FIRST DISTRICT APPELLATE PROJECT
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RECENT LEGAL DEVELOPMENTS IN CRIMINAL, DELINQUENCY, & CIVIL COMMITMENT LAW

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I. Criminal Cases

A. Suppression Motions & Fourth Amendment

Fourth Amendment & exigent circumstances. *People v. Nunes* (2021) 64 Cal.App.5th 1. Defendant moved to suppress evidence from the warrantless search of a backyard shed and a cabinet within it by a fire department captain. The prosecution argued the search was valid under the exigent circumstances exception to the warrant requirement, and the trial court found the exception applicable. It was the prosecution's burden to show the fire captain's search of the cabinet was a "swift action [necessary] to prevent imminent danger." The Sixth District Court of Appeal concluded the prosecution did not meet that burden. Key to the court's analysis was the principle that the justification for searching based on exigent circumstances "ends when the emergency passes." And here, the emergency which may have existed when fire personnel arrived on scene was no longer apparent when the fire captain opened the cabinet inside the shed. The Sixth District was "not persuaded that opening the cabinet in the shed was necessary to avoid imminent danger to life or serious property damage, given that the urgency of the situation had dissipated."

Discovery of arrest warrant can attenuate the taint of original unlawful detention so that evidence obtained during the subsequent search is admissible. *People v. Kasrawi* (2021) 65 Cal.App.5th 751, review granted September 1, 2021, S270040, and deferred pending consideration and disposition of a related issue in *People v. Tacardon*, S264219. In this Fourth Amendment appeal, a law enforcement officer discovered defendant's outstanding warrant after an illegal stop but before a search yielded evidence of a crime. The Fourth District Court of Appeal held that despite the Fourth Amendment violation, suppression was not required because the "case falls into a narrow exception to the exclusionary rule that applies where a law enforcement officer discovers the defendant's outstanding warrant after an illegal stop but before a search yields evidence of a crime."

In its analysis of when defendant was "detained," the court discussed at length various cases that have examined the use of a spotlight as a show of authority. The court harmonized case law on the subject to conclude: "An officer's use of a spotlight, particularly at night, is a show of authority that might constitute a detention if it is coupled with additional actions from the officer that would communicate to a reasonable person they are not free to leave. . . The ultimate question, however, is not the abstract reasonableness of the officer's actions but rather the effect of the cumulative show of authority on a reasonable person's assessment of whether they are free to terminate the encounter with law enforcement." Although none of the officer's actions were "overtly aggressive," the court concluded that the spotlight, combined with the "authoritative manner" of the

officer's approach "and his assertion of total control removed any ambiguity as to whether [the defendant] could leave."

In *Tacardon*, review was granted on the following issue: Was defendant unlawfully detained when the arresting officer used his spotlight to illuminate defendant's parked car and then directed a passenger who exited the car to remain outside and stay on the sidewalk near the car?

Reversal on Fourth Amendment grounds; no reasonable suspicion and no probable cause. *People v. Cuadra* (2021) 71 Cal.App.5th 348. The Second District Court of Appeal reversed the denial of a Penal Code section 1538.5 suppression motion pertaining to a seized firearm as the fruit of an unlawful detention. The reviewing court concluded that there was not probable cause to arrest appellant but for the illegal detention, and that this was not a consensual encounter after the officers directed appellant to the hood of the car. Nor was there a reasonable articulable suspicion that criminal activity was afoot and that appellant was a person engaged in, or about to engage in, criminal activity. All the officers knew was that appellant was standing next to a car in a motel parking lot at 2:00 a.m. And without knowing whether defendant's grant of probation included a search condition, the officers could not ultimately stop and search him as they did. The observation of the bulge in appellant's pocket occurred as a result of appellant's submission to authority. The fact that a curfew was in effect due to Black Lives Matter protests did not affect the majority's analysis because the curfew did not apply to presence on private property, and the defendant was not on public property, but rather at a motel parking lot.

Unprovoked flight upon noticing the police entering a high crime area gives an officer a reasonable basis to detain the runner to investigate further. *People v. Flores* (2021) 60 Cal.App.5th 978. The Court of Appeal affirmed the trial court's denial of the defendant's motion to suppress evidence of drugs and a firearm, holding that the trial court correctly concluded that the facts taken together justified the *Terry* stop. The Court held that "unprovoked flight upon noticing the police entering a high crime area gives an officer a reasonable basis to detain the runner to investigate further."

Fourth Amendment & probable cause to search for illegal quantity of marijuana. *People v. Moore* (2021) 64 Cal.App.5th 291. The Third District Court of Appeal affirmed the trial court's ruling that the search of appellant's backpack, which he left on the passenger-side floorboard of a friend's jeep, was reasonable under the automobile exception to the warrant requirement. The officer observed appellant leaning into the open front passenger door of a Jeep. When the officer parked behind the jeep, appellant walked away to the park. The officer approached the driver, who opened the driver-side door, at which point a "strong smell of fresh marijuana" escaped from the vehicle. The officer asked if there was marijuana in the car, and the driver said no but admitted to recently smoking marijuana. The

officer asked about the backpack, and the driver said a friend had left it in the jeep. The officer saw appellant watching from the park. Based on his observations and the odor of fresh marijuana, the officer decided to search the jeep for an unlawful amount of marijuana. The Court of Appeal rejected appellant's claim that the totality of the circumstances failed to supply probable cause to believe there was an illegal amount of marijuana in the vehicle as opposed to a legal amount. The court held the officer had probable cause to search the vehicle. Though the court attempted to distinguish the facts from *People v. Lee* (2019) 40 Cal.App.5th 853*,* this case is a departure and gives considerably more weight, once again, to the "odor of fresh marijuana" as a basis to search.

Odor of marijuana did not constitute probable cause, and impound was pretextual. *Blakes v. Superior Court* (2021) 72 Cal.App.5th 904. In this writ proceeding, the Third District Court of Appeal concluded the trial court erred in finding the warrantless search was supported by probable cause and that it was a valid impound search. Illegally tinted windows, defendant taking one-tenth of a mile to pull over and stop, the smell of marijuana emanating from the car, his having a suspended license, and his having a prior arrest for felon in possession of a firearm, did not provide probable cause that the car contained contraband or evidence of illegal activity. There are two possible illegal uses of marijuana that could have supported probable cause to believe a crime involving marijuana was being committed, had there been sufficient evidentiary support: driving under the influence of marijuana (Veh. Code, § 23152, subd. (a)) and driving with an open container of marijuana (Veh. Code, § 23222). The prosecution presented no evidence that petitioner was impaired. Likewise, there was no evidence either detective observed an open container before petitioner's car was searched. The fact that there was a smell of burnt marijuana emanating from the car was insufficient to support either theory of probable cause in this case. The Court of Appeal further concluded the impound decision was based on an investigative pretext rather than serving a community caretaking function.

Fourth Amendment & good faith exception. *People v. Lange* (2021) 72 Cal.App.5th 1114. After remand by the US Supreme Court, which held that the "flight of a suspected misdemeanant does not always justify a warrantless entry into a home" and that an "officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency [justifying entry]," the First District Court of Appeal again affirmed the lower court's order denying the suppression motion. The Court of Appeal concluded the good faith exception applied because the officer reasonably relied on "binding appellate precedent" which, at the time, authorized his warrantless entry into defendant's home. The exclusionary rule thus did not apply.

Warrantless blood draw of unconscious driver. *People v. Nault* (2021) 72 Cal.App.5th 1144. Appellant with four prior drunk driving convictions was driving

drunk and hit an oncoming car and killed its driver. While he was unconscious from the crash, police took a warrantless blood sample. A warrantless blood draw is presumed unreasonable unless justified by a recognized exception such as exigent circumstances. The Second District Court of Appeal held that exigent circumstances justified this blood draw, noting that when a driver is unconscious, the general rule is a warrant is not needed, and the Fourth Amendment "almost always" permits a warrantless blood test when police officers do not have a reasonable opportunity for a breath test before hospitalization.

Automobile exception did not justify warrantless seizure of defendant's car and subsequent search. *People v. Rorabaugh* (2022) 74 Cal.App.5th 296. When executing a search warrant at defendant's home, police learned that one of his cars was a short distance away, at a ranch. Police went to the ranch and – after defendant had already been taken into custody – towed the car away to be stored until they could obtain a warrant to search it. In closing argument to the jury, the prosecution argued DNA evidence found in the car corroborated its theory of defendant's culpability for murder. After the jury found defendant guilty of first degree murder, the Court of Appeal found a Fourth Amendment violation for the towing/storing of the car without first seeking modification to the warrant. The appellate court relied on *Coolidge v. New Hampshire* (1971) 403 U.S. 443, and its progeny, to conclude the "automobile exception" did not apply to the seizure and subsequent search of the car without a warrant after defendant was in custody. Accordingly, the warrantless seizure of defendant's car was in violation of the Fourth Amendment, and evidence obtained through a subsequent search of the car should have been suppressed.

Warrantless search of a vehicle was justified under the automobile exception to the warrant requirement. *People v. Sims* (2021) 59 Cal.App.5th 943. The Court of Appeal held that a warrantless search of a vehicle was justified under the automobile exception to warrant requirement. The search was incident to custodial arrest, as required for exception to warrant requirement for searches incident to arrest; the reasonable scope of search included the backseat area of the vehicle; and the search was justified by a reasonable belief that the vehicle contained evidence relevant to establish an offense.

Even when it is reasonably foreseeable that denial of the prosecutor's request for a continuance under Penal Code section 1050 will result in dismissal of the case, the court may deny the requested continuance of a defendant's Penal Code section 1538.5 motion. *People v. Brown* (2021) 69 Cal.App.5th 15, review granted December 22, 2021, S271877. The Court of Appeal held that if the trial court finds that the request for a continuance of a motion to suppress lacks good cause, the court has the authority to deny the requested continuance for lack of good cause. Defendant moved to suppress evidence resulting from statements she made to the arresting officer. At the hearing on the motion, the

prosecutor requested a continuance, informing the court that his sole witness would not appear because he had released the officer from the subpoena to interview a witness in an unrelated investigation. The court denied that motion for lacking good cause and granted the defendant's motion to suppress.

After an appellate division of the superior court affirmed the trial court's denial of the motion, the Court of Appeal declined to follow *People v. Ferrer* (2010) 184 Cal.App.4th 873 – which held that when it is reasonably foreseeable that denial of the prosecutor's request for a continuance will result in dismissal of the case, the court may not deny the requested continuance of a defendant's Penal Code section 1538.5 motion – and reversed.

Review was granted on the following issue: Did the trial court err in granting the People's motion under Penal Code section 1050 to continue the hearing on a motion to suppress evidence, when it was reasonably foreseeable that denying the continuance would result in a dismissal of the case but the People otherwise failed to show good cause for a continuance?

B. Competency

If a defendant is mentally incompetent because of an inability to consult with counsel, the dismissal of counsel is not an appropriate remedy. *People v. Wycoff* (2021) 12 Cal.5th 58. The Supreme Court fully reversed the judgment in a capital case after concluding that the defendant was not competent to stand trial. Nor was he competent to waive his right to counsel. Because defendant's mental illness motivated his desire to waive counsel, his decision to dismiss counsel cannot provide a justification for disregarding his mental illness. The court held that once a trial court has before it substantial evidence that a defendant is not mentally competent, its own observations of the defendant's competence cannot take the place of the formal competence inquiry under Penal Code sections 1368 and 1369. The Supreme Court also reiterated that a finding of incompetence to stand trial can be based solely on a defendant's "incapab[ility] of . . . cooperating with counsel."

Certification of competency by DSH officials does not toll a defendant's commitment period. *People v. Carr* (2021) 59 Cal.App.5th 1136. The Court of Appeal held that a defendant, who had been certified by state authorities to be competent and returned to court, remained "committed" for purposes of calculating the maximum period of commitment. While defendant was awaiting trial, the trial court found him incompetent to stand trial. The Court of Appeal held that the trial court was correct when it found that the filing of a certificate of competency did not terminate the defendant's commitment so as to prevent the three-year maximum commitment term from accruing. Note: In *Rodriguez v. Superior Court* (2021) 70 Cal.App.5th 628, review granted January 5, 2022, S272129, the Supreme Court will decide: "Does an incompetency commitment end when a state hospital files a certificate of restoration to competency or when the trial court finds that defendant has been restored to competency?"

C. Mental Health Diversion (Pen. Code, § 1001.36)

Court did not abuse discretion in denying mental health diversion. *People v. Oneal* (2021) 64 Cal.App.5th 581. After the trial court denied a motion for mental health diversion, defendant pled no contest and was sentenced. On appeal, defendant challenged the denial of his motion for mental health diversion. The trial court found that the mental illness was not a significant factor in defendant's criminal behavior and that he presented a risk of danger to public safety if treated in the community. Appellant contended the court's ruling deprived him of due process because the court improperly relied on reports prepared in relation to his initial insanity plea, and those reports did not support finding that mental illness was not a significant factor in defendant's criminal behavior. He also contended that the record did not support a finding of danger to public safety as defined by statute. Despite the absence of an objection below to the reliance on the report, the Fifth District Court of Appeal exercised discretion to reach the issue and concluded the court did not abuse its discretion by considering the reports and that the reports supported the finding that the schizoaffective disorder was not a significant factor in defendant's criminal behavior.

Trial court abused its discretion in finding that the defendant posed an unreasonable risk of danger to public safety. *People v. Moine* (2021) 62 Cal.App.5th 440. The Court of Appeal held that the trial court abused its discretion in denying a petition for mental health diversion based on a determination that the defendant would pose an unreasonable risk of danger to public safety. A jury convicted defendant of two counts of making criminal threats in violation of Penal Code section 422, subdivision (a). On appeal, the defendant challenged the denial of mental health diversion. The Court of Appeal held that the trial court abused its discretion in finding that the defendant posed an unreasonable risk of danger to public safety. Section 1001.36's reliance on the definition of dangerousness in section 1170.18 necessarily encompasses the list of super strike offenses found at section 667(e)(2)(C)(iv). By requiring an assessment of whether the defendant "will commit a new violent felony" within the meaning of section 667, a trial court necessarily must find the defendant is "likely to commit a super-strike offense." The Court of appeal reasoned there was nothing in the record to indicate the defendant was likely to commit a super strike offense in the future.

The trial court erred in finding that the defendant posed an unreasonable risk to public safety and thus abused its discretion in denying his request for mental health diversion. *People v. Williams* (2021) 63 Cal.App.5th 990. The Court of Appeal held that the defendant was not reasonably likely to commit a "super-strike offense" if granted mental health diversion and treated in the community, and thus was eligible for mental health diversion. After the defendant pleaded no contest to one count of felony stalking, he was denied mental health

diversion under newly enacted Penal Code section 1001.36, which took effect shortly after his plea. The Court of Appeal held that the trial court erred in finding that defendant posed an unreasonable risk to public safety and thus abused its discretion in denying his request for mental health diversion.

Denial of mental health pretrial diversion was warranted in prosecution for arson of forest land. *People v. Pacheco* (Feb. 15, 2022, B311538) ___Cal.App.5th ___ [2022 WL 453956]. The Court of Appeal rejected appellant's argument that the trial court abused its discretion in denying his request for pretrial mental health diversion pursuant to section 1001.36. The denial was based on the court's finding that appellant posed an unreasonable risk of danger to public safety where appellant, "who suffers from schizophrenia and . . . [w]hile under the influence of methamphetamine, using a cigarette lighter and an accelerant, . . . intentionally set fire to dried vegetation in a populated rural area during the late summer fire season."

Trial court erred by denying the defendant's request for mental health diversion as untimely prior to sentencing. *People v. Curry* (2021) 62 Cal.App.5th 314, review granted July 14, 2021, S267394 and deferred pending disposition of related issue in *People v. Braden* (see below). The Court of Appeal held that the phrase "until adjudication," in statute authorizing trial courts to grant pretrial diversion to defendants diagnosed with qualifying mental disorders, means until the judgment of conviction. Defendant was convicted by a jury of robbery. Before the trial court sentenced him to state prison for 40 years to life and imposed various costs, the defendant sought to file a motion for mental health diversion pursuant to Penal Code section 1001.36. The trial court ruled the motion was untimely and did not consider it. The Court of Appeal held the trial court was required to consider the defendant's mental health diversion request and conditionally reversed the judgment with directions to hold a diversion eligibility hearing.

Defendant was ineligible for Penal Code section 1001.36's "pretrial diversion" because he did not request diversion before trial began. *People v. Braden* (2021) 63 Cal.App.5th 330, review granted July 14, 2021, S268925. The Fourth District Court of Appeal held that a defendant is ineligible for a pretrial mental health diversion program after his trial begins. After a jury convicted defendant on a charge of resisting an executive officer with force or violence, he requested mental health diversion pursuant to Penal Code section 1001.36. The Court of Appeal held he was ineligible for that section's "pretrial diversion" because he did not request diversion before trial began. The court disagreed with *People v. Curry*, 62 Cal.App.5th 314 (2021), which held that such a request could be made until entry of judgment. [The issue on which the Supreme Court granted review in *Braden* is: What is the latest point at which a defendant may request mental health diversion under Penal Code section 1001.36?]

A request for diversion under section 1001.36 becomes untimely once the jury has returned a verdict. *People v. Graham* (2021) 64 Cal.App.5th 827, review granted September 1, 2021, S269509. Defendant was charged with attempted premeditated murder and convicted by jury. Defendant argued on appeal that the matter should be remanded for the court to exercise its discretion to grant pretrial diversion because she suffered a mental disorder that was a significant factor in the commission of the crime. Because Penal Code section 1001.36 became effective before defendant went to trial, the Second District Court of Appeal framed the issue as whether a request for pretrial diversion under that statute is timely when made for the first time on appeal. The Second District concluded that the statute requires a request to be made prior to the return of a verdict and, in so holding, parted ways with *People v. Curry* (2021) 62 Cal.App.5th 314 [holding a request is timely so long as it is made prior to sentencing], but "ha[d] no occasion to go as far as *People v. Braden* (2021) 63 Cal.App.5th 330, 333" [holding diversion may not be sought once trial begins].

Under Penal Code section 1001.36, subdivision (c), "adjudication" is an adjudication of guilt, whether by jury conviction or a plea of guilty. *People v. Rodriguez* (2021) 68 Cal.App.5th 584, review granted Nov. 10, 2021, S270895, pending disposition of *Braden*. Two years after defendant pled guilty to felony animal cruelty, defendant requested pretrial mental health diversion under Penal Code section 1001.36. The trial court denied her request as untimely because it was not presented until after her conviction by guilty plea. Penal Code section 1001.36, subdivision (c), defines pretrial diversion as postponement of prosecution "at any point in the judicial process . . . until adjudication" and the trial court interpreted the term "adjudication" to mean an adjudication of guilt, whether by jury conviction or a plea of guilty. The Fourth District Court of Appeal agreed and affirmed.

Certificate of probable cause not required to challenge court's sentencing discretion relating to trial counsel's failure to request a hearing on eligibility for mental health diversion. *People v. Hill* (2021) 59 Cal.App.5th 1190. The Court of Appeal held that a defendant was not required to obtain a certificate of probable cause after pleading no contest to challenge the court's sentencing discretion relating to his attorney failing to request a hearing on his eligibility for mental health diversion under Penal Code section 1001.36 because such a challenge does not attack the validity of the plea. The reviewing court went on to find that Hill's counsel was not ineffective for failing to request an eligibility hearing nor was Hill prejudiced by counsel's failure to do so.

