**FIRST DISTRICT APPELLATE PROJECT**
**TRAINING SEMINAR**
**February 9, 2018**

# RECENT LEGAL DEVELOPMENTS 2018

**GRACE SHIGETANI**
**Staff Attorney**
**First District Appellate Project**
**February 2018**



FDAP
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# I. RECENTLY DECIDED CASES OF INTEREST

## A. UNITED STATES SUPREME COURT

### Eighth Amendment

*Moore v. Texas* (2017) 581 U.S. __ [137 S.Ct. 1039]: After defendant was convicted of capital murder, a state habeas court determined that defendant qualified as intellectually disabled therefore his death sentence violated the 8th Amendment. The state habeas court consulted current medical diagnostic standards and recommended defendant be granted relief. The Texas Court of Criminal Appeals (CCA) declined to follow the state habeas court's recommended judgment, holding that the state habeas court erred by not following the CCA's earlier decision which adopted a definition and standards for assessing intellectual disability based on older medical standards. The United States Supreme Court held that the CCA failed to adequately inform itself of the "medical community's diagnostic framework" and vacated the CCA's decision.

*Virginia v. LeBlanc* (2017) 582 U.S. __ [137 S.Ct. 1726]: Defendant committed rape when he was 16 years old, and was sentenced to life in prison in Virginia, which had replaced traditional parole with a "geriatric release" program in the 1990's. *Graham v. Florida* (8th Amendment prohibits juvenile offenders convicted of nonhomicide offenses from being sentenced to LWOP, must give them some "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation") was decided 7 years after defendant was sentenced. The Supreme Court of Virginia subsequently held in *Angel v. Commonwealth* that Virginia's geriatric release program satisfies *Graham*'s requirement of parole for juvenile offenders. In this case, the trial court denied defendant's motion to vacate his sentence in light of *Graham*, relying on *Angel*. The United States Supreme Court held that the state court did not unreasonably apply *Graham*, and the Court of Appeals for the Fourth Circuit erred by failing to accord the state court's decision the deference owed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

### First Amendment

*Packingham v. North Carolina* (2017) 582 U.S. __ [137 S.Ct. 1730]: A North Carolina statute made it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." In an 8-0 opinion by Justice Kennedy, the Court held that the statute impermissibly restricts lawful speech in violation of the First Amendment.

**Fourteenth Amendment – Due Process**

*McWilliams v. Dunn* (2017) 582 U.S. __ [137 S.Ct. 1790]: The United States Supreme Court held that the Alabama courts' determination that defendant received all the assistance to which he was entitled under *Ake v. Oklahoma* was contrary to, or an unreasonable application of, clearly established federal law. Defendant did not receive any expert assistance in the evaluation, presentation, or presentation of a defense after meeting the threshold criteria demonstrating that his sanity at the time of the offense was to be a significant fact at trial.

*Nelson v. Colorado* (2017) 581 U.S. __ [137 S.Ct. 1249]: Colorado's Compensation for Certain Exonerated Persons statute (Exoneration Act) permitted Colorado to retain conviction-related assessments unless and until the defendant instituted a discrete civil proceeding and proved her innocence by clear and convincing evidence. The United States Supreme Court held that the Exoneration Act's scheme did not comport with the Fourteenth Amendment's guarantee of due process, because once defendants' convictions were reversed, the presumption of innocence was restored. That the Act provided sufficient process to compensate a defendant for their loss of liberty did not mean it provided sufficient process for the return of their property.

*Turner et al. v. U.S.* (2017) 582 U.S. __ [137 S.Ct. 1885]: The United States Supreme Court held that the evidence prosecutors failed to turn over in a connection with a 1984 murder prosecution was not material under *Brady v. Maryland*, as it was not reasonably probable the withheld evidence could have led to a different result at trial.

**Fourth Amendment**

*Manuel v. City of Joliet* (2017) 580 U.S. __ [137 S.Ct. 911]: The Supreme Court held that a defendant may bring a claim based on the Fourth Amendment to contest the legality of his pretrial confinement. The constitutional protections of the Fourth Amendment apply even after the start of "legal process" in a criminal case – here, after the judge's determination of probable cause.

*District of Columbia v. Wesby* (2018) 583 U.S. __ [2018 U.S. Lexis 760]: The Supreme Court concluded that officers made an "entirely reasonable inference" that partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party, therefore the officers had probable cause to arrest the partygoers and were entitled to summary judgment on the partygoers' claims of false arrest under the Fourth Amendment.

**Restitution – Appeals**

*Manrique v. United States* (2017) 582 U.S. __ [137 S.Ct. 1266]: At defendant's initial judgment restitution was deferred, and a later-determined restitution amount was entered on an amended judgment. The Supreme Court held that defendant's notice of appeal from the initial judgment did not invoke appellate review of the later-determined restitution amount. Defendant forfeited his right to challenge the restitution amount by failing to file a second notice of appeal from the restitution order.

**Sixth Amendment – Ineffective Assistance of Counsel**

*Davila v. Davis* (2017) 582 U.S. __ [137 S.Ct. 2058]: During defendant's state capital murder trial, trial counsel objected to a proposed jury instruction that was submitted to the jury. The instructional error issue was not raised on direct appeal or in state habeas proceedings. Defendant then sought federal habeas relief, arguing that his state habeas counsel's ineffective assistance in failing to raise an ineffective-assistance-of-appellate-counsel claim provided cause to excuse the procedural default of the claim. The United States Supreme Court disagreed, and held that the ineffective assistance of postconviction counsel does not provide cause to excuse the procedural default of ineffective-assistance-of-appellate-counsel claims.

*Lee v. U.S.* (2017) 582 U.S. __ [137 S.Ct. 1958]: Defendant, a citizen of South Korea, spent 35 years living in the U.S. as a lawful permanent resident before being indicted with a drug charge (possessing ecstasy with intent to distribute). During plea negotiations, defendant repeatedly asked his attorney if he would face deportation, who assured him he would not be deported as a result of his plea. However, defendant pleaded guilty to an "aggravated felony" which made defendant subject to mandatory deportation as a result of the plea. Although the government conceded defendant's counsel performed deficiently, the Sixth Circuit concluded that defendant could not show prejudice because of the strength of the evidence against him. The United States Supreme Court reversed, rejecting the government's contention that defendant could not show prejudice from accepting a plea where defendant had no viable defense at trial. In this case, defendant adequately demonstrated a reasonable probability he would have rejected the plea had he known it would lead to mandatory deportation.

*Weaver v. Massachusetts* (2017) 582 U.S. __ [137 S.Ct. 1899]: While a public-trial violation is structural error, it does not always lead to fundamental unfairness. The Supreme Court held that the proper remedy for addressing a violation of the right to a public trial depends on when the objection is raised. If defendant does not preserve a structural error on direct review, but raises it later in the context of an ineffective-assistance claim, defendant must show prejudice under *Strickland*.

**Sixth Amendment – Right to Impartial Jury**

*Pena-Rodriguez v. Colorado* (2017) 580 U.S. __ [137 S.Ct. 855]: After defendant was convicted by a Colorado jury, two jurors reported that a third juror made statements during deliberations reflecting that his guilty vote was the product of racial animus. The trial court denied defendant's motion for a new trial, citing the state's no-impeachment rule [prohibiting a juror from testifying as to statements made during deliberations in a proceeding addressing the validity of the verdict] and the state appellate courts affirmed. The United States Supreme Court granted certiorari and reversed. The Sixth Amendment requires a racial bias exception to the no-impeachment rule for jury deliberations. When there is a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict, and that the statement tends to show that racial animus was a significant motivating factor in the juror's vote to convict, an exception to the no-impeachment rule must permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

## B. CALIFORNIA SUPREME COURT

**Competency**

*Jackson v. Superior Court* (2017) 4 Cal.5th 96. Defendant, charged with sexual misconduct, was declared incompetent to stand trial and involuntarily committed to a state hospital. After being held for the maximum three-year commitment authorized by PC 1370, subd. (c), during which time he did not regain competence, defendant was released from custody. Three days later, the district attorney obtained a new indictment with identical charges, as permitted by PC 1387. The California Supreme Court held that persons in defendant's position may be rearrested on charges refiled under PC 1387, but if found incompetent again they may be recommitted only for a period not exceeding the remaining balance, if any, of the three years authorized by PC 1370, subd. (c), after which they must be placed under conservatorship or released.

**Criminal Offenses – Criminal Threats**

*People v. Gonzalez* (2017) 2 Cal.5th 1138. While an off-duty police officer and friends were dining in a restaurant, defendant, a passenger in a car that drove past the restaurant, made a hand sign and manually simulated a pistol pointed upward. The officer recognized the hand sign as a gang symbol, considered the pistol gesture a threat, and he and some of his friends were scared by the gestures. Defendant was charged with five counts of making a criminal threat (PC 422). The trial court dismissed the charges pursuant to PC 995, the Court of Appeal reversed the dismissal, and the California Supreme Court reversed the judgment of the Court of Appeal. Defendant's conduct did not qualify as "statement, made verbally" which cannot be interpreted to include nonverbal conduct.

**Fourteenth Amendment – Right to a Fair Trial – *Batson/Wheeler***

*People v. Gutierrez* (2017) 2 Cal.5th 1150. During jury selection, defendants joined in a *Batson/Wheeler* motion after the prosecutor exercised 10 of 16 peremptory challenges to remove Latino jurors from the panel. The trial court found defendants established a prima facie case, but found the prosecutor's reasons to be neutral; the Court of Appeal affirmed. The California Supreme Court reversed, holding that the record did not sufficiently support the trial court's denial of the *Batson/Wheeler* motion with respect to one prospective juror – the prosecutor's reason for the strike was not self-evident, and the record was void of explication from the court as to why it accepted the reason as an honest one. The court also held that the Court of Appeal erred in refusing to conduct a comparative juror analysis, overruling *People v. Johnson* (1989) 47 Cal.3d 1194 to the extent it suggests comparative analysis by a reviewing court is disfavored.

**Homicide – *Chiu* Error on Habeas Review**

*In re Martinez* (2017) 3 Cal.5th 1216. Defendant was convicted of first degree murder after the jury was instructed on both a direct aiding and abetting theory and a natural and probable consequences theory. The California Supreme Court held that on a petition for writ of habeas corpus, as on direct appeal, *Chiu* error requires reversal unless the reviewing court concludes beyond a reasonable doubt the jury actually relied on a legally valid theory in convicting defendant of first degree murder. Finding the *Chiu* error prejudicial under that standard, the court vacated defendant's first degree murder conviction.

**Indigent Defendants**

**Right to Transcripts Upon Retrial**: *People v. Reese* (2017) 2 Cal.5th 660. The California Supreme Court held that *People v. Hosner* (1975) 15 Cal.3d 60, which held that indigent criminal defendants facing retrial are presumptively entitled to a "full" and "complete" transcript of prior proceedings under Equal Protection principles, applies not only to witness testimony but also opening statements and closing arguments.

**Jury Instructions**

**Failure to Instruct on Elements of Offense**: *People v. Merritt* (2017) 2 Cal.5th 819. Defendant was convicted of two counts of robbery after a jury trial in which the trial court failed to instruct the jury on the elements of robbery. Relying on *People v. Cummings* (1993) 4 Cal.4th 1233, the Court of Appeal held that the trial court's error in failing to instruct the jury on the offense of robbery was reversible per se. The California Supreme Court reversed, rejecting a categorical rule that error in failing to instruct on elements of the offense can never be found harmless. The court, overruling *Cummings*, held that harmless error analysis applies if the error at issue does not vitiate all the jury's findings. In this case, where defendant conceded that the perpetrator was guilty of robbery, his sole defense was that he was not the perpetrator, and the crimes were recorded, the error was harmless beyond a reasonable doubt.

**Instruction Upon Retri**al: *People v. Hicks* (2017) 4 Cal.5th 203. At defendant's first trial, he was convicted of grass vehicular manslaughter while intoxicated and other offenses, but the jury hung on the second degree murder charge. The California Supreme Court held that upon retrial, the trial court errs if it informs the new jury of the specific convictions that resulted from the previous jury's deliberations. The trial court may, upon request, give an instruction pursuant to PC 1093 and 1127 regarding trials in segments, which would prevent the jury from wrongly assuming that an acquittal would result in an escape of criminal liability altogether, without introducing matters extraneous to the retrial.

**Juvenile Delinquency**

***Miller* Resentencing**: *In re Kirchner* (2017) 2 Cal.5th 1040. Petitioner filed for habeas relief after serving 22 years of his LWOP sentence for murder committed as a juvenile, contending that his sentence violated the Eighth Amendment under *Miller*. The Court of Appeal held that the process of recall and resentencing provided by section 1170, subdivision (d)(2) meets the requirements of *Miller* and *Montgomery* and was an adequate remedy petitioner must pursue before resorting to habeas relief. The California Supreme Court reversed, holding that section 1170(d)(2) does not provide an adequate remedy of law for *Miller* error, and that petitioner may obtain a *Miller* resentencing as a form of habeas corpus relief. The resentencing inquiry prescribed by section 1170(d)(2), which was designed to revisit lawful LWOP sentences, does not necessarily account for the full array of *Miller* factors in the manner a proper resentencing under *Miller* would. Petitioner could not be required to exhaust the section 1170(d)(2) procedure prior to seeking habeas corpus relief or to accept section 1170(d)(2) as his exclusive remedy.

***Arbuckle* Rights**: *K.R. v. Superior Court* (2017) 3 Cal.5th 295. Minor admitted to two probation violations pursuant to a plea bargain before a regular visiting judge. The disposition hearing was put out one week, when it was contemplated the minor would have time served under the plea bargain. A different judge presided over the disposition hearing and minor objected under *Arbuckle*. The Court of Appeal held that the minor's plea agreement did not include an express or implied term that the same judge who accepted minor's admissions would preside over the minor's disposition hearing, therefore minor had no *Arbuckle* right to be sentenced by the same judge who accepted the plea. The California Supreme Court reversed the judgment of the Court of Appeal.

**Parole/Probation**

**Parole Revocation Procedure**: *People v. Deleon* (2017) 3 Cal.5th 640. In 2013, defendant's parole was revoked 14 days after his detention, upon a judicial officer reviewing the CDCR rules violation report and concluding there was probable cause to support revocation. The Court of Appeal held that under the parole revocation scheme as amended by the 2011 Realignment Act, superior courts are not required to conduct preliminary probable cause hearings before revoking parole (cf. *Morrissey v. Brewer* (1972) 408 U.S. 471) and that a timely single hearing procedure can suffice. The California Supreme Court reversed the judgment of the Court of Appeal. Although the appeal was technically moot, the court exercised its discretion to decide what procedure should govern parole revocation proceedings under the Realignment Act. Under the Fourteenth Amendment and *Morrissey*, incarcerated parolees facing revocation pursuant to PC 1203.2 are entitled to a timely preliminary hearing. The probable cause determinations in this case, one by the parole agency 3 days after arrest, and a second by the court 14 days after arrest, did not satisfy due process because defendant was not allowed to appear, be heard, present evidence, or question his parole agent who reported the violation. The court declined to decide whether there was an outer time limit for a probable cause hearing, but reiterated *Morrissey*'s command that it should occur "as promptly as convenient after arrest."

