FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
February 10, 2017

RECENT LEGAL DEVELOPMENTS IN SUBSTANTIVE CRIMINAL LAW AND APPELLATE PRACTICE

GRACE SHIGETANI
Staff Attorney
First District Appellate Project
February 2017

TABLE OF CONTENTS

I. RECENTLY DECIDED CASES OF INTEREST

A. United States Supreme Court.

Fourth Amendment

Birchfield v. North Dakota (2016) 579 U.S. __ [136 S.Ct. 2160]: The Fourth Amendment permits warrantless breath tests but not warrantless blood tests incident to arrest for drunk driving. In addition, motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.

Utah v. Strieff (2016) 579 U.S. __ [136 S.Ct. 2056]: In case where there was no flagrant police misconduct and a police officer discovered a valid, pre-existing, and untainted warrant for an individual's arrest, evidence seized pursuant to that arrest was admissible even when the police officer's stop of the individual was unconstitutional. The discovery of a valid, pre-existing, untainted arrest warrant attenuated the connection between an unconstitutional investigatory stop and evidence seized incident to a lawful arrest.

Fifth Amendment – Double Jeopardy Clause

Bravo-Fernandez et al. v. United States (2016) 580 U.S. __ [137 S.Ct. 352] held that the issue-preclusion component of the Double Jeopardy Clause does not apply when verdict inconsistency renders unanswerable "what the jury necessarily decided." In this case, the jury returned irreconcilably inconsistent verdicts of conviction and acquittal, and subsequently the convictions were vacated on appeal due to instructional error unrelated to the verdicts' inconsistency. In *United States v. Powell* (1984) 469 U.S. 57, 68, the Court held that when the jury returns a conviction and acquittal on separate counts turning on the same issue of ultimate fact, the government is barred by the Double Jeopardy Clause from challenging the acquittal, but the acquittal gains no preclusive effect. In *Yeager v. United States* (2009) 557 U.S. 110, 121-122, the Court held *Powell*'s holding does not apply when the jury returns an acquittal on one count and fails to reach a verdict on a different count turning on the same critical issue, *i.e.* the acquittal has preclusive force. Here, the court applied *Powell*, not *Yeager*, because vacatur of the guilty verdicts for unrelated legal error did not render the inconsistent verdicts consistent. Thus, the issue-preclusion component of the Double Jeopardy Clause did not bar retrial after the jury returned irreconcilably inconsistent verdicts of conviction and acquittal.

Sixth Amendment – Right to Counsel

Luis v. United States (2016) 578 U.S. __ [136 S.Ct. 1083]: The pretrial restraint of a criminal defendant's legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment right to counsel of choice.

Sixth Amendment – Right to Speedy Trial

Betterman v. Montana (2016) 578 U.S. __ [136 S.Ct. 1609]: The Sixth Amendment's right to speedy trial ends once a defendant has been found guilty at trial or has pleaded guilty to

criminal charges. Thus, the Sixth Amendment's speedy trial guarantee does not apply to the sentencing phase of a criminal prosecution.

Eighth Amendment Ban on Cruel and Unusual Punishment

Montgomery v. Louisiana (2016) 577 U.S. __ [136 S.Ct. 718]: The Supreme Court's 2012 decision in *Miller v. Alabama* [132 S.Ct. 2455] prohibiting mandatory sentences of life without the possibility of parole for juveniles announced a new substantive rule that, under the Constitution, is retroactive to cases on state collateral review.

Bosse v. Oklahoma (2016) 580 U.S. __ [137 S.Ct. 1]: The Oklahoma Court of Criminal Appeals erred in concluding that it was not bound by the Supreme Court's holding in *Booth v. Maryland* that the Eighth Amendment prohibits a capital-sentencing jury from considering testimony by a victim's family members about the crime, the defendant, and the appropriate sentence.

Fourteenth Amendment – Due Process Clause

Wearry v. Cain (2016) 577 U.S. __ [136 S.Ct. 1002]: Louisiana's postconviction court erred in denying defendant's request for post-conviction relief because *Brady* violation violated defendant's due process rights; defendant's capital conviction reversed.

Williams v. Pennsylvania (2016) 579 U.S. [136 S.Ct. 1899]: Held that failure of judge to recuse himself when he was the former prosecutor in the case violated defendant's Due Process rights.

Fourteenth Amendment – Equal Protection Clause

Foster v. Chatman (2016) 578 U.S. __ [136 S.Ct. 1737]: The Georgia Supreme Court's ruling that defendant failed to show purposeful discrimination in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 was clearly erroneous. The Georgia Supreme Court denied defendant's request for certificate of probable cause on grounds that the state's use of peremptory challenges to strike all four black prospective jurors qualified to serve on the jury for his capital murder trial was racially motivated.

Federal Habeas Review

Johnson v. Lee (2016) 578 U.S. __ [136 S.Ct. 1802]: California's *Dixon* bar [a defendant procedurally defaults claim raised for first time on state collateral review if claim could have been raised on direct appeal] is adequate to bar federal habeas review.

B. California Supreme Court.

Criminal Offenses

Lesser Included Offenses: Sexual Misrepresentation of Professional Purpose: *People v. Robinson* (2016) 63 Cal.4th 200. Misdemeanor sexual battery (Penal Code section 243.4(e)(1)) is not a lesser included offense of sexual misrepresentation of professional purpose (Penal Code section 243.4(c)). When the same evidence is required to support all

the elements of both offenses, there is no lesser included offense. Here, Penal Code section 243.4(c) requires lack of consent by fraudulent representation; if the evidence does not support that circumstance, the misdemeanor offense also cannot stand, therefore the two offenses overlap entirely and there is no room for a lesser included offense.

Penal Code section 954: Larceny and Embezzlement: *People v. Vidana* (2016) 1 Cal.5th 632. Penal Code section 954 prohibits multiple convictions for "different statements of the same offense." After an extensive review of the history of theft, larceny and embezzlement statutes, the court held that larceny (Penal Code section 484(a)) and embezzlement (Penal Code section 503) are different statements of the same offense, therefore a defendant may not be convicted of both under section 954. The court expressly disapproved *People v. Nazary* (2010) 191 Cal.App.4th 727, 739-742 [defendant can be properly convicted of both larceny and embezzlement by an employee].

Carrying Loaded Firearm on Person: *People v. Wade* (2016) 63 Cal.4th 137. Defendant was charged with a violation of Penal Code section 25850(a) [carrying a loaded firearm on his person] for carrying a loaded firearm inside the backpack he was wearing. Noting that the legislative intent of Penal Code section 25850(a) was to address the threat to public safety from those with control over and ready access to loaded guns in public, the court held the backpack and anything inside the backpack, was "on his person" within the meaning of section 25850(a). The court disapproved the analysis, but not necessarily the holding, of *People v. Pellecer* (2013) 215 Cal.App.4th 508 [a knife contained in a backpack is not carried "on the person."]

Penal Code section 654: Robbery and Carjacking: *People v. Corpening* (Dec. 29, 2016, S228258) 2 Cal.5th 307. The prosecution contended that defendant's forceful taking of the victim's vehicle, and the rare coins inside the vehicle, accomplished the crimes of both carjacking and robbery (the relevant facts were not in dispute). The Court of Appeal determined this to be a "course of conduct" case involving several discrete acts to accomplish the robbery and carjacking. It applied the "multiple objectives test" from *Neal v. California* (1960) 55 Cal.2d 11, 19, and rejected defendant's argument that section 654 barred a consecutive term for robbery. The Supreme Court reversed. First reviewing the two-step inquiry for multiple punishment under Penal Code section 654, the court noted that only if a case involves more than a single act – *i.e.* a course of conduct – do courts inquire whether the course of conduct reflects multiple intents and objectives. Then, looking to prior decisions for guidance on how to resolve whether multiple convictions are indeed based on a single act under section 654, the court concluded: "Whether a defendant will be found to have committed a single physical act for purposes of section 654 depends on whether some action the defendant is charged with having taken separately completes the actus reus for each of the relevant criminal offenses." The Supreme Court held that because neither offense was accomplished until completion of the single physical act, the forceful taking of the vehicle, Penal Code section 654 prohibited punishment for both robbery and carjacking.

Burglary: *People v. Garcia* (2016) 62 Cal.4th 1116. Defendant entered a commercial store with intent to commit a robbery; after completing the robbery, defendant took a store employee into a bathroom in the business and raped her. The court reversed the second burglary conviction based on defendant's entry into the store's bathroom with intent to rape. The court held that when a burglar enters a structure with felonious intent then subsequently enters a room within the structure with felonious intent, multiple burglaries may be charged only if the subsequently entered room "provides a separate and objectively reasonable expectation of protection from intrusion relative to the larger structure." Such a separate expectation of privacy and safety may exist where there is proof the internal space is owned, leased, occupied, or possessed by a distinct entity, or if the room is secured against the rest of the space within the structure. The court held that the bathroom in this case, left unlocked with unrestricted access relative to the rest of the store though located in a back hallway, did not provide a separate, reasonable expectation of additional protection.

Juvenile Sentencing

Special Circumstance Based on Murder Committed While Minor: *People v. Salazar* (2016) 63 Cal.4th 214. Eighth Amendment's ban on imposing the death penalty for crimes committed by juveniles (*Roper v. Simmons – Miller v. Alabama – Graham v. Florida* line of cases) does not bar alleging a special circumstance based on prior murder conviction committed while defendant was a juvenile. Those with prior murders tried in juvenile court are not similarly situated from those tried in superior court for Equal Protection purposes.

Juvenile LWOP: *People v. Franklin* (2016) 63 Cal.4th 261. Defendant, 16 years old at time of the 2011 offense, was convicted of first degree murder and the trial court imposed a mandatory sentence of life in prison with the possibility of parole after 50 years. The passage of SB 260 and subsequent enactment of Penal Code sections 3051, 3046(c), and 4801(c), effective January 1, 2014, entitled defendant to a youth offender parole hearing at age 25 and rendered moot defendant's claim that his sentence was functionally equivalent to life without parole in violation of the 8th Amendment. Since defendant was sentenced before *Miller* was decided, remand was required to determine whether he had sufficient opportunity to present evidence relevant to a future youth offender parole hearing.

Evidence

False Evidence: *In re Richards* (2016) 63 Cal.4th 291. Defendant's prior habeas corpus petition was rejected in 2012 by a 4 to 3 majority of the California Supreme Court in *In re Richards* (2012) 55 Cal.4th 948 (*Richards I*). In *Richards I*, the Court held that the prosecution dental expert's recantation of his expert opinion testimony at trial that a lesion on the victim's hand matched defendant's unusual teeth did not constitute "false evidence" within the meaning of Penal Code section 1473 as it then read. In 2014, the Legislature responded to *Richards I* by amending Penal Code section 1473 to add a section defining "false evidence" to "include opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been

undermined by later scientific research or technological advances." (Pen. Code § 1473, subd. (e)(1)). In this new petition for writ of habeas corpus based on the 2014 amendment to Penal Code section 1473, the Court found that the expert's trial testimony regarding the lesion on the victim's hand was false evidence both because the expert repudiated his trial testimony through testimony in habeas corpus proceedings, and because new technological advances led experts to reach a different opinion on the source of the lesion. The Court found a reasonable probability the false evidence presented affected the outcome of the trial and granted the petition.

Expert Testimony: *People v. Sanchez* (2016) 63 Cal.4th 665
Prior law: Under California law, the line between the treatment of an expert's testimony as to general background information and case-specific hearsay became blurred. Evidence Code sections 801 and 802 provide that an expert may explain to the jury "matter" upon which he relied in support of his opinion, even if the matter is ordinary inadmissible. When the matter is hearsay, courts used a two-pronged approach to balance the expert's need to consider extrajudicial matter versus defendant's interest in avoiding substantive use of unreliable hearsay. (*People v. Montiel* (1993) 5 Cal.4th 877, 919.) Under *Montiel*, most often hearsay will be cured by a limiting instruction that matters admitted go only to basis of expert's opinion, not for their truth; when such an instruction is not enough, the testimony may be excluded under EC 352.
New law: If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered for their truth and are therefore hearsay. Like any other hearsay, it must be properly admitted through an applicable hearsay exception, or the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question. The hearsay and confrontation problems cannot be avoided by a limiting instruction that such testimony should not be considered for its truth. Additionally if a prosecution expert relates testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) defendant had a prior opportunity for cross-examination or forfeited that right by wrongdoing. Here, much of the hearsay admitted was testimonial, including statements about prior police contacts based on police reports, a STEP notice, and an FI card. Accordingly, the improper admission of hearsay violated defendant's Confrontation Clause rights and prejudiced him with respect to the gang enhancement. The true findings on the street gang enhancements were reversed.

Dog Trailing Evidence: *People v. Jackson* (2016) 1 Cal.5th 269. In *People v. Malgren* (1983) 139 Cal.App.3d 234, the court held evidence of dog trailing admissible only upon a showing of five foundational requirements: (1) whether the dog's handler was qualified by training and experience; (2) whether the dog was adequately trained in tracking humans; (3) whether the dog has been found to be reliable in tracking humans; (4) whether the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) that the source of the scent has not become stale or contaminated. The Court rejected the fifth requirement – that the source of the scent has not become "stale or contaminated" – and disapproved *Malgren* on that point. The Court held that the

admissibility of dog-trailing evidence is satisfied by evidence that establishes the other four *Malgren* factors.

Proposition 47

Application of Custody Credits to PRCS: *People v. Morales* (2016) 63 Cal.4th 399. Penal Code section 1170.18, subdivision (d) provides for a person resentenced under Proposition 47 shall be subject to parole for one year following completion of his or her reduced sentence, unless the court exercises its discretion to release the person from parole. Defendant had pleaded guilty to felony possession of heroin, was sentenced to 16 months state prison, and had been released on a three year period of PRCS when Prop 47 was passed. Defendant petitioned per Prop 47, his conviction was reduced to a misdemeanor, and the court imposed one year of parole. The Court of Appeal held that defendant was entitled to credit his excess custody time against his parole. The California Supreme Court reversed, holding that excess credit for time served cannot be credited against this parole period established under Penal Code section 1170.18(d). The Court dismissed Equal Protection arguments raised by amici curiae, stating that those resentenced under Proposition 47 are not similarly situated to those originally sentenced under Penal Code section 2900.5. The purpose behind section 2900.5, to equalize treatment of those who can and cannot post bail, is not relevant to the Prop 47 resentencing situation.

