FIRST DISTRICT APPELLATE PROJECT
TRAINING SEMINAR
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RECENT LEGAL DEVELOPMENTS

DEBORAH RODRIGUEZ & NATHANIEL MILLER
Associate Staff Attorneys
First District Appellate Project
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FDAP
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I. RECENTLY DECIDED CASES OF INTEREST

Competency and Restoration of Sanity

Trial Counsel's "Withdrawal" of a Declaration of Doubt: *People v. Gonzales* (2019) 34 Cal.App.5th 1081. The Second District Court of Appeal held that once trial counsel declares a doubt as to the defendant's competence to stand trial, the defendant cannot be treated as competent and tried criminally merely because trial counsel "withdraws" the declaration of doubt. There must be an actual finding of competence. The Court of Appeal conditionally reversed the defendant's convictions and remanded with instructions for the trial court to consider whether a retrospective competency hearing was feasible.

Failure to Appoint Second Mental Health Expert in Competency Proceedings: *People v. Leelu* (2019) 42 Cal.App.5th 1023. In competency proceedings, "[i]f the defendant or the defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two [mental health experts]" to evaluate the defendant. (§ 1369, subd. (a)(1).) Although the defendant appeared to indicate that she was not seeking a finding of mental incompetence, the trial court did not appoint a second mental health expert. The Sixth District Court of Appeal held that any error was harmless. The Court of Appeal reasoned that the error was subject to the prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818, and that there was not a reasonable probability that the trial court would have found the defendant competent had a second mental health expert been appointed, given the significant evidence of the defendant's inability to consult with her attorney or comprehend the proceedings.

Retroactivity of New Law Limiting the Maximum Term of Commitment for Competency Restoration: *People v. Howell* (2019) 43 Cal.App.5th 167. Effective January 1, 2019, Senate Bill 1187 amended section 1370 to reduce the maximum term of commitment for competency restoration to 2 years instead of 3. The Fifth District Court of Appel held that Senate Bill 1187 is not retroactive under the rule of *In re Estrada* (1965) 63 Cal.2d 740, because "competency proceedings are civil in nature and collateral to the determination of defendant's guilt and punishment."

Failure to Reinstate Competency Proceedings Based on Substantial Change of Circumstances: *People v. Easter* (2019) 34 Cal.App.5th 226. Under Penal Code section 1368, the court should have reinstated competency proceedings in a murder prosecution because the defendant's attorney notified the court that the defendant's recent communications consisted of jumbled words and fanciful responses (what his psychologist referred to as "word salad" communications), and that symptom alone was a substantial change of circumstances. According to the court, the defendant's new "word salad" symptom – especially in light of the defendant's lengthy history of psychiatric issues, the amount of time that had passed since his initial evaluations, and an apparently recent change in his medications that could have accounted for his new psychiatric issues – warranted the suspension of the criminal proceedings and the appointment of a medical professional to evaluate the defendant's competency.

Failure to Reinstate Competency Proceedings Based on Substantial Change of Circumstances: *People v. Tejeda* (2019) 40 Cal.App.5th 785. After the defendant was twice found incompetent to stand trial, the trial court found that he could compartmentalize any lingering delusion and reinstated proceedings. The defendant was ultimately convicted of murder and robbery based in part on his testimony, against the wishes of counsel, admitting guilt and explaining that his actions were caused by a government mind control project. The trial court did not declare a doubt as to competency, despite that testimony and the two prior findings of incompetence based on his delusion. The Court of Appeal reversed the judgment, finding the trial court had a duty to declare a doubt as to the defendant's competency when the court was confronted with circumstances that were inconsistent with the assumptions on which the defendant's competency finding was based – that he could compartmentalize his delusion and keep it separate from his legal defense.

***Wende* Review in Appeal from Competency Determination.** *People v. Blanchard* (Dec. 31, 2019, No. A156720) ___Cal.App.5th___ [2019 Cal. App. LEXIS 1302]. Under *Anders v. California* (1967) 386 U.S. 738 and *People v. Wende* (1979) 25 Cal.3d 436, the Court of Appeal must independently review the record if appointed counsel represents that he or she has found no arguable issues in an indigent criminal defendant's first appeal as a matter of right. The California Supreme

Court has held that *Wende* review does not apply to a parent's appeal of a custody determination or an order terminating parental rights (*In re Sade C.* (1996) 13 Cal.4th 952), or to an appeal from the imposition of a conservatorship under the Lanterman-Petris-Short ("LPS") Act (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529). The First District Court of Appeal, Division Three held the same in an appeal from an order finding the defendant incompetent to stand trial in a probation revocation proceeding, reasoning that the "interests at stake in competency proceedings are strikingly similar to LPS commitments."

Mentally Disordered Offender (MDO)

Evidence Insufficient to Find the Defendant's Commitment Offense Satisfied the Requirements for Civil Commitment Under Penal Code Section 2962: *People v. Warren* (2019) 33 Cal.App.5th 749. In a mentally disordered offender proceeding, the evidence was insufficient to support the finding that the defendant's commitment offense, felony indecent exposure, involved an express or implied threat of force or violence likely to produce substantial physical harm, as contemplated in Penal Code section 2962, subdivision (e)(2)(Q). Here, the defendant walked out of his prison cell naked and masturbated while looking at a female correctional officer, who was standing a substantial distance away from him in a secure location. No evidence showed that the defendant ever attempted to make physical contact with the officer or that he exhibited aggressive, forceful, or violent behavior toward her or anyone else. Moreover, the officer's stated fear of the defendant, even if objectively reasonable, did not help establish that the defendant actually threatened to use force or violence against the officer at some unspecified time in the future.

MDO Recommitment Based on a Different Mental Disorder Than the Original Commitment: *People v. Torfason* (2019) 38 Cal.App.5th 1062. Section 2962 provides that a parolee may be committed as a mentally disordered offender ("MDO") where the prosecution proves, among other things, that the parolee suffers from a severe mental disorder, and that the severe mental disorder was a cause or an aggravating factor in the commission of a qualifying offense. (See § 2962, subds. (a), (b), (c), (e).) Section 2966 governs MDO recommitment proceedings and addresses a parolee's ability to challenge the parole board's findings where the parole board "continues a parolee's mental health treatment under Section 2962." The Second District Court of Appeal held where a person is recommitted under

section 2966, the "recommitment must be based on the same mental disorder on which the parolee was initially committed." The Court of Appeal relied principally on the plain language of section 2966, reasoning that "[t]he use of the word 'continues' and the reference to section 2962 both demonstrate that the Legislature meant a continuation of treatment of the same mental disorder that was found to be the basis for commitment and treatment originally."

MDO Recommitment Where the Underlying Offense is Reduced to a Misdemeanor Under Proposition 47: *People v. Foster* (2019) 7 Cal.5th 1202. In 2010, after completing a prison sentence for felony grand theft, the defendant was committed as an MDO. The defendant was then annually recommitted as an MDO each year. In 2016, the defendant successfully petitioned to have his felony grand theft conviction redesignated as a misdemeanor under Proposition 47. The defendant then moved to dismiss his MDO recommitment on the ground that the underlying theft offense, now redesignated as a misdemeanor, was no longer a qualifying offense for an MDO commitment. The California Supreme Court rejected this argument. The Court acknowledged that the defendant was no longer eligible for an *initial* MDO commitment, but reasoned that the MDO *re*commitment statute, Section 2966, does not require present eligibility for an initial MDO commitment. Thus "a showing of changed circumstances eliminating eligibility for initial [MDO] commitment is an insufficient basis for precluding [MDO] recommitment."

MDO Commitment Based on Mental Health Treatment Received During 45-Day Extension: *People v. Parker* (Jan. 13, 2020, No. B294553) Cal.App.5th [2020 Cal. App. LEXIS 27]. Another requirement for an MDO commitment under section 2962 is that the parolee must have "been in treatment for the severe mental disorder for 90 days or more within the year prior to [their] parole or release." (§ 2962, subd. (c).) The defendant received 17 days of mental health treatment in the county jail before being delivered to the CDCR with a scheduled release date 43 days away. The defendant continued to receive mental health treatment at the CDCR, but not enough to satisfy section 2962's 90-day requirement. On March 20, the parole board ordered the defendant to remain in custody for an additional 45 days pursuant to section 2963, which provides that, "[u]pon a showing of good cause, the [parole board] may order that a person remain in custody for no more than 45 days beyond the person's scheduled release date for full evaluation [under

section 2962]." (§ 2963, subd. (a).) The defendant continued to receive mental health treatment during this 45-day extension, until the parole board determined that the 90-day requirement had been satisfied. Reviewing the plain language, purpose, and legislative history of sections 2962 and 2963, the Second District Court of Appeal held that section 2962's 90-day requirement may be satisfied by treatment received during a 45-day extension under section 2963. The Court of Appeal acknowledged the defendant's argument that this holding "would encourage prison officials to delay necessary treatment because they could simply extend the time to provide such treatment," but the Court found "no evidence of unnecessary delay or bad faith here." Further, "the release date can be extended only upon a showing of good cause, such as receipt of a prisoner fewer than 45 days before their scheduled release date, which is what occurred [here]."

Mental Health Diversion (Pen. Code, § 1001.36)

Retroactivity of Mental Health Diversion (Pen. Code, § 1001.36): *People v. Weaver* (2019) 36 Cal.App.5th 1103. Penal Code section 1001.36, which allows for pretrial mental health diversion, applies to individuals who, like the defendant, were convicted and sentenced before the statute's effective date, but whose cases were not yet final on appeal. Although section 1001.36 is not clear regarding its application to cases not yet final on appeal at the time of its enactment, the statute does not contain any language indicating that it otherwise limits the ordinary presumption long established under the *Estrada* rule. Given the legislative clarity demanded by recent cases examining *Estrada* and retroactivity, statutory ambiguity does not suffice to overcome the *Estrada* presumption. Accordingly, the court could not conclude that the Legislature had clearly signaled its intent that section 1001.36 apply only prospectively, and the *Estrada* inference of retroactivity therefore was not rebutted. Moreover, remand of the defendant's case was appropriate because the record affirmatively disclosed that he appeared to meet at least one of the threshold requirements – that he suffered from a diagnosed mental health disorder (§ 1001.36, subd. (b)(1)(A)).

Applicability of Section 1001.36 Mental Health Diversion to Juveniles: *In re J.M.* (2019) 35 Cal.App.5th 999. Following *In re M.S.* (2019) 32 Cal.App.5th 1177, the First District Court of Appeal, Division Three, held that section 1001.36 does not apply to juveniles in delinquency proceedings. The Court of Appeal further held that this

exclusion does not violate equal protection, given that "there are material differences between the adult and juvenile justice schemes with regard to their underlying purposes and to the treatment of offenders with mental health issues."

Suppression of Statements Made While in Custody

Admissibility of Defendant's Un-Mirandized, Un-Counseled Statements to Social Worker: *People v. Keo* (2019) 40 Cal.App.5th 169. The Second District Court of Appeal held that un-Mirandized, un-counseled statements the defendant made while in custody to a social worker performing an investigation in a dependency proceeding were properly admitted at the defendant's trial. The Court of Appeal reasoned that there was no Fifth Amendment *Miranda* violation or Sixth Amendment right to counsel violation, because the social worker was not acting as a law enforcement officer or agent of law enforcement at the time. The Court of Appeal reasoned that the statements were not inadmissible under Welfare and Institutions Code section 355.1, subdivision (f), which provides that "[t]estimony by a parent, guardian, or other person who has the care or custody of the minor made the subject of a proceeding under [s]ection 300 shall not be admissible as evidence in any other action or proceeding," because the statements did not qualify as "testimony." And the Court of Appeal declined to find that the admission of the statements violated the defendant's due process rights.

***Miranda* and Confession to Unknown Police Agent:** *People v. Orozco* (2019) 32 Cal.App.5th 802. While watching his six-month-old daughter by himself one evening, the defendant struck her so hard that he killed her. The defendant confessed to doing so while meeting privately with the child's mother in a police interview room, and the trial court admitted the confession at trial. A jury convicted the defendant of second-degree murder and assault on a child causing death. The Court of Appeal affirmed the judgment, concluding that a suspect's invocation of his right to counsel under *Miranda* does not preclude the admission of a confession a suspect subsequently makes to a person he is unaware is functioning as an agent of law enforcement. Continued questioning of a suspect after invocation of the *Miranda* right to counsel does not automatically taint any subsequent confession. The above described law enforcement conduct does not otherwise violate due process. The defendant's confession to the murdered child's mother was not the suppressible fruit of an earlier

Miranda violation. Defendant's statements to the mother were voluntary because he (mistakenly) believed he was having a private conversation with this girlfriend; he had no idea that police were exerting any pressure on him at all.

***Miranda* Violations, Admission of Case-Specific Hearsay, and SB 1437:** *People v. Anthony* (2019) 32 Cal.App.5th 1102. In a case where the jury convicted the defendant and three of his alleged gang members of a gang-related first-degree murder (Pen. Code, §§ 187, subd. (a), 186.22, subd. (b)(4)), *Miranda* error resulted from the admission of the defendant's statement to police about the shooting of a fellow gang member, which allegedly motivated the charged crime, because the police ignored his prior assertion of his *Miranda* rights, did not advise him of his rights, and, after he had been left in an interview room wearing physical restraints for four and a half hours, asked questions relating to the murder of his fellow gang member that they should have known could result in the defendant incriminating himself. However, the court found the error was harmless, given the strength of the other evidence. The court also held that the error in admitting testimony from the prosecution's gang expert based on case-specific hearsay was harmless because other, properly admitted evidence established that the defendants acted together in furtherance of the gang's objectives. Finally, the court declined to address the merits of a claim relating to changes in the application of the natural and probable consequences doctrine under Senate Bill No. 1437 (2017–2018 Reg. Sess.), because the defendants had not yet petitioned for relief in superior court under Penal Code section 1170.95.

Admissibility of Minor's Statements Obtained in Violation of Statute Requiring Legal Consultation Before Custodial Interrogation: *In re Anthony L.* (2019) 43 Cal.App.5th 438. Welfare and Institutions Code section 625.6 provides that "[p]rior to a custodial interrogation, and before the waiver of any *Miranda* rights, a youth 15 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference." (§ 625.6, subd. (a).) The statute directs courts to "consider the effect" of a failure to comply with the consultation requirement in considering the admissibility of custodial statements. The First District Court of Appeal, Division Four, held that custodial statements obtained in violation of the consultation requirement are not automatically inadmissible. The Court of Appeal reasoned that under Proposition 8's "Right to Truth-in-Evidence"

provision, relevant evidence may only be excluded if required by the United States Constitution or "enacted by a two-thirds vote of the membership in each house of the Legislature," and that section 625.6 did not pass each house by a two-thirds margin. "This conclusion does not mean the policies underlying section 625.6 are irrelevant to whether a minor's statements should be admitted . . . But, as the juvenile court correctly ruled, the proper inquiry remains not whether officers complied with the state statute, but whether federal law compels exclusion of the minor's statements."

Fourth Amendment Search and Seizure

Unreasonable Pat-Search After Fresh Robbery Report: *In re Jeremiah S.* (2019) 41 Cal.App.5th 299. Under the Fourth Amendment, reasonable suspicion that a minor was involved in the robbery of a purse and a phone did not support a pat-search, because there was no other aspect of the stop that, together with the minor's status as a robbery suspect, gave rise to a reasonable belief that he might be armed and dangerous. In reaching this conclusion, the Court of Appeal declined to recognize a rule that would be tantamount to automatically validating pat-searches in all lawful detentions related to a fresh robbery report, regardless of the particular circumstances.

Consensual Encounter with Officers: *People v. Chamagua* (2019) 33 Cal.App.5th 925. In this case, the trial court denied the defendant's motion to suppress evidence, primarily on credibility grounds, after the defendant contradicted himself while testifying at the suppression hearing. His version of the events concerning his encounter with the police also differed from that given by one of the sheriff's deputies involved in the encounter. The deputy testified that, after he and his partner got out of their patrol car, the deputy asked the defendant if he had anything illegal on him and the defendant had responded that he had a pipe on him. The deputy then searched the defendant and found a pipe with traces of crystal methamphetamine. Accepting the deputy's version of events, the Court of Appeal held that the defendant's encounter with the deputies was consensual to the point where he admitted to having an illegal pipe. The deputies did not use or threaten physical force. They did not command the defendant to do anything, but rather they simply asked questions. The deputy's subjective suspicion of the defendant was irrelevant, as was the defendant's subjective belief that he was not free to leave. The pertinent point was that a reasonable and innocent person in the defendant's position would have felt free to

go. Once the defendant admitted he possessed illegal contraband, the deputy had reasonable suspicion to detain and search him.

Illegal Detention of Defendant Fleeing Police: *People v. Flores* (2019) 38 Cal.App.5th 617. As part of a continuing investigation into complaints of gang activity in the area "over the past several months," several officers approached an alleyway known to be frequented by members of a gang. There were no reports of any crimes or gang activity at that particular time. Officers observed several people, including the defendant, running towards them. The defendant was detained, and methamphetamine was found in his sock. The defendant was then escorted back to his apartment, and additional methamphetamine was found in his bedroom. The trial court suppressed the methamphetamine from the defendant's bedroom, but found that the initial detention was lawful and declined to suppress the methamphetamine from the defendant's sock. The trial court also declined to suppress the defendant's jailhouse statements admitting that he was selling methamphetamine. The Fourth District Court of Appeal held that the initial detention of the defendant was unlawful. The defendant was not suspected of any specific criminal activity at the time, and his flight from an alleged high-crime area did not justify the detention given the absence of other suspicious circumstances. The Court of Appeal further held that the defendant's jailhouse statements should have been suppressed, as the statements were obtained by exploitation of the unlawful detention and unlawful search of the defendant's bedroom.

Illegal Detention of Defendant Sitting in Parked Car: *People v. Kidd* (2019) 36 Cal.App.5th 12. An officer observed a car legally parked on a residential street after midnight with its fog lights on and two individuals (one of whom was the defendant) sitting in the car. The officer made a U-turn, parked about 10 feet behind the car (which had another car parked about 10 feet in front of it), shined two spotlights at it, and then exited his patrol vehicle and approached the driver's side window, smelling marijuana as he approached. The Fourth District Court of Appeal affirmed the superior court's grant of the defendant's section 995 motion challenging the officer's subsequent search of the car. The Court of Appeal held that the defendant was detained when the officer made the u-turn, parked behind the car, and trained the spotlights on it, as "motorists are trained to yield immediately when a law enforcement vehicle pulls in behind them and turns on its lights."

The Court of Appeal further held that the detention was unjustified, rejecting the Attorney General's argument that, although the car was legally parked at the time, the officer had a reasonable basis to believe that the car was about to drive with only its fog lights on.

Warrantless Arrest Based on Evidence that May Not Be Admitted at Trial: *People v. Alexander* (2019) 36 Cal.App.5th 827. In a case arising from a series of robberies and burglaries, the Court of Appeal affirmed the trial court's denial of the defendants' motion to suppress the evidence discovered pursuant to warrantless arrests. While investigating a series of 10 robberies in August and September 2012, a police officer reviewed police reports of the crimes and surveillance video of eight of them before arresting two defendants. The officer's testimony about the surveillance videos was admitted at the hearing on the motion to suppress, but only for the purpose of establishing the information he relied upon in arresting the defendants. The court found that, regardless of whether the officer's testimony would have been sufficient to authenticate the videos for admission at trial on the underlying charges, the officer's testimony was a sufficient prima facie showing of authenticity for purposes of the hearing on the motion to suppress. The court further found that an objection on the basis of Evidence Code section 1523, an aspect of the secondary evidence rule, would have been misplaced, because the officer's testimony was admitted to explain the basis for the arrests, not to prove the content of the videos. Because the surveillance videos bore indicia of reliability and because those videos provided a sufficient basis for the officer to recognize the defendants, the warrantless arrest of the defendants was objectively reasonable under the Fourth Amendment.

