

PRIORS

and how to use them

Documents typically used to get those priors into evidence

- 969b packet
- DMV packet
- CLETS/DOJ
- Certified Court Paperwork
- Certified Government Paperwork
- Judicial Notice of Shasta County Court Documents

When using as impeachment

Evidence Code section 788 states in part: "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony. . . . "

Article I, section 28, subdivision (f)(4) of the California Constitution provides in pertinent part that "[a]ny prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment. "

1101b/1108 and 1109

"Subdivision (a) of [Evidence Code] section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition," such as identity, common plan, or intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

A prior conviction can also be used at trial to directly impeach the testimony of a witness or the defendant. Evidence Code section 780 lists several factors to judge witness's credibility, including inconsistent statements, the existence or nonexistence of a fact testified to by him, and his admission of untruthfulness. A prior conviction can be may be used as evidence to help establish these factors

Pen C § 969b creates an exception to the hearsay rule. *People v. Taulton* (2005, Cal App 4th Dist) 129 Cal App 4th 1218

Pen C § 969b (admissibility of records as prima facie proof of prior conviction), is permissive and not mandatory. It does not restrict the People from other forms of proof to establish the fact of imprisonment for a prior conviction. *People v. Dunlap* (1993, Cal App 5th Dist) 18 Cal App 4th 1468

CALCRIM 3102. Prior Conviction: Prison Prior

- If you find that the defendant was previously convicted of _____ <insert description of prior conviction>, you must also decide whether the People have proved that the defendant served a separate prison term for the crime and did not remain (out of prison custody/[and] free of a new felony conviction) for 5 years.
- To prove this allegation, the People must prove that:
 - 1. The defendant served a separate prison term for the crime of _____ <insert description of prior conviction>;
 - AND [EITHER]
 - [2][A]. The defendant did not remain out of prison custody for 5 years after (he/she) was no longer in prison custody for that crime(;/.)]
 - [OR]
 - [2][B]. The defendant was convicted of a new felony that (he/she) committed within 5 years after (he/she) was no longer in prison custody.]

- A person served a separate prison term for a crime if he or she served a continuous period of prison confinement imposed for that crime. [The prison term may have been served for that crime alone or in combination with prison terms imposed at the same time for other crimes.] [A person is still serving a separate prison term for a crime if he or she is placed back in custody (following an escape/ [or] for a parole violation).] [If a person is returned to custody for an escape/ [or] a parole violation) and is also sentenced to prison for following (an escape/ [or] a parole violation) a new separate prison term.] a new crime, then that person is serving a new separate prison term or
- A person is in prison custody until he or she is discharged from prison or released on parole, whichever happens first. [A person is also in prison custody if he or she (is placed back in custody for a parole violation/ [or] has unlawfully escaped from custody).]

Judge Decides

- Whether a 5-year P.C. 667(a) prior is "brought and tried separately" is a question of law for the court. *People v. Wiley* (1995) 9 Cal.4th 580, 583. [P.C. 667(a) provides for a 5-year enhancement for each serious felony prior conviction that is brought and tried separately.]
- The trial court, and not a jury, properly determines whether a prior felony conviction is serious. *People v. McGee* (2006) 38 Cal.4th 682
- The serious nature of a prior felony is an issue for the court regardless of whether the prior is a serious felony on its face or whether the entire record of conviction must be examined (e.g., preliminary hearing transcripts, charging documents, etc.).

- Computer-generated court records are admissible to prove prior convictions. See Evid.C. 452.5, Evid.C. 1280, Evid.C. 1552 (formerly 1500.5), and Gov't C. 69844.5, which were enacted or amended by AB 1387, effective 1/1/97, and are known as the "Criminal Convictions Record Act." Court clerks are required to certify and submit court records of criminal convictions for entry into a computer system operated by the Department of Justice that can be accessed by prosecutors. Evidence Code section 452.5(b) creates a hearsay exception that allows certified court records to prove the fact of a conviction and the commission of the offense reflected in the record. *People v. Duran* (2002) 97 Cal.App.4th 1448, 1461 – 1462.

- A court can take judicial notice of "Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." (Evidence Code section 452(d))
- Evidence Code section 452.5(b)(1) "An official record of conviction certified in accordance with subdivision (a) of Section 1530, or an electronically digitized copy thereof, is admissible under Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record
- This section creates a new hearsay exception "allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.)

DMV packets

- Reasons why a Certified DMV is admissible:
- **Evidence Code section 1400** -- Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law
- **You have many ways in which you can authenticate a writing.** (Evidence Code section 1410 provides that "[n]othing in this article shall be construed to limit the means by which a writing may be authenticated or proved."
- Direct testimony by a witness qualified to testify to the authentication of the document you want admitted. You call a witness to say what the document is.
 - Non testimonial ways to authenticate writing.