Effect on Original Plea Agreement: *Harris v. Superior Court* (2016) 1 Cal.5th 984. Defendant was charged with one count of robbery with six prior felony convictions. Pursuant to a plea agreement, defendant pled guilty to grand theft from the person (Penal Code section 487(c)) and admitted one prior robbery conviction, the remaining charges and allegations were dismissed, and defendant was sentenced to six years in prison. While serving his sentence, Proposition 47 passed, and defendant filed a petition for resentencing. The prosecution moved to withdraw the plea agreement and reinstate the dismissed robbery charge on the basis that the resentencing would deprive them of the benefit of their bargain. The Supreme Court held that when a Proposition 47 sentencing reduction is granted, the prosecution may not withdraw from the original plea agreement. The court based its conclusion on the unambiguous language of section 1170.18 and the expressed intent of Proposition 47 that its resentencing provisions apply to all eligible defendants, including those convicted by plea. It also found additional support in *Doe v. Harris* (2013) 57 Cal.4th 64, which stands for the proposition that the Legislature or electorate has the authority to modify or invalidate the terms of an agreement for the public good and in furtherance of public policy.

Right to Self-Representation

Termination of Right to Self-Representation: *People v. Becerra* (2016) 63 Cal.4th 511. The California Supreme Court reversed a capital case on automatic appeal, for violation of defendant's right to self-representation. (*Faretta v. California* (1975) 422 U.S. 806.) In May 1995, prior to the preliminary hearing, defendant's *Faretta* request to represent himself was granted. At hearings in June, July, and August, the court granted defendant's requests for continuances on the basis that he had not yet received all of the requested discovery. The

prosecutor did not object to the requests, acknowledging that not all items had been turned over. The court did not rule defendant was not entitled to the items, and stated that he wanted to make sure the defendant had all of the requested discovery items before the preliminary hearing. At the September hearing, without any record of any prior warning or discussion, the court terminated defendant's self-representation. The Supreme Court held that the record did not contain factual support for the court's stated reason for termination, defendant's dilatoriness.

Proposition 36

Eligibility for Resentencing: *People v. Conley* (2016) 63 Cal.4th 646. Third strike defendants sentenced under the Three Strikes law before the Three Strikes Reform Act of 2012 went into effect on November 7, 2012, but whose judgments were not yet final as of that date, are not entitled to automatic resentencing, but may petition for recall of sentence under PC 1170.126. The Court distinguished *In re Estrada* (1965) 63 Cal.2d 740, which established a presumption that newly enacted legislation lessening a criminal punishment is intended to apply to all cases not yet final on the statute's effective date. The Court explained that the *Estrada* rule reflects a presumption about legislative intent, not a constitutional command, therefore it does not govern when the statute includes a "savings clause" or otherwise demonstrates a contrary legislative intent. Here, the statute created a mechanism for reducing punishments of those previously sentence, and made retroactive application of a lesser punishment contingent on a court's evaluation of the defendant's dangerousness. The clear legislative intent of the Reform Act was that prisoners presently serving indeterminate life terms, including those with nonfinal judgments, may seek resentencing subject to a judicial "public safety inquiry."

Probation Conditions

Right to Travel: *People v. Moran* (2016) 1 Cal.5th 398. Defendant was convicted of second degree burglary for stealing items from a Home Depot store in San Jose, and was granted probation on the condition that he not be on the premises or parking lot adjacent to any Home Depot store in California. Defendant did not object. The Court of Appeal struck the probation condition, holding the condition unconstitutionally overbroad and suggesting the condition violated appellant's constitutional right to travel. The California Supreme Court reversed, holding that the condition was valid under *Lent* (reasonably related to crime and to preventing future criminality), and that the condition did not implicate defendant's constitutional travel right.

Fourth Amendment – Search and Seizure

Search Incident to Arrest: *People v. Macabeo* (2016) 1 Cal.5th 1206. Defendant was stopped on his bicycle for a traffic infraction, questioned, and the contents of his cell phone were searched without consent; the defendant was subsequently arrested for possessing depicting minors engaging in or simulating sexual conduct. The trial court denied defendant's motion to suppress, holding that because defendant could have been arrested for the traffic infraction, he was lawfully searched incident to arrest under *People v. Diaz* (2011) 51 Cal.4th 84 [incident to a custodial arrest police may search through data on

a defendant's cellular phone without obtaining a warrant]. The Court of Appeal affirmed based on *Diaz* and the good faith exception. The California Supreme Court reversed. The Court initially noted that its decision in *Diaz* was abrogated by *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473]. The court analogized to *Knowles v. Iowa* (1998) 525 U.S. 113, to hold that the officers' probable cause to arrest for a traffic infraction did not justify a search incident to arrest. The court further held that the search of defendant's phone would not have been proper under *Diaz* because defendant was not under arrest when officers searched his phone, therefore the good faith exception to the exclusionary rule did not apply.

Enhancements

Penal Code section 1385 and Gang Enhancements: *People v. Fuentes* (2016) 1 Cal.5th 218. Held, the trial court has discretion under Penal Code section 1385(a) to dismiss a Penal Code section 186.22(b)(1) gang enhancement; Penal Code section 186.22(g) does not limit the court's discretion to merely striking the additional punishment for the enhancement, but permits full dismissal pursuant to section 1385(a).

Procedure

Relitigation of Motion to Suppres: *People v. Rodriguez* (2016) 1 Cal.5th 676. Penal Code section 1538.5 (p) provides that if the prosecution refiles charges after a motion to suppress is granted and the prosecution dismisses the case, any subsequent suppression motion must be heard by the "same judge" so long as the judge is "available." The court declared that the Legislature's purpose in enacting section 1538.5 (p)'s "same judge rule" was to prohibit prosecutors from engaging in "judge shopping." The court held that "mere inconvenience" is not sufficient to render a judge unavailable for purposes of section 1538.5(p). Although trial courts have discretion to determine whether a judge is available under 1538.5(p), the trial court must take "reasonable steps in good faith to ensure that the same judge who granted the previous suppression motion is assigned to hear the relitigated motion." A trial court's finding of unavailability must be made on the record.

Penal Code section 1387 Two Dismissal Rule: *People v. Juarez* (2016) 62 Cal.4th 1164. Penal Code section 1387 bars prosecution for the same offense after two dismissals. Defendant's attempted murder charges were dismissed twice, then defendant was charged with conspiracy to commit murder based on the same underlying facts as the twice-dismissed charges. The court found that *People v. Traylor* (2009) 46 Cal.4th 1205 [prior dismissal of felony complaint did not bar new prosecution for lesser included misdemeanor offense], relied on by the Court of Appeal, did not apply to this situation. The court instead applied the accusatory pleading test, and held that with respect to multiple felony offenses, if, as pleaded, either charge is necessarily included in the other charge, the new charge is the "same offense" under section 1387.

C. California Court of Appeal

Fourth Amendment – Search and Seizure

Probation Searches/Third Parties: *People v. Carreon* (2016) 248 Cal.App.4th 866. Defendant lived in the converted garage unit of a probationer's house, accessible from the house through a laundry room and closed but unlocked door. Officers were aware the converted garage was defendant's room, but unaware of tenancy arrangements in the house, before searching it. An officer searched inside a purse and found methamphetamine, and a pay/owe sheet in a plastic drawer a couple of feet from the purse. The magistrate denied defendant's motion to suppress, holding that this was a consent search based on the probationer's search terms, and the testimony indicated that the garage/bedroom was an area under the probationer's joint control. Defendant's 995 motion reiterating the suppression motion was denied because the officer had a reasonable belief the probationer "had at least access" to the garage and purse, "if not joint control over same." On appeal, the court found that the searching officers' subjective belief, prior to the search, that the converted garage was defendant's room in the probationer's residence was objectively reasonable because the probationer told them so, the probationer had a separate bedroom, and defendant's child was in bed in the garage when the officers arrived. The court found it was significant the probationer was not "merely an unrelated adult housemate" but the resident leaseholder of the premises. The court also stated that an officer should pause and consider an overnight guest's privacy expectations before intruding into the area assigned to the guest, and that it "flouts widely held social expectations to define joint access as simply having the physical ability to open a door, walk into a room, and open drawers." The court concluded that there was insufficient evidence to justify an objectively reasonable belief that the probationer had authority over the contents of either the drawers or the purse in defendant's bedroom, and reversed the judgment.

Search Incident to Arrest for DUI: *People v. Quick* (2016) 5 Cal.App.5th 1006. During a traffic stop, defendant stepped out of the car, threw his jacket containing drugs into his car, and locked the car with the keys inside prior to being arrested for driving under the influence of a controlled substance. The car was towed and an inventory search revealed contraband. The Court of Appeal affirmed the denial of defendant's motion to suppress evidence, holding that the car was properly searched incident to arrest because it was reasonable to believe the car contained evidence (drugs) of the crime for which he was arrested. The fact that defendant locked the car did not defeat the propriety of the search incident to arrest.

Reasonable Expectation of Privacy: *People v. Evenson* (2016) 4 Cal.App.5th 1020. Held, individuals do not have a reasonable expectation of privacy in the contents of computer folders that are shared publicly over a peer-to-peer file sharing network. Files shared publicly via file-sharing software are an exception to the general rule that computer users have an objectively reasonable expectation of privacy in the content of their computers.

Right to Self-Representation

Mental Competency for Self-Representation: *People v. Shiga* (2016) 6 Cal.App.5th 22. The trial court abused its discretion in granting *Faretta* request because court was unaware it had discretion to conduct an inquiry regarding whether defendant was mentally incapable of representing himself, and if necessary deny defendant's request for self-representation on that ground. The trial court's errors were prejudicial per se, and limited remand was ordered to assess the feasibility of assessing whether defendant was competent to stand trial and represent himself at the time of trial. If not feasible, reversal of the judgment is appropriate.

Removal of Self-Represented Defendant From Courtroom Without Standby Counsel: *People v. Ramos* (2016) 5 Cal.App.5th 897. Defendant represented himself in a criminal threats prosecution. Prior to opening statements, the trial court removed defendant from the courtroom for disruptive conduct and no standby counsel was appointed to represent him. During defendant's absence, the prosecution presented its opening statement and conducted direct examination of the alleged victim. The jury found defendant guilty. The Court of Appeal held that the trial court's involuntary removal of a self-represented defendant without appointing substitute counsel violated his Sixth Amendment rights. Reversal was required because the prosecution's direct examination of the alleged victim was a critical stage of the criminal proceeding, and the absence of defense counsel rendered the trial fundamentally unfair.

Proposition 47

No Jurisdiction to Vacate/Modify Completed Sentence: *People v. Vasquez* (2016) 247 Cal.App.4th 513. Penal Code section 1170.18, enacted by Proposition 47, did not give the trial court jurisdiction to vacate or otherwise change defendant's completed sentence, because it allows resentencing only for petitioners currently serving a sentence for a qualifying felony. (Petitioner had sought to have his 16-month sentence vacated for immigration purposes.)

Check Cashing Business is Commercial Establishment: *People v. Smith* (2016) 1 Cal.App.5th 266. A Check Exchange (check cashing business) is a "commercial establishment" under Penal Code section 459.5, the new misdemeanor shoplifting statute created by Proposition 47. "Larceny" under section 459.5(a) includes theft by false pretenses and does not require a trespassory taking, therefore entering a check cashing establishment and passing counterfeit bills or notes qualifies as shoplifting under section 459.5. Additionally, where a Proposition 47 petition includes a declaration that the value of the checks passed did not exceed $950 and the People did not contest that assertion in their responsive pleading, the record does not support affirming an order denying the petition on the basis that petitioner failed to meet his prima facie burden that the value of the property had a value of $950 or less. The proper remedy in these circumstances is remand for the superior court to hold a hearing to consider additional evidence regarding the value of the stolen property.

Prior Disqualifying Conviction: *People v. Zamarripa* (2016) 247 Cal.App.4th 1179. Appellant's Prop 47 petition to reduce a 1999 felony conviction for possession of a controlled substance was denied based on his 2015 conviction of kidnapping to commit a robbery, a "super strike." The court affirmed the denial of the Prop 47 petition, holding that "prior conviction" ineligibility for relief under Penal Code section 1170.18 means the disqualifying conviction occurred any time prior to filing the application for resentencing, not prior to the crime for which the defendant was seeking reclassification or resentencing.
See also: *People v. Walker* (2016) 5 Cal.App.5th 872. The Court of Appeal held that "prior conviction" as used in Penal Code section 1170.18, subdivision (i) refers to a conviction suffered any time prior to the trial court's ruling on a Prop 47 petition. The court held that *People v. Spiller* (2016) 2 Cal.App.5th 1014, which considered the meaning of "prior conviction" within the Prop 36 context, inapplicable to this case.
See also: *People v. Montgomery* (2016) 247 Cal.App.4th 1385. Defendant pleaded guilty to possession of cocaine in 1989; at the same time, was convicted in another case of attempted murder. The court affirmed the denial of defendant's Prop 47 petition based on the attempted murder conviction, holding that "prior conviction" in Penal Code section 1170.18, subdivision (i), means "a conviction that occurred at any time before filing the redesignation application."

Unreasonable Risk of Danger to Public Safety: *People v. Hall* (2016) 247 Cal.App.4th 1255. Defendant appealed the denial of his Prop 47 petition to reduce a felony conviction for grand theft from a person (Pen. Code, § 487(c)) on the basis that his resentencing would pose an unreasonable risk of danger to public safety. First, the court rejected the People's assertion for the first time on appeal that defendant's petition was properly denied because he made no showing that the value of property taken was less than $950. The court stated, "Evidence to support such a finding may come from within or outside the record of conviction, or from undisputed facts acknowledged by the parties." (*Id.* at p. 1263.) The record of conviction did not establish the value of the stolen property and defendant did not submit evidence with his petition, but because defendant may have submitted evidence with an earlier petition missing from the record, and because the People did not press the issue below, the court declined to consider this basis for affirming the order. Second, the court held that the trial court did not abuse its discretion in determining resentencing would pose an unreasonable risk of danger to public safety, where the court clearly stated an awareness of its discretion, noted a continual and consistent escalation of the seriousness of crimes committed over two decades, noted that defendant's two most recent offenses indicated a willingness to use deadly force, and expressly considered each enumerated factor in exercising its discretion. A trial court is not limited to finding an unreasonable risk to public safety only when an offender has previously committed a "super strike" offense, as such offenders are already categorically eliminated from eligibility for resentencing.

