ISSUES GROUNDED IN THE CONSTITUTIONAL RIGHT TO NOTICE OF THE CHARGES

By: Paul Couenhoven

A. THE CONSTITUTIONAL RIGHT TO NOTICE

A criminal defendant has the right to notice of the charges against him. The right to notice is grounded in the Constitution. "[T]he accused shall enjoy the right ... to be informed of the nature and cause of the accusation". (U.S. Const., Amend VI.) The California Constitution has no parallel provision. It only provides "Persons may not . . . be deprived of life, liberty, or property without due process of law." (Cal. Const. Art. 1, §15.) However, the requirement of the Sixth Amendment is binding on the states under the Fourteenth Amendment's due process guarantee. "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (*Cole v. Arkansas* (1948) 333 U.S. 196, 201.) "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." (*Lankford v. Idaho* (1991) 500 U.S. 110, 126 [111 S.Ct. 1723, 1732, 114 L.Ed.2d 173].)

B. SPOTTING "NOTICE" ISSUES

Compare the abstract of judgment and the minutes of sentencing with the last amended version of the charging document. Issues about a potential violation of the right to notice most frequently arise in the context of enhancements. When a defendant is sentenced for any enhancement, whether based on conduct or priors, appellate counsel should check to ensure the precise enhancement imposed (both section and subdivision) was alleged in the charging document. An appellate challenge to an enhancement based on lack of notice is a good issue because if one establish error occurred, courts have generally held the harmless error principle cannot be applied. Convictions for the underlying offenses should also be compared, though there are rarely notice issues involving the underlying charges.

C. WHERE AN ENHANCEMENT INVOLVES AN ELEMENT NOT DUPLICATED IN OTHER CHARGES, THE ENHANCEMENT CANNOT BE IMPOSED UNLESS IT IS PLED AND PROVEN

People v. Hernandez (1988) 46 Cal.3d 194

Defendant was charged with kidnaping and rape with no enhancements. The probation report for the first time "recommended" the imposition of an enhancement because the kidnaping was "for the purpose of committing" rape. (Pen. Code, § 667.8.)[1] The trial court agreed with the prosecutor this was just a "sentencing fact" and imposed the enhancement. The Supreme Court reversed, ruling the lack of a pleading and proof requirement in the law was a legislative oversight. It held the enhancement must be pled and the predicate facts for the enhancement proven. (*Id.* at pp. 200-207.)

An important component of the court's analysis was that section 667.8 included an essential element in addition to those required to prove rape or kidnaping: specific intent. Rape and kidnaping are general intent crimes. The section 667.8 enhancement requires the kidnaping be "for the purpose of committing" the sexual offense. The enhancement "involves a new fact not established merely by defendant's conviction for rape and kidnapping." (*Id*. at p. 204.) The analysis foreshadows the Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476.

Even though section 667.8 did not have a pleading and proof requirement (in contrast with most other enhancements), the court held such a requirement must be implied to comport with due process. "[D]ue process requires that an accused be advised of the specific charges against him so that he may adequately prepare his defense." (*Id*. at p. 208.) Furthermore, the Court rejected the Attorney General's argument the error was harmless. Since defendant received no notice of the penal code section involved, nor "of the mens rea

[1] All further statutory references are to the Penal Code.

required by section 667.8 . . . [a]s a matter of due process, the enhancement under section 667.8 could not be imposed." (*Ibid*.)

People v. Bryant (1992) 10 Cal.App.4th 1584 applies *Hernandez* in a case where an enhancement was alleged but never proven. A former version of section 208, subdivision (d), provided for longer sentences for kidnapping "If the person is kidnapped with the intent to" commit a violent sexual offense. Bryant pled to kidnapping and rape. While it was alleged he kidnapped the victim with the intent to rape her, the court never obtained an admission to that allegation. The trial court imposed a higher sentence under section 208, subdivision (d). Applying *Hernandez*, the appellate court reversed. While Bryant was given notice, he never admitted the essential element of specific intent. (See *People v. Rayford* (1994) 9 Cal.4th 1 [court finds 208, subd. (d) was a separate offense from simple kidnapping. If it is a different offense, it would have to specifically pled and found true by a jury].)

***People v. Haskin* (1992) 4 Cal.App.4th 1434**

Defendant was charged with robbery. In addition, the information alleged he had three five-year priors (Pen. Code, § 667, subd. (a)), and one one-year prison prior (§ 667.5, subd. (b). The prison prior was for a 1979 burglary conviction. After being convicted of robbery, defendant had a court trial on the priors. Examining the record of conviction for the 1979 burglary (the one-year prior), the court determined it was a residential burglary and imposed a five-year sentence for that prior over a defendant's objection. The appellate court reversed. "Due process requires that an accused be advised of the specific charges against him so he may adequately prepare his defense and not be taken by surprise by evidence offered at trial." (*Id*. at p. 1438.) Since the information "made no allegation that the burglary was of an inhabited dwelling house or a residence" (*id.* at p. 1440), defendant could not be sentenced for the more serious enhancement.