**Mandatory Sex Offender Conditions**: *People v. Garcia* (2017) 2 Cal.5th 792. In 2010, the legislature passed the Chelsea King Child Predator Prevention Act of 2010 (Chelsea's Law) relating to sex offender treatment. The California Supreme Court upheld two mandatory sex offender conditions of probation: (1) the requirement to waive any privilege against self-incrimination and participate in polygraph examinations and (2) the requirement to waive any psychotherapist-patient privilege to enable communication between sex offender management professional and supervising probation officer. Because the first condition compels defendant's responses, those responses cannot be used against him in a criminal proceeding and the condition does not violate the Fifth Amendment. The second condition was not overbroad or violative of defendant's constitutional right to privacy.

**Implicit Knowledge Requirement**: *People v. Hall* (2017) 2 Cal.5th 494. Express knowledge requirement not constitutionally required for probation conditions barring possession of firearms and illegal drugs because they are properly construed as prohibiting him from knowing possession of such items.

**Proposition 36**

**Facts Underlying Previously Dismissed Counts**: *People v. Estrada* (2017) 3 Cal.5th 661. The trial court denied defendant's petition for resentencing under Prop 36 on the ground that defendant was armed with a firearm during the commission of his crime, although defendant pled guilty only to grand theft person and all firearm-related charges were dismissed. The Court of Appeal affirmed, holding that preliminary hearing testimony was a proper basis to determine that defendant was armed with firearm during commitment offense. The California Supreme Court affirmed the judgment of the Court of Appeal, holding that Proposition 36 does not prohibit courts from considering facts connected with counts dismissed under a plea agreement.

**Proof Beyond a Reasonable Doubt Required for Resentencing Ineligibility**: *People v. Frierson* (2017) 4 Cal.5th 225. Defendant was convicted of stalking in violation of PC 646.9 and due to two prior strikes was sentenced to a term of 25 to life. Defendant petitioned for resentencing under Prop 36, and the trial court ruled defendant ineligible because the third strike offense was committed with intent to inflict great bodily injury to the victim. The Court of Appeal affirmed, rejecting defendant's argument that the court must determine the existence of disqualifying factors for Prop 36 resentencing based only on facts and circumstances necessarily decided in the underlying conviction. The court also disagreed with *People v. Arevalo* (2016) 244 Cal.App.4th 836, holding that a preponderance of the evidence, not proof beyond a reasonable doubt, is the prosecution's standard of proof for meetings its burden of proving a disqualification for resentencing. The California Supreme Court reversed the judgment of the Court of Appeal, holding that proof beyond a reasonable doubt was required by the prosecution to prove defendant was ineligible for resentencing. Applying this standard of proof preserves the parallel structure between the prospective and retroactive application of Proposition 36.

**Unreasonable Risk of Danger to Public Safety**: *People v. Valencia* (2017) 3 Cal.5th 347. The California Supreme Court held that Proposition 47 did not amend Proposition 36, and that Proposition 47's definition of "unreasonable risk of danger to public safety" does not apply to resentencing proceedings under Proposition 36. Nothing in Proposition 47 suggests the voters' intent to curtain the broad discretion given to resentencing courts by Proposition 36 just two years earlier. The different definitions do not violate Equal Protection principles because those resentenced under Propositions 36 and 47 are not similarly situated.

**Proposition 47**

**Unlawfully Taking a Vehicle Proposition 47 Eligible**: *People v. Page* (2017) 3 Cal.5th 1175. The Court of Appeal held that Proposition 47 does not apply to the offense of unlawfully taking a vehicle (Veh. Code, § 10851), even though Prop 47 does apply to grand theft auto (PC 487(d)(1)), and even if the vehicle's value does not exceed $950. The California Supreme Court held that the lower courts erred in holding that a VC 10851 conviction is categorically ineligible for Proposition 47 resentencing. Vehicle Code section 10851 may be violated in several ways, including theft of a vehicle – PC 490.2 covers the theft form of a VC 10851 offense. Accordingly, a person convicted for vehicle theft under VC 10851 may be resented under PC 1170.18 if the person can show the vehicle was worth $950 or less.

**Entry into Bank to Cash Forged Checks Proposition 47 Eligible**: *People v. Gonzales* (2017) 2 Cal.5th 858. Defendant entered a bank twice and cashed forged/stolen checks for $125 each. The trial court denied defendant's Proposition 47 petition to reduce his felony conviction of second degree burglary. The Court of Appeal held that entering a bank to cash forged checks was not "shoplifting" and that non-shoplifting second degree commercial burglary not eligible for Proposition 47 resentencing. The California Supreme Court reversed the judgment of the Court of Appeal, holding that for the purposes of shoplifting (PC 459.5), it is the value of the stolen goods, not the form of theft, that distinguishes felonies and misdemeanors under Proposition 47. Even if defendant entered the bank to commit identity theft (PC 530.5), defendant's conduct still constituted shoplifting because he entered the commercial establishment with the intent to commit theft by false pretenses, and PC 459.5 required misdemeanor treatment for the underlying conduct.

**Theft of Access Card Information Proposition 47 Eligible**: *People v. Romanowski* (2017) 2 Cal.5th 903. The trial court denied defendant's Prop 47 petition to resentence his conviction for theft of access card information on the basis that Penal Code section 484e was akin to identity theft under section 530.5 and therefore outside the scope of Prop 47. The Court of Appeal reversed, holding that Prop 47 applies to section 484e, subdivision (d) offenses, disagreeing with *People v. Cuen* (2015) 241 Cal.App.4th 1227 and *People v. Grayson* (2015) 241 Cal.App.4th 454. The California Supreme Court affirmed the judgment of the Court of Appeal, holding that theft of access card information (PC 484e(d)) is eligible for reduction under Proposition 47 as petty theft (PC 490.2) where the reasonable and fair market value of the stolen access card information does not exceed $950.

**Proposition 66 – Death Penalty Reform and Savings Act of 2016**

*Briggs v. Brown* (2017) 3 Cal.5th 808. Proposition 66 was approved by voters on November 8, 2016. Petitioner challenged the constitutionality of several aspects of the proposition. The California Supreme Court denied relief based on petitioner's facial challenge to Proposition 66's constitutionality. The court held that to avoid a separation of powers problem, the time limits for review (PC 190.6, subd. (d); PC 1509, subd. (f)) are directive only, rather than mandatory. The effective date of Proposition 66 is the date this opinion becomes final. The opinion did not address the constitutionality of Proposition 66's "conscription" provision for appellate attorneys (PC 1239.1, subd. (b)).

**Restitution**

**Hit-And-Run**: *People v. Martinez* (2017) 2 Cal.5th 1093. Defendant was involved in an accident with a young boy that involved no criminal wrongdoing – but defendant was convicted of leaving the scene of an injury accident in violation of Veh. Code, section 20001, subd. (a). The California Supreme Court held the trial court, under PC 1202.4, was authorized to order restitution for injuries caused or exacerbated by defendant's criminal flight from the scene of the accident, but not authorized to award restitution for injuries resulting from accident itself.

**Sixth Amendment – Right to Jury Trial – Judicial Fact Finding**

*People v. Gallardo* (2017) 4 Cal.5th 120. After defendant waived her right to a jury trial on a prior felony conviction for violating PC 245(a)(1), the trial court considered the preliminary hearing transcript from the prior case, over defendant's hearsay objection, and found that it constituted a strike. The Court of Appeal held that under *Descamps v. United States* (2013) 570 U.S. __ [133 S.Ct. 2276], because the statute at issue in this case was a so-called "divisible statute" (setting out one or more elements of the offense in the alternative), the sentencing court was permitted to consult extrinsic documents to determine which alternative formed the basis for the prior conviction and a jury determination was not required. The California Supreme Court reversed and remanded for a new determination on the prior conviction allegations, holding that the trial court violated defendant's 6th Amendment right by finding a disputed fact about the conduct underlying defendant's assault conviction that was not established by virtue of the conviction itself. Because the facts the trial court relied upon in the preliminary hearing transcript were not found by jury nor admitted by defendant when entering her guilty plea, they could not serve as basis for defendant's increased sentence. The court overruled *People v. McGee* (2006) 38 Cal.4th 682 – a court may no longer rely on its own independent review of record evidence to determine what conduct "realistically" led to the defendant's conviction.

**Waiver of Right to Jury Trial**

*People v. Sivongxxay* (2017) 3 Cal.5th 171. Defendant, a Laotian refugee with no formal education and limited command of English, asserted on appeal that his waiver of his jury trial right was not knowing and intelligent. After a bench trial, defendant was convicted of, inter alia, first degree murder, and the trial court found true the special circumstance allegation that defendant committed the murder during the commission of a robbery. At the penalty phase of the bench trial, the court imposed the death sentence. The California Supreme Court affirmed, holding that defendant entered a knowing and intelligent waiver of his jury trial right at the guilt phase. Defendant's jury waiver for the special circumstance allegation was knowing and intelligent under constitutional standards, but deficient under state law under *People v. Memro* (1985) 38 Cal.3d 658, 700-704 [requiring separate waiver of jury trial for special circumstance allegation]. The court held that where a defendant personally enters a knowing, intelligent, and voluntary jury waiver as to all aspects of their trial, *Memro* error is subject to harmless error analysis. Further, the trial court was not required to reaffirm at the outset at the penalty phase the jury waiver entered prior to trial, where the judge expressly distinguished between the guilty and penalty phases of a capital trial in his advisement prior to taking defendant's jury waiver.

*People v. Daniels* (2017) 3 Cal.5th 961. After a court trial, defendant was convicted of, inter alia, first degree murder, second degree murder, and attempted first degree murder of separate victims. The court found true special allegations of murder in the commission of robbery and burglary and multiple-murder, and sentenced defendant to death. The California Supreme Court reversed the judgment of death, holding that while defendant's waiver as to the guilt phase was valid, defendant's waiver of his right to jury trial on the penalty phase was invalid. Defendant was never informed of the nature of the jury right at the penalty phase of a capital trial that he was waiving.

## C. California Court of Appeal

### Bifurcation

**Prior Conviction Element of Charged Offense**: *People v. Profitt* (2017) 8 Cal.App.5th 1255. Defendant was charged with felony DUI and misdemeanor driving with a license suspended for prior DUI convictions. The trial court granted bifurcation on the three prior DUI convictions alleged as sentence enhancements, but not the misdemeanors. At trial, defendant's DMV record was admitted into evidence, disclosing three prior misdemeanor DUI convictions; the court instructed the jury that the record was relevant only to the misdemeanor license suspension counts and not to the felony DUI charges. The Court of Appeal affirmed, holding that *People v. Calderon* (1994) 9 Cal.4th 59 [trial courts have discretion to bifurcate prior conviction allegations] does not apply when a prior conviction is an element of a charged offense. Rather, the rules of *People v. Valentine* (1986) 42 Cal.3d 170, 173 [state Constitution requires proof "in open court" of the fact of ex-felon status when status is a substantive element of a current charge, rejecting bifurcate trial of ex-felon status] and *People v. Sapp* (2003) 31 Cal.4th 240 [rejecting contention that *Valentine* authorized bifurcation of related charges where a prior conviction was an element: the only options were the prosecution proving each element of the offense to the jury, or defendant stipulating to the conviction and the court "sanitizing" the information received by jury] applied, extending the rule to prior misdemeanor convictions. Even assuming the trial court had the authority to bifurcate, the trial court did not abuse its discretion in denying bifurcation.

### Criminal Offenses

**Carjacking**: *People v. Lopez* (2017) 8 Cal.App.5th 1230. Defendant was convicted of carjacking (PC 215) after entering a car with door open and engine running, holding door shut when owner tried to open it from the outside, and reversing while the owner held onto the door handle. After the owner lost her balance and let go, without falling to the ground, defendant sped off. The Court of Appeal affirmed, holding that a perpetrator accomplishes the taking of a motor vehicle by means of force, as defined under section 215, when the perpetrator drives the vehicle while a victim holds on or otherwise physically attempts to prevent the theft.

**Kidnapping**: *People v. Williams* (2017) 7 Cal.App5th 644. Three co-defendants were convicted of kidnapping to commit robbery (aggravated kidnapping) (PC 209(b)(1)) for incidents that involved moving the victims 40-60 feet within the store from locations closer to the front of the store to the rears of the store. The Court of Appeal reversed these convictions on insufficient evidence, holding that the movements were incidental to the robberies. The defendants' objective was robbery (unlike rape), not to harm the employees, and the record did not contain sufficient evidence that moving the victims to the back of the stores resulted in an increased risk of harm from the robberies. The defendants' simple kidnapping convictions were also reversed because the movement of employees approximately 50 feet within store was merely incidental to the robbery.

**Enhancements**

**Great Bodily Injury**: *People v. Lamb* (2017) 8 Cal.App.5th 137. Defendant convicted of involuntary manslaughter may also receive GBI enhancement on assault by means of force likely to produce GBI for offense involving same victim, following *People v. Martinez* (2014) 226 Cal.App.4th 1169.

**Prior Serious Felony Conviction**: *People v. Nguyen* (2017) 18 Cal.App.5th 260. Defendant had a prior first degree burglary conviction; the information alleged the fact of the prior and cited the statute defining it as a strike, but did not specifically allege a five-year prior serious felony conviction enhancement (PC 667, subd. (a).) Defendant admitted the prior, and at sentencing the trial court used the prior as a strike and prior serious felony conviction enhancement. The Court of Appeal held that the trial court erred by imposing the prior serious felony conviction enhancement. Furthermore, because PC 1170.1, subd. (e), requires an enhancement be alleged in the accusatory pleading, a violation of this requirement results in an unauthorized sentence and defendant's failure to object does not forfeit the error.

**Fourth Amendment – Search and Seizure**

*People v. Superior Court (Corbett)* (2017) 8 Cal.App.5th 670. Defendant did not voluntarily consent to search of his home when consent was obtained in violation of the Fifth Amendment after defendant unambiguously invoked his right to remain silent during custodial interrogation. The court held that the fruits of a warrantless search conducted pursuant to that illegally-obtained consent are properly suppressed. Under the facts of this case, a warrant later obtained after a search was conducted based upon illegally-obtained consent did not satisfy the inevitable discovery doctrine.

