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RECENT LEGAL DEVELOPMENTS IN SUBSTANTIVE LAW AND APPELLATE PRACTICE

JEREMY PRICE AND SHANNON CHASE
FDAP Staff Attorneys
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I. RECENTLY DECIDED CALIFORNIA CASES OF INTEREST

A. Search & Seizure

1. **Scope of Probation Searches**: *People v. Romeo* (2015) 240 Cal.App.4th 931. Officers must know that the target of their search, such as a residence, falls within the scope of a probation search clause in order for the warrantless search to comply with the Fourth Amendment.

2. **Advance Knowledge of Warrantless Search Condition**: *People v. Douglas* (2015) 240 Cal.App.4th 855, petn. for review pending, petn. filed Nov. 10, 2015 (S230503). Notwithstanding the long line of California Supreme Court cases requiring that officers have advance knowledge of a probation search condition for such a condition to justify a warrantless search, the Court of Appeal in *Douglas* held that such a search is reasonable so long as the officer has an "objectively reasonable belief" - not necessarily actual knowledge - that the person is on probation (or, in this case, post release community supervision) and subject to a warrantless search condition.

3. **Advance Knowledge of Warrantless Search Condition**: *People v. Wolfgang* (2015) 240 Cal.App.4th 1268, petn. for review pending, petn. filed Nov. 17, 2015 (S230644). Applying an analysis similar to the framework for the *Leon* good faith exception to the Fourth Amendment exclusionary rule, *Wolfgang* held suppression is not warranted where an officer lacked actual advance knowledge of the defendant's probation search condition but reasonably believed the defendant was subject to a probation search condition.

4. **Detention of a Driver in a Stopped Vehicle**: *People v. Brown* (2015) 61 Cal.4th 968. Approving of *People v. Bailey* (1985) 176 Cal.App.3d 402, the Supreme Court held that a detention occurs when an officer parks behind a stopped vehicle and activates the patrol car's emergency lights and a person submits to the officer's show of authority by remaining in the stopped vehicle.

5. **Officer's Taking of a Person's Identification Card**: *People v. Linn* (2015) 241 Cal.App.4th 46. The Court of Appeal held that during an encounter between the police and a citizen, the officer's taking of a person's identification card does not automatically convert an otherwise consensual

encounter into a detention. Rather, the taking of an identification card is but one factor in analyzing the totality of the circumstances. Nevertheless, the Court of Appeal in this case went on to find a detention and a Fourth Amendment violation, employing a detailed analysis of the relevant factors, including the taking of an identification card, that could prove useful for appointed appellate defense attorneys.

6. **Anonymous Tips**: *People v. Brown* (2015) 61 Cal.4th 968. The Supreme Court found reasonable suspicion to detain based on an anonymous 911 phone call where the following factors were present: (1) "a citizen living in a residential neighborhood made an emergency call seeking police assistance because a fight was happening in an alley behind the citizen's home"; (2) "[t]he caller gave a specific address"; (3) "[t]he caller heard screaming and a reference to a loaded gun"; (4) "[t]he dispatcher heard screaming as well"; (5) "[t]he caller confirmed the fight was occurring as they spoke and remained on the line to narrate events"; (6) "[w]ithin three minutes of dispatch [the officer] arrived with lights and siren activated"; (7) "the only person in the alley, was driving a car away from the reported location of the fight"; (8) "[i]t was after 10:30 p.m."; and (9) the person "left the alley but drove back toward the scene on the main street."

7. **Implied Consent for a Warrantless Blood Draw**: *People v. Agnew* (2015) 242 Cal.App.4th Supp. 1. When considering whether a warrantless blood draw conducted as part of a DUI investigation is reasonable under the Fourth Amendment, California's implied consent law (Veh. Code, § 23612) is one of the factors that enters into the totality of the circumstances analysis. An officer need not admonish the driver regarding the statutory consequences of withdrawing advance consent for the consent to be deemed voluntary under the Fourth Amendment. The Court of Appeal also held that advising a driver that he or she must submit to a test under California law is not inherently coercive. The Court of Appeal remanded this case back to the trial court to determine whether, under the totality of the circumstances, the driver's consent was voluntary. (See also *People v. Harris* (2015) 234 Cal.App.4th 671 [holding that actual consent under the implied consent statute satisfies the Fourth Amendment].)

B. Confessions and Statements to Law Enforcement

1. **Booking Interview Questions**: *People v. Elizalde* (2015) 61 Cal.4th 523. Booking interview questions aimed at determining an arrestee's gang affiliation, during which the defendant in this case identified himself as a gang member, constituted a "custodial interrogation" within the meaning of *Miranda v. Arizona* (1966) 384 U.S. 436. As a result, in the absence of *Miranda* warnings, this admission could not be offered at trial as part of the prosecution's case-in-chief. The defendant's statements did not fall within the public safety exception to the *Miranda* rule.

2. **Reinitiation of Questioning After Invocation of the Right to Counsel**: *People v. Bridgeford* (2015) 241 Cal.App.4th 887. Under *Maryland v. Shatzer* (2010) 559 U.S. 98, once a suspect has invoked the right to counsel during an interrogation and been released from custody, the police may not resume questioning the suspect for 14 days, unless the suspect initiates the conversation or has counsel present. (See also *Edwards v. Arizona* (1981) 451 U.S. 477.) Here, the police resumed interrogating a defendant who invoked his right to counsel and, after being released for only a few hours, was taken back into custody. The Supreme Court rejected the Attorney General's contention that the defendant had reinitiated the communication and, in reversing the judgment, found the erroneous admission of the defendant's statements at trial was not harmless beyond a reasonable doubt.

3. **Assertion of the Right to Remain Silent**: *People v. Villasenor* (2015) 242 Cal.App.4th 42, petn. for review pending, petn. filed Dec. 15, 2015 (S231099). If, during the course of a police interrogation, a suspect "unambiguously" indicates "in any manner" that he or she wishes to remain silent, the questioning must cease. Here, the defendant made such an unambiguous invocation of the right to remain silent by repeatedly asking to be taken home and for his parents to be called to pick him up. The Court of Appeal, however, found the erroneous admission of his statements made after he invoked his right to end the interrogation harmless beyond a reasonable doubt.

4. **Involuntary, Coerced Confession**: *People v. Perez* (Jan. 8, 2016, D068690) ___ Cal.App.4th ___ [2016 WL 104712]. A suspect's statement to the police is involuntary and therefore inadmissible if procured by virtue

of an express promise of leniency. In this case, following 25 minutes of denials, the defendant confessed to his involvement in criminal activity immediately after an officer told him that if he told the truth and was honest he would not be charged with any crimes. The officer's promise of leniency was not a mere exhortation to tell the truth. The Court of Appeal rejected the Attorney General's argument that the statement was voluntary because the officer told the defendant that the district attorney would make the final call whether to prosecute him. The officer did not make this statement until after appellant made incriminating statements in response to the officer's promise of leniency. Because the defendant's involuntarily coerced statements were the only evidence directly connecting him to the offenses he was convicted of committing, the Court of Appeal deemed the erroneous admission of his statements at trial prejudicial and reversed the judgment in its entirety.

5. **Involuntary, Coerced Confession of a Minor**: *In re Elias V.* (2015) 237 Cal.App.4th 568. In reversing the denial of a motion to suppress a minor's inculpatory statements to the police as involuntarily coerced in violation of the Fourteenth Amendment Due Process Clause, the Court of Appeal conducted an extensive analysis of many of the most common police interrogation tactics and studies that indicate these tactics tend to produce false or unreliable confessions. The Court of Appeal demonstrated how the use of these deceptive tactics in this case - including positing guilt quickly, maximization/minimization, presentation of false evidence, the lie detector ploy, and the false choice strategy - played a part in overcoming the minor's will and producing an unreliable, coerced confession. In combination with the minor's youth and the absence of corroborating evidence, these tactics rendered the minor's statement involuntary.

C. Double Jeopardy

1. **Right to Jury Trial on Plea of "Once in Jeopardy"**: *People v. Bell* (2015) 241 Cal.App.4th 315, petns. for review pending, petns. filed Nov. 17, 20, 23, & 24, 2015 (S230458). Generally, the state may retry a defendant who requests and is granted a mistrial. However, when "the prosecutor's actions giving rise to the motion for mistrial were done 'in order to goad the [defendant] into requesting a mistrial,'" double jeopardy bars a retrial. (*Oregon v. Kennedy* (1982) 456 U.S. 667, 673.) The Court of Appeal held

that Penal Code sections 1041 and 1043 entitle the defendant to a jury trial on a plea of "once in jeopardy" when objecting to a retrial following a mistrial on *Kennedy* grounds. As the defendants in this case were denied their requests for a jury trial on their pleas of "once in jeopardy," the Court of Appeal conditionally reversed the judgments against them.

2. **Prior Payment of a Civil Penalty to the Federal Government**: *People v. Gonzalez* (2015) 241 Cal.App.4th 1103, petn. for review pending, petn. filed Dec. 17, 2015 (S21226). The Court of Appeal held that state and federal double jeopardy protections do not prohibit a state criminal prosecution where the defendant previously paid a civil penalty to the federal government as a result of the same conduct underlying the state criminal charges.