Traffic-Stop Identification-Search Not an Exception to the Warrant Requirement: *People v. Lopez* (2019) 8 Cal. 5th 353. The Fourth Amendment does not contain an exception to the warrant requirement for searches to locate a driver's identification following a traffic stop. To the extent it created such an exception, *In re Arturo D.* (2019) 27 Cal.4th 60, 115, is overruled and should no longer be followed.

Possession of Marijuana Does Not Provide Probable Cause to Search a Vehicle: *People v. Lee* (2019) 40 Cal.App.5th 853. Legal possession of a small amount of marijuana did not provide probable cause to search the defendant's vehicle. Under Health and Safety Code

section 11362.1, subdivision (c), legal cannabis and related products are not contraband and their possession and/or use may not constitute the basis for detention, search, or arrest. Even considering the totality of circumstances known to the officer – the defendant being in possession of marijuana and a "wad of cash," his driver's license having been suspended, and the defendant "tens[ing] up" when the officer handcuffed him – there did not exist a fair probability that contraband or evidence of a crime would be found. The Court of Appeal also found that the trial court did not err in concluding that the search was not valid as an inventory search because no community caretaking function was served by impounding the car, and the trial court reasonably found the officer's primary motive was to investigate, not inventory, the vehicle's contents.

Seizure of Dashboard Camera Based on Exigent Circumstances: *People v.* Tran (2019) 42 Cal.App.5th 1. After the trial court denied the defendant's motion to suppress evidence from a dashboard camera officers seized after a collision, a jury found the defendant guilty of reckless driving (Veh. Code, § 23103). The Fourth District Court of Appeal affirmed the judgment, finding that the Fourth Amendment did not require suppression of the evidence from the dashboard camera because the officer's belief that the defendant was driving recklessly was supported by friction marks at the scene. Additionally, the officer's belief that the defendant might seek to destroy the evidence was supported by the officer's experience dealing with high-performance cars with dashboard cameras, the fact that the defendant removed the camera and placed it in his backpack, and the defendant's hesitancy to provide the camera. In holding as it did, the court recognized that a seizure is "far less intrusive than a search" (*Segura v. United States* (1984) 468 U.S. 796, 806), so officers generally have greater leeway in terms of conducting a warrantless seizure than they do in carrying out a warrantless search. Furthermore, the court noted that the "United States Supreme Court has 'frequently approved warrantless seizures of property . . . for the time necessary to secure a warrant. . . ." (*Ibid.*)

Probable Cause for a Warrant and Good Faith Exception: *People v. Khan* (2019) 41 Cal.App.5th 460. A jury found the defendant guilty of arson of an inhabited structure (Pen. Code, § 451, subd. (b)) and found true an enhancement allegation that the defendant used an accelerant (Pen. Code, § 451.1, subd. (a)(5)). The Court of Appeal affirmed, concluding that probable cause existed, under the Fourth

Amendment, for a warrant to search the defendant's home. Although the supporting affidavit lacked information directly tying the defendant to the following incidents, the affidavit showed that the residence of the defendant's former supervisor had been the object of arson using an accelerant and that there had been multiple incidents targeting the defendant's former workplace and former supervisor shortly after the defendant was terminated. Moreover, regardless of whether the search warrant was valid, the good faith exception to the exclusionary rule would apply because the affidavit reflected a serious investigation.

Warrantless Entry Based on the "Community Caretaking Exception": *People v. Ovieda* (2019) 7 Cal.5th 1034. In *People v. Ray* (1999) 21 Cal.4th 464, the California Supreme Court held that under the "community caretaking exception" to the Fourth Amendment warrant requirement, an officer may enter a home based on "circumstances short of a perceived emergency," so long as "a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions." Here, the Court rejected this articulation of the community caretaking exception. The Court held that there is no such thing as a "a nonemergency community caretaking exception permitting residential entry," and that *Ray* "was wrong to create one." The Court explained that while "[t]he need to render emergency aid is a well-recognized part of the exigent circumstances exception," it is a part of the exigent circumstances exception. Accordingly, while the need to render emergency aid may justify a warrantless entry into a home, it may do so only where there are exigent circumstances, i.e., where there are specific, articulable facts giving rise to a reasonable belief "that an emergency exists." The Court concluded that the warrantless entry into the defendant's home was not justified by exigent circumstances.

Applying *People v. Ovieda* to Warrantless Home Entry: *People v. Rubio* (2019) 43 Cal.App.5th 342. Officers responded to a report of shots fired "from the edge of the garage driveway area" of the defendant's residence, which was located in a high-crime area, and observed shell casings on the ground near the garage. The defendant's father answered the front door of the residence and told police that the defendant was in the garage. The defendant's father also stated that he did not believe that anyone in the home had been shot. The officers knocked on a door on the side of the garage and heard what sounded like someone pushing items against the inside of the door, as if to

barricade the door. The defendant subsequently exited the garage and yelled at the officers. The officers detained the defendant, entered the garage, which had been converted into an apartment, and found various evidence of criminal activity. Reconsidering the case in light of *People v. Ovieda* (2019) 7 Cal.5th 1034, the First District Court of Appeal, Division Four held that the entry into the garage was not justified under either the emergency aid or the exigent circumstances exception. The Court of Appeal reasoned that the fact that shots were fired *outside* the garage did not justify the conclusion that either an injured person or the shooter was located *inside* the garage. The defendant's hostile response to the officers did not change this conclusion; the defendant's "evident distrust of police and preference for avoiding any interaction with them does not plausibly support an inference that somebody else was in his apartment suffering from a gunshot wound."

Fifth Amendment and Double Jeopardy

Double Jeopardy and Partial Verdict of Acquittal: *People v. Aranda* (2019) 6 Cal.5th 1077: Under *Stone v. Superior Court* (1982) 31 Cal.3d 503, a trial court is obligated to afford the jury an opportunity to render a partial verdict of acquittal on a greater offense when the jury is deadlocked only on an uncharged lesser included offense. The *Stone* rule protects a defendant from retrial on the greater offense where the jury agrees that the greater offense was not proven but cannot agree on a lesser included offense. The issue in *Aranda* was whether the *Stone* rule was overruled by *Blueford v. Arkansas* (2012) 566 U.S. 599, which essentially held that the *Stone* rule does not apply under the federal double jeopardy clause. The California Supreme Court held that, *Blueford* notwithstanding, the *Stone* rule survived under the state double jeopardy clause, which is "more protective than its federal counterpart."

Sixth Amendment and Right to Counsel

No Ineffective Assistance of Counsel Based on Defense Attorney's Concession of Guilt During Opening and Closing Statements: *People v. Burns* (2019) 38 Cal.App.5th 776. In *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, the United States Supreme Court held that it was ineffective assistance of counsel and structural error for a defense attorney to concede his client's guilt on murder charges during opening and closing statements, where the client expressly objected to

the concession. Here, the defendant argued that his defense attorney's concession of guilt on two counts (evading a police officer and inflicting corporal injury) during opening and closing statements required reversal under *McCoy*. The Fourth District Court of Appeal rejected the argument, distinguishing *McCoy* on the ground that there was no evidence here that the defendant objected, whether expressly or impliedly, to his defense attorney's chosen strategy. (See also *People v. Lopez* (2019) 31 Cal.App.5th 55; *People v. Bernal* (2019) 42 Cal.App.5th 1160.)

Ineffective Assistance of Counsel Based on Defense Attorney's Concession of Guilt During Closing Statements: *People v. Eddy* (2019) 33 Cal.App.5th 472. In a first-degree murder trial, the defendant's absolute Sixth Amendment right to maintain his innocence was violated because counsel conceded his guilt of voluntary manslaughter during closing argument, knowing that the defendant did not agree with the strategy. It did not matter that the defendant did not consistently assert his right to innocence or object to counsel's concession until after he was convicted.

Right to Appointed Counsel at a Pretrial Prosecution Appeal of a Suppression Order: *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998. The California Supreme Court held that a pretrial prosecution appeal of a suppression order qualifies as a critical stage of the prosecution at which an indigent criminal defendant has a right to appointed counsel as a matter of state constitutional law. Here, with the help of court-appointed counsel, a criminal defendant facing misdemeanor charges filed a successful suppression motion, and the prosecution appealed. The Court determined the defendant was entitled to the help of appointed counsel in responding to the prosecution's appeal.

Right to Presence and Counsel at Resentencing Hearing: *People v. Rocha* (2019) 32 Cal.App.5th 352. On remand, without holding a hearing, the trial court issued a written statement declining to strike a firearm enhancement under Penal Code section 12022.53, subdivision (h). The Court of Appeal reversed and remanded. Consistent with the doctrine of avoiding constitutional questions, the court analyzed whether the defendant had a right to counsel and to be present at a resentencing hearing, not as a matter of constitutional law, but as a matter governed by statute. Under Penal Code section 1260, courts must consider whether it is "just under the circumstances" to require

the presence of the defendant and his or her counsel on remand. Here, the court held the defendant was entitled to be present with counsel at a resentencing hearing to offer mitigating evidence weighing in favor of leniency because the defendant was sentenced prior to amendments to § 12022.53 and thus had no previous opportunity to argue that the firearm enhancement should be stricken.

Defendant's Right to Testify in his Defense: *People v. Winn* (2019) 40 Cal.App.5th 1213. The trial court erred during a post-verdict *Marsden* hearing by failing to inquire into the defendant's claim that his counsel deprived him of the opportunity to testify in his defense, choosing instead to focus on counsel's performance. However, remand for a new hearing was not required given the overwhelming evidence of guilt.

Sixth Amendment Right to Presence at Critical Stages of the Proceedings

Right to Presence at Resentencing Hearing: *People v. Cutting* (2019) 42 Cal.App.5th 344. The trial court erred by conducting a resentencing hearing in the defendant's absence. Here, the defendant was resentenced following a remand with directions to strike an enhancement. However, he was not present at the resentencing and he had not provided a valid waiver of his right to be present. The Court of Appeal found that the defendant had a constitutional right to be present, since his resentencing was a critical stage of the proceedings, and that his absence was not harmless, under the *Chapman* harmless error standard, because he might have offered mitigating factors that arose after his original sentencing.

Sixth Amendment Right of Confrontation and Defendant's Inability to Observe Testifying Witness: *People v. Arredondo* (2019) 8 Cal.5th 694. Under *Maryland v. Craig* (1990) 497 U.S. 836, "a defendant's [Sixth Amendment] right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." The defendant was charged with sex offenses against several minor victims. One of the witnesses, 18 years old at the time of trial, started crying as she took the stand, and when she resumed testifying, a monitor was repositioned, over defense objection, to at least partially block the witness's view of the defendant (and vice-

versa). The monitor was similarly repositioned during the testimony of two other witnesses, in those instances without defense objection. With respect to the repositioning of the monitor for the 18-year-old witness, the California Supreme Court held that the repositioning was unjustified and reversed the convictions that were based on the testimony of that witness. "To find that an accommodation was constitutionally permissible merely because [the witness] – a young adult – started crying the first time she entered the courtroom and the court took a short recess to allow her to compose herself, would give courts license to abridge the right of face-to-face confrontation almost any time a witness breaks down on the stand." With respect to the repositioning of the monitor for the other witnesses, the Court held that the issue was forfeited, and that the failure to object did not constitute ineffective assistance of counsel.

Forfeiture-By-Wrongdoing Exception to the Sixth Amendment Right to Confrontation and Admission of Evidence of Prior Acts of Domestic Violence: *People v. Merchant* (2019) 40 Cal.App.5th 1179. A jury convicted the defendant of kidnapping, battery, and dissuading a witness (Pen. Code, §§ 207, 273.5, 136.1) based in part on the out-of-court statement of the victim (his girlfriend) that the defendant careened down the freeway refusing her pleas to stop or let her out, pulled her hair, and flung her cell phone out the window as she tried to call 911, in addition to evidence of the defendant's prior acts of domestic violence against the victim and a former girlfriend. The Court of Appeal affirmed the judgment. Under the forfeiture-by-wrongdoing exception to the Sixth Amendment right to confrontation, it was proper to admit the victim's out-of-court statement because the evidence showed that the defendant engaged in wrongdoing designed to prevent the victim from testifying. Through obsessive, repeated calls, he begged the victim to lie low and told her that his life would be over if she came forward. She was also made aware that, although the defendant was incarcerated, he had friends on the outside watching her. Moreover, the court found that it was proper to admit evidence of prior acts of domestic violence against the victim and a former girlfriend; the evidence showed a pattern of control in romantic relationships similar to the charged offense. Specifically, the defendant tended to convert verbal disagreements with his girlfriends into physical abuse, to inflict physical violence (including in a moving vehicle), and to block attempts to call for help.

Evidentiary Issues

Admission of Two-Decade-Old Prior Bad Act: *People v. Felix* (2019) 41 Cal.App.5th 177. In a trial for attempted murder and assault with a deadly weapon, evidence of a 1994 armed robbery, which was committed with the same accomplice, was properly admitted under Evidence Code section 1101, subdivision (b), because a general similarity was shown. In both criminal incidents, the accomplice, in the presence of the defendant, did not hesitate to criminally threaten and assault the victims with a weapon. The defendant, therefore, knew of the accomplice's violent background and his likelihood to employ violence in the charged incident.

Prior Bad Acts: *People v. Anderson* (2019) 42 Cal.App.5th 780. In a case in which a jury convicted the defendant of attempted first degree burglary, the trial court admitted evidence of the defendant stealing a neighbor's lawn ornaments and his threats against the neighbor. The Court of Appeal held that the trial court properly admitted both pieces of evidence; the theft evidence was admissible to show the defendant's intent to steal from the neighbor when he attempted to break into her home, and the evidence of the threats was admissible as to the neighbor's credibility as a witness.

Rap Videos Bordering on Impermissible Character Evidence: *People v. Coneal* (2019) 41 Cal.App.5th 951. A jury convicted the defendant of first-degree murder (Pen. Code, § 187, subd. (a)) and found true multiple allegations, including that he committed the crime by means of lying-in-wait and to further the activities of his criminal street gang. The victim was a member of a rival gang. The Court of Appeal affirmed the judgment. In so doing, the court rejected the defendant's argument that the sheer volume of gang evidence was unduly prejudicial. Case law provided no authority that the quantity of evidence alone renders its admission error. However, the trial court's admission of five rap videos featuring the defendant and/or members of the defendant's gang was an abuse of discretion under Evidence Code section 352. The rap videos had minimal probative value; they were cumulative of other, less prejudicial evidence, which included screenshots from the videos. Moreover, their probative value depended on construing the lyrics as literal statements of fact or intent without a persuasive basis to do so. And, the minimal probative value of the rap videos was substantially outweighed by the highly prejudicial nature of the violent, inflammatory lyrics. The videos painted a picture of the

defendant and his fellow gang members as eagerly and ruthlessly seeking out and engaging in violence, with no empathy for their victims, which posed a significant danger that the jury would use it as evidence of the defendant's violent character and criminal propensity in violation of Evidence Code section 1101, subdivision (a). In fact, some of the rationales that the prosecutor advanced for admitting the evidence— that the rap videos proved the defendant embraced the gang lifestyle and was a violent soldier in his gang—skirted dangerously close to advocating the use of the videos as evidence of the defendant's violent character. Nevertheless, the court concluded that the error in admitting the rap videos was harmless in light of the substantial other evidence of the defendant's guilt.

Admissibility of Statement Against Penal Interest and Defendant's Prior Misconduct: *People v. Reyes* (2019) 35 Cal.App.5th 538. The police stopped and searched a car with a driver and passenger and found a backpack containing a firearm. The passenger was charged with felon in possession (§ 29800, subd. (a)(1)). The trial court excluded evidence that the driver confessed to the police that the firearm was his, but admitted evidence of a prior incident in which the passenger was found with two firearms in his car. The First District Court of Appeal, Division Two, held that both rulings were erroneous. The driver's confession was admissible as a statement against penal interest (see Evid. Code, § 1230); the hypothetical possibility that the driver falsely confessed to owning the firearm to protect the passenger did not render the confession unreliable. The prior incident involving the firearms in the passenger's car was inadmissible to show that the passenger knew that the backpack in the driver's car contained a firearm (see Evid. Code, § 1101, subd. (b)); there was no reason to believe that the passenger's experience of possessing firearms in his own car several months earlier would lead him to know what was inside a backpack in another person's car.

Adoptive Admission Via Text Exchange: *People v. McDaniel* (2019) 38 Cal.App.5th 986. The defendant was charged with several robberies occurring over the course of summer 2014. At trial, the prosecution introduced, as an adoptive admission, a text exchange between the defendant and his mother from fall 2014 in which the mother texted, "An that is why u will be locked up 4 robberey of the stores in this area," and the defendant did not respond. The Fifth District Court of Appeal held that the text exchange should not have been admitted as

an adoptive admission because, "given the nature of text messaging, the fact that [the defendant] did not text his mother back was not sufficient to show that he had adopted his mother's statement." The Court of Appeal explained that "[t]ext messaging is different from in person and phone conversations in that text exchanges are not always instantaneous and do not necessarily occur in real-time." People may not immediately read a text message upon receipt, may not immediately respond, or may respond via another form of communication, such as a phone call. "Considering the distinctive nature of text messaging, the instant record provides no basis for a conclusion . . . that [the defendant], with knowledge of his mother's statement, in fact failed to deny or respond to it and, in turn, that he thereby adopted it."

Authentication Requirement and Uncertified Prior Conviction Records: *People v. Gonzalez* (2019) 42 Cal.App.5th 1144. To prove the defendant's alleged prior robbery conviction for the purposes of a prior serious felony enhancement and a prior strike enhancement, the prosecution introduced uncertified records which the prosecutor represented had been printed from the superior court's online records system. The First District Court of Appeal, Division Five held that the records were not properly authenticated and should not have been admitted. Evidence Code section 452.5(a) allows for judicial notice of court records, but only where certified. Evidence Code section 452.5(b) provides that "[a]n official record of conviction" is admissible to prove a prior conviction, but again, only where certified. The uncertified records also could have been authenticated through the presentation of other evidence, but no other evidence was presented; the prosecutor did not even present evidence (only the prosecutor's unsworn representation) that the uncertified records had indeed been printed from the superior court's online records system. The Court of Appeal reversed the jury's finding on the prior conviction for insufficient evidence.

"Right to Truth-in-Evidence" and Admissibility of Secretly Recorded Telephone Conversation: *People v. Guzman* (2019) 8 Cal.5th 673. Section 632 prohibits the use of an electronic device to either eavesdrop on or record a private communication without the consent of all parties to the communication. Section 632(d) prohibits the admission of evidence obtained in violation of the statute. The defendant was convicted following a trial at which the jury heard a secretly recorded telephone conversation between the defendant's

mother and his niece. The California Supreme Court held that section 632(d) was abrogated in 1982 by Proposition 8's "Right to Truth-in-Evidence" provision, which instructs that "except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding." The Court rejected the defendant's argument that subsequent amendments to and reenactments of section 632, passed by a two-thirds vote of each house of the Legislature, had revived section 632(d). "Although section 632 has been reenacted more than once since 1982, each time, the exclusionary remedy was reenacted only as an incident to other provisions of section 632 being amended . . . To find that a subsequent amendment of section 632 had the effect of reviving its exclusionary provision, there must be something in the language, history, or context of the amendment to support the conclusion that the Legislature intended such a result."

