2d 324. <i>Note:</i> Felony-murder liability for any death in the course of arson, including the death of an accomplice, attaches to all the active participants in the arson, at least when one or more surviving accomplices were present at the scene and actively participated in the arson. <i>People v Billa</i> (2003) 31 C4th 1064, 6 CR3d 425.		
When the evidence points to a homicide connected to a felony that is not listed in <u>Pen C §189</u> , the court has a sua sponte duty to instruct on such lesser included offenses as second degree murder and voluntary manslaughter. <i>People v Anderson</i> (2006) 141 CA4th 430, 447-449, 45 CR3d 910.		
(e) Attempt of the underlying felony. (See also §2.140, "Murder.")		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.59 g. Murder, Second Degree (Pen C §189)

§2.59 g. Murder, Second Degree (Pen C §189)

	CALCRIM	CALJIC
(1) <i>Elements and degrees of offense</i>	521, 548	8.30 or 8.31, 8.70-8.71
Second degree murder of peace officer. <u>Pen C §190(b), (c)</u> . Murder caused by intentional discharge of firearm from vehicle. <u>Pen C §190(d)</u> .	524-525 525	8.35, 8.36 8.35.2
<i>Note:</i> A defendant may be convicted of second degree implied malice murder of a fetus even if the defendant has no knowledge that the murder victim was pregnant. <u>People v Taylor (2004) 32 C4th 863, 867-871, 11 CR3d 510</u> .		
(2) <i>Specific intent</i> —to kill unlawfully a human being.	Included in 521	Included in 3.31, 8.30- 8.31
(See also <i>Mental state</i> in <u>§2.57</u> , "Murder, First Degree— Premeditated.")		
(3) <i>Included offenses</i> See <i>Included offenses</i> in <u>§2.57</u> , "Murder, First Degree— Premeditated," omitting offense of second degree murder. (See also <u>§2.140</u> , "Murder.")		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.60 h. Murder, Second Degree--Felony Murder (Pen C §189)

§2.60 h. Murder, Second Degree—Felony Murder (Pen C §189)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i> <i>Note:</i> Must be supplemented by an instruction defining the felony involved.	541A	8.32
(2) <i>Specific intent</i> —to commit a nonassaultive, inherently dangerous felony. When the underlying felony is assaultive in nature, <i>i.e.</i> , one that involves a threat of immediate violent injury, the felony merges with the homicide and cannot be the basis of a felony-murder instruction. <i>People v Chun</i> (2009) 45 CA4th 1172, 1197-1200, 91 CR3d 106.	541A	8.32
(3) <i>Included offenses</i>		
(a) Voluntary manslaughter. <u>Pen C §192(a)</u> .	570-572	8.40
(b) Involuntary manslaughter. <u>Pen C §192(b)</u> .	580-582	8.45-8.46
(c) The underlying felony.		
(d) Attempt of the underlying felony.		
<i>Note:</i> Violation of <u>Veh C §2800.2</u> (evading peace officer in willful or wanton disregard of safety of persons or property) is not inherently dangerous felony supporting a felony murder conviction. <i>People v Howard</i> (2005) 34 CA4th 1129, 1139, 23 CR3d 306; see <i>People v Calderon</i> (2005) 129 CA4th 1301, 1308-1309, 29 CR3d 277 (giving felony murder instruction as one of two theories of second degree murder was error requiring reversal). See also <i>People v Lewis</i> (2006) 139 CA4th 874, 884-885, 44 CR3d 403 (relying solely on incorrect felony-murder theory based on violation of <u>Veh C §2800.2</u> relieved prosecution of burden of proving implied malice for second degree murder and required reversal). (See also <u>§2.140</u> , "Murder.")		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.61 i. Murder, Attempted (Pen C §§664, 189)

§2.61 i. Murder, Attempted (Pen C §§664, 189)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Attempted murder.	600	8.66
(b) Attempted premeditated murder.	600-601	8.66-8.67
<i>Note:</i> The crime of attempted premeditated murder requires that the murder attempted was willful, deliberate, and premeditated, but does not require that the defendant personally act willfully, and with deliberation and premeditation, when the defendant is guilty as an aider and abettor. <u><i>People v Lee</i> (2003) 31 C4th 613, 620-629, 3 CR3d 402.</u>		
<i>Note:</i> The court has a sua sponte duty to inform the jury that it must determine whether the premeditation and deliberation required for attempted murder is a natural and probable result of the target crime (in this case, attempted robbery). <u><i>People v Hart</i> (2009) 176 CA4th 662, 673, 97 CR3d 827.</u>		
<i>Note:</i> It is error to instruct with the standard murder instructions (CALJIC 8.10 and 8.11) in an attempted murder case. <u><i>People v Beck</i> (2005) 126 CA4th 518, 522, 24 CR3d 228.</u>		
(c) Attempted murder of peace officer.	600-602	8.66-8.68
(2) <i>Mental state</i>		
(a) Attempted murder—specific intent to kill unlawfully a human being with express malice aforethought.	600	3.31, 8.66
When there are multiple intended victims, the court is not required to instruct the jury that it must find the required intent for each victim. <u><i>People v Anzalone</i> (2006) 141 CA4th 380, 392, 45 CR3d 876.</u>		
(b) Attempted premeditated murder—willful, deliberate, and premeditated attempted murder.	601	3.31, 8.66-8.67
(c) Mental disease, defect, or disorder as partial defense.		3.32
<i>Note:</i> It is not error to refuse to give the instruction if there is no evidence establishing that the defendant suffered from a mental disease, defect, or disorder. <u><i>People v Moore</i> (2002) 96 CA4th 1105, 1114-1117, 117 CR2d 715</u> (defendant's expert testified only to the general effects of rock cocaine use and did not testify to defendant's state at the time of the attempted murder).		
(d) Concurrent intent to kill other persons within a "kill zone." See <u><i>People v Bland</i> (2002) 28 C4th 313, 121 CR2d 546.</u>	Included in 600	8.66.1

Note: Instructions on "concurrent intent" or "kill zone" theory should not be used when defendant shoots into a crowd, intending to kill one of the group, but not knowing or caring which one. The mental state for attempted murder is the intent to kill a human being, not a particular human being. A person who intends to kill can be found guilty of attempted murder even if the person has no specific target in mind, but the conduct does not involve the concept of concurrent intent. *People v Stone* (2009) 46 C4th 131, 136-141, 92 CR3d 362.

(3) *Included offense*

Attempted voluntary manslaughter. Pen C §663.

460

6.00

When a defendant completely denies involvement in an attempted murder, there is no duty to instruct on the lesser included offense of attempted voluntary manslaughter. See *People v Gutierrez* (2003) 112 CA4th 704, 709, 5 CR3d 256.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.62 j. Murder, Conspiracy To Commit (Pen C §§182, 187)

§2.62 j. Murder, Conspiracy To Commit (Pen C §§182, 187)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	563	8.69
(2) <i>Specific intent</i> — to agree to commit murder, and to commit the murder with express malice aforethought. <i>People v Swain</i> (1996) 12 C4th 593, 599, 49 CR2d 390.	Included in 563	Included in 8.69
(3) <i>Included offense</i> — None.		

Note: The crime of conspiracy to commit murder is a unitary offense and is not divisible into degrees; the crime is necessarily conspiracy to commit first degree murder and there is thus no need for specific instruction on premeditation and deliberation. *People v Cortez* (1998) 18 C4th 1223, 1237, 77 CR2d 733.
(See also §2.117, "Conspiracy.")

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.63 24. Human Trafficking (Pen C §236.1(a), (c))

§2.63 24. Human Trafficking (Pen C §236.1(a), (c))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1243	9.62
(2) <i>Specific intent</i> — to commit or maintain a felony violation of <u>Pen C §§266, 266h, 266i, 267, 311.4</u> , or <u>518</u> , or to obtain forced labor or services.	Included in 1243	Included in 9.62
(3) <i>Included offense</i> — None.		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.64 25. Indecent Exposure, Felony (Pen C §314)

§2.64 25. Indecent Exposure, Felony (Pen C §314)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i> <i>Note:</i> An essential element of the offense is that the defendant expose his or her genitals to another; it is not essential that that victim have had direct visual observation of them. <u><i>People v Carbajal</i> (2003) 114 CA4th 978, 986-987, 8 CR3d 206.</u>	1160	10.38
(2) <i>Specific intent</i> – to direct public attention for the purpose of sexual arousal or gratification or to affront others. <i>Note:</i> Affront is modified by the word sexual in <u>Pen C §314(1)</u> . Thus, exposing one's genitals for the purpose of sexually insulting another will support a conviction of indecent exposure even if the offender had no intent to cause sexual arousal or gratification. And a defendant who intentionally exposes his private parts to sexually insult or offend another person as part of road rage incident commits indecent exposure under <u>Pen C §314</u> . <u><i>People v Archer</i> (2002) 98 CA4th 402, 406, 119 CR2d 783.</u> <i>Note:</i> Essential element of the offense is intent to expose the "person." To satisfy this element, the defendant must have intended to expose his or her entire body. <u><i>People v Massicot</i> (2002) 97 CA4th 920, 927, 118 CR2d 705</u> (exposure element not satisfied when defendant did not expose his genitals).	Included in 1160	Included in 10.38
(3) <i>Included offenses</i>		
(a) Attempt. <u>Pen C §§663, 314.</u>	460	6.00
(b) Misdemeanor indecent exposure. <u>Pen C §314.</u>	1160	16.220

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.65 26. Intimidation of Witness (Pen C §§136, 136.1)

§2.65 26. Intimidation of Witness (Pen C §§136, 136.1)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Intimidation of witness by force or fear in furtherance of conspiracy, etc. <u>Pen C §136.1(c)</u> . "Malice," "witness," and "victim" defined.	2622, 2623	7.14, 7.15
(2) <i>Specific intent</i> — to knowingly and maliciously prevent or dissuade a witness or victim or attempt to do so.	2622, 2623	7.16
(3) <i>Included offenses</i> — Offenses under <u>Pen C §136.1(a)-(b)</u> are lesser included offenses of <u>Pen C §136.1(c)</u> .	Included in 2622, 2623	Included in above

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/ 27. Kidnapping Offenses/§2.66 a. Kidnapping (Pen C §207(a))

27. Kidnapping Offenses

§2.66 a. Kidnapping (Pen C §207(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1215	9.50
<i>Note:</i> Kidnapping of an infant by a parent is not preempted by the child abduction crime of <u>Pen C §278</u> , and the illegal purpose or illegal intent element may be used to satisfy both crimes. <u>People v Jones (2003) 108 CA4th 455, 464-466, 133 CR2d 358.</u>		
(a) Victim under 14. <u>Pen C §208(b)</u> .	1201	9.52
(b) Amount of force required to kidnap unresisting infant or child. <u>Pen C §207(e)</u> .	1201	9.57
(c) Reasonable mistake as to the victim's age is not a defense to a charge of kidnapping a child below age 14 years under <u>Pen C §§207(a) and 208(b)</u> . <u>People v Magpuso (1994) 23 CA4th 112, 113, 28 CR2d 206.</u>		
(2) <i>General intent only.</i> <u>People v Thornton (1974) 11 C3d 738, 765, 114 CR 467.</u>	250	3.30
(3) <i>Included offenses</i>		
(a) Attempted kidnapping. <u>Pen C §§663, 207.</u>	460	6.00
(b) False imprisonment. <u>Pen C §§236-237; People v Gibbs (1970) 12 CA3d 526, 547, 90 CR 866.</u>	1240-1242	9.60 or 16.135

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.67 b. Kidnapping for Purpose of Child Molestation (Pen C §207(b))

§2.67 b. Kidnapping for Purpose of Child Molestation (Pen C §207(b))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1200	9.51, 9.50.1
(2) <i>Specific intent</i> — to commit a violation of <u>Pen C §288</u> .	Included in 1200	Included in 9.51
(3) <i>Included offenses</i>		
(a) Kidnapping. <u>Pen C §207</u> .	1215	9.50
(b) Attempted kidnapping. <u>Pen C §§663, 207</u> .	460	6.00
(c) False imprisonment. <u>Pen C §§236-237</u> .	1240-1242	9.60 or 16.135
(d) Lewd and lascivious act on a child. <u>Pen C §288</u> .	1110, 1111	10.41-10.42
(e) Attempted <u>Pen C §288</u> . <u>Pen C §663</u> .	460	6.00

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.68 c. Kidnapping With Intent To Commit Robbery or Sex Offense (Pen C §209(b))

§2.68 c. Kidnapping With Intent To Commit Robbery or Sex Offense (Pen C §209(b))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1203	9.52.1, 9.54, 9.50.1
<i>Note:</i> In addition to instructing on the elements for kidnapping, the court must instruct on the elements of the intended crime.		
(a) Kidnapping with intent to commit robbery.	1203, 1600- 1603	9.52.1, 9.54, 9.50.1, 9.40- 9.40.2, 9.41- 9.43
(b) Kidnapping with intent to commit rape or spousal rape (including in-concert offense).	1203, 1000- 1001, 1070- 1072	9.52.1, 9.54, 9.50.1, 10.00, 10.01, 10.40.1- 10.40.2
(c) Kidnapping with intent to commit sodomy (including in-concert offense).	1203, 1030- 1031, 1090- 1092	9.52.1, 9.54, 9.50.1, 10.20-10.21, 10.47-10.48
(d) Kidnapping with intent to commit oral copulation (including in-concert offense).	1203, 1015- 1016, 1080- 1082	9.52.1, 9.54, 9.50.1, 10.10-10.12, 10.45-10.46
(e) Kidnapping with intent to commit sexual penetration (including in-concert offense).	1203, 1045- 1046, 1100- 1102	9.52.1, 9.54, 9.50.1, 10.30-10.31, 10.49-10.50
(f) Kidnapping with intent to commit lewd or lascivious act.	1203, 1110- 1112	9.52.1, 9.54, 9.50.1, 10.41- 10.42.5
(2) <i>Specific intent</i> – to commit robbery or designated sex offense.	Included in 1203	Included in 9.52.1, 9.54
(3) <i>Included offenses</i>		
(a) Kidnapping. <u>Pen C §207</u> .	1215	9.50
(b) Attempted kidnapping. <u>Pen C §§663, 207</u> .	460	6.00
(c) False imprisonment. <u>Pen C §§236-237</u> .	1240-1242	9.60 or 16.135
(d) Robbery. <u>Pen C §211</u> . Included within offense of kidnapping for purpose of robbery when kidnapper achieves his purpose.	1600	9.40
(e) Attempted robbery. <u>Pen C §§663, 211</u> . Included within offense of kidnapping for purpose of robbery.	460	6.00
(f) Rape or spousal rape. <u>Pen C §§261, 262, 264.1</u> . Included within offense of kidnapping for purpose of rape or spousal rape when kidnapper achieves purpose.	1000-1004	10.00-10.03, 10.05.1
(g) Attempted rape or spousal rape. <u>Pen C §§663, 261</u> . Included within offense of kidnapping for purpose of rape or spousal rape.	460	6.00
(h) Oral copulation. <u>Pen C §288a</u> . Included within offense of kidnapping for purpose of oral copulation when kidnapper achieves purpose.	1015-1019, 1080-1082	10.10-10.13, 10.45-10.46
(i) Attempted oral copulation. <u>Pen C §§663, 288a</u> . Included within offense of kidnapping for purpose of oral	460	6.00

copulation.

(j) Sodomy. <u>Pen C §286</u> . Included within offense of kidnapping for purpose of sodomy when kidnapper achieves purpose.	1030-1034, 1090-1092	10.20-10.23, 10.47-10.48
(k) Attempted sodomy. <u>Pen C §§663, 286</u> . Included within offense of kidnapping for purpose of sodomy.	460	6.00
(l) Sexual penetration. <u>Pen C §289</u> . Included within offense of kidnapping for purpose of sexual penetration when kidnapper achieves purpose.	1045-1049, 1100-1102	10.30-10.32, 10.49-10.50
(m) Attempted sexual penetration. <u>Pen C §§663, 289</u> . Included within offense of kidnapping for purpose of sexual penetration.	460	6.00
(n) Lewd and lascivious act. <u>Pen C §288</u> . Included within offense of kidnapping for purpose of committing a lewd and lascivious act when kidnapper achieves purpose.	1110-1112	10.41- 10.42.5
(o) Attempted lewd and lascivious act. <u>Pen C §§663, 288</u> . Included within offense of kidnapping for purpose of committing a lewd and lascivious act.	460	6.00
(p) Simple assault. <u>Pen C §240</u> .	915	9.00, 9.01
(q) Battery. <u>Pen C §242</u> .	926, 960	16.140, 16.141

Note: When kidnapper achieves any of the purposes specified (robbery, rape, spousal rape, oral copulation, sodomy, sexual penetration, or lewd or lascivious act), the preceding two offenses are lesser included offenses.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.69 d. Kidnapping for Ransom or Extortion (Pen C §209(a))

§2.69 d. Kidnapping for Ransom or Extortion (Pen C §209(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1202	9.53
(2) <i>Specific intent</i> — to hold or detain any individual for ransom, reward, or to commit extortion or to exact from another person any money or valuable thing.	Included in 1202	Included in 9.53
(3) <i>Included offenses</i>		
(a) Kidnapping. <u>Pen C §207</u> .	1215	9.50
(b) Attempted kidnapping. <u>Pen C §§663, 207</u> .	460	6.00
(c) False imprisonment. <u>Pen C §§236-237</u> ; <i>People v Gibbs</i> (1970) 12 CA3d 526, 547, 90 CR 866.	1240, 1242	9.60 or 16.135
(d) Extortion. <u>Pen C §518</u> .	1830	14.70
(e) Attempted extortion. <u>Pen C §§663, 518</u> .	460	6.00

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.70 e. Kidnapping During Carjacking (Pen C §209.5(a))

§2.70 e. Kidnapping During Carjacking (Pen C §209.5(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1204	9.54.1, 9.50.1
(2) <i>Specific intent</i> – to facilitate the commission of carjacking. <i>Note:</i> If some of the transportation of the victim occurs after the actual perpetration of the carjacking, and the purpose of the transportation was to effect the carjackers' escape or to prevent an alarm from being sounded, the kidnapping was with the specific intent to facilitate the commission of carjacking. <u><i>People v Perez</i> (2000) 84 CA4th 856, 860-861, 101 CR2d 376.</u>	Included in 1204	Included in 9.54.1
(3) <i>Included offenses</i>		
(a) Attempt. <u>Pen C §§663, 209.5(a).</u>	460	6.00
(b) Carjacking. <u>Pen C §215; <i>People v Ortiz</i> (2002) 101 CA4th 410, 415, 124 CR2d 92; <i>People v Contreras</i> (1997) 55 CA4th 760, 64 CR2d 233.</u>	1650	9.46
(c) Attempted carjacking. <u>Pen C §§663, 215; <i>People v Jones</i> (1999) 75 CA4th 616, 626, 89 CR2d 485.</u> <i>Note:</i> <u>Vehicle Code §10851</u> , taking an automobile without consent, is not a lesser included offense of kidnapping during the commission of a carjacking. <u><i>People v Russell</i> (1996) 45 CA4th 1083, 53 CR2d 241.</u> <i>Note:</i> Attempted carjacking and attempted kidnapping are both lesser included offenses of <i>attempted</i> kidnapping during the commission of a carjacking. <u><i>People v Medina</i> (2007) 41 C4th 685, 700-702, 61 CR3d 677.</u>		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.71 28. Mayhem (Pen C §§203, 205)

§2.71 28. Mayhem (Pen C §§203, 205)

	CALCRIM	CALJIC
<i>(1) Elements of offense</i>		
(a) Mayhem. <u>Pen C §203</u> .	801	9.30
(b) Aggravated mayhem. <u>Pen C §205</u> .	800	9.32
<i>Note:</i> The permanent disfiguring injury requirement is identical in simple and aggravated mayhem. <u>People v Newby (2008) 167 CA4th 1341, 1347, 84 CR3d 884</u> .		
<i>(2) Intent</i>		
(a) Mayhem – General intent.	250	3.30
(b) Aggravated mayhem – Specific intent to cause the disfiguring injury	800	9.32
<i>Note:</i> See <u>People v McKelvy (1987) 194 CA3d 694, 239 CR 782</u> (lead opinion of one justice), which held that in an appropriate case the trial court should instruct sua sponte that an actual but unreasonable belief in the need for self-defense negates the malice required for a conviction of mayhem and reduces the crime to assault or battery. But see <u>People v Sekona (1994) 27 CA4th 443, 451, 457, 32 CR2d 606</u> (although a court is required to instruct sua sponte on imperfect self-defense in a homicide case, there is no such requirement in a mayhem case). See also <u>People v Quintero (2006) 135 CA4th 1152, 1166-1167, 37 CR3d 884</u> (applied <i>Sekona</i> reasoning that imperfect self-defense in CALJIC 5.17 (CALCRIM 571) is not applicable to aggravated mayhem; malice for mayhem crimes is different than malice for murder). In accord is <u>People v Szadziewicz (2008) 161 CA4th 823, 836, 74 CR3d 416</u> .		
<i>(3) Included offenses</i>		
(a) Attempt. <u>Pen C §§663, 203</u> .	460	6.00
(b) Simple assault. <u>Pen C §240</u> .	915	9.00, 9.01
(c) Battery. <u>Pen C §242</u> .	926, 960	16.140, 16.141
(d) Battery with serious bodily injury. <u>Pen C §243(d)</u> . <u>People v Ausbie (2004) 123 CA4th 855, 859, 20 CR3d 371</u> .	925	9.12
<i>Note:</i> Assault by means of force likely to produce great bodily injury (<u>Pen C §245(a)(1)</u>) is not a lesser included offense of simple mayhem. <i>People v Ausbie, supra</i> , 123 CA4th at 859-863.		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.72 29. Money Laundering (Pen C §186.10)

§2.72 29. Money Laundering (Pen C §186.10)

(1) Elements of offense

CALCRIM

CALJIC

2997

12.99

(2) *Specific intent*—to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any criminal activity.

