First District Appellate Project
Training Seminar
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Recent Legal Developments in Substantive Law and Appellate Practice

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FIRST DISTRICT APPELLATE PROJECT

I. RECENTLY DECIDED CASES OF INTEREST

Competency to Stand Trial

Initial Duty to Suspend Proceedings: *People v. Johnson* (2018) 21 Cal.App.5th 267. Federal constitutional principles of due process and California statutory law make it clear that a trial court has no discretion but to suspend criminal proceedings when presented with substantial evidence that a defendant is not competent to stand trial. Faced with a defendant who "engaged in multiple acts of self-mutilation, shouted to voices in his head, could not be quieted during court proceedings, defecated in his pants, was placed in a medical unit at the prison where he was given medication and was put on a suicide watch," the Third District Court of Appeal found substantial evidence he was not competent to stand trial. The trial court, therefore, erred when it failed to suspend proceedings despite the repeated expressions of doubt voiced by the defendant's lawyer as to his client's mental competence throughout the trial.

Duty to Suspend Proceedings for New Competency Investigation Based on Changed Circumstances: *People v. Rodas* (2018) 6 Cal.5th 219. The trial court erred by failing to suspend proceedings after learning that the formerly incompetent defendant had stopped taking his medications. When a formerly incompetent defendant has been restored to competence solely or primarily through the administration of medication, evidence that the defendant is no longer taking his medication and is again showing signs of incompetence will generally establish a change in circumstances that requires formal investigation before the trial can proceed. The trial court's failure to suspend proceedings under these circumstances violated defendant's due process rights.

Sufficiency of the Evidence in Support of a Competency Finding: *People v. Jackson* (2018) 22 Cal.App.5th 374. The Fourth District Court of Appeal found that a report prepared nine months before the trial court found the defendant competent to stand trial did not amount to substantial evidence of mental competence, particularly where earlier reports on which the trial court relied to find the defendant incompetent indicated the defendant's development disability was a chronic condition that "that limited his ability to grasp and retain information." Moreover, the nine-month-old report itself

relied on a report prepared eleven months earlier, thus making the latter report's contents truly stale by twenty months. The Court of Appeal also "conclude[d] the evidence that [the state hospital] staff drilled Jackson in how to answer the most basic questions about the judicial process and he learned to parrot the expected responses after numerous repetitions did not provide substantial evidence Jackson was competent to stand trial."

Feasibility of a Retrospective Competency Hearing: *In re Galaviz* (2018) 23 Cal.App.5th 491. In 1996, petitioner was found not guilty by reason of insanity of multiple third-strike offenses and committed to the state hospital for a term of 60-years-to-life. In advance of the sanity determination, an expert appointed to evaluate petitioner's sanity documented the then-current symptoms of his mental illness – including "bizarre" and "peculiar" thinking concerning his home on another galaxy – and questioned petitioner's "ability to provide meaningful information and to rationally cooperate with others." Although petitioner had been found incompetent (and restored to competency) earlier in the proceedings, no new competency evaluation was ordered in response to the sanity report. In 2014, petitioner filed a habeas petition in trial court alleging he was mentally incompetent when he entered his plea. The trial court denied his petition, and he filed a new petition in the Court of Appeal. The Fourth District Court of Appeal concluded the sanity report – when read in concert with the prior competency reports – amounted to substantial evidence that petitioner was not competent to stand trial (or enter a plea). Therefore, the trial court erred back in 1996 by not suspending criminal proceedings. Furthermore, the Court of Appeal concluded that the prosecution in the instant habeas proceedings failed to carry its burden of demonstrating that a retrospective competency hearing was feasible in light of the passage of time, the availability of contemporaneous medical evidence, statements by petitioner in the trial record, and the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with petitioner before and during trial. The Court of Appeal granted the habeas petition and vacated the commitment order with directions for the trial court to allow petitioner to withdraw his plea.

The Fourth Amendment Exclusion of Illegally Obtained Evidence

Cell-Site Location Information: *Carpenter v. United States* (2018) 585 U.S.___ [138 S.Ct. 2206]. In a sharply divided 5-4 decision, the United States Supreme Court addressed "whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements." The majority opinion, authored by Chief Justice Roberts, answered this question in the affirmative, holding that the government "conducts a search under the Fourth Amendment" when it accesses a suspect's historical cell-site location information, i.e., "wireless carrier cell-site records revealing the location of [the suspect's] cell phone whenever it made or received calls."

The Smell of Marijuana and Probable Cause to Search a Vehicle After Proposition 64: *People v. Fews* (2018) 27 Cal.App.5th 553. Even after the passage of Proposition 64, which decriminalized the possession of small amounts of marijuana, police were justified in searching a vehicle that smelled like marijuana and was present in a high crime area. Division One of the First District Court of Appeal reasoned that marijuana possession and use is still highly circumscribed by law, even after the passage of Proposition 64 (also known as the "Control, Regulate, and Tax Adult Use of Marijuana Act"). Thus, the odor and presence of marijuana in a vehicle driven in a high crime area, combined with vehicle occupants' evasive conduct, was reasonably suggestive of unlawful drug possession and transport, thereby justifying a search of the car and frisk of the driver.

Warrantless Blood Draw Incident to Arrest: *People v. Gutierrez* (2018) 27 Cal.App.5th 1155. If a DUI suspect freely chooses a blood test over a breath test, the arresting officer does not need a warrant for the blood draw. Here, a police officer arrested the defendant for drunk driving and informed him that he had to submit to a breath or blood test to measure blood alcohol content. The defendant chose a blood test. The officer was then not required to get a search warrant to draw the blood because it qualified as a search incident to arrest.

Defense Burden to Establish Unreasonableness of Blood Draw: *People v. Fish* (2018) 29 Cal.App.5th 462. When a valid search warrant authorizes a blood draw, the burden is on the defendant to establish that the manner in which the blood was drawn was unreasonable for

Fourth Amendment purposes.

Probation Searches and Prolonged Detentions: *People v. Gutierez* (2018) 21 Cal.App.5th 1146. Police violated the defendant's Fourth Amendment rights when they detained him for between 30 and 50 minutes in connection with the probation search of a third party. Here, the defendant was at his friend's house. The police arrived at the house to conduct a routine, random probation compliance search of the friend. Police ordered the defendant to leave the house, patted him down for weapons, and directed him to sit on the porch for the duration of the search. During that time, a deputy also ran a warrant check on him and received erroneous information that he was on probation, causing the deputy to search him more thoroughly. The Fifth District Court of Appeal held that the detention was unduly prolonged. It reasoned that the search of the defendant bore no relation to the search of his friend, and that even if a limited detention were justified for the purpose of ensuring officer safety, the detention continued for 30 minutes after police determined he was unarmed.

Dog Sniffs and Prolonged Detentions: *People v. Vera* (2018) 28 Cal.App.5th 1081. A dog sniff did not unduly prolong the detention where the dog alerted to the presence of drugs before the officer issued the citation. Here, an officer pulled the defendant over due to a tinted window infraction. On appeal, the defendant argued the subsequent dog sniff unduly prolonged the traffic stop, requiring suppression of the evidence under *Rodriguez v. United States* (2015) 135 S.Ct. 1609. However, because the dog alerted to the presence of drugs *before* the officer could issue the traffic citation, the Fourth District Court of Appeal found that the use of the dog did not unconstitutionally extend the detention. Moreover, the record did not show the officer took longer than was reasonably necessary to write the citation.

Detention Following a Vague 911 Call: *People v. Thomas* (2018) 29 Cal.App.5th 1107. Officers lacked reasonable suspicion to pat search the defendant where a 911 call two-and-a-half hours before the search provided only a vague description of a male who was harassing customers in a business 80 yards from where the officers detained the defendant. The Third District Court of Appeal based its decision on the fact that the description of the suspect was extremely vague, inconsistent with defendant, and did not include any reference to an actual crime. Moreover, because the officers were unaware that

defendant had a probation search condition at the time they detained and searched him, they could not rely on the condition to justify the search and seizure.

Evidence Retrieved From Social Media: *People v. Pride* (Jan. 10, 2019, D073360) ___Cal.App.5th___ [2019 Cal.App.LEXIS 34]. The defendant's Fourth Amendment rights were not violated when a police detective posed as a "friend" to gain warrantless access to the defendant's social media account and obtain a video the defendant had posted of himself wearing a gold chain taken in a recent robbery. The defendant argued that he had a reasonable expectation of privacy in his social media posts because the platform in question "was intended for private messages" that "disappear after [being] viewed by intended recipients." The Fourth District Court of Appeal concluded the defendant "assumed the risk that the account for one of his 'friends' could be an undercover profile for a police detective or that any other 'friend' could save and share the information with government officials."

DNA Collection Following Arrest: *People v. Buza* (2018) 4 Cal.5th 658. The act of collecting a DNA sample from a person validly arrested on probable cause for a serious offense does not violate the federal or state constitutions. Here, the defendant was forced to provide a DNA cheek swab sample pursuant to California's DNA Act upon being booked for felony arson. The California Supreme Court relied on *Maryland v. King* (2013) 569 U.S. 435, which upheld a similar statute in Maryland against a Fourth Amendment challenge as a legitimate police booking procedure. Though the California Supreme Court acknowledged differences between the California and Maryland laws "may be relevant in another case involving a differently situated arrestee," it found no constitutional violation on the facts before it.

Exclusion of Unlawfully Obtained DNA Sample: *People v. Marquez* (Jan. 15, 2019, G048762) ___Cal.App.5th___ [2019 Cal. App. LEXIS 48]. On remand from the California Supreme Court post-*Buza*, the Fourth District Court of Appeal found a defendant's DNA sample had been unlawfully seized under the Fourth Amendment due to the absence of evidence that he had been validly arrested or that his DNA was collected as part of a routine booking procedure. Nevertheless, the Court of Appeal refused to order the DNA evidence suppressed under the Fourth Amendment exclusionary rule in a later criminal

proceeding, finding the unlawful collection of the defendant's DNA was sufficiently attenuated from the subsequent cold hit linking him to a new crime.

The Fifth Amendment and Suppression of Statements to the Police

Custodial Interrogations: *People v. Delgado* (2018) 27 Cal.App.5th 1092. Defendant was in custody for *Miranda* purposes where, after his arrest, one officer said he was free to leave but another told him they had to extract data from his cellphone first. Prior to these conversations, the 16-year-old defendant was arrested, handcuffed, shackled to the floor of an interrogation room, and left alone for 90 minutes. Under the circumstances, the Third District Court of Appeal found that no reasonable person would have felt free to leave.

Invocation of Right to Be Silent: *People v. Case* (2018) 5 Cal.5th 1. The police violated the defendant's rights under *Miranda v. Arizona* (1966) 384 U.S. 436 by continuing to question him after he informed the officer that he did not want to talk about a robbery or murder. While the officer interpreted this to mean that the defendant was willing to talk about other things, the California Supreme Court found that the defendant's statement was a clear invocation of his right to be silent, particularly since the robbery-murder was the only topic of discussion. However, it ultimately held that any error was harmless beyond a reasonable doubt because the improperly obtained evidence had slight probative value compared to the overwhelming evidence of the defendant's guilt.

The Sixth Amendment Right to Counsel

Retained Counsel of Choice: *People v. Lopez* (2018) 22 Cal.App.5th 40. The defendant's request right before trial to discharge retained counsel and retain a different attorney was timely despite the fact that the trial had been subject to two years of continuances. Division One of the First District Court of Appeal held that "a court cannot *assume* that the discharge of counsel would require 'substantial delay in the administration of justice' based only on the request's timing" and refused to hold that the trial court here made such an implied finding supported by substantial evidence. The improper denial of a request to discharge retained counsel is subject to automatic reversal on appeal.