Admitting Statistical Evidence Regarding False Allegations of Child Sexual Abuse was Harmless: *People v. Wilson* (2019) 33 Cal.App.5th 559. A jury convicted the defendant of 12 counts of lewd acts against a child (Pen. Code, § 288, subd. (b)(1)), and one count of continuous sexual abuse of the same child (Pen. Code, § 288.5, subd. (a)). The Court of Appeal affirmed the judgment, finding that the trial court's error in admitting statistical evidence about false allegations of child sexual abuse was harmless. Where both the victim and another accuser testified extensively and the jurors could assess their credibility, other percipient witnesses were called, and the defense offered effective rebuttal expert testimony, the court saw no reasonable probability the defendant would have achieved a more favorable result in the absence of the challenged testimony. The trial court's error in failing to instruct the jury it could not convict the defendant of both continual sexual abuse and individual specific lewd and lascivious acts was also harmless. To vacate the defendant's convictions based simply on the trial court's procedural mistake would have given the defendant an unjustified windfall.

Expert Testimony on the Statistical Likelihood of False Allegations in Child Sex Abuse Cases: *People v. Julian* (2019) 34 Cal.App.5th 878. The Second District Court of Appeal held that trial counsel provided ineffective assistance of counsel by failing to object to expert testimony in a child sex abuse case that false allegations of sex abuse by children "don't happen very often" and occur in 1 to "maybe 6,

7, 8 percent of cases." The expert's "92 to 99 percent probability evidence invited jurors to presume [the defendant] was guilty based on statistical probabilities," instead of based on "the evidence properly introduced in the case."

Admission of Case-Specific Hearsay Statements: *People v. Superior Court (Couthren)* (2019) 41 Cal.App.5th 1001. Following a probable cause hearing, the superior court dismissed the prosecution's petition for civil commitment of an inmate as a sexually violent predator (SVP) under the Sexually Violent Predators Act (SVP Act) (Welf. & Inst. Code, § 6600 et seq.). At the probable cause hearing, the prosecution relied solely on psychological evaluations to establish probable cause. The trial court concluded that the psychological evaluations were case-specific hearsay statements submitted for their truth, rendering them inadequate to meet the prosecution's evidentiary burden at a probable cause hearing once an objection had been lodged. The Court of Appeal denied the prosecution's petition for a writ of mandamus, concluding that the rules of evidence apply in an SVP probable cause proceeding and, therefore, the admissibility of the psychological evaluations is governed by the hearsay rule, which "does not permit experts to relate as true case-specific facts gleaned from secondhand sources about which the expert has no personal knowledge, unless these facts have been independently admitted into evidence or fall within a hearsay exception." The court further found that nothing in Welfare and Institutions Code section 6602, the provision requiring a probable cause determination, suggests that the "Legislature intended to create a broad hearsay exception for expert evaluation reports, much less for the multiple-level hearsay contained in such reports."

Fines and Fees

Dueñas* Error and Lack of Objection in Trial Court (Not Forfeited):** *People v. Jones* (2019) 36 Cal.App.5th 1028. ***Dueñas error was not forfeited given the controlling law at the time of the defendant's sentencing, but the error was harmless since the fees could be covered by prison wages. Here, the defendant argued that the trial court's imposition of a $70 fee for court construction and operations, without considering his ability to pay, violated his right to due process. The defendant's failure to raise the issue in the trial court did not forfeit the issue on appeal given the controlling law at the time. However, any error was harmless where the defendant was sentenced

to six years in prison, and with prison wages ranging from $12 to $56 per month, he would have the ability to pay the fees.

***Dueñas* Error and Lack of Objection in Trial Court (Forfeited):** *People v. Gutierrez* (2019) 35 Cal.Ap.5th 1027. The defendant argued that the trial court erred by imposing various fines and fees without first affording him an ability-to-pay hearing under *People v. Dueñas* (2019) 30 Cal.App.4th 1157. However, the defendant did not object to the fines and fees at the original sentencing hearing or on remand from his appeal. If he did not object based on ability to pay the $10,000 restitution fine, he could not complain about the remaining fees that were much less. In any event, the court found he had the ability to pay.

Limited Remand for *Dueñas* Consideration: *People v. Castellano* (2019) 33 Cal.App.5th 485. Where the defendant did not request an ability-to-pay hearing at his pre-*Dueñas* sentencing, a limited remand was appropriate so that the defendant could request a hearing and present evidence demonstrating his inability to pay. The court held that a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees, and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court. In doing so, the defendant need not present evidence of potential adverse consequences beyond the fee itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections. The trial court then must consider all relevant factors in determining whether the defendant is able to pay the fines, fees, and assessments to be imposed. If the trial court determines a defendant is unable to pay, the fees and assessments cannot be imposed; and execution of any restitution fine imposed must be stayed until such time as the People can show that the defendant's ability to pay has been restored.

Garnishing Prison Wages for Prior Case Restitution Fine: *People v. Ellis* (2019) 31 Cal.App.5th 1090. Under Penal Code section 2085.5, subdivision (a), the California Department of Corrections and Rehabilitation (CDCR) may withdraw funds from an inmate's trust account to pay a restitution fine (Pen. Code, § 1202.4) even though the inmate is no longer serving the prison sentence for the crime on which the restitution fine was based. Here, the defendant returned to prison in 2011 and the CDCR began garnishing a portion of his prison wages because he owed restitution in connection with a 1992 offense, for

which he had already completed a seven-year sentence many years earlier.

Imposition of Fines and Fees Without Ascertaining the Defendant's Ability to Pay: *People v. Kingston* (2018) 41 Cal.App.5th 272. After the defendant pleaded no contest to one count of receiving a stolen car (Pen. Code, § 496d, subd. (a)), the trial court suspended imposition of sentence, placed the defendant on formal probation, and imposed several fines, fees, and assessments without first ascertaining the defendant's ability to pay. The trial court later revoked probation and imposed sentence because the defendant failed to register for or perform community service. The Court of Appeal held that the trial court did not violate the defendant's due process rights by imposing the fines and fees without ascertaining the defendant's ability to pay because the fees did not interfere with the defendant's right to present a defense or to appeal the trial court's rulings, nor was the court's imposition of these fees the cause of the defendant's incarceration. Although the defendant argued that his inability to pay a registration fee had caused him to fail to comply with the community service condition, no evidence supported that argument, and the defendant had made other payments while not complying with various conditions.

Excessive Fines Clause of the Eighth Amendment Instead of Due Process Rational Utilized in *People v. Dueñas*: *People v. Aviles* (2019) 39 Cal.App.5th 1055. The defendant was convicted of the attempted premeditated murders of two police officers with firearm enhancements and possession of a firearm by a felon. On appeal, he challenged the trial court's imposition of fines, fees, and assessment. The Court of Appeal held that a constitutional challenge to the imposition of fines, fees, and assessments should be based on the excessive fines clause of the Eighth Amendment, instead of the due process rationale utilized in *People v. Dueñas*, which the court also found was wrongly decided. To the extent the defendant attempted to rely on *Dueñas*, the court further found that he forfeited review of his ability to pay argument by failing to object when the sentencing court imposed restitution fines above the statutory minimum, and any error was harmless because the record showed the defendant had the ability to pay the amounts ordered. While the court recognized that it might take the defendant some time to pay the amounts imposed, that circumstance did not support his inability to make payments on these

amounts from either prison wages or monetary gifts from family and friends during his lengthy prison sentence.

Direct Victim Restitution

Victim Restitution for Noneconomic, Psychological Harm Suffered by Parent of Sexually Abused Child: *People v. Montiel* (2019) 35 Cal.App.5th 312. In a child sex abuse case, the First District Court of Appeal, Division One, affirmed the trial court's imposition of $20,000 in victim restitution for the noneconomic, psychological harm suffered by the mother of the victim, holding that the mother qualified as a "victim" under Section 1202.4(k).

Extradition Costs Not Added to Victim Restitution: *People v. Scarbrough* (2019) 40 Cal.App.5th 550. The defendant failed to appear at sentencing. A bench warrant was issued. The defendant was arrested in Virginia and extradited back to California. The Sixth District Court of Appeal held that the costs of extraditing the defendant could not be imposed upon the defendant as victim restitution under section 1202.4. "Where, as here, a court denies probation and imposes a prison sentence, section 1202.4 limits the scope of victim restitution to losses caused by the criminal conduct for which the defendant sustained the conviction."

Restitution Converted to a Civil Judgment and Factoring in SSI Benefits in Ability to Pay Determination: *In re J.G.* (2019) 6 Cal.5th 867. In a deferred entry of judgment case, the juvenile court properly ordered conversion of the minor's unpaid restitution balance to a civil judgment. The juvenile court granted deferred entry of judgment to a minor on the condition that he pay restitution in the total amount of $36,381, at the rate of $25 per month (Welf. & Inst. Code, § 794). When the minor had successfully completed all terms of his probation, other than the restitution requirement, the court dismissed the petition, and ordered that the restitution award could be enforced as a civil judgment. The Supreme Court found that Welfare & Institutions Code section 794 authorized that the unpaid restitution balance could be converted to a civil judgment. The court also held that, while the court could not order the defendant to use his Supplemental Security Income Program (SSI) to pay the restitution, it did not violate federal law to consider the benefits the minor received from federal SSI in determining his ability to pay restitution. That determination was not "other legal process" within the meaning of 42 U.S.C. § 407(a).

However, because the record indicated the juvenile court was contemplating the SSI money as the source of the restitution payments, the court accepted the prosecution's concession that the case should be remanded for a new hearing on ability to pay that included consideration of the minor's future earning capacity, his current financial circumstances, and the total amount of restitution to be ordered.

Denying Discretionary Relief Based on Outstanding Victim Restitution: *People v. Allen* (2019) 41 Cal.App.5th 312. The trial court denied discretionary relief (Pen. Code, §§ 1203.4, subd. (a)(1), 1203.42, subd. (a)(1)) based on the defendant's outstanding victim restitution obligations. The Court of Appeal affirmed, holding that denying relief did not violate due process because case law that rejected a due process argument in the context of mandatory relief, based on the rehabilitative purposes of probation and the victim's right to restitution (Cal. Const., art. I, § 28, subd. (b)), was persuasive with regard to discretionary relief. Other case law that found a due process violation in imposing assessments and fines on an indigent defendant was distinguishable and, in any event, it was not implicated because denying the defendant's petitions neither denied access to the courts nor resulted in incarceration. Finally, an equal protection argument failed because there is a rational basis for withholding relief to induce payment of full restitution.

Homicide Offenses

Reckless Indifference to Human Life and Evidence of Defendant's Behavior After the Murder: *In re Taylor* (2019) 34 Cal.App.5th 543. The defendant filed a habeas petition seeking to have a felony-murder special circumstance vacated under *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522 on the ground that there was insufficient evidence that he was a "major participant" who acted with a "reckless indifference to human life." The First District Court of Appeal, Division One held that evidence of the defendant's actions after the murder – i.e., the defendant not helping the victim, and stating of the victim the following day, "Fuck that old bitch" – did not support a finding that he acted with a reckless indifference to human life. "[E]ven if a defendant is unconcerned that a planned felony resulted in death, . . . there must also be evidence that the defendant's participation in planning or carrying out the crime contributed to a heightened risk to human life. While [the defendant's]

behavior after the murder may be relevant to whether he acted with the requisite mind state, under *Banks* and *Clark* it is insufficient, standing alone, to constitute substantial evidence that he acted with reckless indifference to human life in participating in the attempted robbery."

Vagueness Challenge to California's Second-Degree Murder Rule: *In re White* (2019) 34 Cal.App.5th 933. In *Johnson v. United States* (2015) 135 S.Ct. 2551, the United States Supreme Court held that the Armed Career Criminal Act's "residual clause" – which defines "violent felony" to include any felony that "involves conduct that presents a serious potential risk of physical injury to another" – was unconstitutionally vague. The Court explained that trial courts applying the residual clause were required to do so according to a "categorical approach" in which they "picture the kind of conduct that the crime involves in 'the ordinary case,' and . . . judge whether that abstraction presents a serious potential risk of physical injury." The Court concluded that this approach left excessive uncertainty regarding both "how to measure the risk posed by [the] crime" and "how much risk it takes for [a] crime to qualify as a violent felony." Here, the Fourth District Court of Appeal rejected the defendant's argument that California's second-degree felony-murder rule – which defines second-degree felony-murder, in relevant part, as a killing in the commission of a felony that is "inherently dangerous to human life" – is unconstitutionally vague under *Johnson*. The Court of Appeal reasoned that, in finding that the defendant's offense of manufacturing methamphetamine is inherently dangerous to human life, the trial court did not apply the sort of "categorical approach" underlying the vagueness finding in *Johnson*, but instead considered case-specific expert testimony regarding the known methods of manufacturing methamphetamine.

Applicability of Senate Bill No. 1437's Petitioning Process in a Juvenile Case: *In re R.G.* (2019) 35 Cal.App.5th 141. Senate Bill 1437 significantly restricted accomplice liability for felony murder and established a petitioning process (§ 1170.95) for those convicted under an invalid theory of felony murder to petition the sentencing court to vacate the conviction and resentence them. The Second District Court of Appeal held that Section 1170.95's petitioning process applies not only in adult criminal cases, but also in juvenile cases where the felony murder allegation was sustained by the juvenile court.

Summary Denial of Section 1170.95 Petition: *People v. Lewis* (Jan. 6, 2020, No. B295998) ___Cal.App.5th___ [2020 Cal. App. LEXIS 9]. Senate Bill 1437 significantly restricted accomplice liability for felony murder and eliminated liability for murder under the natural and probable consequences doctrine, and established a petitioning process (§ 1170.95) for those convicted under an invalid theory of murder to petition the sentencing court to vacate the conviction and resentence them. Section 1170.95(c) provides, in relevant part, that a court receiving such a petition "shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section," and, "[i]f the petitioner has requested counsel, . . . shall appoint counsel to represent the petitioner." (§ 1170.95, subd. (c).) The trial court summarily denied the defendant's section 1170.95 petition, without appointing counsel or holding a hearing, based on the Court of Appeal's opinion in the defendant's case, which indicated that the defendant would be found guilty under a valid theory of murder. The Second District Court of Appeal affirmed. The Court of Appeal held that a court may consider the record of conviction, including an appellate opinion in the case, in considering whether a section 1170.95 petitioner has established the initial prima facie showing. The Court of Appeal further held that a court's duty to appoint counsel does not arise until the court determines that the petitioner has made the initial prima facie showing. (*See also People v. Cornelius* (Jan. 7, 2020, No. B296605) ___Cal.App.5th___ [2020 Cal. App. LEXIS 11].)

Summary Denial of Section 1170.95 Petition: *People v. Ramirez* (2019) 41 Cal.App,5th 923. The trial court erred in summarily dismissing the defendant's Senate Bill No. 1437 petition, in which he sought to have his 2003 murder conviction vacated. He satisfied all of the requirements, but the trial court failed to require a response or hold a hearing. The trial court also disregarded the prior finding that the defendant was not a major participant in the robbery who acted with reckless disregard for human life. Given that finding, the trial court was required to vacate the conviction and resentence the defendant.

First-Degree Lying-in-Wait Murder Based on the Natural and Probable Consequences Doctrine: *People v. Gastelum* (2019) 40 Cal.App.5th 772. In a trial under Penal Code sections 187 and 190.2, for first degree lying-in-wait murder, the court properly instructed the jury under the natural and probable consequences doctrine. In

reaching this conclusion, the court noted that lying-in-wait murder requires proof of certain conduct (i.e., the manner in which the perpetrator carried out the murder), rather than the uniquely subjective and personal mental state required for premeditated murder; thus, the reasoning of *People v. Chiu* (2014) 59 Cal.4th 155, in which the Court held that a defendant cannot be convicted under a natural and probable consequences theory for premeditated murder, was inapplicable.

Felony-Murder Special Circumstance: *In re Ramirez* (2019) 32 Cal.App.5th 384. The defendant was convicted of murder committed while he was an accomplice in the attempted commission of a robbery (Pen. Code, §§ 187, subd. (a) & 190.2), and was sentenced to life in prison without the possibility of parole. The Court of Appeal granted the defendant's petition for writ of habeas corpus and remanded the case for resentencing. For purposes of the robbery-murder special circumstance, a finding under Penal Code section 190.2, subdivision (d), that the defendant was a major participant or demonstrated reckless indifference to human life was not supported by evidence that he supplied the guns that were used in the crime, knew the guns were loaded, and agreed with a suggestion that he and his friends "jack" someone. There was no evidence that the killing was planned or even contemplated. Rather, it appeared the shooting occurred in response to the victim resisting and striking the shooter.

Malice Sufficient for Second-Degree Murder and Mental Health Diversion for Juveniles: *In re M.S.* (2019) 32 Cal.App.5th 1177. The evidence was sufficient to find, under Penal Code sections 187, 188, 189, that a minor had the malice required for second-degree murder, even apart from her admissions that she intended to kill her infant, because it showed that the infant died from a sharp wound to his neck that severed his carotid artery and trachea and extended into his spine, that there had been two or three strikes, and that the infant was alive when his throat was cut. No Fourth Amendment violation occurred when police spoke to the minor in her hospital room; the entry did not violate her reasonable expectation of privacy because the room was in the joint dominion of the hospital. Finally, the minor was not eligible to be considered for mental health diversion under Penal Code sections 1001.35 and 1001.36, because the most recent mental health diversion law does not apply to juveniles, and, even if it did, murder is excluded.

Jury Instruction on Voluntary Manslaughter – Heat of Passion Theory: *People v. McShane* (2019) 36 Cal.App.5th 245. The defendant was not entitled to an instruction on voluntary manslaughter on a heat of passion theory during his second-degree murder trial where the combined effect of the two incidents at issue – his prior altercation with the victim and the victim's attempt to steal his truck – could not constitute adequate provocation. In reaching this decision, the court explained that the incidents were not similar, the defendant had had ample time to cool off after the first incident (altercation), and the second incident (attempted theft) was not sufficient provocation in itself.

Refusal to Give Pinpoint Instructions on Voluntary Manslaughter: *People v. Ramirez* (2019) 40 Cal.App.5th 305. A defendant has a right to instructions pinpointing his or her defense theory, but the trial court may refuse requested pinpoint instructions that are incorrect, confusing, argumentative, or duplicative. (*See People v. Hovarter* (2008) 44 Cal.4th 983, 1021.) The Second District Court of Appeal affirmed the trial court's refusal to give two pinpoint instructions on voluntary manslaughter, despite both instructions being legally correct. The first pinpoint instruction stated that "[p]rovocation sufficient to reduce murder to voluntary manslaughter may accumulate over a period of time and may be based upon a series of acts." The Court of Appeal found that this instruction was duplicative of the statement in CALCRIM 570, the standard instruction on voluntary manslaughter, that "[s]ufficent provocation may occur over a short or long period of time." The second pinpoint instruction stated that "[a] defendant may witness potential acts of provocation and/or be informed of them afterwards." The Court of Appeal characterized this instruction as argumentative, reasoning that CALCRIM 570 "contained no restrictions on the means of provocation," such that the instruction "would simply add emphasis that would favor one side and not the other."

Kill Zone Theory: *People v. Canizales* (2019) 7 Cal.5th 591. Recognizing the "substantial potential" and past practice of misapplication of the kill zone theory, the California Supreme Court clarified the two-part test for proper application of this theory going forward. According to the Court, the kill zone theory of attempted murder only applies where: (1) a defendant intended to create a "zone of fatal harm," meaning an area around the primary target, in which

the defendant intended to kill everyone present to ensure the primary target's death"; ***and*** (2) the alleged attempted murder victim (not the primary target) was located within that zone of harm. In determining whether the defendant intended to create such a zone, the Court explained that a jury should consider the circumstances of the offense, including the type of weapon(s) used, the number of shots fired, the distance between the defendant and the alleged victims, and the proximity of the alleged victim to the primary target. The Court cautioned that trial courts must be "extremely careful in determining when to permit the jury to rely" upon this theory, and should "reserve the kill zone theory for instances in which there is sufficient evidence from which the jury could find that the *only* reasonable inference is that the defendant intended to kill (not merely to endanger or harm) everyone in the zone of fatal harm." Indeed, the Court acknowledged that under this clarified formula, "there will be relatively few cases in which the theory will be applicable and an instruction appropriate." But, even in those few cases, the standard instruction should be revised to better describe the contours and limits of the kill zone theory as the Court laid out in this case.

