Study R-100 August 24, 2016

# Memorandum 2016-47

## Fish and Game Law: Outstanding Issues

The Commission[1] is developing a proposed recodification of the Fish and Game Code. As a step in that process, the staff is preparing a draft tentative recommendation, which will include the subject matter of the preliminary staff drafts that have been presented to date.

Before completing the draft tentative recommendation, the staff needs guidance from the Commission on several issues. This memorandum discusses one of those issues, the use of "prima facie evidence" language (for convenience, "PFE" language) in existing Fish and Game Code sections that govern criminal violations of that code.

Unless otherwise indicated, all statutory references in this memorandum are to the existing Fish and Game Code.

## INTRODUCTION

Nine sections of the existing Fish and Game Code provide that proof of a *basic* fact "is prima facie evidence" of an *elemental* fact (i.e., proof of the basic fact is prima facie evidence of an element of a crime).[2] In two instances, proof of a basic fact is prima facie evidence of a violation of law.[3]

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Sections 2000 (take of animal), 2022(d) (possession with intent to sell ivory or rhinoceros horn), 4600 (kill, wound, capture or possession of undomesticated burro), 4758 (sale, purchase, or possession for sale of bear parts), 5521.5 (possession of abalone for commercial purpose), 7370 (take or possession of sturgeon for commercial purpose) , 8254 (take of lobster for commercial purpose), 8598(a) (take, possession, or landing of marine aquaria pet for commercial purpose), 8664 (use of net in specified area).

3. Sections 3005(c) (take of animal by specified method), 4155(d) (specified trapping of bobcat).

Such use of PFE language is not exclusive to the Fish and Game Code. Both the Penal Code[4] and Vehicle Code[5] include provisions stating that proof of a basic fact is proof of an element of a violation of law. For example, Vehicle Code Section 22350 prohibits driving a vehicle "at a speed greater than is reasonable or prudent…."[6] Vehicle Code Section 22351 then provides that driving faster than the posted speed limit is "prima facie unlawful unless the defendant establishes by competent evidence that the speed in excess of said limits did not constitute a violation of the basic speed law at the time, place and under the conditions then existing."

Representative examples of PFE language in the Fish and Game Code are set out below:

> **2000. Unlawful take generally.**
>
> 2000. (a) It is unlawful to take a bird, mammal, fish, reptile, or amphibian except as provided in this code or in a regulation adopted pursuant to this code.
>
> (b) Possession of a bird, mammal, fish, reptile, amphibian, or part of any of those animals, in or on the fields, forests, or waters of this state, or while returning therefrom with fishing or hunting equipment, is prima facie evidence the possessor took the bird, mammal, fish, reptile, or amphibian, or part of that animal.

> **4758. Sale of bear parts**
>
> 4758. (a) Subject to the provisions of this code permitting the sale of domestically raised game mammals, it is unlawful to sell or purchase, or possess for sale, the meat, skin, hide, teeth, claws, or other parts of any bear in this state.
>
> (b) The possession of more than one bear gall bladder is prima facie evidence that the bear gall bladders are possessed for sale.
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> (c) Nothing in this section prohibits a sale authorized pursuant to Section 3087.

> **8664. Prima facie evidence of unlawful net use**
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> 8664. Except in Districts 6 and 7, any net found in, or within 500 feet of the Klamath, Smith, Eel, Mad, Van Dusen, or Mattole Rivers, or their tributaries, is prima facie evidence that the owner or person in possession of the net is or has been using it unlawfully.

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4. See Penal Code §§ 118a (false affidavit), 270 (neglect of children), 270e (same), 476a (NSF check), 484(a) (defrauding employee), 537(c) (defrauding innkeeper), 597q (docking horsetail).

5. See Veh. Code §§ 21654(b) (driving in right-hand lane), 22351(b) (unsafe speed), 22405 (maximum speed on bridges), 23302 (toll violation), 35655 (weight limits on highways), 35753 (weight limits on bridges).

6. See Veh. Code § 22350.

> The provisions of this section do not apply to trawl or drag nets being transported.

When analyzing such provisions for the purposes of recodification, it occurred to the staff that such language could be construed as a mandatory presumption — i.e., if the basic fact is proven, the jury *shall* presume the truth of the elemental fact. Both the United States Supreme Court[7] and California Supreme Court[8] have held that a mandatory presumption as to an element of a crime violates due process, to the extent that it relieves the prosecution of its burden of proving every element of a charged criminal offense, beyond a reasonable doubt.[9]

Citing *People v. Roder*, the 1983 California Supreme Court decision on this issue, Staff Notes in preliminary recodification drafts asked for public comment on whether the application of PFE language in a criminal context might create an impermissible mandatory presumption. For example, a staff note regarding Section 8664 read:

> In a criminal prosecution for unlawful use of a net, the prima facie evidence rule in existing Fish and Game Code Section 8664 (which was enacted in 1957) might be found unconstitutional, based on modern authority holding that a presumption in a criminal statute may not relieve the prosecution of its burden of proving each element of a charged offense beyond a reasonable doubt. See People v. Roder, 33 Cal. 3d 491, 658 P.2d 1302, 189 Cal. Rptr. 501 (1983). On the other hand, the prima facie evidence rule might well be proper in proving that a net is a nuisance for the purpose of in a civil forfeiture proceeding.
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> **The staff invites comment on whether [Section 8664] should be revised so that it only applies in a civil forfeiture proceeding.**[10]

In response to that staff note, Harold Thomas commented, on behalf of the Butte County District Attorney's office:

> Staff can cite no judicial or administrative authority for the statement "that the prima facie evidence rule might be found unconstitutional." Fish and Wildlife law penalizes possession of certain species as evidence of illegal take on the same evidence theory criticized in this provision. We know of no authority to

7. Ulster County Court v. Allen, 442 U.S. 140 (1979), Sandstrom v. Montana, 442 U.S. 510 (1979).
8. People v. Roder, 33 Cal. 3d 491 (1983).
9. *Id*. at 504.
10. Memorandum 2015-41, attached draft p. 34 (emphasis in original).

> support a weakening of the "possession as evidence" law in this area of jurisprudence.[11]

In addition, the Department of Fish and Wildlife's legal staff has informally expressed its view that the PFE language does not violate due process.