Jury Selection

***Batson/Wheeler* and Sexual Orientation:** *People v. Douglas* (2018) 22 Cal.App.5th 1162. A prosecutor's exclusion of two jurors because they were openly gay was invidious discrimination and required reversal – even if the prosecutor had other, facially valid reasons for challenging both jurors. Here, one of the prosecution's witnesses was a closeted gay man. During voir dire, the prosecution exercised its peremptory challenges against two openly gay members of the venire, telling the judge she was concerned they would be biased against her witness. In addition, she pointed to the fact that one of the prospective jurors was close friends with a public defender in that district, while the other demonstrated bias against the prosecution in her demeanor. The Third District Court of Appeal held that, although the U.S. Supreme Court has not extended *Batson* to sexual orientation, exclusion of jurors on this basis runs afoul of *Batson* and *Wheeler* because the prosecutor based her decision on "impermissible group assumptions, unsupported by the record and based solely on the two jurors' sexuality." The Ninth Circuit reached the same conclusion in *SmithKline Beecham Corp. v. Abbott Labs.* (9th Cir. 2014) 740 F.3d 471, 484.

Waiver of Trial Rights

Validity of Jury Trial Waiver: *People v. Jones* (2018) 26 Cal.App.5th 420. Relying on the California Supreme Court's recent decisions in *People v. Sivongxxay* (2017) 3 Cal.5th 151 and *People v. Daniels* (2017) 3 Cal.5th 961, the Second District Court of Appeal concluded the defendant's waiver of her right to a jury trial was not knowing, intelligent, and voluntary and, therefore, reversed her second degree murder conviction. Where the record did not affirmatively establish that either the trial court or the defendant's counsel had advised the defendant on the nature of a jury trial, the defendant's bare acknowledgment that she understood her right to a jury trial was inadequate to show her waiver of a jury trial was knowing and intelligent. (See also *People v. Blancett* (2017) 15 Cal.App.5th 1200 [applying a similar analysis and reversing an extended mentally disordered offender civil commitment due to an invalid jury trial waiver].)

Mid-Trial Stipulation to All Elements of a Charged Offense in the Absence of a Waiver of the Defendant's Trial Rights: *People v. Farwell* (2018) 5 Cal.5th 295. A stipulation that admits all of the elements necessary for a conviction of a charged crime is tantamount to a guilty plea, which cannot be accepted absent an on-the-record demonstration that the defendant voluntarily and intelligently waived his or her constitutional trial rights. Where the record is silent as to a waiver, the trial court's failure to advise the defendant prior to a plea of his or her *Boykin*/*Tahl* rights is not reversible error if the record affirmatively shows the defendant's waiver was nonetheless knowing and voluntary under the totality of the circumstances. Here, the California Supreme Court found a stipulation during a gross vehicular manslaughter trial that the defendant had knowingly driven with a suspended license in violation of Vehicle Code section 14601.1 was not knowing and intelligent, as there was "no affirmative evidence that [the defendant] understood his stipulation would conclusively establish all of the elements of the misdemeanor crime and make the guilty verdict a foregone conclusion."

Defense Counsel's Mid-Trial Concession of Guilt Not the Equivalent of Guilty Plea Requiring a Waiver of Rights: *People v. Lopez* (Jan. 9, 2019, B282867) ___ Cal.App.5th ___ [2019 Cal.App.LEXIS 22]. Defense counsel's concession during his opening and closing arguments that the defendant was guilty of a hit-and-run offense was not tantamount to a guilty plea without a waiver of jury trial rights. Here, the defendant was convicted of second degree murder and felony hit and run after colliding with a motorcycle while driving drunk. During closing argument, defense counsel conceded the hit and run and focused on the murder count. The Second District Court of Appeal held that this concession was not the equivalent of a guilty plea because the record indicated no surrender of the defendant's trial rights and contained no evidence that the defendant objected to his counsel's decision to concede guilt. In so ruling, the Court of Appeal distinguished *People v. Farwell* (2018) 5 Cal.5th 295 and *McCoy v. Louisiana* (2018) 584 U.S. ___ [138 S.Ct. 1500], in which the United States Supreme Court had just held that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty."

Admission of Hearsay and Sixth Amendment Right to Confrontation

Admissibility of Hearsay Statements Made By Murder Victim: *People v. Kerley* (2018) 23 Cal.App.5th 513. Under the forfeiture by wrongdoing doctrine (Evid. Code, § 1390), hearsay statements that would ordinarily violate the Sixth Amendment Confrontation Clause are admissible where the defendant murdered the declarant at least in part to prevent her from reporting instances of abuse to the police and testifying against him in a pending domestic violence prosecution.

Prohibition Against the Admission of Expert Testimony Relating Case-Specific Hearsay Not Retroactive to Final Judgments: *In re Thomas* (2018) 30 Cal.App.5th 744. The new rule announced in *People v. Sanchez* (2016) 63 Cal.4th 665, which prohibits expert witnesses from relating case-specific hearsay in explaining the basis for their opinions, is not retroactive to final judgments. To support a gang conviction, the People offered a gang expert whose testimony included testimonial, out-of-court statements about the specific facts of the defendant's case. The Fourth District Court of Appeal affirmed the judgment in a pre-*Sanchez* opinion. In a subsequent petition for writ of habeas corpus, the defendant challenged the admissibility of the gang expert's testimony, arguing *Sanchez* was retroactive to final judgments. The Fourth District Court of Appeal concluded that the *Teague v. Lane* (1989) 489 U.S. 288 retroactivity standard governing federal habeas corpus petitions does not govern California habeas corpus petitions, but determined *Sanchez* is not retroactive to final judgments under the three-factor analysis set out by the California Supreme Court in *In re Johnson* (1970) 3 Cal.3d 404 and other decisions.

Failure to Object to Case-Specific Hearsay: *People v. Yates* (2018) 25 Cal.App.5th 474. Trial counsel in a sexually violent predator (SVP) civil commitment proceeding was prejudicially ineffective when he failed to object, under *People v. Sanchez* (2016) 63 Cal.4th 665, to a "massive amount" of case-specific hearsay recounted by the prosecution's experts. Though trial counsel raised a *Sanchez* objection in limine, the trial court "never clearly ruled" on the issue and stated on the record, "if it comes up, counsel, I'm sure you'll object." However, trial counsel failed to object on that basis. The Second District Court of Appeal found there was no satisfactory explanation for the failure to object, and that the hearsay testimony was "unquestionably

prejudicial," stating, "[w]ithout the inadmissible hearsay, the foundation for the experts' opinions goes up in smoke, and with it most of the evidence support of the jury's SVP finding." (See also *People v. Flint* (2018) 22 Cal. App. 5th 983 [finding no forfeiture despite failure to object on *Sanchez* grounds in the trial court on the theory that such an objection would have been futile in light of then-controlling case law].)

Admission of Prior Acts Evidence

Impeachment Evidence and the Right to Testify: *People v. Hall* (2018) 23 Cal.App.5th 576. The trial court abused its discretion and violated the defendant's Fifth, Sixth, and Fourteenth Amendment rights by reversing its earlier ruling excluding evidence of a past crime committed by the defendant after the defendant started to testify. Here, the trial court first ruled that evidence the defendant had previously been convicted of brandishing a knife was inadmissible and prejudicial. Later, when the defendant took the stand in reliance on that ruling, the court announced that the prosecution could bring up the knife-brandishing incident for impeachment purposes – even though the defendant had not explicitly put his character for peacefulness at issue. Division One of the First District Court of Appeal ruled this was prejudicial error, reasoning the court's mid-testimony reversal of its previous ruling "impermissibly burdened the defendant's exercise of his right to testify without impeachment by evidence the court had already deemed more prejudicial than probative, deprived him of the right to counsel's intelligent assistance on whether to exercise his rights to testify or not to testify, and impaired his right to a fair trial."

Admission of Remote and Dissimilar Prior Conviction: *People v. Williams* (2018) 23 Cal.App.5th 396. In a trial arising from the stabbing death of the defendant's wife, it was reversible error to admit evidence of a 23-year-old conviction for shooting his mother-in-law with intent to kill because the prior crime was too dissimilar and remote, and likewise was heavily relied upon by the prosecution to bolster an otherwise weak case. The Third District Court of Appeal found the error was prejudicial because it was reasonably probable the defendant would have achieved a more favorable result had the evidence been excluded.

Admission of Uncharged Prior Sex Offenses Pursuant to Evidence Code Section 1108 Not a Due Process Violation: *People v. Phea* (2018) 29 Cal.App.5th 583. The admission of uncharged prior sex offenses to establish a propensity to commit the charged sex offenses under Evidence Code section 1108 does not violate due process. Here, the defendant was convicted of multiple sex offenses involving minors. He argued the introduction at trial of his prior sex offenses under Evidence Code section 1108 violated his due process rights as articulated in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378. However, the Third District Court of Appeal ruled *McKinney* – a murder case involving the admission of character evidence but not the admission of uncharged prior sex offenses as propensity evidence – has no application in the context of Evidence Code section 1108 evidence, noting that the Ninth Circuit found *McKinney* inapplicable when considering a federal statutory analog of Evidence Code section 1108 in *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1026-1027.

Admission of Uncharged Acts of Domestic Violence: *People v. Megown* (2018) 28 Cal.App.5th 157. In domestic violence prosecutions, Evidence Code section 1109 permits the introduction of uncharged prior acts of domestic violence to prove the defendant's propensity to commit acts of domestic violence. Here, the defendant was charged with beating his cohabitant, a crime of domestic violence. When his cohabitant's mother came to her aid after a beating, the defendant pointed his gun at both of them and threatened to kill them. At trial, the defendant argued evidence of his past uncharged acts of domestic violence against his cohabitant could not be used to prove the threat and assault crimes he allegedly committed *against her mother* because she was not within the class of persons to whom Evidence Code section 1109 applies. However, because the crimes against the mother took place in his cohabitant's presence, the Fourth District Court of Appeal concluded they were crimes "involving" domestic violence for purposes of Evidence Code section 1109.

Homicide Offenses

Implied Malice *Watson* Murder: *People v. Wolfe* (2018) 20 Cal.App.5th 673. In *People v. Watson* (1981) 30 Cal.3d 290, the California Supreme Court held that in homicide cases involving vehicles, the prosecution is not limited to charging vehicular manslaughter, reasoning that second degree murder may be charged if

the facts surrounding the offense support a finding of implied malice. Here, in reviewing a second degree murder conviction in a case arising out of a drunk driving incident, the Fourth District Court of Appeal concluded the evidence was sufficient to find implied malice under Penal Code section 188 because the defendant's subjective awareness of the dangers of drunk driving were established by her prior attendance at a DUI victim impact panel, her acknowledgment when renewing her driver's license of the consequences of driving under the influence, and the fact that she had previously called taxis to avoid driving home from bars. In addition, the Court of Appeal found there was no equal protection violation inherent in the fact that in homicide prosecutions predicated on the use of a vehicle trial courts are under no duty to instruct the jury on vehicular manslaughter, which is a lesser related but not a lesser included offense of *Watson* murder.

Voluntary Intoxication and Imperfect Self-Defense: *People v. Soto* (2018) 4 Cal.5th 968. In a murder prosecution, a defendant may not present evidence of voluntary intoxication to establish a claim of imperfect-self defense to negate either express or implied malice. A defendant's belief in the need to act in self-defense is not a "required specific intent," as that phrase is used in Penal Code section 29.4, which governs the admissibility of voluntary intoxication evidence.