Kill Zone Theory Without a Primary Target: *People v. Medina* (2019) 33 Cal.App.5th 146. A jury convicted two defendants on four counts of attempted murder (Pen. Code, §§ 187, subd. (a), 664), along with other crimes and enhancements, where the defendants fired a gun at two victims (as well as other bystanders) from about 10-20 feet away. In the published portion of this decision, the Court of Appeal affirmed the defendants' convictions for two counts of attempted murder, finding that sufficient evidence supported the convictions because firing a gun at those two victims from a close range was substantial evidence from which the jury could find a specific intent to kill, and at least one direct but ineffective step towards killing them. As for the other two counts of attempted murder, the court concluded that the trial court erred when it instructed the jury on a "kill zone" theory because there was no evidence the defendants had a primary target. As the court explained, "a kill zone instruction is not appropriate where a defendant fires a deadly weapon into a group of individuals with the intent to kill but without a primary target. Nor, in the absence of a primary target, is a kill zone instruction appropriate even if the defendant intends to kill everyone in that group." Rather, the kill zone instruction is only appropriate where the evidence supports that the defendant had a primary target, *and* the specific intent to kill everyone in the kill zone

around the primary target to ensure the target's death. Nevertheless, in the unpublished portion of this decision, the court concluded the error was harmless.

Materially False Evidence Presented at Penalty Phase: *In re Rogers* (2019) 7 Cal.5th 817. At the penalty phase of the defendant's capital case, the prosecution presented a witness who claimed that the defendant had sexually assaulted her. After trial, the defense alleged in the habeas corpus petition that the witness falsely identified the defendant. Following an evidentiary hearing, the referee found the witness had testified falsely as she recanted her identification, and the descriptors given to police initially did not match the defendant. Given that materially false evidence was presented at the penalty phase, the Court concluded that the defendant was entitled to relief (death sentence vacated).

Youthful Offender Parole Hearings

Exclusion of One Strikers from Youthful Offender Parole Hearings: *People v. Edwards* (2019) 34 Cal.App.5th 183. Under Section 3051, a person convicted of an offense committed when he or she was 25 years of age or younger becomes eligible for parole at a youthful offender parole hearing after 15, 20, or 25 years of incarceration, depending on the offense. However, persons sentenced under the "One Strike" Law (§ 667.61) are excluded from Section 3051. The First District Court of Appeal, Division Four held that this exclusion of One Strikers from Section 3051 violates equal protection given that first-degree murderers are *not* excluded from Section 3051. Both the United States and California Supreme Courts have determined that defendants convicted of non-homicide crimes "are categorically less deserving of the most serious forms of punishment than are murderers." Thus, "while a sentencing scheme can rationally express the public's distaste for sex offenders, it cannot limit their opportunity for eventual parole more harshly than it limits these who commit . . . first degree murder."

Youthful Offender Parole Hearing When Case is Final: *In re Cook* (2019) 7 Cal.5th 439. In *People v. Franklin* (2016) 63 Cal.4th 261, the California Supreme Court authorized a post-judgment proceeding for persons who would eventually be eligible for a youthful offender parole hearing, in order to obtain evidence of youth-related factors at the time of the offense. *Franklin*, unlike this case, involved a direct appeal.

Thus, in *Cook*, the California Supreme Court address the following questions: "whether a sentenced prisoner whose conviction is final can seek the remedy of evidence preservation and, if so, by what means"? The Court held that a juvenile homicide offender who is entitled to a youthful offender parole hearing (Pen. Code, §§ 3051, 4801) can, in fact, seek a post-judgment proceeding to obtain evidence of youth-related factors, although the sentence is otherwise final, because retroactivity was intended and Penal Code section 1260 was inapplicable. However, the Court explained that resorting to habeas corpus (Cal. Const., art. I, § 11; Pen. Code, § 1473, subd. (a)) was unnecessary, at least in the first instance, because the trial court's statutory authority to make a post-judgment statement (Pen. Code, § 1203.01), augmented by the trial court's inherent authority (Code Civ. Proc., § 187) to craft necessary procedures, enables the trial court to provide an adequate remedy while exercising its discretion to conduct the process efficiently. The Court, therefore, explained that for inmates, like the defendant, who seek to preserve evidence following a final judgment, the proper avenue is to file a motion in superior court under the original caption and case number, citing the authority of Penal Code section 1203.01 and this decision.

Right to Post-Judgment Proceeding to Obtain Evidence of Youth-Related Factors When Sentencing Occurred After *Franklin*: *People v. Medrano* (2019) 40 Cal.App.5th 961. A jury convicted the defendant of one count of first-degree murder, two counts of second-degree robbery, and one count of assault with force likely to produce great bodily injury. The defendant was 19 years old when he committed the offenses. The trial court sentenced the defendant to 25 years to life in prison, so the defendant would be entitled to a youth offender parole hearing during his 25th year of incarceration. The Court of Appeal affirmed the judgment without prejudice to the defendant filing a motion for a *Franklin* proceeding. The decision in *Franklin*, which established the defendant's right to present mitigating youth-related evidence at sentencing, was in place for one and one-half years before he was sentenced. The record did not indicate that the defendant's opportunity to exercise that right was inadequate in any respect. Rather, it appeared that the defendant merely failed—whether by choice or by inadvertence—to exercise it. Because the defendant was sentenced one and one-half years after *Franklin* was decided, and because nothing in the record indicated that the defendant lacked an adequate opportunity at sentencing to make a record of mitigating

youth-related evidence, the court saw no basis to order the same relief that the Supreme Court granted in *Franklin*.

Non-Homicide Offenses

Malice Not Required Under Penal Code Section 136.1 and Expert Testimony Regarding Intimate Partner Violence: *People v. Brackins* (2019) 37 Cal.App.5th 56. A jury convicted the defendant of aggravated assault (Pen. Code, § 245, subd. (a)(4)), inflicting corporal injury on a former cohabitant (Pen. Code, § 273.5, subd. (a)), attempting to dissuade a witness (Pen. Code, § 136.1, subd. (b)(1)), and misdemeanor vandalism (Pen. Code, § 594, subds. (a), (b)(2)(A)). The trial court sentenced the defendant to four years in prison, and the Court of Appeal affirmed the judgment. The court held that the trial court properly denied the defendant's request to modify CALCRIM No. 2622, the attempted dissuading instruction, to insert language requiring a finding of malice, because the language of Penal Code section 136.1, is clear and unambiguous, and a violation of section 136.1, subdivision (b), unlike a violation of section 136.1, subdivision (a), does not require malice. Moreover, in giving CALCRIM No. 850, the trial court did not err in instructing the jury that it could use the prosecution expert's testimony on intimate partner violence to evaluate the victim's believability. The expert testimony explained how abuse victims often recanted or minimized the abuse even when the abuse had in fact occurred, and that information could properly be used by the jury to evaluate whether the victim's recantations and minimization of the alleged abuse was part of her reaction to abuse or was instead due to her having lied about the alleged abuse in the first place. That use of the expert's testimony did not stray into a direct determination as to whether the abuse itself occurred. Moreover, by generally precluding the jury from using the expert's testimony as proof that the defendant committed any of the crimes charged, CALCRIM No. 850 served as a limiting instruction not only as to adult victim-witnesses but also as to child victims and child witnesses.

Assault with a Deadly Weapon: *People v. Bipialaka* (2019) 34 Cal.App.5th 455. The defendant, experiencing a panic attack after using methamphetamine, put on a "hood-like mask," drove his car through a red-light while being chased by police, and deliberately aimed at another car passing through the intersection, swerving just in time to avoid a collision. The defendant stated that he put on the mask to "freak people out" and deliberately aimed at the other car because he

was "just going crazy and felt like freaking them out." The Second District Court of Appeal found sufficient evidence to support the defendant's conviction for assault with a deadly weapon, rejecting the defendant's argument that he was only driving recklessly without attempting to injure anyone. The defendant acted with a "purpose . . . to frighten others with physical menace," a purpose that "moved his culpability beyond recklessness."

Cutting the Break Lines on the Victim's Car Constituted Assault with a Deadly Weapon: *People v. Marsh* (2019) 37 Cal.App.5th 474. A jury convicted the defendant of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and vandalism (Pen. Code, § 594, subds. (a), (b)(1)). In affirming the judgment, the Court of Appeal rejected the defendant's claim that insufficient evidence supported his conviction for assault with a deadly weapon. According to the court, a jury could reasonably conclude that the defendant's willful act of cutting the brake lines on the victim's vehicle was one that, by its nature, was not only capable of producing but also likely to produce death or great bodily injury, inasmuch as driving a vehicle without the ability to stop it creates a situation in which the probability of serious injury is great. That the victim discovered the severed brake lines before he drove the vehicle, and thus was not injured by the defendant's act, was of no consequence. Moreover, that the defendant did not control or possess the victim's vehicle did not mean the vehicle was not a dangerous weapon under Penal Code section 245, subdivision (a)(1). Finally, although the trial court's instructions were correct statements of the law, the inclusion of any reference to an inherently deadly weapon was error because a vehicle with severed brake lines is not an inherently deadly weapon. However, the error was not prejudicial because a motor vehicle that has had its brake lines severed qualifies as a deadly weapon other than a firearm, and because neither the evidence nor the prosecutor's argument invited the jury to reach a guilty verdict on the theory that the motor vehicle, in that condition, was inherently dangerous.

Reckless Driving: *People v. Escarcega* (2019) 32 Cal.App.5th 362. The defendant was convicted of reckless driving (Veh. Code, § 23103, subd. (a)), based on a head-on collision that occurred while he was attempting to pass two vehicles on a two-lane road at night. The Court of Appeal held that the defendant's actions were sufficient to support the wanton disregard element of reckless driving because he could not see around

the truck he sought to pass and yet pulled into the left lane on a dark, busy road and, driving 70 miles per hour, tried to pass two vehicles at once. The court further held that a great bodily injury enhancement (Pen. Code, § 12022.7) was properly imposed on one conviction for reckless driving, even though the defendant was also convicted of reckless driving causing a specified injury as to a second victim (Veh. Code, § 23105). Although Penal Code section 12022.7, subdivision (g) bars the enhancement on any crime in which "infliction of great bodily injury is an element of the offense," the court found that Vehicle Code section 23105 is not a substantive offense and that great bodily injury is not an element Vehicle Code section 23103; thus, Penal Code section 12022.7, subdivision (g) does not apply.

Multiple Arson Convictions Under Different Subdivisions of Section 451 for the Same Fire: *People v. Shiga* (2019) 34 Cal.App.5th 466. The Second District Court of Appeal held that Section 451 defines a single offense (arson) that may be committed in different ways, not a series of separate offenses. The Court of Appeal accordingly reversed the defendant's convictions, both incurred for the same act of setting fire to a church, for arson of an inhabited property (§ 451, subd. (b)) and arson of a structure (§ 451, subd. (c)), and remanded with instructions for the trial court to reinstate whichever one of the convictions the prosecution elected.

Sexual Communications with Adult Police Officer Posing as Minor: *People v. Korwin* (2019) 36 Cal.App.5th 682. Section 288.3(a) provides that "[e]very person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit [certain enumerated sex offenses]" is guilty of a felony. The Fourth District Court of Appeal rejected the defendant's argument that there was insufficient evidence supporting his conviction under section 288.3(a) because the person he was found to have communicated with was an undercover adult police officer posing as a minor, not an actual minor, and that there was therefore insufficient evidence supporting the statute's knowledge requirement. The Court of Appeal held, "[a]s written, the knowledge requirement of the statute focuses on the knowledge and intent of the offender by ensuring the offense does not impose strict liability upon someone who does not know or has no reason to know the person with whom he or she is communicating or attempting to communicate is a minor. It does not actually require a

minor victim." (*See also People v. Clark* (2019) 43 Cal.App.5th 270 [holding that a conviction for human trafficking of a minor under section 236.1(c) does not require an actual minor]; *but see People v. Moses* (2019) 38 Cal.App.5th 757 [reaching opposite conclusion with respect to section 236.1(c)], review granted November 26, 2019, S258143.)

Meeting Versus Arranging a Meeting with a Minor for a Lewd Purpose: *People v. Ramirez* (Dec. 17, 2019, No. F076911) ___Cal.App.5th___ [2019 Cal. App. LEXIS 1264]. Section 288.4(b) prohibits meeting with a minor for a lewd purpose and sets out a sentencing triad of 2, 3, or 4 years. Section 288.4(a) prohibits arranging a meeting with a minor for a lewd purpose and defines the offense as a misdemeanor. The defendant was convicted under both sections. The bench notes to CALCRIM 1126, the standard instruction for section 288.4(b), states that it is "unclear" whether section 288.4(a) is a lesser included offense of section 288.4(b), or whether Section 288.4(b) is a sentence enhancement for a violation of section 288.4(a). The Fifth District Court of Appeal held that the former is correct, i.e., that section 288.4(a) is a lesser included offense of section 288.4(b), and reversed the defendant's conviction under section 288.4(a).

Force Sufficient to Support a Forcible Sexual Penetration Conviction: *People v. Aguilar* (2019) 41 Cal.App.5th 1023. A jury convicted the defendant of forcible sexual penetration with a foreign object on a minor at least 14 years old and sexual battery. Appealing only the forcible sexual penetration conviction, the defendant argued that there was no evidence of force and that the trial court erroneously instructed the jury. The Court of Appeal disagreed, finding the record affirmatively showed force. Specifically, the victim repeatedly said no, did not cooperate, and tried to push the defendant's hand away, but the defendant overpowered her. Moreover, the trial court had no sua sponte duty to give a nonforcible sexual penetration instruction, as the court found that there was no evidence that the defendant committed anything less than forcible sexual penetration.

Required Movement for Kidnapping to Commit Robbery: *People v. Taylor* (Jan. 6, 2020, No. B293881) ___Cal.App.5th___ [2020 Cal. App. LEXIS 6]. For a defendant to be convicted of kidnapping to commit robbery (§ 209), "the movement of the victim" must be "beyond that merely incidental" to the commission of the robbery, and must increase "the risk of harm to the victim" beyond that "necessarily

present" in the robbery. (§ 209, subd. (b)(2).) The Second District Court of Appeal held that there was insufficient evidence of these elements, where the evidence showed that in robbing the victim's wallet the defendant ordered the victim at gunpoint to back up about three to four steps, until the victim was about 12 inches into an alley.

Assault Was a Natural and Probable Consequence of Armed Robbery: *In re R.C.* (2019) 41 Cal.App.5th 283. The juvenile court sustained a juvenile delinquency petition that charged a minor with assault with force likely to produce great bodily injury and attempted second-degree robbery. The Court of Appeal affirmed the order of wardship, finding that the defendant's liability as an aider was based on the defendant's joint participation in an extremely dangerous situation that he helped create. Specifically, the defendant and another juvenile armed and disguised themselves, and entered a store to commit a robbery. When the store clerk tried to disarm the defendant, the other juvenile pistol-whipped the clerk and fled with the defendant. Under these circumstances, it was foreseeable that the other juvenile would use a pistol as a weapon. Thus, substantial evidence supported the finding that the assault was a natural and probable consequence of the armed robbery. The trial court was not required to consider "non-developed brain" and impulsivity in determining aider and abettor liability, as that is best left to the Legislature.

Force Sufficient to Support Robbery Conviction: *People v. Montalvo* (2019) 36 Cal.App.5th 597. The evidence presented at trial showed force sufficient to support the robbery convictions as the defendant, posing like a police officer, physically grabbed or moved the victims. The defendant and a female associate committed two robberies posing as undercover police officers. The defendant argued there was insufficient evidence of force or fear to sustain the convictions because the victims merely complied with his demands because they believed he was a police officer. However, there was evidence of force as one victim testified that the defendant grabbed him by the neck and threw him against the wall, and the other victim testified that the defendant kicked him and "put" him on the hood of the car.

Possession of Burglary Tools: *People v. Bay* (2019) 40 Cal.App.5th 126. The defendant was convicted of possession of burglary tools (§ 466) based on items found inside a backpack in his car. The defendant argued on appeal that there was insufficient evidence to support the conviction, because section 466 prohibits a person from having burglary

tools "upon him or her in his or her possession" (§ 466), and the burglary tools were not "upon" the defendant. Relying on section 466's legislative history, the First District Court of Appeal, Division One, held that although the section 466's text "appears to require a defendant to have the tools upon his or her person to be convicted, the statute contains a drafting error and should be interpreted to prohibit constructive possession of burglary tools as well." The Court of Appeal nevertheless reversed the defendant's possession of burglary tools conviction, based on the trial court's instruction to the jury that the tools had to be possessed only with the intent to break and enter, not with the intent to break and enter *to commit a felony*. (*See In re H.W.* (2019) 6 Cal.5th 1068.)

Sufficiency of the Evidence Supporting Possession of Burglary Tools (Pen. Code, § 466): *In re H.W.* (2019) 6 Cal.5th 1068. A minor entered a department store with the intent to steal a pair of jeans. When officers apprehended him, the defendant was in possession of the stolen jeans and a pair of pliers. The juvenile court sustained a petition alleging theft and burglary tool possession against the defendant. The Court of Appeal affirmed the juvenile court's order, concluding the pliers were an "other instrument or tool" within the scope of Penal Code section 466. The Supreme Court reversed the judgment, holding that criminal liability under Penal Code section 466 requires not only possession of a given "instrument or tool" encompassed by the statute, but an intent to use it to break into or otherwise effectuate physical entry into a structure in order to commit theft or some other felony within the structure. Although the defendant admitted he entered the store with the intent to commit larceny and used the pliers to effectuate a petty theft, there was insufficient evidence to support the allegation that the defendant possessed the pliers with the felonious intent to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle. The record did not support the conclusion that the defendant possessed the pliers with an intent to use them for any purpose other than to remove an antitheft tag from the jeans.

Multiple Convictions for Criminal Threats Where the Evidence Shows Only One Period of Sustained Fear: *People v. Roles* (Jan. 8, 2020, No. C086645) ___Cal.App.5th___ [2020 Cal. App. LEXIS 16]. The defendant was convicted of 9 counts of criminal threats (§ 422) based on a series of more than 20 voice messages left at the victim's office over the course of several days. The victim did not hear the messages until

she returned to her office and listened to all of the messages at once. The Third District Court of Appeal held there was insufficient evidence to support more than one count of criminal threats, because the evidence showed that the victim experienced only one period of sustained fear, as required for a criminal threats conviction. "[W]hile the prosecution asked [the victim] how she felt after she heard the messages, it failed to elicit testimony about her feelings after listening to each message or group of messages. Instead, [the victim] testified about her fear after hearing *all* of the messages, indicating it was the whole of the messages that placed her in sustained fear."

Sufficiency of Evidence Supporting a Criminal Threats (§ 422) Conviction: *In re A.C.* (2019) 37 Cal.App.5th 262. Evidence did not support a finding of criminal threats under section 422 where the minor told a counselor that he intended to harm two unnamed students at school. The fact that he didn't provide the student's names showed he could not intend for the counselor to communicate his threats to the students. And there was no evidence showing those students were in a sustained state of fear because they did not know about the remarks. These were merely angry statements made to a counselor in an effort to excuse the minor from going to school.