When the issue was first raised, the Commission directed the staff to conduct further research into the issue and bring its findings back for Commission consideration.[12] That direction was reiterated at the Commission's June 2016 meeting,[13] and again at the July 2016 meeting (where the Commission also decided that the work should proceed without further delay).[14]

This memorandum presents the staff's analysis of the issue described above. **After considering that analysis, and any further public comment it might receive, the Commission will need to decide whether to revise the PFE language in its draft tentative recommendation, and if so, how.**

## OVERVIEW

It seems clear that the PFE language would violate due process if it is construed as creating a mandatory presumption affecting the burden of proof as to an element of a crime. And, as discussed below, there is reason to believe that such language *could* be construed in that way. In conducting its analysis of this issue, the staff looked for other ways to construe the PFE language, which might not offend due process. The staff considered three possibilities:

(1) The PFE language is construed as a permissive inference.
(2) The PFE language is construed as a presumption affecting the burden of production, rather than the burden of proof.
(3) The PFE language shifts the burden of proof with respect to an exonerating fact.

Each of those possibilities is discussed separately below. **The staff invites further comment from any person or group, on whether there are other theories or authority that should be considered as part of this analysis.**

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11. See First Supplement to Memorandum 2015-41, pp. 5-6; see also First Supplement to Memorandum 2016-25, pp. 3-4.
12. See Minutes (Oct. 2015), p. 8.
13. See Minutes (June 2016), p.6.
14. See Minutes (July 2016), p. 5.

## PFE LANGUAGE CONSTRUED AS PERMISSIVE INFERENCE

This part of the memorandum discusses the constitutionality of a permissive inference and whether the PFE language at issue could be construed as a permissive inference.

**Mandatory Presumption v. Permissive Inference**

In *Roder*, the Court held that a "mandatory presumption" in a criminal case offends due process because it relieves the prosecution of its burden of proving every element of a charged criminal offense, beyond a reasonable doubt.[15]

However, the governing cases make clear that a "permissive inference" generally does *not* offend due process (except in the unusual circumstance where there is an insufficiently rational connection between the basic fact and the elemental fact).[16]

A "permissive inference" is an evidentiary device that informs a jury that it is "permitted, but not required" to find the elemental fact, if it finds the specified basic fact.[17]

In *County Court of Ulster County v. Allen*, the Court explained the differences between a permissive inference and a mandatory presumption:

> Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime -- that is, an "ultimate" or "elemental" fact -- from the existence of one or more "evidentiary" or "basic" facts. … The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.
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> The most common evidentiary device is the entirely permissive inference or presumption, which allows -- but does not require -- the trier of fact to infer the elemental fact from proof by the

15. *Roder*, 33 Cal. 3d at 504.

16. A permissive inference in a criminal matter is unconstitutional only if "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." See Francis v. Franklin, 471 U.S. 307, 314-315 (1985); People v. Ashmus, 54 Cal.3d 932, 977 (1991).

17. *Roder*, 33 Cal. 3d at 506, n. 15.

> prosecutor of the basic one and which places no burden of any kind on the defendant. … In that situation the basic fact may constitute prima facie evidence of the elemental fact.
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> A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the "no reasonable doubt" burden but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.[18]

Consequently, the first question to be answered in analyzing whether the PFE language at issue offends due process is whether the language is being construed as a mandatory presumption or a permissive inference. In answering that question, a court cannot simply interpret the language of the statute on its face. It must examine how the statute was actually applied (i.e., how the jury was instructed):

> The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. … That determination requires careful attention to the words actually spoken to the jury, … for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.[19]

**Arguments in Support of Construing PFE Language as Permissive Inference**

The staff has not found any California appellate case discussing the meaning or application of the Fish and Game Code's PFE language. Nor has the staff found any CALJIC or CALCRIM jury instructions for the provisions at issue.[20]

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18. County Court of Ulster County v. Allen, 442 U.S. 140, 157 (1979) (citations omitted).

19. Sandstrom v. Montana, 442 U.S. 510, 514 (1979). See also *Ulster County*, 442 U.S. 157, n.16. ("In deciding what type of inference or presumption is involved in a case, the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it.").

20. Prior to January 1, 2006, the Committee on Standard Jury Instructions, Criminal (CALJIC), of the Superior Court of Los Angeles County, was approved by the Judicial Council to draft pattern jury instructions for use in selected criminal matters. In 2006, the Judicial Council endorsed a new set of pattern jury instructions for use in criminal matters, known as CALCRIM instructions. Those instructions were prepared over the course of nine years by a statewide task force consisting of justices from the Court of Appeal, trial court judges, attorneys, academicians, and lay people.

Jury instructions approved by the Judicial Council are the "official" instructions for use in the state of California, and their use is "strongly encouraged." See Cal. Rule of Court 2.1050; Judicial Council of California Criminal Jury Instructions (2016), p. xi.

This means that there is no direct evidence as to how the PFE language in the Fish and Game Code has actually been applied.

However, *Roder* provides some guidance that could help courts and practitioners to construe the PFE language in a way that is compatible with due process. That guidance is discussed below.

*Roder* did not actually involve PFE language. The statute at issue in that case used language — "shall be presumed" — that was much more strongly suggestive of a mandatory presumption than the PFE language. In fact, the Court opined that the best interpretation of that statutory language was that it established a mandatory presumption: "In the present case, if we approach this threshold issue purely as a matter of statutory interpretation, there is little question but that the presumption established by section 496 is a 'mandatory presumption' within the meaning of *Ulster County* and *Sandstrom*."[21] However, as noted above, the Court was obliged to evaluate the presumption language as it was actually applied in jury instructions, rather than on the face of the statute.