Failure to Instruct on Malice Murder and Its Lesser Included Offenses: *People v. Gonzalez* (2018) 5 Cal.5th 186. A jury convicted defendants of first degree felony murder and found true a robbery-murder special circumstance allegation after a trial at which the court did not instruct the jury on malice murder or on any of its lesser included offenses. Although the trial court erred in failing to instruct on malice murder and any of its lesser included offenses and related defenses, the Supreme Court deemed the error harmless under *People v. Watson* (1956) 46 Cal.2d 818 in light of the jury's true finding on the robbery-murder special circumstance allegation. According to the Supreme Court, because the "special circumstance finding requires a jury to find that the killing occurred during the commission of a felony," the verdict "necessarily demonstrates the jury's determination that the defendant committed felony murder rather than a lesser form of homicide." The Supreme Court left open the question whether *People v. Campbell* (2015) 233 Cal.App.4th 148 was correctly decided.

Felony Murder and Reckless Indifference to Human Life: *In re Bennett* (2018) 26 Cal.App.5th 1002. In the absence of any evidence an aider and abettor in an armed robbery was a major participant who acted with reckless indifference to human life, the California Supreme Court's decisions in *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522 compelled the reviewing habeas court to set aside the true finding on a robbery-murder special circumstance allegation and vacate the defendant's LWOP sentence. The Fourth District Court of Appeal found no evidence of anything the defendant "did, or did not do, that elevated the risk to human life beyond those risks inherent in any armed robbery. The evidence showed only a garden-variety armed robbery where death was at most a known possibility, but not a probability."

Retroactivity of Senate Bill No. 1437: *People v. Martinez* (Jan. 24, 2019, B287255) ___ Cal.App.5th ___ [2019 Cal.App.LEXIS 68]. Effective January 1, 2019, Senate Bill No. 1437 "amended the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) Senate Bill No. 1437 also created a statutory mechanism – Penal Code section 1170.95 – for inmates convicted of felony murder or murder under a natural probable consequence theory to petition to have their murder convictions vacated and to be resentenced. The Second District Court of Appeal concluded that Senate Bill No. 1437 does not apply retroactively to non-final judgments on appeal under *In re Estrada* (1965) 63 Cal.2d 740. Instead, Penal Code section 1170.95 is the exclusive vehicle for retroactively setting aside a murder conviction pursuant to Senate Bill No. 1437. In reaching this conclusion, the Court of Appeal largely relied on *People v. DeHoyos* (2018) 4 Cal.5th 594 and *People v. Conley* (2016) 63 Cal.4th 646, in which the California Supreme Court held that Proposition 47 and Proposition 36, respectively, do not apply retroactively on appeal to non-final judgments due to the availability of relief via resentencing petitions. At the same time, in recognition that "some defendants may be able to present a particularly strong case for relief under the changes worked by Senate Bill 1437 and wish to seek that relief immediately rather than await the full exhaustion of their rights to directly appeal their conviction," the Court of Appeal noted that "a defendant retains the option of seeking to stay his or her

pending appeal to pursue relief under Senate Bill 1437 in the trial court" under the authority of *People v. Awad* (2015) 238 Cal.App.4th 215, 222, and Penal Code section 1260.

Transferred Intent and the Lying-in-Wait Special Circumstance: *People v. Robbins* (2018) 19 Cal.App.5th 660. Under the transferred intent doctrine, when a defendant shoots with the intent to kill a particular person but hits and kills an unintended target instead, the defendant is subject to the same criminal liability for the killing of unintended target as he or she would have been had he or she killed the intended target. Here, the Fourth District Court of Appeal held that the prosecution may rely on the transferred intent doctrine when attempting to prove a lying-in-wait special circumstance allegation. The Court of Appeal reasoned that because the lying-in-wait special circumstance has been interpreted to require proof of "[a] substantial period of watching and waiting," which is the functional equivalent of premeditation and deliberation, to which transferred intent unquestionably applies, the doctrine applies to the lying-in-wait special circumstance as well.

Non-Homicide Offenses

Assault with a Deadly Weapon: *In re B.M.* (2018) 6 Cal.5th 528. For an non-inherently dangerous object to qualify as a deadly weapon under Penal Code section 245, subdivision (a)(1), the defendant must have used the object in a manner not only capable of producing but also *likely to produce* death or great bodily injury. Here, the defendant assaulted the victim with a butter knife, slashing at his legs. In reversing the juvenile court's finding that the minor committed assault with a deadly weapon, the California Supreme Court explained that a butter knife is not a deadly weapon as a matter of law; thus, the determination of whether the knife qualifies as a deadly weapon "must rest on evidence of how the defendant actually 'used' the object." The Supreme Court then found insufficient evidence to support a finding that appellant used the butter knife a manner likely to produce death or great bodily injury.

Pandering (When the Victim is Already a Prostitute): *People v. Chatman* (2019) 30 Cal.App.5th 989. In a prosecution for pandering in violation of Penal Code section 266i, subdivision (a)(1), which makes it illegal to "procur[e] another person for the purpose of prostitution," the

government is not required to "demonstrate a demonstrable change in the prostitute's business model," even where the defense is that the alleged prostitute was already a prostitute before being "procured" by the defendant.

Human Trafficking: *People v. Shields* (2018) 23 Cal.App.5th 1242. The absence of an actual victim precludes a conviction for the completed offense of human trafficking of a minor (Pen. Code, § 236, subd. (c)(1)). Here, the defendant was convicted of trafficking a minor for a commercial sex act after he began chatting on social media with a Solano County detective posing as a 17-year-old girl. Division Four of the First District Court of Appeal reversed the conviction, reasoning that the third element of the offense (that the victim is a person under the age of 18) was not satisfied.

Resisting a Police Officer and the Subsequent Use of Excessive Force: *People v. Williams* (2018) 26 Cal.App.5th 71. If a defendant delays, obstructs, or resists a police officer who is engaged in the lawful performance of his or her duties, the defendant may be convicted of resisting arrest even if the officer subsequently uses excessive force. During jury deliberations in the instant case, the jury submitted a written question asking, "If a peace officer is correctly conducting duties [and] a [Penal Code section 148, subdivision (a)(1),] violation occurs [and], subsequent to the violation, excessive force is used, does this invalidate the [Penal Code section 148, subdivision (a)(1),] violation?" The trial court responded, "No." The Sixth District Court of Appeal found no instructional error, reasoning that even if the jury found that the victim-officer had used excessive force, "[t]he use of excessive force after the completed [Penal Code] section 148(a)(1) violation would not invalidate the completed [Penal Code] section 148(a)(1) violation."

Resisting a Police Officer and the Lawful Performance of Duties Requirement: *In re R.W.* (2018) 24 Cal.App.5th 145. A sheriff's deputy was lawfully performing her duties when she forcibly prevented the minor from leaving the sheriff's department after the minor was released from detention but instructed to wait for her mother to come pick her up. When the minor became upset and attempted to walk out of the room, the deputy and two of her colleagues forcibly restrained the minor, who "pulled away" and "resisted." The juvenile court subsequently found true the allegation that the minor

resisted an officer in violation of Penal Code section 148, subdivision (a)(1). In affirming the juvenile court's finding, the Fourth District Court of Appeal found the minor was "in custody . . . solely for her safety until her mother arrived, as required under department policy," and that "nothing in the language of [Welfare and Institutions Code] section 626 requir[es] the release of a minor to be unconditional."

Aggravated Sexual Assault of a Child – Oral Copulation: *People v. Zepeda* (2018) 26 Cal.App.5th 211. The trial court did not err in instructing the jury that it was for them to decide whether oral copulation (Pen. Code, § 269, subd. (a)(4)) can occur over the top of clothing. Division Four of the First District Court of Appeal noted that "clothing may consist of something as flimsy as nylon pantyhose or underwear, or as substantial as bomb disposal clothing. Whether the clothing prevented 'contact' may properly be considered on a case-by-case basis."

Juror Misconduct

Failure to Disclose History of Abuse: *In re Manriquez* (2018) 5 Cal.5th 785. On habeas review in this capital murder case, the California Supreme Court found no prejudicial juror misconduct where the jury foreperson failed to disclose a history of childhood physical and sexual abuse. At an evidentiary hearing held after issuance of an order to show cause, the juror testified that she had not disclosed her childhood experiences, either because they had not come to mind at the time or because they had seemed beyond the scope of the questions. In finding no substantial likelihood of actual bias, the Supreme Court highlighted the fact that the juror's nondisclosure was unintentional. It also pointed out that jurors are generally permitted to rely on life experiences when evaluating evidence and there was no indication that the juror's childhood experiences caused her to find any class of witnesses not credible. Further, there was no basis to automatically ascribe any significance to her position as foreperson.

Outside Discussions: *People v. Hem* (Jan. 11, 2019, No. C086016) ___Cal.App.5th___ [2019 Cal.App.LEXIS 40]. The trial court was required to inquire into a report of juror misconduct where there was undisputed evidence that four members of a deliberating jury were overheard in the hallway outside the courtroom discussing the case. Some of the overheard comments indicated that the jurors were

considering punishment and were contemplating a compromise verdict. The trial court declined defense counsel's request to directly question the jurors to ascertain the scope of the misconduct. The Third District Court of Appeal ruled that, in doing so, the trial court failed to satisfy its duty to ensure the deliberations were proceeding properly and to preserve the defendant's fundamental right to a fair jury determination of the question of his guilt or innocence. Further, because a finding of juror misconduct triggers a presumption of prejudice and there was considerable evidence that deliberations were difficult, reversal was required.

Motion for New Trial

Discovery of a New Witness: *People v. Bonilla* (2018) 29 Cal.App.5th 649. The trial court properly denied a motion for a new trial based on discovery of a new witness where the defense did not establish why the witness could not have been found before trial. Here, the defendants were convicted of felony vandalism after trying to stop someone from wrongfully repossessing their car. They filed a motion for a new trial based on newly discovered evidence in the form of a new witness to the incident. The Third District Court of Appeal determined the trial court properly denied the motion because the defense failed to show the witness could not have been discovered with reasonable diligence before trial.

The Trial Court Must Act as the Thirteenth Juror When Presented With an Insufficiency of the Evidence Claim: *People v. Watts* (2018) 22 Cal.App.5th 102. When ruling on a new trial motion presenting an insufficiency of the evidence claim, a trial court must reweigh the evidence exercising its independent judgment without deference to the jury's weighing of the evidence. Here, the trial court repeatedly refused to independently reweigh evidence supporting a gang enhancement. The Second District Court of Appeal held that the trial court misunderstood the applicable legal standard, noting that a trial court entertaining a new trial motion premised on a claim of insufficient evidence must act as a thirteenth juror. This standard of review contrasts with the deferential standard a trial court must apply when deciding whether there is sufficient evidence to allow a charge to proceed to the jury pursuant to Penal Code section 1118.1.

The State Constitution's Right to a Unanimous Jury Verdict

Polling the Jury: *People v. Bailey* (2018) 27 Cal.App.5th 376. The trial court violated defendant's right under the California Constitution to a unanimous verdict (Cal. Const. art. I, § 16) when it recorded a written guilty verdict on one count after a polled juror replied, "No," when asked whether the verdict form reflected her individual verdict. Although a couple of follow-up questions produced an arguably ambiguous response, the Second District Court of Appeal refused to resolve the ambiguity against the defendant. The defense was not required to object in order to preserve the issue, the error was structural, and the state constitution's double jeopardy prohibition (Cal. Const. art. I, § 15) prevented retrial on that count.

The One Strike Law

The Increased Risk of Harm Element of the Kidnapping Qualifying Cirucmstance: *People v. Adams* (2018) 28 Cal.App.5th 170. When the prosecution proves a defendant charged with a specified sex offense kidnapped the victim and the movement attributable to the kidnapping "substantially increased the risk of harm to the victim," the defendant shall be sentenced to 25 years-to-life in prison under the One Strike law (Pen. Code, § 667.61, subd. (d)(2)). Here, the trial court erred in failing to instruct the jury that the kidnapping qualifying circumstance for the One Strike Law requires proof that the act of asportation substantially increased the risk of harm. The instruction given (CALCRIM No. 1215) did not require that the jury find that asportation substantially increased the risk of harm beyond the level of risk inherent in the charged sex offenses. However, the Second District Court of Appeal found that the error was harmless because the jury impliedly found the movement of the victim increased the risk of harm, and the substantial risk of harm issue was uncontested.