First Amendment Protections and Constitutionality of Penal Code section 148.1, Subdivision (c): *In re J.M.* (2019) 36 Cal.App.5th 668. The juvenile court adjudged a minor a ward of the court pursuant to Welfare and Institutions Code section 602, following a finding that the defendant made a false report that a bomb or other explosive device would be placed in his school, in violation of Penal Code section 148.1, subdivision (c). The Court of Appeal held that the defendant's words were not protected by the First Amendment, and that Penal Code section 148.1, subdivision (c) is not unconstitutionally overbroad. The court rejected the defendant's assertion that the "future bomb placement" portion of section 148.1, subdivision (c), could only be constitutional if limited to false predictions of bomb placement containing specific dates and locations. The defendant failed to demonstrate the statute inhibits a substantial amount of protected speech, as the defendant's statement—"I will blow up the school one day and I know where to find an army gernade [sic]"—was no less a deliberately false statement of fact than, "I am going to blow up the school with a grenade tomorrow at noon."

Assault Under Color of Authority (Penal Code Section 149): *People v. Perry* (2019) 36 Cal.App.5th 444. The defendant was a police officer who used force against a private citizen during an arrest. He was convicted of unnecessarily assaulting a private citizen while acting under color of authority under Penal Code section 149. The prosecution proceeded under two theories: (1) the defendant could not use any force because the visit to the victim's house to effectuate a custody transfer and subsequent arrest were unlawful; and (2) the defendant used excess force in making the arrest. However, the first theory was invalid since an unlawful arrest is not sufficient to support a conviction under section 149. The conviction was, therefore, reversed because the record did not show which theory the jury adopted.

Insufficient Evidence of Battering or Resisting an SRO: *People v. Francis A.* (2019) 40 Cal.App.5th 399. An officer employed by the police department but assigned to a high school as a school resource officer ("SRO") attempted to "encourage" a class-cutting student to go to the vice principal's office by placing his hand on the student's back. The student "moved his right arm back and his body away to escape [the SRO's] touch, and in doing so lightly brushed [the SRO's] hand with his right elbow or upper arm." The SRO grabbed the student by the wrist, the student attempted to pull away, and the SRO forced the student to the ground, handcuffing and arresting him. The First District Court of Appeal, Division Two reversed the juvenile court's findings of battery against a peace officer (§ 243, subd. (b)) and resisting a peace officer (§ 148, subd. (a)(1)) for insufficient evidence. With respect to battery, the Court of Appeal found that there was insufficient evidence that the minor's "brushing" the SRO's hand was either "willful" or "harmful or offensive," as the brushing was merely "incidental to [the minor's] attempt to move away from [the SRO's] hand." With respect to resisting, the Court of Appeal found insufficient evidence that the SRO was enforcing any school rules at the time, insufficient evidence that the SRO's "encouragement" amounted to a clear and direct order, and insufficient evidence that when the minor pulled away after being grabbed by the wrist, the minor "knew or reasonably should have known that [the SRO] was engaged in the performance of his duties as a peace officer." The Court of Appeal concluded its opinion by scolding the government for pursuing the case against the minor: "Not only did the [SRO's] conduct fail to enhance school safety, it elevated what should have been a minor school disciplinary matter into one with

potential criminal implications. The same is true of the district attorney's decision to pursue wardship proceedings on this record."

Relevance of the Defendant's State of Mind When Resisting a Peace Officer: *In re A.L.* (2019) 38 Cal.App.5th 15. The juvenile court declared a minor a ward of the court after finding the minor committed three offenses: battery on a peace officer (Pen. Code, § 243, subd. (b)), resisting an officer (Pen. Code, § 148, subd. (a)(1)), and resisting an officer with force (Pen. Code, § 69). The minor appealed, arguing that the court erred by failing to consider her state of mind at the time she resisted. The Court of Appeal affirmed the wardship order, finding that, since criminal negligence is an objective standard, the juvenile court was correct that under Penal Code section 243, subdivision (b), it made no difference whether the minor believed officers were performing their duty when they detained her; it is enough that a reasonable person would have believed they were. Accordingly, the juvenile court applied the correct standard in finding that the minor violated section 243, subdivision (b). As for the sections 69 and 148, subdivision (a)(1) offenses, the court decided that both these offenses require proof of actual knowledge; nevertheless, the Court of Appeal found that the juvenile court's statement that "whether you think the police have the right to detain you . . . you don't get to resist," did not on its face establish that the juvenile court applied the wrong legal standard. The juvenile court may have been expressing a misunderstanding of the relevant law by indicating the defendant's state of mind did not matter. On the other hand, it may have been referring only to the section 243, subdivision (b) count (battery on a peace officer), in which case the comments correctly described the law. On balance, the comments were not so unambiguous as to require reversal.

Use of Average Cost of Graffiti Remediation to Establish Felony Vandalism: *In re A.W.* (2019) 39 Cal.App.5th 941. Under Section 594, vandalism is a wobbler if "the amount of defacement, damage, or destruction" is $400 or more. (§ 594, subd. (b)(1).) The minor was charged with felony vandalism based on a number of taggings, and the prosecution asserted at the jurisdictional hearing that the "remediation cost" of each incident was $545. The $545 figure was reached not by evidence or analysis specific to the minor's taggings, but by calculating the average cost of graffiti remediation in the municipality. The Fourth District Court of Appeal reversed the felony vandalism findings for

insufficient evidence of the $400 threshold. The Court of Appeal distinguished cases concerning restitution for vandalism, explaining that the use of averages is permitted in the restitution context, either because the relevant statutes specifically authorize the use of averages, or because the standards for determining restitution amounts are more flexible. With respect to a criminal charge, on the other hand, the prosecution "must prove beyond a reasonable doubt that minor *in fact* inflicted damage of $400 or more," and an average, without more, does not satisfy this burden. "The fundamental problem with the use of an average is that it leaves unanswered the following basic question: What if the damage here was below the average?" The Court of Appeal further held that the average relied on by the prosecution was flawed because it included the costs of law enforcement, which cannot be included in calculating "the amount of defacement, damage, or destruction" under section 594.

Definition of "Vehicle" Under Vehicle Code section 10851, Subdivision (a) - Unlawfully Taking or Driving a Vehicle: *People v. Chubbuck* (2019) 43 Cal.App.5th 1. The defendant was convicted of unlawfully taking or driving a vehicle under Vehicle Code section 10851(a). He argued the motorized equipment involved in the case (a motorized device designed to move shipping containers within a storage yard) was not a vehicle for purposes of section 10851, because it was designed to move storage bins, traveled at low speeds, and was not normally used for driving on the highway. The Court of Appeal found that both the plain language of Vehicle Code section 670, which defines the term "vehicle," and the canons of statutory interpretation compel a different conclusion. Specifically, "[s]ection 670 defines a vehicle as a device by which a person or property 'may' be propelled, moved or drawn upon a highway," and, here, the device the defendant drove had the potential to haul storage containers on a highway (even if it was unlawful to do so). Moreover, section 670 identified two exceptions to the definition of a vehicle – devices moved exclusively by human power and devices used exclusively on rails or tracks – neither of which applied to the devise in question. Finally, even though the defendant operated the vehicle in a confined area, never left the storage yard, and only operated the vehicle for a short amount of time, the evidence was sufficient to establish a violation of section 10851 under both a drive and take theory.

Sufficiency of the Evidence Supporting a Preparing False Evidence (Pen. Code, § 134) Conviction: *People v. Lucero* (2019) 41 Cal.App.5th 370. A jury convicted the defendant of preparing false evidence (Pen. Code, § 134) based on the defendant's preparation of declarations containing false information, which the defendant planned to use in a court proceeding. The Court of Appeal affirmed, holding that substantial evidence supported the defendant's conviction because: (1) the declarations constituted false paper or other matter or thing; (2) the untruthful content made the declarations false even though they were not forged or altered; (3) the defendant prepared the false declarations with a fraudulent or deceitful purpose; and (4) materiality did not have to be shown. Moreover, the rule requiring prosecution under a special statute rather than a general statute did not apply to declarations obtained by deceiving the declarants because the intent element of perjury by declaration (Pen. Code, § 118, subd. (a)) and subornation of perjury (Pen. Code, § 127) was lacking, nor did the rule apply to the defendant's own declaration absent a more severe penalty.

Instructing on a Materiality Requirement for a Charge of Preparing and Offering False Evidence (Pen. Code, §§ 132, 134): *People v. Shah* (2019) 38 Cal.App.5th 813. A jury convicted the defendant, a medical doctor, of preparing and offering false evidence (Pen. Code, §§ 132, 134), based on evidence that, after receiving a speeding citation, he duped an employee into signing a letter falsely stating that he was responding to a medical emergency at the time of the traffic stop. The Court of Appeal affirmed the judgment, finding that due process did not require that a materiality requirement be implied to save Penal Code section 32 and 134 from being unconstitutionally vague and overbroad. Materiality is not an element of the offenses under sections 132 and 134, and the trial court did not err in denying the defendant's request for a materiality instruction.

Jury Selection

Voir Dire in Death Penalty Case: *People v. Armstrong* (2019) 6 Cal.5th 735. In a death penalty case, the Supreme Court concluded that the trial court improperly excused at least four prospective jurors for cause. During *Hovey v. Superior Court* (1980) 28 Cal.3d 1 voir dire, the prosecutor gave the jury hypotheticals involving the killer, the getaway driver, and the lookout in a bank robbery. The four excused jurors said they could impose death generally, and in this hypothetical based on the balance of the aggravating and mitigating factors. Given the mild

hypothetical referencing aider and bettor liability, many competent jurors might say they would consider life without parole, and those answers do not establish the same jurors would not vote for death in other cases. Individual consideration does not disqualify candidates. The error in excusing four jurors for cause on this basis required a reversal of the death verdict.

***Batson/Wheeler* Error and Race:** *People v. Smith* (2019) 32 Cal.App.5th 860. Although the defendants claimed that a prosecutor improperly used three of his peremptory challenges to excuse potential jurors because they were Black, there was no *Batson/Wheeler* error or abuse of discretion. The trial court considered at length the prosecutor's reasons for challenging each of the three potential jurors, concluded that all of the proffered reasons were valid and race-neutral, and expressly found the prosecutor credible and his justifications genuine.

Jury Dismissal

Improper Dismissal of Juror: *People v. Salinas-Jacobo* (2019) 33 Cal.App.5th 760. In a prosecution arising from a fatal collision, the trial court dismissed a juror after the foreperson disclosed that the jury had reached a verdict on some counts but was deadlocked on others. After an alternate juror was seated, the defendant was found guilty of four counts, including one on which the original jury had deadlocked, gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)). The Court of Appeal reversed the judgment finding that the juror was improperly dismissed because his alleged failures to perform his duty as a juror were not shown as a demonstrable reality. A finding that the juror considered evidence outside the trial was not supported by his considering whether one of the drivers used a turn signal because that was an issue in the case. Discharge was also not supported by the juror's consideration of punishment because insufficient evidence showed that consideration of this issue was any more than de minimis. Finally, a conclusion that the juror failed to follow the burden of proof instructions was not supported by his expressing doubts about the sufficiency of the evidence in support of the majority view or by his failure to articulate the exact basis for his disagreement after a complicated trial. Other jurors did not claim that he said he intended to disregard the trial court's instructions or he disagreed with the law the trial court instructed.

Jury Instructions

Instructing on an Accomplice Witness Where the Charged Offense Requires Proof That the Defendant Acted with an Accomplice: *People v. Martinez* (2019) 34 Cal.App.5th 721. CALCRIM Nos. 334 and 335, read together, instruct that where a defendant proves by a preponderance of the evidence that a witness was an accomplice to the charged offense, the witness's testimony should be viewed with caution and must be corroborated by other evidence. The Second District Court of Appeal held that where the charged offense is one that requires proof that the defendant acted with an accomplice (such as sexual penetration in concert or rape in concert) the trial court should omit the portion of CALCRIM No. 334 placing the burden on the defendant to prove the witness's status as an accomplice, as the portion "appears to lower the prosecution's burden of proof" with respect to the accomplice element of the charged offense.

Failure to Instruction on All Elements of the Charged Offense: *People v. Vital* (2019) 40 Cal.App.5th 925. In a case in which the defendant was convicted under an aiding and abetting theory of liability for having instructed a mother to engage in acts of a sexual nature with her three-year-old son, the trial court incorrectly instructed the jury that the defendant, instead of the mother who directly perpetrated the acts, had to be 18 years old or older. The evidence presented at trial (including a photograph of the mother and a video with her in it) could not rationally lead to a finding that the mother was 18 years old or older, and no witness even suggested an age range for the mother. Also, the Court of Appeal could not say that even if properly instructed, the jury nonetheless would have convicted the defendant of the violations of Penal Code section 288.7, subdivision (b), because the mother, beyond a reasonable doubt, was 18 years old or older. The omission of the instruction to establish the minimum age requirement for the mother was not harmless beyond a reasonable doubt, as it relieved the prosecution's burden to prove all elements of an offense. The error was thus prejudicial.

Failure to Instruction on Superfluous Element: *People v. Matthews* (2019) 32 Cal.App.5th 792. A jury found the defendant guilty of murder, found three special circumstances to be true, and found that a principal was armed with a firearm. The defendant attacked the correctness of the special circumstance jury instructions, causing the court to addressed the following question: "If a trial court mistakenly

instructs the jury that the People must prove a fact as an element of a crime but does not properly define that fact, does that failure constitute instructional error when that fact is not—in actuality—an element of the crime?" The court concluded that a mistake in instructing the jury on, what it labeled, a superfluous "element" of a crime did not constitute instructional error. California's law of the case doctrine did not bind the court to follow an erroneous jury instruction. Any reduction in the burden of proving a fact the prosecution was not statutorily required to prove was not a cognizable statutory or constitutional error.

Instructing Jurors on a Lesser Related Offense Requires the Parties' Assent: *People v. Alvarez* (2019) 32 Cal.App.5th 781. A jury convicted the defendant of second-degree murder (Pen. Code, § 187) under an implied malice theory based on evidence that, after consuming alcohol, marijuana, and cocaine, the defendant drove through traffic at high speeds, ran a red light and broadsided another car, killing its passenger. In affirming the judgment, the Court of Appeal noted that instruction on a lesser related offense is proper only upon the mutual assent of the parties. Thus, the trial court correctly denied the defendant's request to instruct jurors on gross vehicular manslaughter while intoxicated as a lesser included offense because the prosecution objected to the instruction.

Proposition 47: The Safe Neighborhoods and Schools Act

Receipt of Stolen Property Not Shoplifting: *People v. Brown* (2019) 32 Cal.App.5th 726. In a case in which the defendant was convicted of felony receiving stolen property in excess of $950 in value (Pen. Code, § 496, subd. (a)), the Court of Appeal concluded that the prosecutor was not required to charge the defendant with shoplifting (Pen. Code, § 459.5) instead. However, in light of the prosecutor's receipt theory of liability at trial, aggregating the value of the stolen property the defendant received was improper; because neither the value of the goods from two different stores exceeded $950, insufficient evidence supported the defendant's felony conviction under Penal Code section 496. While the defendant's receipt of the stolen property could have been charged as two misdemeanors, they could not be charged as a single felony. The Court of Appeal, therefore, directed the trial court to reduce the defendant's conviction from a felony to a misdemeanor and resentence him accordingly.

Vehicle Code Section 10851 After Proposition 47: *People v. Morales* (2019) 33 Cal.App.5th 800. The prosecution charged the defendant with felony unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)), among other crimes. As to this offense, the Court of Appeal affirmed the judgment, finding that the defendant showed no grounds for abandoning the *Garza*/*Page* schema, in which taking a vehicle with the intent to permanently deprive its owner is a theft offense, while post-theft driving offenses under Vehicle Code section 10851 are not. (*People v. Page* (2017) 3 Cal.5th 1175; *People v. Garza* (2005) 35 Cal.4th 866.) Thus, *Page* did not preclude felony punishment for the defendant's section 10851 conviction. The court further found that no absurd consequences result from punishing the theft of a vehicle under section 10851 less harshly than the unlawful driving of a vehicle under the same statute. Nor does it violate the equal protection clauses of the United States and California Constitutions to punish post-theft driving under section 10851 more harshly than to punish stealing the same, low-value vehicle under the same statute.

Identity Theft and Proposition 47 (eligible for resentencing): *People v. Chatman* (2019) 33 Cal.App.5th 60. Under Proposition 47, the defendant's identity theft convictions were reduced to misdemeanors, under either Penal Code section 459.5 or 490.2, because there was no evidence that the value of any of the personal identifying information the defendant unlawfully obtained or used exceeded $950. (Review Granted, June 26, 2019, S255235.)

Identity Theft and Proposition 47 (not eligible for resentencing): *People v. Weir* (2019) 33 Cal.App.5th 868. The defendant's four felony convictions for possession of personal identifying information under Penal Code section 530.5, subdivision (c), were not subject to reclassification under Proposition 47 because Penal Code section 490.2 only reclassifies theft offenses and a violation of section 530.5, subdivision (c), is a non-theft offense. (Review Granted, June 26, 2019, S255212.)

Receiving a Stolen Vehicle (Pen. Code, § 496d, subd. (a)) and Proposition 47: *People v. Wehr* (2019) 41 Cal.App.5th 123. The trial court denied the defendant's motion to reduce a conviction for receiving a stolen vehicle (Pen. Code, § 496d, subd. (a)) to a misdemeanor (Pen. Code, § 496, subd. (a)). The Court of Appeal held that the conviction was eligible for misdemeanor treatment upon proof that the vehicle's

value was below the misdemeanor amount ($950) because such treatment was consistent with the case law on petty theft (Pen. Code, § 490.2) and with the nonexclusive list of provisions eligible for misdemeanor punishment under Proposition 47. The court further held that the proper remedy for the trial court's denial of the defendant's motion to reduce the conviction to a misdemeanor was to remand and allow the prosecution to either accept a reduction to a misdemeanor or retry the defendant for a felony, which would not implicate double jeopardy because the trial court and the prosecutor could not be faulted for not anticipating a change in the case law.

Effect of Proposition 47 Resentencing on Other Offenses: *People v. Valenzuela* (2019) 7 Cal.5th 415. Reduction of felony theft conviction to a misdemeanor under Proposition 47 also required a dismissal of the street terrorism offense that is based on "felonious" criminal conduct. The defendant stole a bicycle and was later convicted of both felony grand theft and street terrorism under Penal Code section 186.22, subdivision (a). The felony theft conviction was later reduced to a misdemeanor under Proposition 47. That reduction also required dismissal of the street terrorism offense, which requires a showing of "felonious" criminal conduct.

Proposition 47 Sentencing Where the Offense Is Committed Before the Proposition's Effective Date but the Sentence Is Imposed After: *People v. Lara* (2019) 6 Cal.5th 1128. In *People v. DeHoyos* (2018) 4 Cal.5th 594, the California Supreme Court held that defendants sentenced before Proposition 47's effective date and whose cases were not yet final could obtain resentencing under Proposition 47 only through a resentencing petition (§ 1170.18). Here, the Court established a different rule for defendants whose offenses occurred before Proposition 47's effective date but whose trials and sentences occurred after. The Court held that such defendants need not file a resentencing petition to obtain the benefits of Proposition 47. "We . . . agree with the parties that the applicable ameliorative provisions of Proposition 47 . . . apply directly in trial and sentencing proceedings held after the measure's effective date, regardless of whether the alleged offense occurred before or after that date."

Proposition 57: The Public Safety and Rehabilitation Act of 2016

Parole Consideration under Proposition 57: *In re McGhee* (2019) 34 Cal.App.5th 902. Proposition 57 added a provision to the California Constitution stating that "[a]ny person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." The CDCR adopted regulations establishing a screening process under which inmates eligible for parole consideration under Proposition 57 were referred to the parole board for consideration only if they satisfied eight criteria, all of which required the absence of serious or multiple disciplinary violations while in prison. The First District Court of Appeal, Division Four invalidated the screening process as inconsistent with Prop 57. "The permissibility of the [screening] process is based on the premise that the 'parole consideration' mandated by [Prop 57] need not necessarily be conducted by the [parole] board, and that the [CDCR] itself may determine that an inmate is unsuitable for parole. This premise is unsupportable . . . While the criteria under the . . . screening process undoubtedly bear on whether an inmate is suitable for parole, that ultimate determination is to be made by the [parole] board, not the [CDCR]."