Included in
2997

Included in
12.99

Note: There is no specific intent requirement if the money laundering charge proceeds only on the theory that the defendant had knowledge that the monetary instrument directly or indirectly represents criminal proceeds.

(3) *Included offense*—None.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.73 30. Pandering (Pen C §266i)

§2.73 30. Pandering (Pen C §266i)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1151	10.71
(2) <i>Specific intent</i> — to influence another person to become or continue to be a prostitute. But it is not a violation of <u>Pen C §266i</u> to persuade a person who is already a prostitute to change management. <i>People v Wagner</i> (2009) 170 CA4th 499, 509, 87 CR3d 881.	Included in 1151	Included in 10.71
(3) <i>Included offense</i> Attempt. <u>Pen C §§663, 266i</u> .	460	6.00

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.74 31. Perjury (Pen C §118)

§2.74 31. Perjury (Pen C §118)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Perjury under oath. <u>Pen C §118</u> .	2640	7.20
(b) Perjury under penalty of perjury. <u>Pen C §118</u> .	2640	7.21
(c) Perjury by affidavit. <u>Pen C §118a</u> .	2641	7.21.1
(2) <i>Specific intent</i> — to testify falsely under oath or penalty of perjury.	Included in 2640, 2641	Included in 7.20-7.21, 7.24
(3) <i>Included offense</i> .		
An unexecuted deposition containing false statements can provide the basis for a prosecution for attempted perjury. <u>People v Post (2001) 94 CA4th 467, 480-483, 114 CR2d 356</u> .	460	6.00

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.75 32. Pimping (Pen C §266h)

§2.75 32. Pimping (Pen C §266h)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1150	10.70
(2) <i>General intent only. <u>People v McNulty (1988) 202 CA3d 624, 249 CR 22.</u></i>	250	3.30
(3) <i>Included offense</i> Attempt. <u>Pen C §§663, 266h.</u>	460	6.00

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.76 33. Prison Offenses (Pen C §§404(a), 404.6, 4573.6, 4573.8, 4573.9, 4574)

§2.76 33. Prison Offenses (Pen C §§404(a), 404.6, 4573.6, 4573.8, 4573.9, 4574)

	CALCRIM	CALJIC
<i>(1) Elements of offense</i>		
(a) Inciting riot in prison or jail (<u>Pen C §404.6(c)</u>).	2736	7.33
(b) Bringing or sending firearms, weapons, or explosives into prison/jail (<u>Pen C §4574</u>).	2747	7.34.01
(c) Prisoner possessing firearms, weapons, or explosives (<u>Pen C §4574</u>).	2746	7.34.02
(d) Unauthorized possession of controlled substance in prison or jail (<u>Pen C §4573.6</u>).	2748	7.34.03
(e) Unauthorized possession of drugs, paraphernalia, or alcoholic beverages in prison or jail (<u>Pen C §4573.8</u>).		7.34.04
(f) Person not in custody selling controlled substance to person in state prison or jail (<u>Pen C §4573.9</u>).		7.34.05
<i>(2) Intent</i>		
(a) Specific intent to cause riot under <u>Pen C §404.6</u> .	Included in 2736	Included in 7.33
(b) General intent for violations of <u>Pen C §4574</u> .	250	3.30

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.77 34. Receiving Stolen Property (Pen C §496(a))

§2.77 34. Receiving Stolen Property (Pen C §496(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1750	14.65
(2) <i>Mental state</i>		
(a) Knowledge that property is stolen.	Included in 1750	Included in 14.65
(b) Evidence introduced of innocent intent.	1751	14.66
(3) <i>Included offense</i>		
Attempt. <u>Pen C §§663, 496.</u>	460	6.00
If the defendant is charged with a theft crime, the court must give a sua sponte instruction that the jury cannot convict the defendant of both theft of property and receiving the same property as stolen property. <u>People v Garza (2005) 35 CA4th 866, 28 CR3d 335.</u>		17.04

If the defendant relies on a "claim of right" or "mistake of fact" defense or if there is evidence for such defenses and they are consistent with the defendant's theory of the case, the court must instruct on those defenses sua sponte. People v Russell (2006) 144 CA4th 1415, 1429, 1431, 51 CR3d 263.

Note: When the defendant was involved in pawning the property taken from another, the court has a sua sponte duty to define "stolen" and "theft" so that the jury could determine whether the intent was to permanently deprive. People v MacArthur (2006) 142 CA4th 275, 280, 47 CR3d 736.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.78 35. Reckless Driving Causing Specific Bodily Injuries (Veh C §23105)

§2.78 35. Reckless Driving Causing Specific Bodily Injuries (Veh C §23105)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		12.82, 16.841
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offense</i> Misdemeanor reckless driving. <u>Veh C §23103(a)</u> .	2200	16.840

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.79 36. Resisting Arrest (Pen C §§69, 148(b)-(d), 148.10)

§2.79 36. Resisting Arrest (Pen C §§69, 148(b)-(d), 148.10)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Resisting arrest—removal of weapon or firearm. <u>Pen C §148(b)-(c)</u> .	2653	9.80
(b) Resisting arrest—attempted removal of firearm. <u>Pen C §148(d)</u> .	2654	9.81
(c) Resisting arrest—resulting in death or serious bodily injury. <u>Pen C §148.10</u> . Willful resistance includes flight from an officer attempting a lawful arrest. <u>People v Superior Court (Ferguson) (2005) 132 CA4th 1525, 34 CR3d 481</u> .	2655	9.82
(d) Deterring or resisting officer. <u>Pen C §69</u> . <i>Note:</i> When a defendant is charged with resisting a peace officer (<u>Pen C §§69, 148</u>), the court has a sua sponte duty to instruct on the exigency of the circumstances leading to a warrantless arrest. <u>People v Wilkins (1993) 14 CA4th 761, 778-779, 17 CR2d 743</u> .	2651, 2652	7.50
(2) <i>Intent</i>		
(a) Resisting arrest (<u>Pen C §§148(b)-(c), 148.10</u>)—General intent. See <u>People v Matthews (1999) 70 CA4th 164, 174-175, 82 CR2d 502; People v Roberts (1982) 131 CA3d Supp 1, 8-9, 182 CR 757</u> .	250	3.30
(b) Resisting arrest—attempted removal of firearm (<u>Pen C §148(d)</u>)—specific intent to remove or take firearm from the person or immediate presence of the officer.	Included in 2654	Included in 9.81
(c) Deterring officer by threat or violence (<u>Pen C §69</u>)—Specific intent to deter officers from performing their duties. See <u>People v Patino (1979) 95 CA3d 11, 27, 156 CR 815; People v Roberts, supra</u> .		
(d) Resisting officer by force or violence (<u>Pen C §69</u>)—General intent. See <u>People v Roberts, supra</u> . <i>Mental state:</i> <u>Pen C §§148, 148.10</u> —knowledge or should have knowledge person was peace officer and engaged in performance of duties.		
(3) <i>Included offense</i> —Misdemeanor resisting arrest (<u>Pen C §148(a)</u>) is a lesser included offense of <u>Pen C §148(b)-(c)</u> . Resisting arrest under <u>Pen C §148(a)(1)</u> is a lesser included offense of the second prong of <u>Pen C §69</u> (resisting performance of duty by executive officer). <u>People v Lacefield (2007) 157 CA4th 249, 259, 68 CR3d 508</u> .	2656	16.102

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.80 37. Robbery (Pen C §§211, 212.5)

§2.80 37. Robbery (Pen C §§211, 212.5)

	CALCRIM	CALJIC
(1) <i>Elements and degrees of offense</i>		
(a) Robbery of an operator or passenger.	1600-1603	9.40-9.42
(b) Robbery of an inhabited dwelling house or vessel, or inhabited portion of any other building.	1600-1603	9.40-9.42
(c) Robbery of person using automated teller machine.		9.40-9.42
(d) Robbery in concert with two or more other persons.	1601	3.00-3.01, 9.40, 9.42.1
<i>Note:</i> Robbery in concert (Pen C §213(a)(1)(A)) is not a sentencing factor, but rather a sentencing enhancement that must be pleaded and proved beyond a reasonable doubt. <u>In re Jonathan T.</u> (2008) 166 CA4th 474, 479-484, 82 CR3d 753.		
(e) No evidence to support finding of first degree robbery.	1602	9.43
(f) Store employee as victim of robbery.	1600	9.40.3
<i>Note:</i> Victim's knowledge of the taking of the property is not an element of the crime of robbery. <u>People v Jackson</u> (2005) 128 CA4th 1326, 1331, 27 CR3d 793.		
<i>Note:</i> A person must have actual or constructive possession of property taken during a robbery to be a victim of that robbery. Merely being present during the robbery does not cause one to become a victim. <u>People v Nguyen</u> (2000) 24 C4th 756, 761-765, 102 CR2d 548. If victim is a store employee, instruct with CALJIC 9.40.3.		
<i>Note:</i> The immediate presence element of robbery is satisfied when the defendant, after stealing property belonging to the victim but not from the victim's presence, is confronted by the victim as he is attempting to carry the property to a place of temporary safety and uses forcible resistance to keep the property. <u>People v Gomez</u> (2008) 43 C4th 249, 74 CR3d 123.		
(2) <i>Specific intent</i> —to permanently deprive before or at time of taking of property.	1600	9.40, 9.40.2
Court may instruct with expanded definition of specific intent, <i>i.e.</i> , temporary taking of property, but for an unreasonable time, so as to deprive the owner of a major portion of its value or enjoyment. <u>People v Avery</u> (2002) 27 C4th 49, 54-58, 115 CR2d 403.	1800	14.03
Theft by larceny—Defense of claim of right.	1863	9.44
(3) <i>Included offenses</i>		
(a) Attempted robbery. <u>Pen C §§663, 211.</u>	460	6.00
(b) Grand theft. <u>Pen C §§484-487h.</u>	1800-1806, 1860	14.00-14.10, 14.20-14.31
<i>Note:</i> Grand theft vehicle (Pen C §487(d)) is a lesser included offense of robbery (Pen C §211). <u>People v Gamble</u> (1994) 22 CA4th 446, 450, 27 CR2d 451 (construing former Pen C §487h).		
(c) Petty theft. <u>Pen C §§484-488.</u>	1800-1806, 1860	14.00-14.10, 14.20-14.31
(d) Taking an automobile without consent, if pleaded. <u>Veh C §10851.</u>	1820	14.36

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/ 38. Sex Offenses/
§2.81 a. Annoying or Molesting Child (Pen C §647.6(b), (c)(1), (c)(2))

38. Sex Offenses

§2.81 a. Annoying or Molesting Child (Pen C §647.6(b), (c)(1), (c)(2))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i> The annoying or molesting act need not, in and of itself, be lewd. <u>People v Thompson (1988) 206 CA3d 459, 463-466, 253 CR 564.</u>	1121, 1122	10.57
(2) <i>General intent only.</i> <i>Mental state:</i> Motivated by an unnatural or abnormal sexual interest in the child. Reasonable mistake belief as to age of child is a defense to <u>Pen C §647.6. People v Atchison (1978) 22 C3d 181, 183, 148 CR 881.</u>	250 Included in 1121, 1122 Included in 1121, 1122	3.30 Included in 10.57
(3) <i>Included offense</i> Misdemeanor annoying or molesting child. <u>Pen C §647.6(a).</u>	1122	16.440

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.82 b. Contacting Minor or Communicating With Minor With Intent To Commit Sex Offense (Pen C §288.3(a))

§2.82 b. Contacting Minor or Communicating With Minor With Intent To Commit Sex Offense (Pen C §288.3(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1124	10.59
<i>Note:</i> Court must instruct on the elements of the intended crime, <i>i.e.</i> , <u>Pen C §§207, 209, 261, 264.1, 273a, 286, 288, 288a, 288.2, 289, 311.1, 311.2, 311.4 or 311.11.</u>		
(2) <i>Specific intent</i> — to commit designated sex offense.	Included in 1124	Included in 10.59
(3) <i>Included offense</i> — None.		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.83 c. Arranging Meeting or Attending Meeting With Minor for Lewd Purpose (Pen C §288.4)

§2.83 c. Arranging Meeting or Attending Meeting With Minor for Lewd Purpose (Pen C §288.4)

	CALCRIM	CALJIC
(a) Arranging meeting with minor for lewd purpose. <u>Pen C §288.4(a)</u> .	1125	10.59.1
(b) Attending meeting with minor for lewd purpose. <u>Pen C §288.4(b)</u> .	1126	10.59.2
(c) "Engaging in lewd and lascivious behavior" defined.	Included in 1125-1126	Included in 10.59.1, 10.59.2
(2) <i>Specific intent</i> —to expose genitals or pubic or rectal areas, <i>or</i> have minor expose his or her genitals, pubic, or rectal areas, <i>or</i> engage in lewd and lascivious behavior.	Included in 1125-1126	Included in 10.59.1, 10.59.2
(3) <i>Included offense</i> —None.		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.84 d. Continuous Sexual Abuse of Child (Pen C §288.5(a))

§2.84 d. Continuous Sexual Abuse of Child (Pen C §288.5(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1120	10.42.6
<i>Note:</i> The court has no sua sponte duty to define "recurring access" to a child under <u>Pen C §288.5(a)</u> . <u><i>People v Rodriguez</i> (2002) 28 CA4th 543, 546-550, 122 CR2d 348.</u>		
(2) <i>General intent only.</i> <u><i>People v Whitbam</i> (1995) 38 CA4th 1282, 1292, 45 CR2d 571.</u>	250	3.30
<i>Note:</i> Some judges instruct on the specific intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of defendant or the child (see <u>§2.86</u>) when instructing on continuous abuse of a child.		
(3) <i>Included offenses</i>		
(a) The underlying felonies.		
(b) Attempts of the underlying felonies.		
(c) Simple assault. <u>Pen C §240.</u>	915	9.00, 9.01
(d) Battery. <u>Pen C §242.</u>	926, 960	16.140, 16.141

Note: Unanimity instruction need not be given along with other instructions on violation of Pen C §288.5 (multiple acts of resident child molester), nor need the judge instruct sua sponte on Pen C §288 because §288 is not a lesser included offense of §288.5. *People v Avina* (1993) 14 CA4th 1303, 1313, 18 CR2d 511; *People v Palmer* (2001) 86 CA4th 440, 445, 103 CR2d 301 (continuous sexual abuse does not necessarily require specific intent, while lewd and lascivious conduct always does).

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.85 e. Harmful Matter Sent With Intent To Seduce Minor (Pen C §288.2(a), (b))

§2.85 e. Harmful Matter Sent With Intent To Seduce Minor (Pen C §288.2(a), (b))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1140	10.58
(2) <i>Specific intent</i> — (i) to arouse, appeal to, or gratify the lust or passions or sexual desires of the defendant or the minor, and (ii) to seduce a minor.	Included in 1140	Included in 10.58
It is a defense to a <u>Pen C §288.2</u> charge that a parent or guardian committed the act in aid of legitimate sex education, or that the act was committed in aid of legitimate scientific or educational purposes. <u>Pen C §288.2</u> (c), (d).	Included in 1140	
(3) <i>Included offense</i> <u>Penal Code §313.1</u> (a) (distribution of harmful matter to minor) is a lesser included offense of <u>Pen C §288.2</u> (b). <u>People v Jensen</u> (2003) 114 CA4th 224, 243-245, 7 CR3d 609.		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.86 f. Lewd Act With Child or Dependent Person (Pen C §288)

§2.86 f. Lewd Act With Child or Dependent Person (Pen C §288)

	CALCRIM	CALJIC
<i>(1) Elements of offense</i>		
(a) Lewd act with child. <u>Pen C §288(a)</u> .	1110	10.41
(b) Lewd act with child by use of force or violence. <u>Pen C §288(b)(1)</u> . The court need not instruct sua sponte on the definition of "duress." <u>People v Pitmon (1985) 170 CA3d 38, 216 CR 221</u> . No definition of "force" is required when the evidence establishes force by physical harm. <u>People v Montero (1986) 185 CA3d 415, 431, 229 CR 750</u> . <i>Note:</i> There is a split of opinion on whether "force" includes the physical restraint necessary to make the child perform the sexual act. See, e.g., <u>People v Senior (1992) 3 CA4th 765, 774, 5 CR2d 14</u> (holding that restraining alone is not force). But see <u>People v Neel (1993) 19 CA4th 1784, 1790, 24 CR2d 293</u> (force used for restraint is different in kind from force necessary for consensual acts with victim).	1111	10.42
(c) Lewd act with child age 14 or 15 and defendant at least ten years older. <u>Pen C §288(c)(1)</u> .	1112	10.42.5
(d) Lewd act by caretaker on dependent adult. <u>Pen C §288(c)(2)</u> .	1060	10.90
<i>(2) Specific intent</i> — to arouse, appeal to, or gratify the lust, passions, or sexual desires of defendant or of the child or dependent adult.	Included in 1110-1112, 1060	Included in 10.41-10.42, 10.42.5, 10.80
<i>(3) Included offenses</i>		
(a) Attempt. <u>Pen C §§663, 288</u> .	460	6.00
(b) Simple assault. <u>Pen C §240</u> .	915	9.00, 9.01
<i>Note:</i> Contributing to the delinquency of a minor is not a lesser included offense of lewd and lascivious conduct (<u>Pen C §288</u>). <u>People v Vincze (1992) 8 CA4th 1159, 1162, 11 CR2d 430</u> . <u>Penal Code §288(a), (b)(1), and (c)(1)</u> proscribe any touching of an underage child performed with the intent of arousing the sexual desires of the child or the perpetrator. <u>People v Martinez (1995) 11 CA4th 434, 452, 45 CR2d 905</u> .		
(c) Battery. <u>Pen C §242</u> . The court has a sua sponte duty to instruct on the lesser included offense of battery when the evidence showed that the defendant touched the child in a nonsexual way but in a way that would have been offensive to the child. <u>People v Thomas (2007) 146 CA4th 1278, 1294, 53 CR3d 473</u> .		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.87 g. Oral Copulation (Pen C §288a)

§2.87 g. Oral Copulation (Pen C §288a)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Oral copulation by force or threats. <u>Pen C §288a(c)(2)</u> , (3). When the victim initially consents to an act of oral copulation, and then communicates a withdrawal of consent during the act, but the defendant continues against the victim's will, the court should instruct with the last bracketed paragraph of CALJIC 1.23.1 (consent defined) as well as the bracketed portion of the second paragraph of CALJIC 10.65 (belief as to consent). See <u>In re John Z. (2003) 29 CA4th 756, 760, 128 CR2d 783.</u> Term "force" in forcible oral copulation statute has no specialized legal definition. <u>People v Guido (2005) 125 CA4th 566, 574-576, 22 CR3d 826.</u>	1015 Included in 1000	10.10
(b) Oral copulation with person lacking capacity. <u>Pen C §288a(g)</u> . The court has no sua sponte duty to instruct on the definition of "developmental disability" when the prosecution has claimed that the victim was incapable of giving consent under <u>Pen C §288a(g)</u> . <u>People v Mobley (1999) 72 CA4th 761, 788, 85 CR2d 474.</u>	1019, 1020	10.11
(c) Oral copulation in concert. <u>Pen C §288a(d)</u> .	1016	10.12
(d) Oral copulation with unconscious or intoxicated person or a person unaware of the act or its nature. <u>Pen C §288a(f)</u> , (i). The court should use CALJIC 1.23.2 in <u>Pen C §288a(i)</u> cases and must use it if the jury requests clarification of the phrase "prevented from resisting." See <u>People v Giardino (2000) 82 CA4th 454, 465-467, 98 CR2d 315.</u>	1017, 1018	10.13
(e) Oral copulation while confined. <u>Pen C §288a(e)</u> .	1022	10.14
(f) Oral copulation by fraud. <u>Pen C §288a(j)</u> .	1021	10.15
(g) Oral copulation by unlawful threat of public authority. <u>Pen C §288a(k)</u> .	1015	10.16
(h) Oral copulation with a person under 18, or with a person under 16 when the defendant is over 21. <u>Pen C §288a(b)(1)-(2)</u> .	1081, 1082	10.45
(i) Oral copulation with a person under 14 and more than 10 years younger than the defendant. <u>Pen C §288a(c)(1)</u> . <i>Note:</i> The term "sexual organ," as it applies to males, includes the scrotum as well as the penis. <u>People v Catelli (1991) 227 CA3d 1434, 1448, 278 CR 452.</u>	1080	10.46
(2) <i>General intent only</i>	250	3.30
(a) Defendant's reasonable, good faith belief in consent indicated by evidence. See discussion in <u>§2.89</u> .	1015, 1017	10.65
(b) Defendant's reasonable, good faith belief as to age indicated by evidence.	1081, 1082	10.67
(3) <i>Included offenses</i>		
(a) Attempted oral copulation. <u>Pen C §§663, 288a</u> .	460	6.00
(b) Battery. <u>Pen C §242</u> .	926, 960	16.140, 16.141
(c) Simple assault. <u>Pen C §240</u> .	915	9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.88 h. Sexual Penetration (Pen C §§289, 264.1)