Retroactivity of Recent Amendments to Sentencing Enhancements

Senate Bill No. 620: *People v. McDaniels* (2018) 22 Cal.App.5th 420. Effective January 1, 2018, Senate Bill No. 620 amended Penal Code sections 12022.5 and 12022.53 to vest trial courts with previously unavailable discretion to dismiss certain firearm enhancements. Division One of the First District Court of Appeal held that this ameliorative sentencing amendment must be retroactively applied to

judgments not yet final on appeal under *In re Estrada* (1965) 63 Cal.2d 740. In addition, the Court of Appeal held that a remand for a resentencing hearing at which the trial court must exercise its discretion whether to strike the enhancement is required unless the record shows "that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (See also *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507; *People v. Vela* (2018) 21 Cal.App.5th 1099, 1114; *People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Chavez* (2018) 22 Cal.App.5th 663, 712; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080; *People v. Valenzuela* (2018) 23 Cal.App.5th 82, 87; *People v. McVey* (2018) 24 Cal.App.5th 405, 418 [*McVey* is the only case to find a remand unwarranted, but it purported to apply the same standard articulated in *McDaniels*]; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109.)

Senate Bill No. 620 Does Not Apply to Insanity Acquittees: *People v. K.P.* (2018) 30 Cal.App.5th 331. The recent amendment to Penal Code section 12022.53, subdivision (h), which vests trial courts with discretion to dismiss a firearm enhancement "at the time of sentencing" does not apply to a person committed to a state hospital after being found not guilty by reason of insanity because "[a]n insanity acquittee is not sentenced; he or she is committed to a state hospital for treatment." In addition to reaching this outcome based on the plain language of the statute, the Fourth District Court of Appeal found no equal protection violation, concluding that a rational basis existed for the Legislature to exclude insanity acquittees from the ameliorative provisions of amended Penal Code section 12022.53.

Senate Bill No. 620, Plea Bargains, and the Certificate of Probable Cause Requirement: *People v. Hurlic* (2018) 25 Cal.App.5th 50. Generally, without having first obtained a certificate of probable cause from the trial court, a defendant cannot direct any challenges to the validity of a guilty or no contest plea on appeal, including an attack on a stipulated sentence. However, the Second District Court of Appeal held that a certificate of probable cause is not required to retroactively challenge on appeal the imposition of a firearm enhancement where the defendant admitted the enhancement and received a stipulated sentence pursuant to a plea bargain shortly before the enactment of Senate Bill No. 620, an ameliorative sentencing

amendment that gave trial courts newfound discretion to strike certain firearm enhancements. According to the Court of Appeal, "a certificate of probable cause is not required" "when the defendant's challenge to the agreed-upon sentence is based on our Legislature's enactment of a statute that retroactively grants a trial court the discretion to waive a sentencing enhancement that was mandatory at the time it was incorporated into the agreed-upon sentence." Among the three reasons cited for this conclusion was the established principle that a plea bargain necessarily contemplates and incorporates future changes in law that the Legislature intended to apply to the parties. Therefore, seeking retroactive application of an ameliorative sentencing amendment does not actually call into question the validity of the plea bargain, which means a certificate of probable cause is not required. (See also *People v. Baldivia* (2018) 28 Cal.App.5th 1071.)

Senate Bill No. 1393: *People v. Garcia* (2018) 28 Cal.App.5th 961. Effective January 1, 2019, Senate Bill No. 1393 amended Penal Code section 1385 to vest trial courts with previously unavailable discretion to dismiss the five-year prior serious felony conviction enhancement set forth in Penal Code section 667, subdivision (a). The Fourth District Court of Appeal held that this ameliorative sentencing amendment must be retroactively applied to judgments not yet final on appeal under *In re Estrada* (1965) 63 Cal.2d 740. The Court of Appeal further concluded that a remand for resentencing is required so long as "the record does not indicate that the court would not have dismissed or stricken defendant's prior serious felony conviction for sentencing purposes, had the court had the discretion to do so at the time it originally sentenced defendant."

Senate Bill No. 180: *People v. Millan* (2018) 20 Cal.App.5th 450. Effective January 1, 2018, Senate Bill No. 180 amended the prior narcotics conviction enhancement found in Health and Safety Code section 11370.2, subdivision (c), such that the three-year enhancement is now only applicable when a defendant has a prior conviction for violating or conspiring to violate Health and Safety Code section 11380 ("Inducing violation by minor"). Prior sales and transportation convictions no longer qualify for this enhancement. The Fourth District Court of Appeal held that this ameliorative sentencing amendment must be retroactively applied to judgments not yet final on appeal under *In re Estrada* (1965) 63 Cal.2d 740.

Senate Bill No. 180 Not Retroactive to Defendants on Mandatory Supervision Who Did Not Timely Appeal From Imposition of a Split Sentence: *People v. Grzymski* (2018) 28 Cal.App.5th 799. Although Division One of the First District Court of Appeal, like *People v. Millan* (2018) 20 Cal.App.5th 450, concluded that Senate Bill No. 180 amounts to an ameliorative sentencing amendment that must apply retroactively to non-final judgments on appeal, the Court of Appeal held that "an unappealed split sentence is final within the meaning of *Estrada* 60 days after it is imposed." Here, because the defendant did not appeal from his 2013 or 2015 split sentences, they had been final for years. As a result, *Estrada* did not entitle the defendant to retroactive relief under Senate Bill No. 180.

Senate Bill No. 180 and Appeal Waivers: *People v. Wright* (Jan. 25, 2019, D073038) ___ Cal.App.5th ___ [2019 Cal.App.LEXIS 71]. On appeal after the defendant admitted a prior narcotics conviction enhancement no longer applicable to him post-Senate Bill No. 180 and received a stipulated sentence pursuant to a plea bargain, the Attorney General argued the broad appeal waiver appellant signed precluded retroactive application of Senate Bill No. 180. The Fourth District Court of Appeal, however, concluded the appeal waiver did not bar such relief on account of the general rule that a plea bargain necessarily contemplates and incorporates future changes in law that the Legislature intended to apply to the parties. Moreover, the Court of Appeal reasoned that the defendant's "waiver of his right to appeal his stipulated sentence cannot be construed as applying to a sentencing error of which he had no notice when he signed the plea agreement."

Waiver of the Right to Appeal

Certificate of Probable Cause Requirement: *People v. Espinoza* (2018) 22 Cal.App.5th 794. When a defendant broadly waives the right to appeal as part of a plea agreement, he or she must obtain a certificate of probable cause to appeal on any ground covered by the waiver, regardless of whether the claim arose before or after the entry of the plea. Division One of the First District Court of Appeal applied this rule to conclude that a defendant who agreed to a general appeal waiver as part of a plea bargain that called for a grant of probation could not challenge the lawfulness of a subsequently imposed probation condition in the absence of a certificate of probable cause. At the same time, the Court of Appeal acknowledged that "[w]ith a certificate of

probable cause in hand, the defendant may argue that the [appeal] waiver is not enforceable as to the issue raised, whether because the waiver was not knowing and intelligent or for some other reason. And if the reviewing court determines that the waiver is not enforceable, it will reach the merits of the defendant's underlying claim."

The Eighth Amendment Ban on Cruel and Unusual Punishment

Juvenile Nonhomicide Offenders: *People v. Contreras* (2018) 4 Cal.5th 349. Sentencing juvenile nonhomicide offenders to a term of fifty years to life violates the Eighth Amendment prohibition against cruel and unusual punishment notwithstanding the fact that their parole eligibility dates are within their expected lifespans. The California Supreme Court remanded for resentencing and directed the trial court to consider mitigating circumstances and the impact of any new legislation. It noted that under *Graham v. Florida* (2010) 560 U.S. 48, a lawful sentence must recognize a juvenile nonhomicide offender's capacity for change and limited moral culpability and must also provide a meaningful and realistic opportunity to obtain release. The Supreme Court left open the question whether excluding juveniles sentenced for nonhomicide offenses under the One Strike Law from youth offender parole hearings (Pen. Code, § 3051) – while making such hearings available to juveniles given LWOP sentences following convictions for special circumstances murder – violates state and federal constitutional principles of equal protection and the prohibition on cruel and/or unusual punishment. (See also *People v. Garcia* (2018) 30 Cal.App.5th 316 [applying *Contreras*'s Eighth Amendment holding and similarly declining to address this open question].)

Fines and Fees

Determination of Ability to Pay Restitution Fines and Court Fees: *People v. Duenas* (2019) 30 Cal.App.5th 1157. Due process requires the trial court to hold a hearing to ascertain a defendant's present ability to pay before it imposes any restitution fine under Penal Code section 1202.4, court facilities fee under Penal Code section 1465.8, or court operations fee under Government Code section 70373. The Second District Court of Appeal reasoned that "a state may not inflict punishment on indigent convicted criminal defendants solely on the basis of their poverty," and that "the additional, potentially

devastating consequences [of failing to pay criminal assessments] suffered only by indigent persons in effect transform a funding mechanism for the courts into additional punishment for a criminal conviction for those unable to pay." The Court of Appeal reached this conclusion even though the statutes in question do not contain an express ability to pay requirement, and, in the case of the restitution fine found in Penal Code section 1202.4, the statute directs trial courts not to consider the defendant's ability to pay.

Determination of Ability to Pay Probation Supervision Fees: *People v. Neal* (2018) 29 Cal.App.5th 820. An order that defendant pay a probation supervision fee based on the probation officer's recommendation was improper because the probation officer did not determine the defendant's ability to pay or the manner in which payment would be made as required by Penal Code section 1203.1b. Further, the defendant was not informed of his right to an adjudication after an evidentiary hearing as to the propriety of the probation officer's determinations, nor was he informed that those determinations would be subject to any further judicial review. Division Two of the First District Court of Appeal made it clear that, ultimately, "unless waived by the defendant, it is for the court, not the probation officer, to make the final [ability to pay] determination."

Drug Lab and Program Fees for Conspiracy Convictions: *People v. Ruiz* (2018) 4 Cal.5th 1100. The criminal laboratory analysis and drug program fees set forth in Health and Safety Code sections 11379 and 11373.7, respectively, apply to convictions for conspiracy to transport a controlled substance in violation of Health and Safety Code section 11379, subdivision (a). Although the fee statutes do not expressly mention conspiracy to violate any of the enumerated offenses, the California Supreme Court found that the punishment provisions of Penal Code section 182, subdivision (a), indicated a legislative intent for the fees to apply to such convictions.

Probation

Probation Condition Barring All Use of Social Media Sites: *In re L.O.* (2018) 27 Cal.App.5th 706. The juvenile court imposed a condition of probation barring the minor from accessing or using all social media sites, including Facebook. Drawing heavily from *Packingham v. North Carolina* (2017) 582 U.S. ___ [137 S.Ct. 1730, 1735] – in which the

United States Supreme Court struck down a state law prohibiting registered sex offenders from gaining access to social media websites – Division Four of the First District Court of Appeal held that "an absolute prohibition [on social media access] that admits to no exception is unconstitutionally overbroad on its face[.]" Necessary exceptions might include "innocuous or beneficial purposes, such as following current events on Facebook, using a professional networking site to seek a job, or participating in a school-related online discussion." The Court of Appeal ordered the condition modified to grant the minor's probation officer "the authority to allow social media use that is consistent with the state's compelling interest in reformation and rehabilitation[.]"

