

Review of Selected 2008 California Supreme Court Cases

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Actual Innocence - *In re Lawley* (2008) 42 Cal.4th 1231 (7-0) (capital case)

- The standard for showing actual innocence based on newly discovered evidence is not more lenient than the standard for showing actual innocence to overcome a procedural bar. General burden on habeas petitioners to establish facts by a preponderance of the evidence does not apply to actual innocence claims.
- The evidence must completely undermine the entire structure of the case upon which the prosecution was based.

Appellate Procedure - Certificate of Probable Cause

- CPC not required to challenge upper term if upper term would not be unlawful under plea agreement. (*People v. French* (2008) 43 Cal.4th 36 (7-0).)
 - Plea agreement: “a sentence of no more than 18 years in prison”; D.A. to recommend 18 years at sentencing. (Max with dismissed charge/allegations would have been 180-to-life.)
 - No CPC required to argue to raise *Blakely/Cunningham* argument on appeal because D’s claim does not challenge validity of plea agreement. Unlike where upper term is unlawful under section 654, Sixth Amendment would not render upper term unlawful in all circumstances (e.g. where upper term is based on prior convictions or admissions). Fact that remedy for *Cunningham* error would be resentencing shows that D’s claim would deprive state of benefit of plea agreement.
- CPC required where parties agreed that maximum sentence possible was a sentence that could only have been obtained with consecutive terms and D claims on appeal sentence is unlawful under section 654. (*People v. Cuevas* (2008) 44 Cal.4th 374.) (7-0)
 - Plea agreement: DA reduces aggravated kidnap charges to simple kidnap and multiple 12022.53 charges dismissed and replaced with 12022(b)(1) charge.

Parties agree max sentence under deal is 37 years and 8 months. D sentenced to 35 years and 8 months. (Cal. Supreme Court agrees this is not really a lid.) (*Id.* at 377-78.)

- Presence or absence of a sentence lid does not dictate result. For purposes of CPC requirement, critical question is whether D's section 654 challenge is in substance a challenge to the validity of his plea. (*Id.* at 381.)
- “[D]efendant here is challenging the very sentence he negotiated as part of the plea bargain, and, in substance, is attacking the validity of his plea. The record here clearly reflects that defendant agreed to a maximum possible sentence of 37 years eight months, and belies the assertion that he was merely advised of the maximum sentence.” (*Id.* at 382.)

Appellate Practice - Waiver of *Constitutional* Right to A Jury Trial Must be Express.

- *People v. French* (2008) 43 Cal.4th 36: “The requirement of an *express waiver* applies to the constitutional right to a jury trial, but not to jury trial rights that are established only by statute.” (Emphasis added.) D expressly waived right to a jury trial on substantive offenses, but not to aggravating circumstances. D did not forfeit *Blakely* claim by failing to request a jury trial on aggravating factors. (D entered plea before *Blakely* and was sentenced two weeks after *Blakely*)

Assault - (People v. Chance (2008) 44 Cal.4th 164 (5-2)

- Assault is a general intent crime. Assault requires an act closer to the accomplishment of injury than is required for other attempts. "When discussing the intent requirement, we have characterized assault as ‘unlawful conduct immediately antecedent to battery.’ [Citations.]”
- “Present ability” to commit assault not absent simply because conduct did not immediately precede a battery. Present ability element “is satisfied when ‘a defendant has attained the means and location to strike immediately.’ [Citations.] In this context, however, "immediately" does not mean “instantaneously.” It simply means that the defendant must have the ability to inflict injury on the present occasion. [footnote omitted] Numerous California cases establish that an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected position so that injury would not be "immediate," in the strictest sense of that term.”
- Application by Majority: D ran around trailer. Officer peered around corner, saw D holding gun in one hand, extended forward and supported by other hand. Officer told D to

drop gun, which D eventually did. Gun had fifteen rounds. Although no round in chamber, safety was off. This constituted assault.

- Dissent (Kennard, joined by Werdeger): assault is a specific intent crime requiring an intent to cause injury.

Confrontation Clause - What is Testimonial? - *People v. Romero* (2008) 44 Cal.4th 386, 422 (Cal.,2008) (7-0 capital case).

- Applying *Davis v. Washington* (2006) 547 U.S. 813, victim's statements to officer not testimonial where officer was responding to an emergency call, encountered an agitated victim of a serious assault, who described defendant's attack on him with a small ax. The statements provided the police with information necessary for them to assess and deal with the situation, including taking steps to evaluate potential threats to others by the perpetrators, and to apprehend the perpetrators. The statements were not made primarily for the purpose of producing evidence for a later trial and thus were not testimonial.

Corpus Delicti Rule - Penalty Phase Aggravation Evidence of Unadjudicated Crimes - *People v. Valencia* (2008) 43 Cal.4th 268, 296 (7-0).