§2.88 h. Sexual Penetration (Pen C §§289, 264.1)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Sexual penetration by force or threats. <u>Pen C §289(a)</u> . When the victim initially consents to an act of sexual penetration, and then communicates a withdrawal of consent during the act, but the defendant continues against the victim's will, the court should instruct with the last bracketed paragraph of CALJIC 1.23.1 (consent defined) as well as the bracketed portion of the second paragraph of CALJIC 10.65 (belief as to consent). See <u>In re John Z. (2003) 29 CA4th 756, 760, 128 CR2d 783.</u>	1045 Included in 1000	10.30
(b) Sexual penetration in concert. <u>Pen C §264.1</u> .	1046, 400, 401	3.00-3.01, 10.31
(c) Sexual penetration with person lacking capacity. <u>Pen C §289(b)</u> .	1049, 1050	10.32
(d) Sexual penetration with unconscious or intoxicated person or a person unaware of the act or its nature. <u>Pen C §289(d)-(e)</u> . The court should use CALJIC 1.23.2 in <u>Pen C §289(e)</u> cases and must use it if the jury requests clarification of the phrase "prevented from resisting." See <u>People v Giardino (2000) 82 CA4th 454, 465-467, 98 CR2d 315.</u>	1047, 1048	10.33
(e) Sexual penetration by fraud. <u>Pen C §289(f)</u> .	1051	10.34
(f) Sexual penetration by unlawful threat of public authority. <u>Pen C §289(g)</u> .	1045	10.35
(g) Sexual penetration with a person under 18, or with a person under 16 when the defendant is over 21. <u>Pen C §289(h)-(i)</u> .	1101, 1102	10.49
(h) Sexual penetration with a person under 14 and more than 10 years younger than the defendant. <u>Pen C §289(j)</u> . <i>Note: Penal Code §289 is violated if defendant forces victim to self-penetrate with a finger. People v Keeney (1994) 24 CA4th 886, 29 CR2d 451.</i>	1100	10.50
(2) <i>Specific intent</i> – to cause sexual arousal, gratification, or abuse.		Included in above
(a) Defendant's reasonable, good faith belief as to consent indicated by evidence. <u>People v Castillo (1987) 193 CA3d 119, 125, 238 CR 207</u> . See discussion in <u>§2.89</u> .	1045, 1047	10.65
(b) Defendant's reasonable, good faith belief as to age indicated by evidence.	1100-1102	10.67
(3) <i>Included offenses</i>		
(a) Attempt. <u>Pen C §§663, 289</u> .	460	6.00
(b) Simple assault. <u>Pen C §240</u> .	915	9.00, 9.01
(c) Battery. <u>Pen C §242</u> .	926, 960	16.140, 16.141

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.89 i. Rape (Pen C §§261, 262, 264.1)

§2.89 i. Rape (Pen C §§261, 262, 264.1)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Rape by force or threats. <u>Pen C §§261(a)(2), 262(a)(1)</u> . Term "force" in forcible rape statute has no specialized legal definition. <u>People v Griffin (2004) 33 C4th 1015, 1022-1028, 16 CR3d 891</u> (lower court erred in holding that special definition of force required for a conviction of forcible lewd acts on a child (<u>Pen C §288(b)(1)</u>) was applicable to forcible rape prosecutions). When the female victim initially consents to an act of sexual intercourse, and then communicates a withdrawal of her consent during the act, but the male continues against her will, the court should instruct with the last bracketed paragraph of CALJIC 1.23.1 (consent defined) as well as the bracketed portion of the second paragraph of CALJIC 10.65 (belief as to consent). <u>In re John Z. (2003) 29 C4th 756, 760-763, 128 CR2d 783</u> .	1000	10.00
(b) Rape of incompetent person. <u>Pen C §261(a)(1)</u> .	1002, 1003	10.02
(c) Rape by threatened retaliation. <u>Pen C §§261(a)(6), 262(a)(4)</u> .	1000	10.00.1
(d) Rape in concert. <u>Pen C §264.1</u> .	1001, 400, 401	3.00-3.01, 10.01
(e) Rape with unconscious or intoxicated person or a person unaware of the act or its nature. <u>Pen C §§261(a)(3), (4), 262(a)(2), (3)</u> . The court should use CALJIC 1.23.2 in <u>Pen C §§261(a)(3) and 262(a)(2)</u> cases and must use it if the jury requests clarification of the phrase "prevented from resisting." See <u>People v Giardino (2000) 82 CA4th 454, 465-467, 98 CR2d 315</u> . <i>Note:</i> Lack of consent is not an element of the crime and actual consent is not a defense, but an honest and reasonable belief that the victim was not too intoxicated to give legal consent may be a defense to rape with an intoxicated person. <u>People v Giardino (2000) 82 CA4th 454, 459, 471-472, 98 CR2d 315</u> .	1002-1004	10.02, 10.05.1
(f) Rape by fraud. <u>Pen C §261(a)(5)</u> .	1005	10.03
(g) Rape by unlawful threat of public authority. <u>Pen C §§261(a)(7), 262(a)(5)</u> .	1000	10.04
(2) <i>General intent only</i>		3.30
(a) Defendant's reasonable, good faith belief in consent indicated by evidence. <i>Note:</i> This defense must be distinguished from the defense of actual consent; the two may, but need not necessarily, be raised together. See <u>People v Rhoades (1987) 193 CA3d 1362, 238 CR 909</u> (oral copulation); <u>People v Burnham (1986) 176 CA3d 1134, 222 CR 630</u> ; <u>People v Romero (1985) 171 CA3d 1149, 215 CR 634</u> .	Included in 1000	10.65, 10.61.1
(b) Defendant's reasonable, good faith belief as to age indicated by evidence.	1070, 1071	10.67
(c) Defendant's honest and reasonable belief that the victim was not too intoxicated to give legal consent. See <u>People v Giardino (2000) 82 CA4th 454, 471-472, 98 CR2d</u>	Included in 1002	

315.

(d) The rape of an unconscious person has two mens rea requirements: the defendant must have had (1) knowledge of the victim's unconsciousness and (2) the wrongful intent to have sex with an unconscious person. People v Dancy (2002) 102 CA4th 21, 37, 124 CR2d 898. This crime does not contain a lack-of-consent element. 102 CA4th at 36.

(3) *Included offenses*

(a) Attempted rape. Pen C §§663, 261.

460

6.00

(b) Battery. Pen C §242.

926, 960

16.140,

16.141

(c) Simple assault. Pen C §240.

915

9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.90 j. Sexual Acts With Child 10 Years Old or Younger (Pen C §288.7)

§2.90 j. Sexual Acts With Child 10 Years Old or Younger (Pen C §288.7)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	935-937	10.37- 10.37.2
(a) Sexual intercourse or sodomy with child 10 years old or younger. <u>Pen C §288.7(a)</u> .	1127	10.59.5
(b) Oral copulation or sexual penetration with child 10 years old or younger. <u>Pen C §288.7(b)</u> .	1128	10.59.6
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offenses</i>		
(a) Attempt. <u>Pen C §§663, 288.7</u> .	460	6.00
(b) Battery. <u>Pen C §242</u> .	926, 960	16.140, 16.141
(c) Simple assault. <u>Pen C §240</u> .	915	9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.91 k. Sexual Battery (Pen C §243.4(a)-(d))

§2.91 k. Sexual Battery (Pen C §243.4(a)-(d))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	935-937	10.37- 10.37.2
Sexual battery does not occur when the perpetrator forcibly causes a woman's hand to touch his penis. "Intimate part," as defined in <u>Pen C §243.4(g)</u> , does not include the victim's hand, and it is the perpetrator who must touch the victim's intimate part, not the other way around. <u>People v Elam (2001) 91 CA4th 298, 309-310, 110 CR2d 185.</u>		
(2) <i>Specific intent</i> — to cause sexual arousal, gratification, or abuse.	Included in 935-937	Included in 10.37- 10.37.2
The intent for the purpose of sexual abuse can be to insult, humiliate, intimidate, or physically harm. See <u>In re Shannon T. (2006) 144 CA4th 618, 621-622, 50 CR2d 564.</u>		
(3) <i>Included offenses</i>		
(a) Misdemeanor sexual battery. <u>Pen C §243.4(e)</u> . <i>Note:</i> <u>Penal Code §243.4(e)</u> is not a lesser included offense of <u>Pen C §243.4(c)</u> (sexual battery by fraudulent representation). <u>People v Babaali (2009) 171 CA4th 982, 994-999, 90 CR3d 278.</u>	938	16.145
(b) Attempt. <u>Pen C §§663, 243.4.</u>	460	6.00
(c) Simple assault. <u>Pen C §240; People v Carapeli (1988) 201 CA3d 589, 595 n3, 247 CR 478.</u>	915	9.00, 9.01
(d) Battery. <u>Pen C §242.</u>	926, 960	16.140, 16.141

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.92 I. Sodomy (Pen C §286)

§2.92 I. Sodomy (Pen C §286)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Sodomy by force or threats. <u>Pen C §286(c)(2), (3)</u> . When the victim initially consents to an act of sodomy, and then communicates a withdrawal of consent during the act, but the defendant continues against the victim's will, the court should instruct with the last bracketed paragraph of CALJIC 1.23.1 (consent defined) as well as the bracketed portion of the second paragraph of CALJIC 10.65 (belief as to consent). See <u>In re John Z. (2003) 29 C4th 756, 760, 128 CR2d 783.</u>	1030 Included in 1000	10.20
(b) Sodomy in concert. <u>Pen C §286(d)</u> .	1031, 400, 401	3.00-3.01, 10.21
(c) Sodomy with person lacking capacity. <u>Pen C §286(g)-(h)</u> .	1034, 1035	10.22
(d) Sodomy with unconscious or intoxicated person or a person unaware of the act or its nature. <u>Pen C §286(f), (i)</u> . The court should use CALJIC 1.23.2 in <u>Pen C §286(i)</u> cases and must use it if the jury requests clarification of the phrase "prevented from resisting." See <u>People v Giardino (2000) 82 CA4th 454, 465-467, 98 CR2d 315.</u>	1032, 1033	10.23
(e) Sodomy with a prisoner. <u>Pen C §286(e)</u> .	1037	10.24
(f) Sodomy by fraud. <u>Pen C §286(j)</u> .	1036	10.25
(g) Sodomy by unlawful threat of public authority. <u>Pen C §286(k)</u> .	1030	10.26
(h) Sodomy with a person under 18, or with a person under 16 when the defendant is over 21. <u>Pen C §286(b)(1)-(2)</u> .	1091, 1092	10.47
(i) Sodomy with a person under 14 and more than 10 years younger than the defendant. <u>Pen C §286(c)(1)</u> .	1090	10.48
(2) <i>General intent only</i>	250	3.30
(a) Defendant's reasonable, good faith belief as to consent indicated by evidence. See discussion in <u>§2.89</u> .	1031, 1032	10.65
(b) Defendant's reasonable, good faith belief as to age indicated by evidence.	1090-1092	10.67
(3) <i>Included offenses</i>		
(a) Attempt. <u>Pen C §§663, 286</u> .	460	6.00
(b) Battery. <u>Pen C §242; People v Hughes (2002) 27 C4th 287, 366, 116 CR2d 401.</u>	926, 960	16.140, 16.141
(c) Simple assault. <u>Pen C §240</u> .	915	9.00, 9.01

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.93 m. Unlawful Sexual Intercourse (Pen C §261.5)

§2.93 m. Unlawful Sexual Intercourse (Pen C §261.5)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	1070-1072	10.40.1, 10.40.2, 16.164
(2) <i>General intent only</i> If defendant's reasonable, good faith belief as to age indicated by evidence.	250 1070-1071	3.30 10.67
(3) <i>Included offenses</i>		
(a) Battery. <u>Pen C §242</u> .	926, 960	16.140, 16.141
(b) Simple assault. <u>Pen C §240</u> .	915	9.00, 9.01

Note: Contributing to delinquency of minor (Pen C §272) is not a necessarily lesser included offense within unlawful sexual intercourse. People v Bobb (1989) 207 CA3d 88, 254 CR 70Z, disapproved on other grounds in 12 C4th 186, 198 n7.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.94 39. Solicitation To Commit Felony (Pen C §§653f, 653j)

§2.94 39. Solicitation To Commit Felony (Pen C §§653f, 653j)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Solicitation. <u>Pen C §653f</u> .	441	6.35
(b) Solicitation of a minor. <u>Pen C §653j</u> .	442	6.36
<i>Note:</i> Instruction should be given defining the elements of each offense alleged to have been solicited.		
(2) <i>Specific intent</i> — to actually commit crime that was solicited.	Included in 441-442	Included in 6.35-6.36
(3) <i>Included offense.</i> Attempted, but incomplete, solicitation of murder. <i>People v Saephanh, supra</i> , 80 CA4th at 461.	460	6.00

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.95 40. Speed Contest Causing Specified Bodily Injuries (Veh C §23109.1)

§2.95 40. Speed Contest Causing Specified Bodily Injuries (Veh C §23109.1)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		12.83
(2) <i>General intent only</i>	250	3.30
(3) Included offense		
Misdemeanor speed contest. <u>Veh C §23109(a)</u> .	2201	16.860

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.96 41. Stalking (Pen C §646.9)

§2.96 41. Stalking (Pen C §646.9)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i> Crimes committed before January 1, 2003.		9.16.1, 9.16.20
Crimes committed on or after January 1, 2003.	1301	9.16.11, 9.16.22
(2) <i>Specific intent</i> — to place the other person in reasonable fear for his or her safety or the safety of his or her immediate family.	Included in 1301	Included in above
(3) <i>Included offense</i> — Misdemeanor stalking. <u>Pen C §646.9(a)</u> .		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.97 42. Threats, Criminal (Pen C §422)

§2.97 42. Threats, Criminal (Pen C §422)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i> The court is not required to identify the threatened crime or to instruct on the elements of the threatened crime. <u>People v Butler</u> (2000) 85 CA4th 745, 755-760, 102 CR2d 269.	1300	9.94
(2) <i>Specific intent</i> — to make statement that is taken as a threat.	Included in 1300	Included in 9.94
(3) <i>Included offenses</i> (a) Attempted criminal threat. <u>People v Toledo</u> (2001) 26 C4th 221, 109 CR2d 315.	460	6.00
(b) Threatening a public officer of an educational institution (<u>Pen C §71</u>) may be a lesser included offense of <u>Pen C §422</u> under the accusatory pleading test (<u>In re Marcus T.</u> (2001) 89 CA4th 468, 471-475, 107 CR2d 451), but not under the statutory elements test (<u>People v Chaney</u> (2005) 131 CA4th 253, 256-257, 31 CR3d 714).		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.98 43. Theft, Grand (Pen C §§484, 484.1, 487, 487h)

§2.98 43. Theft, Grand (Pen C §§484, 484.1, 487, 487h)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>		
(a) Forms of theft.	1800	14.00
(b) Larceny.	1800	14.02
(c) Trick and device.	1805	14.05
(d) Embezzlement.	1806	14.07
(e) False pretenses.	1804	14.10-14.14
(f) Theft from pawnbroker. <u>Pen C §484.1.</u>		14.19
(g) Grand and petty theft.	1801	14.20

Note: When a person, intending to steal, causes property to become separated from the victim's person, and then gains possession of the property, the theft is grand theft from the person. In re Jesus O. (2007) 40 C4th 859, 55 CR3d 523.

(h) Theft of cargo. <u>Pen C §487h.</u>		14.21.1
(h) Grand theft of automobile. <u>Pen C §487(d).</u>	1800-1801	14.35
(2) <i>Specific intent</i> – to deprive permanently the owner of property.	Included in above	Included in above
Court may instruct with expanded definition of specific intent, <i>i.e.</i> , temporary taking of property, but for an unreasonable time, so as to deprive the owner of a major portion of its value or enjoyment. <u>People v Avery (2002) 27 C4th 49, 54-58, 115 CR2d 403.</u>	Included in 1800, 1804-1806	14.03

Note: An intent to deprive permanently a victim of property may be inferred from an attempted taking. People v Morales (1993) 19 CA4th 1383, 1391, 24 CR2d 847.

Note: When the defendant was involved in pawning the property taken from another, the court has a sua sponte duty to define "stolen" and "theft" so that the jury could determine whether the intent was to permanently deprive. People v MacArthur (2006) 142 CA4th 275, 280, 47 CR3d 736.