**Fourteenth Amendment – Due Process**

**Showing Required for *Pitchess* In Camera Review**: *Serrano v. Superior Court* (2017) 16 Cal.App.5th 759. After being informed by the prosecution that there might be some impeachment material on a deputy in the Sheriff's personnel files, defense counsel made a *Pitchess* motion, stating that there "may be" such material in the records and explaining why the deputy's credibility was at issue. The Sheriff opposed the motion on the ground that the defense didn't make an allegation of what the deputy's misconduct was and how evidence of it would support the defense. Based on *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, the defense argued that all the defense has to do is allege the existence of the material (without alleging what the material shows) and explain how the deputy's credibility is at issue in the case. The Court of Appeal agreed, granting defendant's petition for writ of mandate and directing the trial court to grant the *Pitchess* motion.

**Prosecutorial Misconduct**: *People v. Cowan* (2017) 8 Cal.App.5th 1152. Defendant was convicted of numerous sex offenses and sentenced to 60 years to life for sodomizing and orally copulating a 3 or 4 year old boy. During rebuttal of closing arguments, the prosecutor stated: "Let me tell you that presumption [of innocence] is over. Because that presumption is in place only when the charges are read. But you have now heard all the evidence. That presumption is gone." The Court of Appeal reversed, holding that the prosecutor committed misconduct by misstating the presumption of innocence and the burden of proof. Defendant's objection that the prosecutor was misstating the law was sufficient to preserve the issue. The prosecutor's statement here was not incomplete, but completely wrong, directly contradicting the trial court's instruction on proof beyond a reasonable doubt. The misconduct required reversal. "We caution prosecutors to observe and respect the law and not rely on harmless error as a safety net to ensure a conviction. The integrity of our system of justice demands nothing less."

**Gangs**

*Elizalde* and *Sanchez* Errors: People *v. Lara* (2017) 9 Cal.App.5th 296. Defendants Lara, Flores, and Espinoza and murder victim Lucero, all fellow gang members, burglarized a house together; approximately 6 hours later, Lucero was murdered. In addition to other charges, the defendants were each convicted of a substantive gang crime and at least one gang enhancement. The Court of Appeal concluded there was substantial evidence to support the defendants' gang participation conviction and enhancement findings, but that they must nevertheless be reversed for constitutional errors pursuant to *People v. Elizalde* (2015) 61 Cal.4th 523 and *People v. Sanchez* (2016) 63 Cal.4th 665. Here, the evidence establishing an "associational or organizational connection" required by *People v. Prunty* (2015) 62 Cal.4th 59 as to Lara, as well as gang membership as to Flores and Espinoza was admitted in violation of *Sanchez*, and admissions made by all defendants during booking interviews were admitted against them in violation of *Elizalde*. The *Sanchez* error as to Lara was prejudicial as to the gang crime and enhancement, while the cumulative prejudice of the *Elizalde* and *Sanchez* errors were prejudicial as to Flores and Espinoza as to the gang crime and enhancement. (See also Homicide section for further discussion of *Lara*).

**Associational or Organization Connection of Subsets to Larger Gang**: *People v. Garcia* (2017) 9 Cal.App.5th 364. Unlike in *People v. Prunty* (2015) 62 Cal.4th 59, where there was a lack of associational or organization connection between the alleged subsets that committed the requisite predicate offenses and the larger gang for which defendant committed the offense, in this case the gang subsets involved in the proffered predicate offenses were the same subsets which the gang expert's testimony linked to the overarching Black P-Stones gang. Accordingly, sufficient evidence supported the gang enhancement.

***Elizalde* and Future Crimes**: *People v. Villa-Gomez* (2017) 9 Cal.App.5th 527. Defendant was booked into jail on an immigration hold without any pending criminal charges; during a classification interview, defendant said he was a Norteno. Subsequently, defendant was involved in a gang-related jailhouse group assault on another inmate. Defendant's statements in response to jail classification questions about his gang membership were admitted at trial, which defendant challenged on appeal pursuant to *People v. Elizalde* (2015) 61 Cal.4th 523. The Court of Appeal held that *Elizalde* does not apply to responses to booking questions for crimes that have not yet been committed, because in those circumstances the questions would not be likely to elicit an incriminating response and thus do not amount to interrogation under the *Innis* test.

**Homicide**

**Insufficient Evidence of First and Second Degree Murder**: *People v. Lara* (2017) 9 Cal.App.5th 296. Defendants Lara, Flores, and Espinoza and murder victim Lucero, all fellow gang members, burglarized a house together; approximately 6 hours later, Lucero was murdered. Multiple witnesses saw or heard portions of the events, but there was no direct evidence of who was the shooter (or shooters). Lara testified that two unknown men, the shooter and another man, arrived in a dark car and fled after the shooting. On appeal, all three defendants challenged the sufficiency of the evidence of their respective murder convictions (1st degree as to Lara; 2nd degree as to Flores and Espinoza). The Court of Appeal agreed, rejecting respondent's argument that circumstantial evidence established the shooter(s) must have been one (or a combination) of the defendants, concluding that the record did not contain "any solid evidence" defendants were the only people present at the time of the murder. The evidence was insufficient to support defendant Lara's conviction for first degree murder because of the lack of direct evidence establishing who shot the victim and did not show that defendant willfully, deliberately, and with premeditation aided or encouraged the murder. Because the evidence established Lara aided and abetted an assault with firearm on Lucero prior the murder, Lara's conviction was reduced to second degree murder based on the natural and probable consequences doctrine. The evidence was also insufficient to convict codefendants Flores and Espinoza of second degree murder, despite behind Lara's companion, being present when the assault occurred, left scene in vehicle after murder, and lied to police, because it did not show that they participated in the assault prior to the murder; their murder convictions were reversed. (See also Gang section for further discussion on *Lara*.)

**Voluntary Manslaughter and Homicide**: *People v. Price* (2017) 8 Cal.App.5th 409. Defendant and to friends participated in robbery during which the victim was shot and killed. Defendant argued that her prosecution for first degree murder while allowing her two co-defendants plead to voluntary manslaughter were factually and legally irreconcilable and denied her of due process. The court held that voluntary manslaughter is a lesser included offense of murder and not legally irreconcilable. Further, defendant failed to establish prosecution took inconsistent positions in bad faith. Assuming error, the co-defendants benefitted but Price was not prejudiced because there was ample evidence to convict her of felony murder.

**Jury Instructions**

**Erroneous Instruction**: *People v. Nicolas* (2017) 8 Cal.App.5th 1165. Defendant was convicted of vehicular manslaughter with gross negligence after she was making calls and texting while driving at 80 mph on the freeway at 11 am, crashing into a vehicle stalled in a traffic jam. The Court of Appeal reversed, holding that the trial court committed structural error by erroneously instructing the jury on uncharged misconduct evidence regarding defendant's cell phone use prior to the accident, which was an indivisible part of the charged offense of gross vehicular manslaughter. The giving of the "erroneous and unnecessary" jury instruction required automatic reversal because it had the effect of lowering the prosecution's burden of proof regarding the existence of the calls and texts, which was the same evidence the prosecution was using to prove gross negligence.

**Juror Misconduct**: *People v. Alaniz* (2017) 16 Cal.App.5th 1. After being convicted by jury of assault likely to produce great bodily injury, defendant moved for new trial based on juror misconduct, arguing that jurors improperly discussed his failure to testify. The Court of Appeal noted the longstanding rule that there is no sua sponte duty to instruct jurors not to consider a defendant's failure to testify; the instruction is only required upon request. The court held that where, as here, no instruction was given instructing jurors not to consider defendant's failure to testify, no misconduct occurred.

**Juvenile Delinquency**

***Arbuckle* Not Applicable to Juvenile Contested Victim Restitution Hearings**: *In re Christian S.* (2017) 9 Cal.App.5th 510. The court of appeal noted that while it has long been settled that *Arbuckle* applies in juvenile cases, it does not apply in all criminal or juvenile court proceedings. Analogizing to sentencing hearings in probation revocation proceedings, the court held that any expectation the minor may have had that the original judge would conduct the hearing was unreasonable, therefore *Arbuckle* does not apply to contested victim restitution hearings in juvenile court.

***Miranda* Waiver Invalid**: *In re T.F.* (2017) 16 Cal.App.5th 202. The juvenile court found true the allegation minor engaged in lewd and lascivious conduct (PC 288, subd. (a)). The Court of Appeal reversed, holding that minor's *Miranda* waiver was not voluntary, the questioning by detective was coercive, and that the error was not harmless.

**Record Sealing**: *In re Dean W.* (2017) 16 Cal.App.5th 970. When sealing records pursuant to WIC 786, the juvenile court lacks discretion to seal only a portion of the records. Here, the juvenile court sealed all records of minor's DUI with the exception of the *Watson* advisement. The Court overturned the order and remanded the sealing of minor's juvenile record in its entirety.

**Record Sealing**: *In re W.R.* (2017) 16 Cal.App.5th 1053. The Court of Appeal held that sealing "the case" under Welfare and Institutions Code section 786 applies to records pertaining to a particular petition for which probation was imposed and satisfactorily completed, not the entire juvenile case file. The juvenile court had discretion to seal records related to a prior filed petition where the allegations were found not true, because it was filed prior to the last petition for which the minor was placed on probation. The juvenile court was required to treat the disposition of two petitions, resulting in the continuation or grant of probation, as one petition for the purposes of record sealing, whether or not the petitions were formally consolidated.

**SB 394 and *Miller***: *People v. Lozano* (2017) 16 Cal.App.5th 1286. Defendant was sentenced to LWOP for a first-degree murder with robbery-murder special circumstance committed when she was 16 years old. The Court of Appeal held that defendant's Eighth Amendment challenge to her sentence under *Miller* was moot because the passage of SB 394 amended PC 3051 to provide a youth offender parole hearing to defendant and others similarly situated after 25 years of incarceration.

**Victims of Human Trafficking**: *People v. Hicks* (2017) 17 Cal.App.5th 496. Defendant was convicted, inter alia, of three counts of human trafficking of a minor. Defendant argued on appeal that the court erred by refusing defendant's request to provide accomplice instructions. The Court of Appeal held that a minor who is a victim of human trafficking cannot be an accomplice, therefore no accomplice instructions were required.

**Penal Code section 1385**

*People v. S.M.* (2017) 9 Cal.App.5th 210. The People appealed from the trial court's dismissal of three felony and three misdemeanor counts pursuant to PC 1385, on its own motion, after the case had been pending for four years. The Court of Appeal affirmed, concluding that the trial court did not abuse its discretion in dismissing the case, after taking into consideration the defendant's lack of criminal record, no new charges during the 4 year pendency of the case, defendant's age, the professional impact it would have on him, and the fact that there was no actual loss. The trial court properly considered factors informed by generally applicable sentencing principles relating to matters such as the defendant's background, character, and prospects, and the interest of society in having crimes punished, before concluding that the furtherance of justice weighed in favor of dismissal.

**Pleas**

**Unauthorized Sentence is Premise of Plea**: *People v. Avignone* (2017) 16 Cal.App.5th 1233. Where the availability of an unauthorized sentence is premise of plea discussions, defendant will be given an opportunity to withdraw his plea even if the court's indicated sentence was not an express term of the bargain.

**Sex Offender Conditions of Probation**: *People v. Dillard* (2017) 8 Cal.App.5th 657. The Court of Appeal affirmed the trial court's denial of a motion to withdraw a no contest plea to human trafficking of a minor. The sex offender management program that was mandated as a condition of probation for sex offenders (PC § 1203.067) was not a direct consequence of defendant's plea to human trafficking of a minor (PC § 236.1(c)), because probation did not automatically flow from his open plea, and because probation was an optional sentencing alternative the defendant was free to reject. Accordingly, no pre-plea advisement of the sex offender management program requirements was required.

**Probation/Parole/Post-release Community Supervision**

**Failure to Rule on Mandatory Condition Objection**: *People v. Malago* (2017) 8 Cal.App.5th 1301. Defendant pled guilty to one count of importing a controlled substance (HS 11352, subd. (a)) and was sentenced to a five-year split sentence with the last 30 months on mandatory supervision. Defendant objected to the imposition of alcohol-related conditions and the trial court noted the objections but deferred ruling on them to the "mandatory supervision judge." On appeal, the court held that the trial court abused its discretion by failing to rule on the objections. The trial court's "policy" of not ruling on mandatory condition objections represented not a case specific application of sentencing discretion, but a preconceived determination applicable to all cases in which a defendant objects to mandatory supervision conditions, and the practice constituted an erroneous failure to exercise discretion. However, the error was harmless because the conditions objected to were reasonably related to future criminality. The trial court could have reasonably concluded based on defendant's past use of cocaine, marijuana, and alcohol and inability to successfully complete probation that defendant's sobriety and participation in substance abuse treatment were critical to his rehabilitation and successful completion of mandatory supervision.

**Electronic Search Condition and Domestic Violence**: *People v. Valdivia* (2017) 16 Cal.App.5th 1130. The Court of Appeal held that an electronic search condition for defendant convicted of domestic violence was overbroad. However, under *People v. Olguin* (2008) 45 Cal.4th 375, the electronic search condition was valid under *People v. Lent*.

**Narcotics Offender Registration and Attempts**: *People v. Smith* (2017) 8 Cal.App.5th 977. Defendant convicted of attempted possession of a controlled substance for sale was properly required to register as a narcotics offender under Health and Safety Code section 11590. The statutory scheme of which HS section 11590 is an integral part unambiguously reflects the Legislature's intent for section 11590 to apply to attempts.

**Proposition 36**

**Firearm Allegation on Possession of Firearm Charge**: *People v. Frutoz* (2017) 8 Cal.App.5th 171. The prosecution may plead and prove "armed with a firearm" allegation (Pen. Code § 1170.12, subd. (c)(2)(C)(iii)) on the charge of possession of a firearm by a felon to preclude eligibility for resentencing under Proposition 36.

**Assault with Intent to Commit Rape**: *People v. Cook* (2017) 8 Cal.App.5th 309. The bare elements of assault with the intent to commit rape could not establish that defendant used force or fear to commit the offense within the meaning of Welf. & Inst. Code, § 6600, subd. (b). Accordingly, it was improper to deny a petition for resentencing under Pen. Code, § 1170.126 based on the bare elements of the offense, without a case-specific determination of whether defendant used force or fear when committed assault with intent to commit rape.