D. Batson/Wheeler

Work product protection does not categorically bar disclosure of jury selection notes in postconviction discovery. *People v. Superior Court (Jones)*

12 Cal.5th 348. In this habeas corpus proceeding after a judgement of death in 1994, the defendant claimed the prosecution had used peremptory strikes to discriminate against prospective jurors in violation of *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258. In connection with this petition, Jones filed a motion for postconviction discovery under Penal Code section 1054.9 seeking access to the prosecutor's jury selection notes. The trial court granted the motion, rejecting the District Attorney's argument that the notes are shielded from disclosure as attorney work product. The Court of Appeal affirmed, and the California Supreme Court affirmed as well. At the *Batson/Wheeler* hearing, the prosecutor had relied on an undisclosed juror rating system to explain his reasons for the challenged peremptory strikes. The Supreme Court did not resolve the broader dispute about whether work product doctrine extends to a prosecutor's jury selection notes but held that even assuming that jury selection notes are protected work product, the prosecutor in this case impliedly waived any work product protection. By putting the rating system at issue, the prosecutor impliedly waived any claim of work product protection over notes containing information about the system.

***Batson/Wheeler* motion involving the striking of a prospective juror who expressed support for Black Lives Matter was improperly denied.** *People v. Silas* (2021) 68 Cal.App.5th 1057. The Court of Appeal held that trial court's finding that defendants failed to establish prima facie case of discrimination in *Batson/Wheeler* challenge to prosecutor's peremptory challenge of prospective Black juror lacked substantial evidence. Four Black co-defendants were tried for the murders of two Black victims. During jury selection, defendants brought unsuccessful *Batson/Wheeler* motions to challenge the prosecutor's exercise of peremptory strikes against three Black prospective jurors, including one who expressed support for Black Lives Matter. The jury, which had two Black members, returned convictions. The Court of Appeal remanded for a new trial. The *Batson/Wheeler* motion involving the prospective juror who expressed support for BLM was improperly denied. Defendants established a prima facie case of discrimination at the first stage of the analysis. The prosecutor's proffered reasons for the strike—that the juror was hostile when asked about supporting BLM and had "anti-prosecution issues"—were invalid, and insufficient evidence supported the conclusion that the peremptory strike was not motivated in substantial part by discriminatory intent.

E. Confessions & *Miranda*

Reversal due to coerced confession. *People v. Jimenez* (2021) 72 Cal.App.5th 712. The Fourth District Court of Appeal reversed appellant's murder conviction after finding his confession was coerced because the police induced it by threatening to charge his sons with the murder. The court explained that whether the threat was coercive turned on the issue of whether the threat could have been lawfully

executed. Here, the detective did not have probable cause to charge defendant's sons with homicide. This was so despite the fact that the detective may have had probable cause to charge the sons with accessory after the fact. The appellate court concluded "the only reasonable interpretation of Detective Munoz's statements is that he knew defendant's sons were not guilty of murder, but he intended to charge them with murder anyway, unless defendant confessed." On this record, the Court of Appeal "[could not] say, beyond a reasonable doubt, that if defendant's confession had been excluded, he would still have been convicted of first degree murder." The Court of Appeal declined to find forfeiture despite the absence of any objection or attempt to suppress the statements below. The Court of Appeal did so because the case presented a pure question of law based on undisputed facts (the only relevant evidence was the interaction between defendant and officer, which was video recorded), and consideration of the issue on appeal "would head off a future habeas petition asserting ineffective assistance of counsel."

The trial court erred in denying a motion to exclude the defendant's confession where police interviewed defendant in two stages—first without warning him under *Miranda*, and then again after warning him. *People v. Sumagang* (2021) 69 Cal.App.5th 712. The Court of Appeal held that confession after the *Miranda* warnings was inadmissible, and the error was not harmless. Police found the defendant asleep in a car in a remote rural area with the victim's deceased body lying on top of him. The police took the defendant into custody and a detective subsequently interviewed him in two stages—first without warning him under *Miranda*, and then again after warning him. In both parts of the interview, he admitted choking the victim until she stopped breathing or moving. The prosecution charged the defendant with willful, deliberate, and premeditated murder. The Court of Appeal reversed, finding the trial court erred by denying the defendant's motion to exclude the confession under *Missouri v. Seibert*. The court concluded the detective deliberately undermined *Miranda* by employing the two-step interrogation tactic.

F. Instructional Error

Defendant was entitled to instruction based on heat of passion, in addition to self-defense and imperfect self-defense. *People v. Dominguez* (2021) 66 Cal.App.5th 163. The trial court erroneously refused to instruct on voluntary manslaughter based on heat of passion. The reviewing court found that evidence supported not only self-defense and imperfect self-defense, but also heat of passion in response to the victim's objectively provocative conduct. The trial court should have instruct on all three theories. In light of the defendants' testimony that they experienced fear and panic, the jury should have been permitted to find defendants guilty of voluntary manslaughter (instead of second degree murder) and attempted voluntary manslaughter (instead of attempted murder). In ruling there was insufficient evidence of subjective provocation, the trial court erred in stating that

there must be a showing the defendant exhibited anger or rage. Any intense emotion (except revenge) may suffice—including fear and panic.

The relevant question is not whether an ordinary person would have become "homicidally enraged" by the provocative conduct. The proper focus is placed on the defendant's state of mind, not on his particular act. The issue is whether the provocation would cause an emotion so intense that an ordinary person in the same or similar circumstances "would simply react, without reflection." When making this assessment, the jury "must assume 'the point of view of a reasonable person in the position of defendant,' taking into account 'all the elements in the case which might be expected to operate on his mind.'"

Delusions are not a bar to imperfect self-defense if objective circumstances support the claim, even where defendant's own testimony is the only evidence of objective circumstances. *People v. Schuller* (2021) 72 Cal.App.5th 221, review granted January 19, 2022, S272237. Prior to this decision, no published case had addressed a court's refusal to give an imperfect self-defense instruction where a defendant's story was that a real person attacked him, but there are delusional components to the defendant's description of what happened. Defendant testified at his murder trial, claiming self-defense, but his trial testimony about what happened leading up to and during the shooting suggested he was delusional and hallucinating. The Third District Court of Appeal held the trial court erred in refusing to instruct the jury on the lesser included offense of voluntary manslaughter based on imperfect self-defense.

The Court of Appeal distinguished the Supreme Court's opinion in *People v. Elmore* (2014) 59 Cal.4th 121, which held that "because unreasonable self-defense is 'a species of mistake of fact [Citation] . . . it cannot be founded on delusion,'" by emphasizing that *Elmore* involved "a *purely (or entirely)* delusional belief in self-defense." In contrast, in this case, while defendant's testimony included evidence of delusion, his account pertaining to the actual shooting was not entirely delusional (he testified the decedent attacked with a knife, and he shot in self-defense) and thus provided substantial evidence of an actual but unreasonable belief in the need for self-defense. *Elmore* described the line between misperception and delusion as "drawn at the absence of an objective correlate." The Court of Appeal here interpreted "an objective correlate" as "relate[d] to the presence or absence of objective circumstances supporting a claim of imperfect self-defense." "[A] single witness, including the defendant, can provide evidence establishing the objective circumstances necessary to support the instruction." It is for the jury, not the court, to assess the credibility of that testimony. Although the court found error for failure to instruct on voluntary manslaughter, the court deemed the error harmless, applying the *Watson* standard.

Our Supreme Court granted review on the following issues: (1) Was the trial court's error in refusing to instruct the jury on voluntary manslaughter based on imperfect self-defense harmless? (2) What standard of prejudice applies to such an error?

Jury should have been allowed to consider the defendant's physical limitations in determining whether his belief in the need for self-defense was objectively reasonable. *People v. Horn* (2021) 63 Cal.App.5th 672. The Court of Appeal held that the defendant was entitled to have the jury consider his spinal problems and fear of paralysis in determining whether his belief in the need for self-defense was objectively reasonable, but the trial court's instructions about the relevance of defendant's physical infirmities to his claim of self-defense sufficiently cured the prosecutor's contrary misstatements of law.

Witness certainty regarding an identification should not be a factor considered by the jury, but inclusion of this factor in the instruction did not violate due process. *People v. Lemcke* (2021) 11 Cal.5th 644. OurSupreme Court considered CALCRIM No. 315, which at the time listed 15 factors the jury should consider when evaluating eyewitness identification evidence. One of those factors stated: "How certain was the witness when he or she made an identification?" Appellant argued that the certainty instruction violated his federal and state due process rights to a fair trial because empirical research has shown that a witness's confidence in an identification is generally not a reliable indicator of accuracy. The Supreme Court rejected the due process claim, concluding that "when considered in the context of the trial record as a whole, listing the witness level of certainty as one of 15 factors the jury should consider when evaluating identification testimony did not render [defendant's] trial fundamentally unfair." Nevertheless, the court noted that despite the absence of a constitutional violation, trial courts should omit the certainty factor from the instruction unless the defendant requests otherwise until the Judicial Council and its Advisory Committee on Criminal Jury Instructions has completed its evaluation of the model instruction. The court agreed "that a reevaluation of the certainty instruction is warranted. Contrary to widespread lay belief, there is now near unanimity in the empirical research that eyewitness confidence is generally an unreliable indicator of accuracy."

Instruction's listing of witness's level of certainty as factor to consider when evaluating identification testimony did not violate due process. *People v. Delgado* (Feb. 10, 2022, B299482) ___ Cal.App.5th ___ [2022 WL 405390]. The Court of Appeal held inclusion of the witness certainty factor did not violate defendant's due process rights in light of the jury instructions and record as a whole. Defendant argued the jury instruction on witness certainty was "especially damaging" in this case because "other than the officers' identifications from the unavailable surveillance footage," there was no other evidence defendant was the shooter. The Court of Appeal found several other factors identified in CALCRIM No. 315 were relevant to the jury's determination of the reliability of the officer's identification, and there was other evidence implicating the defendant.

Kidnaping cannot be accomplished by deception alone, without force or fear. *People v. Lewis* (2021) 72 Cal.App.5th 1, review granted February 23, 2022, S272627. Appellant was convicted by jury of rape by intoxication and kidnapping to commit rape. The Fourth District Court of Appeal concluded the trial court prejudicially erred by modifying the jury instruction for kidnapping to commit rape to state that it could be accomplished by "physical force or deception." The jury was thus instructed it could convict appellant of kidnapping to commit rape based on deception alone. The instruction did not relax the force requirement—the instruction completely eliminated it. Although the appellate court invited the Legislature to consider this issue and, if it believes it is appropriate to do so, amend Penal Code section 207, subdivision (a), to include deception, the Court of Appeal concluded it may not rewrite the statute itself. The appellate court thus reversed the kidnapping conviction. The court additionally held that insufficient evidence supported the kidnapping conviction, such that appellant may not be retried. The dissenting opinion would have found movement by deception an appropriate basis upon which to convict defendant of kidnapping. The Supreme Court granted review to answer the following question: Can a defendant be convicted of kidnapping to commit rape (Pen. Code, § 209, subd. (b)(1)) based on the use of deception, as an alternative to force or fear, to take and carry away an intoxicated adult victim?

Jury instruction for kidnapping, CALCRIM No. 1201, wrongly permitted a jury to find deception itself sufficient to prove general kidnapping. *People v. Nieto* (2021) 62 Cal.App.5th 188. The Court of Appeal concluded that the pattern jury instruction for kidnapping, CALCRIM No. 1201, wrongly permits a jury to find deception itself sufficient to prove general kidnapping. However, the court concluded that the instructional error was harmless beyond a reasonable doubt where the evidence was otherwise sufficient to prove kidnapping.

Instructional error to omit accomplice language from instruction for Penal Code section 12022.53, subdivision (d) enhancement. *People v. Morales* (2021) 67 Cal.App.5th 326. Penal Code section 12022.53, subdivision (d) sets forth a 25-years-to-life enhancement when the defendant, "in the commission of a felony specified in subdivision (a) ... personally and intentionally discharges a firearm and proximately causes great bodily injury ... or death, to any person other than an accomplice." Appellant argued that the victim was an accomplice to disturbing the peace and the court denied him due process of law by modifying CALCRIM No. 3149 to eliminate the need for the jury to determine whether she was a "person other than an accomplice." Reviewing the claim of instructional error de novo, Division Four of the First District Court of Appeal agreed that the trial court erred when it omitted the accomplice language from the jury instruction on the enhancement.

Trial court was required to instruct the jury on battery as a lesser included offense of oral copulation of an unconscious person. *People v. Miranda* (2021) 62 Cal.App.5th 162. The Court of Appeal held that the trial court

had a sua sponte duty to instruct the jury on battery as a lesser included offense of oral copulation of an unconscious person. Defendant was convicted of multiple sex crimes against two minors, including oral copulation of an unconscious person, rape of an unconscious person, and sexual penetration of an unconscious person. The Court of Appeal agreed that battery was a lesser included offense of oral copulation of an unconscious person, rape of an unconscious person, and sexual penetration of an unconscious person. Given that battery required only an offensive touching, it was impossible to commit any of these crimes without also committing battery against that person. The reviewing court concluded the trial court was required to instruct the jury on battery as a lesser included offense as to one of the defendant's crimes – oral copulation of an unconscious person. "As to the counts charging rape or sexual penetration of an unconscious person, the lesser included instruction was not required," as "[t]here was no ambiguity in the evidence regarding the incidents giving rise to those charges that would allow a reasonable jury to find that Miranda committed only battery."

Trial court erred in giving jury instructions that removed the "acting lawfully" element from charges of obstructing and resisting a police officer. *People v. Southard* (2021) 62 Cal.App.5th 424. When instructing the jury on multiple charges of obstructing and resisting an officer, the trial court borrowed from appellate opinions finding that a defendant's intervening acts could purge the taint of an illegal detention such that suppression under the Fourth Amendment is not warranted. The Court of Appeal deemed the instruction erroneous because it impermissibly eliminated the prosecution's burden of proving the officer was acting lawfully at the time of the encounter. The appellate court "reminded" trial courts of the danger of instructing a jury with language from an opinion that has nothing to do with jury instructions. The Court of Appeal also held the trial court erroneously instructed the jury with CALCRIM No. 250 ("Union of Act and Intent: General Intent"), which must not be given in cases where there is a knowledge mental state element.

Trial court erred by giving flight instruction based on defendant's post-arrest suicide attempts. *People v. Pettigrew* (2021) 62 Cal.App.5th 477. The Court of Appeal held that the trial court erred by giving a flight instruction based on defendant's post-arrest suicide attempts. There was no evidence the defendant fled to avoid arrest or tried to escape from custody, and the court agreed with the defendant that the trial court erred by instructing the jury on flight. However, the Court of Appeal held that defendant's due process trial rights were not violated by flight instruction and the trial court's error in giving flight instruction was harmless.

Aiding and abetting jury instructions not properly tailored to implied malice murder. *People v. Powell* (2021) 63 Cal.App.5th 689. The instructions read to the jury allowed the jury to convict appellant of implied malice murder under a

direct aiding and abetting theory, which appellant argued on appeal was a legally invalid theory of culpability. The Court of Appeal held that direct aiding and abetting implied malice murder was a valid legal theory but that the aiding and abetting instructions provided to the jury were not properly tailored for implied malice murder. Nevertheless, the reviewing court found the trial court's error in not properly tailoring aiding and abetting jury instructions for implied malice murder was harmless, as the prosecutor did not rely on such a theory.

Trial court erred in failing to instruct on usable quantity element. *People v. Blanco* (2021) 61 Cal.App.5th 278. The Court of Appeal held that the statute making it a felony to bring "any controlled substance" into a penal institution required proof that the defendant brought a usable amount of controlled substance, and the trial court committed instructional error when it failed to properly instruct that a conviction required proof that the defendant brought a usable quantity of a controlled substance into a penal institution. Finding the error was not harmless beyond a reasonable doubt, the Court of Appeal reversed the conviction.

Trial court erred by failing to instruct on mistake-of-fact. *People v. Speck* (Feb. 2, 2022, C093273) ___ Cal.App.5th ___ [2022 WL 304910]. In this prosecution for vehicle theft and receiving stolen property, defense counsel requested the trial court instruct the jury with CALCRIM No. 3406 regarding mistake-of-fact, as to both counts, based on defendant's testimony that he mistakenly but actually believed he had permission from the owner, and he did not think the car was stolen because it had an ignition that required particular keys and he had been given those keys. The Court of Appeal held that the trial court prejudicially erred in declining to give the applicable pattern instruction because there was substantial evidence supportive of a mistake-of-fact defense.

G. Sufficiency of the Evidence

Insufficient evidence in child molestation case. *People v. Clotfelter* (2021) 65 Cal.App.5th 30. The First District Court of Appeal, Division Two, concluded that evidence was insufficient to support convictions for two counts of annoying or molesting a child. To constitute a violation of Penal Code section 647.6, both an objective and subjective element must be proven: (1) the existence of objectively and unhesitatingly irritating or disturbing conduct; and (2) motivation by an abnormal sexual interest in children. The Court of Appeal held the evidence was insufficient to establish that appellant's conduct—including emails and gifts to the child—was objectively irritating or disturbing under the statute. And considering this evidence "together with appellant's known history as a child molester" to reach a different conclusion is not permissible: "The prosecution would have us characterize Clotfelter's conduct as objectively disturbing because he is a convicted child molester. But viewing the objective conduct in light of Clotfelter's past blurs the objective and subjective elements of the crime, and [*People v. Lopez* (1998) 19

Cal.4th 282] expressly rejects this approach." Ambiguous conduct is not enough to satisfy the statute.

The act of furnishing drugs is not by itself sufficient to establish personal infliction of GBI. *People v. Ollo* (2021) 11 Cal.5th 682. The sad facts of this case involved the 18-year old defendant accidentally furnishing fentanyl to his 16-year-old girlfriend, believing it to be cocaine, leading to her death. A jury convicted defendant of furnishing or giving a controlled substance to a minor (Health & Saf. Code, § 11353) and found true the allegation that he had personally inflicted great bodily injury upon the minor in the commission of the offense (§ 12022.7, subd. (a)). The Supreme Court granted review to determine whether a defendant who furnishes a controlled substance "personally inflicts" great bodily injury whenever the person furnished with the drugs suffers such injury from using the drugs. The Supreme Court reversed the Court of Appeal and held that the act of furnishing is not by itself sufficient to establish personal infliction. Whether a defendant who furnishes drugs personally inflicts such injury depends on the facts of the particular case. To determine whether a defendant personally inflicts an injury, factfinders and courts must examine the circumstances of the underlying offense and the defendant's role in causing the injury that followed. Where a defendant simply provides drugs to a user who subsequently overdoses, the defendant facilitates but does not personally inflict the overdose.

Sufficiency of the evidence for "armed with a firearm" within the meaning of Health and Safety Code section 11370.1. *People v. Sanchez* (2021) 66 Cal.App.5th 14. A jury found defendant guilty on two counts: possession of a controlled substance while armed with a loaded firearm, and carrying a loaded firearm in a vehicle. The phrase "armed with" in Health & Safety Code section 11370.1, subd. (a), means "having available for immediate offensive or defensive use." In this case, the firearm was in a bag in the bed of the defendant's truck, partially covered by a board. The Sixth District Court of Appeal held that based on the plain meaning of the term "immediate," the evidence was insufficient to support a finding that the firearm was available for immediate use because appellant could not have used it without exiting the cab of the truck, retrieving the bag from under the board in the truck bed, and taking the gun out of the bag. These actions would have required too much delay for the gun to be "available for immediate offensive or defensive use" as defined by the statute.