D. GENERALLY, AS LONG AS THE LANGUAGE IN THE INFORMATION PROVIDE NOTICE OF THE PROSECUTION'S INTENT TO PROVE AN ENHANCEMENT AND THE FACTS REQUIRED TO IMPOSE THE ENHANCEMENT, IT MAKES NO DIFFERENCE THE CHARGING DOCUMENT CITES THE WRONG ENHANCEMENT STATUTE OR DOES NOT CITE THE ENHANCEMENT STATUTE AT ALL

Where an enhancement is imposed, the reference to a different enhancement in the information does not violate the due process right to notice if the defendant had notice the prosecution was seeking an enhanced punishment and the facts required to impose the enhancement are proven at trial.

People v. Neal (1984) 159 Cal.App.3d 69

Defendant was charged with sex crimes and with an allegation he used a deadly weapon (a piece of broken glass) during the commission of those offenses. The information listed section 12022, subdivision (b), as the basis for the weapon's use enhancement. The jury found the charges and enhancement true. At sentencing, rather than impose the one-year enhancement under section 12022(b), the court imposed a three-year enhancement under section 12022.3. That section also punishes use of a deadly weapon, but provides for longer sentences if a weapon was used during the commission of specified violent sex crimes. The court of appeal affirmed. There was no notice problem, the court reasoned, because the defendant knew the prosecutor was seeking to enhance his sentence for using a deadly weapon (a piece of broken glass). He had notice of an enhancement and the intention to prove he used a piece of broken glass to establish the enhancement. He therefore had a reasonable opportunity to prepare his defense. This was just a "misstatement of the code section" (*id*. at p. 73), not a constitutional violation.

However, in *People v. Bergman* (1984) 154 Cal.App.3d 30 the court reached the opposite conclusion on similar facts. Defendant was found guilty of rape and firearm use under section 12022.5, which carried a two-year enhancement. At sentencing The court instead imposed a three-year enhancement under section 12022.3. The court of appeal

reversed, holding only a two-year enhancement could be imposed. "[A]ppellant did not here receive fair notice that the prosecution would seek against him application of section 12022.3." (*Id*. at p. 39.)

In *People v. Thomas* (1987) 43 Cal.3d 818 the Supreme Court held *Neal* correctly analyzed the issue and *Bergman* was wrong. "[T]he language of the pleading itself -- irrespective of the statutory specification -- should have alerted the defendant he faced the increased enhancement term." (*Id*. at p. 831.) "[I]t is the language of the accusatory pleading which is controlling and not the specification of the statute by number." (*Ibid*.) The Court wondered, where's the prejudice? "[I]t did not appear the defendant in *Bergman* would have prepared his defense any differently had he been subjectively aware a three-year term could be imposed under section 12022.3." (*Ibid*.) Therefore, reversal was unwarranted.

***People v. Jimenez* (1992) 8 Cal.App.4th 391**

Defendant was convicted of possession of an assault rifle in violation of section 12280 and 12 other felonies, including fleeing from police (Veh. Code, § 2800.2). The evidence proved defendant had the assault rifle in his car when he fled from the police. Section 12280, subdivision (c) provides: "Notwithstanding Section 654 or any other provision of law, any person who commits another crime while violating this section may receive an additional, consecutive punishment of one year for violating this section in addition and consecutive to the punishment, including enhancements, which is prescribed for the other crime." The sentencing court added one year to defendant's sentence pursuant to subdivision (c) even though this enhancement was not listed in the information. Citing *Hernandez*, the appellate court held subdivision (c) is an enhancement which must be pled and proven. However, it found the error harmless. For the enhancement to apply, the prosecution had to prove the defendant committed another crime while he possessed an assault rifle. The evidence showed that defendant fled from police, thereby violation Vehicle Code section 2800.2, with the assault weapon in the car. "Defendant had ample reason to disprove both offenses and thereby disprove the factual basis for the section 12280,

subdivision (c) enhancement." (*Id*. at p. 399.) This analysis is similar to that in *Thomas,* though it goes one step further in finding no harm where no enhancement was alleged at all. Since the defendant would not have done anything differently had the section been alleged, it made no difference the specific enhancement was not alleged as long as defendant is on notice of all the facts he has to defend against.

People v. Shoaff **(1993) 16 Cal.App.4th 1112.**

Defendant was charged with grand theft and with four prison priors, two for robbery and two for petty theft. When he was convicted of the lesser included offense of petty theft, the court sentenced him to prison under section 666 (petty theft with a prior). Defendant argued this violated due process because he was improperly convicted of a lesser related offense. The appellate court affirmed because the "prior" provision of section 666 is not an element of the offense. A charge of grand theft puts a defendant on notice he can also be convicted of any lesser included offense, including petty theft. Defendant was also on notice he was charged with having suffered prior convictions for robbery and petty theft. "Thus, the information alleged, as a factual matter, all of the elements necessary for the imposition of punishment pursuant to section 666. Defendant could not have been misled by the absence of a specific reference to section 666." (*Id*. at p. 1118.)