D. Jury Selection

1. ***Bastson/Wheeler***: *People v. Scott* (2015) 61 Cal.4th 363. The Supreme Court disapproved *People v. Mayfield* (1997) 14 Cal.4th 668, 723-724, to the extent it suggested that a reviewing court may rely on a prosecutor's statement of reasons *to support* a trial court's finding that the defendant failed to make out a prima facie case of discrimination in the prosecutor's use of peremptory strikes. On the other hand, where the reason offered by the prosecutor is used by the reviewing court to *bolster* a prima facie case of discrimination, *Batson* and *Wheeler* mandate that such a proffered justification by the prosecutor "must be weighed with the totality of the relevant facts to determine whether they give rise to an inference of discriminatory purpose and thus compel analysis of the subsequent steps in the *Batson/Wheeler* framework." The Supreme Court also disapproved, in part, two more of its own prior precedents - *People v. Banks* (2014) 59 Cal.4th 1113 and *People v. McKinzie* (2012) 54 Cal.4th 1302 - that incorrectly held a reviewing court should skip ahead to the third stage of the *Batson/Wheeler* analysis when the trial court has determined that no prima facie case of discrimination exists, the trial court allows or invites the prosecutor to state his or her reasons for excusing the juror for the record, the prosecutor provides nondiscriminatory reasons, and the trial court determines that the prosecutor's nondiscriminatory reasons are genuine. In such a situation, "an appellate court should begin its analysis of the trial

court's denial of the *Batson/Wheeler* motion with a review of the first-stage ruling."

E. Competency to Stand Trial

1. **Juvenile Delinquency Proceedings**: *In re R.V.* (2015) 61 Cal.4th 181. Welfare and Institutions Code section 709, which sets forth the procedures for juvenile courts to follow when a doubt arises as to the competency of a minor in delinquency proceedings, does not state which party carries the burden of proof on the question of mental competency. The Supreme Court held in *R.V.* that, consistent with the standards for adults in criminal cases, there is an implied presumption of competence and the party seeking to rebut that presumption bears the burden of proof. The Supreme Court additionally held that the substantial evidence test is the appropriate standard of review on appeal from the juvenile court's determination in a competency proceeding held pursuant to Welfare and Institutions Code section 709. Under the substantial evidence standard of review, in this context, the reviewing court must inquire "whether the weight and character of the evidence of incompetency was such that the juvenile court could not reasonably reject it." In so holding, the Supreme Court disapproved the formulation of the substantial evidence standard articulated in *In re Christopher F.* (2011) 194 Cal.App.4th 462.

F. Sixth Amendment Right to Confrontation

1. **Prosecutor's Leading Questions**: *People v. Perez* (Jan. 8, 2016, D068690) ___ Cal.App.4th ___ [2016 WL 104712]. Allowing a prosecutor to ask unlimited leading questions of a witness who refuses to answer questions to the point where the prosecutor is, in effect, testifying about the witness' prior out-of-court statements violates a defendant's Sixth Amendment confrontation rights. (See also *People v. Murillo* (2014) 231 Cal.App.4th 448 and *Douglas v. Alabama* (1965) 380 U.S. 415.)

2. **Expert Basis Testimony**: *People v. Edwards* (2015) 241 Cal.App.4th 213, petns. for review pending, petns. filed Nov. 23 & 24, 2015 (S230753). The Court of Appeal held that the trial court erroneously admitted testimonial hearsay recounting statements made by nontestifying gang members during in-custody interviews conducted by the police detective/gang expert. The Court of Appeal held that this testimony, offered as expert basis testimony,

violated the Confrontation Clause, as interpreted by *Crawford v. Washington* (2004) 541 U.S. 36. In reaching this conclusion, the Court of Appeal expressly disagreed with *People v. Hill* (2011) 191 Cal.App.4th 1104 and *People v. Thomas* (2005) 130 Cal.App.4th 1202, both of which held that the Confrontation Clause does not apply to expert basis testimony because such testimony is not offered for the truth of the matters asserted. The Court of Appeal agreed with *People v. Valadez* (2013) 220 Cal.App.4th 16, which "opined that both the California and United States Supreme Court would likely reject the contention that expert basis testimony is not offered for the truth for Confrontation Clause purposes."

G. Impeachment of Testifying Defendant with Prior Convictions

1. **Intimate Partner Battery**: *People v. Burton* (Dec. 18, 2015, E061187) ___ Cal.App.4th ___ [2015 WL 9257013]. The Court of Appeal held that intimate partner battery, in violation of Penal Code section 273.5, is a crime of moral turpitude such that a defendant's prior convictions for violation of that statute may be admitted for impeachment purposes if a defendant testifies at trial. In reaching this conclusion, the Court of Appeal disagreed with *Morales-Garcia v. Holder* (9th Cir.2009) 567 F.3d 1058, which held that intimate partner battery is not categorically a crime of moral turpitude.

H. Prosecutorial Misconduct

1. ***Griffin*** **Error**: *People v. Denard* (2015) 242 Cal.App.4th 1012. The prosecutor's statements during rebuttal closing argument that "defendant clearly does not want to take responsibility for his actions" and "[h]e has put it upon [his ex-wife] to testify" amounted to an unconstitutional comment on appellant's silence in violation of *Griffin v. California* (1965) 380 U.S. 609. A prosecutor may not - directly or indirectly - comment upon a defendant's exercise of his or her Fifth Amendment right to remain silent. The Court of Appeal rejected the Attorney General's efforts to categorize the prosecutor's statements as merely aimed at bolstering the defendant's ex-wife's credibility. Although defense counsel did not object to the prosecutor's closing argument, the Court of Appeal exercised its discretion to reach the issue because it implicated the defendant's "substantial rights."

I. Mid-Trial Stipulations to Elements or an Offense

1. **No Advisements of Constitutional Rights**: *People v. Cross* (2015) 61 Cal.4th 164. The Supreme Court invalidated a defendant's mid-trial stipulation to the prior conviction element of the charged offense due to the trial court's failure to advise appellant that the stipulation would result in a longer prison term. A trial court must issue such an advisement and obtain a waiver from the defendant where the stipulation admits "every fact necessary to imposition of the additional punishment other than conviction of the underlying offense." (See *In re Yurko* (1974) 10 Cal.3d 857.) The Supreme Court distinguished the case at bar from *People v. Newman* (1999) 21 Cal.4th 413 and *People v. Adams* (1993) 6 Cal.4th 570, two cases holding no advisements were required. *Cross* also held that a defendant does not forfeit the right to challenge for the first time on appeal a trial court's acceptance of a stipulation to a prior conviction allegation entered without the court advising the defendant of any trial rights or eliciting his waiver of those rights.

2. **Implied Knowing and Voluntary Waiver of Constitutional Rights**: *People v. Farwell* (2015) 241 Cal.App.4th 1313. The Court of Appeal held that a defendant's mid-trial stipulation to one of the charged offenses was knowing and voluntary despite the absence of direct advisements, where, during pretrial hearings and jury voir dire, the defendant's right to trial, right to remain silent, and right to confront and cross-examine witnesses were discussed or mentioned at least 45 times.

J. Homicide

1. **Heat of Passion Voluntary Manslaughter and Provocation**: *People v. Wright* (Dec. 15, 2015, A139881) ___ Cal.App.4th ___ [2015 WL 8954616]. In a 2-1 decision, the Court of Appeal held that "evidence adduced at trial about the acrimonious relationship between defendant and [the shooting victim], particularly concerning their ongoing custody battle over their son, provided a substantial evidentiary basis for voluntary manslaughter instructions premised on a provocation/heat of passion theory." The majority favorably cited several cases "dealing with . . . behavior patterns that developed over a 'provocatory' period as opposed to sudden and heightened instigative situations" in support of its conclusion that the trial court erred by not instructing the jury on heat of passion

voluntary manslaughter. The Court of Appeal additionally found error in the trial court's refusal to instruct the jury that provocation may reduce murder from first to second degree. Ultimately, the Court of Appeal deemed these instructional errors harmless under the state prejudice standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. As footnote 14 in the *Wright* opinion notes, though, "[t]he Courts of Appeal are currently debating whether the erroneous failure to instruct on provocation/heat of passion manslaughter is evaluated for prejudicial error under [*Watson*] or *Chapman v. California* (1967) 386 U.S. 18, 24[]."

2. Felony-Murder Special Circumstance (Pen. Code, § 190.2, subd. (d)): *People v. Banks* (2015) 61 Cal.4th 788. The Supreme Court held that a felony-murder special circumstance - which renders a defendant eligible for the death penalty or, in the alternative, requires a life sentence without the possibility of parole - may not be imposed unless the defendant's involvement is "substantial" and "demonstrate[s] a reckless indifference to the grave risk of death caused by their actions." In reaching this conclusion, the Supreme Court disapproved two Court of Appeal cases - *People v. Lopez* (2011) 198 Cal.App.4th 1106 and *People v. Hodgson* (2003) 111 Cal.App.4th 566 - to the extent they held that the reckless indifference requirement found in Penal Code section 190.2, subdivision (d), is satisfied by mere knowledge that an accomplice is armed. The defendant in this case was the getaway driver for a robbery when another armed accomplice shot someone while escaping. The Supreme Court reversed the felony-murder special circumstance, finding no substantial evidence the defendant was a major participant or demonstrated reckless indifference to human life.