**Collateral Attacks on Prior Strike Convictions**: *People v. Clark* (2017) 8 Cal.App.5th 863. PC 1170.126 does not authorize a collateral attack on a prior strike conviction; the language of the statute does not suggest a hearing to be held on question of a prisoner's eligibility for resentencing, but rather the fact of the prior conviction. Accordingly, resentencing under the Three Strikes Reform Act of 2012 does not permit a constitutional challenge, on the basis of a violation of *Boykin/Tahl* rights, to the underlying strike used to enhance sentence. A defendant's right to challenge the constitutionality of a prior conviction alleged to enhance their sentence in a current proceeding does not necessarily mean the same rights exist on a motion for resentencing (distinguishing *People v. Sumstine* (1984) 36 Cal.3d 909 and *People v. Allen* (1999) 21 Cal.4th 424).

**Proposition 47**

**Entry into Pharmacy with Intent to Obtain Drugs Using Forged Prescription**: *People v. Brown* (2017) 7 Cal.App.5th 1214. Defendant pleaded guilty to second degree burglary (Pen. Code, § 459) for entry into pharmacy with intent to obtain drugs using a forged prescription. The Court of Appeal held that the offense did not qualify for Proposition 47 reduction to misdemeanor shoplifting (Pen. Code, § 459.5) because the gravamen of her offense did not involve intent to steal, but to obtain drugs by means of forged prescription (a violation of Health and Safety Code, § 11368).

**Entry into Pharmacy with Intent to Obtain Drugs Using Forged Prescription** *People v. Gollardo* (2017) 17 Cal.App.5th 547. Defendant pleaded guilty to a felony violation of forging and issuing prescription for a narcotic drug (Health and Safety Code, § 11368) after entering a Walgreens and attempting to obtain a 16-ounce bottle of Codeine cough syrup. The Court of Appeal rejected defendant's argument that his offense was eligible for reduction under Proposition 47 because the underlying conduct of his offense constituted petty theft by false pretenses (PC 490.2).

**Prior Prison Term Enhancements When Priors Reduced Before Sentencing**: *People v. Call* (2017) 9 Cal.App.5th 856. Defendant was convicted by jury of drug offenses and three prior prison term enhancement allegations found true in a bifurcated court trial. After the prior prison term allegations were adjudicated, but prior to defendant's sentencing, the felonies underlying the prison priors were reduced to misdemeanors pursuant to Proposition 47. Over defendant's objection, the trial court imposed the three prison prior terms. The Court of Appeal reversed the imposition of the prior prison enhancements, despite the fact that the felonies had not yet been reduced at the time she committed the current offenses. Unlike *Johnson* (see below), which involved retroactive application of Proposition 47 to override PC 667.5, subd. (b), here because the underlying convictions were reduced prior to sentencing on the current offenses, the requisite prior felony conviction no longer existed at the time of sentencing and the imposition of the enhancements was error.

**Dismissal Pursuant to Penal Code section 1203.4a**: *People v. Khamvongsa* (2017) 8 Cal.App.5th 1239. Defendant petitioned for dismissal of two misdemeanor drug charges pursuant to PC 1203.4a, one which had been reduced from a felony pursuant to Proposition 47. The trial court denied the petition on the ground that appellant had served a state prison sentence for the convictions. The Court of Appeal reversed, holding that the language of PC 1170.18, subd. (k) that felonies reduced to misdemeanors "shall be considered a misdemeanor for all purposes" demonstrates the voters' intent to treat a redesignated misdemeanor like any other misdemeanor, except with regard to firearm restrictions. A completed prison sentence for an offense redesignated as a misdemeanor does not bar relief under PC 1203.4a.

**Penal Code section 2933.1 Custody Credit Limitation**: *In re Mallard* (2017) 7 Cal.App.5th 1220. The court held that Pen. Code, § 2933.1 custody credits limitation applies to a sentence after a felony conviction has been reclassified as a misdemeanor under Proposition 47. The court relied on *People v. Hamlin* (2009) 170 Cal.App.4th 1412, which held that the 15-percent limitation under 2933.1 applied to misdemeanor convictions sentenced contemporaneously with the felony conviction that triggers the application of section 2933.1.

**Restitution**

*People v. Salas* (2017) 9 Cal.App.5th 736. After a fight with his wife, during which defendant bashed his wife's head into the floor and she lost 4-5 pints of blood, defendant pleaded no contest to domestic violence (PC 273.5, subd. (a)). The great bodily injury enhancement to the domestic violence charge and remaining count were dismissed without a *Harvey* waiver. At the restitution hearing, defendant objected to paying for his wife's residential security expenses, over $14k, because his offense was not a "violent felony" as required by PC 1202.4, subd. (f)(3)(J) and defined in PC 667.5, subd. (c). The trial court overruled the objection and ordered restitution for the residential security expenses, concluding that although PC 273.5, subd. (a) was not a statutory "violent felony" the probation report clearly showed the victim suffered great bodily injury. The Court of Appeal reversed the restitution order for residential security expenses due to PC 1202.4, subd. (f)(3)(J)'s explicit limitation to violent felonies as defined by PC 667.5, subd. (c). The court also acknowledged the strong policy considerations weighing in favor of the opposite conclusion, and invited legislative review.

**Sanctions**

*People v. Lena* (2017) 8 Cal.App.5th 1145. The trial court did not abuse its discretion by striking defendant's entire testimony as a sanction for refusing to answer any questions on cross-examination. Although the trial court did not make an express finding that he considered the lesser sanction of an instruction to the jury to take defendant's refusal to answer cross-examination questions into account in assessing his credibility, the Court of Appeal implied the finding in affirming the judgment.

**Sentencing**

**Penal Code section 654**: *People v. Williams* (2017) 7 Cal.App.5th 644. The trial court erred in refusing to stay defendants' sentences for false imprisonment under PC 654, as the false imprisonment in each count was indivisible from and part of the robberies and pursuant to a single objective.

**Prior Strikes Must be Pleaded and Proved**: *People v. Sawyers* (2017) 15 Cal.App.5th 713. Defendant was convicted, inter alia, of first degree murder, and sentenced to 75 years to life pursuant to the Three Strikes law. The information alleged a prior first degree burglary, that defendant had served a prior prison term for the conviction (PC 667.5, subd. (b)), and mentioned PC 1170, subd. (h)(3). Defendant admitted the prior conviction and did not object to Three Strikes sentencing. The Court of Appeal vacated the sentence as unauthorized because the information failed to allege his prior offense was a strike.

**Sex Offenses**

**Sexual Penetration by Fraudulent Misrepresentation of Professional Purpose**: *People v. Icke* (2017) 9 Cal.App.5th 138. During a chiropractic massage with a regular client, defendant's fingers penetrated the victim's vagina several times, who thought she was still being treated, but was not sure whether the contact was purposeful or accidental. Defendant was convicted of sexual penetration by fraudulent misrepresentation of

professional purpose (PC 298 (d)(4)). The Court of Appeal affirmed the conviction against a sufficiency of the evidence challenge, holding that the context in which a touching occurs may be sufficient to communicate a purported professional purpose (no express verbal representation of a false professional purpose required), and there is no requirement that the victim be persuaded that the sexual touching itself served a specific professional purpose. Confusion or doubt about the purpose of the touching does not preclude a conviction so long as the victim allowed the touching to occur because of the defendant's fraudulent misrepresentation of a professional purpose.

**Evidence Code section 1108**: *People v. Shorts* (2017) 9 Cal.App.5th 350. Defendant was charged with sexually assaulting and murdering a 13-year-old girl, who he shot in the head and left in a park. At trial, the court admitted evidence of defendant's prior sex offenses against his ex-girlfriend pursuant to Evidence Code section 1108. The incident involving defendant's ex-girlfriend, an adult, took place less than 3 years before the murder, in which defendant dragged her to a car, took her to a park, pointed a gun at her, strangled her, beat her, and forced her to have oral and anal sex with him. On appeal, defendant argued the admission of the evidence was an abuse of discretion because the substantive sex offenses were predicated on lack of consent based on age rather than use of force. The Court of Appeal disagreed, holding that the propensity evidence was relevant to establish that defendant was prone to use a gun, isolate the victim in a park, strangle the victim, and engage in oral and anal sex, regardless of how the lack of consent was established.

**Sixth Amendment – Effective Assistance of Counsel**

***Marsden***: *People v. Jackson* (2017) 8 Cal.App.5th 1310. Defendant made a *Marsden* motion following a jury verdict on numerous sex offenses, but prior to a pending bench trial on a remaining child pornography charge that had previously been severed. Defendant's counsel moved to transfer the motion to another judge on the basis that he did not want the bench trial judge to hear any evidentiary matters related to the outstanding count. The motion was granted. At the hearing in front of the second judge, appellant protested that he wanted the original judge. The *Marsden* motion was denied, and defendant was found guilty on the remaining charge after the bench trial before the original judge. On appeal, the court denied defendant's claims that the transfer of the *Marsden* motion violated his right to effective assistance of counsel and due process of law. In light of the substantially increased danger of potential prejudice due to the impending bench trial, it was not unreasonable for the trial judge to transfer the *Marsden* motion to another judge for resolution, and defendant's *Marsden* rights were adequately protected.

## II. NOTEWORTHY PENDING CASES

### A. UNITED STATES SUPREME COURT

The summaries below are based on the Granted and Noted List, October 2017 Term, published on the Supreme Court's website, https://www.supremecourt.gov/orders/grantednotedlists.aspx, and on information obtained from SCOTUSBlog, http://www.scotusblog.com/, which provides links to opinions below, briefing, articles, and other relevant material. This is not a comprehensive list of all criminal cases pending before the Court. It focuses on those cases of most interest to California appellate practitioners.

**Fourteenth Amendment – Due Process – Effect of Guilty Plea**

*Class v. U.S.*, No. 16-424 (cert. granted Feb. 27, 2017)

- Question presented: Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction? Defendant parked his vehicle, loaded with guns, ammunition, and knives which he legally owned, in a publicly accessible permit-only lot 1,000 feet from the U.S. Capitol. Defendant was charged with violating a federal statute making it a crime to possess readily accessible firearms on Capitol grounds, to which defendant ultimately pled. Defendant then appealed the federal statute as unconstitutional under the 2nd Amendment and unconstitutionally vague under the 5th Amendment. Before the U.S. Supreme Court, defendant argued that his guilty plea did not include an express waiver of his constitutional issues on appeal, and that the Court should adopt a "default" rule that such issues are available on appeal absent express waiver.
- Status: Argued October 4, 2017.

**Fourth Amendment – Automobile Exception – Cars Within Curtilage**

*Collins v. Virginia*, No. 16-1027 (cert. granted Sept. 28, 2017)

- Question presented: Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a house and search a vehicle parked a few feet from the house. Officers were searching for a motorcycle that evaded them at high speeds, and a social media investigation led them to a home where defendant spent several nights a week. Officers went up the driveway, listed an opaque white cover to view license plate and VIN number for the motorcycle underneath it, and discovered the motorcycle was listed as stolen.
- Status: Argued Jan. 9, 2018.

**Fourth Amendment – Reasonable Expectation of Privacy in Rental Car**

*Byrd v. U.S.*, No. 16-1371 (cert. granted Sept. 28, 2017)

- Question presented: Whether a driver has a reasonable expectation of privacy in a rental car when he has the renter's permission to drive the car but is not listed as an authorized driver on the rental agreement. Defendant's girlfriend rented a car and signed a rental agreement indicating that additional drivers only permitted "with prior written consent." Defendant's girlfriend allowed defendant to drive, then defendant began a trip alone, during which eh was pulled over. Officers searched the car without defendant's consent because he was not listed as an authorized driver therefore had no "reasonable expectation of privacy."
- Status: Argued Jan. 9, 2018.

**Fourth Amendment – Search and Seizure – Cellphone Data**

*Carpenter v. U.S.*, No. 16-402 (cert. granted June 5, 2017)

- Question presented: Whether the warrantless seizure and search of historical cellphone records revealing the location and movements of a cellphone user over the course of 127 days is permitted by the Fourth Amendment. The government obtained several months' worth of historical cell-site records for 16 phone numbers, including defendant's, using the Stored Communications Act.
- Status: Argued Nov. 29, 2017.

**Fifth Amendment – Double Jeopardy Clause**

*Currier v. Virginia*, No. 16-1348 (cert. granted Oct. 16, 2017)

- Question presented: Whether a defendant who consents to severance of multiple charges into sequential trials loses his right under the double jeopardy clause to the issue-preclusive effect of an acquittal. Defendant was indicted on three charges arising out of a theft of a safe – breaking and entering, grand larceny, and being a felon in possession of a firearm (the guns inside the safe). Defendant agreed to sever the felon-in-possession charge to be determined in a separate trial following trial on the theft charges. At the first trial, in which the central question was whether defendant was involved in stealing the safe, defendant was acquitted of both theft charges. At the second trial, which went forward over defendant's double jeopardy clause objection, the prosecution relied on "the same basic theory as the first trial," and defendant was convicted.
- Status: Argument Feb. 20, 2018

**Fifth Amendment – Right Against Self-Incrimination**

*City of Hays, Kansas v. Vogt*, No. 16-1495 (cert. granted Sept. 28, 2017)

- Question presented: Whether the Fifth Amendment is violated when statements are used at a probable cause hearing but not at a criminal trial. Defendant, while a police officer in the city of Hays, applied for a police officer job in another city, and made disclosures that led the Hays police department to further investigate and charge him with two felonies. Defendant's earlier statements were used against him at a probable cause hearing.
- Status: Argument Feb. 20, 2018.

**Sixth Amendment – Right to Effective Representation of Counsel**

*McCoy v. Louisiana*, No. 16-8255 (cert. granted Sept. 28, 2017)

- Question presented: Whether it is unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection. Defendant was tried and convicted on three counts of first-degree murder. Despite defendant steadfastly maintaining his innocence, his attorney conceded defendant's guilt at trial in an unsuccessful attempt to avoid the death penalty. Defendant's attempt to remove his attorney before trial due his attorney's plan to concede guilt was denied.
- Status: Argued Jan. 17, 2018.

## B. CALIFORNIA SUPREME COURT

In light of the availability of pending issues summaries issued by the Judicial Council (http://www.courts.ca.gov/13648.htm), these materials will not provide a complete list of review-granted criminal cases. Instead, the materials will focus solely on issues likely to be of greatest interest to California appellate practitioners which have not been covered in prior FDAP materials. The following are cases pending in the California Supreme Court as of January 19, 2018, that have not been discussed in previous seminar materials. Materials on pending issues covered in past years can be found at http://www.fdap.org/r-article_search.php.