Sufficiency of the evidence for "gassing." *People v. Giddens* (2021) 72 Cal.App.5th 145. Appellant was convicted of "gassing" a peace officer (Pen. Code, § 243.9) for throwing a milk carton of alleged urine at deputy while appellant was incarcerated. The liquid was never tested. Appellant contended there was insufficient evidence that the liquid was urine and that the jail violated its mandatory duty to collect a sample of the suspected substance and to test it, in violation of her due process rights. The Fourth District Court of Appeal rejected

both arguments, finding that on this record, the jail was unable to collect a sample of the liquid. As to the due process challenge, the appellate court concluded appellant could not demonstrate the liquid was potentially or apparently exculpatory, triggering a duty to preserve. Further, appellant did not demonstrate bad faith on the jail's part.

Sufficient evidence supported multiple counts of attempted murder where defendant had no primary target. *People v. Foster* (2021) 61 Cal.App.5th 430. The Court of Appeal held that the evidence was sufficient to support all five counts of attempted murder. The defendant fired a gun from a distance of 40 to 50 feet at a group of at least six people, and no one other than one certain victim was struck or injured. The Court of Appeal held that while there was no indication the defendant had a primary target or that he sought to target a specific individual, that did not negate an intent to kill. The court explained that firing a gun at the group, under such circumstances, was substantial evidence from which the jury could find a specific intent to kill, and was at least one direct but ineffective step towards killing the five victims who survived the shooting. The prosecutor did not argue and the Court of Appeal did not apply the "kill zone" theory of attempted murder.

Substantial evidence supported the jury's finding that the defendant acted with the specific intent to kill in connection with the attempted murder count under the kill zone theory. *People v. Windfield* (2021) 59 Cal.App.5th 496. On remand from the California Supreme Court to reconsider application of the kill zone theory in light of *People v Canizales* (2019) 7 Cal.5th 591, the Court of Appeal affirmed the defendant's attempted murder convictions, holding there was substantial evidence to support a finding of specific intent to kill in connection with the attempted murder count under the kill zone theory. "Although Smith was the targeted individual, the manner of shooting multiple times into the pair of victims who were in close proximity, even in a pile at one point, with semiautomatic firearms fired from close range, gives rise to the strong inference that defendants intended to create a zone of fatal harm and that each defendant harbored the requisite intent to kill both the primary target and everyone within the zone of fatal harm."

Court of appeal upholds the convictions of a psychologist who sexually assaulted three patients under the guise of using "exposure therapy." *People v. Sommer* (2021) 61 Cal.App.5th 696. The Court of Appeal held that substantial evidence existed to support the jury's finding that the defendant tricked his patient into allowing him to touch her breasts on the pretext it served a professional purpose. Confusion or doubt about the purpose of the touching does not preclude a conviction as long as the jury finds beyond a reasonable doubt that the victim allowed the touching to occur because of the defendant's fraudulent misrepresentation of a professional purpose.

The long duration of an injury may support an inference that the injury is permanent. *People v. Chavez* (2021) 69 Cal.App.5th 159. A jury convicted appellant of leaving the scene of an accident resulting in permanent, serious injury to another person (Veh. Code, § 20001, subds. (a) & (b)(2)). The Court of Appeal held that evidence the victim's injuries impacted his ability to walk, balance, and sleep nine months after the accident – and that a prosecution expert opined he was permanently impaired – was sufficient to find that victim suffered a "permanent, serious injury to his leg as a result of the accident." The long duration of an injury, such as a broken ankle that has not fully healed after more than six months, may support an inference that the injury is permanent.

Court of Appeal affirms a second-degree murder conviction. *People v. Morales* (2021) 69 Cal.App.5th 978. The Court of Appeal held that evidence supported a finding that defendant did not act in self-defense or imperfect self-defense, and evidence supported a finding of implied malice despite defendant's post-traumatic stress disorder (PTSD) diagnosis. After the defendant distanced himself from a gang, gang members assaulted him and stabbed him twice. Defendant testified against a gang member and was placed in a witness protection program. Defendant carried knives for self-defense. Believing he was being robbed outside a bus station, the defendant stabbed a man in the torso who died from his injuries. A psychologist testified that the defendant had significant PTSD. After a second trial, the defendant was convicted for second-degree murder and was sentenced to 16 years to life in prison. The court of appeal rejected arguments that the evidence was insufficient to support the conviction and that the trial court erred by improperly instructing the jury on self-defense and imperfect self-defense and denying an instruction on voluntary intoxication.

Insufficient evidence to support a finding that the stun gun was capable of temporarily immobilizing a person. *In re M.S.* (2021) 70 Cal.App.5th 728. The Court of Appeal held that evidence was insufficient to establish that a juvenile's device was capable of temporarily immobilizing a person, as required to adjudicate juvenile a ward of court on an allegation of bringing or possessing a stun gun on school grounds under Penal Code section 626.10, subdivision (a), which operates by reference to the definition of a stun gun found in Penal Code section 244.5, subdivision (a). The Court of Appeal distinguished the expert testimony on stun guns found insufficient in this case from the expert testimony on stun guns found sufficient in *In re Branden O.* (2009) 174 Cal.App.4th 637.

Substantial evidence supported the defendant's conviction for dissuading a witness. *People v. Cook* (2021) 59 Cal.App.5th 586. The Court of Appeal affirmed the defendant's conviction for dissuading a witness from reporting a crime. The defendant's mother tried to call 911 to report that the defendant was fighting with his brother. The defendant ripped the phone off the wall and threw it to the ground, which disconnected the call. The court held that the evidence was sufficient to

support defendant's conviction where defendant was convicted of violating Penal Code section 136.1, subdivision (b)(1); he was not charged with or convicted of violating section 136.1, subdivision (c). Therefore, the prosecutor was not required to prove the defendant acted knowingly and maliciously.

Criminal liability for dissuading a witness from causing a complaint to be filed does not exist if the defendant knew a complaint was filed and did not attempt to dissuade the filing of an amended complaint. *People v. Reynoza* (Feb. 14, 2022) ___ Cal.App.5th ___ [2022 WL 453987]. The Court of Appeal held that evidence was insufficient to sustain a conviction for dissuading a witness from causing a complaint to be filed under Penal Code section 136.1, subdivision (b)(2). The conduct charged in this case occurred after a complaint had already been filed in the underlying prosecution for misdemeanor firearm possession. The defendant knew the complaint had been filed, and the defendant did not take any actions aimed at dissuading an amended complaint.

Substantial evidence supported the defendant's conviction for three counts of stalking and two counts of criminal threats. *People v. Choi* (2021) 59 Cal.App.5th 753. Defendant was convicted of three counts of stalking and two counts of criminal threats. The Court of Appeal held that the evidence supported finding that the defendant's statement, "I need to end Kareem and Leslie," was not too facially ambiguous to constitute a criminal threat, as it was clear that the defendant wanted his threat to be relayed to the victims, and evidence supported a finding that defendant's threat was imminent.

Defendant knew, or reasonably should have known, he had struck and injured someone before fleeing the scene. *People v. Kidane* (2021) 60 Cal.App.5th 817. The Court of Appeal held that sufficient evidence supported a defendant's conviction of gross vehicular manslaughter while intoxicated and an enhancement for fleeing the scene of an accident where the defendant knew, or reasonably should have known, he had struck and injured someone before fleeing the scene. Regarding the enhancement, the Court of Appeal observed that "[c]onstructive knowledge of injury satisfies the statute," before highlighting the photographic and testimonial evidence that supported its finding of constructive knowledge.

H. Other Evidentiary Issues

Admission of evidence from peer-to-peer software database in child pornography prosecution does not constitute hearsay and does not implicate *Kelly/Sargon*. *People v. Lund* (2021) 64 Cal.App.5th 1119. Defendant was convicted of one count of possession of more than 600 images of child pornography, at least ten of which involved prepubescent minors in violation of Penal Code section 311.11, subdivision (c)(1). On appeal, appellant challenged on

hearsay/confrontation grounds the prosecution's use of a privately developed software called Child Protection System (CPS) that searches for child pornography on peer-to-peer networks and includes hash values made by unidentified officers around the world. The First District Court of Appeal, Division Four, concluded the trial court did not abuse its discretion in determining the hash values were not hearsay, so the court did not reach the issue of whether they were testimonial. The court also rejected a *Kelly/Sargon* challenge to the CPS database, holding it is not a scientific process or technique, nor is it novel (the court reasoned it simply automates manual searches), and therefore it does not implicate a court's "responsibility to keep 'junk science' out of the courtroom."

Shotspotter evidence subject to *Kelly/Frye* challenge. *People v. Hardy* (2021) 65 Cal.App.5th 312. Trial court erred in admitting Shotspotter evidence as proof of the number of shots fired without first conducting an evidentiary hearing to assess its scientific reliability pursuant to *People v. Kelly* (1976) 17 Cal.3d 24 and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013. The First District, Division Two, found the error prejudicial because the recording was the strongest, and only unambiguous, evidence that appellant fired more shots than can be fired from a revolver, which the evidence indicated can only fire up to six shots. The Court of Appeal reversed appellant's conviction for assault with a semiautomatic firearm but authorized the trial court to reinstate that conviction on remand after conducting a *Kelly/Frye* hearing if the court concludes that the Shotspotter evidence was admissible at trial.

Court did not abuse discretion in admitting evidence of defendant's immigration status as evidence of motive. *People v. Casillas* (2021) 65 Cal.App.5th 135. Defendant was convicted of attempted premeditated murder and assault on a peace officer, assault with a firearm, and two counts of possession of a firearm by a felon. The Second District Court of Appeal held the trial court did not err in admitting evidence of appellant's immigration status and prior deportation because evidence that defendant was a noncitizen and had twice been deported was relevant and admissible to establish motive. "Casillas had a history of criminal misconduct with a potential for long-term incarceration, which could explain his motive for shooting Deputy Rosales."

An expert's testimony must have some factual connection to the case in order to be relevant and helpful to the jury. *People v. Yang* (2021) 67 Cal.App.5th 1. In this "excruciatingly tragic case," a mother was found guilty of first degree murder and assault on a child resulting in death after she killed her youngest child by placing the baby in a microwave and operating it for multiple minutes. The defense at trial was unconsciousness, related to epileptic seizures. The prosecution countered defendant's claim of unconsciousness with expert testimony of its own, including testimony regarding postpartum mental disorders and testimony utilizing defendant's privileged psychological records, after an

inadvertent disclosure by the trial court allowed the prosecutor to discern these records' contents midtrial and secure their admission on that basis. The Third District Court of Appeal reversed, concluding the trial court abused its discretion by allowing expert testimony regarding postpartum mental disorders without sufficient factual basis and by subsequently admitting into evidence defendant's psychological records not directly related to any mental condition she had put at issue.

Trial court abused its discretion in denying mistrial motion where jury heard otherwise inadmissible evidence of an unrelated murder. *People v. Turner* (2021) 73 Cal.App.5th 117. Appellant was charged with committing two unrelated murders ("the Oakland and Hayward murders"), and the cases were consolidated. At the close of evidence in the consolidated trial, appellant renewed an earlier motion, which had been denied, to sever the two charges on the ground the evidence he committed the Oakland murder was weak. The trial court granted the motion, ruling it would leave the jury to decide only the Hayward case. Defendant then moved for a mistrial in the Hayward case on the ground the jury would be influenced improperly by having heard the evidence of the Oakland murder. The jury heard substantial but inadmissible evidence that defendant committed an unrelated murder. The First District Court of Appeal concluded such evidence was incurably prejudicial. The evidence of the Oakland murder undermined appellant's defense that he was guilty of only voluntary manslaughter rather than murder under a theory of imperfect self-defense because evidence of the Oakland murder (which was unprovoked) would affect the jury's evaluation of the credibility of appellant's testimony. It was therefore an abuse of discretion to deny the mistrial motion. The Court of Appeal was not persuaded otherwise by the fact the jury acquitted defendant of first degree murder and convicted him only of murder in the second degree.

A defense character witness who testifies based on his or her own opinion — rather than based solely on the defendant's reputation — can be asked on cross-examination if he or she knows about the defendant's bad acts. *People v. Hawara* (2021) 61 Cal.App.5th 704. The Court of Appeal held that the prosecutor's cross-examination of defendant's character witnesses as to how their opinion of defendant would change if they knew about instances of bad character was proper. Defendant owned a liquor store. He hired someone to burn down a rival liquor store. Defendant contended, among other things, that the prosecutor improperly cross-examined his character witnesses by asking them if it would change their opinion if they "knew" or "learned" about his commission of the crimes; he maintained that the only correct form for this type of cross-examination was to ask if it would have changed their opinion if they "heard" about his commission of the crimes. The Court of Appeal held a defense character witness who testifies based on his or her own opinion — rather than based solely on the defendant's

reputation — can be asked on cross-examination if he or she knows about the defendant's bad acts.

The trial court did not abuse its discretion when it admitted evidence that defendant watched pornography shortly before the offense on the theory that it was relevant to his motive and intent and for impeachment purposes. *People v. Byers* (2021) 61 Cal.App.5th 447. Appellant was convicted of kidnapping with the intent to commit certain sex offenses. The Court of Appeal held that the trial court did not abuse its discretion when it admitted evidence that defendant watched pornography shortly before committing an assault, where this evidence was relevant to his motive and intent at the time of the kidnapping as well as for impeachment purposes.

Although the trial court admitted evidence in violation of the marital privilege, the error was harmless. *People v. Barefield* (2021) 68 Cal.App.5th 890. The Court of Appeal held that marital privilege applied to preclude the wife's testimony regarding the defendant's prior uncharged acts of domestic violence. Although the trial court admitted evidence in violation of the marital privilege, the error was harmless.

Blue Book car value evidence properly admitted under the Evidence Code section 1340 published compilation exception to the hearsay rule. *People v. Jenkins* (2021) 70 Cal.App.5th 175. On appeal, the defendant argued his conviction for attempted unlawful taking of a vehicle should have been reversed because the court permitted, over his objection, a police detective to testify to the car's estimated value obtained from the Kelley Blue Book's website. Defendant claimed this was hearsay evidence that should have been excluded, and without this testimony, there was no evidence establishing the car was worth more than $950, an element of the felony offense. The Court of Appeal concluded the trial court properly admitted the Blue Book evidence under Evidence Code section 1340, the published compilation exception to the hearsay rule.

The prosecutor's questioning of defense experts concerning the contents of the defendant's prior statements did not constitute *Doyle* error. *People v. Smith* (2021) 70 Cal.App.5th 298. The defendant made a 9-1-1 call and spoke with the arresting officer about the offense before later invoking her *Miranda* right to remain silent. Per *Doyle v. Ohio* (1976) 426 U.S. 610 and its progeny, the prosecution cannot use evidence of a defendant's post-arrest silence against him or her at trial. Here, during the sanity phase of the defendant's trial, the prosecutor cross-examined defense expert witnesses as to whether the documents on which they relied contained any statements from the defendant about being in a state of depersonalization or derealization at the time of the offense. The Court of Appeal held that this line of questioning did not amount to a *Doyle* violation because "the fundamental fairness concerns animating *Doyle* and its progeny do not prohibit a

prosecutor from cross-examining a defense expert about whether there are statements to support his opinion in the documents on which the defense expert has expressly stated that he relied." As to other questioning of defense witnesses and the prosecutor's closing argument concerning the defendant's prior statements, the Court of Appeal relied on more recent U.S. Supreme Court precedent for the proposition that *Doyle* does not apply to prosecution questions and argument regarding a defendant's prior inconsistent statements.

I. Offense-Specific Holdings

Reckless driving is not a lesser included offense of felony evasion. *People v. Walker* (2021) 64 Cal.App.5th 27. The First District Court of Appeal rejected appellant's contention that reckless driving (Veh. Code, § 23103) is a lesser included offense of felony evasion pursuant to Vehicle Code section 2800.2. The appellate court reasoned "the meaning of the phrase "willful or wanton disregard for the safety of persons or property" is materially different for the two statutes. The court held that "willful or wanton disregard" as defined in Vehicle Code section 2800.2, subdivision (b), is significantly broader than the traditional definition of the phrase used in the reckless driving statute. Because the statutory elements of Vehicle Code section 2800.2 thus do not include all of the statutory elements of reckless driving, reckless driving is not a lesser included offense.

Robbery requires that the victim subjectively be in fear. *People v. Collins* (2021) 65 Cal.App.5th 333. The prosecutor in closing argument repeatedly told the jury that "[t]he law is an objective standard" and that it did not "matter if anybody is afraid." This is a misstatement of the law. However, CALCRIM No. 1600 did not specify whether the jury must find that (1) the person from whom the property is taken was actually, subjectively in fear, or (2) an objective, reasonable person in the same circumstances would have been in fear. The Second District Court of Appeal concluded the instruction should so specify. Because the prosecutor misstated the law, because the victim repeatedly denied being actually afraid, because CALCRIM No. 1600 does not speak to this issue, and because the trial court rejected defendant's entreaty to give a supplemental instruction in favor of letting the jury "sort that out," the Court of Appeal reversed the defendant's robbery conviction. The Court also concluded the prosecutor committed error and effectively exploited the ambiguity in the CALCRIM No. 1600 instruction as to whether the "fear" must be subjective or objective.

Burglary of an uninhabited outbuilding, such as a detached garage, is not first degree burglary. *Corona v. Superior Court* (2021) 65 Cal.App.5th 950. Police arrested defendant after he entered a freestanding garage located on the same property as a house. He was charged with first degree burglary of "an inhabited dwelling house." (Pen. Code, § 460, subd. (a).) Appellant argued an uninhabited outbuilding, such as a detached garage, is not an inhabited dwelling house.

Defendant was held to answer, and the motion to set aside the first degree burglary charge was denied. The First District Court of Appeal, Division Five, held that appellant had been committed without probable cause and was entitled to have the first degree burglary charge set aside.

Complaining witness need not be the direct target of a criminal threat. *Ayala v. Superior Court* (2021) 67 Cal.App.5th 296**.** For the crime of criminal threats (Pen. Code, § 422), the listener's sustained fear may be for either his or her own safety or for that of his or her immediate family member. The threat, directed toward the complaining witness, must be to unlawfully kill or cause great bodily injury to either the complaining witness or his or her immediate family member. The Court of Appeal rejected the argument that under Penal Code section 422 only a threat target is a proper complaining witness or victim. Thus, in this case, the threat target, and his wife who was afraid for her husband's safety, were both proper complaining witnesses.

Equal protection and sentencing for possession of destructive device. *People v. Fisher* (2021) 71 Cal.App.5th 745. Appellant was convicted of three offenses (possession with intent to make a destructive device, public possession of destructive device, and sale or transportation of destructive device) that were subject to Realignment Act county jail sentences pursuant to Penal Code section 1170, subdivision (h). He was also convicted of two counts of simple possession of a destructive device, a wobbler which was not county jail eligible. The trial court was therefore required to order that the entire sentence be served in prison. The First District Court of Appeal, Division Four, agreed with appellant that the disparate punishment of offenders convicted of simple possession violates equal protection by treating similarly situated classes of offenders differently with no rational basis for the disparate treatment. The court concluded there was "no realistically conceivable legislative purpose" for requiring a state prison sentence for those convicted of possession while affording the benefits of county jail incarceration for the 1170(h)-eligible destructive device offenses. The Court of Appeal determined the proper remedy was to reform the provision (Penal Code section 18710) to further the legislative purpose of Realignment by making the violation punishable under the sentencing provisions of Penal Code section 1170, subdivision (h). In addition, the Court of Appeal declined to find forfeiture even though appellant did not challenge the sentence in the trial court on equal protection grounds because "the claim presents a pure question of law remediable on appeal by modification of the sentence which does not have an impact on the same proceedings downstream and which presents an important question of law." Lastly, the court also declined to find the issue moot even though appellant had completed his prison sentence because he was still subject to a three-year period of postrelease community supervision that would be terminated upon a successful appeal.

