

Favorably Modify CALCRIM and CALJIC

Be a strong advocate. Don't settle for the standard instructions.

Pro-prosecution terminology, frequently unsuitable language, and sometimes defective restatements make it more important than ever that defense lawyers challenge standard jury instructions.

FORECITE has identified thousands of issues with both CALCRIM and CALJIC, and provides a roadmap that has proven successful since 1990 in challenging individual instructions and submitting more favorable language.

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Anthony Radel
Marina del Rey

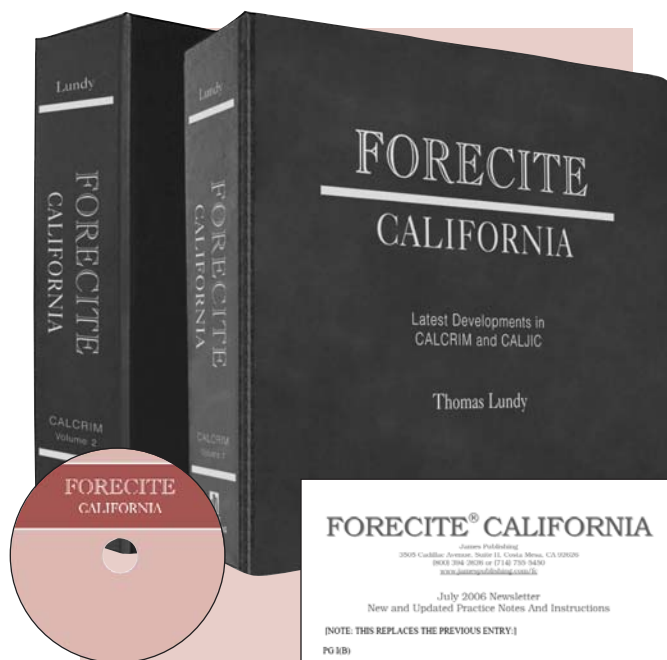
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FORECITE is written so that you can copy and paste its language into your points and authorities, and submit its instructions and arguments to the judge. It is extraordinarily comprehensive, and heavily supported with thousands of cases.

More than alternate instructions

FORECITE helps you with three key tasks:

- 1. Pretrial strategy and negotiation.** Obtain dismissal or reduction of charges before trial, be more effective in plea negotiations, set up issues, focus investigations, and more.
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July 2006 Newsletter
New and Updated Practice Notes And Instructions

(NOTE: THIS REPLACES THE PREVIOUS ENTRY.)

PG 81)

Duty of Court To Go Beyond CALJIC

(1) Jury Instructions Are Not The Law—They Attempt To State The Law. Through usage and custom, standard pattern instructions often are cited as legal authority. However, this is a mischaracterization. "Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words in terms comprehensible to the lay person. The texts of standard jury instructions are not debated and hammered out by legislators, but by ad hoc committees of lawyers and judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong." (McDowell v. California (9th Cir. 1997) 130 F.3d 833, 841.)

As explained by the California Supreme Court with reference to CALJIC: "Though we cite CALJIC No. 12.08 for reference purposes, we caution that jury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles in appellate opinions. At most, when they are accurate, as the counsel portion was here, they recite the law." (People v. Morales (2001) 25 Cal4th 34, 48 fn 7 [104 CR2d 582]; see also People v. Alvarez (90) 14 Cal4th 155, 217 [58 CR2d 385] ("CALJIC 1.09 is not itself the law. Like other pattern instructions, it is merely an attempt at a statement thereof."); Nor do the CALJIC Use Notes have any force of law. (Alvarez, at 223, fn 28).)

"Neither [the courts] nor the CALJIC authors have the 'power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. [The courts] [and the CALJIC authors are] limited to interpreting the statute, and such interpretation must be based on the language used." (Shoobar Associates Corp. v. Shay (11) 214 C 361, 365.) "In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words.

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USER'S MANUAL

FORECITE PRACTICE GUIDE

CALCRIM Table Of Contents

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CALCRIM PRACTICE GUIDE

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Sample pages and more inside...

F 315.1.3 Inst 1 (a-e) Certainty Of Eyewitness Is Not A Reliable Indicator Of Accuracy

Alternative a:

*Delete CC 315, paragraph 2, item 11 re: certainty, as follows:

How certain was the witness when he or she made an identification?