People v. Perez (Jan. 8, 2016, D068690) ___ Cal.App.4th ___ [2016 WL 104712]. On facts similar to *Banks*, the Court of Appeal reversed a felony-murder special circumstance true finding. *Perez* further held that reversal of the special circumstance barred retrial on remand, an issue not mentioned in *Banks*. (See *People v. Lewis* (2008) 43 Cal.4th 415, 509 [barring retrial of a lying-in-wait special circumstance allegation following an appellate reversal for insufficient evidence].)

K. Criminal Threats (Pen. Code, § 422)

1. Considering Out-of-Court Statements with Caution (CALCRIM No. 358): *People v. Diaz* (2015) 60 Cal.4th 1176. Over the objection of the Attorney General, the Supreme Court held that, upon request, the trial court should instruct the jury to consider with caution any out-of-court statements, including when the statements at issue form the basis of a criminal threats prosecution. The Supreme Court disapproved *People v. Zichko* (2004) 118 Cal.App.4th 1055, which found the instruction to view out-of-court statements with caution inapplicable in criminal threats prosecutions. The Supreme Court also overruled its own precedent holding that the trial court had a sua sponte duty to give this instruction in all criminal prosecutions of any kind, where relevant. This instruction is only required when requested.

L. Resisting a Peace Officer (Penal Code, § 148)

1. Refusal to Submit to a Chemical DUI Test: *People v. Valencia* (2015) 240 Cal.App.4th Supp. 11. A person's refusal to submit to a chemical test after a DUI arrest does not constitute resisting an officer.

2. Intent to Refuse to Comply with Peace Officer Directive: *In re Amanda A.* (2015) 242 Cal.App.4th 537. A person's mere statement of an *intent* to refuse to comply with the directive of a peace officer is insufficient to satisfy the elements of the statute prohibiting resisting, obstructing, or delaying a peace officer.

3. Urging Others Not to Cooperate with a Peace Officer: *In re Chase C.* (Dec. 18, 2015, D067787) ___ Cal.App.4th ___ [2015 WL 9254161]. A person who urges others not to cooperate with a police investigation does not, without more, violate Penal Code section 148. In order to violate the statute, there must be evidence that the person's actions urging others not to cooperate obstructed lawful police activity. Neither the juvenile in this case nor his companions were lawfully detained when he urged the others not to cooperate with the officer (and refused to cooperate himself).

M. Battery

1. **Indirect Touching**: *People v. Dealba* (2015) 242 Cal.App.4th 1142. Relying largely on cases from other jurisdictions, the Court of Appeal held, as matter of first impression in California, that a person commits battery via an "indirect touching" where one vehicle strikes another vehicle without making direct contact with the driver of the other vehicle and the force of the collision, intentionally caused, made the victim lose control of her car.

N. Lesser Included Offenses

1. **Sexual Battery**: *People v. Ortega* (2015) 240 Cal.App.4th 956, petn. for review pending, petn. filed Nov. 6, 2015 (S230429). Although not a lesser included offense under the statutory elements test, sexual battery can be a lesser included offense of forcible sexual penetration under the accusatory pleading test.

2. **Oral Copulation**: *People v. Woods* (2015) 241 Cal.App.4th 461, petn. for review pending, petn. filed Dec. 3, 2015 (S230830). Nonforcible oral copulation with a minor is a lesser included offense of forcible oral copulation of a minor over the age of 14 and forcible oral copulation in concert with a minor over the age of 14. The Court of Appeal reversed seven of the defendant's convictions, finding prejudicial error in the trial court's refusal to instruct on lesser included offenses.

3. **Statutory Rape**: *People v. Woods* (2015) 241 Cal.App.4th 461, petn. for review pending, petn. filed Dec. 3, 2015 (S230830). Statutory rape is not a lesser included offense of forcible rape under the statutory elements or accusatory pleading test.

O. Penal Code Section 654 and *Kellet v. Superior Court*

1. **Retrial of Lesser Related Offenses**: *People v. Goolsby* (Oct. 15, 2015, S216648) ___Cal.4th ___ [2015 WL 9464988]. In *Kellett v. Superior Court* (1966) 63 Cal.2d 822, the Supreme Court construed Penal Code section 654 to mean that when "the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such

offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." In *Goolsby*, the defendant was convicted of arson of an inhabited structure or inhabited property (Pen. Code, § 451, subd. (b)). The Court of Appeal reversed the conviction for insufficient evidence and concluded that the defendant could not be retried for the lesser offense of arson of property (Pen. Code, § 451, subd. (d)) because that offense is a lesser *related* offense and not a lesser *included* offense of arson of an inhabited structure or inhabited property (Pen. Code, § 451, subd. (b)). The trial court, however, mistakenly believing the former was a lesser included offense of the latter, instructed the jury on the uncharged lesser related offense. The Supreme Court reversed the portion of the Court of Appeal's opinion forbidding retrial of the lesser related offense. The Supreme Court held that where a lesser related offense is not charged in the information but the trial court instructs the jury on that offense anyway, Penal Code section 654 and *Kellett v. Superior Court* do not bar retrial of the lesser related offense following an appellate reversal of the greater offense for insufficient evidence.

P. Proof of Prior Convictions for Sentencing

1. **The Sixth Amendment Jury Trial Right**: *People v. Marin* (2015) 240 Cal.App.4th 1344. The Court of Appeal reversed the trial court's determination that the defendant's prior vehicular manslaughter conviction constituted a strike for insufficient evidence. Because the state was entitled to retry the prior strike allegation, and the defendant claimed entitlement on remand to a jury trial on the prior conviction allegation, the Court of Appeal analyzed the impact of the United States Supreme Court's recent decision in *Descamps v. United States* (2013) 570 U.S. ___ [133 S.Ct. 2276]. The Court of Appeal concluded that "judicial factfinding, which looks beyond the elements of the crime to the record of conviction to determine what conduct 'realistically' underlay the conviction, violates the Sixth Amendment right to a jury trial." (Quoting *People v. McGee* (2006) 38 Cal.4th 682, 706.) The Court of Appeal further held that the California Supreme Court's decision in *McGee* was no longer good law to the extent it conflicted with *Descamps* and the line of United States Supreme Court cases on which *Descamps* is based (starting with *Apprendi v. New Jersey* (2000) 530 U.S. 46). In *McGee*, the California Supreme Court permitted the trial court to examine "the record of conviction to determine 'whether

that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law.'" According to *Marin* - and the Attorney General did not file a petition for review in *Marin* - "[i]n determining whether a prior conviction qualifies to be used to increase a defendant's punishment under a recidivist sentencing statute, the trial court may, without violating the Sixth Amendment right to a jury trial, use" documents such as the indictment, jury instructions, plea colloquy, and plea agreement "to the extent they show the statutory elements of the crime of which the defendant was convicted[.]" "This kind of factfinding is permissible," *Marin* reasoned, "because it simply reflects the crime (and more particularly the elements of the crime) which the defendant admitted in his guilty plea following a waiver of his right to a jury trial, or the crime (and its elements) a jury determined beyond a reasonable doubt that he committed." On the other hand, "[j]udicial factfinding beyond the elements of the defendant's prior conviction - so called 'superfluous facts' or 'non-elemental facts' - is generally constitutionally impermissible." *Descamps*, *Marin* continued, "would permit judicial factfinding beyond the elements of the prior conviction if, in entering a guilty plea, the defendant waived his right to a jury trial as to such facts and either admitted them or they were found true by the court with defendant's assent." Otherwise, the defendant has a Sixth Amendment right to a jury trial on the prior conviction allegation. In arriving at this conclusion, *Marin* analyzed two other recent - and helpful - Court of Appeal decisions on this subject: *People v. Saez* (2015) 237 Cal.App.4th 1177 and *People v. Wilson* (2013) 219 Cal.App.4th 500.

2. **Out-of-State Prior Convictions**: *People v. Denard* (2015) 242 Cal.App.4th 1012. The Court of Appeal reversed the trial court's finding that the defendant's prior Florida conviction for felony manslaughter qualified as a strike under California law. Because no document in the "record of conviction" (see *People v. McGee*, *supra*, 38 Cal.4th at p. 691) purported to describe the facts of the Florida crime, the trial court erred in finding the prior conviction allegation true. The Attorney General maintained that the Florida probable cause affidavit, which described the facts of the offense and on which the trial court relied, should be considered part of the record of conviction. The Court of Appeal rejected this argument because the affidavit was prepared by law enforcement for the purpose of obtaining an arrest warrant for offenses with which the defendant was neither charged nor convicted. Furthermore, there was no indication the affidavit was ever

presented to the Florida trial court or that the defendant ever stipulated to any of the facts contained in the affidavit. In addition to finding that the probable cause affidavit fell outside the record of conviction and could not be used to prove the defendant's out-of-state manslaughter conviction qualified a strike under California law, *Denard* also agreed with *Marin* that *Descamps* prohibited the type of judicial factfinding in which the trial court engaged - using the probable cause affidavit - to find true the prior strike allegation.