People v. Tardy (2003) 112 Cal.App.4th 783 agreed with *Shoaff*. Tardy was charged with robbery and the information alleged he had prison priors for petty theft. This was adequate notice the judge could sentence him pursuant to section 666 when the jury found him not guilty of robbery, but guilty of petty theft. The information did not have to "specifically identify section 666 or charge him with the separate 'crime' of petty theft with a prior conviction."

People v. Garcia **(1998) 63 Cal.App.4th 820**

The sentence for second degree murder is 15 to life. If the murder is committed while shooting a firearm from a motor vehicle, the term is 20 to life under section 190, subdivision (c) [now subdivision (d)]. Defendant was charged with first degree murder with an allegation

the murder was perpetrated by means of discharging a firearm from a motor vehicle. When he was only convicted of second degree murder, the court imposed a 20-to-life sentence under section 190(c). The court of appeal agreed the 190(c) enhancement should have been pled and proven under *Hernandez*, but found the error harmless because "the pleading and proof of the first degree drive-by allegations put him on notice of the potential applicability of the second degree drive-by provision." (*Id*. at p. 833.)

E. EVEN IF ALL FACTS UNDERLYING AN ENHANCEMENT ARE PROVEN AT TRIAL, AN ENHANCEMENT CANNOT BE IMPOSED IF A STATUTE HAS EXPRESS AND LIMITING PLEADING REQUIREMENTS, THE ENHANCEMENT WAS NOT PLED IN THE CHARGING DOCUMENT, AND THE RECORD SUGGESTS THIS WAS A CHARGING DECISION MADE BY THE PROSECUTOR.

People v. Mancebo (2002) 27 Cal.4th 735.

Defendant was convicted of multiple violent sexual offenses involving two victims. He was sentenced to two consecutive 25-to-life sentences under the one-strike law. (§ 667.61.) The one-strike law requires the pleading of proof of specific circumstances to apply its enhanced sentencing provisions. In *Mancebo*, the sentences were based on rape against one victim. under the specified circumstances of gun use and kidnapping, and forcible sodomy against the second victim under the specified circumstances of gun use and tying or binding. Not satisfied with a 50 to life sentence, the court wanted to impose additional ten-year consecutive sentences for each count for personal use of a firearm, an enhancement which was pled and proven. However, gun use had already been used to impose one-strike sentences and could not be used to enhance the sentence a second time. The judge solved this problem by substituting "multiple victims" for "gun use" as a circumstance justifying the 25-to-life sentences for both counts.

The Supreme Court reversed. Under section 667.61, subdivision (f), where only the minimum number of circumstances have been pled and proven, "those circumstances shall be used as the basis for imposing the" life term "rather than being used to impose the punishment authorized under any other law." Under the express terms of the statute, the gun

use had to be used to impose the one-strike sentence, and could not be used to impose an enhancement under section 12022.5. The Supreme Court held "[t]he plain wording" of the statute controlled.

Even though the information alleged crimes were committed against two separate victims, and the jury so found, the Court rejected the argument the "multiple victim" circumstance was "effectively pleaded and proved." (*Id*. at p. 744.) It reasoned,

> "[N]o factual allegation in the information or pleading in the statutory language informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing under section 667.61, subdivision (a). Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms under section 667.61, subdivision (a) and use the circumstance of gun use to secure additional enhancements under section 12022.5(a)." (*Id*. at p. 746.)

The Court cited a defendant's due process right to notice: "[I]n addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*Id*. at p. 747.) It reasoned, In many instances, the fair notice afforded by that pleading requirement may be critical to the defendant's ability to contest the factual bases and truth of the qualifying circumstances invoked by the prosecution in support of One Strike sentencing." (*Id*. at p. 752.) The Court agreed *Hernandez* and *Haskin* were distinguishable because in those cases the enhancement imposed at sentencing required proof of additional elements, which was not the case in *Mancebo*. However, the Court refused to apply the analysis in *Thomas* to this case. It decided the error was not subject to harmless error analysis because the prosecutor had exercised a choice in how to charge the case.

> There can be little doubt that the prosecution understood the One Strike law's express pleading requirements and knew how to comply with them. We agree with the Court of Appeal's conclusion that the People's failure to include a multiple-victim-circumstance allegation must be deemed a discretionary charging decision. Not only is this conclusion supported by the record, but respondent does not contend, much less suggest, how the failure to plead the multiple victim circumstance was based on mistake or other excusable neglect. Under these circumstances, the doctrines of waiver and estoppel, rather than harmless error, apply. (*Id*. at p. 749.)

The court also decided notice of a specific enhancement impacted a defendant's decision whether to seek a plea bargain. "Furthermore, in many instances a defendant's decision whether to plea bargain or go to trial will turn on the extent of his exposure to a lengthy prison term. Under the People's position, there would be less incentive to plea bargain since the defendant would not be informed in advance of trial or sentencing that the prosecution intends to rely on the fact of convictions of offenses against multiple victims in support of a harsher One Strike term." (*Id*. at p. 752.) This analysis seems to contradict the reasoning in *People v. Neal* and *People v. Jimenez*, *supra.* However, those cases were not distinguished or disapproved.