Alternative b:

*Replace CC 315, paragraph 2, item 11 with the following:

The defendant contends that _____ <name of eyewitness> mistakenly identified (him/her) because, among other factors, _____ <insert factor or factors from defense theory e.g., this was a cross-racial identification, the witness was focused [more] on the culprit's weapon than (his/her) face, etc.>. The People must prove that _____ <name of eyewitness> was not mistaken and that the defendant committed the crime. The defendant does not need to prove that _____ <name of eyewitness> was mistaken or that any mistake was due to _____ <e.g., cross-racial identification, weapon focus effect, etc.>. If you have a reasonable doubt about whether _____'s <name of eyewitness> identification was truthful and accurate, you must find the defendant not guilty.

Alternative c:

Among the factors to consider in weighing eyewitness testimony is that there is no proven relationship between a witness's confidence and the accuracy of the witness's testimony. An eyewitness's certainty about his or her choice of the defendant may have many sources and does not necessarily bear on the correctness of that choice. Whether the prosecution has proven the choice of the witness to be correct, beyond a reasonable doubt, is a matter which you must decide.

* See FORECITE F 315.1.1 Inst 12 (Reference To The Identification As A "Choice" Of The Eyewitness Rather Than As An "Identification").

Alternative d:

If your verdict as to the guilt of the defendant is to depend wholly or substantially on the correctness of the identification, you should bear in mind that there have been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications on a parade or otherwise which identifications were subsequently proved to be erroneous; and accordingly, you should be specially cautious before accepting such evidence of identification as correct; but that if, after careful examination of such evidence in the light of all the circumstances, and with due regard to all the other evidence in the case, you feel satisfied beyond a reasonable doubt of the correctness of the identification, you are at liberty to act upon it.

[Source: *The People v. Casey* 1963 Inland Reports 33, 39.]

Alternative e:

Even if a witness is positive of his or her identification, this does not relieve you of the duty to carefully consider his or her identification testimony, especially if you find it is the only evidence that directly supports the claims that the defendant committed the offense charged.

[Source: *U.S. v. Burrow* (EDNY 1996) 934 FSupp 525, 531-33.]

Points and Authorities

Even though jurors tend to place greater reliance on eyewitnesses who exhibit confidence in their identification, jurors do not generally understand that eyewitness confidence is not a reliable predictor of accuracy. It is often assumed that witness confidence increases accuracy. (See, e.g., *Cunningham v. State* (MD 1997) 701 A2d 374, 382 [right to eyewitness identification instruction precluded, inter alia, on whether there was any evocation associated with the identification]; see also *McDoulett v. State* (OK 1984) 635 P2d 978, 980 [defendant's right to eyewitness identification instruction precluded on whether or not witness was positive]; *Thomson v. State* (OK 1983) 668 P2d 344, 347 [trial court should consider whether witness is positive in his or her identification when deciding whether to caution the jury regarding eyewitness testimony]; *Commonwealth v. Kluber* (PA 1954) 106 A2d 820, 826 [witness positive and unqualified even after cross-examination]; *State v. Dyke* (TN 1995) 899 SW2d 607, 612 [Tennessee Supreme Court promulgates instruction informing the jury to consider, inter alia, the "degree of certainty expressed by the witness regarding the identification ..."].)

However, this assumption fails to take into account the fact that the legal system itself, rather than the accuracy of the identification, is often responsible for the confidence of the witness. "As soon as the eyewitness enters the legal system, confidence in accuracy seems to take different paths. Even routine witness preparation and questioning, conducted without [improper] intent, will tend to boost the eyewitness's certainty, while having a positive impact on the juror's perception." (*People v. ...*)

F 404.2 Intoxication—Tailoring To Facts: Persons, Places, Things And Theories

F 404.2 Inst 1 Improper Shifting Of Burden; Jurors Must Consider Evidence Of Intoxication

*Modify CC 404, paragraph 1, sentence 1 as follows [added language is underlined; deleted language is stricken]:

If you conclude Consider any evidence that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding attempting to decide whether the defendant:

...

*Add after Elements:

Alternative a:

If you have a reasonable doubt whether the defendant had the [specific] intent and/or mental state required for _____ <insert crime[s]> you must find him/her not guilty of (that crime/those crimes).

Alternative b:

Any juror who has a reasonable doubt whether the defendant had the specific intent and/or mental state required for _____ <insert crime[s]> must vote [to acquit] [not guilty] as to (that crime/those crimes).