Q. Sentencing Enhancements

1. **Dual Use of Firearm and Gang Enhancements**: *People v. Le* (2015) 61 Cal.4th 416. The Supreme Court held that when a defendant is convicted of assault with an automatic firearm (Pen. Code, § 245, subd. (b)), the trial court may not impose sentencing enhancements both for personal use of a firearm (Pen. Code, § 12022.5, subd. (a)(1)) and commission of a serious felony for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(B)). The Supreme Court reached this conclusion because the gang enhancement is necessarily attributable to the defendant's use of a firearm, and Penal Code section 1170.1, subdivision (f), provides: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense." (See also *People v. Rodriguez* (2009) 47 Cal.4th 501.)

2. **Prior Serious Felony Conviction Enhancements**: *People v. Sasser* (2015) 61 Cal.4th 1. The Supreme Court held that when a trial court imposes multiple second-strike determinate terms sentences, the court may only impose one five-year prior serious felony conviction enhancement (Pen. Code, § 667, subd. (a)(1)).

3. **Great Bodily Injury Enhancements and Manslaughter**: *People v. Cook* (2015) 60 Cal.4th 922. Penal Code section 12022.7, subdivision (g), provides that a sentencing enhancement for inflicting great bodily injury "shall not apply to murder or manslaughter . . . and shall not apply if infliction of great bodily injury is an element of the offense." Giving this provision a literal interpretation, the Supreme Court held that when a defendant is convicted of vehicular manslaughter and other people survive and suffer great bodily injury as a result of the same conduct, the trial court

may not impose a great bodily injury enhancement (Pen. Code, § 12022.7, subd. (a)) attached to the manslaughter conviction. The same rule would apply to a murder conviction. In reaching this conclusion, the Supreme Court disapproved of contrary Court of Appeal decisions in *People v. Julian* (2011) 198 Cal.App.4th 1524, *People v. Weaver* (2007) 149 Cal.App.4th 1301, and *People v. Verlinde* (2002) 100 Cal.App.4th 1146.

R. Proposition 36: The Three Strikes Reform Act of 2012

1. **Eligibility on a Count-by-Count Basis**: *People v. Johnson* (2015) 61 Cal.4th 674. Because an inmate's eligibility for resentencing under Proposition 36 (Pen. Code, § 1170.126) must be evaluated on a count-by-count basis, an inmate is eligible for resentencing with respect to a three-strikes sentence imposed for a felony that is neither serious nor violent, even though the inmate remains subject to a third-strike sentence of 25 years to life with respect to a separate felony conviction that is serious or violent. *People v. Lynn* (2015) 242 Cal.App.4th 594, decided after *Johnson*, reached the same result.

2. **Prior Juvenile Adjudication**: *People v. Arias* (2015) 240 Cal.App.4th 161. The Court of Appeal held that if a juvenile adjudication qualifies as a strike with respect to sentencing under the Three Strikes Law, then the same adjudication also meets the definition of a conviction for purposes of determining one's eligibility for resentencing under Proposition 36.

3. **Use of Probation Report to Determine Eligibility**: *People v. Burnes* (2015) ___ Cal.App.4th ___ [195 Cal.Rptr.3d 903]. A trial court may not rely on facts described in a post-conviction probation report to determine whether a defendant was armed during the commission of a prior conviction and thus ineligible for resentencing under Proposition 36. A probation report "ordinarily is not part of the record of conviction." (*People v. Oehmigen* (2014) 232 Cal.App.4th 1, 5; see also *People v. Reed* (1996) 13 Cal.4th 217, 230 [where the Supreme Court declined to determine whether a probation report qualifies as part of the "record of conviction"] .)

4. **Use of Preliminary Hearing Transcript to Determine Eligibility**: *People v. Estrada* (Dec. 23, 2015) ___ Cal.App.4th ___ [2015 WL 9435546]. The Court of Appeal held that the trial court did not err in reviewing the reporter's transcript of the defendant's preliminary hearing to determine if

appellant was armed with a firearm during the commission of his grand theft offense, thereby disqualifying him for resentencing as a second strike offender. The record of conviction, the Court of Appeal concluded, includes the preliminary hearing transcript. (See e.g. *People v. Guerrero* (1988) 44 Cal.3d 343 [establishing the rule that a trial court may use the "record of conviction" to determine the truth of a prior conviction allegation]; *People v. Reed*, *supra*, 13 Cal.4th at p. 223 [holding that a preliminary hearing transcript falls within the record of conviction].)

5. **Operative Date of Disqualifying Offenses**: *People v. Nettles* (2015) 240 Cal.App.4th 402. The Court of Appeal held that although the defendant's conviction for assault with intent to commit rape was not listed as a sexually violent offense at the time of his offense, his prior conviction was so designated at the time of the enactment of Proposition 36, thereby disqualifying him for resentencing as a second strike offender.

6. **Burden of Proof**: *People v. Esparza* (2015) 242 Cal.App.4th 726. The erroneous assignment of the burden of proof to the defendant on the question of dangerousness at a Proposition 36 resentencing hearing constitutes a due process violation.

S. Realignment

1. **Demand for Sentencing in Absentia (Pen.Code, § 1203.2a)**: *People v. Mendoza* (2015) 241 Cal.App.4th 764. Penal Code section 1203.2a provides, in relevant part: "If any defendant who has been released on probation is *committed to a prison* in this state or another state for another offense, the court which released him or her on probation shall have jurisdiction to impose sentence, if no sentence has previously been imposed for the offense for which he or she was granted probation, in the absence of the defendant, on the request of the defendant. . . ." (Emphasis added.) The Court of Appeal held that a person who receives a felony prison sentence but who is ordered to serve that sentence in a county jail under realignment may file a demand for sentencing in absentia. The Court of Appeal rejected the Attorney General's argument that only those defendants actually sentenced to state prison may make such a demand pursuant to Penal Code section 1203.2a.

2. **Termination of Mandatory Supervision**: *People v. Camp* (2015) 233 Cal.App.4th 461. Under realignment, a trial court may impose a split sentence whereby the defendant receives a determinate term but the trial court suspends execution of a concluding portion of the term, during which time the defendant is subject to mandatory supervision by the county probation department. (Pen. Code, § 1170, subd. (h)(5)(B).) In *Camp*, the Court of Appeal held that trial courts may terminate the mandatory supervision portion of a split sentence early without placing the defendant in custody for the remainder of the suspended sentence.

T. Execution of Sentence Suspended (ESS) Probation

1. **Revocation After the Principle Term has Expired**: *People v. Martinez* (2015) 240 Cal.App.4th 1006. When a trial court revokes an ESS grant of probation in a case that had originally been designated a subordinate term and where the probationary period for the principle term attributable to another case has already expired, the trial court must sentence the defendant to the subordinate term. This is true even though that reduced term would not have been authorized when the defendant was originally placed on probation had it been the only case or count of conviction.

U. Probation Conditions

1. **Warrantless Electronic Device and Social Media Search Conditions**: There is a split of authority within the First District Court of Appeal as to whether the imposition of a juvenile court probation condition authorizing the warrantless search of electronic devices and social media accounts is reasonable under *People v. Lent* (1975) 15 Cal.3d 481, as follows: *In re Erica R.* (2015) 240 Cal.App.4th 907 [Division Two, finding a *Lent* violation]; *In re Malik J.* (2015) 240 Cal.App.4th 896 [Division Three, finding no *Lent* violation]; *In re Ricardo P.* (2015) 241 Cal.App.4th 676, petn. for review pending, petn. filed Dec. 1, 2015, S230923 [Division One, finding no *Lent* violation]; *In re Patrick F.* (2015) 242 Cal.App.4th 104, petn. for review pending, petn. filed Dec. 23, 2015 (S231428) [Division Five, finding no *Lent* violation]; *In re J.B.* (2015) 242 Cal.App.4th 749 [Division Three, finding a *Lent* violation]; and *In re Alejandro R.* (Dec. 30, 2015, A144398) ___ Cal.App.4th ___ [2015 WL 9583465] [Division One, finding no *Lent* violation]. Moreover, each of the above cases that reached the question of whether the challenged condition was unconstitutionally

overbroad found that it was. Note: the Attorney General agreed with the minor in *Ricardo P.* that the Supreme Court should grant the minor's petition for review. As the Attorney General noted in the answer to the minor's petition for review: "This fundamental disagreement about the *Lent* test, which will inform appellate dispositions of *all* challenges to juvenile *and* adult probation conditions, requires this court's plenary review."

2. **Establishments Where Alcohol is a Chief Item of Sale**: *People v. Gaines* (2015) 242 Cal.App.4th 1035. The Court of Appeal held that a probation condition requiring that a minor "not go to any establishment where alcohol is a chief item of sale" is unconstitutionally vague**.** The Court of Appeal ordered the condition modified to include an express knowledge requirement to give defendant fair warning of what locations he must avoid.