- “[T]he corpus delicti rule does apply to unadjudicated crimes offered in aggravation at the penalty phase of a capital trial under current law.” (Court previously held that the doctrine applied under an earlier death penalty law. (*People v. McClellan* (1969) 71 Cal.2d 793, 805-806.))

DNA Evidence - *People v. Nelson* (2008) 43 Cal.4th 1242, 1259.

- “Experts use a statistical method called the ‘product rule’ to calculate the rarity of the sample in the relevant population.” The result is the probability that the DNA of a person selected at random from the relevant population would match the sample at all tested loci. (*Id.*) The product rule already was deemed to have gained general acceptance in the scientific community. The Court held in *Nelson* that its application to cold hit cases using a computer database does not constitute a new scientific technique requiring no additional analysis under *Kelly*. The rarity of a DNA profile is a relevance question, not a reliability question. (*Id.* at 1260-1265.)
- Evidence obtained by use of the product rule is relevant in a cold hit case.
 - In a non-cold-hit case, the product rule result represents both (1) frequency a DNA profile would be expected to appear (rarity) and (2) the probability of finding a match by randomly selecting one profile (random-match probability). (*Nelson*, 43 Cal.4th at 1266.) In a cold-hit case, the product rule no longer accurately reflects probability of finding a match by chance. Because profiles have been searched

increases the probability of a match. So in a cold-hit case, the product rule only represents the rarity of the profile. (*Id.* at 1266-1267.)

- “The fact that the match ultimately came about by means of a database search does not deprive the rarity statistic of all relevance. It remains relevant for the jury to learn how rare this particular DNA profile is within the relevant populations and hence how likely it is that someone other than defendant was the source of the crime scene evidence.” (*Id.* at 1267.)

DNA Testing (PC § 1405) - *Richardson v. Superior Court* (2008) 43 Cal.4th 1040 (5-2)

- Denial of postconviction motion for DNA testing is reviewed for abuse of discretion.
- Materiality?
 - Under § 1405(f)(4) defendant must make “a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of ... the crime....”
 - D need not show favorable test would conclusively establish innocence. (*Id.* at 1049.)
- Reasonable Probability?
 - Under § 1405(f)(5) defendant must show “a reasonable probability that ... the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of the conviction.”
 - “reasonable probability” has the same meaning it has for IAC (*Strickland*) and state law error (*Watson*).
 - D “must demonstrate that, had the DNA testing been available, in light of all of the evidence, there is a reasonable probability-that is, a reasonable chance and not merely an abstract possibility-that the defendant would have obtained a more favorable result.” (*Richardson*, 43 Cal.4th at 1051.)
- Majority: evidence was relevant but no abuse of discretion in denying capital petitioner’s postconviction motion for DNA testing of hair samples admitted at his capital trial. Majority noted “strong” evidence against petitioner and that jury would have given little weight to hair evidence because it was just one piece of evidence and it was fiercely disputed by defense.

- Dissent (Chin, joined by George): Notes great expense of litigating this issue in comparison to trial court just granting request for testing or parties just agreeing to it. Also notes that express language of statute seems to require rigorous analysis applied by majority, but concludes Legislature could not have intended to make litigation over testing more expensive than the testing itself. Dissent “would interpret section 1045 to require only a preliminary assessment of whether testing results would raise a reasonable probability of a different outcome.”

Discovery - Brady - *In re Miranda* (2008) 43 Cal.4th 541.

- Capital defendant’s death sentence in one case and second degree murder guilty-plea conviction for separate killing in second case both vacated. Prosecutor violated duty to disclose exculpatory letter from an inmate (Montez) detailing confession of another inmate (Saucedo) that he (Saucedo) had personally killed the victim in the second degree murder case. As this was contrary to Saucedo’s testimony at D’s penalty phase in the capital case, the evidence was exculpatory and material. That Montez’s description of Saucedo’s statement left open the possibility that D was an aider and abetter in the second-degree murder case killing, did not undermine impact the evidence would have had at the penalty phase in the capital case where the jury was deciding between life in prison or death. The possibility of an aider and abetter theory of guilt also did not foreclose possibility that defense counsel in the second-degree-murder case, armed with the letter, might have advised against the guilty plea.

Firearms

- Multiple Gun Enhancements - (Pen. Code §§ 12022.5 & 12022.53). After a trial court imposes punishment for the section 12022.53 firearm enhancement with the longest term of imprisonment, the remaining section 12022.53 firearm enhancements and any section 12022.5 firearm enhancements that were found true for the same crime must be imposed and then stayed. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1123 (7-0).)
- Firearm Use in Commission of Drug Offense (Pen. Code § 12022)
 - In *People v. Bland* (1995) 10 Cal.4th 991, Court described a facilitative nexus test for arming with a gun “in the commission of” a drug crime. If (1) D knew of gun’s presence and location nearby, (2) gun’s proximity to drugs was “not accidental or coincidental,” and (3) gun was available for offensive or defensive use in underlying offense, then the gun facilitated the crime and has the requisite purpose and effect.
 - “The particular reason”—contemplating suicide claimed in this case—“why he purposefully placed a gun in close proximity to drugs, where it was available for his use in perpetrating his drug offenses, is irrelevant. The defendant’s deliberate

placement of the weapon negates any claim that the proximity of the gun and the drugs was the result of mere accident or coincidence.” (*People v. Pitto* (2008) 43 Cal.4th 228 (6-1).)