Counterfeit Bills Are Bank Bills Under Penal Code section 473: *People v. Maynarich* (2016) 248 Cal.App.4th 77. The trial court denied defendant's Prop 47 petition to reduce his felony forgery conviction in violation of Penal Code section 475 for possession of three

counterfeit $50 bills, on the basis that counterfeit $50 bills are not "bank bills" or "notes" under Penal Code section 473. The Attorney General agreed with defendant's argument on appeal that counterfeit currency is equivalent to "bank bills" or "notes" within the meaning of section 473; the appellate court reversed the denial of the Prop 47 petition and ordered the court to grant the petition unless it found defendant posed an unreasonable risk of danger to public safety.

Initial Burden of Eligibility: *People v. Johnson* (2016) 1 Cal.App.5th 953 (as modified). The court followed four recent appellate opinions (*Sherow, Rivas-Colon, Perkins, Bush*) interpreting Penal Code section 1170.18(a) to place the initial burden of establishing eligibility for resentencing on defendant. *People v. Bradford* (2014) 227 Cal.App.4th 1322, which held that the trial court must determine eligibility for resentencing under Proposition 36 solely from the record of conviction, is not applicable in the Proposition 47 context, where initial eligibility often cannot be established merely from the record of conviction. Here, defendant did not allege the value of the property underlying his receiving stolen property conviction. In support of his petition, defendant submitted an unsigned copy of his arrest report in which the stolen property was described as a laptop computer that was to be sold for between $350 and $400. However, because the report lacked authentication and the statements of value contained multiple levels of hearsay, it did not contain admissible evidence. The court affirmed the denial of defendant's Prop 47 petition without prejudice to the superior court's consideration of a subsequent petition by defendant offering admissible evidence of his eligibility for relief.

Petty Theft with Prior by Juvenile Sex Offender Not Eligible: *People v. Dunn* (2016) 2 Cal.App.5th 153. Defendant was convicted of felony petty theft with a prior and filed a petition for resentencing under Prop 47. The court held that a person is not eligible for resentencing under PC 666 if the person is required to register as a sex offender as the result of a prior juvenile adjudication. The court held that the electorate's intent to withhold relief from juvenile sex offenders who commit serial thefts was unambiguous in section 666, and this did not violate equal protection guarantees because juvenile sex offenders who commit recidivist theft crimes and juvenile sex offenders who commit other Proposition 47 crimes are not similarly situated.

"Receipt for Goods" Forgery: *People v. Martinez* (2016) 5 Cal.App.5th 234. In 2000, defendant pled guilty to felony forgery by signing a credit card receipt for goods in violation of Pen. Code section 470, subd. (a). The trial court denied defendant's Prop 47 petition for reduction of his conviction to a misdemeanor. The Court of Appeal affirmed, holding that because a receipt for goods forgery is not one of the seven enumerated instruments in the forgery statute amended by Prop 47, Penal Code section 473, defendant was ineligible for a reduction. The court also held that disparate treatment of forgeries of credit card receipts did not violate defendant's Equal Protection rights.

Burglary – Commercial Establishment: *People v. Colbert* (2016) 5 Cal.App.5th 385. Defendant was convicted of several second degree burglary offenses committed in 1996

and 1997 for entering convenience stores, sneaking into the private office area, and taking money. The trial court denied defendant's petition to redesignate the burglary offenses misdemeanor shoplifting (Pen. Code, § 459.5.) The Court of Appeal affirmed, because the separate office area, off-limits to the general public, and not an area where goods were bought and sold, were not part of the "commercial establishment" within the meaning of Penal Code § 459.5.

Resentencing on Counts Unaffected by Prop 47: *In re Guiomar* (2016) 5 Cal.App.5th 265. Defendant entered pleas in four different cases in March 2014 and received an aggregate sentence of six years. In 2015, defendant filed a Prop 47 petition for resentencing on some of the counts. The trial court redesignated some of defendant's offenses misdemeanors, and increased defendant's robbery sentence, then imposed a six-year term. The Court of Appeal held that when resentencing pursuant to Prop 47, the trial court has discretion to alter the sentence on counts unaffected by Prop 47, so long as the aggregate sentence does not exceed the term originally imposed. The court also held that a defendant has a constitutional right to be present at a Prop 47 resentencing hearing, but absence from the hearing is evaluated under the *Chapman* harmless error standard.

Prop 47 Relief for Defendants on Parole or PRCS: *People v. Lewis* (2016) 4 Cal.5th 1085. The Court of Appeal held that a "sentence" which results in imprisonment includes the period of parole or PRCS (Pen. Code, § 3000, subd. (a)(1)). Therefore, the procedure for Prop 47 resentencing under Penal Code section 1170, subd. (a), not subd. (f), applies to a defendant on PRCS because he is "still serving" his sentence. The court held that persons subject to PRCS are not similarly situated with parolees for purposes of applying excess custody credits, therefore defendant was not entitled to application of the excess credits under Equal Protection principles.

Eligibility of Offenses with Gang Enhancements: *People v. Sweeney* (2016) 4 Cal.App.5th 296. The trial court denied defendant's petition to reduce his felony convictions for receiving stolen property because there was a gang enhancement attached to each one. The Court of Appeal reversed, holding that a gang enhancement pursuant to Penal Code section 186.22(b) did not make defendant ineligible for Prop 47 reduction. The court also stated that there is no general rule that a strike cannot be reduced to a misdemeanor under Proposition 47.

Enhancements

Sufficiency of Evidence for Gang Enhancement: *People v. Nicholes* (2016) 246 Cal.App.4th 836. Evidence in attempted manslaughter and assault case held insufficient to support gang enhancement. Sharing a common name, identifying symbols, enemy, ideology, and self-identification not sufficient to establish the existence of a criminal street gang.

Sufficiency of Evidence for Prior Strike Enhancement: *People v. Puerto* (2016) 248 Cal.App.4th 325. Defendant argued on appeal the prosecution failed to present sufficient evidence to support a strike allegation for a violation of Penal Code section 245,

subdivision (a)(1). Relying on *People v. Delgado* (2008) 43 Cal.4th 1059, defendant argued that the prosecution did not prove "personal use" to qualify the assault as a serious or violent felony. On appeal, the court noted *Delgado* was inapplicable because it concerned an earlier version of section 245(a)(1). In 2011, the Legislature amended Penal Code section 245, removing assaults "by any means of force likely to produce great bodily injury" from subdivision (a)(1) and placing them in a newly added subdivision (a)(4) of section 245. Therefore, the current version of section 245(a)(1), in effect when the defendant committed the offense for which he pled no contest in 2013, concerns only assaults with a deadly weapon or instrument other than a firearm. Thus, all convictions under section 245(a)(1) are serious felonies under section 1192.7 (c)(31). Therefore, court records showing a no contest plea to a violation of section 245(a)(1) in 2013 for an assault committed in 2013 is sufficient evidence to support the prior strike conviction finding.

Sufficiency of Evidence for Gang Enhancement *People v. Franklin* (2016) 248 Cal.App.4th 938. Appellant was convicted of residential burglary, criminal threats, false imprisonment, and extortion. Gang enhancements pursuant to section 186.22, subd. (b)(1), were alleged as to all counts, but the jury found them true only as to the criminal threats and false imprisonment charges. On appeal, the court found that there was insufficient evidence to satisfy either of the two "prongs" necessary to establish an enhancement under 186.22(b)(1): (1) that the underlying felony was committed for the benefit of, at the direction of, or in association with any criminal street gang and (2) that the underlying felony was committed with the specific intent to promote, further, or assist in criminal conduct by gang members. The gang expert gave three reasons that the crimes were committed for the benefit of a criminal street gang: the crime was committed in defendant's street gang's territory, the violent crime instills fear in the community, and his opinion that "most crimes" committed by a gang member are committed for the benefit of the gang. The court found the record did not support any of those assertions. The court also rejected the prosecution's argument that appellant committed his crimes in association with a criminal street gang because he used the assistance of friends who were members of other gangs. The gang enhancements were stricken and the matter remanded for resentencing.

Judicial Factfinding on Strike Enhancement: *People v. Eslava* (2016) 5 Cal.App.5th 498. The Court of Appeal held that the trial court violated defendant's Sixth Amendment right to a jury determination of the issue, by finding that defendant's prior battery conviction involved "personal infliction of serious bodily injury" and therefore constituted a prior serious felony or strike.

Aggravated Kidnapping Enhancement: *People v. Perkins* (2016) 5 Cal.App.5th 454. Defendant sodomized his victim then forced her to move from the bathroom to the bedroom within a private residence, a distance of 10-30 feet. The jury found true the aggravated kidnapping and kidnapping enhancements (Pen. Code, § 667.61, subd. (d)(2)) to defendant's sex crimes committed in the bedroom. The Court of Appeal held that insufficient evidence supported the enhancement findings, because the evidence did not

establish that defendant moved the victim a substantial distance and in a manner that substantially increased the risk of harm.

Multiple Enhancements for Infliction of GBI in Same Offense: *People v. Wilson* (2016) 5 Cal.App.5th 561. Penal Code section 1170.1, subd. (g) provides that when two or more enhancements may be imposed for infliction of GBI on the same victim in the same offense, only the greatest shall be imposed. The Court of Appeal held that section 1170.1(g) does not apply to a recidivist enhancement because it is directed towards the defendant's status as a repeat offender, and does not implicate multiple punishment for defendant's act of inflicting GBI. Therefore, the imposition of a GBI enhancement (Pen. Code, § 12022.7) and prior serious felony enhancement (Pen. Code, § 667, subd. (a)(1)) was not prohibited even though the current offense was only a serious felony because he inflicted GBI.

Juvenile Sentencing

Denial of Petition to Recall Juvenile LWOP Sentence: *People v. Willover* (2016) 248 Cal.App.4th 302. In 1999, defendant was sentenced to two consecutive LWOP terms for murders committed when he was 17. In 2012, Senate Bill 9 added Penal Code section 1170, subdivision (d)(2), providing procedural mechanisms for resentencing of defendants given LWOP sentences for offenses committed when they were under the age of 18. In 2014, defendant petitioned for recall and resentencing pursuant to section 1170(d)(2), which the trial court denied. On appeal, the court reviewed the eight factors listed in section 1170, subdivision (d)(2)(F), finding that the trial court did not abuse its discretion finding that 4 of the 8 applied favorably to defendant. [This included approving a finding that the fourth factor ("defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress") did not apply to defendant, when from age 11 defendant lived in multiple group homes and spent time in juvenile hall, had a strained relationship with his mother and her boyfriend, a lengthy history of drug and alcohol use, and had been diagnosed with schizoaffective disorder, conduct disorder, and polysubstance dependence.] The trial court denied defendant's petition based on its evaluation of the factors, and also on its finding that defendant's crimes were "particularly [vicious], cruel and callous" and that defendant was "the leader of the criminal enterprise that day." The Court of Appeal found no abuse of discretion in denying the petition despite the fact that defendant lacked a violent juvenile record, had made efforts at rehabilitation, maintained family ties, and performed positively in prison in light of the "atrocious nature of his life crimes", noting that both *Miller* and 1170(d)(2)(F) permit consideration of the circumstance of the offense to the determination of whether to impose an LWOP sentence.

Attempted Murder Sentence of 32-years-to-life: *People v. Garcia* (January 24, 2017, E059452) __ Cal.App.5th __ [2017 WL 345091]. Defendant was convicted as an adult of attempted murder for an offense committed when he was 15 years old. The Court of Appeal held, in light of *People v. Franklin* (2016) 63 Cal.4th 261, that sentence of 32-years-

to-life was not cruel and unusual punishment because he was eligible for parole during his 25th year of incarceration pursuant to Penal Code section 3051.

Commitment to DJF: *In re Calvin S.* (2016) 5 Cal.App.5th 522. The juvenile court sustained allegations that 14-year-old minor committed assault with a firearm and assault with intent to commit a sexual offense and committed him to the Division of Juvenile Facilities (DJF) for a maximum term of 15 years four months. The Court of Appeal reversed and remanded for a new dispositional hearing, holding that the juvenile court abused its discretion committing minor to DJF without considering placement in juvenile hall. There was no evidence in the record that a juvenile hall placement would have been ineffective or inappropriate, and no evidence supporting the juvenile court's finding that juvenile hall was not appropriate due to the length of the minor's maximum period of confinement.

Criminal Offenses

Residential Burglary: *People v. McEntire* (2016) 247 Cal.App.4th 484. Evidence sufficient to support finding resident present during burglary, making burglary a violent felony for purposes of 10-year criminal street gang enhancement, where defendant's hand penetrated portal of open sliding screen door while resident was still in the home.

Burglary – "Person Present": *People v. Debouver* (2016) 1 Cal.App.5th 972. The presence of an apartment manager in the building's underground parking garage while appellant burglarized vehicles in the garage was sufficient to support the "person-present" burglary finding.

Carrying Concealed Dirk or Dagger: *People v. Castillolopez* (2016) 63 Cal.4th 322. California Supreme Court held that an open blade of a Swiss Army knife is not "locked into position" within the meaning of Penal Code section 16470, which defines "dirk" or "dagger," because the knife could be closed simply by folding the blade back into the knife. Defendant's conviction for carrying a concealed dirk or dagger under Penal Code section 21310 was properly reversed by the Court of Appeal.

Petty Theft by False Pretenses: *People v. Hartley* (2016) 248 Cal.App.4th 620. The court reversed a misdemeanor conviction for petty theft based on insufficient evidence. Defendant had been in a taxi when the driver missed a turn, an argument ensued, and defendant refused to pay and exited the car. Defendant was charged with petty theft of labor, and the trial court permitted only the theft by false pretenses theory at trial. The court concluded that there was insufficient substantial evidence to sustain the necessary finding of fraudulent intent at any point during the transaction.

Reckless Evasion of a Police Officer: *People v. Byrd* (2016) 1 Cal.App.5th 1219. Where no direct evidence was presented at trial demonstrating that either officer in the pursuing police car was wearing a distinctive uniform, there was insufficient evidence to support a conviction under Penal Code section 2800.2.