3. **Possession of Dangerous Drugs**: *People v. Gaines* (2015) 242 Cal.App.4th 1035. The Court of Appeal held that a probation condition prohibiting a minor from possessing or using "narcotics, dangerous drugs, or narcotic paraphernalia" is not unconstitutionally vague and overbroad, and the term "dangerous drugs" need not be replaced with the term "controlled substances."

V. Victim Restitution Imposed After Expiration of Probation

1. **Estoppel**: *People v. Ford* (2015) 61 Cal.4th 282. The Supreme Court granted review in *Ford* to resolve the following question: "whether a trial court retains jurisdiction to modify the amount of restitution once a defendant's term of probation has expired." After the completion of briefing, however, the Supreme Court declined to reach the issue on the merits, affirming the judgment ordering the defendant to pay victim restitution instead on estoppel grounds. The Supreme Court reasoned that "[b]y agreeing to a continuance of the restitution hearing to a date after his probationary term expired, defendant implied his consent to the court's continued exercise of jurisdiction" and was "therefore estopped from challenging it."

2. **Jurisdiction**: *Hilton v. Superior Court* (2014) 224 Cal.App.4th 47. The Supreme Court originally granted review in *Hilton* behind *Ford*. Rather than elevate *Hilton* to lead case status after avoiding the merits in *Ford*, the

Supreme Court summarily dismissed review in *Hilton*, which had held that a trial court may not impose victim restitution as a condition of probation after a person's probation has terminated or expired. Interestingly, someone filed a petition for republication of *Hilton*, and the Supreme Court granted that petition. Thus, *Hilton*'s holding may once again be cited.

3. **Jurisdiction and Estoppel**: *People v. Waters* (2015) 241 Cal.App.4th 822. In *Waters*, the Court of Appeal agreed with *Hilton* and similarly held that a trial court may not impose victim restitution as a condition of probation after a person's probation has terminated or expired. *Waters* also addressed *Ford*, as the Attorney General once more argued that estoppel barred the defendant from objecting on appeal to the restitution order on jurisdictional grounds. The Court of Appeal deemed *Ford* inapplicable to the case before it, as no attempt had been made to set a restitution hearing until years after the defendant had successfully completed her probation and the defendant played no role in delaying a determination of restitution beyond her term of probation.

W. Sex Offender Registration and Residency Restrictions

1. **Equal Protection**: *Johnson v. Department of Justice* (2015) 60 Cal.4th 871. The Supreme Court overruled one of its seminal equal protection cases, *People v. Hofsheier* (2015) 37 Cal.4th 1185, which had found a violation of state and federal constitutional principles of equal protection where sex offender registration was mandatory for a 22-year-old defendant convicted of nonforcible oral copulation with a person 16 years of age (Pen. Code, § 288a, subd. (b)(1)) and yet discretionary for a defendant of the same age convicted of unlawful sexual intercourse with a same-aged minor (Pen. Code, § 261.5). *Johnson* revisited this holding - and the many cases spawned by it invalidating mandatory sex offender registration for other crimes - and concluded *Hofsheier*'s rational basis analysis was "faulty." Under *Johnson*, the statutory disparity mandating registration for oral copulation offenders while affording trial court discretion for intercourse offenders no longer results in an equal protection violation.

2. **Right to Jury Trial**: *People v. Mosley* (2015) 60 Cal.4th 1044. The Supreme Court held that the Sixth Amendment, as interpreted by the United States Supreme Court in *Apprendi*, does not afford a defendant required to

register as a sex offender the right to a jury trial on the factual findings that would subject him or her to sex offender residency restrictions.

X. Motion for Disclosure of Juror Identifying Information

1. **Credibility of Supporting Declarations**: *People v. Johnson* (2015) 242 Cal.App.4th 1155. When considering a motion for disclosure of juror identifying information (Code Civ. Proc., § 237) and deciding whether to hold a hearing on such a motion, the trial court must assume that the declarations supporting the motion are credible in determining whether defendant had established a "prima facie showing of good cause."

Y. Insanity Defense

1. **Self-Defense**: *People v. Leeds* (2015) 240 Cal.App.4th 822. The Court of Appeal in *Leeds* addressed the intersection of an insanity defense and a claim of self-defense. The Court of Appeal held that a defendant is legally insane if, when he or she killed someone, as a result of his or her delusion, the facts as the defendant perceived them, even if erroneous, would entitle the person to a claim self-defense. The Court of Appeal further held that the trial court incorrectly instructed the jury at the conclusion of the sanity trial that in order to claim self-defense, the defendant's beliefs also had to be reasonable.

Z. Commitment of Minors to DJF

1. **The "Most Recent Offense" Rule and Concurrent Offenses**: *In re M.L.* (Dec. 16, 2016, A142299) ___ Cal.App.4th ___ [2015 WL 8980865]. Welfare and Institutions Code section 733 prohibits a DJF commitment when a minor "has been or is adjudged a ward of the court pursuant to Section 602, and *the most recent offense* alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707." (Emphasis added.) The Supreme Court has given this language the following literal interpretation: when "a minor has committed a series of crimes, the court's ability to impose a DJF commitment depends entirely on the type of offense the minor happened to commit last." (*In re D.B.* (2014) 58 Cal.4th 941, 947.) Characterizing the "most recent offense rule" as absurd, the Court of Appeal in *M.L.* held that, consistent with the Legislature's intent, where a minor has committed two overlapping offenses

as part of single course of conduct, and only one of the offenses is DJF-eligible, the juvenile court retains the discretion to impose a DJF commitment if a minor is currently violent.

2. **The "Most Recent Offense" Rule and Out-of-State Petitions**: *In re Albert W.* (2015) 240 Cal.App.4th 411. The Court of Appeal held that because the "most recent offense" rule does not encompass out-of-state petitions, the fact that the minor committed a more recent out-of-state offense that would not, under California law, render the minor DJF-eligible, did not prohibit the juvenile court from imposing a DJF commitment.

AA. Civil Commitment

1. **Hearsay at MDO Commitment Proceedings**: *People v. Stevens* (2015) 62 Cal.4th 325. The Supreme Court held that the state may not prove a person has a qualifying conviction within the meaning of the Mentally Disordered Offender (MDO) civil commitment scheme through the hearsay opinion testimony of an expert witness. In reaching this conclusion, the Supreme Court resolved a split of authority among lower courts, rejecting *People v. Miller* (1994) 25 Cal.App.4th 913 and endorsing *People v. Baker* (2012) 204 Cal.App.4th 1234.

2. **Right to Jury Trial at MDO Commitment Proceedings**: *People v. Blackburn* (2015) 61 Cal.4th 1113. During MDO commitment proceedings, the trial court must advise the proposed committee personally of his or her right to a jury trial and, before holding a bench trial, must obtain a personal waiver of that right from the person, unless the court finds substantial evidence that the person lacks the capacity to make a knowing and voluntary waiver.

3. **Right to Jury Trial at NGI Extended Commitment Proceedings**: *People v. Tran* (2015) 61 Cal.4th 1160. In a companion case to *Blackburn*, the Supreme Court reached the same conclusion with respect to proceedings to extend the commitment of a person found not guilty by reason of insanity (NGI). During NGI extended commitment proceedings, the trial court must advise the proposed committee personally of his or her right to a jury trial and, before holding a bench trial, must obtain a personal waiver of that right from the person, unless the court finds substantial evidence that the person lacks the capacity to make a knowing and voluntary waiver.

4. **Right to Jury Trial at LPS Conservatorship Proceedings**: *Conservatorship of Kevin A.* (2015) 240 Cal.App.4th 1241. The Court of Appeal followed *Blackburn* and *Tran* and held that during Lanterman-Petris-Short (LPS) Act conservatorship proceedings, the trial court must advise the proposed conservatee personally of his or her right to a jury trial and, before holding a bench trial, must obtain a personal waiver of that right from the person, unless the court finds substantial evidence that the person lacks the capacity to make a knowing and voluntary waiver. In reaching this conclusion, the Court of Appeal distinguished *People v. Masterson* (1994) 8 Cal.4th 965 [where the Supreme Court held that trial counsel may waive a defendant's right to a jury trial at proceedings to determine a criminal defendant's competency to stand trial] as well as *Conservatorship of Mary K.* (1991) 234 Cal.App.3d 265 and *Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144. In the latter two cases, the Court of Appeal found no denial of the right to a jury trial where the proposed conservatee either did not want a jury trial or did not object to proceeding without a jury. In *Kevin A.*, the proposed conservatee expressly objected to counsel waiving his right to a jury trial.

5. **Personality Disorder NOS at NGI Extended Commitment Proceedings**: *People v. Williams* (2015) 242 Cal.App.4th 861, petn. for review pending, petn. filed Jan. 4, 2016 (S231402). The Court of Appeal held that whether personality disorder NOS (or any other condition) qualifies as a mental disorder within the meaning of the extended insanity commitment statute is a question of fact for the trial court or jury to resolve with the assistance of expert testimony.