Defendant may not collaterally attack a criminal protective order unless it was void. *People v. Sorden* (2021) 65 Cal.App.5th 582. Appellant contended that violations of certain of the acts prohibited by the criminal protective order (CPO)—namely, disturbing the peace and surveillance— cannot form the basis of a contempt violation for purposes of Penal Code section 166(c)(1)(B). The Fourth District Court of Appeal rejected appellant's arguments as impermissible collateral attacks on the CPO. A party may not defend against enforcement of a court order by contending merely that the order is legally erroneous. A person may defend against enforcement of the order only if the order was beyond the jurisdiction of the court and therefore invalid. Even where the underlying order is ultimately determined to be erroneous, such an order—the violation of which will support a contempt finding—does not become "a nullity." A party may not defy a legally erroneous court order and then challenge it collaterally in proceedings brought to enforce the order. With no suggestion that the CPO was void, appellant was precluded from challenging the CPO in these contempt proceedings. The Court of Appeal also concluded that for purposes of Penal Code section 166(c)(1)(B), the violence required to establish a true finding of a subdivision (c)(4) allegation is not linked (or limited) to the domestic violence victim identified in the criminal protective order. Moreover, although a jury must unanimously agree as to which act violated the CPO for purposes of contempt, no unanimity instruction is required as to the act of violence for purposes of a subdivision (c)(4) enhancement.

Penal Code section 530.5 does not include a knowledge requirement. *People v. Zgurski* (2021) 73 Cal.App.5th 250. The First District Court of Appeal concluded substantial evidence supported appellant's conviction for violating Penal Code section 530.5, which criminalizes the unlawful use of another's personal identifying information. In reaching this conclusion, the Court of Appeal held that the statute does not require proof of a defendant's affirmative knowledge that the victim is a real person. Unlike "knowingly," the word "willfully" used in the statute implies "a purpose or willingness to commit the act," not knowledge of its wrongfulness or intent to injure a real person. The prosecution must prove that the personal identifying information belonged to a real person, but it need not prove that the defendant knew the information belonged to a real person.

Possession of cannabis in prison remains a violation of Penal Code section 4573.6 despite passage of Proposition 64. *People v. Raybon* (2021) 11 Cal.5th 1056. Our Supreme Court considered whether Proposition 64 invalidates cannabis-related convictions under Penal Code section 4573.6, which makes it a felony to possess a controlled substance in a state correctional facility. Proposition 64 contained an exception providing that the Act does not amend or affect "[l]aws pertaining to smoking or ingesting cannabis or cannabis products on the grounds of, or within, any facility or institution under the jurisdiction of the Department of Corrections and Rehabilitation ...." (Health & Saf. Code, § 11362.45, subd. (d).) Defendant argued that because the exception refers to "laws pertaining to smoking

or injesting," the exception does not apply to laws that merely criminalize possession of cannabis. The Supreme Court disagreed, concluding the phrase "[l]aws pertaining to smoking or ingesting cannabis" is broad enough to encompass statutes that criminalize possession. The Court thus held that possession of cannabis in prison remains a violation of Penal Code section 4573.6.

"Commercial consideration" in the context of child pornography distribution requires proof that the person who disseminated the obscene matter intended to receive money or some other form of recompense as part of a commercial or profitmaking venture. *People v. Wimer* (2022) 74 Cal.App.5th 113. When a person knowingly distributes or exchanges child pornography "for commercial consideration," the offense is a felony (Pen. Code, § 311.2, subd. (b).) Penal Code section 311.1, subdivision (a) is nearly identical to Penal Code section 311.2, subdivision (b), making the distribution of child pornography a wobbler offense when the element of commercial consideration is absent. The Court of Appeal concluded the trial court erred when it instructed the jury that the element of "commercial consideration" may be established by an intent to trade in pornographic material with others, and that this error necessitates a reversal of appellant's convictions under Penal Code section 311.2, subdivision (b). To give independent effect to these statutory provisions, commercial consideration must mean something other than merely intending to trade in pornographic material. To harmonize the various statutes governing the criminal distribution of child pornography and best effectuate the Legislature's intent, the First District concluded that the element of commercial consideration in Penal Code section 311.2, subdivision (b) requires proof that the defendant received or intended to receive payment at the time he or she distributed, exhibited or exchanged obscene matter involving minors performing or simulating sex acts. While such payment need not be monetary, the defendant must be engaged in a commercial or profitmaking enterprise at the time the unlawful distribution occurred.

An attempt to commit felony DUI is also punishable as a felony. *People v. Cummings* (2021) 61 Cal.App.5th 603. The Court of Appeal held that an attempt to commit a felony DUI offense was also a felony even though the statute prescribing punishment for the offense does not mention attempts. The Court of Appeal explained that the absence of any reference to attempts in the punishment statute triggered application of Penal Code section 664, subdivision (a), according to which if a crime attempted is punishable as a felony then the attempt, too, is punishable as a felony. Only when the Legislature has enacted a more specific punishment for the attempt to commit a particular crime is Penal Code section 664 rendered inapplicable to that offense.

J. Gang Enhancements & Gang Evidence

Predicate offenses to establish criminal gang activity must be proven by independently admissible evidence. *People v. Valencia* (2021) 11 Cal.5th 818. This case involved allegations of active gang participation (Pen. Code, § 186.22, subd. (a)) and gang enhancements (Pen. Code, § 186.22, subd. (b)) attached to other offenses. The charges require proof that a gang's members have engaged in "a pattern of criminal gang activity" (Pen. Code, § 186.22, subd. (f)), defined, in part, as the commission of two or more enumerated offenses (Pen. Code, § 186.22, subd. (e)). Our Supreme Court held that the commission of such crimes, also known as predicate offenses, are case-specific and must be proven by independently admissible evidence. Under the authority of *People v. Sanchez* (2016) 63 Cal.4th 665, such proof may not be established solely by the testimony of an expert who has no personal knowledge of facts otherwise necessary to satisfy the prosecution's burden. The proper role of expert testimony is to help the jury understand the significance of case-specific facts proven by competent evidence, not to place before the jury otherwise unsubstantiated assertions of fact. The particular facts offered to prove predicate offenses as required by the STEP Act are not the sort of background hearsay information about which an expert may testify. Competent evidence of those particulars is required.

Speculative testimony by a gang expert does not constitute substantial evidence to support a gang enhancement. *People v. Soriano* (2021) 65 Cal.App.5th 278. The facts of this case involved the detention of two gang members walking together. Police arrested defendant after retrieving a knife from his pants pocket. A gang expert opined that the defendant carried the knife for the benefit of, in association with, and with the intent to promote his gang. Relying on the California Supreme Court's recent clarification that when an appellate court reviews a case for substantial evidence it must also consider the standard of proof (see *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1000-1001), the Court of Appeal held there was insufficient evidence for a reasonable jury to find the gang enhancement true beyond a reasonable doubt. Because there were no specific facts from which the gang expert could discern whether Soriano was acting on his own behalf, or whether he was acting on behalf of his gang, the expert "simply informed the jury of how he felt the case should be resolved." The court found the fact appellant was in his gang's territory when detained "not particularly probative" because it is where he lived. The Court reversed the gang enhancement and remanded for sentencing.

Gang enhancement requires nexus between a proven criminal street gang and the underlying crime. *People v. Ramirez* (2021) 72 Cal.App.5th 550. The Fourth District Court of Appeal vacated gang enhancements for lack of sufficient evidence of a nexus between a proven criminal street gang and the underlying crime. During trial, the prosecution presented evidence that defendants and the

inmate who orchestrated the assault each belonged to different Riverside County gangs before they were incarcerated but that they committed the assault for the benefit of the prison gang "La Eme." The prosecution proved that the three Riverside County gangs satisfy the definition of a "criminal street gang," but didn't present such proof for La Eme, the gang the assault was related to. In other words, the prosecution proved the existence of the wrong (or irrelevant) gangs. When the prosecution seeks to prove the gang enhancement should apply to a defendant's conviction, the "evidence must permit the jury to infer that the 'gang' that the defendant sought to benefit, and the 'gang' that the prosecution proves to exist, are one and the same." (*People v. Prunty* (2015) 62 Cal.4th 59, 75.)

Where the record lacks substantial evidence that offenses were gang related, gang enhancements must be set aside. *People v. Gonzalez* (2021) 59 Cal.App.5th 643. The Court of Appeal struck the gang enhancements attached to the defendant's three robbery convictions for lack of substantial evidence the offenses were gang related. The court concluded that the gang expert had no logical basis for his opinion that the defendant was "assisting his gang in having a feared reputation." The court explained that this claim made no sense when nothing linked these crimes to a gang.

Testimony that defendant is part of a gang is irrelevant and inflammatory where there is no evidence the group is actually a criminal gang. *People v. Huynh* (2021) 65 Cal.App.5th 969. Appellant's conviction was previously reversed on appeal (for excluding evidence of prosecution witnesses being gang affiliated); appellant was retried, convicted of murder, and again appealed. This time, the trial court admitted evidence that defendant was in a gang, reasoning "what's good for the goose is good for the gander." The Fourth District Court of Appeal again reversed. The trial court erroneously admitted evidence that appellant was a member and the leader of, or had authority in, a gang called Thien Dang. The gang evidence was not relevant because Thien Dang was not a criminal street gang. Nor was there any evidence that committing crimes was one of its primary activities or that any of its members had committed any crimes, with the exception of defendant's crimes at issue here. Rather, the evidence established that Thien Dang was a place or a group of Vietnamese men who gathered to socialize and drink. Without the fundamental link of Thien Dang being a criminal street gang, evidence of defendant's membership in Thien Dang was not relevant to his motive or intent. Instead, the evidence was inflammatory by implying to the jury that defendant had a disposition or character for using overwhelming violence in retaliation for disrespect, with no foundational support. When there are no permissible inferences the jury can draw from gang evidence, admission of the evidence can be so inflammatory as to violate federal due process.

Jury in a murder prosecution can consider gang evidence in deciding whether defendant acted in self-defense or in the heat of passion. *People v.*

Kaihea (2021) 70 Cal.App.5th 257. The Court of Appeal rejected the defendant's contention that the trial court erred in instructing that the jury could consider gang evidence in deciding whether defendant acted in self-defense or in the heat of passion. Appellant argued that the instruction gave no explanation as to how the jury should consider gang evidence in deciding whether he had acted in defense of another. The court found no error, reasoning that "while no published case holds that gang evidence is relevant to defense of others, there is decisional authority holding that evidence of gang membership is directly relevant to the genuineness of the belief of the need to defend oneself, because such evidence can demonstrate that a defendant killed because of a gang-related motive as opposed to self-defense. [Citation.] We conclude the same applies to defense of others." The Court of Appeal concluded the standard instruction, CALCRIM No. 1403, was legally correct as it related to the use of gang evidence for the purpose of deciding whether a defendant actually believed in the need to defend himself or acted in the heat of passion.

K. Felony Murder (outside the context of 1170.95 petitions)

Evidence of reckless indifference to human life was sufficient; robbery not a lesser included offense of felony murder when robbery not alleged in the information as a predicate offense. *People v. Bradley* (2021) 65 Cal.App.5th 1022. Following a jury conviction for first degree felony murder where the prosecution did not attempt to prove that either defendant was the actual killer, the First District Court of Appeal, Division One, held the evidence was sufficient to establish the defendants acted with the "reckless indifference to human life." Factors supporting a finding of reckless indifference included the undisputed fact that defendants were aware they all had firearms and used them during the attempted robbery; the defendants' physical presence at the scene and the opportunity to prevent the crime; the lack of effort to help the victim; and the absence of effort by defendants to minimize the risk of the robbery. The court acknowledged there were some factors that did not evidence a reckless indifference to human life, such as the short duration of the robbery, but nevertheless concluded "the evidence relevant to the [*People v. Clark* (2016) 63 Cal.4th 522] factors, when considered in total, sufficiently supports the judgment." The court also held the trial court did not err in declining to give a requested instruction on robbery as a lesser included offense of felony murder. Robbery is not a lesser included offense under the accusatory pleading test when the information does not set forth the predicate offense for the felony-murder allegation.

A defendant's youth is a relevant factor in determining whether a defendant acted with reckless indifference to human life under *Banks and Clark*. *In re Moore* (2021) 68 Cal.App.5th 434. Defendant filed a habeas corpus petition challenging the sufficiency of the evidence supporting his felony-murder special-circumstance finding. The First District Court of Appeal summarily denied the petition, but the Supreme Court issued an OSC requiring them to reconsider the

summary denial under *Banks* and *Clark* and to consider "whether [Moore's] youth at the time of the offense should be one of the factors considered under" *Banks* and *Clark*. Upon reconsideration, the First District concluded that a defendant's youth at the time of the offense should be a factor in determining whether that defendant acted with reckless indifference to human life under Penal Code section 190.2, subdivision (d). The court further held that "considering the totality of the circumstances, including the fact that Moore was only 16 at the time of his offenses, in light of *Banks, Clark,* and their progeny, [there was] insufficient evidence to establish that Moore acted with the requisite reckless indifference to human life." The court therefore vacated the robbery-murder special-circumstance finding and remanded the case for resentencing.

L. Prosecutorial, Juror & Judicial Misconduct

Prosecutor committed misconduct by telling the jury the presumption of innocence "lifts" when the first witness testifies at trial and by suggesting facts to the jury the prosecutor knows are untrue. *People v. Roberts* (2021) 65 Cal.App.5th 469. During closing argument, the prosecutor told the jury the presumption of innocence "lifts as soon as the evidence supporting it lifts. … The moment the first witness testifies, now that presumption is starting to lift." The Court of Appeal held this statement is incorrect, as "[i]t is well established that the presumption of innocence continues into deliberations." The prosecutor also made misstatements of facts in closing argument regarding whether the injuries to the victim were serious enough to require treatment at a hospital. The prosecutor knew the victim did not go to the hospital but nonetheless suggested to the jury that the injuries were relatively serious, stating "we don't know if [she] went to the hospital." Knowing there had been no hospital visit, it was clearly misconduct to suggest the possibility to the jury. The Court of Appeal, however, found both instances of prosecutorial misconduct to be harmless error.

The prosecutor erred in closing argument by incorrectly explaining the instruction on circumstantial evidence, and the trial court erred in answering the jury's question about whether it could rely on post-crash gross negligence to convict. *People v. Doane* (2021) 66 Cal.App.5th 965. Defendant lost control of his truck and collided head-on with a vehicle, killing the driver. At trial, the key disputed issue was whether the defendant acted with gross negligence, as he conceded he acted with ordinary negligence and was thus liable for the lesser included offense of vehicular manslaughter without gross negligence, a misdemeanor. Division One of the First District Court of Appeal reversed the conviction for gross vehicular manslaughter because of the cumulative prejudice arising from the prosecutor's misstatement of law and the trial court's incorrect answer to a jury question about the use of post-crash conduct to find gross negligence. During closing argument, defense counsel argued that if circumstantial evidence could support defendant having driven with ordinary negligence and gross

negligence, the jury must conclude he acted with ordinary negligence. The prosecutor then argued that CALCRIM No. 224's reference to "innocence" only applies to actual innocence, not guilt of a lesser included offense. This was error and a misstatement of the law because "innocence" under CALCRIM No. 224 refers to being not guilty of the charged crime, not to being not guilty of the charged crime *and* any lesser included offenses. Further, during deliberations, the jury asked whether, if it believed that the defendant's actions before the crash were merely negligent, it could nevertheless find him guilty of gross vehicular manslaughter based on his grossly negligent post-crash behavior (flight). The Court of Appeal concluded "[t]he answer to that question is clearly no." The trial court, however, responded to the jury's question by re-referring the jury to the instructions already given on flight, ordinary negligence, and gross negligence. Under the circumstances, the Court of Appeal concluded there was a reasonable likelihood that the jury interpreted the trial court's answer to mean that it could consider the defendant's flight in determining whether he acted with gross negligence.

Judicial misconduct for aligning with the prosecution. *People v. Nieves* (2021) 11 Cal.5th 404. In this direct appeal of a judgement of death, the Supreme Court reversed the judgement of death due to judicial misconduct. Throughout the trial, the trial judge made inappropriately disparaging and sarcastic remarks to defense counsel, impugning his performance, chastising him for improper behavior, and sanctioning and citing him for contempt in front of the jury. The trial judge also directed improper comments and questions to witnesses, openly doubting the credibility of one defense expert. In the penalty phase, the trial judge needlessly reprimanded and belittled a lay witness who testified for the defense. The Court concluded that this conduct by the trial judge reflected "a pattern of disparaging defense counsel and defense witnesses in the presence of the jury, and convey[ing] the impression that he favored the prosecution," and it therefore constituted misconduct. The court declined to find structural error and concluded that although the misconduct did not prejudicially affect the guilt determination, the misconduct was prejudicial in the penalty phase because there was "a 'reasonable (i.e., realistic) possibility'" that the outcome of the penalty phase would have been different without the weight of judicial authority favoring the prosecution.

The trial judge's conduct during the examination of an expert witness improperly aligned the judge with the prosecutor and constituted prejudicial misconduct: *People v. Williams* (2021) 60 Cal.App.5th 191. The Court of Appeal held that the trial judge's participation in the questioning of a fingerprint expert was prejudicial judicial misconduct. The Court of Appeal held that the trial judge improperly aligned itself with the prosecutor in the minds of the jury by the manner of his questioning of the prosecutor's fingerprint expert, interrupting the defense's cross-examination and implying that the defense could have hired its own expert.

Trial judge erred in making comments reflecting cultural bias when questioning a defense expert witness. *People v. Sta Ana* (2021) 73 Cal.App.5th 44. A jury convicted appellant of rape of an intoxicated person and rape of an unconscious person. On appeal, appellant challenged comments by the trial judge reflecting cultural bias against appellant. The court reached the merits despite the lack of objection below "as it would be unreasonable under the circumstances here to require counsel to challenge the court's own questions as explicitly or implicitly biased." The Court of Appeal agreed that the trial court's example, directed to a defense expert in front of the jury, about whether "a white male of his age that grew up in the City of Boston" would answer the test questions in the same way as "someone that grew up in a rice paddy, in some field somewhere in a different count[r]y," would cause a reasonable person to question whether the court was obliquely and unfavorably describing defendant as an individual devoid of seeming intellectual sophistication. The gratuitous reference to a "rice paddy," particularly in a case involving an Asian defendant, would reasonably offend many people. Disappointingly, while the court found error and stated it did "not condone the trial court's language choice," the court nevertheless concluded the error did not warrant reversal because the judge's behavior was not "so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." The court deemed this an "isolated question" in contrast to "egregious misconduct" that has warranted reversal in other cases.

Discussing punishment during deliberations was misconduct and the trial court erred in finding inadmissible any evidence of the jury's deliberations regarding punishment. *People v. Flores* (2021) 70 Cal.App.5th 100. The Court of Appeal held that statements indicating that sentencing discussions took place among jurors during guilt-phase deliberations were admissible for purposes of determining the validity of the verdict, and the jury committed misconduct during the guilt phase by considering the defendant's potential punishment. The court further held that the People failed to rebut the presumption that defendant was prejudiced by the jury's misconduct.

M. Sentencing Discretion

If an enhancement or its punishment is stricken under Penal Code section 1385, it cannot be used to increase any aspect of punishment. *People v. Flores* (2021) 63 Cal.App.5th 368. The issue on appeal was: "If a trial court exercises its discretion to strike an enhancement under section 1385 'in furtherance of justice,' may the enhancement still be used to increase the minimum term of the defendant's life sentence under what is commonly called 'Option 3' of third strike sentencing?" (See Pen. Code, § 667, subd. (e)(2)(A)(iii).) The Fourth District Court of Appeal held the answer is no. Once a court exercises its discretion to strike an enhancement under Penal Code section 1385 for sentencing purposes, the enhancement may no longer be used to increase punishment, whether as a separate

determinate term to be served before the life sentence or as a means of lengthening the minimum term of the life sentence.