**Competency**

*People v. Rodas*, S237379 (rev. granted Dec. 14, 2016)

- Question presented: Did the trial court violate defendant's right to due process by failing to suspend proceedings after his attorney declared a doubt as to his competence?
- Opinion below: nonpublished opinion (B255598). Defendant was charged with three counts of murder and two counts of attempted murder, for a series of violent stabbings. Subsequently, defendant was found incompetent to stand trial and proceedings were adjourned, but resumed the next year after a certification of restoration of mental competency was filed. There was no objection to criminal proceedings going forward. After the jury was sworn, defense counsel again declared a doubt as to defendant's competency. In an in camera hearing, defense counsel represented that defendant was communicating in a "word salad," not making sense, and raised many other concerns such as defendant reporting he was not taking his medication. After speaking to defendant, the judge was impressed with defendant's clarity of speech and reasoning and wanted to proceed. Defense counsel agreed, having made the record, and the trial proceeded. The Court of Appeal held that when defense counsel declared a doubt the second time, the judge was not presented with substantial evidence of incompetence, therefore had no duty to conduct a further competency hearing. Counsel's comments did not necessarily constitute substantial evidence of incompetence, while defendant's responses to the judge suggested competence, notwithstanding the fact that defendant began to use the "word salad" and his incomprehensible testimony at trial was stricken and the jury ordered not to consider it.
- Status: Fully briefed.

**Criminal Offenses – Possession of Burglary Tools**

*In re H.W.*, S237415 (rev. granted Nov. 22, 2016)

- Question presented: Did the Court of Appeal err in holding that a pair of pliers, which the defendant used to remove an anti-theft device from a pair of blue jeans in a department store, qualified as a burglary tool within the meaning of Penal Code section 466?
- Opinion below: 2 Cal.App.5th 937 (C079926). The Court of Appeal rejected a sufficiency of the evidence challenge to minor's true finding of possession of burglary tools for possessing pliers on the basis that they are not specifically identified in PC 466 and do not otherwise fall within the definition of "other instrument or tool" because there was no evidence they could be used for the purpose of breaking, entering, or otherwise gaining access into a building or vehicle.
- Status: Fully briefed.

**Criminal Offenses – Assault with Deadly Weapon**

*In re B.M.*, S242153 (rev. granted July 26, 2017)

- Question presented: Can a butter knife with a rounded end and a serrated edge qualify as a deadly or dangerous weapon under Penal Code section 245, subdivision (a)(1)?
- Opinion below: 10 Cal.App.5th 1292 (B277076). The Court of Appeal held that sufficient evidence supported minor's true finding of assault with a deadly weapon, where 17-year-old minor attacked her sister with a knife, who covered herself with a blanket and felt the pressure of the knife through the blanket. The six-inch metal butter knife could be used to slice or stab, even though it was not designed for such, and was used in a manner capable of producing great bodily injury.
- Status: Answer brief due.

**Fourteenth Amendment – Due Process**

*Association for Los Angeles Deputy Sheriffs v. Superior Court*, S243855 (rev. granted Oct. 11, 2017)

- Question presented: When a law enforcement agency creates an internal *Brady* list (see Gov. Code, § 3305.5), and a peace officer on that list is a potential witness in a pending criminal prosecution, may the agency disclose to the prosecution (a) the name and identifying number of the officer and (b) that the officer may have relevant exonerating or impeaching material in his or her confidential personnel file, or can such disclosure be made only by court order on a properly filed *Pitchess* motion? (See *Brady v. Maryland* (1963) 373 U.S. 83; *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Pen. Code, §§ 832.7-832.8; Evid. Code, §§ 1043-1045.)
- Opinion below: 13 Cal.App.5th 413 (B280676). The Los Angeles County Sheriff's Department (LASD) created a "*Brady*" list of deputies with sustained allegations of misconduct relevant to impeachment, proposing to disclose the list to prosecutorial agencies so prosecutors could file *Pitchess* motions or advise the defense of the disclosure. The trial court issued an injunction prohibiting general disclosure of the *Brady* list to prosecutors, but allowed for disclosure of individual deputies in absence of compliance with Pitchess if the disclosed deputy is a potential witness in a pending criminal prosecution. The Court of Appeal held that the identity of any individual deputy on the law enforcement agency's internal *Brady* list may not be disclosed absent a properly filed, heard, and granted *Pitchess* motion accompanied by a corresponding court order. *Brady* and constitutional due process do not create a disclosure obligation that overrides *Pitchess* confidentiality.
- Status: Answer brief due.

*Avitia v. Superior Court*, S242030 (rev. granted June 21, 2017)

- Question presented: Was defendant denied a "substantial right" (*People v. Standish* (2006) 38 Cal.4th 858, 882) by the prosecutor's improper dismissal of a grand juror?
- Opinion below: nonpublished (C082859). Defendant sought to dismiss the indictment pursuant to PC 995 on the basis that the deputy district attorney dismissed a grand juror for bias outside the presence of the other grand jurors, a conceded legal error in violation of PC 939.5. The Court of Appeal held that the error was not structural and did not deny defendant a substantial right, therefore denial of 995 was not error.
- Status: Reply brief due.

**Fourth Amendment – Search and Seizure – Traffic Stops**

*People v. Lopez*, S238627 (rev. granted Jan. 25, 2017)

- Question presented: Does *Arizona v. Gant* (2009) 556 U.S. 332 permit a peace officer to search the interior of a suspect's vehicle for identification if the suspect fails to provide it upon request? (See *In re Arturo D.* (2002) 27 Cal.4th 60.)
- Opinion below: 4 Cal.App.5th 815 (C078537). After defendant parked her car, an officer approached her outside her vehicle and asked whether she had a driver's license. Defendant said no, and when asked whether she had any identification at all, she said "there might be identification in the vehicle." Defendant was placed in handcuffs, her purse was taken from the front passenger seat of the car, and the officer searched it for identification, finding methamphetamine in a side pocket. The trial court granted defendant's motion to suppress, holding that at the time of the search, the officer had probable cause to arrest for driving without a license, but not driving under the influence of alcohol or drugs, therefore *Arizona v. Gant* precluded a vehicle search incident to arrest for evidence of the traffic violation. The Court of Appeal reversed, concluding that *Arturo D.* [narrow exception to warrant requirement in "the context of a valid traffic stop during which a driver fails to produce an automobile registration, driver's license, or identification documentation upon an officer's proper demand" allowing a "limited warrantless search [] of areas within [the] vehicle where such documentation reasonably may be expected to be found"] was still good law following *Gant*, therefore the search was reasonable under the Fourth Amendment.
- Status: Fully briefed; answer to amicus curiae brief due.

**Penal Code section 1385**

*People v. Chavez*, S238929 (rev. granted Mar. 1, 2017)

- Questions presented: (1) Does Penal Code section 1203.4 eliminate a trial court's discretion under Penal Code section 1385 to dismiss a matter in the interests of justice? (2) Do trial courts have authority to grant relief under Penal Code section 1385 after sentence has been imposed, judgment has been rendered, and any probation has been completed?
- Opinion below: 5 Cal.App.5th 110 (C074138). The Court of Appeal held that the trial court properly concluded it lacked discretion to dismiss defendant's conviction after he successfully completed probation under PC 1385; PC 1203.4 is the exclusive method for the trial court to dismiss the conviction of a defendant who has successfully completed probation.
- Status: Oral argument Feb. 6, 2018.

**Proposition 47 – Shoplifting**

*People v. Colbert*, S238954 (rev. granted Feb. 15, 2017)

- Question presented: Did defendant's entry into separate office areas of a commercial establishment that were off-limits to the general public constitute an "exit" from the "commercial" part of the establishment that precluded reducing his conviction for second degree burglary to misdemeanor shoplifting under Penal Code section 459.5?
- Opinion below: 5 Cal.App.5th 385 (H042499). The Court of Appeal held that defendant's thefts from office areas that were separate from the commercial part of the establishment did not qualify as shoplifting under PC 459.5, subd. (a), precluding reduction of defendant's second degree burglary conviction to a misdemeanor under Proposition 47.
- Status: Fully briefed.

**Proposition 47 - Retroactivity**

*People v. DeHoyos*, S228230 (rev. granted Sept. 30, 2015)

- Question presented: Does the Safe Neighborhood and Schools Act [Proposition 47] (Gen. Elec. (Nov. 4, 2014)), which made specified crimes misdemeanors rather than felonies, apply retroactively to a defendant who was sentenced before the Act's effective date but whose judgment was not final until after that date? What is the significance, if any, of the decision in *People v. Conley* (2016) 63 Cal.4th 646 on the issues in this case?
- Opinion below: 238 Cal.App.4th 363 (D065961). The Court of Appeal held that Proposition 47's resentencing provisions were not intended to apply automatically to people currently serving sentences, but would have to utilize the procedure specified in PC 1170.18.
- Note: This case was mentioned in FDAP's 2016 Recent Legal Developments materials, but included here due to supplemental briefing ordered Jan. 25, 2017, following *People v. Conley* (2016) 63 Cal.4th 646 [holding that defendants sentenced under Three Strikes law prior to, but whose judgment were not yet final as of, the passing of Proposition 36, are not entitled to automatic resentencing but may petition for recall of sentence, distinguishing *Estrada*].
- Status: Cause argued and submitted Jan. 3, 2018.

**Proposition 47 – Forgery and Identity Theft**

*People v. Gonzales*, S240044 (rev. granted Feb. 15, 2017)

- Question presented: What relationship, if any, must exist between convictions for forgery and identity theft in order to exclude a forgery conviction from sentencing as a misdemeanor under Penal Code section 473, subdivision (b)? (See also *People v. Guerrero*, S238401.)
- Opinion below: 6 Cal.App.5th 1067 (C078960). The Court of Appeal held that PC 473, subd. (b)'s caveat that misdemeanor status does not apply where a person is "convicted both of" forgery and identity theft applies only to identity theft that is committed in a transactionally related manner with the forgery of an instrument, not when they are independent transactions that happen to be part of the same proceeding.
- Status: Fully briefed.
- Note: Review granted on the court's own motion.

*People v. Guerrero*, S238401 (rev. granted Feb. 15, 2017)

- Question presented: What relationship, if any, must exist between convictions for forgery and identity theft in order to exclude a forgery conviction from sentencing as a misdemeanor under Penal Code section 473, subdivision (b)? (See also *People v. Gonzales*, S240044.)
- Opinion below: nonpublished opinion (H041900). The Court of Appeal declined to imply a "transactionally related" requirement to the identity theft exception to PC 473, subd. (b). Where a defendant is concurrently convicted of both forgery and identity theft, the exception to PC 473, subd. (b) applies.
- Status: Fully briefed.

**Proposition 47 – Convictions Collateral to a Redesignated Conviction**

*In re Guiomar*, S238888 (rev. granted Jan. 25, 2017; briefing ordered Feb. 3, 2017)

- Question presented: Was defendant eligible for resentencing on the penalty enhancement for failure to appear after being released on bail on a felony charge that was later reduced to a misdemeanor?
- Opinion below: 5 Cal.App.5th 265 (H043114). Petitioner was convicted of failure to appear on a felony charge (PC 1320.5), where the underlying felony charge was reduced to a misdemeanor pursuant to Proposition 47. The Court of Appeal held that despite the fact that the underlying charge was reduced, the trial court was not required to vacate petitioner's failure to appear conviction, because at the time of his failure to appear, petitioner was "charged with" a felony and the gravamen of the violation is the act of jumping bail, not the nature of the crime for which the defendant is ultimately convicted. .
- Status: Fully briefed.

**Proposition 47 – Street Terrorism**

*People v. Valenzuela*, S239122 (rev. granted Mar. 1, 2017)

- Question presented: Does a conviction for active gang participation in violation of Penal Code section 186.22, subdivision (a), which requires that the defendant willfully promote, further, or assist in any *felonious* criminal conduct of the gang, remain valid when the underlying conduct in question was reduced from a felony to a misdemeanor pursuant to Proposition 47?
- Opinion below: 5 Cal.App.5th 449 (B269027). Defendant was convicted of grand theft and street terrorism for the theft of a bicycle. Following Proposition 47, defendant's grand theft conviction was reduced to a misdemeanor. The Court of Appeal affirmed the trial court's denial of defendant's motion to dismiss the street terrorism conviction, which required participation in felonious criminal conduct. A street terrorism conviction, unlike a gang enhancement, does not require a felony conviction, only that the engaged in conduct that was felonious at the time.
- Status: Fully briefed.

**Proposition 57 – Direct File**

*People v. Cervantes*, S241323 (rev. granted May 17, 2017)

- Question presented: Are juvenile offenders convicted in adult court before the effective date of Proposition 57 entitled to a fitness hearing in juvenile court before sentencing? (See also *People v. Superior Court (Lara)*, S241231.)
- Opinion below: 9 Cal.App.5th 569, mod. 10 Cal.App.5th 749a (A140464). Defendant, 14 years old at the time of the attack on a 13-year-old girl and her 20-month-old brother, was charged as an adult and convicted of 15 charges including burglary, attempted murder, torture, aggravated mayhem, and various sex offenses. Defendant was sentenced to 66 years to life. While his case was pending on appeal, Proposition 57 passed, and defendant was granted permission to file supplemental briefing arguing that under *In re Estrada* (1965) 63 Cal.2d 740, Proposition 57 should be applied retroactively to all nonfinal cases. The Court of Appeal held that the minor was not entitled to a fitness hearing on retroactivity or Equal Protection grounds. However, because the Court of Appeal also reversed on the specific intent counts with which defendant was convicted, Prop. 57 required remand to juvenile court for fitness hearing to determine which department (adult or juvenile) would handle any retrial on the reversed counts and sentencing. Defendant was eligible for fitness hearing on remand prior to resentencing. The Court of Appeal also held that a sentence of a juvenile to 66 years in prison before parole eligibility was the functional equivalent of LWOP and violated the 8th Amendment under *Graham* and *Caballero*.
- Status: Fully briefed.