***People v. Arias* (2010) 182 Cal.App.4th 1009**

Arias was charged with attempted murder, but the information made no reference to premeditation or deliberation, nor did it cite section 664, subdivision (a). However, the jury was instructed on premeditation and deliberation without objection, the jury found defendant guilty of "first degree attempted murder," and the court imposed a life sentence, which can only be imposed if the attempted murder is deliberate and premeditated.

The court of appeal reversed, relying on *Mancebo, supra*. Section 664, subdivision (a), like 667.61, has an express pleading requirement. The subdivision specifies that "[t]he additional term provided in this section for attempted willful, deliberate, and premeditated

murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact." (§ 664, subd. (a).) "As the record makes clear, the prosecution failed to comply with the unambiguous pleading requirement set forth in section 664, subdivision (a)." (*Id*. at p. 1017.)

The court also cited defendant's constitutional right to notice of the charges. "[D]efendant was not given notice of the special sentencing enhancement that would be used to increase his punishment from a maximum of nine years to a life term. Nor is this error reviewable under the abuse of discretion or harmless error analysis." (*Id*. at p. 1020.) As in *Mancebo*, the court said the prosecutor had made a charging decision, and the lack of notice affected the defendant's decision whether to plea bargain.

The court reversed even though counsel did not object when the jury was instructed on deliberation and premeditation.

***People v. Botello* (2010) 183 Cal.App.4th 1014**

Defendant and his brother were charged with attempted murder with gang and firearm enhancements. The firearm enhancement alleged each defendant personally discharged a firearm causing great bodily injury. (§ 12022.53, subd. (d).) Although not alleged in the information, the court also instructed the jury with section 12022.53, subdivision (e). That subdivision provides a firearm enhancement may be imposed even on a defendant who does not personally discharge the firearm if a gang enhancement is proven and a co-defendant discharged the firearm. The jury found defendants guilty of attempted murder and found each defendant personally discharged a firearm causing great bodily injury. The gang enhancement was also found true. The jury was not given a verdict addressing section 12022.53, subdivision (e), so it made no finding on that allegation.

On appeal, the court reversed the firearm enhancement because the evidence did not prove whether defendant or the co-defendant had fired the shots which caused great bodily injury. The Attorney General asked the court to leave the firearm enhancements intact by

applying section 12022.53, subdivision (e). Citing *Mancebo* and *Arias*, the appellate court refused to do so. The subdivision (e) enhancement was never pled, despite an express pleading requirement in the statute. As in *Arias*, no other allegation in the information advised defendant he could be sentenced for a firearm enhancement even if he did not personally discharge a firearm causing great bodily injury. Relying on those cases the court refused to apply a harmless error analysis. "On this record, where the prosecution failed to plead subdivision (e)(1), failed to ensure jury findings under that provision, failed to raise the provision at sentencing, and obtained a sentence from the trial court that violated subdivision (e)(1), we conclude that the prosecution has forfeited the right to rely on subdivision (e)(1) for the first time on appeal." (*Id*. at p. 1029.)

F. EVEN WHEN A DEFENDANT HAS PLED IN EXCHANGE FOR A SPECIFIED SENTENCE, HE CAN CHALLENGE A SENTENCE IMPOSED FOR AN ENHANCEMENT WHICH WAS NEVER ALLEGED, HE DID NOT ADMIT, AND WAS NOT SHOWN BY THE EVIDENCE.

People v. Mitchell (2011) 197 Cal.App.4th 1009

Defendant pled guilty to several crimes and enhancements, including three counts of first degree robbery. He agreed to a sentence of 34 years 8 months (after earlier rejecting a 20 year offer). To reach that number of years, the court sentenced Mitchell to 9 years for a first degree robbery, which is the upper term for a robbery *in concert*. However, defendant was never charged with robbery in concert, did not plead guilty to robbery in concert, and the evidence concerning the crime did not support a finding he committed a robbery in concert, which requires the robbery be committed with two or more persons.

Even though a defendant generally cannot challenge a stipulated sentence on appeal, the court found this case was an exception because the sentence was unauthorized. "By sentencing a defendant on an offense he did not commit, with which he was not charged, and which he did not admit, the court effectively imposed on him a waiver of his constitutional right to be given notice of the charges against him without informing him of that right or

seeking an express waiver of it." (*Id*. at p. 1018.) The sentence was reduced to 30 years 4 months.

G. A DEFENDANT CANNOT BE CONVICTED OF A CRIME WHICH IS NOT CHARGED AND IS NOT A LESSER INCLUDED OFFENSE OF THE CRIME CHARGED, BUT THE DEFENDANT MUST OBJECT OR THE ISSUE IS FORFEITED.