Ultimately, the Court found that the jury instructions also included a mandatory presumption that violated due process. On that basis, the Court reversed the conviction. It then went on to discuss how the language at issue should be construed and applied going forward:

> One question remains: What should the trial court do with section 496's presumption on retrial? As discussed above, section 496 as currently worded prescribes a mandatory presumption, which -- under *Ulster County* and *Sandstrom* -- is clearly unconstitutional. The Attorney General contends, however, that the presumption of section 496 should not be struck down in its entirety, but -- to save its constitutionality -- should instead be construed as a legislatively prescribed permissive inference, on which a jury should be instructed in an appropriate case. In addition to the familiar authorities which teach that statutes should be interpreted to preserve their constitutionality whenever possible, the Attorney General relies on Evidence Code section 501 which provides that "[insofar] as any statute . . . assigns the burden of proof in a criminal case, such statute is subject to Penal Code section 1096," California's statutory embodiment of the rule that the prosecution bears the burden of proving guilt beyond a reasonable doubt. The Attorney General reasons that because the holdings in *Ulster County* and *Sandstrom* are applications of the constitutional reasonable doubt rule, under Evidence Code section 501 the principles embodied in those decisions should be read into all California statutes -- like section 496 -- which through the use of

21. *Roder*, 33 Cal. 3d at 499.

> presumptions or similar devices assign the burden of proof in a criminal action.
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> Although the Attorney General's suggestion may require some creative statutory construction and the careful framing of jury instructions, we believe that the proposal is basically sound. Under Evidence Code section 501, any statute which assigns the burden of proof in a criminal case is made subject to the overriding rule that the prosecution bears the burden of proving guilt beyond a reasonable doubt. Before *Ulster County* and *Sandstrom*, it was not clear how that principle affected presumptions in criminal cases, but now that the Supreme Court has -- at least in part -- clarified the constitutional limits on the use of such presumptions, it appears more in keeping with the overall legislative intent for courts to pare down existing statutory presumptions to constitutionally permissible limits, rather than to abrogate them altogether.
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> …
>
> Accordingly, we conclude that pursuant to Evidence Code section 501, section 496 should be construed as authorizing only a permissive inference, not a mandatory presumption.[22]

The Court's reasoning could arguably be extended to provisions that use PFE language. Evidence Code Section 501 should be read into those provisions as a limitation, requiring that the PFE language be construed as a permissive inference rather than a mandatory presumption, with juries instructed accordingly.

In support of that proposition, the staff found one case that construed very similar PFE language in a Penal Code provision. Penal Code Section 270 provides, in relevant part:

> 270. If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. ....
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> Proof of abandonment or desertion of a child by such parent, or the omission by such parent to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his or her child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is willful and without lawful excuse.

22. *Roder*, 33 Cal. 3d at 505-07.

Based expressly on the decision in *Roder*, the committee that was at that time approved by the Judicial Council to draft jury instructions for use in criminal prosecutions[23] recommended a jury instruction for Penal Code Section 270 that presents the PFE language as a permissive inference:

> If the evidence establishes beyond a reasonable doubt that the parent of a child abandoned or deserted such child, or that the parent omitted to furnish the necessary food, clothing, shelter or medical attendance or other remedial care, *you may infer* that such omission was willful and without lawful excuse.[24]

The use of this instruction was later upheld as constitutional.[25]

This is evidence that the *Roder* Court's guidance on how to construe presumption language in criminal cases is being applied to beneficial effect. At least with respect to this one section, courts should be construing PFE language as creating a constitutionally permissible permissive inference, rather than a mandatory presumption.

**Arguments Against Construing PFE Language as Permissive Inference**

Strictly as a matter of statutory interpretation, the PFE language is probably best understood as creating a presumption, rather than an inference.

The Evidence Code applies to all civil and criminal actions in courts of this state.[26] Evidence Code Section 602 specifically addresses the effect of PFE language:

> A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption.

Evidence Code Section 600 expressly distinguishes a presumption, "which the law requires to be made," from an inference, "which may logically and reasonably be drawn." This strongly suggests that presumptions and inferences are mutually exclusive. *Because PFE language creates a presumption, it does not create an inference.*

The fact that PFE language creates a *rebuttable* presumption does not make it a permissive inference. Rebuttable presumptions are still mandatory, in the sense used by *Roder*, because any presumption that shifts the burden of proof operates to relieve the prosecution of its burden to prove every element of a crime beyond

23. This was the "CALJIC" committee. See *supra* note 20.
24. CALJIC No. 16.152, 6th ed. (1996) (emphasis added).
25. People v. Moore, 65 Cal. App. 4th 933 (1998).
26. See Evid. Code §§ 105, 300.

a reasonable doubt. The presumption at issue in *Roder* was rebuttable; it was also held to be mandatory.

Because the Evidence Code instructs that PFE language creates a presumption, rather than a permissive inference, it is possible that practitioners and judges would construe the language accordingly. This could lead to constitutional problems, if a judge instructs a jury that the PFE language in the Fish and Game Code creates a mandatory presumption.

That concern is more than theoretical. A pre-*Roder* CALJIC jury instruction for the PFE language used in Penal Code Section 270 (discussed *supra*) had construed that language as a mandatory presumption.[27] In direct reaction to *Roder*, the instruction was revised by the CALJIC committee to instead present the PFE language as a permissive inference (to "rescue section 270 from the jaws of constitutional infirmity").[28] At a minimum, this demonstrates that it is *plausible* to construe PFE language as creating a mandatory presumption. At worst, it means that it is *likely* that readers will construe the PFE language as a mandatory presumption.

In summary, it seems quite possible that a judge who is not aware of the guidance provided by *Roder* would instruct a jury that the Fish and Game Code PFE language creates a mandatory presumption.

## PFE Language Construed as Presumption Affecting Burden of Production

Under California law, there are two different types of rebuttable presumptions: "Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof."[29]

The effect of a presumption affecting the burden of producing evidence is stated in Evidence Code Section 604. That section, along with the corresponding Commission Comment, is set out below[30]:

27. CALJIC No. 16.152, 4th ed. (1979).
28. People v. Moore, 65 Cal. App. 4th 933, 938 (1998).
29. Evid. Code § 601.
30. The Commission drafted the Evidence Code. See *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1 (1965).

**Evid. Code § 604. Effect of presumption affecting burden of producing evidence**

604. The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.[31]

**Comment**. Section 604 describes the manner in which a presumption affecting the burden of producing evidence operates. Such a presumption is merely a preliminary assumption in the absence of contrary evidence, i.e., evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If contrary evidence is introduced, the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict. For example, if a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any believable contrary evidence. However, if the adverse party denies receipt, the presumption is gone from the case. The trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received.