Attempted Lewd and Lascivious Act With Child Under 14: *People v. Villagran* (2016) 5 Cal.App.5th 880. Defendant located girls under 14 on social networking websites, texted them, sent sexually explicit photos of himself, and asked them to send nude photos of themselves. The Court of Appeal found sufficient evidence supported defendant's convictions for attempted lewd acts on a child under 14 years of age (Pen. Code, § 288, subd. (a)) based on these acts. The required touching under section 288 may be constructive; had the girls complied with defendant's request to touch themselves, those acts of touching would have been imputed to him. Accordingly, a defendant may attempt a lewd act on a child via a text message. Section 288 does not require that defendant's intent and the victim's touching occur simultaneously.

False Information to Police: *People v. Morera-Munoz* (2016) 5 Cal.App.5th 838. The Court of Appeal held that Vehicle Code section 31, which criminalizes the making of false statements to peace officers engaged in the performance of their duties, does not violate the First Amendment. Relying on principles of "constitutional avoidance," the court deemed Vehicle Code section 31 to prohibit deceit only as to a material fact pertinent to an investigatory matter undertaken by a peace officer pursuant to the Vehicle Code.

Postrelease Community Supervision (PRCS)

PRCS Revocation Procedure: *People v. Byron* (2016) 246 Cal.App.4th 1009. Parole revocations, governed by Penal Code section 3000.08, and PRCS revocations, governed by Penal Code section 3455, subd. (c), may be procedurally different without violating appellant's due process rights. PRCS revocations must afford general *Morrisey/Vickers* protections, but there is no requirement to use the identical procedure or timeline as parole revocations. *Williams v. Superior Court* (2014) 230 Cal.App.4th 636, which established a time table for parole revocations, does not apply to PRCS revocations. The court additionally held that PRCS violations may be resolved informally, counsel need not be appointed at the initial probable cause hearing, and a court arraignment is not required.

Termination of PRCS Not Automatically Triggered by Year without Violation: *People v. Young* (2016) 247 Cal.App.4th 972. Defendant challenged the denial of a motion to suppress evidence in which he challenged a warrantless search conducted pursuant to the terms of his postrelease community supervision (PRCS) a year and one day after defendant was placed on PRCS with no violations. The court concluded that Penal Code section 3456, subdivision (a)(3), does not automatically trigger termination of supervision after a continuous year on PRCS without violation, but that the supervising agency maintains supervision until discharge actually occurs within 30 days after the end of the one-year period. Accordingly, the search was legal.

Application of Excess Custody Credits to PRCS: *People v. Superior Court (Rangel)* (2016) 4 Cal.App.5th 410. In 1996, defendant was sentenced to 25 years to life under the Three Strikes law. Defendant's petition for resentencing under Proposition 36 was granted, the court applied defendant's excess custody credits against his one-year PRCS term, and deemed that term satisfied. The prosecution petitioned for a writ of prohibition/mandate,

which the Court of Appeal denied in a published decision. The California Supreme Court granted the prosecution's petition for review, and the matter was subsequently transferred to the Court of Appeal with directions to vacate its earlier opinion and reconsider the cause in light of *People v. Morales* (2016) 63 Cal.4th 399. This time, the Court of Appeal granted the prosecution's petition for writ of prohibition/mandate, holding that a defendant resented pursuant to Prop 36 (Pen. Code, § 1170.126) is not entitled to apply excess custody credits to reduce his period of PRCS. While Penal Code section 2900.5 expressly allows excess custody credits to reduce or eliminate parole, the plain language of Penal Code section 3451 governing PRCS is silent on the question of excess custody credits and unambiguously provides that persons released from prison on or after October 1, 2011, are subject to a mandatory period of community supervision. Adopting the reasoning from *Morales* and applying it in the Proposition 36 context, the court held that prisoners resentenced under Proposition 36 are not similarly situated with persons originally sentenced under section 2900.5, thus may be treated differently for purposes of applying excess custody credits to a period of postrelease supervision.

Jury Instructions

No Right to Self-Defense Instruction: *People v. Eulian* (2016) 247 Cal.App.4th 1324. Defendant argued on appeal that it was prejudicial error to instruct the jury pursuant to CALCRIM 3472 (no right to self-defense if provoked quarrel w/ intent to create excuse to use force) because it misstates the law of self-defense in light of *People v. Ramirez* (2015) 233 Cal.App.4th 940, where CALCRIM 3472 was found in error under the facts of that case. The court held that CALCRIM 3472, the analog to CALJIC 5.55 approved by the California Supreme Court, is generally a correct statement of law, and *Ramirez* only applies where a defendant's claim of self-defense or defense of others is based on his use of *deadly* force. In this case, where defendant did not use deadly force, the jury could rationally conclude that defendant provoked the conflict, providing a factual predicate for instructing with CALCRIM 3472.

State of Mind Instruction for Imperfect Self-Defense: *People v. Ocegueda* (2016) 247 Cal.App.4th 1393. Defendant was found guilty of attempted murder, assault with a firearm, and dissuading a witness after shooting the victim multiple times at a party. The jury was instructed on attempted voluntary manslaughter under a theory of imperfect self-defense based on CALCRIM 604. In addition, the jury was instructed based on CALCRIM 3428 that the effect of mental disabilities may be considered to determine whether the defendant acted with the required specific intent or mental state, mentioning only "intent to kill" for attempted murder and attempted voluntary manslaughter, and "premeditation and deliberation" for the attempted murder special allegation. Defense counsel did not request modification to include the state of mind required for imperfect self-defense. The Court of Appeal deemed the claim reviewable so far as the claimed error affected defendant's substantial rights under Penal Code section 1259. The court held it was error to prelude the jury from considering evidence of defendant's mental disabilities in deciding whether he harbored the state of mind required for imperfect self-defense, (i.e., whether his perceptual or sensory processing disabilities made it more likely that self-

defense would appear to be necessary to him and negating express malice). The instruction erroneously limited the jury's consideration of mental disabilities to the issue of whether he intended to kill. However, the error was deemed harmless under *Watson*.

Instruction on Alternative Counts: *People v. Olivas* (2016) 248 Cal.App.4th 758. Defendant was charged with 23 counts relating to continual sexual abuse of a minor. Counts 15-19 (forcible lewd acts upon a minor between ages 7 and 10) were charged in the alternative to Counts 10, 12, 13, and 14 (aggravated sexual assault of minor between 7 and 10 by oral copulation) and Count 11 (aggravated sexual assault of minor between 7 and 10 by rape). The jury was instructed pursuant to CALCRIM 3518 (court can accept a guilty verdict on lesser crime only if defendant found not guilty of corresponding greater crime). The jury submitted this question during deliberations: "If we are 'hung on a count (ie: 14), are we able to consider the alternate count (ie: 19?)" With defense counsel's agreement, the court responded, "No." The next day, the jury found defendant guilty of Counts 1-14 and 20-22, including all of the greater counts charged in the alternative. The court applied the "acquittal-first rule" of *People v. Kurtzman* (1988) 46 Cal.3d 322, 335 [jury may not return verdict on a lesser offense unless it first finds defendant not guilty of the greater offense, but jury not required to acquit of greater offense before even considering lesser included offenses] to counts charged in the alternative, holding it was error to instruct the jury they could not even consider alternative counts unless they acquit of the greater offense. The court held that the *Kurtzman* error affected all alternative counts, even the ones not specifically mentioned in the jury question, because a reasonable juror could conclude that the jury could not consider an alternate count if it was hung on the greater count after receiving the court's answer. The matter was remanded for further proceedings on all alternative counts.

Kill Zone Theory of Liability for Attempted Murder: *People v. Falaniko* (2016) 1 Cal.App.5th 1234. The trial court instructed the jury on all seven counts of attempted murder with a modified CALCRIM 600 and included a "kill zone" theory of liability. The Court of Appeal held that substantial evidence did not support conviction under the kill zone theory on three of the attempted murder counts, therefore the erred in instructing the jury as to those counts. The Court of Appeal also agreed with appellant that the use of the disjunctive "or" between named victims in the instruction to define whom defendant intended to kill was erroneous, because it permitted the jury to convict on all charges of attempted murder in each incident based on a finding of intent to kill only one of the victims in the incident. The Court of Appeal found the instructional errors prejudicial for four of the seven attempted murder counts, which it reversed and remanded for retrial.

Sentencing

Multiple Victim Exception to Penal Code section 654: *People v. Deegan* (2016) 247 Cal.App.4th 532. A court, rather than a jury, may decide whether the multiple victim exception applies to Penal Code section 654's prohibition of separate punishment for multiple offenses arising out of a single, indivisible course of action. Further, *Apprendi v. New Jersey* (2000) 530 U.S. 466, which established a defendant's right to a jury trial on

sentence enhancements, is not applicable to determinations made by a trial court under Penal Code section 654 because the statute entails a sentencing reduction rather than a sentencing enhancement.

Dual Custody Credits: *People v. Santa Ana* (2016) 247 Cal.App.4th 1123. The second sentence of Penal Code section 2900.5, subdivision (b), added by a 1978 amendment, reads: "Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." The court held that this credit limitation applies where there is a single period of custody to be credited arising from the commission of one new offense, there are dual custodial restraints, and, at the time of the sentencing in the two cases, the trial court imposes a probationary jail term in one case and imposes a consecutive probationary jail term in the other case.

Realignment Sentencing with Consecutive Misdemeanor Term: *People v. Brown* (2016) 247 Cal.App.4th 1430. Defendant was charged with two felony violations of Penal Code section 69; the jury found him guilty of the lesser included offense of misdemeanor resisting arrest (Pen. Code, § 148, subd. (a)(1)) on count I, and found him guilty of the felony charge in count II. The court sentenced him to the upper term of 3 years on count II, and a consecutive one-year term as to count I. On appeal, defendant argued that because sentence was imposed pursuant to Penal Code section 1170(h) (enacted as part of the Criminal Justice Realignment Act of 2011), the one-third mid-term limitation on consecutive felony terms under 1170.1(a) should apply to aggregated felony/misdemeanor adult criminal sentences served in county jail pursuant to Penal Code section 1170(h)(2). Otherwise, defendant argued, realignment sentencing would produce an absurd result where a consecutive misdemeanor sentence would be greater than a consecutive felony sentence. The Court of Appeal rejected this argument on the basis that judicial interpretation of Penal Code section 1170.1 has been consistent since 1979, therefore the Legislature would have stated so if it intended a different result when it amended section 1170.1(a) when it enacted the Realignment Act in 2011.

Scope of Waiver of Credits: *People v. Tate* (2016) 248 Cal.App.4th 332. In 2012, defendant was sentence to 7 years in prison, execution of sentence suspended, and granted probation on the condition that she serve 90 days in county jail. On October 18, 2013, defendant admitted a first probation violation. During the hearing, the court reinstated probation in exchange for a waiver of good-time credits. The court asked, "Do you agree to waive your 4019 good-time credits" and defendant responded, "Yes, sir." On December 11, 2014, defendant admitted a second probation violation, and probation was modified and reinstated. At the probation officer's statement that defendant had "previously waived," the court stated "372 and 0" as to the credits earned. On May 1, 2015, defendant admitted a third probation violation, the court imposed the prison term, and awarded defendant 423 actual custody credits and no good time conduct credits. On appeal, the court held that defendant made a knowing and intelligent waiver of 4019 credits earned as of the date of the hearing on October 18, 2013, but the scope of the waiver did not include future 4019 credits. Nothing occurred at the December 11, 2014 hearing indicating defendant agreed

to waive any past or future 4019 credits as of that date. The court reversed the order awarding no section 4019 conduct credits, and remanded for determination of eligibility for conduct credits after October 18, 2013.

Penal Code section 654 and Transportation of Controlled Substance Offenses: *People v. Buchanan* (2016) 248 Cal.App.4th 603. Defendant was convicted of numerous drug and firearm offenses, and was sentenced to 32 years and 8 months in prison. In the published portion of the opinion, the court addresses several issues regarding the application of Penal Code section 654 to defendant's sentence. First, the court held that section 654 does not apply to transportation for sale of heroin and transportation for sale of methamphetamine, where defendant was selling small amounts of drugs to different groups of users (those addicted to stimulants versus depressants). The court distinguished *In re Adams* (1975) 14 Cal.3d 629, where the California Supreme Court struck multiple punishments imposed on a defendant who had been apprehended transporting several types of contraband because the defendant in that case was transporting a shipment of narcotics to a single recipient. Second, the court accepted the People's concession that section 654 applied to stay separate sentences for possession of for sale and transportation for sale of the same narcotic. Third, the court held that *People v. Jones* (2012) 54 Cal.4th 350, where the California Supreme Court struck two of three sentences for violations of different firearms statutes based on possession of a single firearm, precluded separate sentences for being in possession of a firearm and for the firearm enhancement to his narcotics offense, based on the possession of a single firearm on a single occasion.

Victim Impact Statements on Appeal: *People v. Hannon* (2016) 5 Cal.App.5th 94. Defendant appealed from the trial court's restitution award, and the Court of Appeal granted the victim's request to file an impact statement on appeal. The Court of Appeal held that "Marsy's Law" entitled victims to file impact statements on appeal, but may not present facts outside the appellate record.

Pleas

Admonishment of Right to Withdraw Plea: *People v. Silva* (2016) 247 Cal.App.4th 578. Appellant was not properly advised that he could withdraw his plea before the court imposed a sentence 30 days more than the sentencing lid agreed upon in the plea bargain. At the time of the plea, the court did not orally advise appellant of his right to withdraw his plea if the court did not approve of the plea agreement. The Judicial Council plea form was also inadequate because the form did not address the situation in this case where a new point of law was responsible for the increase in sentence. The court remanded for resentencing to allow for either the prosecutor to dismiss the misdemeanor count which required the additional 30 day sentence, the trial court to approve of a new sentence within the lid, or for the appellant to be allowed to withdraw his plea.

Admonishment on Immigration Consequences: *People v. Arendtsz* (2016) 247 Cal.App.4th 613. Prosecutor's admonishment twice on the record that defendant's no contest plea to felony sexual battery "will resort in deportation" was a proper advisal of the immigration

consequences of his plea under Penal Code section 1016.5. Neither *Padilla v. Kentucky* (2010) 559 U.S. 356 nor the legislative intent of Penal Code section 1016.5 require a trial court to specifically advise on asylum or cancellation of removal.