- **Evidence Code §1550.1** -- Reproductions of files, records, writings, photographs, fingerprints or other instruments in the official custody of a criminal justice agency that were microphotographed or otherwise reproduced in a manner that conforms with the provisions of Section 11106.1, 11106.2, or 11106.3 of the Penal Code shall be admissible to the same extent and under the same circumstances as the original file, record, writing, or other instrument would be admissible

Proving a Prior Conviction

1. 969(B) Packet From CDCR or Probation

Penal Code section 969b states:

For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this State has been convicted of an act punishable by imprisonment in a state prison, county jail or city jail of this State, and has served a term therefor in any penal institution, or has been convicted of an act in any other state, which would be punishable as a crime in this State, and has served a term therefor in any state penitentiary, reformatory, county jail or city jail, or has been convicted of an act declared to be a crime by any act or law of the United States, and has served a term therefor in any penal institution, the records or copies of records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence.

Pen C § 969b creates an exception to the hearsay rule. *People v. Taulton* (2005, Cal App 4th Dist) 129 Cal App 4th 1218

Proper foundation for admission of defendant's prison record for purposes of impeachment is laid by the prosecutor by offering "under the provisions of Section 969b of the Penal Code, a certificate of the Department of Corrections signed by the Director and Deputy Director and the accompanying prison record certified as provided by the section." *People v. Beal* (1951, Cal App) 108 Cal App 2d 200

Pen C § 969b (admissibility of records as prima facie proof of prior conviction), is permissive and not mandatory. It does not restrict the People from other forms of proof to establish the fact of imprisonment for a prior conviction. *People v. Dunlap* (1993, Cal App 5th Dist) 18 Cal App 4th 1468

2. Certified Prior

A court can take judicial notice of "Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." (Evidence Code section 452(d))

Evidence Code section 452.5(b)(1) "An official record of conviction certified in accordance with subdivision (a) of Section 1530, or an electronically digitized copy thereof, is admissible under Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record."

This section creates a new hearsay exception "allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.)

How do I get a DMV packet into evidence?

Simple answer: Use a Certified DMV.

Reasons why a Certified DMV is admissible:

Evidence Code section 1400 -- Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law

Evidence Code section 1401 -- (a) Authentication of a writing is required before it may be received in evidence.

(How do we know the writing is what you say it is? And, you have to prove it!)

The answer to that question is as follows:

1. **You have many ways in which you can authenticate a writing.** (Evidence Code section 1410 provides that "[n]othing in this article shall be construed to limit the means by which a writing may be authenticated or proved."

A. Direct testimony by a witness qualified to testify to the authentication of the document you want admitted.

(You call a witness to say what the document is.)

B. Non testimonial ways to authenticate writing.

(Through the use of Evidence Code presumptions and statutes)

So, what are these mysterious Evidence Code presumptions and statutes you refer to?

Evidence Code §1531 -- For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be.

Evidence Code §1532 -- Official Record of Writing

(a) The official record of a writing is prima facie evidence of the existence and content of the original recorded writing if:

- (1) The record is in fact a record of an office of a public entity; and
- (2) A statute authorized such a writing to be recorded in that office.

(b) The presumption established by this section is a presumption affecting the burden of producing evidence.

Evidence Code §1550.1 -- Reproductions of files, records, writings, photographs, fingerprints or other instruments in the official custody of a criminal justice agency that were microphotographed or otherwise reproduced in a manner that conforms with the provisions of Section 11106.1, 11106.2, or 11106.3 of the Penal Code shall be admissible to the same extent and under the same circumstances as the original file, record, writing, or other instrument would be admissible.

Document certified in accordance with Evidence Code section 1530(a):

A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if:

(2) The office in which the writing is kept is within the United States..., and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing; or

Ev C § 1530, codifies an exception for public records to the best evidence rule, which ordinarily requires that an original writing be admitted to prove the content of a writing. The section does not allow either the original or the copy of the writing to be used to prove the truth of the matter asserted in the content of the writing. In *re Shannon C.* (1986, Cal App 3d Dist) 179 Cal App 3d 334.

Evidence Code section 1280 states:

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

(a) The writing was made by and within the scope of duty of a public employee.

(b) The writing was made at or near the time of the act, condition, or event.

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Evidence Code section 664 states:

It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.

Absent contrary evidence, the presumption of Ev C § 664, that official duty has been regularly performed, applies to actions by court clerks and trial judges. *Younesi v. Lane* (1991, Cal App 2d Dist) 228 Cal App 3d 967, overruled on other grounds, *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal 4th 51,

CLETS

Evidence Code section 452.5 extends those records to "include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior court pursuant to Section 69844.5 of the Government Code at the time of computer entry."

Uncertified computer printouts reporting criminal history information are admissible under the official records exception to the hearsay rule (Ev C § 1280) as evidence that a defendant alleged to be a habitual offender (Pen C § 667.7) served prison terms for the prior felony convictions. Accordingly, the trial court properly admitted a printout from the California Law Enforcement Telecommunications System (CLETS) and another printout from a county sheriff's computer system, where both were made "by and within the scope of duty of a public employee," both were made "at or near the time of the act, condition, or event," and both records were trustworthy. (*People v. Martinez* (2000) 22 Cal 4th 106.)