People v. Lohbauer (1981) 29 Cal.3d 364

Defendant was charged with residential burglary. He waived jury. The court had a reasonable doubt about the burglary, but decided defendant was guilty of trespass. Defendant objected. The Supreme Court reversed because defendant never received notice he had to defend against a charge of trespass. The conviction for trespass violated his constitutional right to notice since he had no reasonably opportunity to prepare ad present a defense to that charge. (*Id*. at pp. 368-670.)

People v. Toro (1989) 47 Cal.3d 966

However, a defendant must object to preserve this issue for appeal. In *Toro*, the defendant was charged wit attempted murder and assault with a deadly weapon with a great bodily injury enhancement. Without objection the jury was also instructed on battery with serious bodily injury (§ 243, subd. (d).) The jury found defendant guilty of battery with serious bodily injury as a lesser related offense of attempted murder, and not guilty of assault with a deadly weapon. The Supreme Court held the conviction valid. The defendant impliedly consented to the jury's consideration of the uncharged offense by making no objection to the instructions or the verdicts. (*Id*. at p. at pp. 969-970, 976-977.) "[I]t has been uniformly held that where an information is amended at trial to charge an additional offense, and the defendant neither objects nor moves for a continuance, an objection based on lack of notice may not be raised on appeal. [Citations.] There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions." (*Id*. at p. 976.)

The Supreme Court reasoned it was fair to require an objection to raise the issue because the defendant benefitted from being convicted of a less serious offense than that charged in the information.

H. A DEFENDANT IS NOT ENTITLED TO NOTICE OF THE PROSECUTOR'S THEORY OF GUILT, UNLESS THE DEFENDANT CAN SHOW HE WAS AMBUSHED

While the defendant has a right to notice of the *charges*, there is no similar right to express notice of the prosecutor's *theories of guilt*. (*People v. Diaz* (1992) 3 Cal.4th 495, 557.) Notice of the prosecutor's theories of guilt is provided by the testimony presented at the preliminary hearing. (*People v. Moore* (2011) 51 Cal.4th 386, 413; *People v. Diaz*, *supra* at p. 557; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 126.) Thus, the prosecutor need not provide express notice whether a murder is committed by torture or by lying in wait, or if the theory of guilt is based on being a direct perpetrator or an aider and abettor.

"Nevertheless, an otherwise proper pleading may in unusual circumstances fail to afford due process notice." (*People v. Lucas* (1997) 55 Cal.App.4th 721, 737.) The primary example of such a case is *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234 In that case the Ninth Circuit Court of Appeals held that the prosecutor's actions in affirmatively misleading the defendant as to the nature of the charges against him required the reversal of Sheppard's conviction. Shepard was charged with murder and prosecuted on the sole theory the killing was premeditated, willful and deliberate. There was no robbery charge in the case. Just prior to closing arguments, the prosecutor requested instructions on robbery and felony murder, which were given over the defendant's objection. (*Id*. at p. 1235.) The Ninth Circuit concluded that under the circumstances of that case Sheppard was unfairly ambushed.

> A trial cannot be fair unless the nature of the charges against a defendant are adequately made known to him or her in a timely fashion. [Citation.] Here, the prosecutor "ambushed" the defense with a new theory of culpability after the evidence was already in, after both sides had rested, and after the jury instructions were settled. This new theory then appeared in the form of unexpected jury instructions permitting the jury to convict on a theory that was neither subject to adversarial testing, nor defined in advance of the proceeding.

> [¶] Moreover, the right to counsel is directly implicated. That right is next to meaningless unless counsel knows and has a satisfactory opportunity to respond to the charges against which he or she must defend. (*Id.* at p. 1237.)

Sheppard has been interpreted narrowly to apply only when the facts show an ambush by the prosecutor. (*People v. Lucas, supra,* 55 Cal.App.4th at p. 738.) To have a viable argument of a defendant being "ambushed," you need an objection by the defense, preferably strenuous, and a plausible argument how the defense might have differed had notice been provided.

I. A DEFENDANT IS NOT ENTITLED TO NOTICE OF CREDITS LIMITATIONS.

People v. Fitzgerald (1997) 59 Cal.App.4th 932

defendant argued he could not be subjected to the credits limitation set forth in section 2933.1 [limiting credits to 15% for violent felonies] because "the information did not apprize him of the possibility he would only receive 15 percent of presentence conduct credits." (*Id*. at p. 936.) The Due Process right to adequate notice is satisfied with notice of the charges so that a defendant can adequately present a defense. Statutes concerning credits are not implicated by this principle. (See also *People v. Goodloe* (1995) 37 Cal.App.4th 485 [not entitled to notice of credits limitation contained in section 2933.5].)