If a presumption affecting the burden of producing evidence is relied on, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears and the judge need say nothing about it in his instructions. If there is not evidence sufficient to sustain a finding of the nonexistence of the presumed fact, the judge should instruct the jury concerning the presumption. If the basic fact from which the presumption arises is established (by the pleadings, by stipulation, by judicial notice, etc.) so that the existence of the basic fact is not a question of fact for the jury, the jury should be instructed that the presumed fact is also established. If the basic fact is a question of fact for the jury, the judge should charge the jury that, if it finds the basic fact, the jury must also find the presumed fact. Morgan, Basic Problems of Evidence 36-38 (1957).

Of course, in a criminal case, the jury has the power to disregard the judge's instructions and find a defendant guilty of a lesser crime than that shown by the evidence or acquit a defendant despite the facts established by the undisputed evidence. *Cf*. People v. Powell, 34 Cal. 2d 196, 208 P.2d 974 (1949); Pike, What Is Second

31. Evid. Code § 604.

> Degree Murder in California?, 9 So. Cal. L. Rev. 112 (1936). Nonetheless, the jury should be instructed on the rules of law applicable, including those rules of law called presumptions. The fact that the jury may choose to disregard the applicable rules of law should not affect the nature of the instructions given. See People v. Lem You, 97 Cal. 224, 32 Pac. 11 (1893); People v. Macken, 32 Cal. App. 2d 31, 89 P.2d 173 (1939).

The effect of a presumption affecting the burden of proof is stated in Evidence Code Section 606:

> **Evid. Code § 606. Effect of presumption affecting burden of proof**
>
> 606. The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.

As discussed below, there is a strong argument that the Fish and Game Code PFE language creates a rebuttable presumption affecting the burden of production. If so, it is possible, but far from certain, that such a presumption would not offend due process. That possibility is also discussed below.

**Construing PFE Language as Presumption Affecting Burden of Production**

The staff found three sources of evidence that PFE language can be construed as a rebuttable presumption affecting the burden of producing evidence:

(1) Evidence Code rules of construction.
(2) Definitions of the term "prima facie evidence."
(3) Case law construing PFE language in another context.

Each of those sources is discussed below.

*Evidence Code Rules of Construction*

As discussed above, Evidence Code Section 602 provides that PFE language creates a rebuttable presumption. However, it does not specify the type of rebuttable presumption. Evidence Code Sections 603 and 605 provide rules of construction for determining whether a presumption affects the burden of producing evidence or the burden of proof. Those sections are set out below, along with the corresponding Commission Comments:

**Evid. Code § 603. Presumption affecting burden of producing evidence**

603. A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied.

**Comment**. Sections 603 and 605 set forth the criteria for determining whether a particular presumption is a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof. Many presumptions are classified in Articles 3 and 4 (Sections 630-667) of this chapter. In the absence of specific statutory classification, the courts may determine whether a presumption is a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof by applying the standards contained in Sections 603 and 605.

Section 603 describes those presumptions that are not based on any public policy extrinsic to the action in which they are invoked. These presumptions are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. Typically, such presumptions are based on an underlying logical inference. In some cases, the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence. In other cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence. In still other cases, there may be no direct evidence of the existence or nonexistence of the presumed fact; but, because the case must be decided, the law requires a determination that the presumed fact exists in light of common experience indicating that it usually exists in such cases. Cf. Bohlen, Studies in the Law of Torts 644 (1926). Typical of such presumptions are the presumption that a mailed letter was received (Section 641) and presumptions relating to the authenticity of documents (Sections 643-645).

The presumptions described in Section 603 are not expressions of policy; they are expressions of experience. They are intended solely to eliminate the need for the trier of fact to reason from the proven or established fact to the presumed fact and to forestall argument over the existence of the presumed fact when there is no evidence tending to prove the nonexistence of the presumed fact.

**Evid. Code § 605. Presumption affecting burden of proof**

605. A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of

marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others.

**Comment**. Section 605 describes a presumption affecting the burden of proof. Such presumptions are established in order to carry out or to effectuate some public policy other than or in addition to the policy of facilitating the trial of actions.

Frequently, presumptions affecting the burden of proof are designed to facilitate determination of the action in which they are applied. Superficially, therefore, such presumptions may appear merely to be presumptions affecting the burden of producing evidence. What makes a presumption one affecting the burden of proof is the fact that there is always some further reason of policy for the establishment of the presumption. It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence. For example, the presumption of death from seven years' absence (Section 667) exists in part to facilitate the disposition of actions by supplying a rule of thumb to govern certain cases in which there is likely to be no direct evidence of the presumed fact. But the policy in favor of distributing estates, of settling titles, and of permitting life to proceed normally at some time prior to the expiration of the absentee's normal life expectancy (perhaps 30 or 40 years) that underlies the presumption indicates that it should be a presumption affecting the burden of proof.

Frequently, too, a presumption affecting the burden of proof will have an underlying basis in probability and logical inference. For example, the presumption of the validity of a ceremonial marriage may be based in part on the probability that most marriages are valid. However, an underlying logical inference is not essential. In fact, the lack of an underlying inference is a strong indication that the presumption affects the burden of proof. Only the needs of public policy can justify the direction of a particular assumption that is not warranted by the application of probability and common experience to the known facts. Thus, the total lack of any inference underlying the presumption of the negligence of an employer that arises from his failure to secure the payment of workmen's compensation (Labor Code § 3708) is a clear indication that the presumption is based on public policy and affects the burden of proof. Similarly, the fact that the presumption of death from seven years' absence may conflict directly with the logical inference that life continues for its normal expectancy is an indication that the presumption is based on public policy and, hence, affects the burden of proof.

Applying those rules, there is a strong argument that any presumption created by the PFE language in the Fish and Game Code would be a presumption affecting the burden of producing evidence. In reviewing the PFE provisions in

the Fish and Game Code, the staff could not see any obvious extrinsic public policies served by the PFE language. Instead, the PFE language appears to be aimed only at facilitating the disposition of factual questions in specific proceedings.

This impression is reinforced by the Commission's Comment to Evidence Code Section 603, setting out examples of the types of purposes served by a presumption affecting the burden of producing evidence:

> These presumptions are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed. Typically, such presumptions are based on an underlying logical inference. In some cases, the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence. In other cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence. In still other cases, there may be no direct evidence of the existence or nonexistence of the presumed fact; but, because the case must be decided, the law requires a determination that the presumed fact exists in light of common experience indicating that it usually exists in such cases.