Transfer Hearing Pursuant the Proposition 57: *People v. Castillero* (2019) 33 Cal.App.5th 393. The district attorney charged the defendant in juvenile court with a number of serious sexual offenses. However, the juvenile court found the defendant unfit for juvenile adjudication and transferred the matter to adult/criminal court. In adult/criminal court, the defendant pleaded guilty to four counts of committing a lewd or lascivious act on a child by force (Pen. Code, § 288, subd. (b)(1)) and agreed to serve 40 years in prison. Prior to sentencing, the trial court denied the defendant's request that his case be transferred back to juvenile court for a transfer hearing pursuant to the procedures set out in Proposition 57, which the electorate passed after the defendant's original hearing in juvenile court. The Court of Appeal vacated the judgment and transferred all counts of conviction to the juvenile court, finding that the adult/criminal court erred in not transferring the case back to juvenile court for a post-Proposition 57 transfer hearing. The provisions of Proposition 57 are retroactive and apply to any individual whose sentence was not yet final when the law went into effect. For the crime for which the defendant was over 16 years old at the time of its commission, the juvenile court should afford

the defendant a transfer hearing under the standards set out in Proposition 57. If the juvenile court were to find that the defendant committed a crime when he was less than 16 years old, or if the juvenile court could not determine beyond a reasonable doubt the defendant's age at the time he committed the crime, then the juvenile court should treat his conviction as a juvenile adjudication and impose an appropriate juvenile disposition after a dispositional hearing.

Entitlement to a Juvenile Fitness/Transfer Hearing Pursuant to Proposition 57: *People v. Hargis* (2019) 33 Cal.App.5th 199. The defendant, who was 16 years old at the time he committed the offenses of which he was convicted, filed a motion to have the case remanded to juvenile court pursuant to Proposition 57. The trial court ruled it had no jurisdiction to entertain the defendant's motion and denied the motion on that basis. The Court of Appeal conditionally reversed the defendant's convictions and sentences, and remanded the case with directions. The court concluded that the defendant was entitled to a juvenile fitness/transfer hearing pursuant to Proposition 57, as he was charged directly in adult court and his judgment was not final at the time the new law was enacted. The defendant's entitlement to a juvenile fitness/transfer hearing could not have been raised in the defendant's appeal from his convictions and sentence, because Proposition 57 did not exist at the time. The court did not believe its limited remand constituted a straightjacket for the trial court such that it had no power to hear a motion on an issue that could not have been raised on the defendant's prior appeal, and which concerned a change in the law that altered the court's authority to adjudicate the defendant's case in criminal/adult court in the first instance. As the defendant's adult sentence was already final at the time Senate Bill No. 620 (2017–2018 Reg. Sess.) went into effect, he was not entitled under that enactment to have the trial court exercise its discretion under that new law to strike firearm enhancements.

Proposition 64: The Control, Regulate, and Tax Adult Use of Marijuana Act

Accessory to a Marijuana-Related Felony May Be Eligible for Resentencing Under Proposition 64: *People v. Boatwright* (2019) 36 Cal.App.5th 848. A defendant convicted of accessory to a marijuana-related felony may be eligible for resentencing under Proposition 64. Thus, the trial court erred in finding the defendant categorically ineligible for resentencing. The defendant would not have been

convicted of felony accessory had Proposition 64 been in effect at the time of his offense, given that the completed felony that formed the basis for his conviction was either possession of marijuana for sale or cultivation of marijuana, and those crimes had been reduced to misdemeanor offenses under Proposition 64.

Possession of Marijuana in Prison Post-Proposition 64: *People v. Perry* (2019) 32 Cal.App.5th 885. While serving a prison sentence for another offense, the defendant pleaded no contest to a charge of unauthorized possession of marijuana in prison (Pen. Code, § 4573.6, subd. (a)). After the passage of Proposition 64, the defendant filed a petition for recall or dismissal of sentence, alleging that his section 4573.6 offense involved only 14 grams of marijuana and was therefore eligible for expungement under Proposition 64. The trial court denied the petition and the Court of Appeal affirmed, finding that Proposition 64 did not legalize the possession of marijuana in prison or otherwise affect the operation of Penal Code section 4573.6. Health and Safety Code section 11362.45 was the sole provision in Proposition 64 that directly pertained to the defendant's possession of marijuana in prison, and it expressly provides that the legalization of marijuana by Health and Safety Code section 11362.1, does not affect laws pertaining to cannabis in prison. Accordingly, the defendant was not entitled to resentencing.

Possession of Marijuana in Prison Post-Proposition 64: *People v. Raybon* (2019) 36 Cal.App.5th 111. The appellate court held that possession of less than one ounce of cannabis in prison is not a felony. In enacting Proposition 64, the voters amended Penal Code section 4573.6 to eliminate criminal sanctions for possession of less than an ounce of marijuana and they retained criminal sanctions for possessing more than an ounce or for smoking or ingesting it. The appellate court declined to use the rules of statutory construction to distort the plain meaning of a statute intended to decriminalize the possession of a very small amount of marijuana, even in prison. By expressly providing that laws pertaining to smoking and ingesting cannabis in prison are not affected by the decriminalization of possession of less than an ounce of cannabis, the drafters and voters demonstrated they were aware of the prison population and chose to distinguish possession from consumption. (Review Granted, August 21, 2019, S256978.)

Admissibility of Hearsay at Hearing on Proposition 64 Petition: *People v. Hall* (2019) 39 Cal.App.5th 831. Proposition 64 established a petitioning process (Health & Saf. Code, § 11361.8) for vacating or reducing certain marijuana-related convictions. A petitioner is presumed to be entitled to relief unless the prosecution "proves by clear and convincing evidence" that the petitioner is not so entitled. (Health & Saf. Code, § 11361.8, subd. (f).) The appellant petitioned to have his 1996 felony conviction for sale or transportation of marijuana vacated, and the trial court denied the petition based on the probation and police reports prepared in 1996. The appellant objected to the reports as hearsay, but the trial court admitted the reports as "contain[ing] reliable information." The Second District Court of Appeal affirmed. With respect to the probation report, the Court of Appeal reasoned that because "reliable hearsay statements in a probation report are admissible to show whether a petitioner is eligible for resentencing under Proposition 47 . . . it logically follows that they are also admissible to show whether a petitioner is eligible for relief under Proposition 64." The Court of Appeal distinguished *People v. Banda* (2018) 26 Cal.App.5th 349 on the ground that, in that case, there was not an adequate showing that the probation report was reliable. With respect to the police report, the Court of Appeal held that the report was admissible under the official records exception to the hearsay rule (Evid. Code, § 1280).

Probation

Reasonableness of Electronics Search Condition: *In re Ricardo P.* (2019) 7 Cal.5th 1113. The minor was placed on probation after admitting two counts of felony burglary, and the juvenile court imposed an electronic search condition requiring the minor to "submit electronics including passwords under his control to search." There was no indication that any electronic devices were used in connection with the burglaries. However, the probation report indicated that the minor had previously smoked marijuana and was possibly smoking marijuana at or around the time of the burglaries. In justifying the electronics search condition, the juvenile court observed that "minors typically will brag" about their drug usage on the internet, and that the condition was therefore "a very important part of being able to monitor drug usage and particularly marijuana usage." The California Supreme Court held that the electronics search condition was not reasonably related to future criminality and was invalid under *People v. Lent*

(1975) 15 Cal.3d 481. The Court explained that the condition did not adhere to the required "proportionality between the burden imposed by a probation condition and the legitimate interests served by the condition." That is, the condition imposed a "very heavy burden" on the minor's privacy interests, yet was justified almost exclusively by the juvenile court's unsupported generalization that minors brag about drug usage on the internet, a "very limited justification." The Court also addressed and rejected the Court of Appeal's holding that the electronics search condition was reasonably related to future criminality because it was "reasonably related to enabling the effective supervision of [the minor's] compliance with his other probation conditions." The Court explained that endorsing the notion that any probation condition facilitating the effective supervision of a probationer is reasonably related to future criminality "would effectively eliminate" the future-criminality prong of the *Lent* test, "for almost any condition can be described as enhancing the effective supervision of a probationer."

Electronics Search Condition After *In re Ricardo P.*: *In re Alonzo M.* (2019) 40 Cal.App.5th 156. Applying *In re Ricardo P.*, the First District Court of Appeal, Division Four, rejected the minor's argument that imposing *any* electronics search condition was unreasonable under *Lent*, but held that the particular condition imposed was overbroad. The Court of Appeal reasoned that an electronic search condition was justified because, although there was no evidence that any electronic devices were used in the underlying offenses, both the minor and the minor's mother "attributed [the minor's] delinquent behavior to [certain] people he socialized with," and the record showed that the minor spent "a significant amount of his time using electronic devices." Based on this evidence, the juvenile court did not abuse its discretion by imposing an electronic search condition for the purpose of "ensur[ing] that [the minor] [would] not again succumb to the negative influences he blame[d] for [his] criminal behavior." However, the electronics search condition as written was overbroad, as it authorized the search of "any medium of communication reasonably likely to reveal whether [the minor was] complying with the terms of his probation." The Court of Appeal remanded the case to the juvenile court to craft an electronic search condition "more narrowly tailored to allowing search of any medium of communication reasonably likely to reveal whether [the minor] [was] associating with prohibited persons." The Court of Appeal specified that "[t]he burden on [the minor's]

privacy must be substantially proportionate to the probation department's legitimate interest in preventing him from communicating with his coresponsibles or other identified peers who might draw him in to criminal conduct.

Certificate of Probable Cause Not Required to Challenge Later-Imposed Probation Condition, Despite General Waiver of Appellate Rights: *People v. Patton* (2019) 41 Cal.App.5th 934. The defendant pleaded guilty to grand theft of personal property (Pen. Code, § 487, subd. (a)) after stealing cell phones and other electronic devices. The trial court placed the defendant on probation and imposed an electronic search condition. The Court of Appeal affirmed, holding that the defendant did not need a certificate of probable cause (Pen. Code, § 1237.5) to appeal the condition because a boilerplate waiver of appellate rights did not waive the right to challenge a later-imposed condition not referenced in the plea agreement; thus, the appeal was based on grounds that arose after entry of the plea and did not affect the plea's validity (Cal. Rules of Court, rule 8.304(b)(4)). However, the court further held that the electronic search condition was reasonable because there was a relationship between the condition and the defendant's conviction. Moreover, the defendant forfeited an unconstitutional overbreadth challenge because he failed to raise it below.

Sentencing Enhancements

Remand for Resentencing Under Retroactive New Law Without Certificate of Probable Cause and With Stipulated Sentence: *People v. Stamps* (2019) 34 Cal.App.5th 117. The defendant was sentenced before the effective date of Senate Bill 1393 to a stipulated sentence of 9 years, including 5 years for a prior-serious-felony enhancement (§ 667, subd. (a)). The defendant's request for a certificate of probable cause was denied. On appeal, the defendant requested remand for resentencing under Senate Bill 1393. Relying on *People v. Hurlic* (2018) 25 Cal.App.5th 50, the First District Court of Appeal, Division Four, held that the defendant's failure to obtain a certificate of probable cause did not preclude the request for remand, and that remand was appropriate despite the prior-serious-felony enhancement being imposed pursuant to a stipulated sentence. (Review Granted, July 12, 2019, S255843.)

Remand for Resentencing Under Retroactive New Law Without a Certificate of Probable Cause: *People v. Kelly* (2019) 32 Cal.App.5th 1013. Senate Bill No. 1393, which grants courts the discretion to dismiss the five-year prior serious felony enhancement (Pen. Code, § 667, subd. (a)(1)), did not overrule the certificate of probable cause statute (Pen. Code, § 1237.5). Thus, the Court of Appeal dismissed the appeal because the defendant failed to obtain a certificate of probable cause. However, the court noted that, even if the trial court did strike the two five-year priors, the trial court could reconfigure the sentence choices to achieve a substantially similar aggregate sentence. (Review Granted, June 12, 2019, S255145.)

Remand for Resentencing Under Retroactive New Law Without a Certificate of Probable Cause: *People v. Williams* (2019) 37 Cal.App.5th 602. A defendant sentenced before SB 1393 must obtain a certificate of probable cause before seeking a remand for resentencing under the new law. Here, the defendant pleaded no contest to two felony counts of robbery. Without requesting or receiving a certificate of probable cause, the defendant filed a notice of appeal. Because the defendant was challenging the validity of his no contest plea, the court found that he was required to have a certificate of probable cause to support his appeal in which he asked for a remand for resentencing. (Review Granted, September 25, 2019, S257538.)

Remand for Resentencing Under Senate Bill No. 1393 After a Negotiated Plea: *People v. Wilson* (2019) 42 Cal.App.5th 225. The defendant pleaded no contest to forcible rape and the trial court sentenced him in accordance with the negotiated disposition. The Court of Appeal found that the defendant was not entitled to remand for resentencing under SB 1393 because his sentence resulted from a negotiated plea, and nothing in SB 1393 indicates a legislative intent to change the very nature of negotiated pleas. As the court explained, SB 1393 was not a vehicle to allow the defendant to "whittle down" his sentence but to otherwise leave the plea agreement intact.

Discretion to Impose Lesser Included Firearm Enhancement Upon Remand for Resentencing Under Senate Bill 620: *People v. Morrison* (2019) 34 Cal.App.5th 217. Section 12022.53 sets forth the following enhancements for the use of a firearm in the commission of certain felonies: an additional 10-year term for personal use of a firearm (§ 12022.53, subd. (b)); an additional 20-year term if the defendant personally and intentionally discharges a firearm

(§ 12022.53, subd. (c)); and an additional 25-year-to-life term if the discharge of the firearm causes great bodily injury or death (§ 12022.53, subd. (d)). Senate Bill 620 gave trial courts newfound discretion to strike these enhancements. The First District Court of Appeal, Division Five held that where a case is remanded for resentencing under Senate Bill 620, the trial court is not limited to merely striking or not striking the imposed firearm enhancement; the trial court, "as a middle ground," may also strike the imposed firearm enhancement and impose a lesser included firearm enhancement in its place (e.g., strike an enhancement under Section 12022.53(d) and impose an enhancement under Section 12022.53(b) or (c)). (But see *People v. Tirado* (2019) 38 Cal.App.5th 637, review granted, November 13, 2019, S257658.)

Discretion to Not Strike Firearm Enhancement: *People v. Pearson* (2019) 38 Cal.App.5th 112. The trial court denied the defendant's motion to strike a firearm enhancement imposed pursuant to Penal Code section 12022.53, subdivision (h). The Court of Appeal affirmed the judgment, finding that the trial court did not depart from applicable legal standards or abuse its discretion in denying the defendant's motion. To the contrary, the trial court considered the factors it was required to consider when sentencing a felony defendant; thus, denying the defendant's request to strike the firearm enhancement was squarely within the bounds of the trial court's discretion.

Enhancement for Use of a Firearm in the Commission of a Felony: *People v. Stout* (2019) 38 Cal.App.5th 669. Section 12022.5(a) provides that "any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense." The Third District Court of Appeal held that a section 12022.5(a) enhancement may not be imposed where the underlying conviction is for "carr[ying] a loaded firearm with the intent to commit a felony" in violation of section 25800(a). The Court of Appeal explained that a person "uses" a firearm in the commission of an offense where the use of the firearm "objectively facilitates the offense." Where a person "carries a loaded firearm with the intent to commit a felony" in violation of section 25800(a), the use of the firearm does not "objectively

facilitate the offense." Rather, the offense is complete upon mere possession of the firearm, without any use.

Firearm and Serious Felony Enhancements: *People v. Johnson* (2019) 32 Cal.App.5th 26. Senate Bills 620 and 1393, which became effective while the defendant's case was pending on appeal, provide the trial court with discretion to strike firearm and serious felony prior enhancements, and even though the court was unsympathetic to the defendant at sentencing, remand was ordered to allow the court to exercise that discretion. Here, the defendant was convicted of murder and the jurors found he had a prior serious felony conviction, and that he personally used a firearm in the killing. While his appeal was pending, the legislature enacted Penal Code § 12022.53, subdivision (h), which gives trial courts discretion to dismiss firearm enhancements in the interest of justice. The legislature also passed SB 1393, which gives the trial courts discretion to dismiss five-year prior serious felony enhancements under section 667, subdivision (a). The law applies retroactively to the defendant's case. Even though the trial court made comments at sentencing suggesting a lack of sympathy for the defendant, the defense never had the opportunity to argue for dismissal of the firearm use enhancements, or his prior serious felony enhancement. The matter was remanded for sentencing out of an abundance of caution.

Firearm Enhancement and Final Cases: *People v. Fuimaono* (2019) 32 Cal.App.5th 132. Although the defendant's conviction for assault with a firearm (Pen. Code, § 245, subd. (a)(2)) was already final, he argued that he was entitled to resentencing under SB 620, which gave trial courts the discretion to dismiss firearm enhancements in the interest of justice. The Court of Appeal found that SB 620 does not authorize the resentencing of convictions after they become final. Therefore, absent any new authority to resentence the defendant under SB 620, the trial court lacked jurisdiction to grant the defendant's resentencing request.

Final Judgments and SB 620: *People v. Johnson* (2019) 32 Cal.App.5th 938. Appellant's habeas corpus petitions and restitution-related motions did not extend the date on which his judgment became final for purposes of Senate Bill No. 620 (firearm enhancement resentencing) because, although he sought it, appellant did not obtain collateral relief by way of a state or federal habeas corpus proceeding.

The trial court correctly entered an order summarily denying the sentencing request.

Final Orders and SB 180: *People v. Chamizo* (2019) 32 Cal.App.5th 696. In 2015, the defendant pleaded no contest to transporting cocaine and admitted two Health and Safety Code section 11370.2, subdivision (a) enhancements. The defendant did not appeal the judgment, and it became final in 2015. Two years later, the defendant filed a motion in the trial court to reduce his sentence by striking the two enhancements pursuant to Senate Bill No. 180, but the trial court denied the motion. The Court of Appeal dismissed the defendant's appeal, holding that the trial court was without jurisdiction to consider the defendant's motion to reduce his sentence because the 120-day limitation under Penal Code section 1170, subdivision (d), had long since passed at the time he filed the motion. Because the trial court was without jurisdiction to consider the motion, its denial did not impact the defendant's substantial rights. Moreover, nothing in Senate Bill No. 180 suggested it was intended to apply to judgments that had become final before the filing of the motion. Thus, the trial court's order was not appealable.

Enhancement for Personally Inflicting Great Bodily of Injury Where Victim Voluntarily Ingests Drugs and Overdoses: *People v. Ollo* (2019) 42 Cal.App.5th 1152. Section 12022.7(a) triggers a three-year enhancement for "[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony." (§ 12022.7, subd. (a).) The defendant, 18 years old at the time, provided his 16-year-old girlfriend with a substance he believed was cocaine but was actually fentanyl. The defendant's girlfriend died of a fentanyl overdose, and the defendant was charged with the offense of furnishing a controlled substance to a minor (Health & Saf. Code, § 11353) and with an allegation of personally inflicting great bodily injury (§ 12022.7, subd. (a)). The trial court prohibited the defendant from arguing that his girlfriend's voluntary ingestion of the drugs was an intervening cause precluding his liability under section 12022.7(a). The Second District Court of Appeal affirmed. The Court of Appeal reasoned that "a defendant's act of furnishing drugs and the user's voluntary act of ingesting them constitute concurrent direct causes, such that the defendant who so furnishes personally inflicts great bodily injury upon his victim when she subsequently dies from an overdose." In so holding, the Court of

Appeal followed *People v. Martinez* (2014) 226 Cal.App.4th 1169 and disagreed with *People v. Slough* (2017) 11 Cal.App.5th 419.