- Kennard dissented. She agreed placement of gun was not accidental, but D was entitled to instructions that allowed jury to consider whether placement of gun near drugs was coincidental.
- Note: In *Pitto*, the Court granted review on its own motion upon review of the AG’s request for depublication.

Great Bodily Injury (Pen. Code § 12022.7) - *People v. Cross* (2008) 45 Cal.4th 58 (7-0 concur in result; 4-3 as to reasoning)

- Pregnancy without medical complications that results from unlawful but nonforcible sexual conduct with a minor can support a finding of great bodily injury.
- After noting 22-week gestation in 13-year-old supported GBI in this case, court stated it need not decide whether every pregnancy resulting from unlawful sexual conduct, forcible or otherwise, will invariably support GBI finding.
- Trial court did not err in failing to instruct on the meaning of personal infliction.
- It error for the trial court to instruct the jury that an abortion may constitute great bodily injury, a legally correct statement that did not apply to the facts here, because defendant did not personally perform the surgical abortion?
- Baxter (joined by Chin) concurred: see summary under Instructional Error - Harmless Error.
- Corrigan (joined by George) concurred, but would have held that pregnancy caused by sexual assault is categorically GBI.

Immigration Consequences - *People v. Segura* (2008) 44 Cal.4th 921

- Defendant pleaded no contest to corporal injury on a spouse agreeing to 365 days in county jail as a condition of probation. Court could not, nunc pro tunc, reduce length of jail term.
- “The trial court’s statutory authority to modify conditions of probation in the exercise of its jurisdiction over a probationer did not extend to modifying a material term of a plea agreement that bestowed the privilege of probation subject to defendant’s service of a specified jail term.”

- ICE had deported defendant pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) because he had been convicted of an “aggravated felony,” defined as a “crime of violence . . . for which the term of imprisonment [is] at least one year.” (8 U.S.C. § 1101(a)(43)(F).)

Instructional Error - Harmless Error: *People v. Cross* (2008) 45 Cal.4th 58

- In a concurrence, Baxter (joined by Chin) would apply a straight *Neder/Chapman* harmless error review to instructional error situation where the trial court instructs the jury on both a legally adequate theory (pregnancy can constitute GBI) and a legally inadequate theory (abortion not performed by defendant can support GBI finding). Baxter would not apply test described in *People v. Guiton* (1993) 4 Cal.4th 1116—reversal required because record is silent as to whether jury necessarily convicted defendant on the legally adequate theory. Noting that SCOTUS has applied *Neder/Chapman* to omission of an element or mis-description of an element, Baxter found it would be anomalous to apply a stricter harmless error test when the jury is instructed on a legally correct theory in addition to the legally incorrect theory.

Joinder of Crimes (Intercounty) - *Alcala v. Superior Court* (2008) 43 Cal.4th 1205 (7-0).

- Under section 790(b) of the Penal Code, single trial in Orange County on one Orange County murder and four L.A. County murder charges was proper.
- “790(b), enacted in 1998, permitted joinder where a multiple-murder special circumstance is charged, alleged murders from another county may be joined if the murders “are connected together in their commission.” This does not require that the murders be part of a common plan or scheme. (*Id.* at 1216-1219.)
- Because statutory elements under 790(b) were met, petitioner can establish error only by making a clear showing of prejudice to establish that the trial court abused its discretion in denying severance. (*Id.* at 1220.)

Jury Deliberations: Excusal of Lone Holdout Juror for Life Requires Vacating Death Sentence - *People v. Wilson* (2008) 44 Cal.4th 758 (7-0)

- the erroneous excusal during the penalty phase deliberations of the sole juror holding out for a life sentence requires that we reverse the penalty judgment
- decided on state law grounds only—PC 1089—constitutional claims not reached
- One African-American juror - holdout who kept saying other jurors would not understand; “it was a “black thing” and there was probably more abuse in home than reported. (Defendant was also African-American.)

- Standard of Review: “Although we have previously indicated that a trial court’s decision to remove a juror pursuant to section 1089 is reviewed on appeal for abuse of discretion ..., we have since clarified that a somewhat stronger showing than what is ordinarily implied by that standard of review is required. Thus, a juror’s inability to perform as a juror must be shown as a “demonstrable reality” ... , which requires a “stronger evidentiary showing than mere substantial evidence” As we recently explained ... ‘To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court’s obligation to protect a defendant’s fundamental rights to due process and to a fair trial by an unbiased jury.’” (*Id.* at 821.)
- “Given the jury’s function at the penalty phase under our capital sentencing scheme, for a juror to interpret evidence based on his or her own life experiences is not misconduct.” (*Id.* at 830.)