For example, under Section 2000, if a person is found leaving the woods with a deer and a rifle, those facts are prima facie evidence that the person "took" (i.e., killed) the deer. This seems to be a situation in which the presumed fact "is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence." And if there is an innocent explanation, evidence to support that explanation is "so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence." The other Fish and Game PFE provisions appear to be of a similar character.

For those reasons, the governing Evidence Code rules of construction provide strong support for the notion that any presumption created by the Fish and Game Code's PFE language would be a presumption affecting the burden of producing evidence.

*Definition of "Prima Facie Evidence"*

The staff could not find a statutory definition of the term "prima facie evidence," in either the Evidence Code or the Fish and Game Code.

Black's Law Dictionary defines the term as follows:

> Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence.
>
> The quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence; once a trier of fact is faced with conflicting evidence, it must weigh the prima facie evidence with all of the other probative evidence presented. Evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. An inference or presumption of law, affirmative or negative of a fact, in the absence of proof, or until proof can be obtained or produced to overcome the inference.[32]

This definition is not conclusive, as it seems to contain elements that would support PFE language being construed as either a presumption affecting the burden of producing evidence or proof. However, the concept that the sufficiency of the evidence stands only if unexplained or uncontradicted, seems to be consistent with the way that a presumption affecting the burden of producing evidence operates in California.[33]

The staff also found a California Supreme Court decision that defined the term "prima facie evidence" as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced."[34] Again, the statement that PFE language is sufficient to establish a fact *until contradicted*, echoes the Commission's Comment to Evidence Code Section 604, which explained the operation of a presumption affecting the burden of producing evidence as follows:

> *Such a presumption is merely a preliminary assumption in the absence of contrary evidence*, i.e., evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If contrary evidence is introduced, the trier of fact must weigh the inferences arising from

32. Black's Law Dictionary 825-26 (6th ed. 1991).
33. See Evid. Code § 604, *supra*.
34. People v. Skiles, 51 Cal. 4th 1178, 1186 (2011).

> the facts that gave rise to the presumption against the contrary evidence and resolve the conflict.[35]

The implications of the provisions discussed above are far from conclusive, but they seem to be at least compatible with the idea that PFE language can be construed as a presumption affecting the burden of production.

*Case Law Construing PFE Language in Another Context*

As noted earlier in the memorandum, there appear to be no appellate decisions construing the PFE language in the Fish and Game Code. However, there are several older cases that discuss the use of PFE language in Penal Code Section 270 (discussed above), which relates to proof that a failure to provide support for one's child was "willful" and "without excuse."

In construing that PFE language, the California Supreme Court stated:

> It is also essential to a conviction under section 270 that defendant's omission to support his child be willful. The statute provides that "Proof of . . . the omission by such father to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is prima facie evidence that such . . . omission . . . is willful and without lawful excuse." This provision does not set forth a rule relating to proof but merely declares a rule of procedure that places upon defendant the duty of going forward with evidence that his omission to provide was not willful or was excusable.[36]

The statement that the PFE language does not relate to "proof," but only the "duty of going forward with evidence," suggests that the language operates as a presumption affecting the burden of producing evidence, rather than a presumption affecting the burden of proof.

Furthermore, the "use note" for the pre-*Roder* CALJIC jury instruction for Penal Code Section 270 expressly described the PFE language as a presumption affecting the burden of producing evidence:

> The rebuttable presumption arising form the statutory provision that proof of abandonment or omission to provide was willful and without lawful excuse (Evidence Code, § 602) appears to be an Evidence Code, § 603, presumption affecting the burden of producing evidence. People v. Sorensen, 68 Cal. 2d 280....[37]

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35. Emphasis added.

36. People v. Sorensen, 68 Cal. 2d 280, 286 (1968). See also In re Clarke, 149 Cal. App. 2d 802, 807 (1957) (same).

37. CALJIC No. 16.152, 4th ed. (1979).

While the authority discussed above suggests that PFE language *can* be construed as a presumption affecting the burden of producing evidence, it is not dispositive as to the meaning of the PFE language in the Fish and Game Code. It is possible that the type of rebuttable presumption established by such language could vary from statute to statute. Recall that Evidence Code Sections 603 and 605 require an analysis of the policy purpose served by a presumption in order to determine whether it affects the production of evidence or proof.

**Does a Presumption Affecting the Burden of Producing Evidence Regarding an Element of a Crime Violate Due Process?**

It is possible, but far from certain, that a presumption affecting the burden of producing evidence regarding an element of a crime is compatible with due process rights.

In *Ulster County*, the United States Supreme Court drew an express distinction between a presumption affecting the burden of producing evidence and a presumption affecting the burden of proof and declined to decide whether the application of a presumption affecting the burden of producing evidence in a criminal case would violate constitutional due process rights:

> This class of more or less mandatory presumptions can be subdivided into two parts: presumptions that merely shift the burden of production to the defendant, following the satisfaction of which the ultimate burden of persuasion returns to the prosecution; and presumptions that entirely shift the burden of proof to the defendant. The mandatory presumptions examined by our cases have almost uniformly fit into the former subclass, in that they never totally removed the ultimate burden of proof beyond a reasonable doubt from the prosecution. *E. g., Tot v. United States, 319 U.S., at 469. See Roviaro v. United States, 353 U.S. 53, 63,* describing the operation of the presumption involved in *Turner, Leary*, and *Romano*.
>
> To the extent that a presumption imposes an extremely low burden of production -- *e. g.*, being satisfied by "any" evidence -- it may well be that its impact is no greater than that of a permissive inference, and it may be proper to analyze it as such. See generally Mullaney v. Wilbur, 421 U.S. 684, 703 n. 31.[38]

38. County Court of Ulster County v. Allen, 442 U.S. 140, 157, n.16 (1979). The Court also declined to address the constitutionality of a presumption affecting the burden of production in *Sandstrom v. Montana*, 442 U.S. 510, 515-19 (1979). See also Francis v. Franklin, 471 U.S. 307, 314 n.3 (1985) ("We are not required to decide in this case whether a mandatory presumption that shifts only a burden of production to the defendant is consistent with the Due Process Clause, and we express no opinion on that question.").