Trial Court Discretion to Reject Plea Bargain: *People v. Loya* (2016) 1 Cal.App.5th 923. The trial court abused its discretion by refusing to accept a plea bargain when appellant made it clear he was accepting the plea agreement, at no point did the trial court state the negotiated plea agreement was unfair or contrary to the public interest, and the trial court did not indicate why the plea bargain was unacceptable. The judgment was reversed and the sentences in the case and a trailing probation case were vacated, because they were both included in the previously offered plea. The DA must submit the previously negotiated bargain to the trial court for approval, unless the DA within 30 days elects to retry appellant and resume the negotiation process.

Restitution, Fines and Fees

Noneconomic Restitution: *People v. Lehman* (2016) 247 Cal.App.4th 795. Noneconomic restitution order of $1 million to two victims of numerous sex offenses based on the psychological impact of the abuse affirmed despite fact that neither victim submitted declarations or testified at the restitution hearing, no expert testimony as to impact of the abuse. Prosecutor was permitted to seek noneconomic restitution on victims' behalf.

Drug Program Fees: *People v. Jefferson* (2016) 248 Cal.App.4th 660. The trial court orally imposed and suspended a $150 drug program fee (Health & Safety Code, §11372.27, subd. (a)) based on inability to pay, and imposed a $10 local crime prevention programs fine (Pen. Code, § 1202.5, subd.(a)). On appeal, the court held the drug program fee may not be suspended; if defendant does not have the ability to pay the fine, it may not be imposed at all. Also, because attempted robbery is not an enumerated offense in Penal Code section 1202.5, subdivision (a), the fee did not apply to defendant. The appellate court ordered the fees stricken.

Crime Lab Fees: *People v. Watts* (2016) 2 Cal.App.5th 223. The Court of Appeal held that the $50 crime-lab fee authorized by Health and Safety Code section 11372.5 is not subject to penalty assessments.

Due Process

Severance: *People v. Zendejas* (2016) 247 Cal.App.4th 1098. Appellant's co-defendant at trial was her former boyfriend and the father of her child, who was emotionally and physically abusive, had shot her in the leg and neck, rendering her wheel-chair bound during the trial, and was awaiting trial for the attempted murder of appellant. The court held that appellant's due process right to a fair trial was not violated by the "torment, stress, and distress" of being tried in close proximity to her "violent, murderous codefendant."

Judicial Comment: *People v. Tatum* (2016) 4 Cal.App.5th 1125. The Court of Appeal reversed defendant's murder conviction where trial court made disparaging comments about plumbers on the first day of voir dire, and defendant's only alibi witness was a plumber. The court held the trial court's comments on the credibility of the defense witness exceeded the scope of proper judicial comment, and that the trial court abused its discretion when it denied defendant's motion for a mistrial. The court further held that no admonition could cure the prejudice resulting from the trial court's statement that it believed a plumber would lie in court.

Waiver of Statute of Limitations: *In re Elijah C.* (2016) 248 Cal.App.4th 958 (as modified). Juvenile defendant signed an agreement waiving the one-year statute of limitations for petty theft as a condition for entering a diversion program, without consultation with counsel and prior to a petition being filed. Subsequently, the district attorney's office terminated the minor's participation in the diversion program for failing to complete the requirements and filed a petition charging him with petty theft. The trial court overruled the minor's demurrer and motion to dismiss the charges based on lack of jurisdiction due to the running of the statute of limitations and sustained the petition. On appeal, the court reversed, holding that the waiver of the statute of limitations was invalid because the minor was not represented by counsel at the time of the waiver.

Evidence

Admissibility of Expert Testimony: *People v. Herrera* (2016) 247 Cal.App.4th 467. Held, it was prejudicial error to prevent defendant from offering expert testimony about defendant's psychiatric impairments at the time of the offense in his first degree murder trial.

Scientific Evidence: *People v. Garlinger* (2016) 247 Cal.App.4th 1185. Expert testimony concerning the general location of defendant's cell phone in relation to various cell towers was not inadmissible under the *Kelly* test because the testimony does not describe a "new scientific methodology," nor was it inadmissible under Evidence Code sections 801 and 802, because call detail records may be reasonably relied upon to express a limited opinion of the cell phone's location without any degree of precision. Therefore, trial counsel was not ineffective for failing to make a futile to objection to the evidence on those grounds.

Impeachment Evidence: *People v. Sanghera* (2016) 6 Cal.App.5th 365. Defendant's failure to testify precluded him from challenging on appeal whether the trial court erred in declining to exclude prior misconduct impeachment evidence as unduly prejudicial. Any error by the trial court in failing to consider the impact of allowing the impeachment evidence on defendant's decision to testify was waived by defendant's failure to testify.

Evidence Code section 1161: *In re N.C.* (2016) 4 Cal.App.5th 1235: The Californians Against Sexual Exploitation Act (CASE Act) enacted by voters in 2012 added section 1161 to the Evidence Code, subsequently amended in 2013, which now declares that evidence that a victim of human trafficking "has engaged in any commercial sexual act as a result of

being a victim of human trafficking is inadmissible to prove the victim's criminal liability for the commercial sexual act." As a matter of first impression, the Court of Appeal held that Evidence Code section 1161 applies to uncompensated sexual conduct punishable by Penal Code section 647(b) [solicitation/prostitution]. The court also held that the CASE Act applies to juveniles.

Procedure

Multiple Prosecution: *People v. Hamernik* (2016) 1 Cal.App.5th 412. Defendant was originally charged with possession of the controlled substance Dilaudid. The prosecution had an unanticipated problem of proof and failed to present evidence that the substance in question was in fact Dilaudid. After the presentation of evidence, the prosecutor sought to amend the information to change the charge to attempted possession of a controlled substance. During the same hearing, defendant moved to dismiss the charge pursuant to PC 1118.1. The court dismissed the possession count, and found the motion to amend the information moot because it ruled that attempt was a lesser included offense. Defendant filed a motion to reconsider its determination that the People could proceed on an attempted possession case; the prosecutor orally renewed her request to amend the information. The court denied both motions. On appeal, the court held that attempted possession of a controlled substance is not a lesser included offense of possession of a controlled substance, that the judgment must be reversed, and that retrial was barred under PC 654 and *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827, accord *People v. Goolsby* (2015) 62 Cal.4th 360, 366.

Multiple Prosecution: *People v. Ochoa* (2016) 248 Cal.App.4th 15. Defendant was charged in 2008 with conspiracy to distribute methamphetamine for his role supplying methamphetamine to Nuestra Familia criminal street gang, though no known members of Nuetra Familia and no gang-related offenses or enhancements were charged on the complaint. One month after sentencing on the 2008 case, defendant and 28 others were indicted for active participation in Nuestra Familia and conspiracy to distribute methamphetamine for the benefit of the gang. The trial court denied defendant's motion to dismiss the second indictment under *Kellet v. Superior Court* (1966) 63 Cal.2d 822 (*Kellet*) and Penal Code section 654's bar on multiple prosecutions, on the basis that the two prosecutions targeted two separate, distinct conspiracies because their intent and objectives were distinct. The appellate court applied both the "time and place test" and the "evidentiary test" to analyze defendant's course of conduct under *Kellet*, finding under both tests that it was the same in both prosecutions. Further, the court concluded that the prosecution was aware of defendant's conduct supplying methamphetamine to Nuetra Familia at the time of the first prosecution. Therefore, defendant's second indictment was barred under *Kellet* and Penal Code section 654.

Blanket Peremptory Challenges by Prosecution Permissible. *People v. Superior Court (Tejada)* (2016) 1 Cal.App.5th 892. DA office's blanket use of peremptory challenge pursuant to Cal. Civ. Proc. Code § 170.6 against a judge did not violate separation of powers. The Court of Appeal followed the California Supreme Court's decision in *Solberg*

v. Superior Court (1977) 19 Cal.3d 182, but urged the Supreme Court to revisit the issue of whether blanket papering can be viewed as inconsequential to the trial court's performance of its duty to administer justice.

Proposition 57

Application of Proposition 57 to Cases Directly Filed in Adult Court Prior to its Passage: *People v. Lara* (Jan. 19, 2017, E067296) __ Cal.App.5th __ [2017 WL 222567]. In March 2016, the district attorney directly filed a criminal complaint against a minor in adult court under the authority of former Welfare and Institutions Code section 707, subdivision (d)(2). After a preliminary hearing, the prosecution filed a felony information in June 2016. During the November 2016 election, the voters passed Proposition 57 which eliminated the prosecution's ability to direct file effective November 9, 2016. The trial court granted minor's motion for a fitness hearing in juvenile court pursuant to recently enacted Proposition 57, over the prosecution's objection that Proposition 57 could not be appliedretroactively. The prosecution appealed, contending that Proposition 57 could not be applied to cases directly filed in adult court before the new law took effect. On appeal, the court held the legislative change requiring a juvenile judge to assess whether the minor is charged in adult or juvenile court is a "law governing the conduct of trials" therefore Proposition 57 can only apply to trials that have yet to occur and can only be applied prospectively. Proposition 57 thus requires a juvenile court judge to assess whether cases directly filed against juvenile offenders in adult court before Proposition 57 went into effect go to trial in juvenile or adult court. Only once an accused has been "brought to trial" (the case has been called for trial by a judge who is ready to try the case to conclusion and a panel of prospective jurors sworn) would requiring a juvenile judge to conduct a fitness hearing be a retrospective application of Proposition 57. The court limited its holding to the retroactivity of the portion of Proposition 57 "that requires the juvenile court to permit trial of a minor in adult criminal court."

Habeas Corpus

Revised "New Evidence" Standard for Habeas Corpus Relief: *In re Miles* (Jan. 19, 2017, G046534) __ Cal.App.5th __ [2017 WL 222569]. Effective January 1, 2017, the California Legislature lowered the standard for granting habeas corpus relief on the basis of newly discovered evidence. Habeas relief is now granted when: "New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial." (Pen. Code, § 1473, subd. (b)(3)(A).) Petitioner first filed his petition for writ of habeas corpus in the court of appeal before the new law took effect, attaching declarations from his codefendant and two other men confessing to their role in the robbery for which petitioner was convicted, and swearing under penalty of perjury that petitioner had nothing to do with it. While the petition was pending, the change in law went into effect. The Court of Appeal held that the 2017 statutory amendment applied to petitioner's pending petition because it constituted merely a change in procedure not substantive law, and because the court had not yet ruled on the petition. Applying the new standard for habeas corpus relief, the court

found that the three confessions qualified as "new evidence" and met the new standard for habeas corpus relief.

II. NOTEWORTHY PENDING CASES

A. United States Supreme Court

The summaries below are based on the Granted and Noted List, October 2016 Term, published on the Supreme Court's website, http://www.supremecourt.gov/orders/, and on information obtained from SCOTUSBlog, http://www.scotusblog.com/, which provides links to opinions below, briefing, articles, and other relevant material. This is not a comprehensive list of all criminal cases pending before the Court. It focuses on those cases of most interest to California appellate practitioners.

First Amendment

Packingham v. North Carolina, No. 15-1194 (cert. granted October 28, 2016)

- Question presented: Whether, under the court's First Amendment precedents, a law that makes it a felony for any person on the state's registry of former sex offenders to "access" a wide array of websites – including Facebook, YouTube, and nytimes.com – that enable communication, expression, and the exchange of information among their users, if the site is "know[n]" to allow minors to have accounts, is permissible, both on its face and as applied to petitioner, who was convicted based on a Facebook post in which he celebrated dismissal of a traffic ticket, declaring "God is Good!"
- Status: Argument February 27, 2017.

Fourth Amendment

Manuel v. City of Joliet, No. 14-9496 (cert. granted January 15, 2016)

- Question presented: Whether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment.
- Status: Argued October 5, 2016.

District of Columbia v. Wesby, No. 15-1485 (cert. granted January 19, 2017)

- Question presented: (1) Whether police officers who found late-night partiers inside a vacant home belonging to someone else had probable cause to arrest the partiers for trespassing under the Fourth Amendment, and in particular whether, when the owner of a vacant home informs police that he has not authorized entry, an officer assessing probable cause to arrest those inside for trespassing may discredit the suspects' questionable claims of an innocent mental state; and (2) whether, even if there was no probable cause to arrest the apparent trespassers, the officers were entitled to qualified immunity because the law was not clearly established in this regard.
- Status: Argument not yet set.

Restitution

Manrique v. U.S., No. 15-7250 (cert. granted April 25, 2016)

- Question presented: Whether a notice of appeal from a sentencing judgment deferring restitution is effective to challenge the validity of a later-issued restitution award.
- Status: Argued October 11, 2016.

Sixth Amendment – Right to Impartial Jury

Pena-Rodriguez v. Colorado, No. 15-606 (cert. granted April 4, 2016)

- Question presented: Whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury.
- Status: Argued October 11, 2016.

Sixth Amendment – Ineffective Assistance of Counsel

Weaver v. Massachusetts, No. 16-240 (cert. granted January 13, 2017)

- Question presented: Whether a defendant asserting ineffective assistance of counsel that results in a structural error must, in addition to demonstrating deficient performance, show that he was prejudiced by counsel's ineffectiveness, as held by four circuits and five state courts of last resort; or whether prejudice is presumed in such cases, as held by four other circuits and two state high courts.
- Status: Argument not yet set.

Lee v. U.S., No. 16-327 (cert. granted December 14, 2016)

- Question presented: Whether it is always irrational for a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation.
- Status: Argument not yet set.

Davila v. Davis, No. 16-6219 (cert. granted January 13, 2017)

- Question presented: Whether the rule established in Martinez v. Ryan and Trevino v. Thaler, that ineffective state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of trial counsel claim, also applies to procedurally defaulted, but substantial, ineffective assistance of appellate counsel claims.
- Status: Argument not yet set.

Eighth Amendment

Moore v. Texas, No. 15-797 (cert. granted June 6, 2016)

- Question presented: Whether it violates the Eighth Amendment and this Court's decisions in Hall v. Florida and Atkins v. Virginia to prohibit the use of current

medical standards on intellectual disability, and require the use of outdated medical standards, in determining whether an individual may be executed.

- Status: Argued November 29, 2016.

Due Process

Nelson v. Colorado, No. 15-1256 (cert. granted September 29, 2016)

- Question presented: Whether Colorado's requirement that defendants must prove their innocence by clear and convincing evidence to get their money back, after reversal of conviction of a crime entailing various monetary penalties, is consistent with due process.
- Status: Argued January 9, 2017.