Jury Selection - Death Qualified - *People v. Carasi* (2008) 44 Cal.4th 1263, 82 Cal.Rptr.3d 265.

- Majority: By failing to specifically mention topic in motion to amend questionnaire or in oral comments to court, D forfeited appellate claim that trial court erred in failing to ask jurors in voir dire whether knowledge that case involved premeditated murder of his mother and the mother of his child would cause them to invariably vote for death. (82 Cal.Rptr.3d 265, 287 fn.14.)
- Dissent: Claim not forfeited and would find error: “Would knowledge that defendant’s offenses involved the premeditated murder of his own mother and the mother of his child cause some otherwise impartial jurors to invariably vote for a sentence of death? I believe the answer is yes and that the trial court therefore erred in failing to question jurors about these facts of defendant’s case.” (Werdeger (joined by Kennard) dissenting.)

Jury Selection - Challenges for Cause - *People v. Wilson* (2008) 43 Cal.4th 1, 14.

- Although capital defendant challenged jurors for cause and exhausted all peremptory challenges, by failing to object to jury as seated he forfeited any claim that trial court erred in denying such challenges.
- Justice Werdeger concurred to highlight inconsistent statements in prior cases about what a defendant must do to preserve a challenge for cause:

On the one hand, we have held that “[t]o preserve a claim based on the trial court’s overruling a defense challenge for cause, a defendant must show (1) he used an available peremptory challenge to remove the juror in question; (2) he exhausted all

of his peremptory challenges or can justify the failure to do so; and (3) he expressed dissatisfaction with the jury ultimately selected.” [Citations.]

On the other hand, we have also articulated the test this way: “To preserve a claim of trial court error in failing to remove a juror for bias in favor of the death penalty, a defendant must either exhaust all peremptory challenges and express dissatisfaction with the jury ultimately selected or justify the failure to do so.”

The difference is subtle. Does the justification option excuse the failure to exhaust one's peremptory challenges, the failure to express dissatisfaction with the jury, or both? (*Id.* at 34 (Werdeger, J., concurring).)

Jury Selection - Peremptory Challenges - Wheeler/Batson

- Stage One - Prima Facie Case. *People v. Carasi* (2008) 44 Cal.4th 1263.
 - Capital trial on charges of Mother's Day double murder of D's mother and the mother of his child. 20 of the prosecutor's 23 peremptory challenges were used to excuse women. Majority found no prima facie showing made of gender discrimination because in initial rounds of peremptory challenges the prosecutor accepted the panel nine times and upon several of those acceptances there were 6 or 8 women on the panel. Justice Kennard disagreed, noting that prosecutor's early acceptances of the panel carried little risk of simultaneous acceptance by both defendants in a capital case and could have stemmed from a strategy to excuse women later in the process when the defendants would have fewer peremptory challenges of their own. (Justice Kennard, however, concurred because there were obvious sex-neutral reasons for the challenges (e.g. 12 showed strong reluctance to impose the death penalty; 5 others had extensive professional or personal experience with counseling or psychology; 1 was a former ACLU member with two arrests of her own and had twice been married to men who had served prison sentences, including one who had been convicted of murder; 1 had a criminal defense attorney son formerly employed by the LA County Public Defender, defendant's counsel).
- **Stage One - Prima Facie Case -*People v. Howard* (2008) 42 Cal.4th 1000 (5-2 on *Batson* claim)**
 - Majority: D failed to make out prima facie case.
 - Apply independent review because in this *pre-Johnson v. California* (2005) 545 U.S. 162 trial, it is unclear whether trial court applied erroneous strong-likelihood standard instead of reasonable-inference-of-discrimination standard.

- “When the trial court expressly states that it does not believe a prima facie case has been made, and then invites the prosecution to justify its challenges for the record on appeal, the question whether a prima facie case has been made is not mooted, nor is a finding of a prima facie showing implied.” (*Id.* at 1018.)
- Concurrence/Dissent (Kennard joined by Moreno): once court asks for and receives explanation for challenges from prosecutor, question of whether a prima facie case has been shown is moot and prosecutor’s reasons must be examined. (*Id.* at 1034.)
- **Juror Comparison at Stage One:** *People v. Howard* (2008) 42 Cal.4th 1000, 1019-1020.
 - We decline defendant's invitation to engage in comparative juror analysis. ... It is not a “third-stage” case, in which a trial court concludes a prima facie case has been made, solicits an explanation of the peremptory challenges from the prosecutor, and only then determines whether defendant has carried his burden of demonstrating group bias. “We have concluded that *Miller-El v. Dretke* (2005) 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 does not mandate comparative juror analysis in these circumstances [citation], and thus we are not compelled to conduct a comparative analysis here. Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales, and we thus decline to engage in a comparative analysis here.” [Citation.]
- **Juror Comparison at Stage Three:** *People v. Lenix* (2008) 44 Cal.4th 602 (7-0 with concurrences)
 - Stage three: “the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy”
 - *Miller-El v. Dretke* (2005) 545 U.S. 231 and *Snyder v. Louisiana* (2008) --- U.S. ----, 128 S.Ct. 1203 “stand for the unremarkable principle that reviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent. Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at Wheeler/Batson's third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons. In those circumstances, comparative

juror analysis must be performed on appeal even when such an analysis was not conducted below.”