Although the Court was not deciding the matter, that *dicta* offered a possible rationale for why a presumption affecting the burden of producing evidence (and, presumably, a jury instruction correctly effecting such a presumption) would not violate due process:

(1) Such presumptions "never totally [remove] the ultimate burden of proof beyond a reasonable doubt from the prosecution." The removal of that burden from the prosecution is the essential reason why mandatory presumptions affecting the burden of proof are unconstitutional. If a presumption affecting the burden of producing evidence does not have that effect, it may be constitutional.

(2) A presumption that imposes an extremely low burden of production may have no greater effect on the rights of a criminal defendant than a permissive inference. Given that a rational permissive inference does not offend due process, this suggests that a sufficiently modest and rational presumption imposing a production burden on a defendant in a criminal case could survive constitutional scrutiny.

The *dicta* from *Ulster County*, discussed above, was acknowledged in *Roder*, but was found to be inapposite. The jury instructions at issue in *Roder* included a presumption affecting the burden of proof, making it unnecessary to determine whether a presumption affecting the burden to produce evidence would also violate due process.

*Argument in Favor of Constitutionality of Shifting Production Burden*

The staff sees some merit in the idea that a presumption that only affects the burden of production would not offend due process because it does not "totally [remove] the ultimate burden of proof beyond a reasonable doubt from the prosecution." An opinion of the Fourth Circuit Court of Appeal relied on this reasoning in finding that shifting the burden of production in a criminal case does not violate the defendant's constitutional rights:

> Shifting a production burden simply does not involve the same concerns addressed by the Court in *[Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975)]. Mullaney* is grounded in the standard of proof "beyond a reasonable doubt" required by *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). A burden of production shift, however, does not affect that requirement in any way. The defendant need not meet any persuasion burden at all, but instead must only introduce some evidence to dissipate the presumption and require the state to

> prove the element of the crime beyond a reasonable doubt. Such a shift "has little, if any, impact on the substantive relation between the state and the criminal accused. Instead, placing the burden of production on the defendant is an economical way to screen out issues extraneous to the case at hand and thus to promote efficient litigation." Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1334 (1979). See also, *Mullaney*, 421 U.S. at 703 n. 31 ("Shifting the burden of persuasion to the defendant places an even greater strain upon him [than shifting the burden of production] since he no longer need only present some evidence with respect to the fact at issue; he must affirmatively establish that fact.") To invalidate production burden shifting presumptions would require the state to disprove convincingly every possible defense even though the defense was not raised at trial. We refuse to establish such a requirement, and evaluate this presumption under the *[Ulster County]* standard.[39]

It is helpful to consider this argument in the context of one of the Fish and Game Code PFE provisions. Section 8254 provides, in relevant part:

> **8254. Commercial take of lobster**
>
> 8254. (a) Lobsters shall not be taken for commercial purposes except under a valid lobster permit issued to that person that has not been suspended or revoked, subject to regulations adopted by the commission.
>
> …
>
> (e) For the purposes of this section, it is prima facie evidence that lobster is taken for commercial purposes if the possession of lobster is more than three times the sport bag limit.

Under the current regulation,[40] the sport bag limit for lobster is 7. Thus, under Section 8254, possession of 21 or more lobster is prima facie evidence that the lobster were taken for a commercial purpose (thereby requiring a valid lobster permit).

If the PFE language is construed as a presumption affecting the burden of producing evidence, a person who is charged on the basis of that presumption would bear the burden of introducing evidence "which would support a finding"[41] that the lobster were not taken for a commercial purpose.

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39. Davis v. Allbrooks, 778 F.2d 168, 173-74 (4th Cir. 1985). See also Muller v. Wisconsin, 94 Wis. 2d 450, 472 (1980) (same).

40. 14 Cal. Code Regs. § 29.90(b).

41. Evid. Code § 604.

If such evidence were introduced, the "presumption disappears and the judge need say nothing about it in his instructions."[42] The prosecutor would bear the burden of proving take for a commercial purpose beyond a reasonable doubt, without the benefit of the presumption. Only if the defendant offers no evidence supporting an alleged noncommercial purpose, would the presumption operate, requiring the trier of fact to assume the existence of the presumed fact.

This example demonstrates the importance of a presumption affecting the burden of production as a way of "screening out extraneous issues." In the absence of any evidence of a defendant's purpose, the prosecutor would need to "disprove convincingly every possible defense even though the defense was not raised at trial."[43] Was the defendant intending to give the lobsters as gifts to 21 friends? Throw a lobster bake party? Donate the lobster to a food bank? Arguably, if the defendant had such an explanation, the relevant evidence would be "so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence."[44] Once evidence supporting such an explanation has been introduced, the prosecution would bear the burden of proving that the defendant had a commercial purpose, without the benefit of any presumption.

*Arguments Against Constitutionality of Shifting Production Burden*

The staff sees one strong argument against the constitutionality of a presumption affecting the burden of producing evidence in a criminal case. If the defendant cannot or does not offer sufficient rebuttal evidence to satisfy the burden of production, a court would be *required* to instruct the jury that it must assume the existence of the presumed fact. In that situation, the presumption would operate in the same way as a mandatory presumption affecting the burden of proof. The prosecutor would be relieved of the duty of proving the presumed fact beyond a reasonable doubt.

That was the argument embraced by the Supreme Court of Illinois in holding that a presumption affecting the burden of producing evidence in a criminal case violates due process:

42. *Id.*, Comment.
43. *Davis*, 778 F.2d at 174.
44. Evid. Code § 603, Comment.