Probation Condition Barring Social Media Posts Related to Offense: *In re A.A.* (2018) 30 Cal.App.5th 596. A probation condition prohibiting the minor from posting "anything that has to do with this offense" on social media was not unconstitutionally overbroad under the First Amendment. The Second District Court of Appeal ruled that the probation condition was "precise, narrow, and reasonably tailored to address [the minor's] posting conduct and rehabilitation," and emphasized the juvenile court's "reasonabl[e] belie[f] that some of [the minor's] Instagram followers knew the victim and that [the minor's] postings about the case, if made, would embarrass the victim who was undergoing therapy."

Peaceful Contact with Law Enforcement Probation Condition: *In re G.B.* (2018) 24 Cal.App.5th 464. Division One of the First District Court of Appeal held unconstitutionally vague a probation condition requiring that the minor "have peaceful contact only with all law enforcement." The condition "does not give fair warning what conduct is required or prohibited, nor does it provide guidance as to what would constitute a violation." For example, the Court of Appeal noted, "Does the condition that the minor remain peaceful when interacting with law enforcement require him to remain quiet and tranquil? Or does it merely require he refrain from exhibiting force?" The Court of Appeal ordered the challenged condition stricken.

Ineligibility for Probation Based on Use of a Deadly Weapon: *People v. Nuno* (2018) 26 Cal.App.5th 43. The defendant's conviction for felony hit-and-run (Veh. Code, § 20001, subd. (a)) did not make him presumptively ineligible for probation under Penal Code section 1203,

subdivision (e)(2), as a "person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted." The Fourth District Court of Appeal reasoned that for Penal Code section 1203, subdivision (e)(2), to apply, there would need to be evidence that the defendant used or attempted to use his car – the only conceivable deadly weapon in the case – in connection with his flight from the scene of the collision (not in connection with causing the accident from which he fled). Absent such evidence, Penal Code section 1203, subdivision (e)(2), did not apply.

Authority to Dismiss Under Penal Code Section 1385: *People v. Chavez* (2018) 4 Cal.5th 771. The California Supreme Court held that a trial court lacks the authority to dismiss an action pursuant to Penal Code section 1385 after a term of probation has ended. However, because "the court retains the power to revoke probation and sentence the defendant to imprisonment" during the period of probation, "it may dismiss a criminal action in the interests of justice [pursuant to Penal Code section 1385] through this period."

Proposition 36: The Three Strikes Reform Act of 2012

The Sixth Amendment Jury Trial Right and the Eligibility Determination: *People v. Perez* (2018) 4 Cal.5th 1055. With the passage of Proposition 36, inmates serving third-strike sentences for nonviolent offenses may petition for resentencing as a second-strike offender, unless certain disqualifying factors are present (Pen. Code, § 1170.126). In order for a defendant to be ineligible for resentencing under Proposition 36 based on the fact the he or she was armed with a deadly weapon during the commission of the offense, the prosecution must prove this fact beyond a reasonable doubt. However, the trial court's eligibility determination may rely on facts not found by the jury without violating the right to a jury trial under the Sixth Amendment.

Using Eligibility Criteria Contrary to Jury Verdict: *People v. Piper* (2018) 25 Cal.App.5th 1007. The trial court may not determine eligibility for resentencing under Proposition 36 by drawing conclusions that contradict the jury's verdict and findings. Here, the defendant was convicted in 2001 of being a felon in possession of ammunition and evading a pursuing police officer – his third-strike offense. However, the jury acquitted the defendant of all counts charging him with the

possession or use of a firearm. After the defendant moved for resentencing pursuant to Penal Code section 1170.126, the trial court denied the motion, finding proof beyond a reasonable doubt that "[d]uring the commission of the [defendant's third-strike] offense, the defendant . . . was armed with a firearm or deadly weapon." Because this finding contradicted the jury's acquittals on the firearm counts, the Second District Court of Appeal reversed the order denying the defendant's resentencing petition.

Proposition 47: The Safe Neighborhoods and Schools Act

Venue: *People v. Adelmann* (2018) 4 Cal.5th 1071. Following the passage of Proposition 47, a person convicted of certain theft- and drug-related felonies may file a resentencing petition seeking reduction of an eligible offense to a misdemeanor (Pen. Code, § 1170.18). In a case where a defendant's probation has been transferred from one county to another, the original sentencing court is the proper venue for a probationer to file a resentencing petition under Proposition 47.

Disqualifying Convictions: *People v. Hatt* (2018) 20 Cal.App.5th 321. Proposition 47 relief is not available to defendants who have suffered a "super strike" enumerated in Penal Code section 667, subdivision (e)(2)(C)(4), which includes murder. A person who suffers a disqualifying conviction *after* filing a Proposition 47 resentencing petition is barred from relief if the trial court has not yet ruled on the petition. Here, the defendant had a pending murder charge in another state when he filed his Proposition 47 petition. The prosecution moved to continue proceedings on the defendant's Proposition 47 petition pending resolution of the murder case. When he was convicted of murder, the trial court denied his petition. The Second District Court of Appeal held that the court did not abuse its discretion because the electorate's purpose in including disqualifying offenses was to ensure that people convicted of those offenses cannot benefit from Proposition 47.

Right to Be Present at Evidentiary Hearings: *People v. Simms* (2018) 23 Cal.App.5th 987. Absent a valid waiver, the trial court violated the defendant's constitutional and statutory rights to be present by holding evidentiary hearings on his Proposition 47 petition to determine the value of stolen property in his absence. Division Four of the First District Court of Appeal noted that, while in some cases the

issue of eligibility for Proposition 47 relief can be determined as a matter of law, in the instant case the evidentiary hearings addressed factual concerns, rendering the defendant's presence critical to the outcome. The Court of Appeal concluded that the constitutional violation was not harmless because it was not clear beyond a reasonable doubt that the error did not affect the outcome of the proceeding.

Retroactivity of Proposition 47 to Cases Not Yet Final On Appeal: *People v. DeHoyos* (2018) 4 Cal.5th 594. Where a defendant was sentenced on a Proposition 47-eligible felony before Proposition 47 went into effect, but the judgment was not yet final, the retroactivity principles articulated in *In re Estrada* (1965) 63 Cal.2d 740 do not compel an automatic reduction of that offense to a misdemeanor. Rather, the defendant must petition for statutory resentencing under Penal Code section 1170.18, which includes an assessment of the defendant's risk to public safety.

Prior Prison Term Enhancements (Effect of Reduction): *People v. Buycks* (2018) 5 Cal.5th 857. When a defendant whose prior felony conviction was reduced to a misdemeanor pursuant to Proposition 47 suffers a new conviction, the reduced prior conviction can no longer serve as a basis for a prior prison term enhancement (Pen. Code, § 667.5, subd. (b)), "so long as the judgment containing the enhancement was not final when Proposition 47 took effect."

Prior Prison Term Enhancements ("Washout"): *People v. Kelly* (2018) 28 Cal.App.5th 886. The "washout" provision of Penal Code section 667.5, subdivision (b), applies where the reduction of one or more felonies to misdemeanors under Proposition 47 resulted in a period exceeding five years during which the defendant was free of felony convictions. "Interpreting the washout provision to disregard prison terms for reduced convictions," the Fifth District Court of Appeal reasoned, "honors the intent of the voters in enacting Proposition 47." (See also *People v. Baldwin* (2018) 30 Cal.App.5th 648; *People v. Warren* (2018) 24 Cal.App.5th 899.)

On-Bail Enhancements and Felony Convictions for Failure to Appear: *People v. Buycks* (2018) 5 Cal.5th 857. When a prior felony conviction is reduced to a misdemeanor pursuant to Proposition 47, it cannot serve as the basis for a subsequent sentencing enhancement for

committing a felony while on bail for another felony (Pen. Code, § 12022.1, subd. (b)). However, such a reduction does not impact the offense of failure to appear on a felony charge (Pen. Code, § 1320.5).

Expungement of DNA Samples: *In re C.B.* (2018) 6 Cal.5th 118. The reduction of a prior felony adjudication under Proposition 47 does not entitle the defendant to the expungement of a DNA sample collected as a result of the prior felony adjudication. The California Supreme Court noted, "While Proposition 47 spares some future offenders a duty to submit samples, it does not alter the past reality that [the minors] were adjudicated to have committed felonies and were obligated at the time to provide samples based on those adjudications."

Unlawful Drug Transportation: *People v. Martinez* (2018) 4 Cal.5th 647. Because Proposition 47 did not alter the offense of unlawful drug transportation (Health & Saf. Code, § 11379), such a conviction is not eligible for resentencing as a misdemeanor under Proposition 47. The California Supreme Court reasoned that the electorate reasonably could have understood that drug possession and transportation crimes are distinct and merit different treatment. Accordingly, the defendant's 2007 felony conviction for unlawful transportation of methamphetamine was ineligible for resentencing under Proposition 47 because it would not have been a misdemeanor had current law been in effect at that time.

Shoplifting's Commercial Establishment Element: *People v. Colbert* (Jan. 24, 2019, S238954) ___ Cal.5th ___ [2019 Cal.LEXIS 299]. The passage of Proposition 47 created the new misdemeanor offense of shoplifting, which Penal Code section 459.5 defines as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." Entering an off-limits interior room within a commercial establishment with intent to steal therefrom is punishable as burglary, not shoplifting. The defendant in this case was convicted of four counts of burglary after entering various convenience stores and/or gas stations during regular business hours, sneaking or breaking into the back offices, and stealing money he found there. The trial court denied the defendant's Proposition 47 petition to reclassify two of the convictions as misdemeanor shoplifting offenses under Penal Code section 459.5. The California Supreme Court agreed, interpreting

the term "commercial establishment" in the statute to refer only to the portion of a commercial establishment that is used for commerce, rather than private interior rooms in which no goods or services are sold to the public.

Prosecution's Burden to Prove Burglary Not Shoplifting: *In re E.P.* (2018) 29 Cal.App.5th 1196. In a prosecution for second degree burglary, the prosecution has the burden of proving the crime committed was not in fact shoplifting (Pen. Code, § 459.5) – a crime created by Proposition 47. In the instant case, the Fourth District Court of Appeal emphasized that "[b]ecause a person cannot commit burglary if he actually committed shoplifting, a prosecutor who wishes to convict a defendant of burglary must prove that the defendant did not commit shoplifting." Although the issue in this case arose in a juvenile delinquency proceeding, the Court of Appeal suggested trial courts must also "instruct the jury the prosecution must disprove the element(s) of shoplifting beyond a reasonable doubt to secure a burglary conviction," citing *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.

Shoplifting Not Defined By the Common Understanding of the Term Prior to the Passage of Proposition 47: *People v. Franske* (2018) 28 Cal.App.5th 955. The defendant entered a commercial business and stole cigarettes and $240 from a wallet he found on the premises. His conduct fit within the statutory definition of shoplifting under Penal Code section 459.5, so his commercial burglary conviction was properly reduced to a misdemeanor under Proposition 47. The Third District Court of Appeal rejected the Attorney General's position that the definition of the new offense of shoplifting created by the passage of Proposition 47 should be limited to the public's common understanding of that term.

Conspiracy to Commit Petty Theft: *People v. Martin* (2018) 26 Cal.App.5th 825. The defendant's conviction for felony conspiracy to commit petty theft (Pen. Code, §§ 182, subd. (a)(1), 484) was not eligible for reduction to a misdemeanor under Proposition 47. A conviction for a felony conspiracy to commit petty theft may be reduced under Proposition 47 "only if [the defendant's] crime would have been shoplifting had Proposition 47 been in effect at the time of the offense." Here, the Second District Court of Appeal emphasized the enhanced dangers of conspiracy as compared to shoplifting, particularly in the

instant case, as the defendant intended to steal cosmetics and transport them to Latin America.