J. THE RIGHT TO JURY UNANIMITY

While in a federal criminal prosecution the verdict must be unanimous (*Johnson v. Louisiana* (1972) 406 U.S. 356, 363), the Sixth Amendment does not require unanimous verdicts in state criminal proceedings. (*Apodaca v. Oregon* (1972) 406 U.S. 404, 411-412). However, Article I, section 16, of the California Constitution requires jury unanimity in criminal cases. Based on this right, and as a matter of due process under the California Constitution, in any case in which the evidence would permit jurors to find the defendant guilty of a crime based on two or more discrete acts and the jury could disagree whether the defendant is responsible for one act or the other, either the prosecutor must elect among the

alternatives or the court must require the jury to agree on the same criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132-1133.) Where that risk of jury disagreement is present, the court must give a unanimity instruction sua sponte. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.) The omission of a unanimity instruction is reversible error only if absent the instruction some jurors may have believed the defendant guilty based on one act, while others may have believed him guilty based on another. (*People v. Russo*, *supra*, at p. 1133.)

***People v. Diedrich* (1982) 31 Cal.3d 263**

Defendant was charged with one count of bribery. The prosecutor presented evidence of two discrete bribes. As to one alleged bribe, defendant denied it altogether. As to the second alleged bribe, he admitted paying money but explained why it was not a bribe. The Supreme Court held the failure to give a unanimity instruction under those circumstances was reversible error.

***People v. Crawford* (1982) 131 Cal.App.3d 591**

Defendant was charged with possession of a concealable firearm by an ex-felon. Police found two guns in a bedroom occupied by Crawford and his girlfriend and two more guns in a bedroom occupied by someone else. Defendant's girlfriend claimed that she exclusively owned and possessed one handgun found in their bedroom closet. Defendant and his girlfriend denied ever seeing another gun found in their bedroom. (*Id*. pp. 594-95.) Under these circumstances, the court committed reversible error in failing to instruct the jury they had to unanimously agree which gun defendant possessed. The guns were in different parts of the house and "unique facts surround[ed] the possessory aspect of each weapon." (*Id*. at p. 599.) Individual jurors could have concluded that defendant possessed one gun, but not others. (*Id*. at p. 598.)

***People v. King* (1991) 231 Cal.App.3d 493**

Police searched a house and found methamphetamine in two locations. Defendant had pay-owe document and $1,394 in currency in her purse. However, her boyfriend said the

methamphetamine found in one location was his. The other stash of methamphetamine was found in a purse previously used by another woman. The Court of Appeal held that, given this evidence, the trial court should have given a unanimity instruction."[T]here was a separation of the contraband by space and there was conflicting evidence as to the ownership of the narcotics themselves." (*Id*. at p. 501.)

If there is only evidence of one crime, the jury does not have to agree on the theory of guilt

Where defendant is charged with murder, the jury does not have to unanimously agree if the murder was premeditated and deliberate, murder by torture, murder by lying in wait or felony murder. (*People v. Cole* (2004) 33 Cal.4th 1158, 1221.)

Where defendant is charged with one crime, jury does not have to unanimously agree if he is guilty as a direct perpetrator or as an aider and abettor. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1025; *People v. Santamaria* (1994) 8 Cal.4th 903, 918-919.)

Even where there is evidence of more than one act which could be the basis for a guilty verdict, no unanimity instruction is required, and any error is harmless, if there is no evidence separate defenses were presented for each act

Defendant was charged with one count of robbery but there were two acts involving taking property. No unanimity instruction was required since his defense to both acts was the same: he was asleep and did not participate in either robbery. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

Where defendant was charged with one count of robbery involving two victims, no unanimity instruction was necessary "as there was no evidence here from which the jury could have found defendant was guilty of robbing one of the victims and not the other." (*People v. Carrera* (1989) 49 Cal.3d 291, 311-312.)

Any failure to instruct the jury it had to unanimously agree whether a murder was caused by strangulation or by shooting was harmless where defendant presented only one defense, that of self-defense. (*People v. Crandell* (1988) 46 Cal.3d 833, 875.)

Failure to give an instruction the jury must unanimously agree which overt acts were committed in furtherance of a conspiracy was harmless where "there was no realistic possibility of disagreement among the jurors as to the fact or characterization of the alleged overt acts." (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 614-615.)

In child molestation cases where a child victim testifies generically to numerous acts which could be the basis for a conviction, no unanimity instruction is required where "there is no possibility of jury disagreement regarding the defendant's commission of any of these acts." (*People v. Jones* (1990) 51 Cal.3d 294, 321-322.)

In general, no unanimity instruction is required when separate acts are part of one continuous course of conduct and the defendant presents the same defense to all acts. (*People v. Diedrich, supra*, at pp. 281-282; *People v. Thompson* (1984) 160 Cal.App.3d 220, 224; *People v. Turner* (1983) 145 Cal.App.3d 658, 681.)

APPENDIX

PARTIAL LIST OF STATUTES WITH EXPRESS PLEADING REQUIREMENT

PENAL CODE

PEN §186.11. enhanced punishment in fraud and embezzlement cases depending on amount of money involved.

(b) (1) The additional prison term and penalties provided for in subdivisions (a), (c), and (d) shall not be imposed **unless the facts set forth in subdivision (a) are charged in the accusatory pleading** and admitted or found to be true by the trier of fact.