(3) <i>Included offenses</i>		
(a) Petty theft. <u>Pen C §488.</u>	1801	14.20
(b) Attempted theft. <u>Pen C §§663, 484.</u>	460	6.00
(c) Unlawful taking or driving of an automobile. <u>Veh C §10851.</u>	1820	14.36
(d) Unlawful taking of bicycle or vessel. <u>Pen C §499b.</u>	1822	16.305

Note: A defendant is entitled to a clarifying instruction when a jury is instructed with CALJIC 16.305 (Pen C §499b violated if a person *takes* a vehicle with specific intent to use it temporarily) if the facts show that the defendant might be found guilty of the lesser included offense of merely driving the car that had been stolen by someone else. People v Frye (1994) 28 CA4th 1080, 1090, 34 CR2d 180. The courts of appeal disagree whether misdemeanor joyriding (Pen C §499b) is a specific intent crime or a general intent crime. People v Howard (1997) 57 CA4th 323, 66 CR2d 849, and People v Diaz (1989) 212 CA3d 745, 260 CR 806, hold that it is a specific intent crime; People v Frye, supra, disagreed with Diaz and held that it is a general intent crime.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.99 44. Threatening Witnesses, Victims, or Informants (Pen C §140(a))

§2.99 44. Threatening Witnesses, Victims, or Informants (Pen C §140(a))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	2624	7.17
(2) <i>General intent only</i>	250	3.30
(3) <i>Included offense</i> Attempt.	460	6.00

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.100 45. Torture (Pen C §206)

§2.100 45. Torture (Pen C §206)

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	810	9.90
(2) <i>Specific intent</i> — to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose. <i>Note:</i> The trial court has no sua sponte duty to instruct on imperfect self-defense in a torture prosecution. <u><i>People v Vital</i> (1996) 45 CA4th 441, 446, 52 CR2d 676.</u>	Included in 810	Included in 9.90
(3) Included offense Extortion included within offense of torture for purpose of extortion when defendant achieves purpose (see <u>§2.44</u>). <i>Note:</i> A violation under <u>Pen C §245(a)(1)</u> of assault with a deadly weapon is not a lesser included offense of torture. <u><i>People v Martinez</i> (2005) 125 CA4th 1035, 1042-1045, 23 CR3d 508.</u> <i>Note:</i> A violation of <u>Pen C §245(a)(1)</u> of assault by means of force likely to produce great bodily injury is not a lesser included offense of torture. <u><i>People v Hamlin</i> (2009) 170 CA4th 1412, 1456, 89 CR3d 402.</u>	1830	14.70-14.71

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.101 46. Trafficking of Personal Identifying Information (Pen C §530.5)

§2.101 46. Trafficking of Personal Identifying Information (Pen C §530.5)

	CALCRIM	CALJIC
<i>(1) Elements</i>		
(a) Unauthorized use of personal identifying information. <u>Pen C §530.5(a)</u> .	2040	15.60
(b) Fraudulent possession of personal identifying information of 10 or more persons. <u>Pen C §530.5(c)(3)</u> .	2041	15.62
(c) Fraudulent possession of personal identifying information with prior conviction. <u>Pen C §530.5(c)(2)</u> .	2041	15.62
(d) Fraudulent sale or transfer of personal identifying information. <u>Pen C §530.5(d)(1)</u> .	2042	15.63
(e) Knowing sale or transfer of personal identifying information to person about to commit further violation. <u>Pen C §530.5(d)(2)</u> .	2043	15.64, 15.60
(f) "Personal identifying information" defined. <u>Pen C §530.55(b)</u> .	Included in 2040-2043	15.61
(g) "Person" defined. <u>Pen C §530.55(a)</u> .	Included in 2040-2043	15.61
<i>(2) Intent</i>		
(a) Unauthorized use of personal identifying information. <u>Pen C §530.5(a)</u> —general intent.	250	3.30
(b) Knowing sale or transfer of personal identifying information to person about to commit further violation. <u>Pen C §530.5(d)(2)</u> —general intent.	250	3.30
(c) Fraudulent possession, sale, or transfer of personal identifying information. <u>Pen C §530.5(c)(2)-(3)</u> , (d)(1)—specific intent to defraud.	2041-2042	15.26, Included in 15.62, 15.63
<i>(3) Included offense</i>		
Unlawful possession of personal identifying information (<u>Pen C §530.5(c)(1)</u>) is lesser included offense of <u>Pen C §530.5(c)(2)-(3)</u> .	2041	16.540

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.102 47. Vandalism, Felony (Pen C §594(a), (b)(1))

§2.102 47. Vandalism, Felony (Pen C §594(a), (b)(1))

	CALCRIM	CALJIC
(1) <i>Elements of offense</i>	2901	14.95
(2) <i>General intent only</i>		
(3) <i>Included offense</i>		
Misdemeanor vandalism (<u>Pen C §594(a), (b)(2)</u>).	2900	16.320

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/ C. Miscellaneous Instructions/§2.103 1. Accomplices

C. Miscellaneous Instructions

§2.103 1. Accomplices

	CALCRIM	CALJIC
(a) Instruction required when accomplice witness is called by prosecution. (<u><i>People v Terry</i> (1970) 2 C3d 362, 398, 85 CR 409</u> , disapproved on other grounds in 15 C4th 312, 381), or when prosecution introduces accomplice's extrajudicial statements (see <u><i>People v Belton</i> (1979) 23 C3d 516, 523, 153 CR 195</u>).	334	3.10
(b) Instruction should be given sua sponte when defendant in testifying implicates codefendant while confessing own guilt. <i>People v Terry, supra</i> . <i>Note:</i> When defendant testifies in his or her own behalf and denies guilt while incriminating codefendant, it is <i>discretionary</i> whether to give accomplice instruction sua sponte. <i>People v Terry, supra</i> .	334	3.10
(c) Accomplice must be defined. <u>Pen C §1111</u> ; <u><i>People v Gordon</i> (1973) 10 C3d 460, 466, 110 CR 906</u> .	334	3.10, 3.14
(d) When evidence establishes that a witness for prosecution is accomplice as a matter of law, ordinarily jury must be so instructed (<u><i>People v Robinson</i> (1964) 61 C2d 373, 394, 38 CR 890</u>), except when accomplice is a codefendant who has made a judicial confession implicating the other defendants (<u><i>People v Hill</i> (1967) 66 C2d 536, 555, 58 CR 340</u>).	334	3.16
(e) Testimony of accomplice must be corroborated. <u>Pen C §1111</u> ; see <u><i>People v Verlinde</i> (2002) 100 CA4th 1146, 1157, 123 CR2d 322</u> . For purposes of <u>Pen C §1111</u> , "testimony" includes accomplice's extrajudicial statements. <i>People v Belton, supra</i> , 23 C3d at 524. But see <u><i>People v Jeffery</i> (1995) 37 CA4th 209, 218, 43 CR2d 526</u> ("testimony" includes only those extrajudicial statements used as substantive evidence of guilt that are made under suspect circumstances).	334	3.11
(f) Sufficiency of corroborative evidence.	334, 335	3.12
(g) A cautionary instruction must be given whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies; the instruction should refer only to testimony that tends to incriminate the defendant, and it should refer to viewing the testimony with caution, rather than with distrust. <u><i>People v Guiuan</i> (1998) 18 C4th 558, 569, 76 CR2d 239</u> .	Included in 334, 335	3.18
(h) When the court must instruct on accomplice testimony, it should not instruct with CALJIC 2.11.5 (unjoined perpetrators of same crime) or 2.27 (sufficiency of testimony of one witness); those instructions might be understood to conflict with the charge on accomplice testimony. <u><i>People v Williams</i> (1988) 45 C3d 1268, 1312, 248 CR 834</u> . See also <u><i>People v Hall</i> (1989) 208 CA3d 34, 46, 256 CR 149</u> (court erred in giving CALJIC 2.11.5 when alleged accomplice testified as witness).		
(i) There is no sua sponte duty to give an accomplice instruction in an incest case even when evidence establishes that the victim was willing. A child in an incest		

case is a victim of, not an accomplice in, the crime even if he or she participates willingly. *People v Tobias* (2001) 25 C4th 327, 329, 106 CR2d 80.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.104 2. Aiders and Abettors

§2.104 2. Aiders and Abettors

	CALCRIM	CALJIC
(a) Definitions. When any defendant is prosecuted as an aider and abettor, the terms "principals" and "aiding and abetting" must be defined. <u>People v Beeman (1984) 35 C3d 547, 199 CR 60</u> . CALJIC 3.01 correctly defines "aiding and abetting" even though it is written in the disjunctive (aiding, promoting, encouraging, or instigating the commission of a crime); it does not permit the jury to convict a defendant unless the jury finds that the defendant both aided and abetted. <u>People v Campbell (1994) 25 CA4th 402, 414, 30 CR2d 525</u> .	400-403	3.00-3.02
(b) Defining the crimes. A court has a sua sponte duty to identify and describe any target offense allegedly aided and abetted by the defendant when the prosecutor has elected to rely on the natural and probable consequences theory of accomplice liability and the court has determined that the evidence will support instructions on that theory. <u>People v Prettyman (1996) 14 C4th 248, 266-270, 58 CR2d 827</u> . There is a sua sponte duty to instruct on a lesser included offense when the evidence supports a conclusion that the lesser offense is a natural consequence of the act that is aided and abetted. <u>People v Woods (1992) 8 CA4th 1570, 1589, 11 CR2d 231</u> . The sua sponte duty to instruct on target offenses in the context of the natural consequences of aiding and abetting arises only when the prosecution relies on the "natural and probable consequences" theory of accomplice liability, and the court finds that the evidence supports instructions on that theory. <u>People v Gonzalez (2002) 99 CA4th 475, 484, 121 CR2d 279</u> . In this context, the court need not identify all possible target offenses supported by the evidence, but only those identified by the prosecution. <u>People v Huynh (2002) 99 CA4th 662, 677, 121 CR2d 340</u> .	402, 403	3.02
(c) Withdrawal from participation. If the defendant produces evidence of withdrawal, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant did not effectively withdraw. The court has a sua sponte duty to instruct on the prosecution's burden of proof. <u>People v Fiu (2008) 165 CA4th 360, 382-386, 81 CR3d 32</u> .	401	3.03
(d) Aiding and abetting a robbery. Some courts have held that to be convicted on an aiding and abetting theory, the defendant must have formed the requisite intent and given aid before the offense is completed. <u>People v Brady (1987) 190 CA3d 124, 235 CR 248</u> . See also <u>People v Forte (1988) 204 CA3d 1317, 251 CR 855</u> . However, in <u>People v Cooper (1991) 53 C3d 1158, 282 CR 450</u> , the Supreme Court held that for robbery, the requisite intent for aider and abettor liability may be formed at any time until the carrying away of the stolen property to a place of temporary safety. Because the commission of a robbery, for the purposes of determining aider and abettor liability, continues until the cessation of the final act of asportation of the stolen goods, a getaway driver who has no prior knowledge of the	1601, 1603	9.40.1

robbery may be found liable for aiding and abetting although he had not formed the intent to aid before carrying away the stolen property. The court cautioned judges not to use former CALJIC 9.44 (now CALJIC 8.21.1) for aider and abettor liability.

1702

14.54

(e) Aiding and abetting a burglary. In *People v Montoya* (1994) 7 CA4th 1027, 1044, 31 CR2d 128, the California Supreme Court held that a person who happens on the scene after the initial entry, becomes aware of the perpetrator's unlawful purpose, and assists the perpetrator, aids the commission of the crime as certainly as if that person's knowledge had preceded the initial entry. The *Montoya* court disapproved *People v Brady, supra*, and *People v Forte, supra*, to the extent that these cases held that the requisite intent for aider and abettor liability must be formed before or during entry by the perpetrator.

(f) Conspiracy not included. When the defendant is prosecuted on an aiding and abetting theory and not for conspiracy, the court is not required to instruct, either sua sponte or on request, using CALJIC 6.16, which provides that a coconspirator is not criminally liable for a conspirator's act that is an independent product of his or her own mind and is outside the common design and not a furtherance of that design; the defense in CALJIC 6.16 applies to conspiracy only and not to aiding and abetting. *People v Brigham* (1989) 216 CA3d 1039, 265 CR 486.

(g) Aiding and abetting by failing to act. A mother who remained present when her daughter was molested by the mother's boyfriend could be said to have aided and abetted the boyfriend's crime by failing to act when she had a duty to do so. *People v Swanson-Birabent* (2003) 114 CA4th 733, 744-746, 7 CR3d 744.

(h) Aiding and abetting a murder. A person may be convicted of aiding and abetting a murder based on acts committed after the fatal blow has been struck but before the victim died. *People v Celis* (2006) 141 CA4th 466, 471-474, 46 CR3d 139.

(See also §2.110(e), "Proof by Preponderance of the Evidence.")

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.105 3. Admissions and Confessions (Oral)

§2.105 3. Admissions and Confessions (Oral)

	CALCRIM	CALJIC
(a) Instruction that evidence of oral admission is to be viewed with caution. <u>People v Anderson (1974) 43 CA3d 94, 101, 117 CR 507</u> . CALJIC 2.71 should be given sua sponte when there is evidence of a defendant's oral admission. <u>People v Lopez (2005) 129 CA4th 1508, 1529, 29 CR3d 586</u> . <i>Note:</i> A trial court is not required to instruct the jury that a defendant's out-of-court admission should be viewed with caution in a prosecution for making a criminal threat (<u>Pen C §422</u>) where the defendant's threatening words constituted the crime itself. <u>People v Zichko (2004) 118 CA4th 1055, 1058-1060, 13 CR3d 509</u> .	356, 357	2.70-2.71
(b) The court has no sua sponte duty to give CALJIC 2.71.5 (adoptive admissions). However, the court must do so on the request of the defendant. <u>People v Carter (2003) 30 C4th 1166, 1197-1198, 135 CR2d 553</u> . If CALJIC 2.71.5 is given, CALJIC 2.72 must also be given.	357, 359	2.71.5, 2.72
(c) Instruction that oral statement of intent, plan, motive, or design is to be received with caution. <u>People v Beagle (1972) 6 C3d 441, 455, 99 CR 313</u> .	358	2.71.7
(d) Corpus delicti must be proved by evidence independent of any admission or confession. <i>People v Beagle, supra</i> .	359	2.72
(e) No sua sponte requirement to give a cautionary instruction on an admission at the penalty phase of a death penalty trial. <u>People v Livaditis (1992) 2 C4th 759, 784, 9 CR2d 72</u> .		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.106 4. Alibi

§2.106 4. Alibi

No duty to instruct sua sponte on alibi. *People v Freeman*
(1978) 22 C3d 434, 437-438, 149 CR 396.

CALCRIM
3400

CALJIC
4.50-4.51

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.107 5. Burden of Proof

§2.107 5. Burden of Proof

	CALCRIM	CALJIC
The court has a duty to instruct on applicable standard. <u>Evid C §502.</u>		
Burden of proof to prove guilt beyond a reasonable doubt must be given sua sponte. See <u>§2.4.</u>	103, 220, 221	2.90
Special circumstance trial. Counterpart of CALJIC 2.90 to be used in special circumstance trial on first degree murder.	700-702	8.80 or 8.80.1

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.108 a. Reasonable Doubt--When Defendant Has Burden

§2.108 a. Reasonable Doubt—When Defendant Has Burden

	CALCRIM	CALJIC
(a) If there is an issue of defendant's consciousness, defendant has burden to raise reasonable doubt thereof. <u>Evid C §501; People v Babbitt (1988) 45 C3d 660, 690, 248 CR 69.</u>	3425	4.30-4.31
(b) Defendant has burden to raise reasonable doubt of prescription as defense to possession or being under the influence of narcotic. <u>Evid C §501.</u>	2304, 2400	12.30.1- 12.30.2, 16.061
(c) Defendant has burden to raise reasonable doubt as to guilt of driving a motor vehicle without a driver's license. <u>Evid C §501; People v Gosinsky (1921) 52 CA 62, 198 P 40.</u>	2221	16.630- 16.631
(d) Defendant has burden to raise reasonable doubt that a securities offering was exempt from registration in a prosecution under the state securities laws. <u>People v Figueroa (1986) 41 C3d 714, 719, 224 CR 719.</u>		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.109 b. Reasonable Doubt--When Prosecution Has Burden

§2.109 b. Reasonable Doubt—When Prosecution Has Burden

	CALCRIM	CALJIC
(a) In <u>Pen C §1026.5</u> proceedings to extend commitment of a defendant found not guilty by reason of insanity, the prosecution has the burden of proving beyond a reasonable doubt that the defendant has a mental disease, defect, or disorder and, as a result, the defendant poses a substantial danger of physical harm to others and has difficulty controlling his/her dangerous behavior. <u>People v Sudar (2007) 158 CA4th 655, 663, 70 CR3d 190.</u>	3453	4.17
(b) Prosecution has burden of proving beyond a reasonable doubt that defendant is a sexually violent predator in commitment proceedings under <u>Welf & I C §§6600-6604.</u>	3454	4.19
(c) When the prosecution charges an act or series of acts within a specified period and has not elected to rely on any specific date or dates, it must prove beyond a reasonable doubt the commission within the period alleged of either a specific act or acts constituting the crime or all of the acts described by the alleged victim. <u>People v Jones (1990) 51 C3d 294, 270 CR 611; People v Madden (1981) 116 CA3d 212, 171 CR 897.</u> Giving a modified version of CALJIC 4.71.5 that allowed the jury to convict if it unanimously found that the defendant had committed all acts within the time frame alleged required reversal when the jury returned a mixed verdict (guilty on one count out of ten) and there were different kinds of molestation on different dates. <u>People v Smith (2005) 132 CA4th 1537, 1545-1547, 34 CR3d 472.</u>	3410	4.71.5
(d) When defendant properly presents evidence in a trial for murder that the homicide was justifiable or excusable, the prosecution has the burden of proving beyond a reasonable doubt that it was not. <u>People v Banks (1976) 67 CA3d 379, 137 CR 652.</u> However, if the defense does not rely on excuse or justification (has not met a minimal burden of producing evidence supportive of excuse or justification), the judge need not instruct on these issues. <u>People v Frye (1992) 7 CA4th 1148, 1158, 1159, 10 CR2d 217.</u>	505	5.15
(e) When defendant charged with murder presents evidence sufficient to raise a reasonable doubt as to malice, either of heat of passion or sudden quarrel, or actual but unreasonable belief in necessity of self-defense, prosecution must prove its absence beyond a reasonable doubt. <u>Mullaney v Wilbur (1975) 421 US 684, 95 S Ct 1881, 44 L Ed 2d 508.</u>	570, 571	8.50
(f) When defendant presents defense of self-defense to a charge of assault, the prosecution must prove beyond a reasonable doubt that it was not in lawful self-defense. <u>People v Adrian (1982) 135 CA3d 335, 185 CR 506.</u>	915	9.00
(g) When defendant is charged with willfully resisting a lawful arrest by a police officer, the prosecution must prove beyond a reasonable doubt that the police officer was making a lawful arrest. See <u>People v Castain (1981) 122 CA3d 138, 145, 175 CR 651.</u>	2672	16.110
(h) Prosecution has burden of proving beyond a reasonable doubt a fact alleged for the purpose of:		

- Imposing a sentence enhancement or rendering defendant ineligible for probation; or 3115-3163 17.15-17.24.5
- Proving a felony conviction as an element of the present crime. 3100-3103, 3260 17.25-17.26

Note: A court has a sua sponte obligation to instruct on all the elements of an enhancement, including all the elements of the prior conviction that formed the basis for an enhancement. People v Wims (1995) 10 C4th 293, 303, 41 CR2d 241. Accordingly, a court cannot take judicial notice of a prior conviction because that negates the instruction (CALJIC 2.90) that the jury must determine the fact of the prior. People v Barre (1992) 11 CA4th 961, 966, 14 CR2d 307.

The court, not the jury, must determine whether a prior conviction arose from "charges brought and tried separately." People v Wiley (1995) 9 C4th 580, 592, 38 CR2d 347.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.110 c. Proof by Preponderance of the Evidence

§2.110 c. Proof by Preponderance of the Evidence

	CALCRIM	CALJIC
(a) When defendant requests CALJIC 2.50 on the limited purpose of proof of uncharged offenses, these crimes must be proved by a preponderance of the evidence. When defendant requests CALJIC 2.50.01 on the limited purpose of proof of uncharged sex offenses, or CALJIC 2.50.02 on the limited purpose of proof of uncharged domestic violence offenses, or CALJIC 2.50.03 on the limited purpose of proof of uncharged elder abuse offenses, or CALJIC 2.50.04 on the limited purpose of proof of uncharged child abuse offenses, the offenses must be proved by a preponderance of the evidence.	375, 852, 853	2.50.1- 2.50.2
(b) Defendant has burden of proving defense of insanity by preponderance of evidence. <u>Evid C §522</u> .	3428, 3450	4.00
(c) A defendant who seeks to prove present mental incompetence has burden of proof by preponderance of evidence. <u>Evid C §522; People v Skeirik (1991) 229 CA3d 444, 459-460, 280 CR 175</u> (when only prosecution seeks incompetence, burden is on prosecution; when court assumes burden of producing evidence of incompetence, neither side has burden of proof).	3451	4.10
(d) Defendant has burden of proving entrapment by preponderance of evidence. <u>People v Moran (1970) 1 C3d 755, 760, 83 CR 411</u> .	3408	4.60
(e) Defendant has burden of proving by a preponderance of evidence that a corroborating witness was an accomplice. <u>People v Tewksbury (1976) 15 C3d 953, 962, 127 CR 135</u> .	334, 335	3.13, 3.19
(f) In restoration of sanity proceedings, defendant has burden of proving by a preponderance of the evidence that he or she is not a danger to the health and safety of him or herself or others. <u>Pen C §1026.2(k); In re Franklin (1972) 7 C3d 126, 147, 101 CR 553</u> . See also <u>People v Williams (1988) 198 CA3d 1476, 244 CR 429</u> (trial court erred in refusing defendant's instruction that jury consider whether defendant is dangerous in his present medicated condition and whether he will continue to take medication as prescribed in unsupervised environment).	3452	4.15
(g) Defendant has burden of proving defense of necessity by preponderance of evidence. <u>People v Slack (1989) 210 CA3d 937, 258 CR 702</u> .	3403, 2764	4.43-4.44
(h) Defendant has burden of proving by a preponderance of the evidence the defense that he or she no longer represents substantial danger of inflicting physical harm on others in present medicated condition and will continue to take medication as prescribed in an unsupervised environment. <u>People v Bolden (1990) 217 CA3d 1591, 266 CR 724</u> .	3453	4.17.1
(i) Defendant has burden of proving by a preponderance of the evidence the defense of lawful possession for the purpose of disposal in a prosecution for unlawful possession of a controlled substance.	2305	12.06

§2.111 6. Burglary

	CALCRIM	CALJIC
(a) Court should define felony (<u>Pen C §17</u>) and instruct on which acts amounting to felonies that, from the evidence, defendant may have intended to commit on entry. <u>People v Faila (1966) 64 C2d 560, 51 CR 103.</u>	1700	14.50
(b) Degrees of burglary. <u>Pen C §1157.</u>	1701	14.51
(c) Definition of inhabited dwelling.	1701	14.52
<i>Note:</i> The occupant of a building need not have a possessory right in the building for the property to be inhabited. <u>People v Rojas (1995) 31 CA4th 611, 614, 37 CR2d 361.</u>		
(d) Unexplained possession of recently stolen property will not alone support conviction of burglary. The court does not have a sua sponte duty to give CALJIC 2.15. <u>People v Najera (2008) 43 C4th 1132, 1140-1141, 77 CR3d 605.</u> The fact that CALJIC 2.15 refers to needing "slight corroborating evidence" and CALCRIM 376 refers to needing "slight supporting evidence" does not render the CALCRIM instruction invalid. <u>People v Solorzano (2007) 153 CA4th 1026, 1036, 63 CR3d 659.</u> CALJIC 2.15 applies to theft crimes only. If the defendant is charged with both theft and nontheft offenses, the court must limit the instruction to the theft offenses. <u>People v Prieto (2003) 30 C4th 226, 248-249, 133 CR2d 18.</u>	376	2.15
(e) Definition of "deadly weapon." <u>People v Harrison (1970) 5 CA3d 602, 85 CR 302.</u>	2503	12.42
(f) Aiding and abetting a burglary.	1702	14.54