Trial court's discretion to strike a prior strike is limited to consideration of whether the defendant is within the spirit of the Three Strikes Law, not whether the ultimate sentence is a just one. *People v. Vasquez* (2021) 72 Cal.App.5th 374. In this People's appeal, the defendant was charged with attempted murder and two armed robberies, with various sentencing enhancements, and faced a potential exposure of 90 years to life. The defendant pled open to the court, and the court struck a prior strike and sentenced him to a determinate prison term of 28 years. After the prosecution appealed, the Fourth District Court of Appeal reversed, holding that "Given Vasquez's background, character, and prospects, he falls squarely within the letter and the spirit of the 'Three Strikes' law. . . . [T]here are no extraordinary circumstances— none—that justify a departure from the Three Strikes law. Therefore, we find the court abused its discretion by dismissing one of Vasquez's strike priors." Here, the trial court said at sentencing that he needed to "decid[e] whether or not the court's indicated [sentence] is fair and in the interests of justice." The appellate court concluded "the trial court got it wrong." According to the Court of Appeal majority, "the court did not act within the confines of the Three Strikes law. . . . [The judge] just thought 28 years was enough." In reaching its conclusion, the appellate court noted that it was immaterial that Vasquez's two prior strikes arose out of one case because he was convicted of two separate and distinct armed robberies; it was immaterial that Vasquez's determinate sentence was lengthy because he was within the spirit of the Three Strikes Law; and it was immaterial that the prior strike convictions occurred 16 years before the instant crimes because he spent 13 of those years in prison. Presiding Justice O'Leary dissented and would not have found an abuse of discretion.

After striking firearm enhancement found true by the jury pursuant to Penal Code section 1385, trial court was not barred from imposing lesser uncharged enhancements for using firearm in robbery or discharging firearm. *People v. Tirado* (2022) 12 Cal.5th 688. Penal Code section 12022.53 establishes a tiered system of sentencing enhancements for specified felonies involving firearms. Subdivision (h) authorizes courts to strike certain enhancements in the interests of justice pursuant to Penal Code section 1385. Here the Supreme Court considered the scope of that authority when the prosecution has alleged, and the jury has found true, the facts supporting an enhancement under subdivision (d). The Supreme Court held the trial court is not limited to imposing the subdivision (d) enhancement or striking it. The court concluded the statutory framework permits a court to strike the subdivision (d) enhancement found true by the jury and to impose a lesser-included uncharged statutory enhancement instead.

When a lesser firearm enhancement was separately charged under Penal Code section 12022.53 but was not determined to be true, the trial court

lacked discretion to impose it upon striking a greater enhancement. *People v. Delavega* (2021) 59 Cal.App.5th 1074, review granted April 14, 2021, S267293, further action deferred pending consideration and disposition of related issues in *People v. Tirado*, S257658. Defendant was charged with murder with three firearm enhancements under subdivisions (b), (c), and (d) of Penal Code section 12022.53. The subdivision (d) enhancement applies when a defendant is found to have personally and intentionally discharged a firearm causing death; subdivision (b) applies when a defendant is found to have personally used a firearm; subdivision (c) applies when a defendant is found to have intentionally discharged a firearm. The (b) and (c) enhancements are lesser included enhancements of the (d) enhancement. A defendant who violates subdivision (d) necessarily violates (b) and (c). The verdict forms did not reference the subdivision (b) and (c) allegations. The jury made no finding as to either. The jury convicted defendant of second-degree murder and found true the subdivision (d) enhancement. Defendant asked the court to exercise its discretion to strike the subdivision (d) enhancement, which carried a term of 25 years to life. The court declined and sentenced Delavega to 40 years to life in prison. According to the Court of Appeal, when a lesser enhancement was separately charged under Penal Code section 12022.53 but was not determined to be true, the trial court lacks discretion to impose it upon striking a greater enhancement under the statute. This holding is now questionable in light of the Supreme Court's more recent decision in *People v. Tirado* (2022) 12 Cal.5th 688.

An information alleging a prior strike with respect to some charged offenses may put a defendant on notice that the Three Strikes law applies to all eligible charged offenses. *People v. Laanui* (2021) 59 Cal.App.5th 803. Defendant appealed his conviction for six offenses committed between 1995 and 2017, including murder, solicitation of murder, and assault with a firearm. Defendant argued the trial court erroneously doubled the sentence on one count because the information only alleged a prior strike conviction as to other counts. The Court of Appeal concluded that the prior strike allegation need not be pleaded on a count-by-count basis and that the information adequately pleaded the prior strike as to all counts. The trial court, therefore, did not err in doubling the sentences of all eligible offenses. The dissenting opinion maintained that if prosecutors "*choose* to specify counts to which the enhancement applies, however, they should be required to specify *all* counts for which the People allege application."

Trial court erred in imposing an enhancement under Health and Safety Code section 11370.4, subdivision (a)(4), because the pleading failed to provide her with notice that she could be subject to such an enhancement with respect to any charged count. *People v. Haro* (2021) 68 Cal.App.5th 776. Defendant was convicted by jury of multiple drug related offenses after she crossed into the United States from Mexico on three occasions while transporting large amounts of methamphetamine hidden in her vehicle. The jury also found true two

separately charged 10-kilogram weight enhancements. At sentencing, the trial court aggregated the two weight enhancements and sentenced the defendant pursuant to an uncharged 20-kilogram weight enhancement that carried a longer term. The Court of Appeal agreed with the defendant that the trial court erred in imposing a 20-kilogram weight enhancement under Health and Safety Code section 11370.4, subdivision (a)(4), because the accusatory pleading failed to provide the defendant with notice that she could be subject to such an enhancement with respect to any charged count. As the Court of Appeal explained: "Even though the accusatory pleading includes the allegation of facts from which, if found true, one could conclude that more than 20 kilograms of methamphetamine were at issue in the offenses for which Haro was charged, the pleading itself did not provide Haro with fair notice that the People intended to exercise their discretion to pursue a sentencing enhancement based on a conspiracy to transport more than 20 kilograms of methamphetamine."

Possibility of appellate relief on one or more counts was not an appropriate basis for imposing consecutive terms of LWOP. *People v. McInnis* (2021) 63 Cal.App.5th 853. The Court of Appeal held that the trial court erred when it imposed consecutive terms of life imprisonment without the possibility of parole because of the potential the defendant might obtain appellate relief on one or more counts. This is especially true because "when a defendant has an aggregate sentence and a count is reversed on appeal, the trial court may reconsider its prior sentencing choices."

Trial courts are required to consider the defendant's service-related diagnosis of Post-Traumatic Stress Disorder (PTSD) as a mitigating factor in sentencing. *People v. Panozo* (2021) 59 Cal.App.5th 825. Appellant was convicted of various offenses in connection with two domestic violence incidents involving his former girlfriend. At sentencing, the court rejected the defendant's request to be placed on probation and enrolled in Veterans Court. The Court of Appeal held that Penal Code sections 1170.9 and 1170.91 obligated a court to consider a defendant's service-related mental health issues, including post-traumatic stress disorder, as a mitigating factor in evaluating whether to grant probation and in selecting the appropriate determinate term. Because the record indicated the trial court was unaware of this requirement, the Court of Appeal remanded for a new sentencing hearing.

N. Penal Code sections 654 and 954

Appellant's sentence violates Penal Code section 654's proscription against multiple punishments for a single act. *People v. Washington* (2021) 61 Cal.App.5th 776. Defendant appealed his conviction and sentence for possession of three controlled substances while armed with a firearm, possession of the three controlled substances for sale, possession of a firearm as a felon, and possession of

ammunition as a felon. The Court of Appeal held the defendant could not be punished more than once for possession of each controlled substance, and the defendant could receive only one punishment for possession of a firearm. Defendant's sentence violated Penal Code section 654's proscription against multiple punishments for a single act. The court explained that, under *People v. Jones* (2012) 54 Cal.4th 350 and its progeny, "because appellant's convictions for possession of controlled substances while armed involve the possession of both the drugs and the firearm, those convictions cover the same acts covered by his other drug- and firearm-related offenses, thus implicating Section 654. If appellant is punished on remand for possessing a controlled substance for sale, he may not also be punished for possessing the same substance while armed. Similarly, if appellant is punished for the possession of a firearm by a felon, he may not also be punished for possessing any controlled substance while armed (but may be punished for possessing the controlled substances for sale)."

The trial court did not err when it imposed consecutive sentences for defendant's five burglary convictions for breaking into five separate buildings on the same compound in the same night. *People v. Latten* (2021) 63 Cal.App.5th 574. The Court of Appeal held that the defendant's conduct in burglarizing five buildings on the same compound on the same night did not constitute an indivisible course of conduct such that Penal Code section 654 would prohibit multiple punishment. The fact that defendant's conduct affected only a single possessory interest did not make the course of conduct indivisible. In so holding, the Court of Appeal distinguished cases that explore the exception for multiple burglaries of a single building. Here, on the other hand, defendant made multiple entries into multiple buildings.

Defendant's robbery offense was incident to defendant's offense of kidnapping for robbery. *People v. Barrios* (2021) 61 Cal.App.5th 176. Defendant was convicted of several crimes stemming from his hijacking of the victim's car, taking cash from the victim's wallet, and ordering the victim to drive them both to ATMs for more cash. At issue on appeal was whether the defendant can be punished both for robbery and for kidnapping to commit robbery. The Court of Appeal explained that because the kidnapping had no objective but robbery, there was but one criminal "act" pursuant to Penal Code section 654, and the robbery sentence and its enhancement must be stayed.

Trial court erred in separately punishing defendant for two assault counts. *People v. Mendoza* (Feb. 3, 2022, B306169) ___ Cal.App.5th ___ [2022 WL 324989]. The Court of Appeal held that defendant was properly convicted of both force-likely assault and deadly weapon assault, but it was an error to punish him separately for these two offenses because the trial court correctly identified but one objective for the defendant's acts.

Penal Code section 654 can bar multiple punishment for reckless evasion of an officer and assault, but there is no prohibition against dual adjudications or convictions for force-likely assault and deadly weapon assault. *In re L.J.* (2021) 72 Cal.App.5th 37. The First District Court of Appeal agreed with appellant that on the facts of this case, the punishment for reckless evasion of police must be stayed under Penal Code section 654 because it was based on the same indivisible course of conduct with the same intent and objective as the assault counts of which appellant was also convicted. The minor's collisions with the officers' vehicles, which constituted the basis for the sustained assault allegations, constituted part of his attempt to evade them, so that both the evasion and the assaults had the single objective of eluding the police. The Court of Appeal distinguished *People v. Jimenez* (2019) 32 Cal.App.5th 409, which reached a contrary conclusion with somewhat different facts. The Court of Appeal also rejected arguments that a defendant cannot be adjudicated to have committed both force-likely assault and deadly weapon assault because the former is a lesser included offense of the latter or because they are two statements of the same offense for purposes of Penal Code section 954.

Force-likely and deadly weapon assault are different statements of the same offense when they are based on the same criminal act such that dual convictions violate Penal Code section 954. *People v. Waxlax* (2021) 72 Cal.App.5th 579, review granted February 23, 2022, S272695, and deferred pending consideration of *People v. Aguayo*, S254554. Appellant's dual aggravated assault convictions— for assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and assault with force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4))—violated Penal Code section 954 because he was convicted of two statements of the same offense and both were based on the same conduct. The Fourth District Court of Appeal acknowledged that this issue is currently pending before our Supreme Court in *People v. Aguayo* (2019) 31 Cal.App.5th 758, review granted May 1, 2019, S254554. Here, the appellate court joined two of the three appellate courts to have considered the issue in concluding dual assault convictions based on the same criminal act violate Penal Code section 954. (See *People v. Brunton* (2018) 23 Cal.App.5th 1097, 1100; *People v. Cota* (2020) 44 Cal.App.5th 720.) The Fourth District disagreed with *In re Jonathan R.* (2016) 3 Cal.App.5th 963, which reached a contrary conclusion. After examining the legislative history of Penal code section 245, the Court of Appeal held that "[o]n balance, given the history of section 245, the legislative history of the 2011 amendment, and the fact that force-likely and deadly weapon assault carry the same base term punishment, we conclude they are different statements of the same offense when they are based on the same criminal act." The appellate court did not address appellant's alternative argument that force-likely assault is a necessarily included offense of deadly weapon assault (an issue which is also under review in *Aguayo*.)

Driving under the influence of an alcoholic beverage (Veh. Code, § 23152(a)) and driving with a 0.08 BAC (Veh. Code, § 23152(b)) are separate offenses and a defendant may properly be convicted of both. *People v. Grabham* (2021) 68 Cal.App.5th 549. The Court of Appeal held that the defendant's convictions for driving under the influence of an alcoholic beverage and driving with a blood alcohol content of 0.08 or higher were for separate offenses and, thus, did not violate the statute (Pen. Code, § 954) prohibiting multiple convictions for a different statement of the same offense.

O. Restitution

In setting victim restitution related to automobile damage, a trial court has discretion to determine the owner was entitled to original manufacturer parts rather than aftermarket parts. *People v. Frias* (2021) 69 Cal.App.5th 1121. The Court of Appeal held that the trial court did not abuse its discretion in accepting a repair estimate of $8,385.04 as the basis for a restitution award. Defendant pled no contest to stealing a truck with 200,000 miles on it and no damage before the theft. After the theft, there was damage, and a shop estimated repair at $8,385.04. The defendant opposed this estimate and proposed $7,025.21, which was a later estimate from the same shop but without using original GM parts. The Court of Appeal affirmed an order of restitution for $8,385.04, finding that the trial court had the discretion to determine the owner was entitled to original manufacturer parts rather than aftermarket parts. It was the defendant's burden to show otherwise.

P. Credits

The time a defendant spent in custody after the date he fulfilled his sentence in one county could be credited toward a sentence in a case in another county if the additional time was accrued before the sentence in the second county. *People v. Shropshire* (2021) 70 Cal.App.5th 938. The Court of Appeal agreed with the defendant that he was entitled to additional custody credits. The defendant was serving a two-year sentence in a separate case from one county while he awaited trial for a case in a second county, and the sentence in the first case was reduced to a misdemeanor before the defendant was sentenced in the second case. Because the defendant had accrued more custody credits than was necessary to serve the sentence in the first case, the defendant was entitled to apply those excess credits to his sentence in the second case.

Q. Probation & Mandatory Supervision

Condition of probation that defendant not associate with individuals known to have "a criminal record" is unconstitutionally vague and overbroad. *People v. Gonsalves* (2021) 66 Cal.App.5th 1. The Court of Appeal held

that a probation condition banning association with individuals known to have a criminal record was unconstitutionally vague because the term "criminal record" has no settled meaning and may include persons who were merely arrested but not charged or convicted of any crime. Nor can the probation officer specify whether the term includes arrests, as this would "improperly delegate the determination of the 'nature of the prohibition' to the probation department." The association condition was overboard because the government's interests are not promoted by a "blanket ban on defendant's association with persons who have been arrested but not charged or convicted." A mere record of arrest is not probative on the law-abiding character of the arrestee. Note, however, that the Court of Appeal "ha[d] no argument with" the proposition that "the government's interests are reasonably advanced by prohibiting defendant's association with individuals he knows to have criminal convictions." It was only the prohibition on association with individuals arrested but not convicted that gave the court pause. Also note that the Court deemed forfeited and did not address appellant's arguments that (1) the association condition wrongly prohibited defendant from forging beneficial relationships with individuals in substance abuse and treatment programs and (2) that the condition disproportionately impacted Latino and Black probationers who were more likely to have family members, friends, and community members with records of conviction.

Discretionary conditions imposed upon defendants serving a period of mandatory supervision are, like probation conditions, to be evaluated for reasonableness on a case-by-case basis under *Lent* test. *People v. Bryant* (2021) 11 Cal.5th 976. The trial court imposed an electronic device search term as a condition of defendant's release on mandatory supervision. The defendant challenged the search condition as unreasonable under *People v. Lent* (1975) 15 Cal.3d 481. Our Supreme Court rejected an argument advanced by the government that "defendants on mandatory supervision are inherently more prone to recidivism, justifying a lesser showing to impose a condition." Examining the legislative history of the Realignment Act, our Supreme Court concluded that, in general, conditions of probation and mandatory supervision are now intended to be handled in the same way. The Legislature has expressly determined that low-level felony offenders will benefit from "community-based corrections programs and evidence-based practices" to "facilitate their reintegration back into society." (§ 17.5, subd. (a)(4)-(5).) Employing the *Lent* test to assess mandatory supervision conditions best implements the Legislature's stated goals. The court noted, however, that "this case-specific outcome should not be read to 'categorically invalidate electronics search conditions.'"

Admissibility of a bodycam video under the excited utterance exception satisfies the minimum requirements of due process applicable at probation violation hearings. *People v. Gray* (2021) 63 Cal.App.5th 947, review granted July 14, 2021, S269237. The Court of Appeal held that admission of body camera video recording of statements by the defendant's girlfriend that he had assaulted her

satisfied due process at final revocation hearing. The Court of Appeal affirmed the trial court's judgment finding a probation violation in this case where a video recording from a police officer's body worn camera depicted a visibly distraught woman reporting that her boyfriend had beat her up. The Court of Appeal explained that, although her statement qualified as an "excited utterance" admissible under the hearsay rule, it would be inadmissible at trial under the Sixth Amendment's Confrontation Clause, as construed in *Crawford v. Washington* (2004) 541 U.S. 36, if she were unavailable as a witness. However, the appellate court reasoned that the right to cross-examination at a probation violation hearing is not governed by the Confrontation Clause but by the more limited due process confrontation right. The reviewing court agreed with *People v. Stanphill* (2009) 170 Cal.App.4th 61, 78, and held that the admissibility of the bodycam video under the excited utterance exception satisfies the minimum requirements of due process applicable at probation violation hearings. This case and *People v. Stanphill* stand in conflict with *People v. Liggins* (2020) 53 Cal.App.5th 55, which held: "Where the prosecution offers an out-of-court statement as a substitute for live testimony, there will always be some value to the defendant's right to confront the speaker. Whether, in the circumstances, that right is so essential as to overcome the state's showing of good cause for offering hearsay can only be determined by situational weighing of the [*People v. Arreola* (1994) 7 Cal.4th 1144] balancing factors." Our Supreme Court granted review on the issue of whether the trial court violated the due process right to confrontation applicable at probation and parole revocation hearings by admitting hearsay statements in a bodycam video under the excited utterance exception (Evid. Code, § 1240) without first making a finding of good cause and determining whether a balancing of the relevant factors under *People v. Arreola* (1994) 7 Cal.4th 1144 favored admission.

R. Parole

CDCR acted within authority provided by the State Constitution when it adopted regulation excluding individuals currently serving a sentence for a violent felony – even if they are also serving a sentence for a nonviolent felony – from early parole consideration pursuant to Proposition 57. *In re Mohammad* (2022) 12 Cal.5th 518. This case asked whether Proposition 57 requires California's Department of Corrections and Rehabilitation to provide early parole consideration to individuals currently serving a term of incarceration for a violent felony, even if they are also serving a sentence for a nonviolent felony. Proposition 57 added section 32 to article I of the California Constitution to provide, in relevant part, that "[a]ny person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." (Cal. Const., art. I, § 32, subd. (a)(1).) Considering the text together with the materials presented to the voters, the Supreme Court held that the Department's approach – which excluded from consideration individuals currently serving a term of incarceration for a violent felony – was

reasonably necessary to effectuate the purpose of Proposition 57. Note, however, Justice Liu's concurring opinion. "Lurking beneath this holding, however, are a number of questions concerning what it means for an inmate with both violent and nonviolent felony convictions to be 'currently serving a term of incarceration for a 'violent felony.'" Petitioner here did not contest the Department's determination that he was currently serving a term for a violent felony, so the court had no occasion to examine the proper application of the regulation to inmates like defendant who are incarcerated for both violent and nonviolent felony offenses. Justice Liu observed, "Today's decision does not . . . address at what point, if any, during [defendant]'s consecutive sentence he may become eligible for early parole consideration. These issues await resolution in future cases."