Sentence Under Uncharged Sentence Enhancement Where Trial Counsel Fails to Object: *People v. Jimenez* (2019) 35 Cal.App.5th 373. The jury convicted the defendant of a number of counts of child sexual molestation and also found true an allegation under Section 667.61, subdivisions (b) and (e), that the offenses were committed against more than one victim, triggering a mandatory term of 15 years to life. At sentencing, at the recommendation of both the prosecution and the probation report, the trial court sentenced the defendant not under Section 667.61, subdivisions (b) and (e), but under Section 667.61, subdivision (j)(2), which triggers a mandatory term of 25 years of life where the child is under 14 years of age. Although the information did not include an allegation under subdivision (j)(2), and no such allegation was presented to the jury, trial counsel did not object to the sentence. The Sixth District Court of Appeal held that the sentence under subdivision (j)(2) was unauthorized given the failure to plead the subdivision in the information, and that the defendant's challenge to the sentence was therefore cognizable on appeal despite trial counsel's failure to object. (*But see People v. Zaldana* (Dec. 17, 2019, No. B295959) ___Cal.App.5th___ [2019 Cal.App. LEXIS 1262; I*n re Vaquera* (2019) 39 Cal.App.5th 233, review granted, November 26, 2019, S258376.)

Penal Code Section 1473.7 Post-Judgement Motion to Vacate

Right to Counsel in Section 1473.7 Proceedings: *People v. Fryhaat* (2019) 35 Cal.App.5th 969. Section 1473.7 authorizes the filing of a motion to vacate a plea where the resulting "conviction or sentence is legally invalid due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of [the] plea." (§ 1473.7, subd. (a).) Section 1473.7 does not expressly address the right to counsel in proceedings under the statute. The Fourth District Court of Appeal held that an indigent movant under Section 1437.7 has a right to appointed counsel where the movant "set[s] forth factual allegations stating a prima facie case for entitlement to relief under the statute," because "to interpret the statute otherwise would be to raise serious and doubtful questions as to its constitutionality." (*See also People v. Rodriguez* (2019) 38 Cal.App.5th 971.)

Establishing Prejudice in Section 1473.7 Proceeding: *People v. Vivar* (2019) 43 Cal.App.5th 216. The Fourth District Court of Appeal affirmed the denial of the defendant's section 1473.7 motion, holding that although the motion established that trial counsel failed to properly advise the defendant on the immigration consequences of his plea, the motion did not establish prejudice. The Court of Appeal observed that the defendant "was offered and rejected a plea agreement that would have completely avoided any immigration consequences, . . . demonstrat[ing] that immigration consequences were not [the] defendant's primary consideration in accepting or rejecting any plea offer, and that further advice on this front was not reasonably probable to change his decision-making."

Insufficient Immigration Advisement: *People v. Mejia* (2019) 36 Cal.App.5th 859. The defendant made the showing required to vacate his 1994 guilty pleas to three drug crimes because the evidence substantiated his claim that he would not have pleaded guilty had he understood the immigration ramifications. To establish prejudicial error under Penal Code section 1473.7, a person need only show by a preponderance of the evidence: (1) he or she did not meaningfully understand or knowingly accept the actual or potential adverse immigration consequences of the plea; and (2) had the defendant understood the consequences, it is reasonably probable he or she would have instead attempted to defend against the charges. Here, at the time of the plea, the defendant had been living in the United States for eight years, since he was 14 years old, and his wife, infant son, mother and siblings lived in the United States. In addition, there were lingering questions about the strength of the underlying evidence, which further corroborated his claim that he likely would have taken his chances at trial had he meaningfully understood the dire immigration consequences of his 1994 guilty pleas.

Insufficient Immigration Advisements: *People v. Camacho* (2019) 32 Cal.App.5th 998. The evidence supported the defendant's motion under Penal Code section 1473.7, to vacate his conviction, following a no contest plea, to possession of marijuana for sale because it showed that counsel advised the defendant only that the conviction could subject him to deportation, not that deportation would be mandatory. Under section 1473.7, the defendant did not have to show that the representation fell below an objective standard of reasonableness under prevailing professional norms. As to prejudice, the evidence that

defendant would not have entered the plea included that he had lived in the United States since he was two years old and that his spouse and children were United States citizens.

Insufficient Immigration Advisement Amounting to Ineffective Assistance of Counsel: *In re Hernandez* (2019) 33 Cal.App.5th 530. Counsel provided deficient assistance under the Sixth Amendment of the United States Constitution by failing to advise the defendant that a plea to possession of methamphetamine for sale would subject her to mandatory deportation. That the defendant would not have entered her plea had she been advised of the immigration consequences was supported by evidence that the defendant: (1) was a legal permanent resident; (2) had lived in the United States since she was three years old; (3) was the single parent of three minor children, all of whom were United States citizens: (4) had been employed as a medical assistant; (5) had no prior criminal record other than a traffic infraction; and (6) rather than signing a form agreeing to deportation, she had remained in immigration custody for eight months.

Evidence Insufficient to Show the Defendant's Plea was "Legally Invalid" or that He Was Prejudice: *People v. DeJesus* (2019) 37 Cal.App.5th 1124. The trial court denied the defendant's motion to vacate and withdraw his 2016 plea of no contest to assault with a firearm. At the time the defendant filed his motion, he was a parolee and thus in constructive custody. The Court of Appeal, therefore, found he was not eligible for relief under Penal Code section 1473. But, even if the defendant were eligible for relief, the Court of Appeal found that the defendant failed to show by a preponderance of the evidence that his plea was "legally invalid" within the meaning of Penal Code section 1473.7. The defendant's claims that his trial attorney erred by failing to try the case or investigate an immigration-neutral disposition was not supported by sufficient evidence. Although the defendant claimed that his attorney threatened to abandon him if he wanted to proceed with a jury trial, the court noted that the defendant explicitly told the trial court, at his change of plea hearing, that no one threatened or forced him to enter a plea. As for trial counsel's failure to investigate an immigration-neutral disposition, the Court of Appeal noted that the defendant did not offer any evidence from the prosecutor, his public defender, or an immigration expert on this point, and further failed to identify any "immigration-neutral disposition to which the prosecutor was reasonably likely to agree."

(*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1118.) However, even assuming the defendant's trial attorney erred, the defendant failed to show prejudice because he did not offer contemporaneous evidence that he would have refused to enter the plea if he had known it would render him deportable.

Prosecutorial Misconduct.

Misstatement of Facts in Evidence: *People v. Armstrong* (2019) 6 Cal.5th 735. The prosecutor committed misconduct during closing argument by making up facts on a point that the defendant had specifically denied during his testimony, and there was no other evidence to support that fact in the record. However, the error did not require reversal of the conviction given the overwhelming evidence of guilt.

***Brady* Violation and Penal Code section 654:** *People v. Jimenez* (2019) 32 Cal.App.5th 409. A jury convicted the defendant of assault with a deadly weapon on a peace officer (Pen. Code, § 245, subd. (c)), two counts of felony child abuse (Pen. Code, § 273a, subd (a)), and evading a peace officer with reckless driving (Veh. Code, § 2800.2, subd. (a)), where the defendant led police officers in a high-speed chase with his two daughters in the car and, at one point, drove straight toward a patrol vehicle, forcing officers to veer out of the way at the last moment to avoid a collision. The Court of Appeal held that the defendant had not established a *Brady* violation based on the prosecution's failure to disclose a police report authored by one of the deputies involved in the chase detailing a shooting incident that occurred weeks before the charged incident because the defendant had not shown that the undisclosed report was favorable or material to his case. For the same reason (immateriality), the trial court did not abuse its discretion in denying the defendant's motion for a new trial under Penal Code section 1181. Finally, the court held that the imposition of separate punishments for the counts of assault and evasion of a peace officer did not violate Penal Code section 654 because the evidence was sufficient to support the trial court's implied finding that the defendant had two objectives—he was both intending to evade the first patrol vehicle behind him and trying to assault the deputies in the second patrol vehicle facing him by driving on the wrong side of the road heading directly toward them.

Dual Punishment/Convictions (Pen. Code, § 654 & 954) and the Williamson Rule

Conspiracy and Penal Code Section 654: *People v. Beman* (2019) 32 Cal.App.5th 442. The appellate court rejected the defendant's contention that Penal Code section 654 precluded the imposition of punishment for the two substantive offenses of human trafficking in addition to the punishment for conspiracy to commit human trafficking. Here, the defendant pleaded no contest to one count of conspiracy to commit human trafficking based on allegations that for more than seven years, he and his coconspirators used threats, force, and violence in pimping at least three victims. The defendant also pleaded no contest to two counts of human trafficking for his conduct against one of the victims in 2011. For all three counts, the trial court sentenced the defendant to 16 years 8 months in prison (the middle term of 14 years for the conspiracy count and two consecutive 16-month terms for the human trafficking counts). The Court of Appeal found that the defendant's conspiracy to commit human trafficking had broader objectives and involved more victims than the two substantive offenses; thus, the trial court did not err in imposing consecutive terms for the two substantive offenses.

Two Convictions for Acts Occurring During One Incident: *People v. Kopp* (2019) 38 Cal.App.5th 47. A jury convicted one of the defendants of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and assault by means likely to produce great bodily injury (Pen. Code, § 245, subd.). The defendant challenged his convictions, arguing that he could not be convicted of both counts of assault based on the same assault. The court began its analysis of this issue by distinguishing the facts of this case from *In re Jonathan R.* (2016) 3 Cal.App.5th 963 and *People v. Brunton* (2018) 23 Cal.App.5th 1097, two cases that held a single act cannot lead to a conviction for violating both subdivision (a)(1) and (4) of section 245, albeit for different reasons. Because the court found that the defendant's convictions did not result from a single course of conduct, but rather different acts committed during a single incident, the court evaluated the facts of this case under Penal Code section 954. In doing so, the court noted that the "California Supreme Court has repeatedly held that the same act can support multiple charges and multiple convictions. Unless one offense is necessarily included in the other, multiple convictions can be based upon a single criminal act or an indivisible course of criminal conduct (§

954)." Here, the court explained that the assault with a deadly weapon conviction is based on the use of a knife, whereas the assault by means likely to produce great bodily injury was based on punches and kicks to the victim's head. That these separate acts occurred during the same altercation does not bar the jury from convicting the defendant under both counts.

Sufficiency of Evidence Robbery and Williamson Rule: *People v. Joseph* (2019) 33 Cal.App.5th 943. In a perjury (Pen. Code, § 118) and second-degree robbery (Pen. Code, § 211) case, substantial evidence supported the jury's finding that the robbery victim's cell phone was taken by means of force or fear. The evidence supported a finding that the defendant necessarily had to apply more than just that "quantum of force . . . necessary to accomplish the mere seizing of the property." (*People v. Morales* (1975) 49 Cal.App.3d 134, 139.) However, the Williamson rule barred the defendant's conviction for perjury by declaration under Penal Code section 118, subdivision (a). Filing a false vehicle theft report in violation of Vehicle Code section 10501, as the defendant did, would commonly result in a violation of section 118. There is no provision in the Vehicle Code requiring that a stolen vehicle report be filed under penalty of perjury, and no other indication that the Legislature intended to allow prosecution under section 118 as well as Vehicle Code section 10501. Therefore, the court concluded that Vehicle Code section 10501, preempts section 118.

Waiver of the Right to Appeal

Certificate of Probable Cause Required to Challenge Credits: *People v. Becerra* (2019) 32 Cal.App.5th 178. The defendant's claim that he was entitled to 164 days of custody credits was not reviewable on appeal because his claim fell within the scope of his appellate waiver in his written plea agreement, and he failed to obtain a certificate of probable cause to challenge the enforceability of the waiver. Although the defendant's appellate waiver did not contain the phrase "custody credits," the appellate waiver expressly encompassed all rights regarding state and federal writs and appeals, including but not limited to, the right to appeal the judgment and any collateral attacks on the conviction or sentence at any time in the future. The parties clearly intended a broad waiver covering any and all claims that the defendant might try to later assert regarding his sentence or the judgment.

Appellate Waiver with a Specified Prison Term Barred Challenge to Subsequent Sentencing Error: *People v. Barton* (2019) 32 Cal.App.5th 1088. The defendant knowingly and intelligently waived the right to appeal her prison sentence of eight years eight month where her plea agreement included a specified prison term and a waiver of the right to appeal the sentence. In rejecting the defendant's argument that she did not knowingly and intelligently waive the right to challenge unforeseen sentencing errors arising subsequent to the execution of her plea agreement, the Court of Appeal followed *People v. Panizzon* (1996) 13 Cal.4th.68, which holds that the length of the sentence and the right to appeal the sentence are issues that cannot fairly be characterized as falling outside of the defendant's contemplation and knowledge when the waiver was made. (Review Granted, June 26, 2019, S255214.)

Waiver of Arbuckle Rights

No Waiver of Arbuckle Rights: *People v. Bueno* (2019) 32 Cal.App.5th 342. The defendant did not waive her *Arbuckle* rights to have her sentence imposed by the judge who accepted her no contest plea. The burden is never on the defendant to ensure that his or her *Arbuckle* rights are invoked; rather, it is the prosecution's burden to show that the defendant's *Arbuckle* rights were knowingly and intelligently abandoned. Based on the Supreme Court's recent reaffirmance of the implied right to be sentenced by the judge who took the plea, the appellate court chose not to follow the forfeiture doctrine set forth in *People v. West* or any other appellate decision, regardless of whether the decisions were specifically disapproved by the Supreme Court.

Juvenile Dispositions

Sufficiency of the Evidence Supporting a DJF Commitment: *In re A.M.* (2019) 38 Cal.App.5th 440. Before committing a ward to the Division of Juvenile Facilities ("DJF"), the juvenile court must determine that "the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the [DJF]." (Welf. & Inst. Code, § 734.) In *In re Carlos J.* (2018) 22 Cal.App.5th 1, the First District Court of Appeal, Division Five reversed a minor's DJF commitment for lack of substantial evidence of probable benefit where there was "no specific information in the record

regarding the programs at the DJF." Here, the First District Court of Appeal, Division Five distinguished *Carlos J.* and held that the minor's commitment to DJF was supported by substantial evidence. The Court of Appeal highlighted that the prosecution presented "lengthy testimony from a DJF official about the programs offered at the DJF, as well as DJF publications describing various programs."

Indeterminate Sentence: *In re J.C.* (2019) 33 Cal.App.5th 741. Following a Welfare and Institutions Code section 602 petition, a minor admitted to carjacking with a personal firearm use enhancement. The juvenile court entered a disposition order committing the minor to juvenile hall until age 21, but providing for an earlier release if and when he successfully completed a court-ordered treatment program. The Court of Appeal held that the commitment order did not impermissibly delegate to the probation officer the authority to determine the length of the minor's commitment. Under the statutory scheme, the juvenile court retained the supervisory authority to determine whether and when the minor successfully completed the treatment program and, therefore, whether and when he would be released early from juvenile hall. The juvenile court scheduled a review hearing in the exercise of that supervisory authority. If the minor believed the probation officer was unfairly assessing his performance in the program, he could bring the issue to the juvenile court at the scheduled review hearing or by filing a Welfare and Institutions Code section 778 petition.

Penal Code Section 1381

Applicability of Penal Code Section 1381 to Suspended Executed Sentence: *People v. Smith* (2019) 35 Cal.App.5th 399. In January 2017, in a case in Los Angeles County, the trial court suspended an executed sentence of three years and placed the defendant on probation. In August 2017, in a case in San Diego County, the defendant was sentenced to two years in state prison. While serving the San Diego sentence, the defendant sent a Penal Code section 1381 letter demanding that he be sentenced in the Los Angeles case within 90 days. When this did not occur, the defendant moved to dismiss under section 1381, and the trial court denied the motion. The Second District Court of Appeal affirmed, holding that the "plain text of section 1381 dictates that its protections apply only when a defendant 'remains to be sentenced,'" and that a defendant has already been "sentenced" when a sentence is imposed with only its execution suspended.

Prejudice

Prejudice Standard for Alternative Theory Error: *People v. Aledamat* (2019) 8 Cal.5th 1. The California Supreme Court clarified that in a case of alternative theory error – i.e., where the trial court instructs a jury on two theories of guilt, one of which was legally valid and one of which was legally invalid – the prejudice standard is the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18. Thus, alternative theory error requires reversal unless the reviewing court finds "beyond a reasonable doubt that . . . the error did not contribute to the verdict." The Court rejected the Court of Appeal's holding that alternative theory error is subject to an even higher prejudice standard, i.e., a standard requiring reversal unless the record establishes that the jury "actually relied" upon the legally valid theory. A majority of the Court (with Justices Liu, Cuellar, and Groban dissenting) further concluded that the alternative theory error here – instructing the jury that a box cutter could be considered an "inherently deadly weapon" – was harmless beyond a reasonable doubt.

Prison Disciplinary Proceedings

Standard of Review for Prison Disciplinary Proceedings: *In re Rigsby* (2019) 38 Cal.App.5th 1011. Prison officials accused an inmate of possessing a precursor ingredient for inmate-manufactured alcohol, known as a "kicker" in prison slang, and subsequently found the inmate guilty of possessing contraband, resulting in a 30-day loss of inmate privileges and early release credits. The inmate challenged the disciplinary action by petitioning for a writ of habeas corpus. The Court of Appeal reversed the order granting the inmate's petition, concluding that the superior court's decision could not be reconciled with the standard of review for prison disciplinary proceedings, which requires only that there be some evidence to support the finding. The superior court's inability to determine whether a coffee jar containing the kicker was in "plain view" in the inmate's cell did not render the evidence insufficient, nor did it matter that the item was located on a shelf used by the inmate's cellmate. The two men had been jointly occupying the cell, which was 6 feet by 11 feet in size, for about six months when the kicker was found, and the inmate's shelf had to have been located above his cellmate's shelf in a common area. The inmate himself noted that the two of them had very meager possessions. During a search of the cell, prison officials discovered a prohibited item located in a common area accessible to both inmates. Those facts permitted an

inference, i.e., constituted some evidence, that the inmate was in possession of the contraband. The superior court's analysis conflicted with the case law, and the court was not persuaded to depart from precedent that was directly on point.

II. NOTEWORTHY PENDING CASES IN THE CALIFORNIA SUPREME COURT

Ameliorative Sentencing Amendments

Retroactivity of Mental Health Diversion: *People v. Frahs* (2018) 27 Cal.App.5th 784(S252220). Review ordered on the court's own motion after the Court of Appeal conditionally reversed and remanded a judgment of conviction of criminal offenses. The court limited review to the following issues: (1) Does Penal Code section 1001.36 apply retroactively to all cases in which the judgment is not yet final? (2) Did the Court of Appeal err by remanding for a determination of defendant's eligibility under Penal Code section 1001.36.

Certificate of Probable Cause Requirement: *People v. Kelly* (2019) 32 Cal.App.5th 1013 (S255145). Petition for review after the Court of Appeal dismissed an appeal from a judgment of conviction of a criminal offense. *People v. Stamps* (2019) 34 Cal.App.5th 117 (S255843). Petition for review after the Court of Appeal affirmed in part and reversed in part a judgment of conviction of a criminal offense. *Kelly* and *Stamps* both present the following issue: Is a certificate of probable cause required for a defendant to challenge a negotiated sentence based on a subsequent ameliorative, retroactive change in the law?

Effect of an Appellate Waiver: *People v. Barton* (2019) 32 Cal.App.5th 1088 (S255214). Petition for review after the Court of Appeal dismissed an appeal from a judgment of conviction of criminal offenses. This case includes the following issue: Does a waiver of the right to appeal, included as part of a plea bargain for a stipulated sentence, bar an appeal of the sentence imposed if newly enacted legislation would otherwise be available to enable the appellant to obtain a remand for resentencing under *In re Estrada* (1965) 63 Cal.2d 740?