Forgery and Identity Theft: *People v. Gonzales* (2018) 6 Cal.5th 44. A forgery conviction is ineligible for reclassification as a misdemeanor under Proposition 47 in the case of "any person who is convicted both of forgery and of identity theft, as defined in [Penal Code] [s]ection 530.5." (Pen. Code, § 473, subd. (b).) However, the California Supreme Court concluded that a person convicted of both forgery and identity theft is only barred from Proposition 47 resentencing on the forgery conviction where the forgery and identify theft offenses were "undertaken in connection with each other." The trial court in this case denied the defendant's petition for resentencing on four counts of forgery committed in 2003, based on the defendant's conviction for identify theft committed in 2006. The California Supreme Court reversed, noting the forgery and identify theft offenses were "based on conduct committed years apart" and had "no relationship to each other." According to the Supreme Court, the fact that the defendant "was convicted and sentenced in a single consolidated proceeding for his forgery and identity theft offenses does not automatically tether th[e] [offenses] sufficiently to leave [the defendant] ineligible for resentencing under Proposition 47."

Value of Forged Check: *People v. Franco* (2018) 6 Cal.5th 433. When a forged check contains a stated value, that amount equals its value for the purpose of determining whether the crime is a misdemeanor under Penal Code section 473, subdivision (b). Disapproving *People v. Lowery* (2017) 8 Cal.App.5th 533 to the extent it was inconsistent, the California Supreme Court held that the defendant was not entitled to be sentenced as a misdemeanant for being in possession of a forged, stolen check made out in the amount of $1,500, where Proposition 47 relief is only available for forgeries valued at $950 or less.

Value of Counterfeit Currency: *People v. Aguirre* (2018) 21 Cal.App.5th 429. In cases of fraud based on possession of counterfeit currency, the proffered value of the counterfeit money determines whether the offense remains a wobbler or must be charged as a misdemeanor pursuant to Proposition 47.

Vehicle Theft: *People v. Jackson* (2018) 26 Cal.App.5th 371. A defendant cannot be convicted of a felony violation of Vehicle Code

section 10851, subdivision (a) – unlawfully taking or driving a vehicle – on a vehicle theft theory unless the prosecution establishes that the vehicle was worth more than $950. Relying on *People v. Page* (2017) 3 Cal.5th 1175, Division One of the First District Court of Appeal held it was error to not instruct the jury that the defendant could only be found guilty of unlawfully taking or driving a vehicle on a theft theory if there was proof beyond a reasonable doubt that the vehicle was worth more than $950. The Court of Appeal found the error was not harmless beyond a reasonable doubt under *People v. Chiu* (2014) 59 Cal.4th 155 and remanded with instructions to the prosecution to either reduce the conviction to a misdemeanor or retry the defendant on a felony charge. (See also *People v. Bussey* (2018) 24 Cal.App.5th 1056; *People v. Gutierrez* (2018) 20 Cal.App.5th 847.)

Receiving a Stolen Vehicle: *People v. Williams* (2018) 23 Cal.App.5th 641. Although Proposition 47 did not alter the statutory language of – or otherwise expressly reference – Penal Code section 496d (buying or receiving a stolen vehicle), that offense is nonetheless eligible for resentencing under Proposition 47 if the car is valued at $950 or less. Relying both on legislative intent and the California Supreme Court's recent decisions in *People v. Page* (2017) 3 Cal.5th 1175 and *People v. Romanowski* (2017) 2 Cal.5th 903, Division Four of the First District Court of Appeal reasoned that there is no logical basis for distinguishing between receipt of stolen property – a Proposition 47-eligible offense – and receipt of a stolen vehicle. (But see *People v. Orozco* (2018) 24 Cal.App.5th 667, rev. granted August 15, 2018 (S249495).)

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

Burden of Proof and Consideration of Hearsay Outside the Record of Conviction: *People v. Banda* (2018) 26 Cal.App.5th 349. Proposition 64 created a statutory mechanism for petitioning to reduce or vacate certain prior marijuana-related convictions (Health & Saf. Code, § 11361.8). Because the statute instructs trial courts to presume the petitioner meets the criteria for relief, the Second District Court of Appeal concluded that the prosecution bears the burden of demonstrating, by clear and convincing evidence, that a defendant does not qualify for Proposition 64 relief. The facts contained in a probation report are insufficient to meet that burden when the report is not

shown to be reliable, even if the defendant stipulated to the report as the factual basis for a guilty plea. However, in deciding whether a defendant is eligible for resentencing or dismissal under Proposition 64, the trial court may consider facts beyond the record of conviction, including hearsay if it is shown to be reliable. In this case, the defendant objected to the probation report because it contained multiple levels of hearsay and did not identify the source of the information included in the report. The Court of Appeal found an abuse of discretion to the extent that the trial court impliedly found the probation report to be reliable.

Burden for Establishing Unreasonable Risk of Danger: *People v. Saelee* (2018) 28 Cal.App.5th 744. If a petitioner is eligible for Proposition 64 resentencing relief, the trial court may only deny such a petition if it determines that "granting the petition would pose an unreasonable risk of danger to public safety." (Health & Saf. Code, § 11361.8, subd. (b)). To deny relief on this ground, the prosecution is required to present actual evidence to establish, by a preponderance of the evidence, that the defendant poses an unreasonable risk of danger to public safety. The Third District Court of Appeal rejected the defendant's claim that the prosecution had the burden of proving the risk of dangerousness by clear and convincing evidence. However, the Court of Appeal agreed that the prosecution is required to present some type of evidence to the trial court; mere assertions of fact and argument, unsupported by evidence, are insufficient.

Applicability to Conspiracy Offenses: *People v. Medina* (2018) 24 Cal.App.5th 61. The trial court properly declined to reduce the defendant's conviction for felony conspiracy to possess marijuana for sale because, even when the target offense is marijuana-related, conspiracy requires proof of different elements and is serious enough to allow prosecutors to continue to charge it as a felony post-Proposition 64. However, the Second District Court of Appeal emphasized that the resentencing provisions of Proposition 64 are not limited to only those marijuana-related offenses specified in Health & Safety Code section 11361.8.

Proposition 57: The Public Safety and Rehabilitation Act of 2016

Retroactivity of the Ban on Directly Filing Criminal Charges Against Juvenile Offenders: *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299. The provisions of Proposition 57 eliminating the authority of prosecutors to directly file charges against juvenile offenders in criminal courts of adult jurisdiction are retroactive to judgments not yet final on appeal. Relying on the rule announced in *In re Estrada* (1965) 63 Cal.2d 740 providing for retroactive application of statutes that impose reduced penalties, the Supreme Court noted that being charged in juvenile court, where rehabilitation is the goal, can result in dramatically different and more lenient treatment. Accordingly, the defendant was entitled to a fitness hearing in juvenile court. (See also *People v. Vela* (2018) 21 Cal.App.5th 1099l; accord *People v. Garcia* (2018) 30 Cal.App.5th 316.)

Early Parole Consideration for Third-Strike Offenders: *In re Edwards* (2018) 26 Cal.App.5th 1181. Proposition 57 added a constitutional provision that renders state prison inmates convicted of nonviolent offenses eligible for early parole consideration after completing "the full term for his or her primary offense," excluding enhancements, consecutive sentences, and alternative sentences. One of the implementing regulations promulgated by the California Department of Corrections and Rehabilitation (CDCR) excluded nonviolent third-strike offenders. On habeas review, the Second District Court of Appeal voided the regulation and directed CDCR to repeal and replace it so that nonviolent third-strike offenders would be eligible for early parole consideration under Proposition 57.

Early Parole Consideration for Sex Offense Registrants: *In re Gadin* (Jan. 28, 2019, B289852) ___ Cal.App.5th ___ [2019 Cal.App.LEXIS 75]. In response to *Edwards*, CDCR revised its Proposition 57-implementing regulations to make third-strike offenders eligible for early parole consideration. However, CDCR's regulations still purport to render state prison inmates with prior convictions for registrable sex offenses ineligible for parole consideration. The Second District Court of Appeal invalidated this regulation as well, finding no basis for it in the relevant constitutional provision added by Proposition 57. The Court limited its holding to *prior* sex offense convictions; it expressed no opinion on CDCR's regulation excluding inmates with *current* offenses for which sex offender registration is required.

Post-Release Community Supervision

Application of Excess Credits to PRCS Term: *People v. Steward* (2018) 20 Cal.App.5th 407. Reduction of one of the defendant's felony convictions to a misdemeanor pursuant to Proposition 47 resulted in excess custody credits above and beyond the length of his modified prison sentence. The defendant was then released on PRCS. No statutory provision expressly provides for offsetting any portion of a term of PRCS by excess custody credits. However, citing recent amendments to Penal Code section 1170, subdivision (a)(3), which now requires trial courts to advise defendants that excess credits will be applied to any subsequent period of PRCS, Division Five of the First District Court of Appeal held that the defendant was entitled to have his excess credits applied against his PRCS discharge date. To hold otherwise "would lead to patently unfair and absurd results: trial courts would be required to advise defendants, *contrary to law*, that excess presentence custody credits reduce a period of PRCS." In so ruling, the Court of Appeal reached the opposite conclusion of three prior published cases that did not address the significance of Penal Code section 1170, subdivision (a)(3). (See *People v. Superior Court (Rangel)* (2016) 4 Cal.App.5th 410; *People v. Tubbs* (2014) 230 Cal.App.4th 578; *People v. Espinoza* (2014) 226 Cal.App.4th 635.)

Reinstatement of Post-Release Community Supervision Does Not Extend the Supervisory Period: *People v. Johnson* (2018) 29 Cal.App.5th 1041. The length of a supervisory period is not automatically extended when post-release community supervision (PRCS) is reinstated after revocation, although a trial court may choose to extend the original expiration date for PRCS within the maximum statutory period. Here, after the defendant's PRCS was revoked and then reinstated, he challenged the extension of his PRCS as unauthorized by law. In *People v. Leiva* (2013) 56 Cal.4th 498, the California Supreme Court held that summary revocation of probation only tolls the period of supervision for the purpose of retaining jurisdiction to adjudicate an alleged violation. Such tolling does not extend the probationary period. Division Two of the First District Court of Appeal concluded: "Although *Leiva* was concerned with probation, [Penal Code] section 1203.2, subdivision (a), applies to PRCS as well, and it would be anomalous to view the tolling provision as having a different meaning in the context of PRCS."

Youth Offender Parole Hearings

***Thompson* Terms for Youth Offenders Found Suitable for Parole:** *In re Jenson* (2018) 24 Cal.App.5th 266. On habeas corpus, the petitioner was entitled to immediate release upon being found suitable for parole at a youth offender parole hearing despite the fact that he had been sentenced to several additional consecutive terms based on in-prison offenses ("*Thompson* terms"), including for one offense committed when he was 29 years old. The Second District Court of Appeal found that Penal Code section 3051 – which dictates that youth offenders be "immediately released upon being found suitable for parole" – is "irreconcilable" with Penal Code section 1170.1, subdivision (c), governing consecutive terms for multiple convictions. The Court of Appeal held that Penal Code section 3051 "supersedes" Penal Code section 1170.1, subdivision (c), because it was enacted more recently and is more specific to the situation at hand. In so holding, the Court found no basis to distinguish *In re Trejo* (2017) 10 Cal.App.5th 972, which held the same with respect to *Thompson* terms imposed for crimes committed while the individual was of youth offender age (i.e., under 26 years old).

Parole Unsuitability Finding Contrary to Psychological Risk Assessments: *In re Poole* (2018) 24 Cal.App.5th 965. Division Two of the First District Court of Appeal vacated the finding of the Board of Parole Hearings (BPH) that the petitioner posed a current threat to public safety and was therefore unsuitable for parole. At the petitioner's parole hearing in 2017, BPH focused exclusively on the petitioner's stated reasons for having committed the offense, concluding he "lacked insight into the 'real' reasons for his crime." BPH's decision conflicted with the petitioner's psychological assessments from 2010, 2015, and 2017, all of which indicated he was aware of the factors that led him to commit his offense and presented a low risk for violence in the community. In reversing BPH's finding and ordering a new hearing, the Court of Appeal noted that BPH's decision was "particularly troubling in view of the fact that petitioner was a youth offender."