A trial court must refer a parole revocation petition filed by the district attorney to the parole agency for a written report in cases involving lifetime parolees. *People v. Williams* (2021) 71 Cal.App.5th 1029. Under the plain terms of Penal Code section 1203.2, subdivision (b)(1), a court is required to receive a parole agency's written report before ruling on a parole revocation petition initiated by a district attorney. The First District Court of Appeal held there was no implied exception to this requirement when such a petition is filed against a lifetime parolee, because the report is not pointless even though a court has no discretion to impose intermediate sanctions. "[W]e can conceive of situations in which a district attorney—even though aware of the consequences of filing a revocation petition against a lifetime parolee and choosing to do so anyway—might reconsider that decision upon learning that the parole agency would have imposed intermediate sanctions in light of the parolee's individual circumstances."

The trial court lacked statutory authority to modify defendant's parole condition absent an alleged parole violation or revocation hearing. *People v. Wilson* (2021) 66 Cal.App.5th 874. Defendant was released to parole in 2018. CDCR ordered as a condition of his parole that he not reside within one-half mile of any public of private school. Defendant invited the trial court to exercise its authority under Penal Code section 1203.2 to modify the residency restriction, arguing that he was currently homeless because he was unable to reside in any home available to him, this result was harmful and contrary to the purposes of parole, and the residency restriction was therefore invalid as applied to him. The trial court accepted that invitation, and CDCR appealed, arguing the trial court exceeded its authority under the statute because, at the time of the modification, there was no pending parole revocation proceeding or alleged parole violation. Based on its analysis of the legislative history of Penal Code section 1203.2, Division Five of the First District Court of Appeal agreed with CDCR and reversed the trial court's modification.

Exclusion from youthful offender parole of non-minors sentenced to LWOP does not violate equal protection. *People v. Jackson* (2021) 61 Cal.App.5th 189;

People v. Acosta (2021) 60 Cal.App.5th 769; *In re Murray* (2021) 68 Cal.App.5th 456; *People v. Sands* (2021) 70 Cal.App.5th 193; *People v. Moore* (2021) 68 Cal.App.5th 856. The courts of appeal have repeatedly and uniformly held Penal Code section 3051's exclusion of persons over 18 years of age (but under 26 years of age) with LWOP sentences is constitutional. Courts have held the carve out for non-minor youth offenders serving LWOP sentences does not violate equal protection because there is a rational basis for distinguishing between juvenile and youthful LWOP offenders in this context.

The Supreme Court has thus far declined to grant review on this issue, but Justice Liu wrote concurring statements upon the denial of review in *People v. Montelongo* (2020) 55 Cal.App.5th 1016 and *People v. Jackson* (2021) 61 Cal.App.5th 189, expressing his belief that the statute's youth offender parole eligibility scheme is in tension with equal protection of the law because the scheme excludes certain people from youth offender parole hearings depending on the crime they committed, even though the mitigating attributes of youth are not crime-specific. He invited the Legislature to reconsider this aspect of Penal code section 3051.

Penal Code section 3051, subdivision (h), which excludes One Strike offenders from the procedures for youth offender parole hearings, violates equal protection. *In re Woods* (2021) 62 Cal.App.5th 740, review granted June 16, 2021, S268740, further action deferred pending consideration and disposition of a related issue in *People v. Williams*, S262229. The Court of Appeal agreed with petitioner that Penal Code section 3051, subdivision (h), which excludes One Strike offenders from the procedures for youth offender parole hearings, violated his right to equal protection of the laws because such procedures are generally available to similarly situated offenders and no rational basis exists to deny them to One Strike offenders. Therefore, the court concluded that petitioner was entitled to a youth offender parole hearing during his 25th year of incarceration. But see *People v. Moseley* (2021) 59 Cal.App.5th 1160, review granted April 14, 2021, S267309, further action deferred pending consideration and disposition of a related issue in *People v. Williams*, S262229 [reaching the opposite conclusion]. In *Williams*, the Supreme Court will decide: "Does Penal Code section 3051, subdivision (h), violate the equal protection clause of the Fourteenth Amendment by excluding young adults convicted and sentenced for serious sex crimes under the One Strike law (Pen. Code, § 667.61) from youth offender parole consideration, while young adults convicted of first degree murder are entitled to such consideration?"

A trial court may not refuse to hold a *Franklin* hearing where there was no previous "meaningful chance" to place on the record any evidence related to "youth-related factors." *People v. Benzler* (2021) 72 Cal.App.5th 743. Appellant, who was sentenced in 2014 for offenses he committed when he was 18 years old, appealed the summary denial of his motion for a *Franklin* hearing under Penal Code section 1203.01. Because appellant's sentencing hearing occurred nearly

two years before the ruling in *Franklin*, he did not have a "meaningful chance" to place on the record any evidence relevant to his "youth-related factors" for use in a later parole board hearing. The Third District Court of Appeal concluded appellant did not have a meaningful chance to present evidence of youth-related factors even though appellant had already received a parole "consultation," and even though he is scheduled for a parole hearing in 2027, which is before he would be eligible for a youth offender parole hearing under Penal Code section 3051.3. The Court of Appeal reversed the trial court's order and remanded.

A *Franklin* hearing motion need not describe in detail the evidence sought to be preserved. *People v. Howard* (2021) 74 Cal.App.5th 141. A *Franklin* hearing can be requested by written motion. The trial court may deny the request if it determines no relevant, noncumulative evidence likely exists. But before doing so, the court must provide the defendant a meaningful opportunity to describe the evidence he or she seeks to preserve in the record. Here, appellant filed a motion for a *Franklin* hearing three decades after committing the underlying offense. By that time, he had already introduced youth-related evidence at a prior parole hearing, but he had never requested a *Franklin* hearing. The trial court denied his motion on its face because it failed to show what additional evidence merited preservation. The Fourth District Court of Appeal found the trial court prematurely denied appellant's request. The requirements for a *Franklin* motion are minimal. The motion need not describe in detail the evidence the offender seeks to preserve. By denying appellant's motion on its face, the court failed to provide appellant with an adequate opportunity to demonstrate whether a *Franklin* hearing was warranted. Given the low threshold for such motions, at a minimum, the court should have afforded appellant the opportunity to offer proof of any relevant, noncumulative evidence he sought to preserve. The Court also held a defendant is not required to request a *Franklin* hearing prior to a parole hearing. The Court reversed and remanded.

The Court of Appeal reversed the denial of a criminal defendant's request for a *Franklin* hearing. *People v. Lipptrapp* (2021) 59 Cal.App.5th 886. In 1995, when appellant was 25 years old, he admitted that he attempted two murders and engaged in street terrorism. The trial court sentenced him to a determinate 30-year prison term. In 2019, the defendant filed a motion requesting appointment of counsel, resentencing, and a *Franklin* hearing. The Court of Appeal held that the defendant's motion contained sufficient information for defendant to gain access to a *Franklin* evidence preservation proceeding.

An inmate, granted parole under the Elderly Parole Program, is not required to serve his consecutive terms for in-prison offenses because a grant of parole under Penal Code section 3055 supersedes Penal Code section 1170.1(c). *In re Hoze* (2021) 61 Cal.App.5th 309. The Court of Appeal held that a parole grant under the Elderly Parole Program overrode sentences for in-

prison offenses. Defendant began serving an indeterminate life sentence in 1980 after being convicted of multiple offenses. Defendant was sentenced to two additional, consecutive prison terms for two in-prison offenses, totaling four years. In 2018, the Board of Parole Hearings granted Defendant parole under the Elderly Parole Program, Penal Code section 3055, reasoning that defendant no longer posed a risk of danger to society. Although the parole decision became final in September 2018, the defendant was not released immediately. The Board concluded that his parole grant did not excuse him from serving his consecutive prison terms, citing Penal Code section 1170.1, subdivision (c). The Court of Appeal held that the defendant was not required to serve his sentences for in-prison offenses because a grant of parole under Penal Code section 3055 supersedes Penal Code section 1170.1, subdivision (c).

Even assuming incarceration has become unconstitutionally disproportionate due to repeated parole denials, it is not a per se justification to terminate parole after release. *In re Palmer* (2021) 10 Cal.5th 959. Petitioner first sought release on parole in 1995, and the Board of Parole Hearings denied parole. Petitioner continued to seek release, and after the Board's tenth denial, petitioner filed a petition for writ of habeas corpus alleging that the thirty years he had served on a life sentence for an aggravated kidnapping committed when he was a juvenile was constitutionally excessive. The Board subsequently ordered petitioner released on parole. Ruling on the writ, the Court of Appeal concluded that Palmer's completed term of imprisonment had become unconstitutional and ended his parole. However, the Supreme Court reversed, holding that his parole remained valid in the absence of any persuasive argument from petitioner that his parole term had become constitutionally excessive.

S. Resentencing Issues

CDCR letter to trial court requesting a correction to the abstract of judgment does not constitute a recall recommendation triggering full resentencing. *People v. Magana* (2021) 63 Cal.App.5th 1120. CDCR notified the trial court of potential errors in the abstract of judgment. The matter was calendared, and defendant asked the court to conduct a full resentencing hearing. The trial court corrected clerical errors in the abstract but denied defendant's motion for a full resentencing hearing. The Sixth District Court of Appeal dismissed the appeal, rejecting the contention that the trial court effectively recalled appellant's sentence pursuant to former Penal Code section 1170, subdivision (d)(1)[1], and that he was entitled to a resentencing hearing. CDCR's letter specifically asked the trial court to determine whether "a correction is required."

[1] Effective Jan. 1, 2022, the sentence recall framework was moved from Penal Code section 1170, subdivision (d), to Penal Code section 1170.03, pursuant to Assembly Bill No. 1540.

Here, because the CDCR did not recommend a recall, the trial court lacked authority to recall defendant's sentence. Therefore, the order denying that motion did not affect defendant's substantial rights and was not an appealable order.

Trial courts have the authority to recall and resentence defendants based on post-judgment changes in the law giving courts discretion to strike or dismiss enhancements. *People v. Cepeda* (2021) 70 Cal.App.5th 456. In 2018, the defendant pleaded guilty to carjacking as a second strike and admitted he sustained a prior serious felony conviction. In 2020, the CDCR secretary sent a letter to the trial court invoking the sentence recall provision of former Penal Code section 1170, subdivision (d)(1). The trial court recalled the defendant's sentence and held a resentencing hearing under section 1170, subdivision (d)(1), declining to strike the defendant's enhancement. The Court of Appeal held that statute governing recall and resentencing authorized the trial court, on the recommendation of CDCR, to apply the law in effect at time of resentencing, recall the sentence, and resentence defendant. Moreover, during recall, the resentencing court was not bound by the defendant's original guilty plea and sentence recommendation. The resentencing court was also required to consider additional evidence concerning the defendant's behavior in prison after being sentenced before declining to strike enhancement. In so holding, the Court of Appeal agreed with *People v. Pillsbury* (2021) 69 Cal.App.5th 776. The Court of Appeal also concluded that the trial court abused its discretion when it declined to strike the defendant's prior serious felony enhancement.

Except in certain limited circumstances, when a trial court has jurisdiction on remand to modify every aspect of the sentence, it is required to exercise that jurisdiction. *People v. Walker* (2021) 67 Cal.App.5th 198. When part of a criminal sentence is ordered stricken by an appellate court, the trial court on remand "has jurisdiction to modify *every* aspect of the sentence" when resentencing. In this appeal, the Second District considered whether a trial court conducting such a resentencing is *required* to exercise that jurisdiction in order to correct a different part of the sentence that has become incorrect by the time of resentencing. The court "conclude[d] that the answer is 'yes.'" This is subject to certain exceptions: If the appellate court's order upon remand limits the scope of resentencing, the trial court must adhere to the limits set forth in the remand order; if the appellate court's order upon remand requires correction as to one part of a sentence but altering another part of the sentence would be inconsistent with the parties' plea agreement, the trial court may not transgress that agreement; if the appellate court's order upon remand requires correction as to one part of a sentence and alterations to another part of the sentence could have been raised in a prior appeal but were not, the court need not make those alterations absent a showing of good cause or justification for delay in raising the issue. But when, as in the current case, none of these circumstances is present, then by correcting one part of the sentence, the trial court is not only permitted, but also obligated to look at the facts

and the law in effect at the time of that resentencing, including "'any pertinent circumstances which have arisen since the prior sentence was imposed'" and whether they render a different part of the sentence legally incorrect.

If the trial court does not grant any resentencing relief on remand after an appeal, it need not reconsider the entire sentence upon request from the defendant. *People v. Cervantes* (2021) 72 Cal.App.5th 326. The Second District Court of Appeal affirmed the decision of the trial court not to strike a firearm enhancement pursuant to a limited remand based on the retroactive application of Senate Bill No. 620. In so ruling, the Court of Appeal also held that the trial court did not err in failing to reconsider appellant's "entire sentence" (specifically, the failure to reconsider the motion to strike the strike, which previously had been denied) because "[t]he issues a trial court may address in remand proceedings are . . . limited to those specified in the reviewing court's directions." Here, the appellate court had not vacated the sentence in any way, so resentencing was ultimately not required.

Reversal of the denial of a CDCR recommendation for recall of a 724-month sentence to consider striking firearm enhancements. *People v. Mendez* (2021) 69 Cal.App.5th 347. The Court of Appeal held that due process required the sentencing court to give parties notice of CDCR's recommendation and an opportunity to submit briefing and additional information before ruling on the sentence recall request. Defendant argued the trial court failed to adequately weigh his post-conviction record and afforded him no opportunity to be heard regarding the CDCR recommendation. The appellate court remanded to the trial court to give notice to the parties and to allow the parties the opportunity to supplement CDCR's recommendation with additional relevant information.

Reversal of the denial of a petition to recall an LWOP sentence imposed on a minor in 1997; a prior juvenile felony adjudication for second-degree burglary did not preclude relief. *People v. Harring* (2021) 69 Cal.App.5th 483. Former Penal Code section 1170, subdivision (d)(2) – now subdivision (d)(1) – provides a mechanism to petition for recall of an LWOP sentence imposed for conduct committed when the offender was a minor. An offender is statutorily ineligible for recall if he or she has juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims. The Court of Appeal held that the trial court could not consider unproven factual circumstances related to a defendant's prior juvenile felony adjudication in determining eligibility for recall of the sentence, and defendant's prior juvenile felony adjudication for second degree burglary did not render him ineligible for recall of his sentence. The Court of Appeal concluded that trial court must consider the felony crime subject to juvenile adjudication and its elements to determine whether it is a crime with "significant potential for personal harm to victims." The conduct comprising the

crime of second-degree commercial burglary is unlike assault in that it does not involve an act that by its nature creates a risk of physical harm to another.

Affirmance of trial court order denying resentencing under Propositions 36 and 47 based on finding that appellant posed an unreasonable risk of danger to public safety. *People v. Strother* (2021) 72 Cal.App.5th 563. In 2003 appellant was convicted of second degree burglary (Pen. Code, § 459) and theft of access card information (Pen. Code, § 484e, subd. (d)). Under the Three Strikes Law, he was sentenced to two consecutive terms of 25 years to life in prison. In 2013, appellant filed a petition to recall his entire sentence pursuant to Proposition 36 (Pen. Code, § 1170.126), and in 2014 he filed a petition to recall his sentence for theft of access card information pursuant to Proposition 47 (Pen. Code, § 1170.18). The trial court found appellant eligible for relief under both propositions but found appellant posed an unreasonable risk of danger to public safety and was not suitable for resentencing. As a result, the trial court denied both petitions. Appellant appealed, contending the trial court abused its discretion in finding he posed an unreasonable risk of committing one of the "super strikes" identified in Proposition 47 (Pen. Code, § 1170.18) because the trial court 1) failed to consider that his two prior convictions involving violence and firearm use occurred almost 30 years ago with no evidence he was the shooter; 2) failed to consider his prison fighting from 2016 through 2019 was the result of his gang renunciation in 2016; and 3) erroneously found that his conflict resolution and anger management programming and parole plans were inadequate. The Second District Court of Appeal found no abuse of discretion and affirmed the trial court's order. The Court of Appeal agreed with the trial court that it was particularly troubling that appellant incurred rules violations after the passage of Proposition 36 and Proposition 47 "when one would expect eligible inmates to be on their best behavior." The Court of Appeal found it reasonable to view appellant's continued fighting at such a time as evidence that he was unable to control his violent tendencies or to resolve conflicts peacefully. Considered together with appellant's pre-incarceration use of firearms and a knife, the prison rules violations were evidence indicating appellant would be equally unable to control his violent tendencies outside prison and would be likely to resort to the use of a firearm to resolve disputes or solve problems.

A showing of rehabilitative progress does not constitute good cause to permit an otherwise untimely successive petition for Three Strikes relief. *People v. Valencia* (2021) 64 Cal.App.5th 641. The trial court denied a petition to recall sentence pursuant to Three Strikes Reform Act (Pen. Code, § 1170.126) on grounds that the petition was successive and untimely. Appellant contended rehabilitative progress constituted good cause to permit an untimely and successive petition. The trial court reasoned that the good cause exception only applied to the first petition filed (not to a second). The Fifth District Court of Appeal ultimately declined to resolve whether the Three Strikes Reform Act permits an inmate to file

successive recall petitions because it concluded that even assuming it does, an inmate's rehabilitative progress does not constitute good cause to excuse an untimely filing. Construing the statute to permit belated, successive petitions upon a showing that the inmate had progressed in his or her rehabilitation would render the statute of limitations surplusage. The reviewing court therefore affirmed the denial of the petition. The court did acknowledge that the plain language of the statute is subject to contrary interpretations regarding the availability of successive petitions, but did not resolve this issue.

Penal Code section 1170.91 resentencing does not require a diagnosed mental condition. *People v. Coleman* (2021) 65 Cal.App.5th 817. Defendant, who was sentenced in 1996 to 126 years in prison for various sex offenses against a child victim, appealed from denial of his Penal Code section 1170.91 petition (which allows a current or former service member suffering from sexual trauma or substance abuse as a result of military service to obtain a new sentencing hearing). The Fourth District Court of Appeal agreed that appellant pleaded and proved a qualifying condition and reversed. Appellant served 17+ years in the Air Force and National Guard. While in the Air Force, he was the victim of sexual assault he did not report for fear he would be viewed as homosexual. Alcohol abuse was also a routine part of his military life. He contended in his pro per petition that it was plausible these issues and trauma "account[ed] for [his] flawed decision making." The superior court denied the petition because it did not see "some form of diagnosed medical condition." The statute merely requires a petitioner to allege that he or she "may be suffering from" a qualifying condition. (Pen. Code, § 1170.91, subd. (b)(1).) It does not require a petitioner to allege evidentiary facts, such as the symptoms or manifestations of the qualifying condition. The statute also does not require the petitioner to allege that the qualifying condition actually contributed to the commission of the crime.