*People v. Mendoza*, S241647 (rev. granted July 12, 2017)

- Question presented: Are the provisions of Proposition 57 that eliminated the direct filing of certain juvenile cases in adult court applicable to cases not yet final on appeal?
- Opinion below: 10 Cal.App.5th 327 (H039705). Defendant, 16 years old at the time of his offense, was charged by direct filing in adult court and convicted of second degree murder with gang enhancements. While defendant's appeal was pending, Proposition 57 passed, eliminating direct filing. The Court of Appeal affirmed the conviction, holding that Proposition 57 did not apply retroactively.
- Status: Reply brief due

*People v. Superior Court (Lara)*, S241231 (rev. granted May 17, 2017)

- Question presented: Are the provisions of Proposition 57 that eliminated the direct filing of certain juvenile cases in adult court applicable to cases already filed? (See also *People v. Cervantes*, S241323.)
- Opinion below: 9 Cal.App.5th 753 (E067296). Prior to the passage of Proposition 57 on November 8, 2016, the People direct filed charges against Lara (real party in interest), a minor, in adult court, and an information was filed charging Lara with several felony sex offenses. After Proposition 57 passed, Lara filed a motion requesting a fitness hearing in juvenile court, which the trial court granted. The People petitioned for writ of mandate and an emergency stay. The Court of Appeal held that applying Proposition 57 to require a juvenile court judge to determine whether Lara goes to trial in adult or juvenile court does not constitute retroactive application of the new law, and denied the petition. The court stated that *Estrada* does not apply in this context because Proposition 57 is not a legislative reduction in the punishment for a crime, but rather a law governing the conduct of trials. Accordingly, though Lara's crime had already been committed, his trial had not yet been conducted therefore applying Proposition 57 in his case was a prospective application to his future trial.
- Note: Amicus curiae briefs filed by San Diego County District Attorney (in support of petitioner) and Pacific Juvenile Defender Center and Los Angeles County Public Defender (in support of real party in interest)
- Status: Cause argued and submitted Dec. 6, 2017.

**Homicide Instructions**

*People v. Gonzalez*, S234377 (rev. granted July 13, 2016)

- Question presented: Was the trial court's failure to instruct on murder with malice aforethought, lesser included offenses of murder with malice aforethought, and defenses to murder with malice aforethought rendered harmless by the jury's finding of a felony murder special circumstance?
- Opinion below: 246 Cal.App.4th 1358 (B255375). At defendants' trial, in which defendants were charged, inter alia, with malice murder (PC 187), the jury was instructed on first degree felony murder and first degree felony murder as an aider and abettor – no instructions on any other theory of murder or defense were given. Although under the accusatory pleadings test, appellants were entitled to instructions on malice murder and the lesser included offenses to murder, if warranted by substantial evidence, the Court of Appeal concluded any error was harmless.
- Status: Fully briefed.

**Juvenile Delinquency – Restitution**

*In re J.G.*, S240397 (rev. granted May 10, 2017)

- Question presented: (1) Did the juvenile court have the authority to convert a restitution order to a civil judgment at the completion of deferred entry of judgment? (2) Did the juvenile court err by ruling that restitution could be paid from federally-protected Social Security benefits?
- Opinion below: 7 Cal.App.5th 955 (C077056). Minor admitted to felony vandalism and misdemeanor trespass charges and was granted DEJ. At a hearing to determine whether minor had the ability to pay restitution, it was determined that minor was a freshman, did not have a job, did not have a bank account or trust fund. Minor received Supplemental Security Income (SSI) and foodstamps, and his father received disability income, his family had no other source of income, and it was undisputed that the family's income was below the federal poverty level. The juvenile court found minor had ability to pay restitution, set the monthly payment at $25, and total restitution at $35,381 joint and several with minor's co-offenders. Two months later, the juvenile court terminated probation and DEJ, and converted the unfulfilled restitution order to a civil judgment. The Court of Appeal held that victim restitution order survives dismissal under Welfare and Institutions Code section 793, therefore the juvenile court had authority to convert the unfulfilled restitution order to a civil judgment after terminating DEJ and dismissing the wardship petitition.
- Status: Fully briefed.

**Juvenile Delinquency – Extreme Sentences**

*In re Cook*, S240153 (rev. granted Apr. 12, 2017)

a. Question presented: Does habeas corpus jurisdiction exist for a petitioner seeking a post-sentencing hearing to make a record of "mitigating evidence tied to his youth" (*People v. Franklin* (2016) 63 Cal.4th 261, 276) after the conviction is final?
b. Opinion below:7 Cal.App.5th 393 (G050907). Defendant was convicted in 2007 of first degree murder and sentenced to 125 years to life, and his conviction and sentenced were affirmed on appeal. In 2014, defendant initiated habeas corpus proceedings. The Court of Appeal denied the petition in April 2016, and the California Supreme Court granted Petitioner's petition for review and transferred the matter back to the Court of Appeal with directions. Following transfer, the Court of Appeal held that the relief afforded by *People v. Franklin* (2016) 63 Cal.4th 261, 268-269, 283-284 [right to make a record before the superior court at sentencing of mitigating evidence tied to youth in anticipation of an eventual youth offender parole hearing] is available both by direct review and petition for writ of habeas corpus. A previously convicted defendant may obtain relief by habeas corpus when changes in case law expanding a defendant's rights are given retroactive effect, which was done in *Franklin*, and nothing in *Franklin* suggests it was intended to be excepted from the rule of full retroactivity.
c. Status: Fully briefed.
d. Note: Amicus curiae brief filed by Post-Conviction Justice Project and Pacific Juvenile Defender Center.

*People v. Contreras*, S224564 (rev. granted and briefing deferred Apr. 15, 2015; briefing ordered Aug. 17, 2016)

- Question presented: Is a total sentence of 50 years to life or 58 years to life the functional equivalent of life without the possibility of parole for juvenile offenders?
- Opinion below: nonpublished opinion (D063428). Defendants, age 16 at the time of the offense, were tried and convicted as adults for numerous violent felonies. The Court of Appeal held that the defendants' sentences of 50 years to life and 58 years to life constituted cruel and unusual punishment. Because the sentences were the functional equivalent of LWOP, they did not comply with *Graham*, which categorically banned LWOP sentences for juveniles who commit nonhomicide offenses.
- Status: Submitted Nov. 30, 2017.
- Note: Amicus curiae brief filed by Pacific Juvenile Defender Center.

*People v. Mendoza*, S238032 (rev. granted Jan. 25, 2017)

- Question presented: Did *Montgomery v. Louisiana* (2016) 577 U.S. __, 136 S.Ct. 718, 193 L.Ed.2d 599, clarify that *Miller v. Alabama* (2012) 567 U.S. __, 132 S.Ct. 2455, 183 L.Ed.2d 407, created a presumption against a sentence of life imprisonment without possibility of parole for juvenile offenders and requires trial courts to determine that a juvenile offender is one of "those rare children whose crimes reflect irreparable corruption" (*Montgomery*, 577 U.S. at p. __ [136 S.Ct. at p. 734]) before imposing such a sentence? Or is it sufficient, for purposes of compliance with *Montgomery and Miller*, that a trial court take into consideration the offender's youth and attendant circumstances in exercising its sentencing discretion under Penal Code section 190.5, subdivision (b)? (See also *People v. Padilla*, S239454.)
- Opinion below: nonpublished opinion (B259259). Defendant Mendoza was 17 years old at the time of the offenses in this case, for which he was convicted of two first degree murders, attempted murder, and assault with a firearm, and sentenced to two consecutive terms of LWOP. On appeal, Mendoza challenged his sentence arguing it violated the 8th Amendment. The Court of Appeal affirmed the sentence, holding that *Miller* did not create a presumption against juvenile LWOP, *only* that the sentence consider an offender's youth and attendant characteristics before imposing a certain penalty.
- Status: Fully briefed; supplemental briefs due.
- Note: Supplemental briefing ordered Nov. 1, 2017 regarding effect of SB 394, signed into law on Oct. 11, 2017.
- Note: amicus curiae brief filed by Juvenile Law Center.

*People v. Padilla*, S239454 (rev. granted Jan. 25, 2017)

- Question presented: Did *Montgomery v. Louisiana* (2016) 577 U.S. __, 136 S.Ct. 718, 193 L.Ed.2d 599, clarify that *Miller v. Alabama* (2012) 567 U.S. __, 132 S.Ct. 2455, 183 L.Ed.2d 407, bans a sentence of life without the possibility of parole on a specific class of juvenile offenders whose crimes reflect the transient immaturity of youth, thereby requiring that trial courts determine that the crime reflects "irreparable corruption resulting in permanent incorrigibility" before imposing life without parole, or does a trial court comply with the constitutional mandates of *Miller* by giving due consideration to the offender's youth and attendant circumstances in exercising its sentencing discretion under Penal Code section 190.5, subdivision (b)? (See also *People v. Arzate*, S238032.)
- Opinion below: 4 Cal.App.5th 656 (B265614). Defendant was convicted in 1999 for a murder he committed at age 16, and was sentenced to LWOP. Appellant was granted a *Miller* resentencing hearing and LWOP was reimposed. While defendant's appeal of the reimposed LWOP sentence was pending, *Montgomery v. Louisiana* clarified and elaborated *Miller*'s holding. The Court of Appeal reversed and remanded for new resentencing hearing, holding that the trial court's resentencing decision did not reflect the guidance provided by *Montgomery*. *Montgomery* clarified that while *Miller* had a procedural component, it was no less substantive than *Roper* and *Graham*, except that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The court held that *Miller*, as recast by *Montgomery*, requires the trial court to assess the *Miller* factors "with an eye to making an express determination whether the juvenile offender's crime reflects permanent incorrigibility arising from irreparable corruption."
- Status: Fully briefed.
- Note: Review ordered on the court's own motion.
- Note: Supplemental briefing ordered Nov. 1, 2017 regarding effect of SB 394, signed into law on Oct. 11, 2017.
- Note: Supplemental brief filed by amicus curiae ACLU of Northern and Southern California.

*People v. Rodriguez*, S239713 (rev. granted Apr. 12, 2017)

- Questions presented: (1) Was the accomplice testimony in this case sufficiently corroborated? (See *People v. Romero & Self* (2015) 62 Cal.4th 1, 36.) (2) Is defendant's constitutional challenge to his 50 years to life sentence moot when, unlike in *People v. Franklin* (2016) 63 Cal.4th 261, his case was not remanded to the trial court to determine if he was provided an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings as it fulfills its statutory obligations under Penal Code sections 3051 and 4801?
- Opinion below: nonpublished opinion (F065807). Defendants Rodriguez, 15, and Barajas, 16, were involved in a gang-related drive-by shooting (Rodriguez the driver; Barajas the shooter). Defendants were charged as adults, and convicted of willful, deliberate, and premeditated murder, conspiracy to commit murder, active participation in a criminal street gang, and a firearm enhancement, and each sentenced to 50 years to life. Barajas argued on appeal his conviction must be reversed because the only evidence against him was the testimony of an accomplish. The Court of Appeal disagreed, holding that nonaccomplice evidence amply corroborated the accomplice testimony. Defendants also challenged their sentences, under the 8th Amendment, as the functional equivalent of LWOP. The Court of Appeal held that the enactment of PC 3051 rendered defendants' challenges to their sentences moot, nothing that defendants appeared to have had sufficient opportunity to put on the record the kinds of information deemed relevant at a youth offender parole hearing.
- Status: Fully briefed.

**Sixth Amendment – Right to Confrontation**

*People v. Arredondo*, S244166 (rev. granted Nov. 15, 2017)

- Question presented: Was defendant's right of confrontation violated when he was unable to see witnesses as they testified because the trial court allowed a computer monitor on the witness stand to be raised by several inches to allow them to testify without seeing him when they testified in his presence?
- Opinion below: 13 Cal.App.5th 950 (E064206). During prosecution for multiple sex offenses against children, trial court permitted computer monitor to be raised so that victims ages 18, 14, and 13 could testify without having to see defendant. The Court of Appeal held there was no confrontation clause violation.
- Status: Not yet briefed.

**Stored Communications Act/Supremacy Clause**

*Facebook, Inc. v. Superior Court (Touchstone)*, S245203 (rev. granted Jan. 17, 2018)

- Questions presented: In addition to the issues raised in the petition for review, the court directed the parties to address the following issues: (1) If, on remand and in conjunction with continuing pretrial proceedings, the prosecution lists the victim as a witness who will testify at trial (see Pen. Code, §§ 1054.1, subd. (a)), 1054.7) and if the materiality of the sought communications is shown, does the trial court have authority, pursuant to statutory and/or inherent power to control litigation before it and to insure fair proceedings, to order the victim witness (or any other listed witness), on pain of sanctions, to either (a) comply with a subpoena served on him or her, seeking disclosure of the sought communications subject to in camera review and any appropriate protective or limiting conditions, or (b) consent to disclosure by provider Facebook subject to in camera review and any appropriate protective or limiting conditions? (2) Would a court order under either (1)(a) or (1)(b) be valid under the Stored Communications Act, 18 U.S.C., section 2702(b)(3)? (3) Assuming the orders described in (1) cannot properly be issued and enforced in conjunction with continuing *pretrial* proceedings, does the trial court have authority, on an appropriate showing *during trial*, to issue and enforce such orders? (4) Would a court order contemplated under (3) be proper under the Stored Communications Act, 18 U.S.C., section 2702(b)(3)? With regard to questions (1)-(4), see, e.g., *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423; *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854; *Negro v. Superior Court* (2014) 230 Cal.App.4th 879; and the Court of Appeal decision below, *Facebook, Inc., v. Superior Court (Touchstone)* (2017) 15 Cal.App.5th 729, 745-748. (5) As an alternative to options (1) or (3) set forth above, may the trial court, acting pursuant to statutory and/or inherent authority to control the litigation before it and to insure fair proceedings, and consistently with 18 U.S.C. section 2702(b)(3), order the prosecution to issue a search warrant under 18 U.S.C. section 2703 regarding the sought communications? (Cf. *State v. Bray* (Or.App. 2016) 383 P.3d 883, pets. for rev. accepted June 15, 2017, 397 P.3d 30 [S064843, the state's pet.]; 397 P.3d 37 [S064846, the defendant's pet.].) In this regard, what is the effect, if any, of California Constitution, article I, sections 15 and 24?
- Opinion below: 15 Cal.App.5th 729 (D027171). Facebook (petitioner) filed motion to quash subpoena by Touchstone (real party in interest), who was awaiting trial on charge of attempted murder, for contents of victim's social media account on grounds that the Store Communications Act (SCA) (18 U.S.C. §§ 2701-2712) prohibited disclosure. The Court of Appeal issued a peremptory writ of mandate ordering the trial court to grant petitioner's motion. The supremacy clause of the US Constitution prohibited enforcement of the trial court's order compelling Facebook to produce contents of victim's account because California's discovery laws cannot be enforced in a way that compels provider to violate the SCA.
- Status: Not yet briefed.