Turner v. U.S., No. 15-1503 / *Overton v. U.S.*, No. 15-1504 (cert. granted and cases consolidated December 14, 2016)

- Question presented: Whether the petitioners' convictions must be set aside under *Brady v. Maryland*. Both *Turner* and *Overton* arise out of a 1984 murder in which petitioners were convicted largely based on eyewitness testimony. Decades later it was discovered that prosecutors failed to turn over a statement suggesting someone else committed the crime and other evidence that could have aided the petitioners.
- Status: Argument not yet set.

McWilliams v. Dunn, No. 16-5294 (cert. granted January 13, 2017)

- Question presented: Whether, when this court held in Ake v. Oklahoma that an indigent defendant is entitled to meaningful expert assistance for the "evaluation, preparation, and presentation of the defense," it clearly established that the expert should be independent of the prosecution.
- Status: Argument not yet set.

B. California Supreme Court

In light of the availability of pending issues summaries issued by the Judicial Council (http://www.courts.ca.gov/13648.htm), these materials will not provide a complete list of review-granted criminal cases. Instead, the materials will focus solely on issues likely to be of greatest interest to California appellate practitioners which have not been covered in prior FDAP materials. The following are cases pending in the California Supreme Court as of January 20, 2017, that have not been discussed in previous seminar materials. Materials on pending issues covered in past years can be found at http://www.fdap.org/r-article_search.php.

Proposition 47

People v. Adelmann, S237602 (review granted November 9, 2016)

- Question presented: If a case is transferred from one county to another for purposes of probation (Pen. Code, § 1203.9), must a Proposition 47 petition to recall sentence be filed in the court that entered the judgment of conviction or in the superior court of the receiving county?

- Opinion below: 2 Cal.App.5th 1188 (E064099). Defendant's probation case was transferred to Riverside County, where defendant filed a Proposition 47 petition, which was granted. People appealed. The Court of Appeal held that Riverside County had jurisdiction to consider the petition. People petitioned for review.
- Status: Answer brief due.

People v. Buycks, S231765 (review granted January 20, 2016)

- Question presented: Was defendant eligible for resentencing on the penalty enhancement for committing a new felony while released on bail on a drug offense even though the superior court had reclassified the conviction for the drug offense as a misdemeanor under the provisions of Proposition 47?
- Note: Review on court's own motion.
- Opinion below: 241 Cal.App.4th 519 (B262023). The Court of Appeal held the Prop 47 reduction of felony conviction to misdemeanor precluded use of the conviction for on-bail enhancement.
- Status: Fully briefed.

In re C.B., S237801 (review granted November 9, 2016)

- Question presented: Did the trial court err by refusing to order the expungement of a juvenile's DNA record after his qualifying felony conviction was reduced to a misdemeanor under Proposition 47 (Pen. Code § 1170.18)?
- Opinion below: 2 Cal.App.5th 1112 (A146277). Trial court granted minor's Prop 47 petition but denied requests to vacate the order to submit DNA samples and expunge his samples from the state DNA database. The Court of Appeal held that the DNA and Forensic Identification Data Base and Data Bank Act prohibited expungement of minor's DNA sample upon redesignation of his adjudication.
- Status: Not yet briefed.

In re C.H., S237762 (review granted November 16, 2016)

- Questions presented: (1) Did the trial court err by refusing to order the expungement of juvenile's DNA record after his qualifying felony conviction was reduced to a misdemeanor under Proposition 47 (Pen. Code § 1170.18)? (2) Does the retention of juvenile's DNA sample violate equal protection because a person who committed the same offense after Proposition 47 was enacted would be under no obligation to provide a DNA sample?
- Opinion below: 2 Cal.App.5th 1139 (A146120). Trial court granted minor's request to redesignate his felony offense a misdemeanor, but denied his request to expunge his samples from the state DNA database. The Court of Appeal held that a felony juvenile adjudication's reclassification to a misdemeanor under Prop 47 is not a proper basis for DNA expungement, and that the DNA Fingerprint, Unsolved Crime and Innocence Protection Act does not violate equal protection in its disparate treatment of minors based on the time of their delinquency adjudication.
- Status: Not yet briefed.

Caretto v. Superior Court, S235419 (review granted August 10, 2016)

- Question presented: What is the value of an unused stolen debit card for the purpose of distinguishing between misdemeanor and felony receiving stolen property in violation of Penal Code section 496, subdivision (a)?
- Opinion below: nonpublished opinion (B265256). Trial court denied petitioner's Prop 47 petition for resentencing felony receiving stolen property conviction, valuing the debit cards according to the amounts in the victim's bank accounts linked to the cards. The Court of Appeal agreed and denied the petition.
- Status: Fully briefed.

People v. Franco, S233973 (review granted June 15, 2016)

- Question presented: For the purpose of the distinction between felony and misdemeanor forgery, is the value of an uncashed forged check the face value (or stated value) of the check or only the intrinsic value of the paper it is printed on?
- Opinion below: 245 Cal.App.4th 679 (B260447). The Court of Appeal held that value of forged check was based on the check's face value.
- Status: Not yet briefed.

People v. Gonzales, S231171 (review granted February 17, 2016)

- Question presented: Was defendant entitled to resentencing under Penal Code section 1170.18 on his conviction for second degree burglary either on the ground that it met the definition of misdemeanor shoplifting (Pen. Code, § 459.5) or on the ground that section 1170.18 impliedly includes any second degree burglary involving property valued at $950 or less?
- Opinion below: 242 Cal.App.4th 35 (D067544). The trial court denied defendant's Prop 47 petition to reduce his felony conviction of second degree burglary. The Court of Appeal held that entering a bank to cash forged checks was not "shoplifting" and that non-shoplifting second degree commercial burglary not eligible for Prop 47 resentencing.
- Status: Argued and submitted 1/4/17.

People v. Romanowski, S231405 (review granted January 20, 2016)

- Question presented: Does Proposition 47 ("the Safe Neighborhoods and Schools Act"), which reclassifies as a misdemeanor any grand theft involving property valued at $950 or less (Pen. Code, § 490.2), apply to theft of access card information in violation of Penal Code section 484e, subdivision (d)?
- Opinion below: 242 Cal.App.4th 151 (B263164). The trial court denied defendant's Prop 47 petition to resentence his conviction for theft of access card information on the basis that Penal Code section 484e was akin to identity theft under section 530.5 and therefore outside the scope of Prop 47. The Court of Appeal reversed, holding that Prop 47 applies to section 484e, subdivision (d) offenses, disagreeing with *People v. Cuen* (2015) 241 Cal.App.4th 1227 and *People v. Grayson* (2015) 241 Cal.App.4th 454.
- Status: Argued and submitted 1/5/17.

People v. Valenzuela, S232900 (review granted March 30, 2016)

- Question presented: Is defendant eligible for resentencing on the penalty enhancement for serving a prior prison term on a felony conviction after the superior court had reclassified the underlying felony as a misdemeanor under the provisions of Proposition 47?
- Opinion below: 244 Cal.App.4th 692 (D066907). Defendant was convicted of felony possession of methamphetamine with a one year enhancement under section 667.5(b) for a prison prior. The Court of Appeal held that the redesignation of defendant's prior felony as a misdemeanor did not invalidate defendant's prior prison term sentence enhancement.
- Status: Fully briefed.

People v. Page, S230793 (review granted January 27, 2016)

- Question presented: Does Proposition 47 ("the Safe Neighborhoods and Schools Act") apply to the offense of unlawful taking or driving a vehicle (Veh. Code, § 10851), because it is a lesser included offense of Penal Code section 487, subdivision (d), and that offense is eligible for resentencing to a misdemeanor under Penal Code sections 490.2 and 1170.18?
- Opinion below: 241 Cal.App.4th 714 (E062760). The Court of Appeal held that Prop 47 does not apply to the offense of unlawfully taking a vehicle (Veh. Code, § 10851), even though Prop 47 does apply to grand theft auto (Pen. Code, § 487(d)(1)), and even if the vehicle's value does not exceed $950.
- Status: Fully briefed.

People v. Martinez, S231826 (review granted March 23, 2016)

- Question presented: Could defendant use a petition for recall of sentence under Penal Code section 1170.18 to request the trial court to reduce his prior felony conviction for transportation of a controlled substance to a misdemeanor in light of the amendment to Health and Safety Code section 11379 effected by Proposition 47?
- Opinion below: nonpublished opinion (E063107). Defendant was convicted in 2007 of transportation of methamphetamine (Health & Safety Code, § 11379(a)); at the time of the conviction, HS 11379 applied to transportation for personal use, but the statute was amended effective January 1, 2014, to add the requirement that the transportation be for sale. Defendant's petition to reduce his transportation conviction to a misdemeanor, on the basis that the conduct underlying his transportation conviction would today amount to simple possession misdemeanor under Prop 47, was denied. The Court of Appeal affirmed the denial of the Prop 47 petition because HS 11379 was not specifically enumerated in Prop 47 and Penal Code section 1170.18(a).
- Status: Fully briefed.

Fourth Amendment – Warrantless Blood Draws

People v. Arredondo, S233582 (review granted June 8, 2016)

- Questions presented: (1) Did law enforcement violate the Fourth Amendment by taking a warrantless blood sample from defendant while he was unconscious, or was the search and seizure valid because defendant expressly consented to chemical testing when he applied for a driver's license (see Veh. Code, § 13384) or because defendant was "deemed to have given his consent" under California's implied consent law (Veh. Code, § 23612)? (2) Did the People forfeit their claim that defendant expressly consented? (3) If the warrantless blood sample was unreasonable, does the good faith exception to the exclusionary rule apply because law enforcement reasonably relied on Vehicle Code section 23612 in securing the sample?
- Opinion below: 245 Cal.App.4th 186, mod. 245 Cal.App.4th 777d (H040980). Defendant was suspected of drunk driving, and his blood was drawn at the hospital without a warrant while defendant was unconscious. The trial court found that the blood extraction was permissible based on California's "implied consent" law. The Court of Appeal disagreed, holding that consent under the "implied consent" law cannot itself justify a warrantless blood draw. Nevertheless, the Court of Appeal affirmed defendant's conviction by applying the "good faith" exception to the exclusionary rule.
- Note: Both parties' petitions for review were granted.
- Status: Answer brief due.

Parole/Probation

People v. Chatman, S237374 (review granted November 16, 2016)

- Question presented: Does Penal Code section 4852.01 deny equal protection by making a former felony probationer subsequently incarcerated on a new offense ineligible for a certificate of rehabilitation because a former felony prisoner subsequently incarcerated on a new offense is not ineligible?
- Opinion below: 2 Cal.App.5th 561 (A144196). The Court of Appeal reversed the order denying defendant's petition for certificate of rehabilitation, holding that there is no rational basis for disparate treatment of former felony prisoners and former felony probationers under Penal Code section 4852.01, governing eligibility for certificates of rehabilitation.
- Status: Not yet briefed.

People v. DeLeon, S230906 (review granted February 3, 2016)

- Question presented: In light of the changes made to the parole revocation process in the 2011 realignment legislation (Stats. 2011, ch. 15; Stats. 2012, ch. 43), is a parolee entitled to a probable cause hearing conducted according to the procedures outlined in *Morrissey v. Brewer* (1972) 408 U.S. 471 before parole can be revoked?
- Opinion below: 241 Cal.App.4th 1059 (A140050). In 2013, defendant's parole was revoked 14 days after his detention, upon a judicial officer reviewing the CDCR rules violation report and concluding there was probable cause to support

revocation. The Court of Appeal held that under the parole revocation scheme as amended by the 2011 Realignment Act, superior courts are not required to conduct preliminary probable cause hearings before revoking parole and that a timely single hearing procedure can suffice.

- Status: Fully briefed.

Proposition 36

People v. Frierson, S236728 (review granted October 19, 2016)

- Question presented: What is the standard of proof for a finding of ineligibility for resentencing under Proposition 36? (See *People v. Arevalo* (2016) 244 Cal.App.4th 836; cf. *People v. Osuna* (2014) 225 Cal.App.4th 1020.)
- Opinion below: 1 Cal.App.5th 788 (S232114). Defendant was convicted of stalking in violation of PC 646.9 and due to two prior strikes was sentenced to a term of 25 to life. Defendant petitioned for resentencing under Prop 36, and the trial court ruled defendant ineligible because the third strike offense was committed with intent to inflict great bodily injury to the victim. The Court of Appeal affirmed, rejecting defendant's argument that the court must determine the existence of disqualifying factors for Prop 36 resentencing based only on facts and circumstances necessarily decided in the underlying conviction. The court also disagreed with *People v. Arevalo* (2016) 244 Cal.App.4th 836, holding that a preponderance of the evidence, not proof beyond a reasonable doubt, is the prosecution's standard of proof for meetings its burden of proving a disqualification for resentencing.
- Status: Answer brief due.

People v. Estrada, S232114 (review granted April 13, 2016)

- Question presented: Did the trial court improperly rely on the facts of counts dismissed under a plea agreement to find defendant ineligible for resentencing under the provisions of Proposition 36?
- Opinion below: 243 Cal.App.4th 336 (B260573). The trial court denied defendant's petition for resentencing under Prop 36 on the ground that defendant was armed with a firearm during the commission of his crime, although defendant pled guilty only to grand theft person and all firearm-related charges were dismissed. The Court of Appeal affirmed, holding that preliminary hearing testimony was a proper basis to determine that defendant was armed with firearm during commitment offense.
- Status: Fully briefed.

People v. Perez, S238354 (review granted January 11, 2017)

- Question presented: Did the Court of Appeal err when it failed to defer to the trial court's factual finding that defendant did not use a deadly weapon during his previous assault and was therefore eligible for resentencing under the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126)?

- Opinion below: 3 Cal.App.5th 812 (F069020). Defendant was convicted after a jury trial of assault with force likely to produce great bodily harm for an incident involving a vehicle. The trial court granted defendant's petition for resentencing under Prop 36, stating that defendant's use of the vehicle during the offense was "incidental" and did not make him ineligible for resentencing. The Court of Appeal reversed, holding that evidence in the record of conviction established defendant used a vehicle as a deadly weapon and made him ineligible for resentencing pursuant to section 1170.126, subdivision (c)(2).
- Status: Not yet briefed.