BB. Appealability

1. **Request to Recall Sentence**: *People v. Loper* (2015) 60 Cal.4th 1155. Until earlier this year, the Courts of Appeal across the state had long held that the denial of a Penal Code section 1170, subdivision (d), recall motion brought within 120 days of sentencing is not an appealable order. There had been no meaningful disagreement in this area among the published authorities for decades. (See e.g. *People v. Pritchett* (1993) 20 Cal.App.4th 190; *People v. Chlad* (1992) 6 Cal.App.4th 1719; *People v. Gainer* (1982) 133 Cal.App.3d 636; *People v. Druschel* (1982) 132 Cal.App.3d 667; *People v. Niren* (1978) 76 Cal.App.3d 850.) However, in *Loper*, the California Supreme Court held that the denial of a section 1170, subdivision

(e), compassionate release recall petition is an appealable order pursuant to Penal Code section 1237, subdivision (b). In arguing against the appealability of compassionate release recall petitions, the Attorney General urged the Supreme Court to follow the reasoning of the above-cited Court of Appeal cases interpreting Penal Code section 1170, subdivision (d). *Loper* concluded that a key line of the above Court of Appeal cases had been wrongly decided, disapproving the cases holding that because a defendant does not have the right to move for relief under Penal Code section 1170, subdivsion (d) - but only the right to invite the trial court to exercise its discretion to recall a sentence on its own motion within 120 days - the denial of such relief is a non-appealable order. Accordingly, where the defendant has filed a timely notice of appeal from the denial of a Penal Code section 1170, subdivision (d), recall motion brought within 120 days of the original sentencing hearing, the trial court's ruling on the recall motion should now be considered an appealable order. At the very least, *Loper* has opened the door for trial attorneys to file notices of appeal from the denial of Penal Code section 1170, subdivision (d), recall motions and for appellate attorneys to assert, with supporting authority, that the denial of such a motion constitutes an appealable order.

II. NOTEWORTHY PENDING CASES IN THE CALIFORNIA SUPREME COURT

A. Search/Seizure

1. **Protective Sweep During Detention**: *People v. Ikeda*, S209192 rev. granted March 11, 2013. Can a protective sweep of a hotel room be conducted incident to the detention of a suspect outside a hotel room, where the officer has a reasonable suspicion that the area to be swept harbors a dangerous person? Here, the detained suspect admitted that a BB gun was inside the hotel room and the police officers heard two people talking in the room before knocking and detaining the suspect.

2. **Good Faith Exception**: *People v. Macabo*, S221852, rev. granted November 25, 2014. Does the good faith exception apply to the warrantless search of a cell phone? In *Macabo*, the search was conducted after the California Supreme Court upheld warrantless cell phone searches in *People v. Diaz* (2011) 51 Cal.4th 84. However, the United States Supreme Court settled the issue in *Riley v. California* (2014) __U.S. __; 134 S.Ct. 2473,

holding that absent exigent circumstances, the police cannot conduct warrantless cell phone searches.

3. Collection of DNA after Felony Arrest per Penal Code § 296: *People v. Lowe*, S215727, rev. granted March 19, 2014. Proposition 69, the DNA Fingerprint, Unsolved Crime and Innocence Protection Act was approved in 2004. Starting in 2009, it mandated collection of DNA from all adults arrested for any felony offense. Does the collection of DNA for all felony arrestees violate the Fourth Amendment?

This issue was addressed in *People v. Buza* (*Buza* I) (2011) 197 Cal.App.4th 1424, by the First District Court of Appeal, Division Two. *Buza* I held that the collection of DNA upon felony arrest was unconstitutional, based on the Fourth Amendment. The court reasoned that the taking of DNA at a time when the defendant is presumed innocent, and prior to any judicial determination of probable cause to believe he committed the offense, was an unreasonable search and seizure. The California Supreme Court granted review on October 19, 2011 (S196200), and transferred the case back to the First District Court of Appeal for reconsideration in light of *Maryland v. King* (2013) 569 U.S. __; 133 S.Ct. 1958.

In *Maryland v. King*, the United States Supreme Court upheld a Maryland law that provided for the collection of DNA from suspects arrested for *serious charges* upon probable cause. King was arrested on assault charges and his DNA was collected at the time of arrest. Months later the DNA was tested and connected him to a 2003 rape. The United States Supreme Court considered it important that the Maryland law at issue limited the use of the collected DNA to identity. The Court held that to the extent that DNA is another identifier, it functions as other identifiers already used by police - name, description, etc. It allows the police to know what kind of danger is presented. The Court commented that "CODIS loci come from non-coding parts of the DNA that do not reveal the genetic traits of the arrestee" and do not provide information beyond identification.

People v. Buza (2014) 231 Cal.App.4th 1446 (*Buza* II), S223698, rev. granted, February 18, 2015: The Court of Appeal again held the DNA Act unconstitutional - based "solely upon article I, section 13 of the California

Constitution, which in our view undoubtedly prohibits the search and seizure at issue." Section 13: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." In the opinion, the court also distinguished California's unconstitutional DNA collection law from the Maryland DNA collection law, as the former applies to *any* felony, and requires immediate collection before judicial determination of probable cause for the offense. Also, there is no automatic expungement of DNA if not convicted.

B. Pre-trial Issues/Charging

1. **Double Jeopardy**: *People v. Aranda*, S214116, rev. granted, December 18, 2013. Does the Double Jeopardy Clause of the Fifth Amendment bar retrial of a criminal defendant for first degree murder where in an earlier trial the jury deadlocked on second degree murder and voluntary manslaughter, but the court failed to offer the jury the opportunity to return a verdict of not guilty on the greater offense before declaring a mistrial? In *Stone v. Superior Court* (1982) 31 Cal.3d 503, the California Supreme Court endorsed a partial acquittal rule, holding that when a jury indicates it has unanimously found the defendant is not guilty of the greater offense, but indicates that it is deadlocked on a lesser included offense, the court must allow the jury the opportunity to return a partial verdict of acquittal on the greater offense. If the jury is not given this opportunity, double jeopardy precludes retrying for that offense.

The United States Supreme Court held in *Blueford v. Arkansas* (2012) 566 U.S. __; 132 S.Ct. 2044, that the Fifth Amendment's double jeopardy clause does not mandate this result - that the Fifth Amendment does not compel such partial acquittal rule barring retrial. The Court of Appeal in *Aranda* found that since *Blueford* limited its ruling to state that the Fifth Amendment did not compel a partial acquittal rule, that *Stone* continues to apply to criminal prosecutions in California until the California Supreme Court holds otherwise.

2. **Disqualifying All Judges in a County**: *Gomez v. Superior Court*, S223799, rev. granted March 18, 2015. Gomez filed a petition for writ of

habeas corpus alleging the prosecutor failed to disclose exculpatory evidence. He sought simultaneous recusal of all judges in the county as his claim would require weighing a colleague's credibility. Code of Civil Procedure § 170.1 provides grounds for disqualification of a judge where "recusal would further the interests of justice" or "[a] person aware of the facts might reasonably entertain a doubt that the judge would b able to be impartial." The Sixth District Court of Appeal held that section 170.1 did not set forth grounds for seeking simultaneous recusal of all judges in the superior court of one county.

3. **Refiled Charges Following Successful 1538.5 Suppression Motion**: *People v. Rodriquez*, S223129; rev. granted March 11, 2015. Is it an abuse of discretion for a presiding judge to find that a judge who granted a defendant's motion to suppress is not "available" to relitigate the motion as specified by Penal Code section 1538.5, subdivision (p), simply where the judge was transferred to a different courthouse in the same county? The statute does not define the circumstances under which a judge is rendered unavailable to relitigate a motion to suppress. However, its purpose is to avoid forum shopping and it has been held that the People may not seek disqualification through Code of Civil Procedure section 170.6 to deem him unavailable. The Court of Appeal found that it was not an abuse of discretion based on the presiding judge's inherent discretion in assigning matters, along with the legislative intent behind section 1538.5 to avoid judge-shopping, which was not a motivating factor in this case.

4. **Successive Complaints Filed**: *People v. Juarez,* S219889, rev. granted Sept. 10, 2014. Two felony complaints were filed charging Juarez with murder and each was dismissed. A third complaint charged the same conduct - the murder - yet charged the conduct as a conspiracy to commit murder. The Court will decide if Penal Code § 1387, which limits the People to filing two felony complaints for the "same offense", requires dismissal of the third complaint.

5. **Sexually Violent Predator Act and Use of Confidential Records**: *People v. Superior Court (Smith)*, S225562, rev. granted May 20, 2015. In an action brought under the Sexually Violent Predator Act, Welfare and Institutions Code § 6600, may the prosecution's mental health expert review confidential treatment information lawfully obtained? The prosecutor subpoenaed the defendant's mental health records and retained a mental

health expert pursuant to Code of Civil Procedure §§ 1985-1985.8. The Court of Appeal upheld the review of such confidential material. The court found that the defendant's privacy interest in the Welfare and Institutions Code section 6603, subdivision (c)(1) evaluations and mental health records was not absolute. Balancing that interest against the government's interest in protecting the public from sexually violent predators weighted in favor of evaluation of the mental health records.