**Truth-in-Evidence (Cal. Const., art. I, § 28, subd. (f), par. (2))**

*People v. Guzman*, S242244 (rev. granted July 31, 2017)

- Question presented: Does the "Right to Truth-in-Evidence" provision of the California Constitution (art. I, § 28, subd. (f)(2)) abrogate Penal Code section 632, subdivision (d), which otherwise mandates the exclusion of recorded confidential communications from evidence in criminal proceedings?
- Opinion below: 11 Cal.App.5th 184 (B265937). During a trial for sex offenses upon a child under 14 years old, the trial court admitted a recorded telephone conversation between a defense witness and the mother of one of the victims. The Court of Appeal held that the "Right to Truth in Evidence" provision of the California Constitution, enacted by Proposition 8 in 1982, abrograted the exclusionary rule stated in PC 632, subd. (d) to the extent it is invoked to suppress relevant evidence in a criminal proceeding.
- Status: Opening brief due.

## III. SELECTED CALIFORNIA LEGISLATIVE DEVELOPMENTS[1]

### A. NEW CRIMINAL LEGISLATION (JUVENILE)

**AB 529^ – Juveniles: Sealing of Records**

- amends WIC 786
- adds WIC 786.5
- requires sealing all records pertaining to dismissed petitions or petitions not sustained by the court after an adjudication hearing
- all records in custody of juvenile court, law enforcement agencies, probation, or the Department of Justice
- authorizes prosecutor, within 6 months of the date of the dismissal, to access a sealed record for limited purpose of refiling dismissed petition based on new circumstances (requires court determination)
- require probation department to seal records of juvenile upon satisfactory completion of diversion or supervision to which juvenile was referred in lieu of filing petition

**AB 878^ – Juveniles: restraints**

- adds WIC 210.6
- authorizes the use of mechanical restraints on a juvenile during transportation only upon a determination by the probation department, in consultation with the transporting agency, that restraints are "necessary to prevent physical harm to the juvenile or another person or due to a substantial risk of flight"
- requires a county probation department that uses mechanical restraints other than handcuffs to establish procedures for their use, including the reasons for their use
- authorizes the use of mechanical restraints during a juvenile court proceeding only if the court determines that the individual juvenile's behavior in custody or in court "establishes a manifest need to use mechanical restraints to prevent physical harm to the juvenile or another person or due to a substantial risk of flight
- requires the court to document the reasons for the use of mechanical restraints in the record
- if mechanical restraints are used, requires that the least restrictive form of restraint be used "consistent with the legitimate security needs of each juvenile"

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[1] ^ = California District Attorneys Association (CDAA) opposed
** = CDAA supported
*** = CDAA sponsored

**AB 1308^ – Youth Offender Parole Hearings**

- amends PC 3051, 4801 to require youth offender parole hearings for offenders who committed the offense when they were 25 years or younger (along with changes from AB 1308)
- requires board to complete by 1/1/2020 all youth offender parole hearings for individuals who were sentenced to indeterminate life terms who became entitled to a hearing on effective date of bill (by 1/1/2022 for determinate terms)

**SB 190 – Juveniles [fines and fees]**

- amends GC 27757; PC 1203.16, 1203.1ab, 1208.2; WIC 207.2, 332, 634, 652.5, 654, 656, 659, 700, 729.9, 729.10, 871, 902, 903, 903.1, 903.2, 903.25, 903.4, 903.45, 903.5, 904
- repeals WIC 903.15
- makes fees for home detention program (administrative fee and application fee) payable only by adult participants of that home detention program who are over 21 years of age and under the jurisdiction of the criminal court
- requires court to order a defendant to pay a reasonable fee for drug and substance abuse testing as a condition of probation, not to exceed the actual cost of testing, only if the defendant is an adult over 21 years of age and under the jurisdiction of the criminal court
- deletes to $20/month maximum on support and maintenance payments from the county treasury and deletes the authorization of the county board of supervisors to establish a maximum amount that the court may order the county to pay
- repeals provisions imposing liability on a parent, spouse, or other person liable for the support of a ward, dependent child, or other minor person for specified costs (i.e. transportation to a juvenile facility, costs of food, shelter, and care at juvenile facility, costs of alcohol or drug education programs, legal services); specifies that the provisions apply to a minor designated as a dual status child, for the purposes of the dependency jurisdiction only and not for purposes of the delinquency jurisdiction
- removes the requirement that a request be made in order for persons to be entitled to an evaluation and determination of ability to pay restitution costs for replacing an electronic monitor that is damaged or discarded while in the possession of the minor

**SB 312 – Juveniles: Sealing of Records**

- amends WIC 781
- amends WIC 786
- requires dismissal of petition and sealing of record of juvenile petitions sustained on commission of a specified serious or violent offense committed when individual 14 or older, if the finding on that serious or violent offense was reduced to a misdemeanor
- repeals limitation of Proposition 21 on authority of court to order sealing of records of those persons found to have committed serious or violent offenses after 14 under specified circumstances

**SB 394^ – Youth Offender Parole Hearings (Juvenile LWOP Sentences)**

- a person convicted of offense committed before person turned 18 and for which LWOP sentence imposed will be eligible for release on parole during 25th year of incarceration at a youth offender parole hearings
- requires board to complete by 7/1/2020 all hearings for individuals who will be entitled for a youth offender parole hearing by these provisions before 7/1/2020.
- amends PC 3051, 4801 (along with changes from AB 1308)

**SB 395^ – Custodial Interrogation: Juveniles**

- adds WIC 625.6
- requires youth 15 or younger to consult with legal counsel in person, by telephone, or by video conference prior to a custodial interrogation and before waiving *Miranda* rights
- prohibits a waiver of the consultation
- requires the court to consider the effect of failure to comply with consultation requirement in adjudicating admissibility of statements of youth 15 or younger made during or after a custodial interrogation (these provisions do not apply to admissibility if both these criteria are met: (1) officer reasonably believed information sought necessary to protect life or property from an imminent threat; (2) officer's questions were limited to those questions reasonably necessary to obtain that information)
- requires governor to convene panel no later than 1/1/2023 to review and examine effects and outcomes related to implementation of these requirements; provide information to legislature and Governor no later than 4/1/2024; bill would repeal requirements on 1/1/2025.
- "*The Legislature finds and declares all of the following:*
  *(a) Developmental and neurological science concludes that the process of cognitive brain development continues into adulthood, and that the human brain undergoes "dynamic changes throughout adolescence and well into young adulthood"* (see Richard J. Bonnie, et al., Reforming Juvenile Justice: A Developmental Approach, National Research Council (2013), page 96, and Chapter 4). *As recognized by the United States Supreme Court, children "'generally are less mature and responsible than adults'"* (*J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2397, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115); *"they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them'"* (*J.D.B.*, 131 S.Ct. at 2397, quoting *Bellotti v. Baird* (1979) 443 U.S. 622, 635); *"they 'are more vulnerable or susceptible to... outside pressures' than adults"* (*J.D.B.*, 131 S.Ct. at 2397, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 569); *they "have limited understandings of the criminal justice system and the roles of the institutional actors within it"* (*Graham v. Florida* (2010) 560 U.S. 48, 78); *and "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them"* (*J.D.B.*, 131 S.Ct. at 2397).
  *(b) Custodial interrogation of an individual by the state requires that the individual be advised of his or her rights and make a knowing, intelligent, and voluntary waiver of those rights before the interrogation proceeds. People under 18 years of age have a lesser ability as compared to adults to comprehend the meaning of their rights and the consequences of waiver. Additionally, a large body of research has established that adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions* (see, e.g., Steinberg

et al., "Age Differences in Future Orientation and Delay Discounting," Child Development, vol. 80 (2009), pp. 28-44; William Gardner and Janna Herman, "Adolescents' AIDS Risk Taking: A Rational Choice Perspective," in Adolescents in the AIDS Epidemic, ed. William Gardner et al. (San Francisco: Jossey Bass, 1990), pp. 17, 25-26; Marty Beyer, "Recognizing the Child in the Delinquent," Kentucky Children's Rights Journal, vol. 7 (Summer 1999), pp. 16-17; National Juvenile Justice Network, "Using Adolescent Brain Research to Inform Policy: A Guide for Juvenile Justice Advocates," September 2012, pp. 1-2; Catherine C. Lewis, "How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications," Child Development, vol. 52 (1981), pp. 538, 541-42). *Addressing the specific context of police interrogation, the United States Supreme Court observed that events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens"* (*Haley v. Ohio* (1948) 332 U.S. 596, 599 (plurality opinion)), *and noted that "'no matter how sophisticated,' a juvenile subject of police interrogation 'cannot be compared' to an adult subject"* (*J.D.B.*, 131 S.Ct. at 2403, quoting *Gallegos v. Colorado* (1962) 370 U.S. 49, 54). *The law enforcement community now widely accepts what science and the courts have recognized: children and adolescents are much more vulnerable to psychologically coercive interrogations and in other dealings with the police than resilient adults experienced with the criminal justice system.*

*(c) For these reasons, in situations of custodial interrogation and prior to making a waiver of rights under Miranda v. Arizona* (1966) 384 U.S. 436, *youth under 18 years of age should consult with legal counsel to assist in their understanding of their rights and the consequences of waiving those rights.*"

**SB 625 – Juveniles: honorable discharge**

- amends WIC 827, 1179,1719, 1766, and 1772
- repeals and adds WIC 1177 and 1178
- confers on the Board of Juvenile Hearings (BJH) obligation to make an honorable discharge determination for a person previously committed to the Division of Juvenile Facilities (DJF) upon their completion of local probation supervision, but not sooner than 18 months following the date of discharge by the board; require the board to make regulations setting forth the criteria for an honorable discharge
- requires county of commitment to inform youths previously under DJF jurisdiction about the opportunity and process of petitioning the board for an honorable discharge
- authorizes the BJH to grant an honorable discharge if the person has "proven his or her ability to desist from criminal behavior and to initiate a successful transition into adulthood"
- specifies that all persons honorable discharged are to be released from all penalties and disabilities resulting from the offenses for which they were committed, including, but not limited to, those that affect access to education, employment, or occupational licenses

## B. NEW CRIMINAL LEGISLATION (ADULT)

**AB 41** – DNA evidence**

- adds PC 680.3
- requires law enforcement agencies to report information regarding rape kit evidence, within 120 days of the collection of the kit, to the Department of Justice's SAFE-T database
- imposes new requirements for kids collected on or after 1/1/2018
- prohibits law enforcement agencies or laboratories from being compelled to provide any contents of the database in a civil or criminal case, except as required by *Brady v. Maryland* (1963) 373 U.S. 83

**AB 90^ – Criminal gangs [Fair and Accurate Gang Database Act of 2017]**

- amends GC 70615; adds PC 186.36; repeals and adds PC 186.34 and 186.35
- revises the definition of "shared gang database" in the California Street Terrorism Enforcement and Prevention Act to mean any gang database that is accessed by an agency or person outside of the agency that created the database
- defines "gang database" as "any database accessed by a law enforcement agency that designates a person as a gang member or associate, or includes or points to information, including, but not limited to, fact-based or uncorroborated information, that reflects a designation of that person as a gang member or associate
- makes DoJ responsible for administering and overseeing any shared gang database in which California law enforcement agencies participate
- provides that commencing 1/1/2018 the CalGang Executive Board no longer administers or oversees the CalGang database
- requires the DoJ to promulgate regulations governing the use, operation, and oversight of shared gang databases (including requirements for entering and reviewing gang designations, retention period for listed gangs, and criteria for identifying gang members)
- requires standardized periodic training for all persons with access to the CalGang database
- requires periodic audits to ensure the accuracy, reliability, and proper use of any shared gang database and reports of those audits to those public
- recasts as petition process the review and appeal process that authorizes challenges to the inclusion in a shared gang database
- imposes a moratorium on use of the CalGang database commencing 1/1/2018 until the Attorney General certifies that specified information has been purged

**AB 208^ – Deferred entry of judgment: pretrial diversion**

- amends PC 1000, 1000.1, 1000.2, 1000.3, 1000.4, 1000.5, 1000.6
- adds PC 1000.65
- makes the deferred entry of judgment program a pretrial diversion program
- makes a defendant qualified for pretrial diversion if (1) there is no evidence of a contemporaneous violation relating to narcotics or restricted dangerous drugs other than a violation of the offense that qualifies him or her for diversion; (2) the charged offense did not involve violence; (3) there is no evidence within the past 5 years of a violation relating to narcotics or restricted dangerous drugs other than a violation that qualifies for the

program; and (4) the defendant has no prior conviction for a felony within 5 years prior to the alleged commission of the charged offense
- under the pretrial diversion program, a qualifying defendant would enter a plea of not guilty and waive his or her right to a trial by jury, and proceedings would be suspended in order for the defendant to enter a drug program for 12 to 18 months, or longer if requested by the defendant with good cause

**AB 210** – Homeless multidisciplinary personnel team**
- adds Chapter 18 to Part 6 of Division 9 of the WIC
- authorizes counties to establish a homeless adult and family multidisciplinary personnel team with the goal of facilitating that expedited identification, assessment, and linkage of homeless individuals to housing and supportive services within that county and to allow provider agencies to share confidential information for those purposes
- a homeless adult and family multidisciplinary personnel team means any team of two or more persons who are trained in the identification and treatment of homeless adults and families, and who are qualified to provide a broad range of services related to homelessness, including police officers, probation officers, or other law enforcement agents
- members of these teams may disclose to, and exchange with one another, confidential information/writings if the team member reasonably believes it is "generally relevant to the identification, reduction, or elimination of homelessness or the provision of services"
- information and records communicated or provided to the team members are deemed private and confidential and protected from discovery and disclosure by all applicable statutory and common law protections

**AB 260** – Human trafficking**
- amends Civil Code 52.6
- extends requirement that specified establishments must post a notice containing information related to slavery and human trafficking to hotels, motels, and bed and breakfast inns (not including personal residences)

**AB 264*** – Protective orders**
- amends PC 136.2
- requires the court to consider issuing a protective order restraining the defendant from any contact with a percipient witness to a crime involving domestic violence, a violation of specified sex offenses, or a violation of laws relating to criminal gangs, if it is shown by clear and convincing evidence that the witness has been harassed
- extends requirement that the court consider, at the time of sentencing, issuing a protective order restraining defendant from any contact with the victim (valid up to 10 years) if defendant convicted of a crime of domestic violence or specified sex offenses, to include violation of laws relating to criminal gangs.