PEN §186.33. punishments for failing to register as a gang member.

(b)(2) The existence of any fact bringing a person under this subdivision **shall be alleged in the information, indictment, or petition,** and be either admitted by the defendant or minor in open court, or found to be true or not true by the trier of fact.

PEN §191.5. (d) requires a life sentence for vehicular manslaughter if the defendant has a prior conviction for specified offenses.

(g) For the penalties in subdivision (d) to apply, the existence of any fact required under subdivision (d) **shall be alleged in the information or indictment** and either admitted by the defendant in open court or found to be true by the trier of fact.

PEN §302. disrupting a worship meeting. Punishment enhanced for prior conviction of same offense.

(d) The existence of any fact which would bring a person under subdivision (c) or (d) **shall be alleged in the complaint, information, or indictment** and either:

(1) Admitted by the defendant in open court.

(2) Found to be true by a jury trying the issue of guilt.

(3) Found to be true by the court where guilt is established by a plea of guilty or nolo contendere.

(4) Found to be true by trial by the court sitting without a jury.

PEN §337a. penalties for gambling related offenses with enhanced punishment if the defendant has prior convictions.

(b) In any accusatory pleading charging a violation of this section, if the defendant has been once previously convicted of a violation of any subdivision of this section, **the previous conviction shall be charged in the accusatory pleading**
(c) In any accusatory pleading charging a violation of this section, if the defendant has been previously convicted two or more times of a violation of any subdivision of this section, **each previous conviction shall be charged in the accusatory pleadings**.

PEN §404.6. punishes inciting to riot. Enhanced punishment for inciting to riot in a jail or prison which results in great bodily injury.

(d) The existence of any fact that would bring a person under subdivision (c) **shall be alleged in the complaint, information, or indictment** and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt, by the court where guilt is established by a plea of guilty or nolo contendere, or by trial by the court sitting without a jury.

PEN §451.1. (a) Notwithstanding any other law, any person who is convicted of a felony violation of Section 451 shall be punished by a three-, four-, or five-year enhancement if one or more of the following circumstances is found to be true:

(b) **The additional term specified in subdivision (a) shall not be imposed unless the existence of any fact required under this section shall be alleged in the accusatory pleading** and either admitted by the defendant in open court or found to be true by the trier of fact.

PEN §452.1. (a) Notwithstanding any other law, any person who is convicted of a felony violation of Section 452 shall be punished by a one-, two-, or three-year enhancement for each of the following circumstances that is found to be true:

(b) **The additional term specified in subdivision (a) of Section 452.1 shall not be imposed unless the existence of any fact required under this section shall be alleged in the accusatory pleading** and either admitted by the defendant in open court or found to be true by the trier of fact. [Added by Stats. 1994, Ch. 421, Sec. 4. Effective September 7, 1994]

664 (a) **The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading** and admitted or found to be true by the trier of fact.

PEN §548. punishes insurance fraud. Enhanced punishment if the defendant has a prior conviction.

(b) The existence of any fact which would subject a person to a penalty enhancement **shall be alleged in the information or indictment** and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

PEN §550. punishes insurance fraud with enhanced punishment if the defendant has prior convictions for the same offense.

(e) The existence of any fact that would subject a person to a penalty enhancement **shall be alleged in the information or indictment** and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

PEN §666.5. (a) provides that any person convicted of specified vehicle theft offenses who has a prior conviction for a similar offense shall be punished more severely.

(c) **The existence of any fact which would bring a person under subdivision (a) shall be alleged in the information or indictment** and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

PEN §667.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony **and it has been pled** and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall [impose a sentence under the Three Strikes Law].

(e) For purposes of subdivisions (b) to (I), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:
(1) If a defendant has one prior felony conviction **that has been pled** and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.
(2) (A) If a defendant has two or more prior felony convictions as defined in subdivision (d) **that have been pled** and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

PEN §1170.12: duplicates § 667, subdivisions (b) - (I), including the requirement prior convictions be pled.

PEN §667.10. (a) Any person who has a prior conviction of the offense set forth in Section 289 and who commits that crime against a person who is 65 years of age or older, or against a person who is blind, deaf, developmentally disabled, as defined in subdivision (d) of Section 667.9, a paraplegic, or a quadriplegic, or against a person who is under the age of 14 years, and that disability or condition is known or reasonably should be known to the person committing the crime, shall receive a two-year enhancement for each violation in addition to the sentence provided under Section 289.

(b) The existence of any fact which would bring a person under subdivision (a) **shall be alleged in the information or indictment** and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

§667.61. (a) Except as provided in subdivision (j), (l), or (m), any person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life.

(b) Except as provided in subdivision (a), (j), (l), or (m), any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life.

(o) **The penalties provided in this section shall apply only if the existence of any circumstance specified in subdivision (d) or (e) is alleged in the accusatory pleading pursuant to this section,** and is either admitted by the defendant in open court or found to be true by the trier of fact.