Discretion to Impose a Lesser Firearm Enhancement: *People v. Tirado* (2019) 38 Cal.App.5th 637 (S257658). Petition for review after the Court of Appeal affirmed a judgment of conviction of criminal

offenses. This case presents the following issue: Can the trial court impose an enhancement under Penal Code section 12022.53, subdivision (b), for personal use of a firearm, or under section 12022.53, subdivision (c), for personal and intentional discharge of a firearm, as part of its authority under section 1385 and subdivision (h) of section 12022.53 to strike an enhancement under subdivision (d) for personal and intentional discharge of a firearm resulting in death or great bodily injury, even if the lesser enhancements were not charged in the information or indictment and were not submitted to the jury?

Finality of ISS Grants of Probation: *People v. McKenzie* (2018) 25 Cal.App.5th 1207 (S251333). Petition for review after the Court of Appeal remanded for resentencing and otherwise affirmed a judgment of conviction of criminal offenses. This case presents the following issue: When is the judgment in a criminal case final for purposes of applying a later change in the law if the defendant was granted probation and the imposition of sentence was suspended?

Admission of Case-Specific Hearsay

Failure to Object: *People v. Perez* (2018) 22 Cal.App.5th 201 (S248730). Petition for review after the Court of Appeal reversed in part and affirmed in part judgments of conviction of criminal offenses. The court limited review to the following issue: Did defendant's failure to object at trial, before *People v. Sanchez* (2016) 63 Cal.4th 665 was decided, forfeit his claim that a gang expert's testimony related case-specific hearsay?

Proposition 47: The Safe Neighborhoods and Schools Act

Receiving a Stolen Vehicle: *People v. Orozco* (2018) 24 Cal.App.5th 667 (S249495). Petition for review after the Court of Appeal affirmed an order denying a petition to recall sentence. This case presents the following issue: Can a felony conviction for receiving a stolen vehicle in violation of Penal Code section 496(d) be reclassified as a misdemeanor under Proposition 47 in light of Penal Code section 496(a), which provides that receiving other stolen property is a misdemeanor when the value of the property does not exceed $950?

Identity Theft as Shoplifting: *People v. Jimenez* (2018) 22 Cal.App.5th 1282 (S249397). Petition for review after the Court of Appeal affirmed an order granting a petition to recall sentence. This

case presents the following issue: May a felony conviction for the unauthorized use of personal identifying information of another (Pen. Code, § 530.5(a)) be reclassified as a misdemeanor under Proposition 47 on the ground that the offense amounted to shoplifting under Penal Code section 459.5?

Identity Theft, Forgery, and Proposition 47: *People v. Guerrero* 2018 Cal. App. Unpub. LEXIS 8250 | 2018 WL 6382041 (S253405). Petition for review after the Court of Appeal affirmed a judgment of conviction of criminal offenses. This case presents the following issue: Did the Court of Appeal properly apply the "some connection or relationship" test of *People v. Gonzales* (2018) 6 Cal.5th 44 in holding that defendant's conviction for identity theft precluded reducing his forgery conviction to a misdemeanor under the provisions of Proposition 47?

Proposition 57: The Public Safety and Rehabilitation Act of 2016

Prior Sex Offense and Proposition 57: *In re Gadlin* (2019) 31 Cal.App.5th 784. Petition for review after the Court of Appeal granted relief on a petition for writ of habeas corpus. This case includes the following issue: Under Proposition 57 (Cal. Const., art. I, § 32), may the California Department of Corrections and Rehabilitation categorically exclude from early parole consideration all prisoners who have been previously convicted of a sex offense requiring registration under Penal Code section 290?

Senate Bill No. 1391 and Proposition 57: *O.G. v. Superior Court* (40) Cal.App.5th 626 (S259011). Petition for review after the Court of Appeal denied a petition for peremptory writ of mandate. This case presents the following issue: Did Senate Bill No. 1391 (Stats. 2018, ch. 1012), which eliminated the possibility of transfer to adult criminal court for crimes committed when a minor was 14 or 15 years old, unconstitutionally amend Proposition 57?

Proposition 64: The Control, Regulate, and Tax Adult Use of Marijuana Act

Possession of Marijuana in Prison: *People v. Raybon* (2019) 36 Cal.App.5th 111 (S256978). Petition for review after the Court of Appeal reversed orders denying petitions to recall sentence. This case presents the following issue: Did Proposition 64 [the "Adult Use of

Marijuana Act"] decriminalize the possession of up to 28.5 grams of marijuana by adults 21 years of age or older who are in state prison as well as those not in prison?

Homicide Offenses

SB 1437 and Natural and Probable Consequences: *People v. Gentile* (2019) 35 Cal.App.5th 932 (S256698). Petition for review after the Court of Appeal affirmed a judgment of conviction of a criminal offense. The court limited review to the following issues: (1) Does the amendment to Penal Code section 188 by recently enacted Senate Bill No. 1437 eliminate second degree murder liability under the natural and probable consequences doctrine? (2) Does Senate Bill No. 1437 apply retroactively to cases not yet final on appeal? (3) Was it prejudicial error to instruct the jury in this case on natural and probable consequences as a theory of murder?

SB 1437 and Natural and Probable Consequences: *People v. Lopez* (2019) 38 Cal.App.5th 1087 (S258175). Petition for review after the Court of Appeal affirmed in part and reversed in part judgments of conviction of criminal offenses. The court limited review to the following issues: (1) Does Senate Bill No. 1437 (Stats. 2018, ch. 1015) apply to attempted murder liability under the natural and probable consequences doctrine? (2) In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) 50 U.S. 99 and *People v. Chiu* (2014) 59 Cal.4th 155?

Non-Homicide Offenses

Sexual Communications with Adult Police Officer Posing as Minor: *People v. Moses* (2019) 38 Cal.App.5th 757 (S258143). Review on the court's own motion after the Court of Appeal reversed in part and affirmed in part a judgment of conviction of criminal offenses. The court limited review to the following issue: Did the Court of Appeal err in reversing defendant's conviction for human trafficking of a minor (Pen. Code, § 236.1, subd. (c)(1)) on the ground that defendant was communicating with an adult police officer posing as a minor rather than an actual minor?

Fines and Fees

Determination of Ability to Pay and Burden of Proof: *People v. Kopp* (2019) 38 Cal.App.5th 47 (S257844). Petition for review after the Court of Appeal affirmed in part and reversed in part judgments of conviction of criminal offenses. The court limited review to the following issues: (1) Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? (2) If so, which party bears the burden of proof regarding the defendant's inability to pay?

Eyewitness Identifications

Reliability of an Identification Based on the Witness's Certainty: *People v. Lemcke* 2018 Cal. App. Unpub. LEXIS 4265 | 2018 WL 3062234 (S250108). This case presents the following issue: Does instructing a jury with CALCRIM No. 315 that an eyewitness's level of certainty can be considered when evaluating the reliability of the identification violate a defendant's due process rights?

Consolidation of Pleadings

Unitary Information After Separate Preliminary Hearings: *People v. Henson* (2019) 28 Cal.App.5th 490 (S252702). This case presents the following issue: When a defendant is held to answer following separate preliminary hearings on charges brought in separate complaints, can the People file a unitary information covering the charges in both those cases or must they obtain the trial court's permission to consolidate the pleadings? (See Pen. Code, §§ 949, 954.)

III. NOTEWORTHY PENDING CASES IN THE UNITED STATES SUPREME COURT

Fourth Amendment

Detention Based on Registered Owner of Vehicle: *Kansas v. Glover*, 18-556. Whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary. (Argued November 4, 2019.)

Detention by Physical Force: *Torres v. Madrid*, 19-292. Whether an unsuccessful attempt to detain a suspect by use of physical force is a

"seizure" within the meaning of the Fourth Amendment, or whether physical force must be successful in detaining a suspect to constitute a "seizure." (Argument TBD.)

Fourteenth Amendment

Unanimous Verdict: *Ramos v. Louisiana*, 18-5924. Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict. (Argued October 7, 2019.)

Insanity Defense: *Kahler v. Kansas*, 18-6135. Whether the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense. (Argued October 7, 2019.)

Criminal Prohibition Against Encouraging or Inducing Illegal Immigration

Facial Constitutionality of Criminal Statute: *United States v. Sineneng-Smith*, 19-67. Whether the federal criminal prohibition against encouraging or inducing illegal immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional. (Argument Set for February 25, 2020.)

IV. NOTEWORTHY NEW CALIFORNIA LAWS

Limited Immunity From Arrest When Reporting Specified Crimes, and Restriction on Evidence in Certain Sex Work Prosecutions: Senate Bill 233 adds Penal Code section 647.3, which prohibits the arrest of a person for various minor offenses – i.e., most misdemeanor drug offenses and certain sex work offenses – if the person is reporting that they are a victim of, or a witness to, specified crimes. Section 647.3 further provides that possession of condoms does not establish probable cause to arrest for certain sex work offenses. Senate Bill 233 also amends Evidence Code section 782.1 to make inadmissible the defendant's possession of condoms in a prosecution for certain sex work offenses.

Elimination of 1-Year Prison Priors (§ 667.5, subd. (b)) Except for Sexually Violent Offenses: Senate Bill 136 amends Penal Code section 667.5(b) to eliminate 1-year prison priors except for sexually violent offenses.

Transfer of Minor From Adult Court Back to Juvenile Court for Disposition: Assembly Bill 1423 adds Welfare and Institutions Code section

707.5, which authorizes a minor who has been transferred to adult court to request, in certain situations, to be transferred back to juvenile court for disposition following conviction or entry of a plea. The applicable situations all require the minor to have been convicted of, or entered a plea to, only misdemeanors and/or offenses not listed in Welfare and Institutions Code section 707(b).

Restrictions on Police Use of Deadly Force: Assembly Bill 392 amends Penal Code sections 196 and 835a to restrict the use of deadly force by a police officer to situations where the officer reasonably believes that the use of deadly force is necessary to either (1) "defend against an imminent threat of death or serious bodily injury to the officer or to another"; or (2) "apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended."

No Waiver of Subsequent Ameliorative Changes in the Law: Assembly Bill 1618 adds Penal Code section 1016.8, which makes void as against public policy a provision of a plea bargain requiring the defendant to waive future benefits of legislative enactments, initiatives, appellate decisions, or other changes in the law that may retroactively apply after the date of the plea.

No Drug Offender Registration: Assembly Bill 1261 repeals the drug-offender-registration requirement from various sections of the Health and Safety Code.

V. NOTEWORTHY NEW CALIFORNIA RULES OF COURT

Electronic Filing

Effective January 1, 2020, the following provisions regarding electronic filing were added to rule 8.72:

(b) Responsibilities of electronic filer

Each electronic filer must:

(1) Take all reasonable steps to ensure that the filing does not contain computer code, including viruses, that might be harmful to the court's electronic filing system and to other users of that system;

(2) Furnish one or more electronic service addresses, in the manner specified by the court, at which the electronic filer agrees to accept service; and

(3) Immediately provide the court and all parties with any change to the electronic filer's electronic service address.

Formatting Rules

Effective January 1, 2020, the following provisions regarding various formatting and other requirements for electronic documents were added to rule 8.74:

(a) Formatting requirements applicable to all electronic documents

(1) *Text-searchable portable document format*: Electronic documents must be in text-searchable portable document format (PDF) while maintaining the original document formatting. In the limited circumstances in which a document cannot practicably be converted to a text-searchable PDF, the document may be scanned or converted to non-text-searchable PDF. An electronic filer is not required to use a specific vendor, technology, or software for creation of a searchable-format document, unless the electronic filer agrees to such use. The software for creating and reading electronic documents must be in the public domain or generally available at a reasonable cost. The printing of an electronic document must not result in the loss of document text, formatting, or appearance. The electronic filer is responsible for ensuring that any document filed is complete and readable.

(2) *Pagination*: The electronic page counter for the electronic document must match the page number for each page of the document. The page numbering of a document filed electronically must begin with the first page or cover page as page 1 and thereafter be paginated consecutively using only arabic numerals (e.g., 1, 2, 3). The page number for the cover page may be suppressed and need not appear on the cover page. When a document is filed in both paper form and electronic form, the pagination in both versions must comply with this paragraph.

(3) *Bookmarking*: An electronic bookmark is a descriptive text link that appears in the bookmarks panel of an electronic document. Each electronic document must include an electronic bookmark to each heading, subheading, and the first page of any component of the document, including any table of contents, table of authorities, petition, verification, memorandum, declaration, certificate of word count, certificate of interested entities or persons, proof of service, exhibit, or attachment. Each electronic bookmark must briefly describe the item to which it is linked. For example, an electronic bookmark to a heading must provide the text of the heading, and an electronic bookmark to an exhibit or attachment must include the letter or number of the exhibit or attachment and a brief description of the exhibit or attachment. An electronic appendix must have bookmarks to the indexes and to the first page of each separate exhibit or attachment. Exhibits or attachments within an exhibit or attachment must be bookmarked. All bookmarks must be set to retain the reader's selected zoom setting.

(4) *Protection of sensitive information*: Electronic filers must comply with rules 1.201, 8.45, 8.46, 8.47, and 8.401 regarding the protection of sensitive information, except for those requirements exclusively applicable to paper form.

(5) *Size and multiple files*: An electronic filing may not be larger than 25 megabytes. This rule does not change the limitations on word count or number of pages otherwise established by the California Rules of Court for documents filed in the court. Although certain provisions in the California Rules of Court require volumes of no more than 300 pages (see, e.g., rules 8.124(d)(1), 8.144(b)(6), 8.144(g)), an electronic filing may exceed 300 pages so long as its individual components comply with the 300-page volume requirement and the electronic filing does not exceed 25 megabytes. If a document exceeds the 25-megabyte file-size limitation, the electronic filer must submit the document in more than one file, with each file 25 megabytes or less. The first file must include a master chronological and alphabetical index stating the contents for all files. Each file must have a cover page stating (a) the file number for that file and the total number of files for that document, (b) the volumes contained in that file, and

(c) the page numbers contained in that file. (For example: File 2 of 4, Volumes 3-4, pp. 301-499.) In addition, each file must be paginated consecutively across all files in the document, including the cover pages for each file. (For example, if the first file ends on page 300, the cover of the second file must be page 301.) If a multiple-file document is submitted to the court in both electronic form and paper form, the cover pages for each file must be included in the paper documents.

(6) *Manual Filing*:

(A) When an electronic filer seeks to file an electronic document consisting of more than 10 files, or when the document cannot or should not be electronically filed in multiple files, or when electronically filing the document would cause undue hardship, the document must not be electronically filed but must be manually filed with the court on an electronic medium such as a flash drive, DVD, or compact disc (CD). When an electronic filer files with the court one or more documents on an electronic medium, the electronic filer must electronically file, on the same day, a "manual filing notification" notifying the court and the parties that one or more documents have been filed on electronic media, explaining the reason for the manual filing. The electronic media must be served on the parties in accordance with the requirements for service of paper documents. To the extent practicable, each document or file on electronic media must comply with the format requirements of this rule.

(B) Electronic media files such as audio or video must be manually filed. Audio files must be filed in .wav or mp3 format. Video files must be filed in .avi or mp4 format.

(C) If manually filed, photographs must be filed in .jpg, .png, .tif, or .pdf format.

(D) If an original electronic media file is converted to a required format for manual filing, the electronic filer must retain the original.

(7) *Page size*: All documents must have a page size of 8-1/2 by 11 inches.

(8) *Color*: An electronic document with a color component may be electronically filed or manually filed on electronic media, depending on its file size. An electronic document must not have a color cover.

(9) *Cover or first-page information*:

(A) Except as provided in (B), the cover – or first page, if there is no cover – of every electronic document filed in a reviewing court must include the name, mailing address, telephone number, fax number (if available), email address (if available), and California State Bar number of each attorney filing or joining in the document, or of the party if he or she is unrepresented. The inclusion of a fax number or email address on any electronic document does not constitute consent to service by fax or email unless otherwise provided by law.

(B) If more than one attorney from a law firm, corporation, or public law office is representing one party and is joining in the document, the name and State Bar number of each attorney joining in the electronic document must be provided on the cover. The law firm, corporation, or public law office representing each party must designate one attorney to receive notices and other communication in the case from the court by placing an asterisk before that attorney's name on the cover and must provide the contact information specified under (A) for that attorney. Contact information for the other attorneys from the same law firm, corporation, or public law office is not required but may be provided.

(b) Additional formatting requirements applicable to documents prepared for electronic filing in the first instance in a reviewing court

(1) *Font*: The font style must be a proportionally spaced serif face. Century Schoolbook is preferred. A sans-serif face may be used

for headings, subheadings, and captions. Font size must be 13-points, including in footnotes. Case names must be italicized or underscored. For emphasis, italics or boldface may be used or the text may be underscored. Do not use all capitals (i.e., ALL CAPS) for emphasis.

(2) *Spacing*: Lines of text must be 1.5 spaced. Footnotes, headings, subheadings, and quotations may be single-spaced. The lines of text must be unnumbered.

(3) *Margins*: The margins must be set at 1-1/2 inches on the left and right and 1 inch on the top and bottom. Quotations may be block-indented.

(4) *Alignment*: Paragraphs must be left-aligned, not justified.

(5) *Hyperlinks*: Hyperlinks to legal authorities and appendixes or exhibits are encouraged but not required. However, if an electronic filer elects to include hyperlinks in a document, the hyperlink must be active as of the date of filing, and if the hyperlink is to a legal authority, it should be formatted to standard citation format as provided in the California Rules of Court.

(c) Additional formatting requirements for certain electronic documents

(1) *Brief*: In addition to compliance with this rule, an electronic brief must also comply with the contents and length requirements stated in rule 8.204(a) and (c). The brief need not be signed. The cover must state:

(A) The title of the brief;

(B) The title, trial court number, and Court of Appeal number of the case;

(C) The names of the trial court and each participating trial judge; and

(D) The name of the party that each attorney on the brief represents.

(2) *Request for judicial notice or request, application, or motion supported by documents*: When seeking judicial notice of matter not already in the appellate record, or when a request, application, or motion is supported by matter not already in the appellate record, the electronic filer must attach a copy of the matter to the request, application, or motion, or an explanation of why it is not practicable to do so. The request, application, or motion and its attachments must comply with this rule.

(3) *Appendix*: The format of an appendix must comply with this rule and rule 8.144 pertaining to clerks' transcripts.

(4) *Agreed statement and settled statement*: The format for an agreed statement or a settled statement must comply with this rule and rule 8.144.

(5) *Reporter's transcript and clerk's transcript*: The format for an electronic reporter's transcript must comply with Code of Civil Procedure section 271 and rule 8.144. The format for an electronic clerk's transcript must comply with this rule and rule 8.144.

(6) *Exhibits*: Electronic exhibits must be submitted in files no larger than 25 megabytes, rather than as individual documents.

(7) *Sealed and confidential records*: Under rule 8.45(c)(1), electronic records that are sealed or confidential must be filed separately from publicly filed records. If one or more pages are omitted from a record and filed separately as a sealed or confidential record, an omission page or pages must be inserted in the publicly filed record at the location of the omitted page or pages. The omission page or pages must identify the type of page or pages omitted. Each omission page must be paginated consecutively with the rest of the publicly filed record. Each single omission page or the first omission page in a range of omission pages must be bookmarked and must be listed in any indexes included in the publicly filed record. The PDF counter for each omission page must match the page number of the page omitted from the publicly filed record. Separately-filed sealed or confidential records must comply with this rule and rules 8.45, 8.46, and 8.47.

(d) Other formatting rules

This rule prevails over other formatting rules.

Petitions for Rehearing

Effective January 1, 2020, the following provision regarding the page limit for petitions for rehearing was added to rule 8.204(c):

(5) A petition for rehearing or an answer to a petition for rehearing produced on a computer must not exceed 7,000 words, including footnotes. A petition or answer produced on a typewriter must not exceed 25 pages.