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.112 7. Cautionary Instructions

§2.112 7. Cautionary Instructions

	CALCRIM	CALJIC
(a) Accomplices. See <u>§2.103</u> .		
(b) Oral admissions and confessions. See <u>§2.105</u> .		
(c) Juror notetaking. Although it did not decide whether it is required sua sponte, the court stated that the better practice is to give a cautionary instruction on juror notetaking in <u>People v Whitt (1984) 36 C3d 724, 746, 205 CR 810</u> . The court set forth the content of such an instruction.	102, 202	1.05
(d) Testimony of immunized witness. The trial court is <i>not</i> required to give a cautionary instruction sua sponte that the testimony of an immunized witness should be viewed with distrust. <u>People v Leach (1985) 41 C3d 92, 106, 221 CR 826</u> . Nor is the court required to give such an instruction on request. <u>People v Hunter (1989) 49 C3d 957, 977, 264 CR 367</u> .		
(e) Testimony of informant. The trial court is <i>not</i> required to give a cautionary instruction <i>sua sponte</i> that the testimony of an informant should be viewed with distrust. <u>People v Hovey (1988) 44 C3d 543, 565, 244 CR 121</u> . The court must give a cautionary instruction on request regarding an in-custody informant. <u>Pen C §1127a</u> . See CALJIC 3.20.		
(f) Expert testimony relating to child sexual abuse accommodation syndrome or rape trauma syndrome. The court must give an appropriate limiting instruction when such evidence is admitted. <u>People v Bowker (1988) 203 CA3d 385, 394, 249 CR 886</u> .	1192, 1193	10.64
(g) Witness in custody or in physical restraints.	204, 337	2.29

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.113 8. Circumstantial Evidence

§2.113 8. Circumstantial Evidence

	CALCRIM	CALJIC
Instruction must be given sua sponte if case rests entirely or substantially on circumstantial evidence. See <u>§2.4</u> .	224	2.01
(a) Counterpart of CALJIC 2.01 was made applicable to special circumstance trial on first degree murder.	704	8.83
(b) Specific intent is essential element of the crime and proof of such intent rests entirely or substantially on circumstantial evidence. <u>People v Yrigoyen (1955) 45 C2d 46, 286 P2d 1</u> . See also <u>People v Wiley (1976) 18 C3d 162, 174, 133 CR 135</u> . Do not give if only circumstantial evidence is extrajudicial admission (<u>People v Gould (1960) 54 C2d 621, 629, 7 CR 273</u> , overruled on other grounds in 12 C4th 252, 257), or if only inference to be drawn from circumstantial evidence points to the existence of a requisite mental state (<u>People v Morrison (1979) 92 CA3d 787, 155 CR 152</u>). This instruction must be preceded by CALJIC 3.31.	225, 251	2.02, 3.31
(c) Counterpart of CALJIC 2.02 was made applicable to special circumstance trial on first degree murder.	705	8.83.1

CALCRIM	CALJIC
3530	17.32

If the judge comments on the evidence, the judge must make it clear that his or her views are not binding but advisory only. *People v Friend* (1958) 50 C2d 570, 327 P2d 97. In *People v Cook* (1983) 33 C3d 400, 189 CR 159, the Supreme Court held that judicial comment made before a deadlocked jury is erroneous, and that the trial court may not directly express its opinion on the ultimate factual issue of guilt or innocence at any stage of the proceedings.

However, in *People v Rodriguez* (1986) 42 C3d 730, 765, 230 CR 66Z, the court overruled *Cook*'s absolute prohibition against judicial comment when the jury is deadlocked, and held that such comment is allowed if it is accurate, temperate, nonargumentative, and scrupulously fair. The comment must not withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate fact-finding power.

If the judge intends to comment on evidence, the better practice would be to afford counsel advance notice of this intent, even though such notice is not legally required.

People v Proctor (1992) 4 C4th 499, 15 CR2d 340.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.115 10. Compassionate Marijuana Use

§2.115 10. Compassionate Marijuana Use

Defense of compassionate use of marijuana. Health & S C §11362.5.

CALCRIM	CALJIC
2360-2363, 2370, 2375- 2377	12.24.1

(a) *Burden of proof.* Defendant has the burden to raise a reasonable doubt as to the facts underlying the defense. People v Frazier (2005) 128 CA4th 807, 816, 27 CR3d 336; People v Mower (2002) 28 C4th 457, 483, 122 CR2d 326.

(b) *Transportation charge.* The Medical Marijuana Program (Health & S C §§11362.7 et seq) provides an affirmative defense to the crime of transporting marijuana by individuals entitled to the protections of the Compassionate Use Act. People v Wright (2006) 40 C4th 81, 89-92, 51 CR3d 80.

(c) *Primary caregiver.* A defendant asserting primary caregiver status must prove at a minimum that he or she (1) consistently provided caregiving, (2) independent of any assistance in taking medical marijuana, (3) at or before the time he or she assumed responsibility for assisting with medical marijuana. People v Mentch (2008) 45 C4th 274, 283-287, 85 CR3d 480.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.116 11.
Consciousness of Guilt

§2.116 11. Consciousness of Guilt

	CALCRIM	CALJIC
(a) Defendant's false or contradictory statements may be considered as a circumstance tending to prove a consciousness of guilt but are not themselves sufficient to prove guilt. <u>People v Atwood</u> (1963) 223 CA2d 316, 332, 35 CR 831. <i>Note:</i> This instruction should not be given when defendant's testimony is consistent with his or her pretrial statements. <u>People v Green</u> (1980) 27 C3d 1, 40, 164 CR 1. This instruction should also not be given unless it can be inferred that defendant made a false statement to deflect suspicion from himself, rather than to protect someone else. <u>People v Rankin</u> (1992) 9 CA4th 430, 436, 11 CR2d 735.	362	2.03
(b) Flight after crime may be considered as tending to show a consciousness of guilt. <u>Pen C §1127c</u> ; <u>People v Williams</u> (1960) 179 CA2d 487, 3 CR 782.	372	2.52

§2.117 12. Conspiracy

	CALCRIM	CALJIC
(a) For conviction of conspiracy requiring overt act, one or more overt acts must be alleged and proved. <u>Pen C §182(b)</u> .	415	6.10
(b) Jury must determine whether each defendant was a conspirator. <u>People v Fratianno (1955) 132 CA2d 610, 629, 282 P2d 1002</u> . See also <u>People v Fulton (1984) 155 CA3d 91, 101, 201 CR 879</u> .	415	6.22
(c) A conspirator cannot be held liable for a substantive offense committed pursuant to the conspiracy when the offense was committed before that conspirator joined the conspiracy. <u>People v Marks (1988) 45 C3d 1335, 1345, 248 CR 874</u> .	419	6.19
(d) The feigned participation of a false coconspirator or government agent in a conspiracy of more than two people does not negate criminal liability for conspiracy, as long as there are at least two other coconspirators who actually agreed to the commission of the subject crime, specifically intended that the crime be committed, and committed at least one overt act to accomplish the object of the conspiracy. <u>People v Liu (1996) 46 CA4th 1119, 1131, 54 CR2d 578</u> .		
(e) In a conspiracy prosecution, the trial court has a sua sponte obligation to instruct on lesser included target offenses if there is evidence from which a jury could find a conspiracy to commit a lesser offense. The court should examine the description of the conspiracy agreement within the accusatory pleading, and not the description of the overt acts, to determine whether a lesser offense was necessarily the target of the conspiracy. <u>People v Fenenbock (1996) 46 CA4th 1688, 1707, 54 CR2d 608</u> .		
(f) The court has a sua sponte duty to instruct with CALCRIM 416 when there is evidence of an uncharged conspiracy. <u>People v Williams (2008) 161 CA4th 705, 709, 74 CR3d 405</u> .	416	
(g) A conspiracy does not terminate as a matter of law when the object of the conspiracy becomes impossible to achieve. <u>U.S. v Jimenez Recio (2003) 537 US 270, 123 S Ct 819, 154 L Ed 2d 744, 749-751</u> (government frustrated drug conspiracy's objective by seizing drugs that its members agreed to distribute).		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.118 13. Controlled Substances

§2.118 13. Controlled Substances

	CALCRIM	CALJIC
(a) Momentary possession of a drug for the sole purpose of disposal is not unlawful. <u><i>People v Mijares</i> (1971) 6 C3d 415, 99 CR 139.</u> <u>Note: In <i>People v Martin</i> (2001) 25 C4th 1180, 1185-1192, 108 CR2d 599,</u> the California Supreme Court revisited the momentary possession defense and overruled <u><i>People v Cole</i> (1988) 202 CA3d 1439, 249 CR 601,</u> which had expanded the holding of <i>Mijares</i> to include any possession solely for the purpose of disposal. The Court held that momentary possession is an essential element of the defense and not simply a factor in the jury's determination of whether the possession was unlawful.	2305	12.06
(b) When no delivery has been made, the court must instruct that a specific intent to deliver a substance in lieu of the controlled substance proffered for sale is required for a violation of <u>Health & S C §11355.</u> <u><i>People v McDaniel</i> (1979) 24 C3d 661, 156 CR 865.</u> The court should appropriately modify CALJIC 12.04.	2315, 2316	See 12.04

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.119 14. Corpus Delicti

§2.119 14. Corpus Delicti

Corpus delicti must be proved by evidence independent of any admission or confession. *People v Beagle* (1972) 6 C3d 441, 455, 99 CR 313.

CALCRIM
359

CALJIC
2.72

In terms of corpus delicti, there is no difference between an instruction that advises that there must be evidence concerning each element of the crime and one which advises that there must be evidence that a crime was committed. *People v Reyes* (2007) 151 CA4th 1491, 1498, 60 CR3d 377.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.120 15. Corroborating Evidence

§2.120 15. Corroborating Evidence

	CALCRIM	CALJIC
(a) Accomplices. See <u>§2.103</u> .		
(b) False pretense. See <u>§2.128</u> .		
(c) Perjury. See <u>§2.143</u> .		
(d) Solicitation. See <u>§2.150</u> .		
(e) Dogtracking evidence used to prove defendant's identity. <u>People v Gonzales (1990) 218 CA3d 403, 267 CR 138</u> .	374	
(f) Single witness testimony. A jury in a sex offense case that is given CALJIC 2.27, permitting finding of fact to be based on single witness testimony once evidence is carefully reviewed, may also be instructed with CALJIC 10.60 (it is not essential to a conviction of rape that testimony of complaining witness be corroborated by other evidence). <u>People v Gammage (1992) 2 C4th 693, 702, 7 CR2d 541</u> .	301	2.27

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.121 16. Death Penalty--Special Circumstances

§2.121 16. Death Penalty—Special Circumstances

	CALCRIM	CALJIC
(1) <i>Special circumstance</i> —introduction.		
(a) When murder committed before June 6, 1990.	700, 701	8.80
(b) When murder committed on or after June 6, 1990.	700, 702	8.80.1
<i>Note:</i> The court has no sua sponte duty to define reckless indifference to life if the prosecution presents that theory to the jury. <u>People v Estrada</u> (1995) 11 C4th 568, 578, 46 CR2d 586.		
(2) <i>Elements of special circumstance charged</i>		
(a) Murder for financial gain.	720	8.81.1
(b) Multiple murder convictions.	721	8.81.3
(c) Murder by destructive device, bomb, or explosive.	722	8.81.4
(d) Murder to prevent arrest or perfect escape.	723	8.81.5
(e) Murder of peace officer, federal officer or agent, or firefighter.	724	8.81.7
(f) Murder of witness to crime.	725	8.81.10
(g) Murder of judge, prosecutor, or federal official.	726	8.81.11
(h) Murder while lying in wait.		
(i) When murder committed before March 8, 2000.	727	8.81.15
(ii) When murder committed on or after March 8, 2000.	728	8.81.15.1
(i) Murder because of race, religion, nationality, etc.	729, 1354	8.81.16
(j) Murder in commission of one of specified crimes.	703, 730	8.81.17
(k) Murder in commission of kidnapping/arson with intent to kill (to be used for murders committed on or after March 8, 2000).	731, 732	8.81.17.1
(l) Murder involving infliction of torture. (Element number 3 of instruction concerning the defendant's actual infliction of extreme pain and suffering is to be omitted for crimes committed on or after June 6, 1990.)	733	8.81.18
(m) Murder by administration of poison.	734	8.81.19
(n) Murder of juror.	726	8.81.20
(o) Murder by means of an intentional discharge of a firearm from a motor vehicle.	735	8.81.21
(p) Murder by active street gang member.	736	8.81.22
(q) Murder with prior conviction of murder.	751	8.82
(3) <i>Definition</i> —Define "performance of his duties" if special circumstance charged was peace officer victim.	724	8.81.8
(4) <i>Sufficiency of circumstantial evidence generally</i>	704	8.83
(5) <i>Sufficiency of circumstantial evidence to prove required mental state</i>	705	8.83.1
(6) <i>Jury prohibited from considering penalty</i>	706	8.83.2
(7) <i>Requirement that accomplice's testimony be corroborated</i> —special circumstance trial.	707, 708	8.83.3

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.122 17. Defenses

§2.122 17. Defenses

See specific headings for cases requiring instructions on particular defenses (*e.g.*, entrapment). This list does not include all possible defenses.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.123 18. Definition of Terms

§2.123 18. Definition of Terms

	CALCRIM	CALJIC
<i>Note:</i> General rule is that when terms have no technical meaning peculiar to the law, but are commonly understood by those familiar with the English language, instructions as to their meaning are not required. <u>People v Bland</u> (2002) 28 C4th 313, 334, 121 CR2d 546.		
(a) "Accomplice." <u>People v Gordon</u> (1973) 10 C3d 460, 466, 110 CR 906.	334	3.10
(b) "Cohabiting." See <u>People v Moore</u> (1996) 44 CA4th 1323, 52 CR2d 256; <u>People v Holifield</u> (1988) 205 CA3d 993, 1001, 252 CR 729.	840-841	9.35-9.35.01
(c) "Consent."		
(i) Generally.		1.23
(ii) Extortion.	1830, 1831	14.74
(iii) Rape, sodomy, sexual penetration, or oral copulation.	1000, 1015, 1030	1.23.1
(iv) Kidnapping. <u>People v Donell</u> (1973) 32 CA3d 613, 617, 108 CR 232.	1203, 1204, 1215	9.56
<i>Note:</i> CALJIC 1.23 should not be given when crime is joy-riding.		
(d) "Conspiracy." If hearsay admitted under <u>Evid C §1223</u> . <u>People v Cabral</u> (1975) 51 CA3d 707, 124 CR 418.	415, 416	6.10-6.10.5
(e) "Corruptly."	2600, 2601, 2603, 2610-2612	7.00.5
(f) "Criminal or gross negligence," when CALJIC 4.45 is given on the defense of accident or misfortune. <u>People v Thurmond</u> (1985) 175 CA3d 865, 221 CR 292.	253, 582	3.36
(g) "Deadly weapon." <u>People v Caberera</u> (1930) 104 CA 414, 286 P 176. However, "deadly weapon" need not be defined in a <u>Pen C §417.8</u> case (drawing or exhibiting deadly weapon with intent to resist or prevent arrest by peace officer) when the instrument used was a knife with an open blade, which lay people could readily determine to be deadly. <u>People v Pruett</u> (1997) 57 CA4th 77, 86, 66 CR2d 750.	2503	12.42
(h) "Device designed to accelerate a fire" in <u>Pen C §451.1(a)(5)</u> means a piece of equipment or a mechanism intended, or devised, to hasten or increase the progress of the fire. <u>People v Andrade</u> (2000) 85 CA4th 579, 587, 102 CR2d 254 (failure to instruct on the definition was an error, but error was harmless).	1551	
(i) "Dirk or dagger." A closed switchblade is a dirk or dagger. <u>People v Plumlee</u> (2008) 166 CA4th 935, 941, 83 CR3d 172.	2501	12.41
(j) "Distinctively marked" police vehicle. <u>People v Hudson</u> (2006) 38 C4th 1002, 1012-1013, 44 CR3d 632.	2180-2182	12.87
(k) "Driver" and "Driving."	2241	1.28
(l) "Firearm" and "armed with firearm." <u>People v Smith</u> (1992) 9 CA4th 196, 204, 11 CR2d 645.	3115, 3131, 3132	17.16.1
(m) "Firefighter."	602, 860, 861, 900	1.27
(n) "Knowingly." Use CALJIC 12.70 for <u>Veh C §§20001-20004</u> offenses. Do not use CALJIC 1.21 in		1.21

Medi-Cal fraud cases under <u>Welf & I C §14107</u> . <u>People v Gregory</u> (1990) 217 CA3d 665, 266 CR 527.		
(o) "Malice" and "maliciously." Use CALJIC 8.11 in murder trial.		1.22
(p) "Materiality," when crime is perjury. <u>People v Feinberg</u> (1997) 51 CA4th 1566, 1575, 60 CR2d 323.	2640, 2641	Included in 7.20, 7.21
(q) "Opening" and "maintaining" a place for selling or distributing narcotics when <u>Health & S C §11366</u> is charged. <u>People v Shoals</u> (1992) 8 CA4th 475, 490, 10 CR2d 296.	See 2440	
(r) "Peace officer." <u>People v Lara</u> (1994) 30 CA4th 658, 668, 35 CR2d 886.	524, 602, 860-861, 900, 945, 981, 2182, 2670	1.26
(s) "Possession." When crime is possession of controlled substance, use CALJIC 12.00.	1800, 2500	1.24
(t) "Prevented from resisting" defined for rape, sodomy, forcible sexual penetration, and oral copulation.	Included in instructions on crime elements	1.23.2
(u) "Principals" and "aiding and abetting." <u>People v Beeman</u> (1984) 35 C3d 547, 199 CR 60.	400, 401	3.00-3.01
(v) "Proximate cause." See <u>§2.145</u> .		
(w) "Reasonable doubt." <u>People v Soldavini</u> (1941) 45 CA2d 460, 114 P2d 415. See California Jury Instructions—Criminal, Appendix B (2009) (CALJIC).	103, 220-221	2.90
(x) "Sexual abuse, sexual assault, sexual exploitation." <u>Pen C §11165.1</u> .	2980	16.163
(y) "Speeding," when it is the act forbidden by law in felony DUI charge. <u>People v Ellis</u> (1999) 69 CA4th 1334, 82 CR2d 409. See <u>Veh C §22350</u> .	595	
(z) "Traumatic condition." <u>People v Burns</u> (1948) 88 CA2d 867, 893, 200 P2d 134.	822, 840	
(aa) "Willfully." <u>People v Peabody</u> (1975) 46 CA3d 43, 49, 119 CR 780. Should not be given for specific intent crimes. Willful instruction is incomplete for purposes of violation of <u>Pen C §290</u> (sex offender registration) because it fails to require actual knowledge of the registration requirement. <u>People v Garcia</u> (2001) 25 C4th 744, 754, 107 CR2d 355; <u>People v Jackson</u> (2003) 109 CA4th 1625, 1634, 1 CR3d 253.	Included in instructions on crime elements	1.20

CALCRIM	CALJIC
3402	4.40

(a) Must be given if there is evidence to support the defense of duress. See *People v Heath* (1989) 207 CA3d 892, 255 CR 120 (court extensively discusses differences between duress defense and necessity defense).

(b) Duress is not a defense to murder; nor can it reduce murder to manslaughter. *People v Anderson* (2002) 28 C4th 767, 122 CR2d 587. But duress can provide a defense to murder on a felony-murder theory by negating the underlying felony. *People v Wilson* (2005) 36 C4th 309, 331, 30 CR3d 513.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.125 20. Entrapment

§2.125 20. Entrapment

Must be given if there is evidence to support the defense of entrapment. *People v Barraza* (1979) 23 C3d 675, 686, 153 CR 459. But see *People v Martinez* (1984) 157 CA3d 660, 203 CR 833, which holds that CALJIC 4.60-4.61.5 do not accurately reflect the decision in *Barraza*. *People v Kelley* (1984) 158 CA3d 1085, 205 CR 283, holds that they do. *People v Slatton* (1985) 173 CA3d 487, 219 CR 70, *People v Arthurlee* (1985) 168 CA3d 246, 214 CR 5, and *People v Lee* (1990) 219 CA3d 829, 268 CR 595, agree with *Kelley* and disagree with *Martinez*.
(See also §§2.107-2.110, "Burden of Proof.")