Prerequisite for resentencing eligibility under Penal Code section 1170.91 is that defendant can be resentenced to a determinate sentence. *People v. Stewart* (2021) 66 Cal.App.5th 416. A petitioner is not eligible for relief under Penal code section 1170.91 unless he or she would be resentenced under Penal Code section 1170, subdivision (b) — i.e., unless the potential penalty for at least one element of the sentence is a determinate triad. The Fourth District Court of Appeal considered petitioner's two arguments that he could potentially be resentenced to a determinate term via (1) a *Romero* motion to strike the prior or (2) resentencing under Proposition 36. The appellate court rejected both contentions. First, the court concluded that Penal Code section 1170.91 is not a vehicle for obtaining the opportunity to make a *Romero* motion. Nor was defendant eligible for resentencing to a determinate term under Proposition 36, because that measure disqualifies defendants who intended to cause great bodily injury during the commission of the offense. The prosecution need not have pleaded and proved the disqualifying factor at trial. Rather, it is sufficient that the trial court finds the disqualifying factor,

beyond a reasonable doubt, when it rules on the petition. Note, however, that the Court of Appeal rejected an argument advanced by the Attorney General that all defendants whose base terms are doubled due to a second or third strike are sentenced under Penal Code sections 667 and 1170.12 and therefore "not sentenced under section 1170, subdivision (b)" and not eligible for Penal Code section 1170.91 relief.

Judicial factfinding at the initial stage of a Penal Code section 1473.6 motion to vacate is improper, **and error in this regard may require assignment of new judge on remand**. *People v. Murillo* (2021) 71 Cal.App.5th 1019. After appellant served his prison sentence, he moved to vacate his resisting conviction based on newly discovered evidence of the arresting officer's false statements in other investigations, pursuant to Penal Code section 1473.6, which utilizes the same procedural rules in place for adjudicating a petition for writ of habeas corpus. Thus, the trial court was required to refrain from judicial factfinding at the initial stage of the motion process, prior to the issuance of an order to show cause. Here, the trial judge summarily denied the motion, emphasizing that he had presided over appellant's trial and that he considered the officer to be a credible witness, given all the evidence that was presented during the trial. The Fourth District Court of Appeal held the judge erred in so doing because in determining whether a prima facie case has been made, the judge must take the moving party's factual allegations as true and make a preliminary assessment whether the moving party would be entitled to relief if his or her factual allegations were proven. The Court of Appeal reversed the trial court's summary denial of appellant's motion because the trial court's factfinding was improper. The court took the additional step of stating that because the trial judge had already taken a position on the officer's credibility and the veracity of his trial testimony, "the matter shall be assigned to a different judge on remand to the superior court. (Code Civ. Proc., § 170.1, subd. (c).)"

Before a court exercises discretion to resentence, it must give parties notice and an opportunity to be heard. *People v. Williams* (2021) 65 Cal.App.5th 828. This People's appeal challenged the striking of the five-year punishment for a Penal Code section 667, subdivision (a)(1) felony enhancement in an unreported minute order without the parties present. The court did so following a CDCR recommendation pursuant to former Penal Code section 1170, subdivision (d), that the consecutive enhancement not be imposed. The Fourth District Court of Appeal held that before a trial court exercises its discretion to recall a sentence and enter a reduced term, it must (1) give the parties notice and an opportunity to be heard and (2) set forth the reasons for its choice of sentence. That CDCR provided copies to the parties of the recommendation did not constitute sufficient notice. If the court is inclined to recall a defendant's sentence for equitable reasons, it should prepare and serve on counsel for the parties its tentative response to the recommendation along with copies of all correspondence with CDCR. The tentative

ruling should state with particularity the reasons for its sentence choice and provide counsel a window of time within which to object and request a hearing.

T. New Legislation & *Estrada* Retroactivity

An order granting probation by suspending execution of a particular sentence is not final for purposes of *Estrada* retroactivity if the defendant may still timely obtain direct review of an order revoking probation and causing the state prison sentence to take effect. *People v. Esquivel* (2021) 11 Cal.5th 671. Our Supreme Court held that a case in which a defendant is placed on probation with execution of an imposed state prison sentence suspended is not yet final for purposes of *Estrada* if the defendant may still timely obtain direct review of an order revoking probation and causing the state prison sentence to take effect. Any constraint on the Legislature's power to affect "final" criminal judgments would appear to arise from the conclusion of a criminal proceeding as a whole. "We see no persuasive reason to presume that the Legislature would wish to extend the benefit of ameliorative legislation to suspended-imposition defendants whose probation is revoked (per [*People v. McKenzie* (2020) 9 Cal.5th 40]), but not to suspended-execution defendants whose probation is revoked. Accordingly, we conclude that legislation ameliorating punishment presumptively applies to suspended execution cases pending on appeal from an order causing a previously imposed sentence to take effect."

Remand after negotiated disposition for trial court to strike Penal Code section 667.5, subdivision (b) enhancements (prison priors). *People v. Houle* (2021) 64 Cal.App.5th 395, review granted July 28, 2021, S269337. The parties and Court of Appeal agreed that appellant was entitled to retroactive relief under Senate Bill No. 136. The First District Court of Appeal departed from *People v. France* (2020) 58 Cal.App.5th 714, review granted Feb. 24, 2021, S266771, in holding that Senate Bill No. 136 had rendered the parties' plea bargain unenforceable, such that on remand the trial court must restore the parties to the status quo ante. (*People v. Stamps* (2020) 9 Cal.5th 685.) The *Stamps* court concluded the Legislature did not change the well-settled law that "a court lacks discretion to modify a plea agreement unless the parties agree to the modification." (*Stamps*, supra, 9 Cal.5th at p. 702.) The First District, Division Three, acknowledged a split in authority but relied on *Stamps* and remanded for the court to strike the enhancements and give the parties an opportunity to negotiate a new plea agreement. However, the court held it would be an abuse of discretion for the trial court to impose a longer sentence on remand. The parties may enter into a new plea agreement, but, if they do, the trial court may not impose a longer sentence than defendant's original six-year term. (See *People v. Collins* (1978) 21 Cal.3d 208.)

The announcement of an aggregate sentence covering two separate cases does not reopen the sentence imposed in the first case or render it

nonfinal for purposes of the *Estrada* rule. *In re Rodriguez* (2021) 66 Cal.App.5th 952. In this case, the defendant was serving a determinate term in prison that was the result of two separate trial court proceedings, both of which went to trial and ended in conviction. After the second proceeding, the trial court announced a single, aggregate term of imprisonment, taking into account both proceedings, including a one-year prison prior enhancement from the first proceeding. The Fourth District Court of Appeal concluded defendant was not entitled to the benefit of Senate Bill No. 136's amendment to Penal Code section 667.5 because the judgment in the first proceeding was final before the amendment took effect. "While the trial court in the second proceeding used the first judgment to calculate the aggregate term of imprisonment covering both proceedings, the first judgment itself was unaffected. It remained final, and the amendment to section 667.5 does not apply retroactively to it."

Assembly Bill No. 1261's elimination of narcotics registration is ameliorative and retroactive. *People v. Pinedo* (2021) 66 Cal.App.5th 608. The Fifth District Court of Appeal held the defendant was entitled to relief from the narcotics offender registration requirement under Assembly Bill No. 1261. The government argued that Assembly Bill No. 1261 was prospective only because "registration [requirement] is not a 'punishment,' and therefore is not subject to the retroactivity principles that apply to changes in the law which ameliorate punishment." The Court of Appeal rejected this argument: "[W]hatever label is affixed to registration requirements, when properly viewed as a burdensome consequence of conviction, legislation that either reduces or eliminates that burden clearly constitutes an ameliorative change in the law to which the *Estrada* presumption applies."

Assembly Bill No. 1869's repeal of fees is retroactive even where execution of sentence was suspended, and the issue may be raised on direct appeal in the first instance without first presenting it in a *Fares* letter. *People v. Clark* (2021) 67 Cal.App.5th 248. The First District Court of Appeal held that Assembly Bill No. 1869, which repealed the statute authorizing the probation supervision fee (Pen. Code, § 1203.1b), was retroactive such that appellant was entitled to have the probation supervision fee vacated, even where execution of sentence was suspended and no appeal was taken of that sentence until the sentence was executed following a finding that appellant had violated probation. Further, on an issue of first impression, the Court of Appeal concluded that appellant was not required under Penal Code section 1237.2 to first seek relief from the trial court either by *Fares* letter or motion.

Assembly Bill No. 1869's elimination of the criminal justice administration fee applies retroactively to both final and nonfinal sentences. *People v. Lopez-Vinck* (2021) 68 Cal.App.5th 945. The Court of Appeal held that the statutory amendment eliminating criminal justice administration fees applied to both final

and non-final sentences to relieve any unpaid debt, and the defendant was entitled to have vacated any portion of the fee imposed pursuant to Government Code section 29550.1.

Senate Bill No. 567 is an ameliorative change to the law that applies retroactively to nonfinal decisions. *People v. Flores* (2022) 73 Cal.App.5th 1032. Senate Bill No. 567 created a presumption in favor of a low term prison sentence when a defendant is under 26 years of age at the time of the offense. Defendant here was 22 at the time of the offense and was sentenced to the middle term. The Court of Appeal agreed that Senate Bill No. 567 constituted an ameliorative change to Penal Code section 1170, the determinate sentencing law, and applied retroactively to defendant's case pursuant to *Estrada* because defendant's conviction was not yet final. However, the court held defendant was not automatically entitled to the lower-term sentence. The court held defendant's six-year midterm sentence must be vacated and the matter remanded to the trial court with directions to resentence him under the newly amended version of Penal Code section 1170, subdivision (b). Remand was required because revised section 1170, subdivision (b)(6)(B) does not require imposition of the lower term in every case in which the defendant was under age 26 at the time the crime was committed. Rather, this provision establishes a presumption of the lower term if the defendant's youth was "a contributing factor" in his or her commission of the crime "*unless* the court finds that the aggravating circumstances outweigh the mitigating circumstances that imposition of the lower term would be contrary to the interests of justice. . . ."

Certain provisions of Assembly Bill No. 333's amendments to gang laws are retroactive under *Estrada*. *People v. Lopez* (2021) 73 Cal.App.5th 327. The Second District Court of Appeal vacated gang enhancement allegation findings under Penal Code section 186.22, the special circumstances findings under Penal Code section 190.2, subdivision (a)(2), and the gang-related firearm enhancement findings under section Penal Code section 12022.53, subdivision (e), and remanded the matter for a limited retrial due to retroactive statutory changes made by Assembly Bill No. 333. Assembly Bill No. 333 requires the prosecution to prove collective, not merely individual, engagement in a pattern of criminal gang activity. Here, no evidence was introduced at trial to establish that the crimes committed constituted collective criminal activity by the 18th Street gang. In addition, pursuant to the new legislation, imposition of a gang enhancement requires proof of the following additional requirements with respect to predicate offenses: (1) the offenses must have "commonly benefited a criminal street gang" where the "common benefit . . . is more than reputational"; (2) the last predicate offense must have occurred within three years of the date of the currently charged offense; (3) the predicate offenses must be committed on separate occasions or by two or more gang members, as opposed to persons; and (4) the charged offense cannot be used as a predicate offense. (Assem. Bill 333, § 3, amended Pen. Code, § 186.22, subds. (e)(1)–

(2), eff. Jan. 1, 2022.) The jury in this case was not prohibited from relying upon the currently charged offenses in determining whether a pattern of criminal gang activity had been proven, and the jury was not instructed that the benefit to the gang had to be more than reputational. Evidence on these two points was presented to the jury that would have been sufficient to comply with these new statutory requirements, but the Court of Appeal concluded this was irrelevant because "the jury was not asked to, and therefore did not, make the factual determinations that are now required by the amendments to section 186.22. To rule that the existence of evidence in the record that would permit a jury to make a particular finding means that the jury need not actually be asked to make that finding would usurp the jury's role and violate Lopez's right to a jury trial on all the elements of the charged allegations."

Senate Bill No. 317's extension of conduct credits to incompetency commitments applies only prospectively. *People v. Orellana* (2022) 74 Cal.App.5th 319. The trial court found a doubt as to Orellana's competency and suspended criminal proceedings. Orellana was treated at Patton State Hospital. He regained competence following treatment, and the parties entered into a plea agreement in which Orellana agreed to serve a prison term of two years. The trial court subsequently imposed a sentence consistent with the terms of the plea agreement. On appeal, Orellana contended the trial court's failure at sentencing to award him conduct credit for the period of time in which he was receiving treatment for restoration to competence in the state hospital violated Senate Bill No. 317. Applying the California Supreme Court's decision in *People v. Brown* (2012) 54 Cal.4th 314, the Sixth District Court of Appeal held that Senate Bill No. 317 does not apply retroactively and the trial court's denial of conduct credit for the time at state hospital did not violate equal protection principles. The appellate court reasoned that, similar to *Brown*, the statutory amendment does not mitigate or lessen the penalty for a particular crime or offense but rather facilitates the accrual of conduct credits by extending Penal Code section 4019 to a group previously excluded from its provisions.

Assembly Bill No. 103's extension of Three Strikes Law reform to insanity commitments did not unconstitutionally amend Proposition 36. *People v. Steward* (2021) 63 Cal.App.5th 895. Assembly Bill No 103 added Penal Code section 1170.127, which created a statutory mechanism for a person serving an insanity commitment to seek a reduction to their maximum term of commitment if they would have been eligible for relief under the Three Strikes Reform Act (Pen. Code, § 1170.126) had it been in effect when they were committed and had they been found guilty (as opposed to not guilty by reason of insanity). The Court of Appeal held that Assembly Bill No. 103 was not an unconstitutional amendment of the Three Strikes Reform Act. The Court of Appeal found that Assembly Bill No. 103 did "not amend Proposition 36 to prohibit what Proposition 36 authorized or authorize what it prohibited: [w]hile Proposition 36 addresses the length of prison sentences for

criminal defendants, Assembly Bill 103 addresses the length of commitment terms for NGI committees."

Assembly Bill No. 1950 retroactively limited felony probation to a maximum term of two years with certain exceptions, but there is a split of authority as to whether a court may unilaterally reduce the term of probation or whether the prosecution is entitled to withdraw from the plea bargain. Assembly Bill No. 1950 reduced the maximum period of probation in most felony cases to two years and in most misdemeanor cases to one year, with certain exceptions for offenses that statutorily mandate specific terms of probation. (e.g., Pen. Code, § 1203.097 offenses, DUI offenses.) The Courts of Appeal have uniformly held that Assembly Bill. No. 1950 is ameliorative and applies retroactively to cases not yet final on appeal. However, a split of authority exists in the context of a conviction by plea as to whether the appropriate remedy is simple reduction of the probation term, or whether the prosecution must be offered the opportunity to withdraw from the plea bargain consistent with *People v. Stamps* (2020) 9 Cal.5th 685. *People v. Stewart* (2021) 62 Cal.App.5th 1065 and *People v. Butler* (Feb. 15, 2022, B313121) ___Cal.App.5th___ [2022 WL 456406] have held that the trial court has authority to unilaterally modify the plea bargain and reduce the term of probation. *People v. Scarano* (Feb. 9, 2022, C092538) ___ Cal.App.5th ___ [2022 WL 390889] and *People v. Montoya* (2021) 68 Cal.App.5th 980 have held that remand to allow the prosecution to withdraw from the plea bargain is the appropriate remedy.

Our Supreme Court has granted review to resolve this conflict in *People v. Prudholme*, S271057, which presents the following issues: (1) Does Assembly Bill No. 1950 (Stats. 2020, ch. 328) apply retroactively under *In re Estrada* (1965) 63 Cal.2d 740? (2) If so, does the remand procedure of *People v. Stamps* (2020) 9 Cal.5th 685 apply?

Does retroactive application of Assembly Bill No. 1950 mean that then-valid action taken by a trial court to revoke or terminate probation after the two-year period of probation must now be considered an act in excess of the court's jurisdiction? There is a split of authority on this issue. In *People v. Butler* (Feb. 15, 2022, B313121) ___Cal.App.5th___ [2022 WL 456406], appellant argued on appeal, and respondent conceded, that the trial court lacked jurisdiction to revoke his probation under Assembly Bill No. 1950 ("AB 1950") because it applied retroactively such that appellant had already served the maximum term of his probation. In that case, probation was summarily revoked in 2020 prior to the effective date of AB 1950, but the probation violation was not adjudicated until April 2021, after AB 1950 had taken effect. The Second District Court of Appeal held that "Assembly Bill No. 1950 applie[d] retroactively to Butler, and the trial court lacked jurisdiction to revoke his probationary term."

However, the First District Court of Appeal, Division Three, reached a contrary conclusion in *Kuhnel v. Superior Court* (Feb. 28, 2022, A163307)

___Cal.App.5th___ and *People v. Faial* (Feb. 28, 2022, A159026) ___Cal.App.5th ___. In *Kuhnel*, which involved a misdemeanor grant of probation, the alleged probation violation occurred within the first year of probation, but probation was not summarily revoked until after the first year. The Court of Appeal concluded that "having summarily revoked Kuhnel's probation under these circumstances, the trial court retained jurisdiction to conduct a formal hearing on the probation violation even after the effective date of Assembly Bill 1950." The court reasoned that because the defendant was validly on probation when her probation was summarily revoked, Penal Code section 1203.2, subdivision (a) by its terms tolled the running of the probationary period until a formal probation hearing could occur. The court acknowledged in a footnote that "another appellate court recently reached a different result in *People v. Butler* (Feb. 15, 2022, B313121) __ Cal.App.5th __, but without addressing [Penal Code] section 1203.2(a) or [*People v. Leiva* (2013) 56 Cal.4th 498, 512]" and respectfully disagreed with *Butler*.

In *Faial*, the probation violation was adjudicated prior to the effective date of AB 1950, but after appellant had already served two years of probation, and the court executed the previously suspended sentence, which appellant was still serving after the effective date of AB 1950. The Court of Appeal held it was "not persuaded that Assembly Bill 1950 invalidates a trial court's revocation and termination of a defendant's probation where, as here, such actions were properly taken before Assembly Bill 1950's effective date."

Where a defendant is convicted of a felony offense requiring two-year probationary term due to Assembly Bill No. 1950 and a misdemeanor offense exempt from Assembly Bill No. 1950 requiring three-year probationary term, a probation violation can carry felony punishment consequences only during the first two years of the probationary term. *People v. Saxton* (2021) 68 Cal.App.5th 428. The defendant pled no contest to driving under the influence (Veh. Code, § 23152, subd. (f)), a misdemeanor exempt from Assembly Billl No. 1950 carrying a three-year maximum probation term, and willfully evading a police officer (Veh. Code, § 2800.2, subd. (a)), a felony carrying a two-year maximum probation term pursuant to Assembly Bill No. 1950. The trial court suspended imposition of sentence and ordered the defendant to serve three years of formal probation. It specified that any probation violation that occurs during those three years can carry felony punishment consequences. The Court of Appeal held that a probation violation under these circumstances carried felony punishment consequences only during the first two years of the probationary term. In addition, the Court of Appeal concluded formal, rather than informal, probation of three years was required, as informal probation is not an option for felony offenses.

U. Immigration Consequences of Criminal Convictions

An appellate court must independently review the denial of a motion to withdraw a plea pursuant to Penal Code section 1437.7. *People v. Vivar* (2021) 11 Cal.5th 510. In this opinion empathetically written by Justice Cuellar and illustrative of why he will be missed, the Supreme Court held as a matter of first impression that the independent review standard applies to rulings on a motion to withdraw a plea due to adverse immigration consequences. Exercising its independent judgment to determine whether the facts satisfied the rule of law, the Supreme Court found objective evidence corroborated appellant's claim that he would not have entered the plea had he known it would lead to deportation, and thus that appellant was prejudiced by his counsel's ineffective assistance. Although appellant in this case had rejected a potentially deportation-neutral plea, the court concluded that since he was ignorant of the immigration consequences attached to his various plea options, "the fact that he *unknowingly* rejected an immigration-neutral option cannot, in itself, demonstrate that 'immigration consequences were not defendant's primary consideration.'" The Court reversed the judgment of the Court of Appeal affirming the trial court's denial of appellant's motion to withdraw his plea due to adverse immigration consequences.