Juvenile Delinquency

People v. Conteras, S224564 (review granted and briefing deferred April 15, 2015; briefing ordered August 17, 2016)

- Question presented: Is a total sentence of 50 years to life or 58 years to life the functional equivalent of life without the possibility of parole for juvenile offenders?
- Opinion below: nonpublished opinion (D063428).
- Note: Respondent's petition for review was granted and the matter was deferred pending consideration of a related issue in *In re Alatriste*, S214652, *In re Bonilla*, S214960, and *People v. Franklin*, S217699. After *Franklin* was decided on May 26, 2016, *Alatriste* and *Bonilla* were transferred for consideration in light of that case.
- Status: Reply brief due.

K.R. v. Superior Court, S231709 (review granted March 9, 2016)

- Question presented: Was the juvenile entitled to a disposition hearing before the same judge who accepted his admissions to a criminal offense and probation violations even though he did not make an affirmative showing of individualized facts in the record establishing that this was an implied term of the plea agreement? (See *People v. Arbuckle* (1978) 22 Cal.3d 749.)
- Opinion below: 243 Cal.App.4th 495 (C079548). Minor admitted to two probation violations pursuant to a plea bargain before a regular visiting judge. The disposition hearing was put out one week, when it was contemplated the minor would have time served under the plea bargain. A different judge presided over the disposition hearing and minor objected under *Arbuckle*. The Court of Appeal held that the minor's plea agreement did not include an express or implied term that the same judge who accepted minor's admissions would preside over the minor's disposition hearing, therefore minor had no *Arbuckle* right to be sentenced by the same judge who accepted the plea.
- Status: Fully briefed.

In re Kirchner, S233508 (review granted May 18, 2016)

- Question presented: When a juvenile offender seeks relief from a life-without-parole sentence that has become final, does Penal Code section 1170, subdivision (d)(2), which permits most juvenile offenders to petition for recall of a life-without-parole sentence imposed pursuant to Penal Code section 190.5 after 15 years,

provide an adequate remedy under *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455], as recently construed in *Montgomery v. Louisiana* (2016) 577 U.S. ___ [136 S.Ct. 718]?

- Opinion below: 244 Cal.App.4th 1398 (D067920). Petitioner filed for habeas relief after serving 22 years of his LWOP sentence for murder committed as a juvenile, contending that his sentence violated the Eighth Amendment under *Miller*. The Court of Appeal held that the process of recall and resentencing provided by section 1170, subdivision (d)(2) meets the requirements of *Miller* and *Montgomery* and was an adequate remedy petitioner must pursue before resorting to habeas relief.
- Status: Oral argument February 7, 2017.

In re Ricardo P., S230923 (review granted February 17, 2016)

- Question presented: Did the trial court err by imposing an "electronics search condition" on the juvenile as a condition of his probation when that condition had no relationship to the crimes he committed but was justified on appeal as reasonably related to future criminality under *People v. Olguin* (2008) 45 Cal.4th 375 because it would facilitate the juvenile's supervision?
- Opinion below: 241 Cal.App.4th 676 (A144149). The juvenile court declared wardship after finding that minor committed two felony counts of first degree burglary and placed him on probation with an electronics search condition. Relying on *Olguin*, the Court of Appeal held that the electronics search condition was valid under *People v. Lent* (1975) 15 Cal.3d 545, because it was reasonably related to enabling effective supervision of minor's compliance with other probation conditions.
- Note: The California Supreme Court has granted review and deferred the matter pending disposition of this issue in numerous recently-decided Court of Appeal decisions. (See, e.g. *In re Patrick F.* (2015) 242 Cal.app.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 3, 2016, S232240; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 3, 2016, S232849; and *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932.)
- Status: Fully briefed.

Pre-Trial Discovery

Facebook, Inc. v. Superior Court, S230051 (review granted December 16, 2015)

- Questions presented: (1) Did the Court of Appeal properly conclude that defendants are not entitled to pretrial access to records in the possession of Facebook, Instagram, and Twitter under the federal Stored Communications Act (18 U.S.C. § 2701, et seq.) and *People v. Hammon* (1997) 15 Cal.4th 117? (2) Does an order barring pretrial access to the requested records violate defendants' right to compulsory process and confrontation under the Sixth Amendment or their due process right to a fair trial? (3) Should this court limit or overrule *People v. Hammon* (1997) 15 Cal.4th 117?

- Opinion below: 240 Cal.App.4th 203 (A144315). Two defendants charged with offenses including murder served subpoena duces tecum on social network operators Facebook, Instagram, and Twitter. The trial court denied the operators' motion to quash; the operators petitioned in the Court of Appeal for a writ of mandate and/or prohibition. The Court of Appeal granted the operators' petition and directed the trial court to issue an order quashing the subpoenas.
- Status: Supplemental briefs due.

Stipulations

People v. Farwell, S231009 (review granted February 3, 2016)

- Questions presented: (1) Does the "totality of the circumstances" test apply in determining whether a defendant knowingly and voluntarily waived his constitutional rights before stipulating to an offense, if the record indicates that the trial court did not advise the defendant or obtain his waiver of rights at the time of the stipulation? (2) Under this test, are references to a defendant's constitutional rights during earlier stages of the proceedings and the defendant's criminal history sufficient to support the conclusion that the defendant knowingly and voluntarily waived those rights when entering into to the stipulation?
- Opinion below: 241 Cal.App.4th 1313 (B257775). Defendant challenged his conviction for driving on a suspended license (Veh. Code, § 14601.1(a)) because the trial court did not explicitly advise him of his constitutional trial rights before accepting his stipulation to the substantive crime. The Court of Appeal reviewed the entire record and held that "under the totality of circumstances" the record affirmatively showed the stipulation was voluntary and intelligent. The court noted that defendant became fully aware of his constitutional rights during the pretrial proceedings and extensive jury voir dire. The court also found defendant's previous experience in the criminal justice system for two prior convictions (residential burglary and engaging in an illegal speed contest) was relevant to his knowledge regarding his legal rights.
- Status: Fully briefed.

Judicial Fact Finding

People v. Gallardo, S231260 (review granted February 17, 2016)

- Question presented: Was the trial court's decision that defendant's prior conviction constituted a strike incompatible with *Descamps v. U.S.* (2013) 570 U.S. __ (133 S.Ct. 2276) because the trial court relied on judicial fact-finding beyond the elements of the actual prior conviction?
- Opinion below: nonpublished opinion (B257357). After defendant waived her right to a jury trial on a prior felony conviction for violating section 245(a)(1), the trial court considered the preliminary hearing transcript from the prior case, over defendant's hearsay objection, and found that it constituted a strike. The Court of Appeal held that under *Descamps*, because the statute at issue in this case was a so-called "divisible statute" (setting out one or more elements of the offense in the alternative), the sentencing court was permitted to consult extrinsic documents to

determine which alternative formed the basis for the prior conviction and a jury determination was not required.

- Status: Fully briefed.

Enhancements

People v. Maita, S230957 (review granted February 17, 2016)

- Question presented: In light of an amendment to Health and Safety Code section 11379 defining "transports" as transportation for sale (Stats. 2013, ch. 504, § 2), was defendant's sentence improperly enhanced with a prior conviction for transporting a controlled substance?
- Opinion below: nonpublished opinion (C074872). The Court of Appeal held that the 2014 amendment to section 11379 does not apply retroactively to defendant's 2003 conviction in a prior case because the conviction became final long before the amendment (*In re Estrada* (1965) 63 Cal.2d 740). Accordingly, the prior conviction enhancement was valid.
- Status: Fully briefed.

Jury Instructions

People v. Merritt, S231644 (review granted March 9, 2016)

- Question presented: Is the failure to instruct the jury on the elements of a charged offense reversible per se or subject to harmless error review? (See *Neder v. United States* (1999) 527 U.S. 1; *People v. Mil* (2012) 53 Cal.4th 400; *People v. Cummings* (1993) 4 Cal.4th 1233.)
- Opinion below: nonpublished opinion (E062540). Relying on *Cummings*, the Court of Appeal held that the trial court's error in failing to instruct the jury on the offense of robbery was reversible per se.
- Status: Argued and submitted January 4, 2017.

People v. Soto, S236164 (review granted October 12, 2016)

- Questions presented: (1) Did the trial court err in instructing the jury? (2) If so, was the error prejudicial?
- Opinion below: The Court of Appeal held that the trial court erred by precluding the jury from considering evidence of defendant's voluntary intoxication with respect to his claim of imperfect self-defense. Penal Code section 29.4 expressly allows for consideration of voluntary intoxication with respect to express malice, and an actual but unreasonable belief in the need for self-defense negates express malice, therefore evidence of voluntary intoxication is relevant to the state of mind required for imperfect self-defense. However, the court held the error was not prejudicial under the *Watson* standard.
- Status: Answer brief due.

Fines/Fees

People v. Ruiz, S235556 (review granted September 14, 2016)

- Question presented: May a trial court properly impose a criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) and a drug program fee (Heath & Saf. Code, § 11372.7, subd. (a)) based on a defendant's conviction for conspiracy to commit certain drug offenses?
- Opinion below: nonpublished opinion (F068737). The Court of Appeal held that the fees pursuant to Health and Safety Code sections 11372.5 and 11372.7 constituted "punishment" such that the court properly imposed them against appellant for his conviction of conspiracy to transport a controlled substance.
- Status: Answer brief due.

III. SELECTED DEVELOPMENTS IN CALIFORNIA LAW

A. New and Amended Rules of Court

Rule 8.1105. Publication of appellate opinions

- Opinion still depublished if the rendering court grants rehearing (Rule 8.1105(e)(1)(A))
- Effective July 1, 2016, grant of review by the Supreme Court does not affect the appellate court's certification of the opinion for full or partial publication. (Rule 8.1105(e)(1)(B))
- The Supreme Court may still order an opinion certified for publication not to be published and vice versa, and may order depublication of part of an opinion any time after granting review. (Rule 8.1105(e)(2))

Rule 8.1115. Citation of opinions

- When review of a published opinion has been granted and review is pending, unless ordered otherwise by the Supreme Court, the opinion may be cited for "potentially persuasive value" only and has no binding or precedential effect. (Rule 8.1115(e)(1))
- Any citation to a published opinion with review pending must note the grant of review and any subsequent action by the Supreme Court. (Rule 8.1115(e)(1))
- After decision on review, unless ordered otherwise by the Supreme Court, the published opinion and any published opinion in a matter in which the Supreme Court has ordered review and deferred action pending the decision, is citable and has binding/precedential effect (except to the extent it is inconsistent with the decision or disapproved by the court). (Rule 8.1115(e)(2))
- The Supreme Court may at any time order all or part of a published opinion for which review was granted not citable or order that the published opinion has a binding or precedential effect different from that specified in Rule 8.1115(e)(1) and (2) [the default rules for citation of published opinions when review has been granted]. (Rule 8.1115(e)(3))

B. Legislative Developments

Selected Voter Initiatives Passed in November 2016

- **Prop 57: "The Public Safety and Rehabilitation Act of 2016." (eff. 11/9/16)**
  - Increases eligibility for parole consideration or nonviolent offenders after serving full prison term for primary offense.
  - Gives the CDCR the authority to award credits for good behavior and approved rehabilitative or educational achievements.
  - Eliminates prosecutorial direct filing; requires juvenile court to determine whether youth may be transferred to adult court
- **Prop 63: "The Safety for All Act of 2016." (eff. 11/9/16)**
  - Adds PC 25250 and 25265; creating new infraction/misdemeanor crimes for failing to notify law enforcement regarding a lost/stolen firearm or recovery of a firearm previously reported lost or stolen. (eff. 7/1/17)
  - Amends PC 490.2 to exclude theft of firearms (eff. 11/9/16)
  - Implements various other provisions related to firearms and ammunitions
- **Prop 64: "The Adult Use of Marijuana Act." (eff. 11/9/16)**
  - Legalizes adult nonmedical use of marijuana
  - Changes penalties for marijuana-related crimes
- **Prop 66: "The Death Penalty Reform and Savings Act of 2016." (eff. 11/9/16)**
  - Amends PC 190.6 to give crime victims the right to have judgments of death carried out "within a reasonable time."
  - Places time limits on legal challenges to death sentences, changes process for appointing attorneys, and makes other changes related to the enforcement of death sentences.

Selected Criminal Justice Bills Passed During the 2015-2016 Legislative Session

- **SB 1016: Sentencing. (eff. 1/1/17)**
  - Amends Sections 186.22, 186.33, 1170, 1170.1, 1170.3, 12021.5, 12022.2, and 12022.4 of the Penal Code, relating to sentencing;
  - Extends sunset date of current versions of provisions from 1/1/2017 to 1/1/2022, thereby continuing to provide that when a statute specifies three possible terms of imprisonment, the choice of the appropriate term rests within the sound discretion of the court
- **SB 1084: Sentencing. (eff. 1/1/17)**
  - Amends Section 1170 of the Penal Code, relating to sentencing
  - Offenders under 18 at time of offense with LWOP sentencing may submit petition for recall and resentencing after 15 years of incarceration.
- **AB 2590: Sentencing: restorative justice. (eff. 1/1/17)**
  - Amends Section 1170 of the Penal Code, relating to sentencing: (1) Changes purposes of sentencing: replaces "punishment" with "public safety" achieved through accountability, rehabilitation and restorative justice; (2) Gives judges more discretion; (3) Encourages CDCR to provide educational and rehabilitative

programs for all inmates; (4) Judges must state reasons for sentencing choice on record.