CALCRIM

3408

CALJIC

4.60-4.61,
4.61.5

	CALCRIM	CALJIC
(a) Limited purpose of evidence of defendant's statements to a physician—for purpose of diagnosis. <u>People v McQuiston</u> (1970) 12 CA3d 584, 590, 90 CR 687.	360	2.10
(b) Limited purpose of proof of prior felony convictions.	316	2.23
(c) Evidence admitted as to one party or for one purpose. Mandatory only on request. <u>Evid C §355</u> . A court has no sua sponte duty to give a limiting instruction with respect to evidence of prior domestic violence admitted under <u>Evid C §1109</u> . <u>People v Jennings</u> (2000) 81 CA4th 1301, 1316, 97 CR2d 727.	303-305	2.07-2.09
(d) Limited purpose of proof of uncharged offenses <i>not</i> required sua sponte. <u>People v Collie</u> (1981) 30 C3d 43, 63, 177 CR 458. However, when court gives such an instruction, it must accurately instruct on the precise issues to which the evidence is limited. <u>People v Key</u> (1984) 153 CA3d 888, 898, 203 CR 144. See also <u>People v Willoughby</u> (1985) 164 CA3d 1054, 1067, 210 CR 880, in which the court suggests that in an extraordinary case, in which evidence of past offenses plays such a dominant part against the defendant that it would be highly prejudicial without a limiting instruction such as CALJIC 2.50, the court should give the instruction sua sponte.	375	2.50
(e) Limited purpose of proof of uncharged sex offenses. <u>Evid C §1108</u> . It is error to leave out the part of CALJIC 2.50.01 that advises the jury that commission of prior sexual offenses is not by itself sufficient to prove beyond a reasonable doubt that defendant committed the charged crimes. <u>People v Frazier</u> (2001) 89 CA4th 30, 35, 107 CR2d 100.	1191	2.50.01
(f) Limited purpose of proof of uncharged domestic violence offenses. <u>Evid C §1109(a)(1)</u> . Instruction may not be modified to include reference to charged domestic violence offenses. <u>People v Quintanilla</u> (2005) 132 CA4th 572, 582-583, 33 CR3d 782.	852	2.50.02
(g) Limited purpose of proof of uncharged elder abuse offenses. <u>Evid C §1109(a)(2)</u> .	853	2.50.03
(h) Limited purpose of proof of uncharged <u>Pen C §273d</u> child abuse offenses. <u>Evid C §1109(a)(3)</u> , (d)(2).		2.50.04

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.127 22. Failure To Stop After Vehicle Accident

§2.127 22. Failure To Stop After Vehicle Accident

Jury must agree on violation of at least one of duties required of motorist in prosecution under Veh C §20001.
People v Scofield (1928) 203 C 703, 710, 265 P 914.

CALCRIM
2140-2142

CALJIC
12.70

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.128 23. False Pretense, Proof of

§2.128 23. False Pretense, Proof of

How a false pretense is proved. Pen C §532(b).

CALCRIM
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CALJIC
14.14

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.129 24. Flight, Effect of

§2.129 24. Flight, Effect of

Pen C §1127c.

Note: There is no corresponding duty to instruct on the absence of flight. *People v McGowan* (2008) 160 CA4th 1099, 1104, 74 CR3d 57.

CALCRIM
372

CALJIC
2.52

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.130 25. Honest but Unreasonable Belief

§2.130 25. Honest but Unreasonable Belief

	CALCRIM	CALJIC
(a) The doctrine of imperfect self-defense has survived the elimination of diminished capacity as a defense. <u><i>In re Christian S.</i> (1994) 7 C4th 768, 771, 30 CR2d 33.</u> Actual (<i>i.e.</i> , honest) but unreasonable belief in necessity of self-defense negates the element of malice aforethought required for a conviction of murder, but it is not a defense to manslaughter. <u><i>People v Flannel</i> (1979) 25 C3d 668, 680, 160 CR 84.</u> It is also not a defense to felony murder because malice aforethought is not required. <u><i>People v Lowstaunau</i> (1986) 181 CA3d 163, 170, 226 CR 216.</u>	571	5.17
(b) The court must instruct on imperfect self-defense when there is sufficient evidence to support both self-defense and imperfect self-defense to the crime of murder even when the court instructs on self-defense and heat of passion or sudden quarrel. The court must instruct on all theories of lesser included offense for which there is substantial support. <u><i>People v Viramontes</i> (2001) 93 CA4th 1256, 1262-1264, 115 CR2d 229.</u>		
(c) Actual but unreasonable belief in necessity of self-defense negates the element of malice required for a conviction of mayhem and reduces the crime to assault or battery. <u><i>People v McKelvy</i> (1987) 194 CA3d 694, 239 CR 782</u> (lead opinion of one justice). But see <u><i>People v Sekona</i> (1994) 27 CA4th 443, 457, 32 CR2d 606</u> (instruction on imperfect self-defense not required sua sponte in mayhem cases). (See also <u>§2.131</u> , "Imperfect Defense of Others.")		

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.131 26. Imperfect Defense of Others

§2.131 26. Imperfect Defense of Others

	CALCRIM	CALJIC
	571	8.40

A defendant who kills in the actual but unreasonable belief that he or she must protect another person from imminent danger of death or great bodily injury is guilty of voluntary manslaughter, and not murder, because the defendant lacks the malice required for murder. *People v Randle (2005)* 35 C4th 987, 993-1000, 28 CR3d 725, overruled on other grounds in 45 C4th 1172, 1201 (court recognized doctrine of imperfect defense of others).

(See also §§2.130, "Honest but Unreasonable Belief"; 2.147, "Self-Defense.")

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.132 27. Insanity

§2.132 27. Insanity

Defense of insanity instructions. See also §2.6.

CALCRIM
3428, 3450

CALJIC
4.00, 4.02,
4.05

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	CALCRIM	CALJIC
Relevance of voluntary intoxication to specific intent or mental state other than general intent. <u>Pen C §22</u> . There is no violation of due process in strictly limiting the effect of voluntary intoxication on culpability (see <u>Pen C §22</u>). <u>People v Martin</u> (2000) 78 CA4th 1107, 1117, 93 CR2d 433.	625, 3426	4.21
Relevance of voluntary intoxication in determining whether defendant tried as an aider and abettor had the required mental state. However, intoxication evidence is irrelevant on question of whether a charged crime was a natural and probable consequence of the target crime. <u>People v Mendoza</u> (1998) 18 C4th 1114, 1133, 77 CR2d 428 (CALJIC 4.21.2 derived from <i>Mendoza</i>). <i>Note</i> : The court should not instruct jury to consider evidence of defendant's intoxication in determining a simple assault, assault with a deadly weapon, or assault with a deadly weapon on a peace officer. <u>People v Hood</u> (1969) 1 C3d 444, 451, 82 CR 618. (See also <u>§2.136</u> (a), "Manslaughter"; <u>2.140</u> (a), "Murder"; <u>2.151</u> (c), "Specific Intent.")	404, 3426	4.21.2

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.134 29. Judicially Noticed Facts--Duty To Accept

§2.134 29. Judicially Noticed Facts—Duty To Accept

Note: Mandatory only on request. Evid C §45Z.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.135 30. Kidnapping for Extortion

§2.135 30. Kidnapping for Extortion

When crime is kidnapping for extortion (see §2.69), "extortion" must be defined. *People v Hill* (1983) 141 CA3d 661, 668, 190 CR 628.

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CALJIC
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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.136 31. Manslaughter

§2.136 31. Manslaughter

	CALCRIM	CALJIC
(a) Killing while unconscious due to voluntary intoxication is involuntary manslaughter. <u>People v Graham (1969) 71 C2d 303, 316, 78 CR 217.</u>	626	8.47
(b) Distinction between voluntary and involuntary manslaughter if evidence would support conviction of either. <u>People v Alfredo (1967) 251 CA2d 666, 670, 59 CR 647.</u>	570-572, 580-582	8.40, 8.45
(c) When defendant did not actually form intent to kill due to voluntary intoxication, killing is involuntary manslaughter even though defendant was not unconscious. <u>People v Ray (1975) 14 C3d 20, 27, 120 CR 377.</u>	3428, 625, 3426	3.32, 4.21
(d) If evidence that a killing was in actual but unreasonable belief in the necessity to defend against imminent peril of life or great bodily injury, court must instruct sua sponte that such an actual but unreasonable belief negates the element of malice aforethought necessary to the crime of murder and makes the offense no greater than manslaughter. <u>People v Flannel (1979) 25 C3d 668, 674, 160 CR 84.</u> See also <u>In re Christian S. (1994) 7 C4th 768, 771, 30 CR2d 33</u> (imperfect self-defense doctrine survives elimination of diminished capacity as defense).	570-572, 580-582	5.17, 8.40, 8.45, 8.50- 8.51

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.137 32. Mental Incapacity

§2.137 32. Mental Incapacity

Defense of mental incapacity. Pen C §26.
The test for mental incapacity is the same as that for legal insanity. People v Phillips (2000) 83 CA4th 170, 173, 99 CR2d 448.

CALCRIM
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CALJIC
4.47

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.138 33. Mistake of Fact

§2.138 33. Mistake of Fact

CALCRIM	CALJIC
3406	4.35

When evidence supports defense of mistake of fact. See People v Lucero (1988) 203 CA3d 1011, 250 CR 354 (defendant's actual and reasonable belief he was immune from prosecution by acting as police informant). Actual but unreasonable belief in facts that may form the basis of a duress defense may not negate specific intent needed for robbery and felony murder. People v King (1991) 1 CA4th 288, 297-299, 2 CR2d 197. Defense of mistake of fact instruction is not required when the mistake is one of law rather than fact. People v Mayer (2003) 108 CA4th 403, 412, 133 CR2d 454 (mistake as to the definition of residence for Election Code purposes was one of law rather than fact).

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.139 34. Multiple Defendants; Multiple Unlawful Acts

§2.139 34. Multiple Defendants; Multiple Unlawful Acts

- (a) Defendants. See §2.154(6).
- (b) Unlawful acts. See §2.154(7).

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	CALCRIM	CALJIC
(a) Mental disease, voluntary intoxication, voluntary manslaughter, and involuntary manslaughter instructions are required if there is any supportive evidence. <u>People v Tidwell</u> (1970) 3 C3d 82, 89 CR 58 (decided before the diminished capacity defense was abolished). But see <u>People v Saille</u> (1991) 54 C3d 1103, 2 CR2d 364 (voluntary intoxication and/or mental disorder may not be used to reduce what would otherwise be murder to voluntary manslaughter; court need not instruct on voluntary intoxication sua sponte in determining premeditation); <u>People v Bobo</u> (1990) 229 CA3d 1417, 1443, 3 CR2d 747 (when defendant clearly intends to kill, voluntary manslaughter instructions are inapplicable, even if defendant is delusional); <u>People v Morales</u> (1992) 5 CA4th 917, 927, 7 CR2d 358; <u>People v Walker</u> (1993) 14 CA4th 1615, 1622, 18 CR2d 431 (if there is evidence of sufficient intoxication to support an instruction on absence of intent to kill because of voluntary intoxication, defendant must request a "pinpoint" instruction; following <u>People v Saille</u> , <i>supra</i> , a court need not give the voluntary intoxication instruction (CALJIC 4.21) sua sponte).	3428, 625, 3426	3.32, 4.21
(b) Mental disease and voluntary intoxication are applicable to rebut actual formation of specific intent required for underlying felony. <u>People v Tidwell</u> , <i>supra</i> .	3428, 625, 3426	3.32, 4.21
(c) Duress is not a defense to murder; nor can it reduce murder to manslaughter. <u>People v Anderson</u> (2002) 28 C4th 767, 122 CR2d 587.		
(d) Definition of felony. In first and second degree felony murder, court should define felonies committed or attempted and, when appropriate, which felonies are inherently dangerous to human life. <u>People v Lilloock</u> (1968) 265 CA2d 419, 427, 71 CR 434.		
(e) Includable offense. Voluntary or involuntary manslaughter may be an included offense to first or second degree felony murder.	570-572, 580-582, 603	8.37, 8.40, 8.42-8.47
(f) Proof of felony. Felony involved in felony murder must be proved beyond a reasonable doubt. <u>People v Whitehorn</u> (1963) 60 C2d 256, 264, 32 CR 199.	540A, 541A	8.21, 8.32
(g) Proof of required intent. Proof of requisite specific intent to commit involved felony essential to felony murder.	540A, 541A	8.21, 8.32
(h) Death penalty. See §2.121, "Death Penalty—Special Circumstances."		
(i) Degree of murder; murder or manslaughter. <u>People v Dewberry</u> (1959) 51 C2d 548, 555, 334 P2d 852. In a murder prosecution in which the prosecution's only theory is first degree felony murder, if the jury is instructed to find the defendant either guilty or not guilty of first degree murder, a verdict of guilty that fails to specify the degree of murder is a verdict of first degree murder. <u>Penal Code §1157</u> does not apply and the court is not required to give a CALJIC 8.70 instruction. <u>People v Mendoza</u> (2000) 23 C4th 896, 907-910, 98 CR2d 431.	521, 548, 580	8.70-8.72
(j) Self-defense. If evidence that a killing was in actual but	570-572,	5.17, 8.40,

unreasonable belief in the necessity to defend against imminent peril of life or great bodily injury, court must instruct sua sponte that such an actual but unreasonable belief negates the element of malice aforethought necessary to the crime of murder and makes the offense no greater than manslaughter. <u>People v Flannel (1979) 25 C3d 668, 680, 160 CR 84</u> . Actual but unreasonable belief in the necessity for self-defense is not a defense to felony murder because malice aforethought is not required. <u>People v Loustaunau (1986) 181 CA3d 163, 170, 226 CR 216</u> .	580-582	8.45, 8.50-8.51
(k) Manslaughter.	570-572, 580-582	8.40, 8.45, 8.50-8.51
(l) Other types of first degree murder defined. By destructive device or explosive, weapon of mass destruction, or armor-piercing ammunition, by poison, by torture, by discharge from a vehicle, or by means of lying in wait.	521	8.22-8.24, 8.25
(m) First degree felony murder in pursuance of a conspiracy defined.	540B, 540C	8.26
(n) First degree felony murder by aider and abettor defined.	540B, 540C	8.27
(o) Second degree felony murder in pursuance of a conspiracy defined.	541B, 541C	8.33
(p) Second degree felony murder by aider and abettor defined.	541B, 541C	8.34
(q) Drive-by murder.	521	8.25.1
(r) Felony murder liability when burglar kills while escaping from the scene. <u>People v Bodely (1995) 32 CA4th 311, 313, 38 CR2d 72</u> .	549	8.21.2
Hate crime defined.	523	8.28.1

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.141 36. Necessity, Defense of

§2.141 36. Necessity, Defense of

(a) Generally.

(b) Escape from prison.

CALCRIM

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§2.142 37. Nullification

A judge is not required to advise the jury of its power to nullify a verdict (*i.e.*, its power to disregard the evidence and the court's instructions). *People v Fernandez* (1994) 26 CA4th 710, 713-715, 31 CR2d 677. But the judge may attempt to prevent nullification by informing the jurors that they have no legal authority to engage in nullification and may solicit their assurance to follow the law as stated by the court. *People v Estrada* (2006) 141 CA4th 408, 415, 46 CR3d 111.

Evidentiary requirements prescribed by Pen C §118(b).
People v Di Giacomo (1961) 193 CA2d 688, 698, 14 CR 574.
Instruction need not be given sua sponte when the issue is
the identity of the perjurer and not the falsity of the
statement. People v Trotter (1999) 71 CA4th 436, 440, 83
CR2d 753 (uncorroborated witness testimony established
falsity of signature and did not require corroboration
instruction).

CALCRIM
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CALJIC
7.23

No presumption from exercise of privilege.

Note: Mandatory only on request. Evid C §913(b). See also People v Garner (1989) 207 CA3d 935, 255 CR 257 (trial court erred in giving CALJIC 2.25 when witness refused to testify because it would permit prosecution for perjury based on preliminary examination testimony).

CALCRIM
320

CALJIC
2.25-2.26

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.145 40. Proximate Cause

§2.145 40. Proximate Cause

	CALCRIM	CALJIC
Court should define proximate cause if element of crime. <u>People v Bernhardt (1963) 222 CA2d 567, 590, 35 CR 401.</u>	240	3.40 or 3.41
(a) Felonious homicide.		8.55, 3.40 or 3.41
(b) Vehicular manslaughter.	590, 591	8.93, 3.40 or 3.41
(c) Drunk driving.	2100	12.60, 3.40 or 3.41
(d) Felony resisting arrest resulting in death or serious bodily injury.	2655	9.82, 3.40- 3.41

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.146 41. Restraints on Defendant or Witness

§2.146 41. Restraints on Defendant or Witness

	CALCRIM	CALJIC
Physical restraints on defendant—cautionary instruction. <i>Note:</i> If restraints are within the jury's view, the judge has a sua sponte duty to instruct that the restraints have no relevance to the question of defendant's guilt. <u><i>People v Givan</i> (1992) 4 CA4th 1107, 1117, 6 CR2d 339.</u>	204	1.04
Physical restraints on witness or witness in custody—cautionary instruction.	337	2.29

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.147 42. Self-Defense

§2.147 42. Self-Defense

	CALCRIM	CALJIC
(1) <i>Evidence</i> —appropriate instruction on self-defense should be given if warranted by evidence. <u><i>People v Holt</i> (1944) 25 C2d 59, 153 P2d 21.</u>		
(a) Justifiable homicide in defense of self or others.	505	5.10, 5.12-5.16
(b) Nonhomicidal defense of self or others. A modified version of CALJIC 5.30 must be given to instruct that a person may, in appropriate circumstances, use reasonable force to resist a battery even when the person has no reason to believe the battery poses an imminent danger of bodily injury. <u><i>People v Myers</i> (1998) 61 CA4th 328, 71 CR2d 518.</u>	3470	5.30-5.32
(c) Permissible force in defense of property.	3475-3476, 506	5.40-5.43
(d) Resistance to arrest by peace officer.	3470, 2670-2672	5.30, 9.23, 9.26, 9.28
<i>Note:</i> Instruction that jury should acquit if reasonable doubt whether defendant acted in self-defense not required sua sponte. <u><i>People v Sandoval</i> (1970) 9 CA3d 885, 88 CR 625.</u>		
(2) <i>Instruction requirement</i> —duty to instruct on general principles encompasses obligation to instruct on defenses, including self-defense. <u><i>People v Sedeno</i> (1974) 10 C3d 703, 718, 112 CR 1,</u> overruled on other grounds in 19 C4th 142, 165. Evidence of third party threats is admissible to support a claim of self-defense if there is also evidence from which the jury may find that the defendant reasonably associated the victim with those threats. <u><i>People v Minifie</i> (1996) 13 C4th 1055, 56 CR2d 133.</u> Evidence of battered women's syndrome is admissible to establish that the defendant actually believed it was necessary to kill in self-defense and that the belief was reasonable. <u><i>People v Humphrey</i> (1996) 13 C4th 1073, 56 CR2d 142.</u> Even if the defendant is a convicted felon, the more limited CALJIC 12.50 instruction may not be substituted for the broader right not to retreat afforded to a defendant under CALJIC 5.50 when defendant was not charged with violating <u>Pen C §12021</u> and a key issue in defendant's defense was whether he was required to have retreated. <u><i>People v Rhodes</i> (2005) 129 CA4th 1339, 1346-1348, 29 CR3d 226.</u>	3470-3472, 3474	5.50-5.56
(3) <i>Imperfect self-defense</i> —A defendant with actual but unreasonable belief in necessity of self-defense cannot be found guilty of murder, but it is not a defense to manslaughter. <u><i>People v Flannel</i> (1979) 25 C3d 668, 680, 160 CR 84.</u> The doctrine of imperfect self-defense is valid despite the elimination of diminished capacity as a defense. <u><i>In re Christian S.</i> (1994) 7 C4th 768, 771, 30 CR2d 33.</u> But imperfect self-defense may not be based on delusion when the killing results solely from that delusion. <u><i>People v Mejia-Lenares</i> (2006) 135 CA4th 1437, 1454-1455, 38 CR3d 404.</u>	571	5.17

To constitute perfect, rather than imperfect, self-defense, the defendant's belief in the need to defend against imminent danger must be reasonable. People v Jasper (2002) 98 CA4th 99, 106, 119 CR2d 470.

When there is substantial evidence of perfect self-defense, but not substantial evidence of imperfect self-defense, the court is not required to instruct on imperfect self-defense because it instructed on perfect self-defense. People v Rodriguez (1997) 53 CA4th 1250, 1271, 62 CR2d 345.