- Limitations of cold appellate record - “Defendants who wait until appeal to argue comparative juror analysis must be mindful that such evidence will be considered in view of the deference accorded the trial court's ultimate finding of no discriminatory intent.”
 - non-verbal communication by jurors
 - fluid process of jury selection: “Two panelists might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable.”
- In *Miller-El II*, “[c]omparative juror analysis was only one part of the Supreme Court's exhaustive review in an egregious case. “Comparative juror analysis is circumstantial evidence.
- Procedural Default? “In a footnote following this paragraph, the Supreme Court stated: ‘The Louisiana Supreme Court did not hold that petitioner had procedurally defaulted reliance on a comparison of the African-American jurors whom the prosecution struck with white jurors whom the prosecution accepted. On the contrary, the State Supreme Court itself made such a comparison. See [*State v. Snyder* (La.2006)] 942 So.2d 484, 495-496.’ (*Snyder, supra*, 128 S.Ct. at p. 1211, fn. 2.) The Attorney General interprets the footnote as suggesting the Supreme Court would honor a state procedural rule requiring that comparative juror analysis be conducted first in the trial court or be deemed forfeited. Of course, the court did not actually say that. The intended meaning of footnote remains unclear. Without further guidance from the Supreme Court, we do not attempt to discern its meaning.” (44 Cal.4th at 620, fn.14)
- In a concurrence (Baxter, joined by Chin) emphasized the open question regarding procedural default.

Lifer Parole Cases

- *In re Lawrence* (2008) 44 Cal.4th 1181, 1191.
 - “[T]he standard of review properly is characterized as whether ‘some evidence’ supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous.”

- “[T]o the extent our decisions in *Rosenkrantz* and *Dannenberg* have been read to imply that a particularly egregious commitment offense always will provide the requisite modicum of evidence supporting the Board’s or the Governor’s decision, this assumption is inconsistent with the statutory mandate that the Board and the Governor consider all relevant statutory factors when evaluating an inmate’s suitability for parole.” (*Id.* at 1191.)
- “In some cases, such as this one, in which evidence of the inmate’s rehabilitation and suitability for parole under the governing statutes and regulations is overwhelming, the only evidence related to unsuitability is the gravity of the commitment offense, and that offense is both temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur, the immutable circumstance that the commitment offense involved aggravated conduct does not provide ‘some evidence’ inevitably supporting the ultimate decision that the inmate remains a threat to public safety.” (*Id.*)
- *In re Shaputis* (2008) 44 Cal.4th 1241.
 - The Court of Appeal impermissibly substituted its own evaluation of the record for that conducted by the Governor. Because, unlike *Lawrence*, the record contains some evidence supporting the Governor’s determination that the inmate poses a *current* threat to public safety, the Court reversed the judgment of Court of Appeal granting a writ of habeas corpus. (*Id.* at 1255.) Defendant “failed to take responsibility for the murder of his wife, and despite years of rehabilitative programming and participation in substance abuse programs, has failed to gain insight into his previous violent behavior, including the brutal domestic violence inflicted upon his wife and children for many years preceding the commitment offense.” (*Id.* at 1246.)
 - Regarding nature of commitment offense: “the relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense.” (*Id.* at 1254-1255.)
 - “[T]he aggravated nature of the offense indicates that petitioner poses a current risk to public safety.... [T]he murder was the culmination of many years of petitioner’s violent and brutalizing behavior toward the victim, his children, and his previous wife.” (*Id.* at 1259.)

Mental Health Examination of Defendant By Prosecution Witness

- “[T]rial court’s order granting the prosecution access to [a defendant] for purposes of having a prosecution expert conduct a mental examination is a form of discovery that is

not authorized by the criminal discovery statutes or any other statute, nor is it mandated by the United States Constitution.” (*Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1116; see also *People v. Wallace* (2008) 189 P.3d 911, 950-951, 81 Cal.Rptr.3d 651, 698.)

- But prosecution waived argument that appointment was authorized by Evidence Code section 730, so Court did not decide that issue. (*Verdin*, 43 Cal.4th at 1109.) (Evidence Code section 730 provides: “When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. [¶] The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court.”)

Pre-Charging Delay (Due Process) - *People v. Nelson* (2008) 43 Cal.4th 1242, 1250.