Certificates of Rehabilitation

No Relief for Former Probationers: *People v. Chatman* (2018) 4 Cal.5th 277. Penal Code section 4852.01 et seq. sets forth a mechanism

for convicted felons to move for a certificate of rehabilitation, which, if granted, is then sent to the Governor as an application and recommendation for a pardon. If the application for a pardon is granted, the applicant can have reinstated certain rights otherwise permanently lost by virtue of his or her felony convictions. The fact that Penal Code section 4852.01 bars subsequently incarcerated former probationers who have obtained relief under Penal Code section 1203.4 – but not other subsequently incarcerated felons – from obtaining certificates of rehabilitation does not violate the right to equal protection under the federal and state constitutions. The California Supreme Court applied the rational basis standard of review, finding the Legislature's choice to extend certificate of rehabilitation relief only to a subset of felons was a rational means of preserving government resources in light of the availability of alternative means for probationers to obtain licenses and other benefits that are also available to individuals who obtain a certificate of rehabilitation.

No Relief for Non-Residents of California: *People v. Miller* (2018) 23 Cal.App.5th 973. Penal Code section 4852.06, on its face, prohibits non-residents of California from filing a petition seeking a certificate of rehabilitation. The Sixth District Court of Appeal rejected the petitioner's objections to this plain reading of the statute.

Motion for Factual Innocence

Denial of Motion is an Appealable Order: *People v. Caldwell* (2018) 29 Cal.App.5th 180. An order denying a factual innocence motion is appealable. Here, the defendant's 1991 second degree murder conviction was reversed when the Superior Court granted his habeas corpus petition. The petition alleged various grounds for relief including ineffective assistance of trial counsel and factual innocence. The court granted the relief solely on the ground of ineffective assistance of counsel. The defendant thereafter filed a Penal Code section 1485.55 motion for a finding of factual innocence. The motion was denied. Notwithstanding the absence of an express statutory provision authorizing an appeal from such a ruling, Division Three of First District Court of Appeal held that the denial of the factual innocence motion was appealable as an order after judgment affecting the movant's substantial rights under Penal Code section 1237, subdivision (b).

Penal Code Section 1473.7 Post-Judgment Motion to Vacate

Sufficient Advisements: *People v. Tapia* (2018) 26 Cal.App.5th 942. Penal Code section 1437, subdivision (a), authorizes the filing of a motion to vacate a conviction or sentence based on trial counsel's ineffective assistance regarding the immigration consequences of the conviction or sentence. Here, the defendant filed a motion under Penal Code section 1473.7 alleging that trial counsel had not told him that his aggravated felony convictions would render him deportable. Trial counsel submitted a declaration stating he had advised the defendant that the plea would "expose him 'to deportation proceedings and other negative consequences.'" In light of trial counsel's declaration and the trial court's immigration advisements at the time of the plea, the Fifth District Court of Appeal found that denial of the motion was supported by substantial evidence the defendant had been properly advised of the immigration consequences of his plea.

Insufficient Advisements: *People v. Ogunmowo* (2018) 23 Cal.App.5th 67. The defendant, a native of Nigeria, established ineffective assistance of counsel where his trial attorney incorrectly advised him that because he was a lawful permanent resident of the U.S. he would not face immigration consequences as a result of his guilty plea to possession for sale of a controlled substance. The Second District Court of Appeal reversed the trial court's denial of the defendant's Penal Code section 1437.7 motion to vacate his conviction.

Juvenile Delinquency Proceedings

Dual Delinquency and Dependency Jurisdiction: *In re Aaron J.* (2018) 22 Cal.App.5th 1038. Pursuant to Welfare and Institutions Code section 241.1, as a general rule, a minor cannot be both a dependent and a delinquent ward of the juvenile court. The statute and rule 5.512 of the California Rules of Court set forth procedures for determining when the juvenile court should invoke dependency or delinquency jurisdiction. Here, Division Four of the First District Court of Appeal found "quite troubling" the aspect of the joint written protocol adopted by San Francisco that designated a representative of the city attorney as the tie-breaking third member of its case assessment committee. Both the statute and rule of court contemplate collaboration solely by the probation and child welfare departments when making status

recommendations. According to the Court of Appeal, "[n]ot only does such a process appear to fly in the face of the requirement that status disagreements between the probation and child welfare departments be reported to the juvenile court, but it also grants ultimate authority for the status recommendation to an unaffiliated third party with no expertise or framework for decisionmaking." Nevertheless, the Court of Appeal deemed any defects in the assessment protocol harmless on the record before it, where "[t]he juvenile court was provided with exhaustive information regarding appellant, including information with respect to all of the factors required to be considered under any [Welfare and Institutions Code] section 241.1 protocol."

Insufficient Evidence in Support of a DJF Commitment: *In re Carlos J.* (2018) 22 Cal.App.5th 1. Before committing a delinquent ward to the Division of Juvenile Facilities (DJF), Welfare and Institutions Code section 734 requires the juvenile court to find 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]." Here, Division Five of the First District Court of Appeal reversed the minor's DJF commitment due to the absence of substantial evidence of probable benefit. The boilerplate statement in the probation report asserting in general terms that "appellant should be placed 'in a state facility where his educational, therapeutic, and emotional issues can be addressed in a secure facility'" did not amount to substantial evidence of probable benefit from which the juvenile court could make an informed assessment of the appropriateness of a DJF commitment, particularly in the absence of any "evidence in the record of the programs at the DJF expected to be of benefit to appellant." The Court of Appeal highlighted that the probation report contained no information on mental health treatment or gang intervention services offered at DJF, two rehabilitative goals especially relevant to the minor.

Truancy and Resisting an Officer: *In re R.M.* (2018) 22 Cal.App.5th 582. According to Penal Code section 148, "[e]very person who willfully resists, delays, or obstructs any public officer, [or] peace officer … in the discharge or attempt to discharge any duty of his or her office or employment" is guilty of a misdemeanor. (Pen. Code, § 148, subd. (a)(1).) To sustain a violation of this statute, it must be established that the officer was engaged in the lawful performance of his or her duties.

Here, Division Two of the First District Court of Appeal found the record lacking in substantial evidence that a deputy sheriff was performing a legal duty when he ordered a truant high school student to go inside her school to attend class. Instead, the Court of Appeal held that "a peace officer executing a truancy arrest has no duty to ensure the truant minor *actually attends class*." The officer's lawful duty ends with delivery of the minor to school. At that point it is up to school officials to handle the matter of class attendance.

Victim Restitution for Uncharged Conduct: *In re S.O.* (2018) 24 Cal.App.5th 1094. The Second District Court of Appeal held that juvenile courts have the authority to require victim restitution for losses based on uncharged conduct so long as restitution is imposed as a condition of probation. In affirming the restitution order, the Court of Appeal found that substantial evidence supported the juvenile court's findings that the minor was involved in the uncharged conduct in question and that holding him responsible for the full amount of loss to the victim would further the purposes of probation.

Fitness for Juvenile Court Proceedings: *J.N. v. Superior Court* (2018) 23 Cal.App.5th 706. Before a minor may be found unsuitable for juvenile court jurisdiction and transferred to an adult court of criminal jurisdiction, Welfare and Institutions Code section 707, subdivision (d), directs juvenile courts to consider five factors, including (1) whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction and (2) the circumstances and gravity of the charged offense. Applying the abuse of discretion standard of review, the Fourth District Court of Appeal concluded the record lacked substantial evidence in support of the juvenile court's finding on these two factors and set aside the transfer order. The Court of Appeal explained that the prosecution introduced "no evidence as to the efforts necessary to rehabilitate J.N. and no evidence as to why available programs were unlikely to result in rehabilitation in the time allotted." Further, with respect to the circumstances and gravity of the offense, the Court of Appeal concluded that the juvenile court appeared to be under the incorrect impression that a minor charged with murder could not be found suitable for juvenile court jurisdiction.

Civil Commitment Proceedings

Consequences of the Verdict: *People v. Mendez* (2018) 21

Cal.App.5th 654. It has long been established in the criminal trial context that a defendant's potential punishment is not a proper matter for juror consideration. So, too, is it outside the province of the jury in a civil commitment proceeding to consider the consequences of its verdict. Thus, Division One of the First District Court of Appeal held that the trial court erred in this mentally disordered offender civil commitment proceeding when it "instructed the jury to consider the consequences of its verdict" by directing the jury to determine the person's dangerousness "if released into the community unsupervised" instead of limiting the jury's inquiry to whether the person "presents a substantial danger of physical harm to others given his present mental condition." The Court of Appeal concluded the error – which was repeated in the verdict forms – was not harmless and reversed the commitment. (See also *Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163 [trial court erred by instructing the jury on the consequences of finding the person gravely disabled, but error found non-prejudicial].)

Right to a Speedy SVP Trial: *People v. Superior Court (Vasquez)* (2018) 27 Cal.App.5th 36. Persons facing SVP commitment proceedings, like defendants in criminal proceedings, have a due process right to a timely trial. Here, the Second District Court of Appeal concluded that a 17-year delay in bringing an alleged SVP to trial violated his federal constitutional rights. Although much of the delay was attributable to the defense, the Court of Appeal, relying principally on *Vermont v. Brillon* (2009) 556 U.S. 81, held that "the extraordinary length of the delay resulted from 'a systemic "breakdown in the public defender system,"' and must be attributed to the state."

Access to Expert Witnesses at Restoration to Sanity Hearings and Remote Appearance: *People v. Endsley* (2018) 28 Cal.App.5th 93. The trial court erred at the defendant's first-stage restoration to sanity hearing seeking outpatient placement by denying his request for an appointed expert and refusing to allow him to testify by telephone. The Fourth District Court of Appeal held that the trial court failed to follow Penal Code section 1026.2's prehearing confinement provisions and emphasized that access to an independent expert is fundamental when a person's freedom from involuntary confinement hinges on their ability to disprove the opinions of the state's expert witnesses. As a result, the Court of Appeal could not conclude beyond a reasonable doubt that a defense expert would not have impacted the trial court's decision and remanded the matter for a new hearing on the defendant's

conditional release petition.

Access to Treatment Records: *People v. Superior Court (Smith)* (2018) 6 Cal.5th 457. While the California Supreme Court was considering "whether the district attorney prosecuting a civil commitment petition under the [Sexually Violent Predators Act] may obtain copies of the treatment records supporting the updated or replacement evaluators' opinions about an individual's suitability for designation as an SVP," the Legislature added Welfare and Institutions Code section 6603, subdivision (j), in order to settle this question in favor of disclosure to the prosecutor. Although the new statute only directly references "updated" evaluations, the Supreme Court held that it applies to "replacement" evaluations as well. The Supreme Court further concluded that the district attorney may share records obtained pursuant to this statute with its retained experts, subject to an appropriate protective order, without violating the confidentiality provisions of Welfare and Institutions Code section 5328. (See also *People v. McClinton* (2018) 29 Cal.App.5th 738. 750-756.)

II. NOTEWORTHY PENDING CASES IN THE CALIFORNIA SUPREME COURT

Bail

Ability to Pay, Factors in Setting Amount, and Denial of Bail: *In re Humphrey* (2018) 19 Cal.App.5th 1006 (S247278) and *In re White*, (2018) 21 Cal.App.5th 18 (S248125) Petitions for review after the Court of Appeal granted relief on a petition for writ of habeas corpus in *Humphrey* and denied relief of a petition for writ of habeas corpus in *White*. The court limited review to the following issues: (1) Did the Court of Appeal err in holding that principles of constitutional due process and equal protection require consideration of a criminal defendant's ability to pay in setting or reviewing the amount of monetary bail? (2) In setting the amount of monetary bail, may a trial court consider public and victim safety? Must it do so? (3) Under what circumstances does the California Constitution permit bail to be denied in noncapital cases? Included is the question of what constitutional provision governs the denial of bail in noncapital cases—article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution—or, in the alternative, whether these provisions may be reconciled. (4) What effect, if any, does Senate

Bill No. 10 (2017-2018 Reg. Sess.) have on the resolution of the issues presented by this case?