Points and Authorities

This Court Has The Power And Duty To Grant This Instruction Request. [See CALCRIM Motion Bank # *CCM-001*.]

Deletion Of Burden Shifting Language.—The phrase "If you conclude ..." improperly implies that the defendant has a burden to prove or establish his or her intoxication. Thus, the instruction fails to assure the jurors will understand that except for affirmative defenses (see e.g., *People v. Lam* (2004) 122 CA4th 1297, 1301) and preliminary facts (see EC 403) the defendant has no burden to present evidence or prove anything at trial. (See *In re Winship* (1970) 397 US 358, 363 [90 SCt 1068; 25 LE2d 368]; *People v. Hall* (1996) 17 CA4th 800, 831; *United States v. Blankenship* (11th Cir. 2004) 382 F3d 1110, 1127.)

Nor do the remaining CALCRIM instructions cure the defect.

First, no other CALCRIM instruction specifically informs the jurors that the defendant has no burden of proving specific issues at trial.

Second, CALCRIM 103 which specifically defines the presumption of innocence does so only in the context of the prosecution's burden to prove all elements of the charge. It does not discuss how the presumption relates to other essential factual issues. This suggests by implication that the presumption of innocence does not apply to essential facts which are not elements of the charge. (See FORECITE *PG X(D)(5)*.)

Third, many of the more specific CALCRIM instructions actually suggest that the defendant may have some burden of production or proof. (See e.g., FORECITE F 103.3 Inst 2; F 104.1 Inst 1; F 100.7 Inst 1.)

Fourth, language that merely contradicts an erroneous instruction does not cure the defect in the erroneous instruction. (See *Francis v. Franklin* (1985) 471 US 307, 322 [85 LE2d 344, 105 SCt 1965]; *People v. Noble* (2002) 100 CA4th 184, 191 [contradictory instructions on burden of proof in MDO proceeding made it impossible to determine whether the jury reached its verdict using the correct burden]; *People v. Elgren* (1992) 8 CA4th 1214, 1219 [failure to repeat burden of proof instruction given during voir dire was prejudicial]; *People v. Valenzuela* (1977) 76 CA3d 218, 222.)

In sum, when considered in light of all the instructions, as the jurors are required to do (see CALCRIM 200, paragraph 5), CALCRIM 400 improperly permits the jurors to conclude that the defendant must prove or disprove certain specific issues and facts at trial.

See also FORECITE F 100.1 Inst 1.

Presumption Of Innocence: No Duty To Prove Or Disprove Anything.—See FORECITE F 100.1 Inst 1.

Improper To Tell Jurors They "May Consider" Intoxication.—From CC 3427; see also FORECITE F 105.2 Inst 1.

Addition Of Language Relating Intoxication To Reasonable Doubt.—From CC 3406, ¶ 4, see also CC 382, Bench Notes, CC 600, ¶ 5, CC 620, ¶ 5; CC 727, ¶ 5; CC 764, ¶ 2; CC 765, ¶ 2; CC 2842-2845.

See also FORECITE F 315.1.2 Inst 2.

Specific Intent.—It will be necessary to coordinate all references to intent. CALCRIM purports to eliminate the terminology of "specific" intent. (See CALCRIM User's Guide, page 2.) However, there are places where the term is used in CALCRIM. (See e.g., CC 251; CC 252; CC 3406; CC 3408, 3409.)

Omitted matters.

CALCRIM omits nearly a thousand important items that are addressed by FORECITE, like reliability of eyewitnesses.

Recurring problems.

CALCRIM contains hundreds of deficiencies. One regarding burden of proof is shown here.

How FORECITE Helps

CALCRIM and CALJIC have numerous deficiencies. They frequently do not keep up with changes in the law, fail to cover hundreds of issues, omit required sua sponte instructions, and contain problems not yet identified by the appellate courts.

FORECITE tackles these shortcomings head on by:

- Critically reviewing existing instructions in light of evolving principles to identify problems even before the reported cases do.
- Identifying sua sponte duties not in CALCRIM and CALJIC.
- Providing advance notice of coming CALCRIM and CALJIC changes.
- Evaluating instructions for problems not yet identified by appellate courts or by CALCRIM or CALJIC.
- Tracking the "hidden reversal" potential of pending cases in the California and U.S. Supreme Courts.
- Helping you preserve federal constitutional issues for review in the California appellate courts and on federal habeas corpus.
- Providing California's only complete and up-to-date compendium of recognized lesser included offenses.