- **AB 701: Sex Crimes: rape. (eff. 1/1/17)**
  - Adds Section 263.1 to the Penal Code, relating to sex crimes; sets forth Legislature's finding and declaration that "all forms of nonconsensual sexual assault may be considered rape for purposes of the gravity of the offense and the support of survivors" and provides that this is declaratory of existing law.
- **SB1004: Young adults: deferred entry of judgment pilot program (eff. 1/1/17)**
  - Adds PC 1000.7; authorizes Alameda, Butte, Napa, Nevada, and Santa Clara Counties to establish a 3-year pilot program to operate a deferred entry of judgment pilot program within a county's juvenile hall for felony offenders age 18, 19, or 21 at the time of the commission of the crime.
- **AB 1671: Confidential communications: disclosure. (eff. 1/1/17)**
  - Amends PC 632, 633.5, and 637.2 and adds PC 632.01, relating to confidential communications; creates new felony wobbler crime of intentionally distributing, or aiding and abetting the distribution of, a confidential communication with a health care provider that was unlawfully obtained pursuant to PC 632; amends PC 632 to provide that the fine associated with this crime is to be imposed per violation.
- **AB 1945: Juveniles: sealing of records. (eff. 1/1/17)**
  - Amends WI 786, 827, 827.9, and 828 relating to sealing of juveniles records.
- **AB 1909: Falsifying evidence. (eff. 1/1/17)**
  - Amends PC 141(c); creates new felony crime for prosecuting attorney to falsify evidence.
- **AB 2888: Sex crimes: mandatory prison sentence. (eff. 1/1/17)**
  - Amends PC 1203.065, adding sex crimes where victim unconscious or incapable of consent due to intoxication to list of sex offenses ineligible for probation.
- **AB 1829: Vessels: operation under the influence of alcohol or drugs: chemical testing. (eff. 1/1/17)**
  - Amends Harbors and Navigations Code to require a person arrested for operating a water device under the influence of alcohol and/or a drug to be informed that the officer has the authority to seek a search warrant compelling the arrested person to submit a blood sample; eliminates the requirement that arrested person be informed that refusal to submit to/failure to complete a chemical test may be used against the person in court and may result in increased penalties upon conviction (required only to inform arrested person of right to refuse chemical testing).
  - Note: The requirement to inform arrested person that refusal to submit or complete chemical test may be used against person in court was eliminated before the United States Supreme Court decision in *Birchfield v. North Dakota* (2016) __ U.S. __, 136 Sup.Ct. 2160, 2186 [holding that a motorist cannot be criminally punished for refusal to submit to a chemical test].
- **SB 1182: Controlled substances. (eff. 1/1/17)**
  - Adds HS 11350.5; creates new felony crime of possessing any controlled substance specified in HS 11054(e)(3) with intent to commit sexual assault.

  - Adds HS 11377.5; creates new felony crime of possessing any one of three specified controlled substances [GHB, Ketamine, Rohypnol – commonly known as date rape drugs] with the intent to commit sexual assault.
- **SB 139: Controlled Substances. (eff. 9/25/16)**
  - Amends HS 11357.5 and HS 11375.5 to increase punishment for second and third offense of using or possessing a synthetic cannabinoid or synthetic stimulant, respectively; adds HS 11375.7 to provide that defendants charged with HS 11357.5 or HS 11375.5 are eligible to participate in pre-plea drug court programs as set forth in PC 1000.5.
- **SB 823: Criminal procedure: human trafficking. (eff. 1/1/17)**
  - Adds PC 236.14; establishes procedure for person arrested for or convicted of a nonviolent offense committed while a victim of human trafficking to petition the court for "vacatur relief" of convictions and arrests.
- **AB 1761: Human trafficking: victims: affirmative defense. (eff. 1/1/17)**
  - Adds PC 236.23; creates specific affirmative defense for a human trafficking victim that applies to any crime except a serious or violent felony or human trafficking (PC 236.1) if "coerced to commit the offense as a direct result of being a human trafficking victim at the time of the offense and had a reasonable fear of harm."
- **SB 7: Tobacco products: minimum legal age. (eff. 6/9/16)**
  - Amends PC 308 to eliminate infraction crime of person under 18 purchasing, receiving, or possessing tobacco, tobacco products, or paraphernalia (section now applies only to sellers, givers, and furnishers of tobacco or paraphernalia); expands misdemeanor crime of knowingly selling, giving, or furnishing tobacco, tobacco products, or paraphernalia to a minor under 18 by raising age to 21 and expanding definition of "tobacco products" to include electronic cigarettes and devices.
- **SB 1322: Commercial sex acts: minors. (eff. 1/1/17)**
  - Amends PC 647(b), decriminalizing for minors the misdemeanor crime of soliciting, agreeing to engage in, or engaging in an act of prostitution.
  - Amends PC 653.22, decriminalizing for minors the misdemeanor crime of loitering in a public place with the intent to commit prostitution.
  - See also SB 420: Prostitution; SB 1129: Prostitution: sanctions.
- **SB 1143: Juveniles: room confinement. (eff. 1/1/18)**
  - Adds WI 208.3; beginning 1/1/18, limits to 4 hours the time a minor or ward can be held in "room confinement" in a juvenile hall or ranch, or local, regional, state or CDCR facility.
- **AB 2813: Juvenile offenders: dual-status minors (eff. 1/1/17)**
  - Amends WI 628; eliminates 4 of 7 grounds upon which a probation officer may decide to detain a minor taken into custody instead of releasing the minor to a parent, guardian, or responsible relative.
- **SB 843: Public safety. (eff. 6/27/16)**
  - Adds WI 1718, PC 5027, and amends PC 5075, 5075.1, providing that Board of Juvenile Hearings is successor entity to the Board of Parole Hearings (BPH) for juvenile matters and adds new requirements for the entity.

- Adds PC 5027, authorizing CDCR to award 3-year grants to non-profit organizations to replicate their prison programs at other prisons underserved by volunteer and non-profit organizations; provides that programs should focus on offender responsibility and restorative justice principles.
- Amends PC 6258.1, permitting CDCR to transfer an inmate to community correctional facility if inmate has less than 1 year to serve in state prison.
- Adds PC 6404, providing that inmates shall not be prohibited from family visits based solely on the fact that the inmate is serving an LWOP sentence or a life sentence with a parole date not yet established.
- Amends PC 13601 to require Commission on Correctional Peace Officer Standards and Training (CPOST) to consider including additional training in the areas of mental health and rehabilitation and coursework on the theory and history of corrections.

- **AB 15: End of life. (eff. 6/9/16)**
  - Adds HS 443.17; creates 2 new felony crimes (HS 443.17(a) and HS 443.17(b)) in the End of Life Option Act (new HS 443-443.22) which permits an adult with a terminal disease to request a prescription for an aid-in-dying drug.
- **SB 1137: Computer crimes: ransomware. (eff. 1/1/17)**
  - Amends PC 523(b)(1); creates new extortion-type computer crime related to the introduction of "ransomware" into a computer.
- **SB 448: Sex offenders: Internet identifiers. (eff. 1/1/17)**
  - Adds PC 290.018(i); creates new misdemeanor crime for a person who is required to register as a sex offender and provide Internet identifiers for failing to provide his or her Internet identifiers.
- **AB 2687: Vehicles: passenger for hire: driving under the influence. (eff. 7/1/18)**
  - Amends VC 23152(e) and 23153(e) to impose on passenger for hire drivers the same 0.04 blood alcohol limit that applies to drivers of commercial vehicles, when the passenger for hire driver has a paying passenger in the vehicle [applicable to taxi, Uber, and Lyft drivers and any other driver with a passenger for hire inside the vehicle]
- **SB 883: Domestic violence: protective orders. (eff. 1/1/17)**
  - Amends PC 166, adding a willful and knowing violation of an order made pursuant to PC 273.5(j) (domestic violence restraining order) to list of protective and stay-away order violations in subdivision (c) that constitute contempt of court and a misdemeanor crime punishable up to 1 year in jail, increasing maximum punishment for violation of order issued pursuant to PC 273.5(j) from 6 months.
- **AB 2295: Restitution for crimes. (eff. 1/1/17)**
  - Amends PC 186.11, 186.12, 1202.4, and 1202.46 to require the court to order a defendant to make full restitution, because anything less is not consistent with the California Constitution.
- **AB 2298: Criminal gangs. (eff. 1/1/17)**
  - Amends PC 186.34 and adds PC 186.35; adds adults to persons who must be notified by law enforcement before they are designated as a suspected gang member or associated in a shared gang database (already applicable to minors); creates

procedure whereby persons not removed from gang database after contesting gang designation may appeal the law enforcement agency denial to the superior court.

- **AB 1924: Privacy: electronic communications. (eff. 9/23/16)**
  - Amends PC 638.52 and PC 1546.1 (the California Electronic Communications Privacy Act (CalECPA)) and adds PC 638.54 and 638.66, making several changes to provisions regarding the use of pen registers and tap and trace devices by law enforcement (PC 638.50-638.53 was enacted by the Legislature in 2015 setting forth procedures for law enforcement to make a written or oral application for the installation of a pen register or a trap and trace device).
  - See also SB 1121: Privacy: electronic communications.
- **AB 2027: Victims of crime: nonimmigrant status. (eff. 1/1/17)**
  - Adds PC 679.11, creating procedure for noncitizen victims of human trafficking to obtain a declaration of cooperation from law enforcement in order to help them obtain a T Visa (almost identical to procedure in PC 679.10 for obtaining a declaration of cooperation required for U Visa).
- **SB 813: Sex offenses: statute of limitations (eff. 1/1/17)**
  - Amends PC 799, 801.1, 803; removes statute of limitations for enumerated sex offenses committed under certain specified circumstances; applies to crimes committed after January 1, 2017, and for crimes whose statute of limitations has not run as of January 1, 2017.
- **SB 1389: Interrogation: electronic recordation. (eff. 1/1/17)**
  - Amends PC 859.5; expands to adults the requirement to electronically record the custodial interrogation of a murder suspect who is in a fixed place of detention (previously only applied to juveniles).
- **SB 955: State hospital commitment: compassionate release. (eff. 1/1/17)**
  - Adds WI 4146, PC 1370.15, and PC 2977, and amends PC 1026; establishes compassionate release provisions for terminally ill defendants who were found not guilty by reason of insanity.
- **AB 2765: Proposition 47: sentence reduction. (eff. 1/1/17)**
  - Amended PC 1170.18 to extend by 5 years, to November 4, 2022, the deadline for a defendant to petition the court to have a felony conviction reduced to a misdemeanor pursuant to Proposition 47.
- **SB 266: Probation and mandatory supervision: flash incarceration. (eff. 1/1/17)**
  - Adds PC 1203.35 permitting a county probation department to use flash incarceration for violators of probation and mandatory supervision (different procedure than for PRCS flash incarceration) (to sunset 1/1/21 unless extended); amends PC 1203, adding that for any person granted probation before January 1, 2021, the court may take a waiver from the defendant permitting flash incarceration by a probation officer pursuant to new PC 1203.35; amends PC 4019 to provide that any time in custody due to flash incarceration pursuant to PC 1203.35 counts towards any new term imposed if probation or mandatory supervision later revoked.
- **SB 1474: Public Safety Omnibus. (eff. 1/1/17)**

  - Amends PC 1203.10, adding other probation agencies to list of entities and persons that may inspect a probation department's record of a case.
- **AB 2839: Criminal penalties: nonpayment of fines. (eff. 1/1/17)**
  - Amends PC 1205 and 2900.5 to clarify that when a defendant serves time in jail at rate of $125 per day to serve out fines instead of paying, only the amount of the base fine (not penalty assessments) is used to determine how many days the defendant must serve.
- **AB 1276: Child witnesses: human trafficking. (eff. 1/1/17)**
  - Adds PC 1347.1 to create procedure (identical to that in PC 1347) to authorize minor age 15 or younger to testify in a human trafficking case out of the presence of defendant, judge, jury, and attorneys via closed-circuit television.
- **SB 1134: Habeas corpus: new evidence: motion to vacate judgment: indemnity (eff. 1/1/17)**
  - Amends PC 1473, authorizing writ of habeas corpus to be prosecuted on ground that new evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial; amends PC 1485.5 and 1485.55 regarding the binding nature of the court's factual findings.
  - Legislative history indicates the purpose of the bill was to lower the new evidence habeas standard from *In re Lawley* (2008) 42 Cal.4th 1231, 1239 (evidence that undermines the entire prosecution case and points unerringly to innocence) to evidence that would have more likely than not changed the outcome at trial.
- **AB 813: Criminal procedure: postconviction relief. (eff. 1/1/17)**
  - Adds PC 1473.7, creating right for convicted defendant to bring a post-conviction motion for relief on grounds of adverse immigration consequences or newly discovered evidence of actual innocence, even if the defendant is no longer imprisoned or restrained.
- **SB 759: Prisoners: segregation housing. (eff. 1/1/17)**
  - Repeals and replaces former PC 2933.6 which made state prison inmates placed in solitary confinement ineligible to earn conduct credits; new PC 2933.6 requires CDCR to establish regulations to allow those inmates to earn custody credits by July 1, 2017.
- **AB 1597: County jails: performance milestone credits. (eff. 1/1/17)**
  - Amends PC 4019.4, expanding the discretion of a sheriff or county director of corrections to award rehabilitative programming credits by making section applicable to all sentenced and unsentenced inmates (previously only applied to inmates sentenced to county jail pursuant to PC 1170(h)).
- **AB 1798: Firearms: imitation firearms: gun-shaped phone cases. (eff. 1/1/17)**
  - Amends PC 16700 to expand definition of "imitation firearm" to include a cell phone case so substantially similar in appearance to an existing firearm as to lead a reasonable person to perceive that the case is a firearm.
- **SB 1046: Driving under the influence: ignition interlock device. (eff. 1/1/19)**
  - Beginning January 1, 2019, eliminates pilot program operating in Alameda, Los Angeles, Sacramento, and Tulare counties requiring all DUI offenders to install

ignition interlock devices (IID) in their vehicles. From January 1, 2019, until January 1, 2026, all persons convicted of DUI or VC 14601.2 in all counties are required to install IIDs and are prohibited from driving a vehicle without an IID for 6 to 48 months.

- **AB 2466: Voting: felons. (eff. 1/1/17)**
  - Amends Elections Code sections 2101, 2106, 2212, clarifying that felons on mandatory supervision or PRCS are eligible to vote; only inmates currently serving a state or federal prison sentence or persons on CDCR-supervised parole are not eligible to vote
- **SB 614: Criminal procedure: legal assistance: ability to pay. (eff. 1/1/17)**
  - Amends PC 987.8 to expand categories of defendants deemed not to have a reasonably discernable future financial ability to reimburse a county for legal assistance provided at taxpayer expense, adding defendants sentenced to county jail for more than 364 days, including a PC 1170(h) sentence.
- **SB 1242: Sentencing: misdemeanors. (eff. 1/1/17)**
  - Amends PC 18.5 to specifically make retroactive to misdemeanors of any age the provision that every misdemeanor is punishable up to 364 days only; creates new subdivision permitting any person sentenced to one year in jail before 1/1/2015 for a misdemeanor conviction to submit an application to the trial court that entered the judgment of conviction to have the sentence modified to 364 days.