> We agree that in the area of criminal law, mandatory rebuttable presumptions which shift the burden of production to the defendant are unconstitutional. A production-shifting presumption places a burden on the defendant to come forward with a certain quantum of evidence to overcome the presumption. If the defendant does not satisfy that burden, the judge is required, in effect, to direct a verdict against the defendant on the element which is proved by the use of the presumption. This result conflicts with the longstanding rule that a verdict may not be constitutionally directed against a defendant in a criminal case. See, e.g., Sandstrom, 442 U.S. at 516 n.5, 61 L. Ed. 2d at 46 n.5, 99 S. Ct. at 2455 n.5; United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73, 51 L. Ed. 2d 642, 652, 97 S. Ct. 1349, 1355 (1977). In sum, we agree with the commentator who noted that, "since a verdict may not be directed against an accused, the burden of production with respect to an element of a crime may never be shifted to the defendant." 17 Crim. L. Bull. at 441. Therefore, we hold that such a presumption violates the due process clause of the United States Constitution for the reasons discussed above. These same reasons lead us to hold separately that a mandatory production-shifting presumption also violates the due process clause of the Illinois Constitution.[45]

According to the Illinois Supreme Court, a majority of the commentators who have considered the issue agree that shifting the production burden in a criminal case violates due process.[46]

It is also worth briefly discussing the jury instructions for PFE provisions in other codes that CALCRIM has construed as a presumption affecting the burden of producing evidence. For each of those provisions, CALCRIM provides a permissive inference instruction (rather than a mandatory presumption instruction) to be given if the defendant fails to meet the burden of production.[47] The CALCRIM user notes for those instructions cite *Roder* as the reason for that treatment. This suggests that the CALCRIM committee saw at least a significant possibility that a mandatory presumption affecting the burden of production would violate due process and took steps to avoid that problem.

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45. People v. Watts, 181 Ill. 2d 133, 147 (1998). See also Washington v. Johnson, 100 Wash. 2d 607, 617 (1983) (same).

46. *Id.* at 145-46.

47. See CALCRIM Nos. 2220 (construing PFE language in Vehicle Code Sections 14601 et seq.), 2641 (construing PFE language in Penal Code Section 118a), 2800, 2801, and 2810 (construing PFE language in Revenue and Taxation Code Sections 19701(d) and 19703), 2981 (construing PFE language in Penal Code Section 270).

**Conclusion**

There is a strong argument for construing the Fish and Game Code PFE language as a presumption affecting the burden of producing evidence. Under Evidence Code Section 604, such a presumption would place the initial burden on the defendant, to produce some evidence supporting the nonexistence of the elemental fact. If that production burden is met, the presumption disappears and the judge would give no instruction on the presumption to the jury. If the burden is not met, then the judge would instruct the jury to assume the existence of the elemental fact.

The United States and California Supreme Courts have expressly declined to decide whether such a presumption offends due process. There are possible arguments for and against the constitutionality of such a presumption. Courts in different jurisdictions have decided the matter differently. The staff could find no precedent on the issue that binds California courts. For now, the question remains unresolved.

It seems very likely that some judges, relying on the Evidence Code rules of construction, would construe the PFE language as a presumption affecting the burden of producing evidence and instruct the jury accordingly. If it turns out that a mandatory presumption affecting the burden of producing evidence is unconstitutional, such instructions would be problematic. And, of course, the converse could be true. If such a presumption is constitutional, then instructions given to properly effect the presumption would be unproblematic.

## BURDEN OF PROOF AS TO EXONERATING FACT

In limited circumstances, the common law rule of "convenience and necessity" allows the burden of proving certain facts to be placed on the defendant in a criminal case:

> Under that rule, despite the state's burden of proof beyond a reasonable doubt of all material elements of the offense (Pen. Code, § 1096), if the charge contains a negative averment or concerns a fact peculiarly within the knowledge of the accused, the initial burden of producing evidence on that issue may be placed upon the accused where he has more ready access to that proof and subjecting him to this burden will not be unduly harsh or unfair.[48]

48. People v. Montalvo, 4 Cal. 3d 328, 334 (1971). See also People v. Agnew, 16 Cal. 2d 655, 663 (1940) ("Where the subject matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly

*People v. Salas*[49] provides the California Supreme Court's most modern formulation of the rule:

> Under the so-called rule of convenience and necessity, "the burden of proving an exonerating fact may be imposed on a defendant if its existence is 'peculiarly' within his personal knowledge and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient."[50]

As indicated, a key limitation on the rule of convenience and necessity is that it only applies to the proof of exonerating facts, and not to the proof of an element of a crime.

For example, in *People v. Mower*, the defendant had been charged with possession and cultivation of marijuana. In his defense, defendant argued that the possession and cultivation was lawful under the Compassionate Use Act of 1996, because he was a qualified patient under that Act. One of the issues before the Court was whether the defendant bore the burden of proving that defense. Applying the rule of convenience and necessity, the Court held that the facts at issue related to an *exception* to the crime charged, rather than an element of the crime. Moreover, the exonerating fact at issue — whether a defendant was a "patient" who possessed and cultivated marijuana on the recommendation or with the approval of a physician — was a fact "peculiarly within a defendant's personal knowledge, and proof of their existence by the prosecution would be relatively difficult or inconvenient." And, the Court held, it would not be "unduly harsh or unfair" to allocate the burden of proving those facts to the defendant. Consequently, it was proper to shift that burden of proof to the defendant.[51]

All of the cases that the staff has found upholding the application of the necessity and convenience rule to justify shifting a burden of proof to a criminal defendant involved the proof of an affirmative defense, rather than an element of a crime.[52]

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within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him.").

49. 37 Cal. 4th 967 (2006).

50. *Id*. at 981. See also People v. Mower, 28 Cal. 4th 457, 477 (2002) ("The rule of convenience and necessity declares that, unless it is 'unduly harsh or unfair,' the 'burden of proving an exonerating fact may be imposed on a defendant if its existence is "peculiarly" within his personal knowledge and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient.'"), *quoting* In re Andre R., 158 Cal. App. 3d 336, 342 (1984).

51. People v. Mower, 28 Cal. 4th 457, 477 (2002).

52. See, e.g., People v. Fuentes, 224 Cal. App. 3d 1041 (1990) (in prosecution for possession of hypodermic needle, defendant bore burden of proving defense that possession was authorized

Consistent with that pattern, the Court held the rule of convenience and necessity to be *inapplicable* in *People v. Montalvo*. In that case, the defendant had been charged with being 21 years or older and furnishing narcotics to a minor. The state argued that, under the rule of convenience and necessity, it did not bear the burden of proving the defendant to be 21 years or older. The Court disagreed:

> In the absence of a legislative provision that minority is a defense, we do not believe that the relative ability of the prosecution and defense to establish the defendant's age is sufficient to justify invoking the rule of necessity and convenience to relieve the prosecution of its burden of proving the defendant's majority….[53]

If the staff's understanding of the rule of convenience and necessity is correct, it would only be relevant to the Fish and Game Code PFE language if the element fact at issue is an exonerating fact, rather than an element of a crime.