About the Service

FORECITE contains thousands of pages covering CALCRIM and CALJIC. The bulk of the pages are devoted to alternate instructions, points and authorities, and use notes. All are written so that you can copy and paste directly from the site or CD directly into your documents.

Also included are motions, articles, and a practice guide. All of the material comes to you three ways: (1) in a two-volume book, (2) on CD, and (3) on a password-protected website. The website is updated twice-annually with a comprehensive Newsletter, and bimonthly with California case law updates.

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PG XI(D)(2) CALCRIM Instructions Stating That Certain Kinds Of Evidence Are Not Alone Sufficient To Convict

Subject	CALCRIM
Failure to disclose evidence "is not evidence that the defendant committed a crime"	306 ¶ 4
"You may not convict ... based on the (statement/ [or] testimony) of an accomplice alone."	335 ¶ 2
Uncharged crime is "not sufficient by itself to prove that the defendant is guilty ..."	335 last ¶ , S 2
Failure to explain/ deny is "not enough by itself to prove guilt."	361 ¶ 1, S 2
False statements "cannot prove guilt by itself."	362 ¶ 2
Attempts to fabricate/suppress of evidence "cannot prove guilt by itself."	371(a-b)
3rd party attempt to fabricate/ suppress evidence "conduct cannot prove guilt by itself."	371(c)
Flight "cannot prove guilt by itself."	372, S 3
Stolen Property. " ... you may not convict the defendant of _____ <insert crime> based on those facts alone."	376 ¶ 1
Mere presence/failure to prevent crime "does not, by itself, make him or her an aider and abettor."	401 ¶ 4, S 2

CALCRIM Practice Guide.

Included are pages providing argument and authority for modifying CALCRIM, mixing CALCRIM and CALJIC instructions, providing pinpoint instructions, and this chart of insufficient evidence.

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SERIES 800 ASSAULTIVE AND BATTERY CRIMES

A. MAYHEM

F 800 AGGRAVATED MAYHEM (PC 205)

F 800.1 AGGRAVATED MAYHEM: TITLES AND IDENTIFICATION OF PARTIES

- [F 800.1 Inst 1](#) Aggravated Mayhem—Title
- [F 800.1 Inst 2](#) Identification Of Prosecution And Defendant

F 800.2 AGGRAVATED MAYHEM: TAILORING TO FACTS: PERSONS, PLACES, THINGS AND THEORIES

- [F 800.2 Inst 1](#) Tailoring To Facts

F 800.3 AGGRAVATED MAYHEM: LANGUAGE THAT IS ARGUMENTATIVE, CONFUSING, ETC.

- [F 800.3 Inst 1](#) Deletion Of Argumentative Language

F 800.4 AGGRAVATED MAYHEM: BURDEN OF PROOF ISSUES

- [F 800.4 Inst 1](#) Relating Prosecution Burden To Enumerated Elements
- [F 800.4 Inst 2](#) (a & b) Aggravated Mayhem: Indiscriminate Attack Insufficient For Mayhem (PC 205)
- [F 800.4 Inst 3](#) Aggravated Mayhem: Intent Not To Be Inferred From Injuries Alone (PC 205)

F 800.5 AGGRAVATED MAYHEM: ELEMENTS AND DEFINITIONS

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- [F 800.5 Inst 2](#) Separate Enumeration Of Malice And Unlawful Elements
- [F 800.5 Inst 3](#) Definition Of Permanent Disfigurement (PC 205)
- [F 800.5 Inst 4](#) Concurrence Of Malice, Burden Of Proof, And Intent

Intuitive website.

The password-protected FORECITE website is heavily indexed, extensively cross-linked, and easily-navigated. It contains thousands of pages of argument, authority, and alternate instructions for both CALCRIM and CALJIC.

About the Author

Having advised criminal lawyers on instructional issues since 1990, **Tom Lundy** is probably the best-known authority on jury instructions in California.

Mr. Lundy has been a criminal appellate practitioner since 1974, and now focuses on capital and serious felony cases. He was a senior staff attorney for the California State Public Defenders Office for five years.

Mr. Lundy is a frequent speaker at CACJ, CPDA, and California Appellate Advocacy seminars. He writes Jury Instruction Corner, a column that appears regularly in CACJ Forum, California Defender, California State Bar newsletter, and NACDL's Champion.



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