C. Pleas

1. **Ineffective Assistance of Counsel**: *People v. Patterson,* S225193, rev. granted June 17, 2015. Did counsel's failure to advise the defendant of the immigration consequences of his plea constitute ineffective assistance of counsel? Was the defendant entitled to withdraw his plea (Pen. Code, § 1018) based on ineffective assistance of counsel based on the failure to advise him of the immigration consequence of his plea?

D. Trial

1. **Right to Confrontation**: *People v. Sanchez,* no. S216681, rev. granted May 14, 2014. The jury found true the gang enhancement for a crime benefitting a criminal street gang. (Penal Code, § 186.22, subdivision (b)(1).) Is the defendant's Sixth Amendment right to confrontation violated by admission of a gang expert's opinion on gang membership that was based on his interactions with the gang members and based on statements by nontestifying witnesses, including other officers serving the defendant with notice of the gang's status (STEP notice). Were the statements made by by gang members and collected by police testimonial and thus barred from admission at trial by the Confrontation Clause where there was no opportunity for cross examination, as specified in *Crawford v. Washington* (2004) 541 U.S. 36?

   People v. Hopson, S228193, rev. granted October 14, 2015. Is the right of confrontation violated where the court allows the introduction of an out-of-court statement that were made by a deceased co-defendant? The Court of Appeal asked whether the statement was testimonial and, if so, was there another purpose for admission besides to establish the truth of the matter asserted? The court held that the co-defendant's out-of-court statements during a police interview were testimonial as they were collected for the

purpose of an investigation. Yet, the court found the statements were offered for two nonhearsay purposes: 1) to show the effect upon the listeners (the police officers) and 2) to explain how the police investigation proceeded.

2. **Kill-Zone Theory**: *People v. Canizales*, S221958, rev. granted August 13, 2014. Was the jury properly instructed on the "kill zone" theory for attempted murder where the target group of people scattered either right before or right after the initial gunshot? On appeal, the defendant relied upon *People v. McCloud* (2012) 211 Cal.App.4th 788, which held that "the kill zone theory applies only if the evidence shows that the defendant tried to kill the targeted individual by killing *everyone in the area* in which the targeted individual was located." The Court of Appeal in *Canizales* rejected the *McCloud* holding and found the intent to kill the nontarget person may be inferred from the circumstances, including the nature and scope of the attack as well as the method used.

The second question raised in *Canizales* is whether the standard CALCRIM jury instruction for the "kill zone" theory is correct as it refers to the "zone of harm" not "zone of lethal harm"?

3. **Crimes**

a) **Penal Code § 954 Allowing Multiple Convictions**:

i) **Burglary**: *People v. Garcia*, S218233, rev. granted July 9, 2014. The Court of Appeal held that two burglaries were committed when the defendant entered a business with the intent to commit a robbery and then moved the robbery victim to the back of business and to a different room with the intent to rape. The California Supreme Court will decide whether one or two burglaries occurred. The justification given for two separate criminal offenses was based on the danger increasing with each room entered.

ii) **Rape**: *People v. White*, S228049, 237 Cal.App.4th 1087, rev. granted for a second time on September 30, 2015. Can the defendant be convicted of both rape of an intoxicated person and rape of an unconscious person for single act of sexual

intercourse? The Court of Appeal upheld both convictions. This case was initially a grant and hold pending *People v. Gonzalez* (2014) 60 Cal.4th 533, which presented the question whether a defendant could be convicted of both oral copulation of unconscious person and oral copulation of intoxicated person. The Court upheld the two convictions in *Gonzalez* based on the statutory language setting out distinct crimes and applicable punishments.

In *Gonzalez,* the Court distinguished *People v. Craig* (1941) 17 Cal.2d 453, which disapproved multiple rape convictions where the rape was charged both as a rape by force and violence and rape of a 16-year old minor. The Court pointed out that the statute for rape, at that time, set out a single crime of rape, and then listed separate ways it could be committed. In *Gonzalez*, the Court stated: "*Craig* did not hold that a single Penal Code section could never comprise multiple offenses; it simply concluded, based on the wording and structure of the statute, that former section 261 set forth only one offense that could be committed under several different circumstances, as described in its several subdivisions." (*Gonzalez, supra*, 60 Cal.4th at p. 539.)

iii) **Embezzlement and Grand Theft by Larceny (Penal Code, § 487)**: *People v. Vidana*, S224546, rev. granted April 1, 2015. Are embezzlement and grand theft by larceny separate offenses or are they merely two ways of committing a single offense? The Court of Appeal held that this was a single offense, but only because it was committed before the California Supreme Court decided *People v. Whitmer* (2014) 59 Cal.4th 733. *Whitmer* upheld multiple convictions for separate acts of theft, even if done pursuant to a single overarching scheme. The Court of Appeal concluded that *Whitmer* is not retroactive.

iv) **Criminal Threats (Penal Code, § 422)**: *People v. Gonzalez,* S223763, rev. granted March 18, 2015. Can a nonverbal threatening gesture violate Penal Code § 422, which includes threats made verbally, in writing, or by means of electronic

communication device? This is a case involving gestures made by gang members.

v) **Battery Against a Peace Officer under Penal Code, § 243, subdivision (b)**: *People v. Pennington,* S22227, December 10, 2014. Is a Santa Barbara Waterfront Department Officer a "peace officer" as defined by § 243, subdivision (b)?

vi) **Embezzlement (Penal Code § 503) and Falsification of Accounts by Public Officers (Penal Code § 424)**: *People v. Hubbard*, S215444, rev. granted October 29, 2014. Does the latter section apply only to officers who authorize disbursement of public funds, even if the actual authority to approve the disbursement lies elsewhere?

b) Lesser Included Offenses; Sexual Battery: *People v. Robinson*, S220247, rev. granted September 24, 2014. Is misdemeanor sexual battery (Penal Code, § 243.4, subd. (e)(1)), a lesser included offense of sexual battery by fraudulent representation (Penal Code, § 243.4, subd. (c))? The Court of Appeal found insufficient evidence of sexual battery by fraudulent representation, reduced two convictions to misdemeanor sexual battery, and remanded for resentencing.

c) Weapons

i) **Possessing Concealed Dirk or Dagger (Penal Code, § 21310)**: *People v. Castillolopez*, S218861, rev. granted July 30, 2014. The Court of Appeal reversed a conviction for possession of a concealed dirk or danger, finding insufficient evidence that a pocketknife with the blade in its fully extended position ("clicked" into final position) was "locked into position," as defined by Penal Code § 16470, which defines dirk or dagger. The Court of Appeal also found that the term "locked into position" had a plain meaning of "firmly fixed in place or securely attached so as to be immovable." The Supreme Court will decide whether possession of a concealed pocketknife with the blade fully extended supports a conviction for Penal Code § 21310.

ii) **Carrying Loaded Firearm on the Person**: *People v. Wade*, S224599, 234 Cal.App.4th 265, rev. granted April 29, 2015. Defendant was carrying a loaded firearm in backpack and the trial court granted defendant's Penal Code § 995 motion to dismiss on the basis he was not carrying the firearm "on his person" (PC 25850). In *People v. Pellecuer* (2013) 215 Cal.App.4th 508, the court held that a knife kept in a backpack was not being carried "on the person." The Court of Appeal reversed in *Wade*, holding that a loaded firearm kept in a backpack was sufficient to establish that the firearm was "on his person" and distinguished *Pellecuer,* where the defendant was leaning on backpack, not wearing it, and based on differences between knives and guns as weapons.

4. Sentencing/Resentencing

a) Eighth Amendment: *In re Alatriste*, S214652; *In re Bonilla*, S214960. This is the continuation of the Court applying the constitutional prohibition against mandatory life sentences for juvenile offenders as set out in *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455]. Does a 50-years-to-life sentence for a homicide committed as a juvenile violate the 8th Amendment? Is a sentence of 50 years to life the equivalent of a life without parole term? Does Penal Code § 3051, which provides the opportunity for consideration of parole through a parole suitability hearing, moot any 8th Amendment issue?

b) Court's Power to Dismiss Gang Enhancement (Penal Code, § 186.22): *People v. Fuentes*, S219109, rev. granted August 13, 2014. Is a court's power to dismiss a gang enhancement (Penal Code, § 186.22) within the court's power to dismiss (Penal Code, § 1385)?

c) Restitution: *People v. Martinez*, S219970, rev. granted September 14, 2014. Can a defendant, who is sentenced to prison, be ordered to pay restitution for injuries sustained in an automobile collision when he pleaded guilty to leaving the scene of an accident, but did not plead guilty or make an admission of guilt relating to the accident? The Court of Appeal found that restitution could not be awarded and "remanded to allow the People to file a motion, in their discretion,

for restitution in which they will bear the burden of proving an amount, if any, which reflects the degree to which the victim's injuries were exacerbated, if at all, by defendant's flight."

d) **Penal Code, § 654**: *People v. Corpening*, S228258, rev. granted September 28, 2015. Does Penal Code § 654, barring multiple punishment for an indivisible course of conduct, prohibit separate sentences for robbery and carjacking accomplished by single act? The trial court found separate intents and the Court of Appeal agreed. The defendants first intended to steal coins and then escape from the scene in their own cars. When the victim resisted, they entertained a new intent to take the victim's van and did flee in the van.

e) **Proposition 36; The Three Strikes Reform Act of 2012**: *People v. Chaney*, S223676, rev. granted February 18, 2015; *People v. Valencia*, S223825, rev. granted February 18, 2015. Does the definition of "unreasonable risk of danger to public safety" as set out in Proposition 47 apply retroactively to resentencing under Proposition 36?

i) **Retroactivity of Prop 36**: *People v. Conley*, S211275, rev. granted August 14, 2013. Does Proposition 36, reducing the punishment for many non-violent third strike offenders, apply retroactively to defendants who were sentenced before the Three Strikes Reform Act became effective and before the judgment was final?

f) **Proposition 47**

i) **Retroactivity:** *People v. Dehoyos*, S228230 238 Cal.App.4th 363, rev. granted September 28, 2015.

ii) **Failure to Appear Where Underlying Offense Reclassified as Misdemeanor**: *People v. Eandi*, S229305; *People v. Perez*, S229046, 239 Cal.App.4th 24, rev. granted November 18, 2015. Can a felony conviction for the willful failure to appear stand where the pending trial was for a felony drug offense reclassified as a misdemeanor?