As they are currently drafted, the staff believes that the Fish and Game Code PFE language provisions relate to the proof of elements of crimes, rather than defenses or exceptions. Consider the three examples that were set out at the beginning of this memorandum:

> **2000. Unlawful take generally.**
>
> 2000. (a) It is unlawful to take a bird, mammal, fish, reptile, or amphibian except as provided in this code or in a regulation adopted pursuant to this code.
>
> (b) Possession of a bird, mammal, fish, reptile, amphibian, or part of any of those animals, in or on the fields, forests, or waters of this state, or while returning therefrom with fishing or hunting equipment, is prima facie evidence the possessor took the bird, mammal, fish, reptile, or amphibian, or part of that animal.

> **4758. Sale of bear parts**
>
> 4758. (a) Subject to the provisions of this code permitting the sale of domestically raised game mammals, it is unlawful to sell or purchase, or possess for sale, the meat, skin, hide, teeth, claws, or other parts of any bear in this state.
>
> (b) The possession of more than one bear gall bladder is prima facie evidence that the bear gall bladders are possessed for sale.

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by prescription); People v. Salas, 37 Cal. 4th 967 (2006) (in prosecution for sale of unregistered securities, defendant bore burden of proving defense of good faith belief that securities were registered); People v. Agnew, 16 Cal. 2d 655, 663 (1940) (in prosecution for false imprisonment, defendant bore burden of proving defense that he was justified in executing a citizen's arrest).

53. People v. Montalvo, 4 Cal. 3d 328, 334 (1971).

(c) Nothing in this section prohibits a sale authorized pursuant to Section 3087.

**8664. Prima facie evidence of unlawful net use**

8664. Except in Districts 6 and 7, any net found in, or within 500 feet of the Klamath, Smith, Eel, Mad, Van Dusen, or Mattole Rivers, or their tributaries, is prima facie evidence that the owner or person in possession of the net is or has been using it unlawfully.

The provisions of this section do not apply to trawl or drag nets being transported.

In each of those provisions, the presumed fact appears to be an element of the crime at issue (in Sections 4758 and 8664 it appears to be the *only* element of the crime). For that reason, the rule of convenience and necessity appears to be inapplicable to the Fish and Game Code PFE provisions. It is not discussed further in this memorandum.

## CONCLUSION

The constitutionality of language establishing a presumption or inference in a criminal case cannot be evaluated on the face of the statute. It can only be evaluated as applied. What matters is how the jury is instructed.

The staff found no appellate decisions construing the Fish and Game Code PFE provisions. Nor are there any CALJIC or CALCRIM jury instructions for those provisions. This means that the staff found no direct evidence on how the PFE provisions are actually being applied.

In *Roder*, the California Supreme Court provided guidance on how to construe a statutory presumption that is applied to proof of an element of a crime: Evidence Code Section 501, affirming that the prosecution bears the burden of proving every element of a crime beyond a reasonable doubt (with an exception not relevant here), should be read into every such provision. Consequently, presumption language should be construed as creating a permissive inference, and juries should be instructed accordingly.

There is some possibility that trial courts are aware of and are following the Court's guidance on this issue. In *People v. Moore*, the court upheld a CALJIC instruction construing PFE language in Penal Code Section 270 as a permissive inference. This CALJIC instruction had been revised specifically to address the decision in *Roder*.

Given the lack of any case law showing problematic application of the Fish and Game Code PFE provisions, and the guidance provided by *Roder*, one could argue that there is no need for any change to the PFE provisions. Despite the possibility of constitutional error in the application of these provisions, there is no direct evidence that such errors are occurring. Prudence argues against making changes to the law without demonstrated need.

However, if a trial court judge or practitioner is unaware of the guidance provided by *Roder*, there seems to be a good possibility that the PFE language would be construed as creating a presumption, rather than an inference. Rules of construction in the Evidence Code strongly point toward that reading and, before *Roder* was decided, that was how the CALJIC committee construed such language in Penal Code Section 270. Considering that there are no pattern jury instructions or cases directly on point for the Fish and Game Code PFE provisions, individual trial court judges will need to construe those provisions and determine what instructions to give to juries. This opens the door to constitutional error.

**If the Commission is sufficiently concerned about that possibility, and believes that the PFE language is best construed as creating a permissive inference, the Commission could recommend clarifying guidance on that point.** The PFE language could be recast to use permissive inference language. That would effectively preclude application of the PFE language in a way that is inconsistent with *Roder*. Alternatively, if the Commission is reluctant to change the language of the statutes, Commission Comment language could be drafted to direct readers to the guidance provided by *Roder*. This would not be binding, but would help to avoid error.

One possible problem with either of those approaches is that they would be in conflict with construing the PFE language as creating a presumption affecting the burden of producing evidence. If such a presumption is constitutional, then revising the statutes to simply provide for a permissive inference, without any indication that the language shifts the burden of production, could be a substantive change in the law.

There is a strong argument, based primarily on the rules of construction in the Evidence Code, that the PFE language should be construed as creating a presumption affecting the burden of producing evidence. The difficulty is that we do not know for sure that courts are construing the language in that way.

And, importantly, we do not know for sure that such a presumption is constitutional in a criminal case. There is no binding precedent on that point.

**If the Commission concludes that the PFE language should be construed as creating a presumption affecting the burden of producing evidence, and that there is a sufficient likelihood that such a presumption would be constitutional, it may wish to revise the PFE language provisions (or, alternatively, provide guidance to the same effect in Comments).**

**However, if the Commission is unsure of the proper construction of the PFE language, it may decide against attempting to give any clarifying guidance, in the statutes or their related Comments.** The Commission cannot provide useful clarification of the PFE provisions if it cannot determine how they should be construed. This hands-off approach would preserve a significant ambiguity and some scope for constitutional error. On the other hand, it would do no affirmative harm. And it would leave space for further development of the law either by the courts or the Legislature.

**On the latter point, if the Commission decides against making any change, it could include a discussion of the PFE language in the narrative portion of its report, to alert the Legislature to an issue that it may want to address.**

**How would the Commission like to proceed?**

Respectfully submitted,

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