- **Evidence Code §1531** -- For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be.
- **Evidence Code §1532** -- Official Record of Writing
 - The official record of a writing is prima facie evidence of the existence and content of the original recorded writing if:
 - The record is in fact a record of an office of a public entity; and
 - A statute authorized such a writing to be recorded in that office.
 - The presumption established by this section is a presumption affecting the burden of producing evidence.

CLETS

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- Uncertified computer printouts reporting criminal history information are admissible under the official records exception to the hearsay rule (Ev C § 1280) as evidence that a defendant alleged to be a habitual offender (Pen C § 667.7) served prison terms for the prior felony convictions. Accordingly, the trial court properly admitted a printout from the California Law Enforcement Telecommunications System (CLETS) and another printout from a county sheriff's computer system, where both were made "by and within the scope of duty of a public employee, both were made "at or near the time of the act, condition, or event," and both records were trustworthy. (*People v. Martinez* (2000) 22 Cal 4th 106.)

- Evidence Code section 452.5(b) was amended, effective January 1, 2014, to provide that an electronically digitized copy of an official record of conviction is admissible pursuant to Evid. Code section 1280 (public records hearsay exception) to prove a prior conviction, a criminal offense, or the service of a prison term. "Electronically digitized copy" is defined in subdivision (b)(2) of Evid. Code 452.5 as a copy that is made by scanning, photographing, or exactly reproducing a document, that is stored or maintained in a digitized format, and that bears an electronic signature or watermark unique to the entity responsible for certifying the document.

Jury Decides

- Jury issues may include the following:

- (1) Is there a prior conviction? (i.e., was someone actually convicted?)
- (2) Did the prior conviction occur before the commission of the current offense of the current offense. See Section I, above.)
- (3) Did the defendant serve and complete a prison term? (This is relevant if the prior is alleged as a prison prior pursuant to P.C. 667.5.)
- (4) Was there a period of five or more years (for P.C. 667.5(b) 1-year prison priors) or a period of ten or more years (for P.C. 667.5(a) 3-year prison priors) in which the defendant remained free of both prison custody and the commission of an offense that resulted in a felony conviction?

Identity

- Pursuant to Penal Code 1025, "the question of whether the defendant is the person who has suffered the prior conviction" shall be tried by the court without a jury, unless the prior conviction is alleged as a special circumstance pursuant to P.C.190.2 or is alleged as an element of a charged offense. This amendment restricts but does not entirely eliminate the right to a jury trial for a prior conviction. *People v. Epps* (2001) 25 Cal.4th 19, 28; *People v. Kelii* (1999) 21 Cal.4th 452, 458 - 459. P.C. 1025(c) eliminates the right to a jury trial on the issue of identity. *Kelii*, *supra* at 458.

CALCRIM 3250. Enhancement, Sentencing Factor, or Specific Factual Issue

- If you find the defendant guilty of the crime[s] charged in Count[s] __[,], [or of attempting to commit (that/those) crime[s]] or the lesser crimes[s] of <insert lesser offense [s]>, you must then decide whether[, for each crime,] <insert description of the People have proved the additional allegation that > [You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.]
 - To prove this allegation, the People must prove that:
 - <INSERT ELEMENTS REQUIRED.>
 - The People have the burden of proving each allegation beyond a reasonable doubt. If the
 - People have not met this burden, you must find that the allegation has not been proved.

CALCRIM 3100. Prior Conviction: Nonbifurcated Trial (Pen. Code, §§ 1025, 1158)

If you find the defendant guilty of a crime, you must also decide whether the People have proved the additional allegation that the defendant was

previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s] ____ <insert number[s] or description[s] of exhibit[s]>. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The People allege that the defendant has been convicted of: ____ <insert

[1.] A violation of ____ <insert code section alleged>, on ____ <insert

date of conviction>, in the ____ <insert name of court>, in Case Number ____ <insert docket or case number>.

When using as an Enhancement

This will be done two different scenarios:

Case in chief:

gun use, great bodily injury, use of a deadly weapon, etc.

Post trial - after conviction:

Strikes, prison priors, out on bail, etc.

Proper foundation for admission of defendant's prison record for purposes of impeachment is laid by the prosecutor by offering "under the provisions of Section 969b of the Penal Code, a certificate of the Department of Corrections signed by the Director and Deputy Director and the accompanying prison record certified as provided by the section." *People v. Beal* (1951, Cal App) 108 Cal App 2d 200

When the prior is an element of the crime

Certain crimes require that the defendant has been convicted in the past of a criminal offense.

In these cases, it is your responsibility to prove beyond a reasonable doubt that the conviction exists.

Need to prior to prove this, need to make sure you have the proper paperwork prior to starting your trial.

Many times defense stipulates to the fact of the conviction or requests that court to sanitize.

Done in your case in chief.

Typical uses of prior convictions

1. When it is an element of the crime charged – done during trial or prelim hrg
 - 29800, 666.5, 290, DUI, MDO, SVP etc.
2. Impeachment of Witness – done during trial/hearing
3. 1101b/1108/1109 – done during trial
4. Proving Enhancements – post verdict
 - 1170.12, 667(a), 667.5(b) etc.