- No presumption of prejudice. “Presuming prejudice would be inconsistent with the Legislature’s declining to impose a statute of limitations for murder, among the most serious of crimes.”
- Prejudice to defendant is balanced against justification for delay.
- Citing federal authorities: “delay undertaken to gain a tactical advantage over the accused, or delay incurred in reckless disregard of circumstances known to the prosecution suggesting that delay might prejudice the defense, would violate due process if the defendant demonstrates prejudice.” (*Id.* at 1253.)
- Under California law, negligent delay may violate due process, but if delay was merely negligent a greater showing of prejudice is required. (*Id.* at 1255-1256.)
- No due process violation in this case because “the justification for the delay was strong.” While there was reason to suspect D shortly after crime in 1976, crime not solved until cold DNA hit in 2002. (*Id.*) Court refuses to second guess law enforcement allocation of resources such that it makes no difference that DNA comparison could have been conducted years earlier. (*Id.* at 1256-1267.)

Prison Offenses - *People v. Watson* (2007) 42 Cal.4th 822 (7-0)

- Inmate transferred to state hospital for mental health treatment is a person “confined in a state prison” and is “subject to prosecution for battery under section 4501.5 and to the increased punishment provided upon conviction under that statute.”

Prosecutorial Misconduct-Closing Argument - *P. v. Lopez* (2008) 42 Cal.4th 960 (7-0).

- Court rejected three claims of misconduct arising from prosecutor's closing argument in prosecution of priest for child molestation:
 - Prosecutor argued, "we know that priests are human just like any other person. They commit sins as the defendant said, and they commit crimes, and they commit horrendous crimes." Court rejected argument that in light of Catholic Church scandal this constituted an argument for guilt by association.
 - Posing hypothetical situations to jurors asking them to imagine being assaulted in a room and four years later being asked to recount what objects were in the room was not improper. Prosecutor did not ask jurors to stand in victim's shoes, so as to evoke sympathy for victim.
 - No misconduct when, at end of rebuttal argument addressing defense counsel's argument that prosecutor resorted to attacking defense counsel, prosecutor stated: "I don't think [counsel] is mean or stupid. But I think his client is guilty." Not misconduct because statement did not imply belief in guilt was based on evidence not before jury.

Prosecutorial Recusal

- Order denying recusal reviewed for abuse of discretion. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 709. (7-0)) "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review." (*Id.* at 711.) Abuse of discretion standard also applied in capital case. (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 728.)
- *Haraguchi*:
 - Lead prosecutor moonlighted as a novelist, writing a fictional account of a heroine prosecutor's decision whether to try a rape case involving an intoxicated victim. The novel ("Intoxicating Agent") was published shortly before her scheduled prosecution of petitioner for the rape of an intoxicated victim. Trial Court found no conflict, Supreme Court, reversing court of appeal, found no abuse of discretion. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706.)
 - Two-part test: (1) is there a conflict? and (2) does the conflict make it unlikely D will receive fair trial?
 - No abuse of discretion: "[W]hile a prosecutor's literary career might benefit generally from publicity attendant on successful prosecutions or plea bargains,

there is little reason to conclude such a second career would have distortive effects on the incentives to try, settle, or dismiss any particular unrelated case.” (*Id.* at 715.) Author may not have same view of prosecutor’s role as her fictional character.

- *Hollywood:*
 - D.A. gave “Alpha Dog” filmmakers¹ voluminous materials; trial court assumed inclusion of any confidential docs was not intentional, at most negligent. “While in the abstract it is conceivable a fear of criminal sanctions might alter how Zonen handled this case, the trial court found Zonen credible and concluded the possibility that confidential documents might have been disclosed inadvertently would not prevent Zonen from acting fairly toward Hollywood. That conclusion does not appear arbitrary or capricious and is supported by substantial evidence.” (43 Cal.4th at 731.)
 - DA’s cooperation with dissemination of film not unethical because “cooperation came before Hollywood had been captured and was solely motivated by his desire to have Hollywood captured so he could be tried in a court of law, and (2) Zonen sought throughout to have Hollywood portrayed in as accurate a fashion as possible.” (*Id.* at 732.)
 - D.A. not compensated for assisting with film; had shelved plans for a book. “as the trial court found, Zonen is left with the same interest in burnishing his legacy that every attorney has in a high-profile case-indeed, that every attorney on both sides in this case has. Success in high-profile cases brings acclaim; it is endemic to such matters. Moreover, if the high-profile nature of a case presents incentives to handle the matter in any way contrary to the evenhanded dispensation of justice, the problem is not one recusal can solve, as the same issue would arise equally for any theoretical replacement prosecutor. In such matters, we must rely on our prosecutors to carry out their fiduciary obligation to exercise their discretionary duties fairly and justly-to afford every defendant, whether suspected of crimes high or petty, equal treatment under the law.” (*Id.* at 734.)
- *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737 - recusal order constituted abuse of discretion because it was based on error or law.
 - In absence of bad faith and where prosecutor’s opposition to discovery is motivated by desire for law to be followed and not to be obstructionist, that opposition does not warrant recusal. (*Id.* at 747-748.)