§667.7. (a) Any person convicted of a felony in which the person inflicted great bodily injury as provided in Section 12022.53 or 12022.7, or personally used force which was likely to produce great bodily injury, who has served two or more prior separate prison terms as defined in Section 667.5 [for specified crimes] [shall receive enhanced punishment]

(b)T**he term imposed under this section shall be imposed only if the prior prison terms are alleged under this section in the accusatory pleading,** and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by a trial by the court sitting without a jury.

§667.71. (a) For the purpose of this section, a habitual sexual offender is a person who has been previously convicted of one or more of the offenses specified in subdivision (c) and

who is convicted in the present proceeding of one of those offenses [offenses listed] [probation is prohibited for habitual sexual offenders]

(f) **This section shall apply only if the defendant's status as a habitual sexual offender is alleged in the accusatory pleading,** and either admitted by the defendant in open court, or found to be true by the trier of fact.

§667.75. Any person convicted of [specified Health and Safety Code violations] who has previously served two or more prior separate prison terms, as defined in Section 667.5, for [specified Health and Safety Code violations] may be punished by imprisonment in the state prison for life . . . **The term imposed under this section shall be imposed only if the prior prison terms are alleged under this section in the accusatory pleading,** and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by a trial by the court sitting without a jury.

PEN §670. (a) Any person who violates Section 7158 or 7159 of, or subdivision (b), (c), (d), or (e) of Section 7161 of, the Business and Professions Code or Section 470, 484, 487, or 532 of this code as part of a plan or scheme to defraud an owner or lessee of a residential or nonresidential structure in connection with the offer or performance of repairs to the structure for damage caused by a natural disaster specified in subdivision (b), shall be subject to the penalties and enhancements specified in subdivisions (c) and (d). The existence of any fact which would bring a person under this section **shall be alleged in the information** or indictment and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by trial by the court sitting without a jury.

1170.1(e) **All enhancements shall be alleged in the accusatory pleading** and either admitted by the defendant in open court or found to be true by the trier of fact.

PEN §1203.045. (a) Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person convicted of a crime of theft of an amount exceeding one hundred thousand dollars ($100,000).

(b) **The fact that the theft was of an amount exceeding one hundred thousand dollars ($100,000) shall be alleged in the accusatory pleading,** and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

PEN §1203.048. (a) Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person convicted of a violation of Section 502 or subdivision (b) of Section 502.7 involving the taking of or damage to property with a value exceeding one hundred thousand dollars ($100,000).

(b) **The fact that the value of the property taken or damaged was an amount exceeding one hundred thousand dollars ($100,000) shall be alleged in the accusatory pleading,** and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilt or nolo contendere or by trial by the court sitting without a jury.

PEN §1203.049. (a) Except in unusual cases where the interest of justice would best be served if the person is granted probation, probation shall not be granted to any person who violates subdivision (f) or (g) of Section 10980 of the Welfare and Institutions Code, when the violation has been committed by means of the electronic transfer of CalFresh benefits, and the amount of the electronically transferred CalFresh benefits exceeds one hundred thousand dollars ($100,000).

(b) **The fact that the violation was committed by means of an electronic transfer of CalFresh benefits and the amount of the electronically transferred CalFresh benefits exceeds one hundred thousand dollars ($100,000) shall be alleged in the accusatory pleading**, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by trial by the court sitting without a jury.

PEN §1203.055. (a) Notwithstanding any other law, in sentencing a person convicted of committing or of attempting to commit one or more of the offenses listed in subdivision (b) against a person who is a passenger, operator, driver, or other occupant of any public transit vehicle whether the offense or attempt is committed within the vehicle or directed at the vehicle . . .,
(c) Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person convicted of a felony offense falling within this section if the person has been previously convicted and sentenced pursuant to this section.

(d) (1) **The existence of any fact which would make a person ineligible for probation under subdivisions (a) and (c) shall be alleged in the accusatory pleading,** and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by a trial by the court sitting without a jury.

12022.53(e) (1) The [firearm use] enhancements provided in this section shall apply to any person who is a principal in the commission of an offense **if both of the following are pled** and proved:

(A) The person violated subdivision (b) of Section 186.22.

(B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).

(j) **For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the accusatory pleading** and either admitted by the defendant in open court or found to be true by the trier of fact.

HEALTH AND SAFETY CODE

HSC §11370. (a) prohibits probation where a defendant is convicted for specified offenses and has a similar prior conviction.

(d) **The existence of any previous conviction or fact which would make a person ineligible for suspension of sentence or probation under this section shall be alleged in the information or indictment,** and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by trial by the court sitting without a jury.

HSC §11370.2. (a) imposes three-year enhancement for specified narcotics prior convictions.

(d) **The enhancements provided for in this section shall be pleaded and proven as provided by law.**

HSC §11370.4. provides for weight enhancements in drug offenses.

(c) The additional terms provided in this section shall not be imposed **unless the allegation . . . is charged in the accusatory pleading** and admitted or found to be true by the trier of fact.