5. Probation

a) No Contact Condition: *In re A.S.*, S220280, H039825, rev. granted September 24, 2014. Must a no-contact probation condition be modified to explicitly include a knowledge requirement? The Court of Appeal upheld the no-contact condition.

b) Waiver of 5th Amendment Right, Medical Privacy for Certain Sex Offenders: *People v. Friday* S218288 (rev. July 16, 2014); *People v. Garcia*, S218197 (rev. July 16, 2014); *People v. Klatt*, S218755 (rev. July 16, 2014). Constitutionality of probation conditions mandated per Penal Code section 1203.067, subdivision (b), for specified sex offenses - waiver of the Fifth Amendment privilege against self-incrimination, required participation in polygraph examinations, and waiver of psychotherapist/patient privilege.

c) Explicit Knowledge Requirement: *People v. Hall*, S227193, rev. granted Sept. 8, 2015. Is a probation condition prohibiting owning "any weapon that can be concealed on his person" and possessing illegal drugs unconstitutionally vague? Is an explicit knowledge requirement constitutionally mandated?

d) Right to Association/Travel: *People v. Schaeffer,* S205260, rev. granted October 31, 2012. A probation condition was imposed limiting where the probationer could live, as approved by probation officer. The Court of Appeal approved the probation condition requiring the probation officer's approval of the exact residence and the officer's permission to move to a different residence.

People v. Moran, S215914, rev. granted March 26, 2014. The trial court imposed a probation condition barring the defendant from entering all Home Depot retail stores and from frequenting the store's parking lots after a single shoplifting conviction. The Court will decide if this condition is overbroad, impinging upon the defendant's constitutional right to travel.

6. Parole & Proposition 47 – Excess custody credits: *People v. Morales*, S228030, rev. granted August 26, 2015. When a felony is reclassified as a

misdemeanor pursuant to Proposition 47, can the excess custody credits be used to reduce or eliminate the one-year parole that is required by Penal Code § 1170.18, subd. (d)?

7. **Post-Conviction Discovery**:

   a) **Court's Jurisdiction to Order Preservation of Materials**: *People v. Superior Court (Morales*), S22864, rev. granted September 30, 2015. Following imposition of a sentence of death, the trial court ordered certain public agencies to preserve large numbers of documents and other materials in anticipation of a request for post-conviction discovery (PC 1054.9). The court of appeal held that the trial court did not have jurisdiction to order preservation of documents where no petition had been filed.

8. **Juvenile Proceedings; Commencement of Juvenile Proceedings:** *People v. Arroyo*, S219178, rev. granted July 23, 2014. Does Welfare and Institution Code, § 707, subdivision (d), create a right to a preliminary hearing or can a prosecutor proceed to charge a juvenile in adult court by way of grand jury indictment? The statute mentions charging by information following a preliminary hearing, yet is this a limitation on charging by way of grand jury indictment?

III. NEW CALIFORNIA LAWS 2016

A. Search/Seizure

1. **SB 178**: California Electronic Communications Privacy Act (CalECPA) ACLU calls this "the most comprehensive digital privacy law in the nation - it makes sure police go to a judge and get a warrant before they can get access to electronic information about who we are, where we go, who we know, and what we do." (https://www/aclunc.org)

2. **AB 256**: Under this section, it is now a misdemeanor to destroy or conceal a digital image or video recording owned by another, knowing it is about to be produced in investigation or trial, with intent to prevent it from being produced.

B. Parole

1. **SB 261**: The parole board now must consider release of many offenders in state prison who committed crimes under the age of 23.

2. **SB 230**: Two or more panel members of the Parole Board must meet with inmates one year before the minimum parole eligibility date "and shall normally grant parole as provided in Section 3041.5" once the inmate is found suitable to leave prison.

C. Guns

1. **SB 707**: The Gun-Free School Zone Act of 1995 (Penal Code §§ 626.9; 30310) bars concealed firearms on college campuses, k-12 school grounds. This prohibition applies even if a person has a license to carry a concealed weapon, with certain exceptions.

2. **AB 1014**: Family members may now secure temporary restraining orders barring gun ownership for relatives who are believed to be at risk of committing an act of violence.

3. **SB 199**: Toy guns must have indicators that they are toys.

D. Police Interaction with the Public

1. **AB 953**: The police must collect and report statistics of individuals who are stopped. This includes the individual's race, gender, religion, and sexual orientation.

2. **SB 11**: The Commission on Peace Officer Standards and Training (POST) to must now review existing training on handling individuals with developmental disabilities, mental illness, and substance abuse. POST must improve training for recognition and deescalation in interactions with the mentally ill, disabled, or impaired.

3. **SB 29**: Police field training officers now must have eight hours of crisis intervention behavior health training and four hours of training as part of the field training officer course.

4. **SB 411**: The public is allowed to take video of police officers.

5. **SB 227**: The prosecution may not seek grand jury indictment for police shootings.

E. **Challenging Fines and Fees PC § 1237.2**: A defendant must file in superior court any challenge of monetary issues, including fines, penalty assessments, surcharges, fees, and costs. An error in the imposition or calculation of such monetary orders may not be raised on appeal unless either (1) the defendant first presents the claim to the superior court or (2) the monetary error is not the sole issue on appeal.

F. **Other New Laws of Interest**:

1. **AB 243, 266; SB 643**: The Bureau of Medical Marijuana Regulation will now license the entire medical marijuana supply chain in California.

2. **SB 405**: Traffic tickets may be contested without first paying the fine.

G. **Hints about big changes to come?**: On October 3, 2015, Governor Brown stated while vetoing additional new laws expanding criminal laws:

"Over the last several decades, California's criminal code has grown to more than 5,000 separate provisions, covering almost every conceivable form of human misbehavior. During the same period, our jail and prison populations have exploded. ¶ Before we keep going down this road, I think we should pause and reflect on how our system of criminal justice could be made more human, more just and more cost-effective."

The Governor also commented in a speech: "California's legal codes contain more than 5,000 separate criminal provisions and over 400 penalty enhancements; an arcane and complex mix that only the most exquisitely trained specialist can fathom."

IV. NEW AND AMENDED RULES OF COURT

A. **Minor Terminology Changes**: There are many minor wording changes in the Rules of Court to allow for electronic filing and storing of documents. An example is use of the word "send" instead of "mail." Also, the rules replaced references to the "Administrative Office of the Courts" with "Judicial Council staff."

B. Article 6. Public Access to Electronic Appellate Court Records

i) **Purpose**: The rules now allow for public access to electronic appellate court records through Title 8, Article 6, titled the Public Access to Electronic Appellate Court Records. It became effective January 1, 2016. The purpose of the Article is "to provide the public with reasonable access to appellate court records that are maintained in electronic form, while protecting privacy interests.*"*

ii) **No Expanded Right to View Documents**: The Article does not expand the rights of the public to view documents, it simply allows that records stored electronically shall be accessible. Rule 8.83(d) does allow, "in extraordinary cases," for remote access of electronic documents. However, remote access does not apply to criminal and mental health proceedings. (Cal. Rules of Court, rule 8.83(c)(2)(D) & (E).)

iii) **Rule 8.862, subdivision (c)** The Probation Officer's Reports will now be sealed in an envelope.

iv) **Rule 9.80** This rule changes some of the terms of membership and appointment to the Committee on Judicial Ethics. This committee provides judicial ethics advisory opinions and advice to judicial officers and candidates.

v) **California Supreme Court Considering Change in Rule 8.1115(e)(1)** "In contemplating and drafting the possible rules, the Supreme Court considered the practices of other jurisdictions and the language of prior proposed rules. The possible amendments include alternative versions of rule 8.1115(e)(1), concerning the binding or precedential effect of published Court of Appeal opinions after grant of review by the Supreme Court and pending that review, and the court would particularly appreciate comments on those alternatives." "Rule change could mean Court of Appeal decisions would no longer be automatically depublished when the Supreme Court grants review." See more at: http://www.courts.ca.gov/32807.htm#sthash.0AHpqMbV.dpuf"