Actual but unreasonable belief in necessity of self-defense negates the element of malice required for mayhem and mitigates the crime to assault or battery. People v McKelvy (1987) 194 CA3d 694, 239 CR 782 (lead opinion of one justice). But see People v Sekona (1994) 27 CA4th 443, 451, 457, 32 CR2d 606 (no sua sponte requirement for instructions on imperfect self-defense in mayhem case).

See also People v Quintero (2006) 135 CA4th 1152, 1166-1167, 37 CR3d 884 (applied *Sekona* reasoning that imperfect self-defense in CALJIC 5.17 (CALCRIM 571) is not applicable to aggravated mayhem; malice for mayhem crimes is different than malice for murder). (See also §2.131, "Imperfect Defense of Others.")

(4) *Nonapplicability*—neither self-defense nor actual but unreasonable belief in need for self-defense applies to felony murder under Pen C §189 or to felony-murder special circumstances under Pen C §190.2(a)(17). People v Loustaunau (1986) 181 CA3d 163, 170, 226 CR 216. The trial court has no sua sponte duty to instruct on imperfect self-defense in a torture prosecution. People v Vital (1996) 45 CA4th 441, 446, 52 CR2d 676.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.148 43. Sex Offender Registration

§2.148 43. Sex Offender Registration

Willful element. A willful violation of the sex offender registration requirement requires that the defendant have actual knowledge of the requirement. Failure to instruct the jury that it could not convict unless it found that the defendant actually knew of the requirement is reversible error. *People v Jackson* (2003) 109 CA4th 1625, 1634-1635, 1 CR3d 253; *People v LeCorno* (2003) 109 CA4th 1058, 1067-1068, 135 CR2d 775.

CALCRIM	CALJIC
Included in	
1170	

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.149 44. Sexually Violent Predator

§2.149 44. Sexually Violent Predator

The court must instruct sua sponte on whether custody in a secure facility is necessary to ensure that the defendant is not a danger to others. *People v Grassini* (2003) 113 CA4th 765, 777, 6 CR3d 662.

CALCRIM
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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.150 45. Solicitation

§2.150 45. Solicitation

Evidentiary requirements prescribed by Pen C §653f.

CALCRIM
441

CALJIC
6.35

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.151 46. Specific Intent

§2.151 46. Specific Intent

	CALCRIM	CALJIC
(a) Circumstantial evidence instruction regarding specific intent.	225, 251	2.02, 3.31
(b) Evidence of mental disease received for limited purpose—on specific intent. The crime of receiving stolen property is a "specific intent crime" as that term is used in <u>Pen C §§22(b) and 28(a)</u> with regard to the element of knowledge; thus, evidence of mental disease or voluntary intoxication is admissible on that element. <u>People v Reyes (1997) 52 CA4th 975, 982, 61 CR2d 39.</u>	3428	3.32
(c) Voluntary intoxication relevant to specific intent. See <u>People v Reyes, supra.</u>	625, 3426	4.21

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.152 47. Syndromes, Expert Testimony on

§2.152 47. Syndromes, Expert Testimony on

	CALCRIM	CALJIC
(a) Limiting instruction on expert testimony. The court must give an appropriate limiting instruction when expert testimony relating to child sexual abuse accommodation syndrome (CSAAS) or rape trauma syndrome is admitted. <u>People v Bowker</u> (1988) 203 CA3d 385, 394, 249 CR 886; <u>People v Howley</u> (1992) 6 CA4th 947, 959, 8 CR2d 431.	1192, 1193	10.64
(b) Cautionary instruction on intimate partner battering.	850-851	9.35.1

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.153 48. Unconsciousness

§2.153 48. Unconsciousness

	CALCRIM	CALJIC
(a) Generally. <u><i>People v Newton</i> (1970) 8 CA3d 359, 373, 87 CR 394.</u>	3425	4.30
(b) Killing while unconscious due to voluntary intoxication. (See also §§2.107-2.110, "Burden of Proof.")	626	8.47

	CALCRIM	CALJIC
(1) <i>Unanimous agreement on whether murder or manslaughter.</i> <u>People v Aikin</u> (1971) 19 CA3d 685, 699, 97 CR 251, disapproved on other grounds in 13 C3d 500, 514.	641-643	8.74
(2) <i>Separate counts.</i> CALCRIM 3515 (CALJIC 17.02), instructing jury to decide each of several counts separately, not required to be given sua sponte. However, if a jury is so instructed, the court need not further instruct that no evidence presented on one count may be considered by the jury as proof of any of the other counts. <u>People v Manriquez</u> (2005) 37 C4th 547, 579-580, 36 CR3d 340.		
(3) <i>Degree of guilt.</i> Jury must find the degree of guilt of defendant when offenses are divided into degrees. <u>Pen C</u> <u>§1157</u> ; see <u>People v Avalos</u> (1984) 37 C3d 216, 223, 207 CR 549 (error to instruct jury if it can avoid reaching unanimous verdict on question of degree by returning general verdict of guilty of an unspecified degree); <u>In re</u> <u>Birdwell</u> (1996) 50 CA4th 926, 58 CR2d 244 (degree cannot be inferred from extrinsic evidence or jury's other findings).		
(a) Burglary. See <u>People v Hutchins</u> (1988) 199 CA3d 1219, 245 CR 541, and <u>People v Jarrell</u> (1987) 196 CA3d 604, 242 CR 219 (trial court erred in instructing jury that if it found defendant guilty of crime of burglary, it was first degree burglary as a matter of law).	1701	14.51
(b) Grand or petty theft.	1801	14.20
(c) Murder.	548	8.70
In a murder prosecution in which the prosecution's only theory is first degree felony murder, if the jury is instructed to find the defendant either guilty or not guilty of first degree murder, a verdict of guilty that fails to specify the degree of murder is a verdict of first degree murder. <u>Penal</u> <u>Code §1157</u> does not apply and the court is not required to give a CALJIC 8.70 instruction. <u>People v Mendoza</u> (2000) 23 C4th 896, 907-910, 98 CR2d 431.		
(4) <i>Conviction on lesser degree.</i> If defendant is found guilty of offense divided into degrees or kinds, but there is reasonable doubt of which degree he is guilty, he can only be convicted of lesser degree. <u>Pen C §1097</u> .	3518	17.11
(a) Burglary.	1701	14.51
(b) Murder.	521, 548	8.71
(c) Petty theft with prior theft conviction and term served.	1850	14.40
<i>Note:</i> If defendant has stipulated to the prior conviction to prevent the jury from learning about it (<u>People v Bouzau</u> (1991) 53 C3d 467, 279 CR 847), use CALJIC 14.41.		
(d) Vehicular manslaughter.	590-593	8.90, 8.93
(e) Robbery.	1602	9.42
(5) <i>Defendant guilty of lesser offense.</i> If evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, and the jury entertains a reasonable doubt as to which offense has been committed, the jury must find defendant guilty of only the lesser offense. The court must also instruct on reasonable doubt as to whether defendant is guilty of greater or lesser offense when both the greater and lesser offenses are	3517	17.10

charged. <u>People v Crone</u> (1997) 54 CA4th 71, 62 CR2d 607.		
(a) Murder or manslaughter.	580	8.72
(b) Grand theft auto or <u>Veh C §10851</u> .	1820	14.37
(6) <i>Verdicts as to several defendants (when multiple defendants charged)</i> . <u>People v Mask</u> (1986) 188 CA3d 450, 456, 233 CR 181.	203	17.00
(7) <i>Verdict based on one of a number of unlawful acts</i> . <u>People v Madden</u> (1981) 116 CA3d 212, 171 CR 897.	3500-3502	17.01
(8) <i>Inconsistent charges</i> . Jury may not find defendant guilty on more than one of two alternative or inconsistent charges. <u>People v Black</u> (1990) 222 CA3d 523, 271 CR 771 (stealing vehicle and receiving same stolen vehicle); <u>People v Perez</u> (1974) 40 CA3d 795, 800, 115 CR 405.	3516	17.03
(9) <i>Partial verdict</i> . Jury may return partial verdict, <i>i.e.</i> , not guilty verdict on greater offense, regardless of what the jury does with reference to lesser offenses. <u>Stone v Superior Court</u> (1982) 31 C3d 503, 183 CR 647. See also <u>People v Bordeaux</u> (1990) 224 CA3d 573, 273 CR 717 (trial court may, when jury is deadlocked on greater offense, withdraw that charge as a form of dismissal under <u>Pen C §1385</u> and permit jury to consider and return verdict on lesser offense). When the jury is presented with alternative primary offenses and the possibility of a lesser included offense as to one of the alternative primary offenses, the court should instruct the jury that it must reach the issue of guilt or innocence of the lesser included offense only if it concludes that the defendant is not guilty of both alternative primary offenses. <u>People v Gutierrez</u> (1990) 219 CA3d 1, 268 CR 26. In <u>Gutierrez</u> , the alternative primary offenses were receiving stolen property and unlawful vehicle taking, and the lesser included offense to the latter was joyriding. The court suggested an appropriate instruction for this situation. 219 CA3d at 7 n4.		
(a) Homicide case. Jury may not return a verdict on a lesser included offense before acquitting on a greater offense; however, a jury may consider or discuss lesser offenses during its deliberations before returning a verdict on the greater offense. <u>People v Kurtzman</u> (1988) 46 C3d 322, 329, 250 CR 244.	640-643	8.75
If a jury is unable to reach agreement on a greater offense, but renders a guilty verdict on a lesser included offense, the trial court may properly decline to receive and record the verdict pending further deliberations by the jury. The trial court has authority under <u>Pen C §1161</u> to direct the jury to reconsider its lone verdict of conviction on the lesser included offense in light of the acquittal-first rule announced in <u>Kurtzman</u> . <u>People v Fields</u> (1996) 13 C4th 289, 310, 52 CR2d 282 (if verdict on lesser offense received and recorded without express acquittal of the greater offense, retrial on the greater offense barred).		
(b) Nonhomicide case.	3518	17.12
(10) <i>Sentence enhancement findings</i> . Sentence enhancement findings and denial of probation findings under various Penal Code and Health & Safety Code provisions.	1354-1355, 1401-1402, 3115-3117, 3130-3132, 3145-3150, 3160-3163, 3200-3201, 3220-3222, 3250-3251	17.15- 17.24.5
(11) <i>Sentence enhancement findings in DUI cases</i> . Sentence	2131	17.28.2

enhancement findings for willful refusal to take or complete tests regarding driving under the influence under Veh C §§23577, 23612.

(12) *Jury's duty to find charged prior felony conviction.* The court should give CALJIC 17.26 if it grants defense motion to bifurcate the trial. The court has discretion to bifurcate, but it is not required to do so if the defendant will not be unduly prejudiced by having the truth of the alleged prior(s) determined in a unitary trial. *People v Calderon* (1994) 9 C4th 69, 77, 36 CR2d 333.

3100, 3103, 17.25
3260

(13) *Differing verdicts for several offenses.* The jury may return verdicts of not guilty of the greater offense and guilty of a lesser included offense at the same time by simultaneously returning the appropriate verdict forms to the court. CALJIC 17.49, which instructs the jury to return only one verdict form, is incorrect in such a case. *People v Kurtzman, supra*, 46 C3d at 322.

3517 17.49

(14) *Concluding instructions.* *People v Howard* (1930) 211 C 322, 295 P 333.

3550 17.50

(15) *Alternate juror substituted for a juror after deliberations have begun.* *People v Collins* (1976) 17 C3d 687, 131 CR 782. See also *People v Aikens* (1988) 207 CA3d 209, 254 CR 30 (court gave CALJIC 17.51 when it properly substituted a juror after a verdict on one count had been returned and allowed the reconstituted jury to reach a verdict on the remaining counts); *People v Martinez* (1984) 159 CA3d 661, 205 CR 636. It is error not to instruct with CALJIC 17.51 when an alternate juror is substituted. *People v Renteria* (2001) 93 CA4th 552, 558-561, 113 CR2d 287.

3575 17.51

(16) *Alternate juror substituted for a juror during penalty phase.* *People v Cain* (1995) 10 C4th 1, 66, 40 CR2d 481.

3576 17.51.1

(17) *Jury should not be instructed that it may disregard the law (jury nullification).* *People v Dillon* (1983) 34 C3d 441, 487 n39, 194 CR 390; *People v Fernandez* (1994) 26 CA4th 710, 31 CR2d 677.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/2 Sua Sponte Instructions/§2.155 50. Victim Anonymity

§2.155 50. Victim Anonymity

Anonymity of alleged victim. Pen C §293.5.

CALCRIM
123, 208

CALJIC
1.12

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	CALCRIM	CALJIC
(a) Discrepancies in testimony. See <u>People v Allison (1989)</u> 48 C3d 879, 895, 258 CR 208; <u>People v Goodwin (1988)</u> 202 CA3d 940, 249 CR 430 (instruction upheld as correct statement of law).	226, 302	2.21.1
(b) Witness willfully false. See <u>People v Allison, supra</u> ; <u>People v Goodwin, supra</u> (instruction upheld as correct statement of law; court disagreed with dictum in <u>People v Lescallett (1981)</u> 123 CA3d 487, 493, 176 CR 687, that instruction should possibly be avoided when it might appear to be directed principally toward defendant's exculpatory testimony). This instruction may be given at the penalty phase of a trial, when appropriate under the evidence. <u>People v Johnson (1993)</u> 6 C4th 1, 48, 23 CR2d 593.	226	2.21.2
(c) Weighing conflicting testimony.	302	2.22
(d) Judging expert testimony. <u>Pen C §1127b</u> .	332	2.80
(e) Purpose of proof of witness's prior felony conviction limited to credibility. Required on request under <u>Evid C §355</u> . See §2.126(b).	316	2.23
(f) Defendant's failure to testify. Instruction forbidding inference of guilt from defendant's failure to testify (CALJIC 2.60) is not required sua sponte. <u>People v Gardner (1969)</u> 71 C2d 843, 852, 79 CR 743. See also <u>James v Kentucky (1984)</u> 466 US 341, 104 S Ct 1830, 80 L Ed 2d 346 (defendant entitled to such an instruction even though only an admonition requested); <u>People v Gates (1987)</u> 43 C3d 1168, 1208, 240 CR 666 (penalty phase of capital case). Nor does a court need to take a defendant's personal waiver of the right to have a jury instructed using CALJIC 2.60 when defense counsel has requested that the instruction not be given. <u>People v Towey (2001)</u> 92 CA4th 880, 884, 112 CR2d 326.		
(g) Evaluation of testimony of child age 10 or younger. Required on request under <u>Pen C §1127f</u> . It is not required to be given sua sponte. <u>People v Cudjio (1993)</u> 6 C4th 585, 25 CR2d 390. Both CALJIC 2.20.1 and CALCRIM 330 approved against constitutional challenge. <u>People v McCoy (2005)</u> 133 CA4th 974, 980, 35 CR3d 366.	330	2.20.1
(h) Defendant's prior inconsistent statement(s) obtained in violation of <i>Miranda</i> . The court does not have a sua sponte obligation to give CALJIC 2.13.1. However, it is required if the defense requests and the evidence supports it. <u>People v Coffman v Marlow (2004)</u> 34 C4th 1, 63, 17 CR3d 710.	356	2.13.1
(i) Witness's believability. Misdemeanor conduct that has some logical bearing on the veracity of a witness may be used to impeach a witness in a criminal proceeding under <u>Pen C §28(d)</u> , although the fact of the conviction is hearsay. Just as on a witness's believability under CALJIC 2.23, it must also instruct on the effect of prior misdemeanor conduct on credibility if such convictions were admitted under <u>People v Wheeler (1992)</u> 4 C4th 284, 14 CR2d 418, without hearsay objection. <u>People v Lomeli (1993)</u> 19 CA4th 649, 654-655, 24 CR2d 5, disapproved on other grounds in 33 C4th 1040, 1052 n3.	316	2.23.1
(j) Evaluation of testimony of witness with a	331	2.20.2

developmental disability or a cognitive, mental, or communication impairment. Pen C §1127g.

(k) Evaluation of testimony of witness with impaired physical faculties. 3429 3.37

(l) Declarant's unavailability. If evidence of a decedent's prior statement regarding gang-related crimes is introduced under Evid C §§1231-1231.4, the jury may not be told that the declarant died from other than natural causes but must merely be told that the declarant is unavailable. Evid C §1231.4.

Selected Common Instructional Errors

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.1 I.
SCOPE OF CHAPTER

§3.1 I. SCOPE OF CHAPTER

This chapter discusses what some judges think are the most common instructional errors made in criminal cases. This discussion is not limited to errors involving sua sponte instructions.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/ II. COMMON ERRORS/§3.2 A. Defendant Testifying--When Adverse Inference May Be Drawn (CALCRIM 361; CALJIC 2.62)

II. COMMON ERRORS

§3.2 A. Defendant Testifying—When Adverse Inference May Be Drawn (CALCRIM 361; CALJIC 2.62)

When the defendant has testified but has failed to explain or deny incriminating evidence, the trial court may instruct the jury with CALCRIM 361 (CALJIC 2.62). The instruction should only be given when the defendant testifies and when the privilege against self-incrimination has not been invoked. *People v Mask* (1986) 188 CA3d 450, 455, 233 CR 181.

Before this instruction may be given, the court must ascertain whether:

- The defendant was asked a question calling for an explanation or denial of incriminating evidence. *People v Roebler* (1985) 167 CA3d 353, 392, 213 CR 353.
- The defendant knew the facts necessary to answer the question. 167 CA3d at 393. If the defendant does not answer a question because of some circumstance that precludes his or her knowledge, such as an alibi removing defendant from the crime scene, a denial of guilt is deemed to have been made, and an adverse inference instruction is inappropriate. *People v Roebler, supra*; *People v Saddler* (1979) 24 C3d 671, 683, 156 CR 871 (defendant's alibi removed him from the crime scene).
- The defendant failed to deny or explain the incriminating evidence when answering the question. 24 C3d at 682. Contradiction of the prosecution's case is not by itself a failure to explain or deny. *People v Marks* (1988) 45 C3d 1335, 1346, 248 CR 874; *People v Peters* (1982) 128 CA3d 75, 86, 180 CR 76. Nor is a defendant's failure to recall specific details. *People v De Larco* (1983) 142 CA3d 294, 309, 190 CR 757.
- The facts that the defendant failed to explain or deny were within the scope of permissible cross-examination. *People v Tealer* (1975) 48 CA3d 598, 122 CR 144 (defendant limited testimony to denial of alleged extrajudicial admission; error for prosecutor to comment, or the trial court to instruct, on defendant's failure to explain or deny other adverse evidence). The use note to CALJIC 2.62 states that if there is evidence of facts not within the permissible scope of cross-examination, this instruction must be revised to state specifically the matters within the scope of proper cross-examination that the defendant failed to explain or deny.

If the defendant's explanation or denial is bizarre or implausible, the jury must determine whether his or her response is reasonable. Thus, an adverse inference instruction should be given in such a case. *People v Mask* (1986) 188 CA3d 450, 233 CR 181; *People v Roebler, supra*, 167 CA3d at 393-394. But see *People v Kondor* (1988) 200 CA3d 52, 245 CR 750 (adverse inference instruction not warranted when the defendant explains or denies matters within his or her knowledge, no matter how implausible that explanation may seem).

Judicial Tips:

- In order to prevent surprise, the court should require the prosecution to notify the court and defense at the close of cross-examination, or in any event before argument, of its intention to request the giving of an instruction regarding adverse inferences, and to state the claimed evidentiary basis for the instruction so that the court may give the defendant an opportunity to testify further to explain any adverse evidence the defendant may have overlooked or forgotten to give earlier. See use note to CALJIC 2.62.
- One court has suggested that CALCRIM 361 (CALJIC 2.62) should only be given when there is a significant omission on the part of the defendant to explain or deny incriminating evidence that the prosecution wishes to stress or that the defense wishes to mitigate. See *People v Haynes* (1983) 148 CA3d 1117, 1119-1120, 196 CR 450.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.3 B. 'Pinpoint' Instructions

§3.3 B. "Pinpoint" Instructions

The defendant is generally entitled, on request, to an instruction that pinpoints the theory of the defense and charges the jury on how to relate the evidence of that defense to the prosecution's general burden of proving guilt beyond a reasonable doubt. People v Earp (1999) 20 C4th 826, 886, 85 CR2d 857; People v Sears (1970) 2 C3d 180, 190, 84 CR 711 (instructions relating evidence to lack of motive, lack of furtiveness, and defendant's prior relationship with his victims to issues of premeditation and deliberation in light of reasonable doubt standard); People v Guzman (1975) 47 CA3d 380, 386, 121 CR 69 (specific instructions on factors that affect eyewitness identification testimony as they relate to reasonable doubt). What is pinpointed is not specific evidence as such, but the theory of the defendant's case. It is the specific evidence on which the theory focuses that is related to reasonable doubt. People v Adrian (1982) 135 CA3d 335, 338, 185 CR 506.