¹ Director was Nick Cassavetes, son of Gena Rowlands and John Cassavetes.

- “[T]he People were allowed to participate in the third party discovery hearings, that in doing so they did not represent third party interests, and that the trial court therefore erred as matter of law in concluding they had represented such interests and had thereby created a conflict.” (*Id.* at 748.)

Robbery - Immediate Presence Element - *People v. Gomez* (2008) 43 Cal.4th 249 (7-0 (1 concurring justice)).

- The Court had already held that the use of force or fear during the asportation, but not the caption phase can constitute robbery . The Court now holds that the immediate presence element may also arise during asportation, but not caption, and still constitute robbery. Robbery is committed even when that victim was not present when the defendant took possession of the property, so long as the defendant forcefully retained the property in the victim’s presence.

Sentencing - Allocution - *People v. Evans* (2008) 44 Cal.4th 590 (7-0)

- “California law gives a defendant the right to make a personal statement in mitigation of punishment but only while under oath and subject to cross-examination by the prosecutor.”
- The federal constitution requires no more.
- The Court did not decide whether right is personal to defendant or whether it is decision to be made by defense counsel.

Sentencing - Right to a Jury Trial - Admissions - *People v. French* (2008) 43 Cal.4th 36.

- “[D]efendant, by entering into a plea agreement that included the upper term as the maximum sentence, did not implicitly admit that his conduct could support [upper] term.”
- Stipulating to factual basis did not constitute admission of upper-term aggravators where (1) “factual basis as stated by the prosecutor does not clearly establish an aggravating circumstance in the present case”; (2) “nothing in the record indicates that defendant, either personally or through his counsel, admitted the truth of the facts as recited by the prosecutor” and “counsel was careful to state that she agreed that witnesses would testify to the facts as recited by the prosecutor; she did not stipulate that the prosecutor's statements were correct”.

Sentencing - Right to a Jury Trial - Harmless Error - *People v. French* (2008) 43 Cal.4th 36, 54.

- *Cunningham*-error “prejudice assessment is even more problematic” in guilty plea context than following a jury trial, “because the record generally does not contain a full presentation of evidence concerning the circumstances of the offense.”

Sentencing - Right to a Jury Trial - Recidivist Factors - *People v. Towne* (2008) 44 Cal.4th 63

- Although it could be considered dicta, court resolved lingering questions of whether *Almendarez-Torres* exception applied to various recidivist factors used to impose an upper term sentence:
 - Prior prison terms and parole or probation status at time of the current offense come within the *Almendarez-Torres* exception.
 - Unsatisfactory parole or probation performance comes within the *Almendarez-Torres* exception if it is based on prior convictions for offenses committed while on parole or probation.
 - But, unsatisfactory parole or probation performance does not come within *Almendarez-Torres* exception if based on alleged misconduct while on probation/parole which was not the subject of a conviction.
- All this remains subject to *Black II*: so as long as trial court cited at least one valid factor, there’s no *Blakely-Cunningham* error.
- There's no constitutional bar to judge considered acquitted conduct as part of discretionary selection among terms for which defendant is eligible.

Death Penalty - Penalty Phase Evidence - *People v. Gay* (2008) 42 Cal.4th 1195 (7-0, with concurrence)

- Upon penalty phase retrial, exclusion of defense evidence that defendant was not the shooter violated Pen. Code § 190.3 and that error, exacerbated by court’s instruction that it was conclusively shown that defendant was actual shooter and to disregard evidence to the contrary, required reversal. Evidence concerning circumstances of the offense is admissible, even if only goes to showing lingering doubt about D’s guilt of capital offense.
- Trial court erroneously held that defendant was precluded from presenting evidence contrary to jury’s verdict that defendant personally used a firearm.

Sentencing-Penalty Phase-Vic. Impact Evidence - *People v. Kelly* (2007) 42 Cal.4th 763

- At capital trial penalty phase, trial court admitted 20-minute montage of still photos and video of victim's life,"narrated calmly and unemotionally by her mother.
 - "[M]usic of Enya-with most of the words unrecognizable-plays in the background; the music is generally soft, not stirring.
 - Victim sings songs with school group, including "You Light Up My Life."
 - "[S]hows scenes of her swimming, horseback riding, at school and social functions, and spending time with her family and friends."
 - Video ends with a view of grave marker followed by video clip of people riding horseback in Alberta, Canada.
- Majority: no need to decide if it was error not to redact to eliminate Enya music or horseback riding at end because not prejudicial.
- Concurrences by Werdeger and Moreno agree not prejudicial, but conclude it was error to admit the videotape which Moreno described being akin to a eulogy.