Bail Conditions: *In re Webb* (2018) 20 Cal.App.5th 44 (S247074). Petition for review after the Court of Appeal granted relief on a petition for writ of habeas corpus. This case presents the following issue: Does the superior court have statutory or inherent authority to impose conditions of bail on felony defendants who post bail in the amount specified in the superior court's bail schedule or above that amount? What effect, if any, does Senate Bill No. 10 (2017-2018 Reg. Sess.) have on the resolution of the issues presented by this case?

The Fourth Amendment Exclusion of Illegally Obtained Evidence

Community Caretaking Exception to the Warrant Requirement: *People v. Ovieda* (2018) 19 Cal.App.5th 614 (S247235). Petition for review after the Court of Appeal affirmed a judgment of conviction of criminal offenses. This case presents the following issue: Did the trial court err when it applied the community caretaking exception to the Fourth Amendment as the basis for denying defendant's motion to suppress evidence of drug manufacturing equipment and an assault weapon found in his residence after police officers responded to an emergency call involving his threats to commit suicide, encountered defendant outside the residence, and entered without a warrant or consent?

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 in violation of his Sixth Amendment right of confrontation?

Drug Identification Database: *People v. Veamatahau* (2018) 24 Cal.App.5th 68 (S249872). Petition for review after the Court of Appeal affirmed a judgment of conviction of criminal offenses. The court limited review to the following issues: (1) Did the prosecution's expert

witness relate inadmissible case-specific hearsay to the jury by using a drug database to identify the chemical composition of the drug defendant possessed? (2) Did substantial evidence support defendant's conviction for possession of a controlled substance (Health & Saf. Code, § 11375, subd. (b)(2))?

Non-Homicide Offenses

Accessory After the Fact for Refusing to Testify: *People v. Partee* (2018) 21 Cal.App.5th 630 (S248520) Petition for review after the Court of Appeal affirmed a judgment of conviction of criminal offenses. This case presents the following issue: Was defendant properly convicted as an accessory after the fact (Pen. Code § 32) for refusing to testify at trial after being subpoenaed as a witness and offered immunity for her testimony?

Prosecutorial Misconduct

Vouching: *People v. Rodriguez* (2018) 26 Cal.App.5th 890 (S251706). Petition for review after the Court of Appeal reversed a judgment of conviction of criminal offenses. This case presents the following issue: Did the prosecutor improperly vouch for the testifying correctional officers by arguing in rebuttal that they had no reason to lie, would not place their careers at risk by lying, and would not subject themselves to possible prosecution for perjury?

Retroactivity of Ameliorative Sentencing Amendments

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 imposition of sentence was suspended?

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?

Proposition 47: The Safe Neighborhoods and Schools Act

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?

Value of Access Card Information: *People v. Liu* (2018) 21 Cal.App.5th 143 (S248130). Petition for review after the Court of Appeal affirmed in part and reversed in part an order denying a petition to recall sentence. This case includes the following issue: For the purpose of determining whether a conviction for theft of access card information in violation of Penal Code section 484e (d), is eligible to be reduced to a misdemeanor under Proposition 47 when the information has been used to obtain property, is the value of the access card information limited to the fair market value of the information itself on the black market or can the value of the property obtained by the use of the information be considered? (See *People v. Romanowski* (2017) 2 Cal.5th 903, 914.)

Theft and Shoplifting the Same Property: *People v. Lopez* (2018) 26 Cal.App.5th 382(S250829). 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) Can the prosecution charge theft and shoplifting of the same property, notwithstanding Penal Code section 459.5 (b), which provides, "Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property"? (2) If not, was trial counsel ineffective for failing to object to the theft charge? (3) Did defendant forfeit the argument under Penal Code section 459.5 by failing to object to the prosecution's charging both shoplifting and theft? (4) If defendant had objected, what should the trial court's ruling have been? Might it have

ordered the prosecution to choose between a shoplifting charge and a theft charge? If so, and given the potential difficulty in proving the intent required for shoplifting, might the prosecution have chosen to charge only petty theft with a prior? Would defendant have been prejudiced by the failure to object? (5) Was petty theft with a prior a lesser included offense of shoplifting under the accusatory pleading test? If so, could the trial court have instructed the jury on shoplifting as the charged offense and on petty theft as a lesser included offense? (See *People v. Reed* (2006) 38 Cal.4th 1224, 1227- 1231.) If not, and assuming defendant had objected to charging both crimes, could the prosecution have moved to amend the charging document to make the theft charge a lesser included offense of shoplifting under the accusatory pleading test? If that had occurred, could the trial court have instructed on shoplifting as the charged offense and on petty theft as a lesser included offense? In that event, would defendant have been prejudiced by the failure to object?

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?

Youth Offender Parole Hearings

Giving Great Weight to the Diminished Culpability of Youth: *In re Palmer* (2018) 27 Cal.App.5th 120(S252145). Petition for review after the Court of Appeal granted relief on a petition for writ of habeas corpus. This case presents the following issue: What standard should the Board of Parole Hearings apply in giving "great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner" as set forth in Penal Code section 4801(c), in determining parole suitability for youth offenders?

Juvenile Delinquency Proceedings

Designation of Wobblers: *In re G.C.* (2018) 27 Cal.App.5th 110

(S252057). Petition for review after the Court of Appeal dismissed an appeal from orders in a juvenile wardship proceeding. This case presents the following issue: Can the juvenile court's failure to expressly declare whether an offense is a felony or a misdemeanor (see *In re Manzy W.* (1997) 14 Cal.4th 1199) be challenged on appeal from orders in a subsequent wardship proceeding?

III. NOTEWORTHY PENDING CASES IN THE UNITED STATES SUPREME COURT

Jury Selection

***Batson/Wheeler*:** *Flowers v. Mississippi*, 17-9572 (Argument TBD). Whether a prosecutor's history of adjudicated purposeful race discrimination may be dismissed as irrelevant when assessing the credibility of his proffered explanations for peremptory strikes against minority prospective jurors under *Batson v. Kentucky* (1986) 476 U.S. 79.

The Fourth Amendment Exclusion of Illegally Obtained Evidence

Warrantless Blood Draw from an Unconscious Motorist: *Mitchell v. Wisconsin*, 18-6210 (Argument TBD). Whether an implied-consent statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

Eighth Amendment

Excessive Fines: *Timbs v. Indiana*, 17-1091 (Argument held Nov. 28, 2018). Whether the Eighth Amendment's excessive fines clause is incorporated against the states under the Fourteenth Amendment.

Appeal Waivers

Counsel's Duty to File a Notice of Appeal: *Garza v. Idaho*, 17-1026 (Argument held October 30, 2018). Whether the "presumption of prejudice" recognized in *Roe v. Flores-Ortega* (2000) 528 U.S. 470, applies where a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant's plea agreement included an appeal waiver?

IV. NEW CALIFORNIA LAWS

Accomplice Liability for Felony Murder

SB 1437: Significantly scales back the first degree felony murder rule, eliminates the natural and probable consequences doctrine for murder, and arguably eliminates the second degree felony murder rule. Under SB 1437, a person is not liable as an aider or abettor unless the person was the actual killer, acted with intent to kill, or acted with reckless indifference to human life. This provision does not apply if the victim was a peace officer. SB 1437 is retroactive, enabling eligible individuals to file a petition for resentencing. The burden of proof rests upon the prosecution, who must prove ineligibility beyond a reasonable doubt. Either party may rely on the record of conviction or offer new evidence.

Discretion to Dismiss Prior Serious Felony Conviction Enhancement:

SB 1393: Deletes the restriction in Penal Code section 1385, subdivision (b), prohibiting a judge from striking a prior serious felony conviction that supports a five-year enhancement under Penal Code section 667, subdivision (a). This bill is similar to SB 620, a 2018 bill that gave the court discretion to strike certain firearm enhancements under Penal Code sections 12022.5 and 12022.53. Accordingly, the same approach will likely apply to SB 1393, so counsel whose cases involve Penal Code section 667, subdivision (a), enhancements should argue the case must be remanded for an exercise of discretion.

Ban on Prosecuting Minors Under 16 Years Old as Adults

SB 1391: Prohibits prosecution of minors in adult court for offenses committed while under 16 years old unless the minor was not apprehended until after turning 18 years old. This new law should apply retroactively to judgments not yet final on appeal under *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, a concession we have seen the Attorney General make. District Attorneys around the state have been challenging SB 1391 as an unconstitutional legislative amendment to a voter initiate, Proposition 57.

Age Range for Juvenile Court Jurisdiction

SB 439: Amends Welfare and Institutions Code sections 601 and 602 and modifies the ages for juvenile court delinquency jurisdiction to between 12 and 17 years of age, except where the minor is alleged to have committed murder and several specified sex offenses.

Maximum Length of an Incompetency Commitment

SB 1187: Changes the law on how long an incompetent person may be held pending restoration of competency. Previously, the maximum statutory period was either the maximum sentence for the offenses or three years, whichever was shorter. Now the maximum statutory period for holding someone is either the maximum sentence for the offenses or two years, whichever is shorter.

Eligibility for Proposition 64 Relief

AB 1793: Adds Health and Safety Code section 11361.9, which requires the Department of Justice to look through their records for offenses which are potentially eligible for Proposition 64 dismissals or reductions. The DOJ will then notify prosecutors of those convictions. If the prosecutor does not challenge the person's eligibility, then the court shall reduce or dismiss the charge no later than July 1, 2020. If the prosecution does challenge the reduction or dismissal, the public defender office shall make a reasonable effort to notify the defendant. While it is unclear whether the public defender will represent all eligible individuals, it does appear that the public defender will represent past clients whose eligibility is challenged – even if those clients do not show up and have not communicated with the public defender.

Prosecutor Access to Sealed Juvenile Court Records

AB 2952: Authorizes the prosecutor to access juvenile records sealed after successful completion of informal probation. The prosecutor may only access the records to provide exculpatory evidence to a defendant and must seek the court's approval to gain access.

Offenses Excluded from Mental Health Diversion Program

SB 215: Amends the Penal Code section 1001.36 to exclude from the mental health diversion program those charged with murder, voluntary manslaughter, and sex offenses that automatically require sex offender registration upon a conviction.

Disclosure of Peace Officer Video and Audio Recordings

AB 748: Allows a video or audio recording that relates to a "critical incident" to be withheld for 45 calendar days (subject to extensions) if disclosure would substantially interfere with an active investigation. The bill would allow the recording to be withheld if the public interest in withholding video or audio recording clearly outweighs the public interest in disclosure because the release of the recording would, based on the facts and circumstances depicted in the recording, violate the reasonable expectation of privacy of a subject depicted in the recording, in which case the bill would allow the recording to be redacted to protect that interest. If the agency demonstrates that the reasonable expectation of privacy of a subject depicted in the recording cannot adequately be protected through redaction, the bill would require that the recording be promptly disclosed to the recording's subject, his or her parent, guardian, or representative or, if deceased, his or her heir, beneficiary, immediate family member, or authorized legal representative.

Sex Offense Exoneration

SB 1050: Provides that individuals exonerated of specified sex crimes no longer have to register as sex offenders. Exonerated defendants who are in prison will be paid $1000 upon their release.

Firearms Prohibition for Misdemeanor Domestic Violence Convictions

AB 3129: Increases the firearms prohibition for those convicted of misdemeanor domestic violence in violation of Penal Code section 273.5 from 10 years to life. The lifetime prohibition only applies to those convicted on or after January 1, 2019.