**AB 335** – Parole: placement at release**

- amends PC 3003
- adds certain sexual penetration offenses and sexual assault offenses in which the victim is unconscious or unable to give consent to list of offense to which release location restriction applies (not to be returned to a location within 35 miles of the residence of a victim or witness if they make such a request and the Board of Parole Hearings or the Department of Corrections and Rehabilitation finds that the placement is necessary to protect the victim or witness)

**AB 368** – Criminal procedure: jurisdiction of public offenses**

- amends PC 784.7
- adds the offense of sexual intercourse, sodomy, oral copulation or sexual penetration with a child 10 years of age or younger to the list of specified offenses to which the jurisdictional provision that when more than one violation of specified offenses occurs in more than one jurisdictional territory, jurisdiction for any of those offenses and any other properly joinable offenses maybe in any jurisdiction where at least one of the offenses occurred if all district attorneys in the counties with jurisdiction over any of the offenses agree to the venue applies

**AB 411** – Witness testimony: therapy and facility dogs**

- adds PC 868.4
- authorizes victims entitled support persons pursuant to PC 868.5, as well as certain child witnesses in a court proceeding involving any serious or violent felony, to be accompanied by a dog, trained in providing emotional support, while testifying
- requires a party requesting the use of such a dog to file a motion with the court, specifying the qualifications of and need for the dog
- requires the court, if the dog is used during a criminal jury trial, to issue, upon request, an appropriate jury instruction designed to prevent prejudice for or against any party

**AB 413 – Confidential communications: domestic violence**

- amends PC 633.5 and 633.6
- allows a party to a confidential communication to record the communication for the purpose of obtaining evidence reasonably believed to relate to domestic violence, and the evidence so obtained would not be inadmissible in a prosecution against the perpetrator of domestic violence

**AB 459 – Public records: video or audio recordings: crime**

- adds GC 6254.4.5
- specifies that the California Public Records Act does not require disclosure of a video or audio recording that was created during the commission or investigation of the crime of rape, incest, sexual assault, domestic violence, or child abuse that depicts the face, intimate body part, or voice of a victim depicted in the recording
- requires an agency withholding such a video or audio recording to justify withholding

**AB 484** – Sex offenses: registration**

- amends PC 290
- adds to list of offenses requiring registration the offense of rape in cases where the victim submits to an act of sexual intercourse under the believe that the person committing the act is someone known to the victim other than the accused (PC 261(a)(5)), and the offense of rape in cases where the act is accomplished against the victim's will by threatening the use of the authority of a public official to incarcerate, arrest, or deport the victim or another (PC 261(a)(7))

**AB 539*** – Search warrants**

- amends PC 1524
- provides that a search warrant may be issued when the property or things to be seized consists of evidence that tends to show that a misdemeanor violation of PC 647(j)(1), (2), or (3) [disorderly conduct involving the use of an instrumentality to view the interior of specified rooms with the intent to invade the privacy of individuals, or the use of specified devices to secretly videotape, film, photograph, or record an identifiable either under or through their clothing, for purposes of viewing the body or undergarments, in a state of full or partial undress] has occurred or is occurring.

**AB 785** – Firearms: possession of firearms by convicted persons**

- amends and repeals PC 29805
- incorporates non-conflicting provisions of, then repeals, separate identically numbered section, into PC 29805 as amended by Proposition 63 (approved November 8, 2016)
- adds to list of misdemeanors carrying a 10-year firearm prohibition violations of PC 422.6 (injury or threat to person or damage to property based on perception of person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation)

**AB 789 – Criminal procedure: release on own recognizance**

- amends PC 1319.5
- extends the prohibition on the release of a person on their own recognizance, until a hearing is held in open court, to any person who has failed to appear in court 3 or more times over the 3 years preceding the current arrest, and who is arrested for (1) any offense involving domestic violence; (2) any offense in which the defendant is alleged to have caused great bodily injury to another person; and (3) any other felony offense not otherwise enumerated unless the person is released pursuant to a court-operated or court-approved pretrial release program
- removes the same prohibition for an arrest for theft (PC 484)

**AB 953 – Protective orders: personal information of minors**

- amends CCP 527.6
- adds FC 6301.5
- authorizes a minor or minor's guardian to petition the court to keep all information regarding the minor obtained when issuing a temporary restraining order and injunction prohibiting harassment or abuse, or a protective order under the Domestic Violence Protection Act, in a confidential case file

**AB 993** – Examination of victims of sex crimes**

- amends PC 1346
- extends the list of charged crimes for which for which the prosecution may apply for an order that a victim's testimony at the preliminary hearing be video recorded and preserved, to include aggravated sexual assault with a child under 14 years of age (PC 269) and sexual intercourse, sodomy, sexual penetration, or oral copulation with a child under 10 years of age (PC 288.7)

**AB 1008 – Employment Discrimination: conviction history**

- add GC 12952; repeal LC 432.9
- repeals current prohibitions on state/local agencies from asking an applicant for employment to disclose information regarding a criminal conviction
- provides that it is an unlawful employment practice under the California Fair Employment and Housing Act (FEHA) for an employer with 5 or more employees to include on any application for employment any question that seeks the disclosure of an applicant's conviction history, to inquire into or consider the conviction history of an applicant until that applicant has received a conditional offer, and, when conducting a conviction history background check, to consider, distribute, or disseminate information
- requires an employer who intends to deny a position of employment solely or in part because of conviction history to make an individualized assessment of whether the conviction history has a "direct and adverse relationship with the specific duties of the job" and to consider certain topics when making that assessment
- requires an employer who makes a preliminary decision to deny employment based on that individualized assessment to provide written notification of the decision containing specified information and granting applicant 5 business days to respond before the employer may make a final decision

**AB 1115 – Convictions: expungement**

- adds PC 1203.42
- allows a defendant sentenced to state prison for a felony that, if committed after the 2011 Realignment Legislation, would have been eligible for a county jail sentence pursuant to PC 1170(h), to withdraw their guilty or no contest plea and enter a plea of not guilty, and be released from all penalties and disabilities resulting from the offense of which he or she was convicted (except as provided in VC 13555 and subject to conditions), after the lapse of 1 or 2 years following the completion of the sentence, provided the defendant is not under supervision and not serving a sentence for, on probation for, or charged with the commission of any offense

**AB 1024*** – Grand juries: peace officers: proceedings**

- amends PC 924.6
- requires a court to disclose all or part of a jury indictment proceeding transcript, excluding the grand jury's private deliberations and voting, if the grand jury decides not to return an indictment in an inquiry into an offense that involves a shooting or use of excessive force by a peace officer that led to the death of a person being detained or arrested by the peace officer, upon application of the district attorney, a legal representative of the decedent, or a legal representative of the news media or public, with notice to the district attorney and the affected witness involved, and an opportunity to be heard, except as specified
- disclosure is not required if the court finds, following an in camera hearing, that there exists an overriding interest that outweighs the right of public access to the record, the overriding interest supports sealing the record, a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed, the proposed sealing is narrowly tailored, and no less restrictive means exist to achieve the overriding interest

**AB 1312** – Sexual assault victims: rights**

- amends PC 264.2, 679.04, 680, 13823.11, and 13823.95
- adds PC 680.2
- requires a law enforcement authority or district attorney victims of sexual assault, as specified, that they have the right to request to have a person of the same gender or opposite gender as the victim advocate present in the room during any interview with a law enforcement official or district attorney, unless no such person is reasonably available
- prohibits a law enforcement official from discouraging a victim from receiving a medical evidentiary or physical examination
- requires every local law enforcement agency to develop a card that explains the rights of sexual assault victims, including a clear statement that the victim is not required to participate in the criminal justice system or to receive a medical evidentiary or physical examination in order to retain his or her rights under law
- requires a law enforcement official or medical provider to provide this card to the victim upon the initial interaction
- requires a law enforcement official, upon written request by a victim, to furnish a copy of the initial crime report related to the sexual assault
- requires a prosecutor, upon written request by the victim, to provide the defendant's information on a sex offender register, if any, to the victim
- specifies that a victim's waiver of the right to an advocate is not admissible in court, unless the waiver is at issue in the pending litigation

**AB 1448^ – Elderly Parole Program**

- amends PC 3041, amends PC 3046, adds PC 3055
- established Elderly Parole Program
- Parole eligibility for inmates 60 years or older who have served "a minimum of 25 years of continuous incarceration, as defined, on their sentence."
- Exempt: (1) persons sentenced pursuant to the Three Strikes Law; (2) person sentenced to LWOP; (3) person convicted of first-degree murder of peace officer or former peace officer.

**AB 1542 – Violent felonies: video recording**

- adds PC 667.95
- authorizes the court consider as an aggravating sentencing factor that a defendant convicted of a specified violent felony willfully recorded a video of the commission of the violent felony with the intent to encourage or facilitate the offense.

**SB 40** – Domestic violence**
- amends PC 13701 and 13730
- requires law enforcement agencies to inform domestic violence victims at the scene that strangulation may cause internal injuries and encouraging the victim to seek medical attention
- requires law enforcement agencies to compile information regarding whether domestic violence-related calls for assistance involved strangulation or suffocation
- requires incident report forms regarding domestic violence to include whether there were indications that the incident involved strangulation or suffocation

**SB 65*** – Vehicles: alcohol and marijuana: penalties**
- amends Vehicle Code sections 23220 and 23221
- makes drinking an alcoholic beverage or smoking or ingesting marijuana or any marijuana product while driving, or while riding as a passenger in, a motor vehicle being driven upon a highway or upon specified lands punishable as an infraction

**SB 180^ – Controlled substances: sentence enhancements: prior convictions**
- limits the imposition of sentence enhancement pursuant to HS 11370.2 (full, separate, and consecutive 3-year term for each prior conviction of/conspiracy to violate specified controlled substances crimes) to only if prior conviction of or conspiracy to violate using a minor in the commission of offenses involving specified controlled substances (HS 11380 [inducing violation by minor])
- amends HS 11370.2
- effective 1/1/2018

**SB 230*** – Evidence: commercial sexual offenses**
- amends EC 1108
- includes in the definition of "sexual offense" specified human trafficking offense

**SB 238** – Criminal procedure: arrests and evidence**
- amends PC 849, 851.6, 1417.7
- authorizes an arresting officer to release an arrested person from custody without taking him or her before a magistrate if the person is delivered, subsequent to being arrested, to a specified facility for the purpose of mental health evaluation and treatment and no further criminal proceedings are desired; requires a person arrested and released according to this provision be issued a certificate describing the action as a detention
- allows, in addition to a photographic record, a digital record of exhibits in criminal actions before it is disposed of

**SB 336 – Exonerated inmates: transitional services**

- amends PC 3007.05, which requires CDCR to assist exonerated persons with specified transitional services for a period of not less than 6 months and not more than 1 year from the date of release
- revises the definition of exonerated for purpose of eligibility for assistance with transitional services to include a person who has been convicted and subsequently granted a writ of habeas corpus, as specified

**SB 384 – Sex offenders: registration: criminal offender record information systems**

- amends PC 9002 and 13125
- adds sections 290, 290.006, 290.008, 290.45, 290.46, 290.5, and 4852.03
- commencing 1/1/2021, establishes 3 tiers of sex offender registration based on specified criteria, for periods of at least 10 years, at least 20 years, and life, for a conviction of specified sex offenses (PC 290), and 5 years and 10 years for adjudication as a ward of the juvenile court for specified sex offenses (PC 290.008)
- allows the DoJ to place a person in a tier-TBD category for max period of 24 months if their appropriate tier designation cannot be immediately ascertained
- commencing 7/1/2021, establishes procedures for termination from the sex offender registry for tier one or tier two offenders who complete their minimum registration period under specified conditions (PC 290.5)
- requires the offender to file a petition at the expiration of their minimum registration period
- establishes procedures for a tier three offender based solely on their risk level to petition the court for termination from the registry after 20 years from release of custody, if certain criteria are met (PC 290.5)

**SB 393 – Arrests: sealing**

- authorizes a person who has suffered an arrest that did not result in conviction to have arrest sealed
- requires Judicial Council to create forms for persons applying to have their arrest records sealed
- provides that a person eligible to have their arrest sealed is entitled, as a matter of right, to that sealing unless the person has been charged with certain specified crimes if the person's record "demonstrates a pattern of domestic violence arrests, convictions, or both" in which case person may obtain sealing only upon showing that the sealing would serve the interests of justice
- if petition for sealing granted, the court must issue a written ruling and order which states that the arrest is "deemed not to have occurred" and that "except as otherwise provided, the petitioner is released from all penalties and disabilities resulting from the arrest
- requires the court to furnish a disposition report to the DoJ
- if petition for sealing granted, prohibits the disclosure of the arrest, or information about the arrest that is contained in other records, from being disclosed to any person or entity, except as specified.
- prohibits the DoJ from disclosing, as part of the state summary criminal history information that an individual was granted relief pursuant to the provisions above
- amends PC 851.87, 851.90, 1000.4, 1001.9, 11105
- adds PC 851.91, 851.92

**SB 500^ – Extortion**

- amends PC 518, 520, 523, 524, 526
- includes within the definition of extortion the obtaining of consideration, as defined, by force, fear, or under color of official right
- defines "consideration" as anything of value, including enumerated sexual acts or sexual images

**SB 620^ – Firearms: crimes: enhancements**

- amends PC 12022.5, 12022.53
- deletes prohibition on striking an allegation or finding related to use of a firearm in the commission of a felony and would allow a court, in the interest of justice and at the time of sentencing or resentencing, to strike or dismiss an enhancement otherwise required to be imposed by PC 12022.5 and 12022.53

**SB 670** – Sentencing: county of incarceration and supervision**

- amends PC 1170 and 1170.3
- requires, when imposing specified felony sentences concurrent or consecutive to another felony sentence in another county or counties, the court rendering the 2nd or other subsequent judgment to determine the county or counties of incarceration and supervision of the defendant
- requires the Judicial Council to adopt rules providing criteria for the consideration of the trial judge when determining the county or counties of incarceration and supervision

**SB 684*** – Incompetence to stand trial: conservatorship: treatment**

- amends PC 1368.1 and 1370
- amends WIC 5008
- allows the initiation of conservation proceedings on the additional basis that the person is gravely disabled due to a condition in which the person, as a result of a mental health disorder, is unable to provide for his or her basic needs for food, clothing, or shelter
- allows, if the action is on a complaint charging a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person, the prosecuting attorney at any time before or after a defendant is determined incompetent to stand trial, to request a determination of probable cause to believe defendant committed the offense(s), solely for the purpose of establishing that the defendant is gravely disabled; allows for initiation of conservatorship upon a criminal complaint if there has been a finding of probable cause on the complaint

**SB 725^ – Veterans: pretrial diversion: driving privileges**

- amends PC 1001.80
- specifies that a defendant may be placed in the veteran's pretrial diversion program for a misdemeanor violation of driving under the influence or driving under the influence and causing bodily injury

**SB 756** – Restitution: noneconomic losses: child sexual abuse**

- amends PC 1202.4
- includes in the required restitution order amount noneconomic losses for psychological harm stemming from felony incidents of repeated or recurring incidents of sexual abuse of a child under 14 years of age or from felony incidents of sexual contact with a child under 10 years of age