Special Circumstances

- Evidence of Torture-Murder Insufficient - *People v. Mungia* (2008) 44 Cal.4th 1101.
 - Evidence insufficient to support jury's torture-murder special-circumstance finding. First degree murder is punishable by death if murder "was intentional and involved the infliction of torture." (§ 190.2, subd. (a)(18).) Requires proof D intentionally performed acts calculated to cause extreme physical pain to the victim.
 - There was ample evidence D battered V to death with a blunt object, causing great pain and suffering. But evidence, including D's admission to his sister suggest that he killed V to ensure that she would not survive to identify him, suggest there was no intent to torture. Despite brutality of injuries, they do not suggest D inflicted any of them in an attempt to torture rather than to kill. There is no evidence D deliberately inflicted nonfatal wounds to increase suffering. Binding of victim unaccompanied by other strong evidence of sadistic intent does not establish torture.

- Reversal of the torture-murder special circumstance did not require reversal of death sentence because jury properly considered two other valid special circumstance findings (murder in the commission of a burglary and robbery), all of the facts and circumstances underlying Franklin’s murder, and defendant’s lengthy criminal record.
- Evidence of Lying-in-Wait Insufficient (*People v. Lewis* (2008) 43 Cal.4th 415 (7-0))
 - “[R]equires “proof of ‘an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.’ ” (*Id.* at 508 (citations omitted).)
 - Evidence of lying in wait insufficient as to one incident where eyewitness accounts only related aftermath of shooting.
 - Evidence insufficient as to other incident because at time of killing the lying in wait special circumstance required that the killing be committed during the period of lying in wait. Here, the D’s accomplished the forcible kidnapping of each victim while lying in wait, but then drove victims around in cars for periods of one to three hours before killing them.” (The lying in wait special circumstance was later amended (in 2000) to require only that the killing be committed “by means of” lying in wait, to parallel the lying in wait definition for first degree murder by means of lying in wait.)
- Multiple Multiple-Murder Special Circumstances Improperly Charged (*People v. Zamudio* (2008) 43 Cal.4th 327 (7-0)) (as numerous other cases, superfluous finding is stricken and D suffered no prejudice).

Sentencing - Proof of Prior

- *People v. Delgado* (2008) 43 Cal.4th 1059 (7-0)
 - Court trial held on serious felony allegation for prior section 245(a)(1) conviction. Section 245(a)(1) punishes both assault with a deadly weapon and assault with force likely to cause great bodily injury.
 - Evidence was sufficient to prove prior conviction was for assault with a deadly weapon (not force likely to cause GBI) where sole proof is abstract of judgment stating “[Penal Code section] 245(A)(1)” and described the crime as “Asslt w DWpn.”
- *People v. Miles* (2008) 43 Cal.4th 1074 (7-0).
 - At time of prior federal conviction, federal statute, 18 USC § 2113(a), criminalized both bank robbery (a serious felony in Cal.) and what is essentially burglary of a bank (not a serious felony in Cal.)
 - Evidence that the defendant suffered a previous conviction under section 2113(a), standing alone, cannot establish that the conviction was for a serious felony under California law.
 - But proof was sufficient to establish prior was a serious felony where documents included judgment signed by federal judge stating D pled guilty to “armed bank robbery” and kidnapping.
 - Note: in 1986, Congress amended subdivision (a) of 18 USC 2113 to add to the first paragraph extortion of bank property or money. The serious felony of bank robbery includes no extortion form of the crime.

SVP - Effect of Reversal of Underlying Criminal Conviction - *In re Smith* (2008) 42 Cal.4th 1251 (7-0).

- To avoid difficult constitutional question, Court interprets SVP law to not authorize SVP commitment where conviction underlying custody that led to SVP proceedings reversed and prosecutor has elected not to retry.
- Avoided constitutional question: whether equal protection bars differential treatment of person not in custody (who can be committed through LPS proceedings) and person whose conviction has been reversed.

SVP - Right to testify - *People v. Allen* (2008) 44 Cal.4th 843 (7-0)

- “a defendant in [an SVP] proceeding has a right under the California and the federal Constitutions to testify despite counsel’s decision that he or she should not testify”
- Subject to *Chapman* harmless error review.
- Harmless in this case: “the proffered testimony that the uncharged conduct in 1989 was consensual, that defendant was willing to take his medication, and that staff members flirted with him could not, in the circumstances of this case, have had any impact upon the jury’s conclusion that defendant is a sexually violent predator.”

Theft - Poss. of Recently Stolen Property - *People v. Najera* (2008) 43 Cal.4th 1132 (7-0)

- In trial on theft-related offense no sua sponte duty to instruct that possession of recently stolen property is insufficient by itself to establish guilt.
 - Where an instruction merely informs jury that a fact (or facts) is not substantial evidence of guilt, there no sua sponte duty, e.g. instructions re consciousness of guilt, other crimes evidence, motive alone.
 - Distinguish where there is an exception to substantial evidence test requiring corroboration of evidence that would otherwise constitute substantial evidence. There is thus sua sponte duty to instruct that accomplice testimony must be corroborated, on the corpus delicti rule.