There are exceptions to the requirement of giving pinpoint instructions. They include:

- *Argumentative instructions.* A pinpoint instruction may not invite the jury to draw inferences favorable to the defendant from specific evidence on a disputed question of fact. People v Wright (1988) 45 C3d 1126, 1135-1136, 248 CR 600 (instruction improperly singled out the testimony of one witness).
- *Duplicative instructions.* A pinpoint instruction may not be repetitious of other instructions given by the trial court that adequately cover the defense theory, and nothing in the particular circumstances of the case suggests a need for additional clarification. People v Bolden (2002) 29 C4th 515, 558-559, 127 CR2d 802 (trial court properly refused to give instruction that merely affirmed that the prosecutor must prove a particular element of the charged offense beyond a reasonable doubt).
- *Confusing instructions.* A pinpoint may not confuse the jury. People v Garceau (1993) 6 C4th 140, 192-193, 24 CR2d 664 (trial court properly refused to give instruction that listed 25 questions for jurors to consider in deciding whether defendant was guilty beyond reasonable doubt).

Although the trial court may refuse to give a requested pinpoint instruction that is argumentative or that contains irrelevant factors, the court has a duty to modify an otherwise proper instruction to eliminate the faults and to tailor it to the facts of the case. People v Fudge (1994) 7 C4th 1075, 1110, 31 CR2d 321; People v Hall (1980) 28 C3d 143, 158-159, 167 CR 844, overruled on other grounds in 21 C4th 413, 415.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.4 C. Eyewitness Identification (CALCRIM 315; CALJIC 2.92)

§3.4 C. Eyewitness Identification (CALCRIM 315; CALJIC 2.92)

CALCRIM 315 (CALJIC 2.92) lists factors that a jury must consider when evaluating eyewitness identifications. This instruction must be given by the trial court on request when an eyewitness identification of the defendant is a key element of the prosecution's case and there is no substantial corroborative evidence to give the identification independent reliability. *People v Wright* (1988) 45 C3d 1126, 1143-1144, 248 CR 600. See also *People v McDonald* (1984) 37 C3d 351, 377 n24, 208 CR 236, overruled on other grounds in 23 C4th 896, 914. In *Wright*, the Supreme Court held that the instruction should focus the jury's attention on facts relevant to its determination of whether reasonable doubt exists regarding identification by listing in a neutral and nonargumentative manner the relevant factors supported by the evidence. *People v Wright, supra*, 45 C3d at 1141. The Court stated that CALJIC 2.92, appropriately modified to include additional "pinpoint" factors raised by the evidence, will usually provide sufficient guidance. 45 C3d 1141.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.5 D. Proof Need Not Show Actual Date of Crime (CALCRIM 207; CALJIC 4.71)

§3.5 D. Proof Need Not Show Actual Date of Crime (CALCRIM 207; CALJIC 4.71)

When a crime is charged as committed "on or about" a certain date or time, CALCRIM 207 (CALJIC 4.71) is a proper instruction. However, this instruction should not be given when:

- The evidence fixes the commission of the crime at a particular time, and the defendant has presented evidence of an alibi for that particular time. People v Jones (1973) 9 C3d 546, 556, 108 CR 345, overruled on other grounds in 49 C3d 713, 719. See also People v Jones (1984) 155 CA3d 153, 178, 202 CR 162 (not error to instruct when defendant does not rely on alibi defense but simply denies committing offense); People v Barney (1983) 143 CA3d 490, 497, 192 CR 172 (error to give instruction when defendant's theory was lack of opportunity to commit the offense at a particular time, which is analogous to alibi defense); or
- The defendant is charged with an offense in a single count, and the evidence establishes two or more similar offenses on any of which the jury might convict. People v Deletto (1983) 147 CA3d 458, 474, 195 CR 233 (trial court should have given CALJIC 4.71.5 instead of CALJIC 4.71); People v Creighton (1976) 57 CA3d 314, 129 CR 249, disapproved on other grounds in 20 C3d 457, 468. This is similar to the error encountered in the failure to give CALCRIM 3500 (CALJIC 17.01), discussed in §3.6.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.6 E. Verdict May Be Based on One of a Number of Unlawful Acts (CALCRIM 3500; CALJIC 17.01)

§3.6 E. Verdict May Be Based on One of a Number of Unlawful Acts (CALCRIM 3500; CALJIC 17.01)

When the defendant is charged with an offense in a single count, the evidence shows more than one criminal act of the kind alleged, and the prosecution has not elected to rely on a particular act, the trial court must generally give CALCRIM 3500 (CALJIC 17.01) sua sponte, requiring the jury to agree unanimously that a particular criminal act was committed beyond a reasonable doubt. See People v Russo (2001) 25 C4th 1124, 1132, 108 CR2d 436; People v Diedrich (1982) 31 C3d 263, 280-283, 182 CR 354.

Despite that general rule, however, there is no sua sponte obligation to instruct with CALCRIM 3500 (CALJIC 17.01) "unless there is evidence based on which reasonable jurors could disagree as to which act the defendant committed." People v Schultz (1987) 192 CA3d 535, 539-540, 237 CR 513. See also People v Diaz (1987) 195 CA3d 1375, 1382, 241 CR 366 (no error when prosecution made election in opening argument and court gave instruction based on CALJIC 2.50 that evidence of uncharged acts may not be considered except to show motive or intent).

Therefore, some judges do not give CALCRIM 3500 (CALJIC 17.01) when there is no basis for juror disagreement or when the jury, in believing that one act took place, must necessarily believe that all acts took place. See People v Schultz, supra, 192 CA3d at 539.

Judicial Tip: Many judges recommend taking a cautious approach and give the instruction in any case when evidence has been admitted of separate acts that could form the basis for one charge. Some judges give the instruction in every case. Giving the instruction when not required, at worst, is harmless error; the failure to give it when required may be reversible error.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.7 1. Illustrative Cases

§3.7 1. Illustrative Cases

The following cases illustrate the application of the CALCRIM 3500 (CALJIC 17.01) unanimity instruction:

<i>Offense</i>	<i>Case</i>	<i>Description</i>
Assault	<u><i>People v Espinoza</i> (1983) 140 CA3d 564, 189 CR 543</u>	Evidence showed two assaults with a deadly weapon, one by defendant with a knife and one by his companion with a gun.
Bribery	<u><i>People v Dieðrich</i> (1982) 31 C3d 263, 280, 182 CR 354</u>	Evidence showed two distinct acts of bribery.
Criminal threats	<u><i>People v Melbado</i> (1998) 60 CA4th 1529, 1534, 70 CR2d 878</u>	Evidence showed two acts of making criminal threats.
Embezzlement	<u><i>People v Laport</i> (1987) 189 CA3d 281, 234 CR 399</u>	Embezzlement of two types of property from same victim to which defendant offered different defenses.
Firearm possession by an ex-felon	<u><i>People v Crawford</i> (1982) 131 CA3d 591, 182 CR 536</u>	Evidence showed seizure of four firearms, two from defendant's bedroom and two from bedroom of another occupant of house.
Fraud or embezzlement	<u><i>People v Ferguson</i> (1982) 129 CA3d 1014, 1020, 181 CR 593</u>	Evidence showed 35 separate bad checks with different victims.
Lewd acts with child	<u><i>People v Brown</i> (1996) 42 CA4th 1493, 50 CR2d 407</u>	Evidence showed two distinct lewd acts.
Mayhem	<u><i>People v Jenkins</i> (1994) 29 CA4th 287, 300, 34 CR2d 483</u>	Evidence showed that defendant committed a number of acts of mayhem and torture closely related in time and place; conduct comes within the "continuous course of conduct" exception to CALJIC 17.01. See §3.9.
Murder	<u><i>People v Dellinger</i> (1984) 163 CA3d 284, 300, 209 CR 503</u>	CALJIC 17.01 was required when victim died from physical assault and ingestion of cocaine, and jury was instructed it could find first degree murder based on either premeditated killing or murder by poison; but see <u><i>People v Briscoe</i> (2001) 92 CA4th 568, 590-592, 112 CR2d 401</u> (when evidence showed defendant committed two provocative acts, unanimity instruction

Narcotics possession	<u><i>People v King</i> (1991) 231 CA3d 493, 282 CR 402</u>	not required as to which provocative act defendant committed). Actual or constructive possession is based on two or more units of contraband found in different places or at different times, and there is some evidence that each unit might have been solely possessed by someone other than the defendant.
Oral copulation	<u><i>People v Deletto</i> (1983) 147 CA3d 458, 195 CR 233</u>	Evidence showed two distinct acts of oral copulation.
Possession for sale	<u><i>People v Wesley</i> (1986) 177 CA3d 397, 223 CR 9</u>	Evidence showed possession for sale of both heroin and cocaine.
Possession of multiple firearms	<u><i>People v Wolfe</i> (2003) 114 CA4th 177, 185, 7 CR3d 483</u>	Defendant may have possessed up to eight different firearms, leading to eight chargeable offenses.
Sodomy	<u><i>People v Gordon</i> (1985) 165 CA3d 839, 852, 212 CR 174</u> , disapproved on other grounds in 19 C4th 282, 292, and 21 C4th 737, 765	Evidence showed two distinct acts of sodomy.
Street Terrorism	<u><i>People v Quang Minh Tran</i> (2009) 177 CA4th 138, 164, 99 CR3d 122</u>	When the prosecutor does not make an election as to which of two acts would form the basis of a conviction, the judge has a sua sponte duty to give a unanimity instruction.
Theft	<u><i>People v Norman</i> (2007) 157 CA4th 460, 466-467, 69 CR3d 359</u>	Evidence showed two distinct theft offenses.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/ 2. Exceptions to CALCRIM 3500 (CALJIC 17.01) Requirement/§3.8 a. Alternative Legal Theories of Culpability

2. Exceptions to CALCRIM 3500 (CALJIC 17.01) Requirement

§3.8 a. Alternative Legal Theories of Culpability

When the prosecution relies on alternative legal theories that characterize a defendant's actions, the jury need not unanimously agree on the specific legal theory on which guilt is determined. *Schad v Arizona* (1991) 501 US 624, 111 S Ct 2491, 115 L Ed 2d 555 (upheld constitutionality of instructions that jury need not agree on a single theory of first degree murder and therefore does not require the jury to decide between felony murder and premeditated murder).

In the following situations, the jury was not required to choose a specific legal theory on which to unanimously agree:

- First degree murder based on premeditation and rape murder. *People v Pride* (1992) 3 CA4th 195, 249, 10 CR2d 636.
- First degree murder based on premeditation and felony murder. *People v Forbes* (1985) 175 CA3d 807, 816, 221 CR 275.
- Second degree murder based on implied and express malice. *People v Brown* (1995) 35 CA4th 708, 715, 41 CR2d 321.
- Defendant guilty as an aider and abettor or as the direct perpetrator. *People v Beardlee* (1991) 53 C3d 68, 92, 279 CR 276;
People v Davis (1992) 8 CA4th 28, 45, 10 CR2d 381.
- Petty theft based on trick or device and on simple larceny. *People v McLemore* (1994) 27 CA4th 601, 605, 32 CR2d 687.
- Forgery based on forging and uttering documents. *People v Sutherland* (1993) 17 CA4th 602, 612-615, 21 CR2d 752.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.9 b. Continuous Course of Conduct

§3.9 b. Continuous Course of Conduct

A court has no duty to instruct on unanimity if the offenses constitute a "continuous course of conduct." This exception arises in two contexts:

- (1) When the acts are so closely connected that they form part of one and the same transaction, and thus one offense, and
- (2) When the statute involved contemplates a continuous course of conduct of a series of acts over a period of time. *People v Avina* (1993) 14 CA4th 1303, 1309, 18 CR2d 511.

The following offenses may be committed by a continuous course of conduct, although some may be violated by a single act:

- Kidnapping (Pen C §§207, 209). *People v Cortez* (1992) 6 CA4th 1202, 1209, 8 CR2d 580; *People v Ordonez* (1991) 226 CA3d 1207, 1231, 277 CR 382.
- Stalking (Pen C §646.9). *People v Zavala* (2005) 130 CA4th 758, 768, 30 CR3d 398.
- Spousal abuse (Pen C §273.5). *People v Thompson* (1984) 160 CA3d 220, 225-226, 206 CR 516.
- Child abuse (Pen C §273a). *People v Napoles* (2002) 104 CA4th 108, 114-116, 127 CR2d 777.
- Annoying or molesting a child (Pen C §647.6(a)). *People v Moore* (1986) 185 CA3d 1005, 1014-1016, 230 CR 237. See §3.12.
- Continuous sexual abuse of child (Pen C §288.5). *People v Avina* (1993) 14 CA4th 1303, 1309-1313, 18 CR2d 511. See §3.12.
- Elder abuse (Pen C §368). *People v Rae* (2002) 102 CA4th 116, 122-123, 125 CR2d 312.
- Pimping (Pen C §266h). *People v Lewis* (1978) 77 CA3d 455, 461, 143 CR 587.
- Pandering (Pen C §266i). *People v White* (1979) 89 CA3d 143, 151-152, 152 CR 312.
- Torture (Pen C §206). *People v Hamlin* (2009) 170 CA4th 1412, 1427-1431, 89 CR3d 402.
- Animal abuse (Pen C §597). *People v Sanchez* (2001) 94 CA4th 622, 632-634, 114 CR2d 437.
- Accessory to a felony (Pen C §32). *People v Gunn* (1988) 197 CA3d 408, 411-416, 242 CR 834.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.10 c. When More Than One Act Can Be Element of Offense

§3.10 c. When More Than One Act Can Be Element of Offense

The appellate courts are split on whether the trial court must give CALCRIM 3500 (CALJIC 17.01) sua sponte when the evidence shows that more than one act could constitute an element of the charged offense. One common situation is when the defendant is charged with driving under the influence or vehicular manslaughter and the evidence shows several separate acts that could constitute the element of an act forbidden by law. The court in *People v Gary* (1987) 189 CA3d 1212, 1218, 235 CR 30, held that the instruction must be given in this situation. The courts in *People v Leffel* (1988) 203 CA3d 575, 586, 249 CR 906, and *People v Mitchell* (1986) 188 CA3d 216, 222, 232 CR 438, held that jury unanimity is not required when the multiple acts are alternative ways of proving a necessary element of the same offense rather than separate chargeable offenses. See *People v Durkin* (1988) 205 CA3d Supp 9, 252 CR 735 (court found continuous course of conduct exception applicable to multiple driving infractions under facts of case).

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.11 d. Conspiracy Cases

§3.11 d. Conspiracy Cases

In a conspiracy case, the jury need not unanimously agree on a specific overt act. It is sufficient if the jury unanimously finds that some conspirator committed an overt act in furtherance of the conspiracy. *People v Russo* (2001) 25 C4th 1124, 1133-1136, 108 CR2d 436.

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.12 e. Child Molestation Cases

§3.12 e. Child Molestation Cases

Courts have long wrestled with difficult issues regarding matters of proof, due process, and the element of continuum as they relate to the "resident child molester" case, in which the defendant either resides in the same home with the child victim or otherwise has virtually unchecked access to the minor and who sexually abuses the minor on repeated occasions over a prolonged period of time. In *People v Jones* (1990) 51 C3d 294, 318-320, 270 CR 611, the Supreme Court held that "generic" testimony in a child molestation prosecution may be sufficient evidence for conviction and does not deny the defendant's due process rights to fair notice of the charges and to defend against the charges. The court rejected the contention that jury unanimity is necessarily unattainable when testimony regarding repeated identical offenses is presented in child molestation cases. In such cases, although the jury may not be able to readily distinguish between the various acts, it is capable of unanimously agreeing that the acts took place in the number and manner described. 51 C3d at 321.

Jones further held that the standard unanimity instruction should be given when the evidence indicated that the jurors might disagree on the particular act the defendant committed. 51 C3d at 321. However, when there is no reasonable likelihood of juror disagreement about particular acts and the only question is whether the defendant committed all of them, the court should give the jury a modified unanimity instruction that, besides allowing conviction if the jurors unanimously agree on specific acts, also allows conviction if the jurors unanimously agree that the defendant committed all the acts described by the victim. 51 C3d at 322. This modified instruction is found in CALCRIM 3501 (CALJIC 4.71.5). When there is one count of incest encompassing many acts, the version of the unanimity instruction (CALJIC 4.71.5) that states that the jurors must agree on all the acts alleged by the victim within the stated time period is sufficient to inform the jury of the unanimity requirement. *People v Baughman* (2008) 166 CA4th 1316, 1320-1321, 83 CR3d 570.

Effective in 1990, Pen C §288.5 was adopted to create a new crime of continuous sexual abuse of a child to deal with the problem of resident child molesters (see CALCRIM 1120; CALJIC 10.42.6). This statute is a constitutional prohibition of a "course-of-conduct" crime. *People v Avina* (1993) 14 CA4th 1303, 1312-1313, 18 CR2d 511.

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.13 3. Prosecution Elects One Act Among Many

§3.13 3. Prosecution Elects One Act Among Many

When the prosecutor elects one act among many as the basis for the offense, the court must not give the CALCRIM 3500 (CALJIC 17.01) unanimity instruction. The court, however, has a sua sponte duty to instruct on the election unless the prosecutor informs the jury of the election to seek conviction based on the one criminal act. People v Melbado (1998) 60 CA4th 1529, 1534-1536, 70 CR2d 878. This instruction is found in CALCRIM 3502 (CALJIC 4.72).

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Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.14 F. Distinguishing Attempts From Lesser Included Offenses

§3.14 F. Distinguishing Attempts From Lesser Included Offenses

The relationship between attempts and necessarily included offenses can make the judge's sua sponte obligations unclear. It has long been the rule that the court must instruct on any necessarily included offenses whenever there is sufficient evidence to support a conviction on such offenses as opposed to the charged offense. *People v Wickersham* (1982) 32 C3d 307, 324, 185 CR 436, disapproved on other grounds in 12 C4th 186, 201. Similarly, the court must instruct, sua sponte, on an attempt to commit the charged offense whenever there is evidence that might absolve the defendant from guilt on the charged offense, and there is evidence that would justify a conviction for an attempt. *People v Crary* (1968) 265 CA2d 534, 540, 71 CR 457.

Because the same instructional rule applies to attempts and to lesser included offenses, many appellate decisions refer to attempts as "necessarily included offenses" even in general intent crimes, although attempts require specific intent. The specific intent element of attempt excludes the possibility that an attempt will necessarily be committed in the process of committing a general intent crime. Therefore, an attempt is not a necessarily included offense to a general intent crime.

CALJIC Appendix C characterizes attempts as being in a different category than necessarily included offenses. It states that attempts may be more accurately described as "lesser statutorily included offenses." California Jury Instruction—Criminal, Appendix C (2009) (CALJIC).

Source: Criminal Law/Mandatory Criminal Jury Instructions Handbook/3 Selected Common Instructional Errors/§3.15 G. Distinguishing Defenses From Lesser Included Offenses

§3.15 G. Distinguishing Defenses From Lesser Included Offenses

As discussed in §1.6, the court's obligation to instruct, sua sponte, on defenses is more limited than the court's duty to instruct on lesser included offenses. Although the court must instruct on lesser included offenses even if they are inconsistent with the defense theory of the case, it has no duty to instruct on defenses that are inconsistent with the defense theory. People v Barton (1995) 12 C4th 186, 195-197, 47 CR2d 569.

The distinction between the duty to instruct on lesser included offenses and the duty to instruct on defenses can be unclear. This lack of clarity is pronounced in the case of voluntary manslaughter. One form of voluntary manslaughter is predicated on unreasonable self-defense. Unreasonable self-defense is quite similar to true self-defense. The sole difference between the two theories is the reasonableness of the defendant's belief in the need to defend himself or herself. Because unreasonable self-defense closely resembles true self-defense, it is tempting to treat unreasonable self-defense as a true defense that exonerates the defendant of any criminal liability. However, unreasonable self-defense is a partial defense that reduces a defendant's criminal liability from a greater to a lesser included offense and is more accurately characterized as one form of voluntary manslaughter. Therefore, in a murder prosecution, the trial court's duty to instruct on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense. *People v Barton, supra*, 12 C4th at 199-201 (unreasonable self-defense and heat of passion are forms of voluntary manslaughter, a lesser included offense within the crime of murder, and not defenses to murder)

Judicial Tip: When considering a court's duty to instruct on a lesser included offense or a defense, it is helpful to consider whether a defense is complete (*e.g.*, unconsciousness, alibi, self-defense) or partial (*e.g.*, heat of passion, unreasonable self-defense). If the evidence presents a complete defense, the court must apply the rules applicable to instruction on defenses. If the evidence presents only a partial defense, the rules applicable to instruction on lesser included offenses apply.

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