Counsel must defend against immigration consequences, not just advise about possible deportation. *People v. Lopez* (2021) 65 Cal.App.5th 484. Penal Code section 1016.3 requires counsel to "provide accurate and affirmative advice" about potentially adverse immigration consequences of any plea agreement *and* to "defend against those consequences." Because there was not an effort to negotiate an acceptable plea bargain with the relevant immigration consequences in mind, the Second District Court of Appeal reversed the trial court's order denying the motion to withdraw the guilty plea in the interests of justice. Reversal was warranted despite the signed *Tahl* form and a general advisement during the plea hearing. A trial court's warning that deportation "will result" is not a categorical bar to relief, and a *Tahl* advisement is not a substitute for the advice of defense counsel. The appellate court reviewed denial of the Penal Code section 1018 motion to withdraw for an abuse of discretion and declined to extend the independent review standard articulated in *Vivar,* which applied specifically to Penal Code section 1473.7. However, the court appeared to leave the door open at a future date, particularly where the record considered by the trial court consists of a written record rather than live testimony.

"Reasonable Diligence" pursuant to Penal Code section 1473.7. *People v. Alatorre* (2021) 70 Cal.App.5th 747. Appellant accepted a plea deal in 2011 for credit for time served and pled to conspiracy to possess cocaine for sale. In 2011, he applied for naturalization, which alerted immigration to his conviction, and appellant was deported. In early 2020, appellant filed a motion to vacate his conviction under Penal Code section 1473.7, only to have the trial court deny it as

untimely based on a finding that he did not exercise "reasonable diligence" to become aware of the existence of the statutory remedy after the law became effective. The Fourth District Court of Appeal considered the question of how a petitioner's "reasonable diligence" should be evaluated when the ripening of an unexpected immigration consequence predates the creation of an avenue of relief. The Fourth District concluded that a reasonable person in appellant's circumstances—convicted in 2008, deported to Mexico in 2011, and working as a day laborer—would have little reason to discover 2017 changes to California law that might provide a new way to contest an old conviction. After considering the text, history, and purpose of Penal Code section 1473.7, the appellate court reversed the trial court's ruling, finding that it had applied an incorrect legal standard when it assumed appellant was obligated to learn about the new law starting in January 2017, when the statute became effective. Where a petitioner's adverse immigration consequences predate January 1, 2017, a court assessing the timeliness of a Penal Code section 1473.7 motion must determine when the petitioner would have had reason to seek legal help or otherwise investigate new forms of postconviction relief, and evaluate diligence from that point forward, in light of all the circumstances. Further, at the hearing on such a motion, the prosecution is not authorized to elicit testimony from petitioner's former attorneys in violation of the attorney-client privilege. After independently reviewing the record in this case, the Court of Appeal concluded the motion was timely as a matter of law. As to the merits of appellant's request, the Court of Appeal found he established prejudicial error within the meaning of Penal Code section 1473.7 and remanded to the trial court with instructions to issue an order granting the motion.

Evidence supported the defendant's motion that he had not been sufficiently advised of the immigration consequences he faced. *People v. Rodriguez* (2021) 60 Cal.App.5th 995. The Court of Appeal held that defense counsel did not adequately advise the defendant of the immigration consequences of his guilty plea. In 2007, a non-citizen entered a plea agreement that avoided any adverse immigration consequences. The negotiated sentence included 120 days of custody. After the plea was entered, but before sentencing, Rodriguez was arrested and jailed for another crime. As a result of that arrest, Rodriguez did not appear at the scheduled sentencing hearing. He later agreed to be sentenced in absentia, and the court imposed a sentence of sixteen months prison, which elevated the offense to an aggravated felony and subjected defendant to deportation. Deportation proceedings were initiated after defendant's release from custody. In 2019, after amendments to Penal Code section 1473.7, the defendant moved to vacate his conviction on the grounds that he had not been sufficiently advised of the immigration consequences he faced. After an evidentiary hearing, the court denied the motion. The Court of Appeal concluded the evidence supported Rodriguez's motion.

V. Miscellaneous Other

Restrictions on "successive" habeas petitions do not apply to claims that could not with reasonable diligence have been presented in an earlier petition. *In re Friend* (2021) 11 Cal.5th 720. Our Supreme Court addressed the provisions of Proposition 66, which introduced restrictions on the presentation of "successive" habeas corpus petitions absent proof by a preponderance of the evidence that the petitioner is actually innocent or ineligible for the sentence. The court considered whether the restrictions apply to all claims raised in a second or subsequent habeas petition, including claims based on newly available evidence or newly decided case law, or whether the restrictions apply only to those claims that were or could have been raised in an earlier petition. The court concluded the restrictions apply only to claims that were or could have been raised in an earlier petition. A successiveness bar lacking an exception for claims that could not with reasonable diligence have been presented in an earlier petition threatens the guarantee of fair access to courts that has traditionally been central to habeas corpus procedure in this state and, in so doing, raises significant questions under the California Constitution.

Vehicle Code section 41500 does not apply to offenses prosecuted in the same action and arising out of a single incident. *People v. Escareno* (2021) 64 Cal.App.5th 595. Vehicle Code section 41500, subdivision (a), provides: "A person shall not be subject to prosecution for a nonfelony offense arising out of the operation of a motor vehicle . . . that is pending against him or her at the time of his or her commitment to the custody of the Secretary of the Department of Corrections and Rehabilitation, the Division of Juvenile Justice in the Department of Corrections and Rehabilitation, or to a county jail pursuant to subdivision (h) of Section 1170 of the Penal Code." In a felony DUI case that also alleged misdemeanor and infraction vehicle code violations, defense counsel contended that Vehicle Code section 41500 applied to charges filed concurrently with a pending felony case and moved to have the misdemeanor and infractions dismissed in light of defendant's prison commitment. The trial court ruled Vehicle Code section 41500 did not apply to charges filed concurrently with felony charges. The First District Court of Appeal, Division Two, affirmed, reasoning, "Applying section 41500 to a defendant being prosecuted in a single action for felony and nonfelony offenses arising out of a single incident would further none of the Legislature's purposes in section 41500."

Reversal after *Wende* brief because court finds no factual basis for plea. *People v. Richardson* (2021) 65 Cal.App.5th 360. After appellant filed a *Wende* brief in a case where defendant failed to obtain a certificate of probable cause, the First District Court of Appeal, Division Three, reversed because it determined that a factual basis did not support the negotiated plea. Defendant pleaded no contest to one count of human trafficking of a minor for a sex act, but the victim was 26 years

old. "[I]n this case the negotiated plea was no more valid than a no contest plea to murder where the victim is still alive." The court treated the appeal as a petition for writ of habeas corpus and concluded that the trial court acted in excess of its jurisdiction when approving the plea bargain because it was undisputed that the victim was an adult. The Court of Appeal's estoppel analysis seems to suggest that if the appellant had challenged the sentence, he might have been estopped from making the argument, but since the defendant did not challenge the validity of the plea, he could not be trifling with the courts, and policy considerations attendant to estoppel should not hinder a *Wende* review: "Clearly, we, as a court, are not estopped from reviewing the validity of the plea."

Defendant's constitutional right to confront witnesses was not violated by trial court's requirement that all persons in the courtroom wear face masks. *People v. Lopez* (Feb. 15, 2022, B309605) ___ Cal.App.5th ___ [2022 WL 456304]. Defendant made a pretrial request to be relieved of the requirement to wear a face mask covering his nose and mouth during trial and also requested that all witnesses be allowed to testify without masks. The trial court denied defendant's motion but ordered that defendant, as well as both counsel, could stand and remove their respective masks when being introduced to the jury. The Court of Appeal found that the court's mask requirement furthered the public policy of protecting against the substantial health risks presented by the COVID-19 virus, particularly in an indoor setting like a courtroom. The Court of Appeal held that the mask order not only protected the safety of the trial participants, but also public health more broadly by seeking to limit the spread of the virus. Furthermore, the Court of Appeal held that the mask requirement did not meaningfully diminish the face-to-face nature of the witness testimony.

Masking order did not violate the defendant's right to confrontation during COVID-19 pandemic in prosecution for residential burglary. *People v. Alvarez* (Feb. 14, 2022, B309269) ___ Cal.App.5th ___ [2022 WL 441534]. The Court of Appeal held that the masking order satisfied an important public policy and retained essential safeguards of reliability as required by the Sixth Amendment Confrontation Clause, including "(1) in-person testimony; (2) given under oath; (3) subjected to cross-examination and (4) the ability of the defendant and fact finder to view witness demeanor for the purpose of evaluating credibility."

II. Delinquency Cases

Confinement of minor may not be prolonged to find post-release services rather than to restore competency. *J.J. v. Superior Court* (2021) 65 Cal.App.5th 222. The First District Court of Appeal, Division Five, considered as an issue of first impression whether Welfare and Institutions Code section 709, which prescribes incompetency proceedings for minors who are subject to delinquency petitions in juvenile court, allows the secure confinement of those minors beyond the statutory

period for remediation of their competency. The First District held that a minor cannot be confined under subdivision (h)(5)(C) beyond the statutory remediation period, where the minor has not attained competence by the end of that remediation period, there is no finding that he would attain competence in the foreseeable future, and confinement is prolonged solely to find post-release services rather than to restore the minor to competency. Once the court determined that J.J. had not attained competency at the end of the statutory remediation period, no further confinement could be ordered given the state of the record in J.J.'s case, and the court was required to dismiss the delinquency petition and release J.J. in the absence of civil commitment proceedings.

Reversal of jurisdictional finding due to improper admission of pre-arrest statements in violation of *Miranda*. *In re Matthew W.* (2021) 66 Cal.App.5th 392. In this case, police officers questioned the 17-year-old defendant in the kitchen of his home at 6 a.m., while it was still dark out. The interrogation directly followed another witness implicating defendant during an interrogation. The officer denied appellant's mother's request to be present during questioning. However, the officer told appellant he was not under arrest and that the officer was just there to ask some questions. Appellant testified that he was scared, panicked, and his mind was racing during the interrogation. The First District Court of Appeal, Division Two, reversed jurisdictional findings sustaining an assault with a deadly weapon charge because the juvenile court improperly admitted defendant's pre-arrest statements to police made during a custodial interrogation, in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. The court held that on these facts, "defendant's home was transformed into a 'police-dominated atmosphere' during the interrogation, which led defendant to reasonably believe he was not free to leave his kitchen or otherwise end the interrogation." On balance, the police officers "created a coercive atmosphere such that a reasonable 17-year-old would have experienced a restraint tantamount to arrest." Note also the Court of Appeal's determination that because the court made no factual findings about the circumstances of the interrogation and simply denied the defense motion, the Court of Appeal "ha[d] no reason to defer to the court on this issue and w[ould] independently review the record and apply the relevant law."

Where an adjudication for attempted robbery comes within Penal Code section 1203.09, it is also a 707(b) offense. *In re Noah S.* (2021) 67 Cal.App.5th 410. Minor contended his attempted robbery adjudication did not fall within Welfare and Institutions Code section 707, subdivision (b) ("707(b)"). Division Three of the First District reviewed this issue of statutory interpretation de novo and held an attempted robbery against the particular types of victims specified in Penal Code section 1203.09 – e.g., a victim who is 60 years of age or older, where the perpetrator inflicts great bodily injury –qualifies as an offense falling within section 707(b).

Neither a juvenile ward nor his family may be ordered to pay the cost of domestic violence treatment program as a condition of probation. *In re M.W.* (2021) 67 Cal.App.5th 586. Appellant was adjudicated a ward of the juvenile court and ordered as a condition of probation to attend a domestic violence treatment program. The trial court denied the juvenile's motion requesting that the court order the probation department to pay for the program. The First District Court of Appeal, Division Five, held that the juvenile court had no authority to require appellant or his family to pay for a treatment program to address his violent behavior, imposed as a probation condition. Through Senate Bill No. 190, the Legislature largely eliminated statutory authority for charging wards and their families due to concerns about imposing costs on families that are already struggling. Even prior to this 2017 legislation, these costs could not be imposed on appellant's family because under Welfare and Institutions Code section 903, subdivision (b), parents may not be liable for "any costs of treatment or supervision for the protection of society and the minor and the rehabilitation of the minor." The appellate court also noted that it made no difference that the juvenile court was willing to hold a hearing on appellant's ability to pay. Because there was no statutory authority for imposing the cost of treatment on appellant or his family, he had no duty to request such a hearing.

Juvenile court erred in ordering minor to pay fees to attend DUI program. *In re Cesar G.* (Feb. 10, 2022, A161171) ___ Cal.App.5th ___ [2022 WL 405011]. After the minor pleaded no contest to allegations of alcohol-related reckless driving, he was adjudged a ward of the court and placed on probation subject to a number of conditions, including that he attend DUI programs. The Court of Appeal concluded that the juvenile court erroneously ordered the minor to pay the cost for attending DUI-related programs.

HIPAA and confidentiality of mental health assessments conducted by therapists working with probation department. *Y.C. v. Superior Court* (2021) 72 Cal.App.5th 241. 17-year-old Y.C. agreed to participate in a mental health assessment conducted by a therapist pursuant to an established protocol of the probation department. Finding the issues moot, the Court of Appeal declined to address whether Y.C.'s Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel were violated when the therapist provided a summary of her interview to the probation department, which was admitted into evidence at Y.C.'s detention hearing. The Court concluded defendant was not entitled to have the portion of the probation report sealed that contained the interview summary. In a dissenting opinion, Justice Streeter agreed that the issues were moot but maintained: "Wittingly or not, the fact is that [the psychologist's] professional duties of loyalty and confidentiality to her young patient were compromised." Justice Streeter expressly stated that he would find a violation of HIPAA on this record. Justice Streeter further argued that Y.C.'s assessment interview violated Y.C.'s privilege against self-incrimination and right to counsel, and that it was

therefore error to admit into evidence the summary of Y.C's psychological assessment at the detention hearing.

Juvenile court's consideration of "previous delinquent history" at a transfer hearing is not limited to conduct that occurred before the alleged offense or that resulted in the filing of a delinquency petition. *D.C. v. Superior Court* (2021) 71 Cal.App.5th 441. One of the criteria the juvenile court must consider at a transfer hearing is "the minor's previous delinquent history." (Welf. & Inst. Code, § 707, subd. (a)(3)(C)(i).) After examining the legislative history, the First District Court of Appeal, Division Five, concluded that in this context the juvenile court is not limited to considering conduct that occurred prior to the alleged offense and that the phrases "delinquent history" and "delinquent behavior" do not refer only to conduct which led to a delinquency petition. The reviewing court also upheld the admission into evidence of rap lyrics written by petitioner as "evidence of petitioner's mental state" and his "continued attraction to violence." Lastly, the Court of Appeal noted: "We are troubled by the implication arising from the record that, although the People had ample evidence by late 2018, they waited to file a petition until Petitioner was scheduled for release from DJJ in early 2020. As Petitioner argues, the amount of time a youth will be subject to DJJ jurisdiction can be a significant factor in a transfer decision. Thus, prosecutors should make efforts to promptly file petitions alleging a minor has committed a transferrable offense." However, the appellate court declined to find trial counsel was ineffective for failing to object to the delay or seek dismissal of the transfer motion due to unreasonable delay.

State must provide some contrary evidence that would enable the juvenile court to make a comparative analysis of the placement options before it concludes a minor will probably benefit from DJJ and that less restrictive options would be ineffective or inappropriate. *In re Miguel C.* (2021) 69 Cal.App.5th 899. Before committing a minor to the Division of Juvenile Justice (DJJ), the state's most restrictive placement for juvenile offenders, the juvenile court must find both that the placement would probably benefit the minor and that less restrictive options would be either ineffective or inappropriate. Expert testimony indicated that placing minor in DJJ would be counterproductive because it would likely assure his entrenchment in gang culture and, due to the ready availability of drugs in DJJ facilities, undermine efforts to treat and improve a significant substance abuse disorder that led to a single episode of violent criminal behavior over the course of a few hours. Beyond identifying that substance abuse treatment was available at DJJ, the State introduced no responsive evidence. The Court reversed and remanded in an opinion that focused "not on the substantive correctness of the juvenile court's conclusion, but on the procedural requirement that there be evidence in the record to support whatever conclusion the court reaches."

Recalling a sentence pursuant to former Penal Code section 1170, subdivision (d)(1), reopens finality such that a minor tried as an adult may obtain the retroactive benefit of Proposition 57 and Senate Bill No. 1391. *People v. Hwang* (2021) 60 Cal.App.5th 358, review granted April 14, 2021, S267274. Upon resentencing appellant at the request of CDCR pursuant to former Penal Code section 1170, subdivision (d)(1), the trial court refused to grant him retroactive relief under Proposition 57 and Senate Bill No. 1391, both of which limited the state's ability to prosecute juvenile offenders as adults. The Court of Appeal held that recalling appellant's sentence and resentencing him reopened the finality of the judgment in his case such that the trial court erred in not retroactively granting appellant the benefit of these ameliorative sentencing enactments.

Senate Bill 1391, enacted in 2018, lawfully amended Proposition 57 to prohibit minors under the age of sixteen from being transferred to adult criminal court. *O.G. v. Superior Court of Ventura County* (2021) 11 Cal.5th 82. The California Supreme Court held that Senate Bill No. 1391 was a permissible amendment to Proposition 57. Because Proposition 57 expressly permits legislative amendments, the Court found that the Legislature acted within its authority and upheld Senate Bill No. 1391. While barring the transfer of 14 and 15 year olds to adult court is a change from Proposition 57's statutory provisions, that amendment is fully consistent with and furthers Proposition 57's fundamental purposes of promoting rehabilitation of youthful offenders and reducing the prison population.

The juvenile court erred when it found the human trafficking affirmative defense in Penal Code section 236.23 did not apply. *In re D.C.* (2021) 60 Cal.App.5th 915. The Court of Appeal held that the human trafficking defense set forth in Penal Code section 236.23 did not require evidence that the juvenile was coerced to commit the offense by his trafficker in order for the defense to apply. The Court of Appeal reversed the jurisdictional finding that the minor carried a concealed dirk or dagger on his person because the juvenile court erred when it found the human trafficking affirmative defense did not apply in his case.

A TRO application under Welfare and Institutions Code section 213.5 must satisfy the procedural requirements of Code of Civil Procedure section 527. *In re E.F.* (2021) 11 Cal.5th 320. A delinquency petition was filed based on an allegation that the minor committed the felony offense of poisoning. The trial court issued a temporary restraining order prohibiting the juvenile from contacting the alleged victim, and, following a hearing, entered a three-year restraining order. The Supreme Court held that where the prosecutor has not given advance notice and has not made an adequate showing to justify the lack of notice, the court must give sufficient time for counsel and the minor to prepare and respond to the application before any order is issued.

Substantial evidence did not support finding that juvenile aided and abetted principal in commission of robbery. *In re K.M.* (Feb. 17, 2022, A159962) ___ Cal.App.5th ___ [2022 WL 484810]. The Court of Appeal held that the record did not support a finding that minor aided or encouraged the robbery of a cell phone. While the Court noted that the evidence the minor had the requisite knowledge of the principal's intent or harbored the requisite intent himself was "thin at best," it reversed the judgment due to a lack of substantial evidence that he took any action to aid or encourage the robbery.

III. Civil Commitment Cases

A. LPS Conservatorship

Capacity or willingness to accept treatment is a relevant factor to be considered on the issue of grave disability but is not a separate element that must be proven to establish a conservatorship. *Conservatorship of K.P.* (2021) 11 Cal.5th 695. Our Supreme Court considered, in the context of an LPS conservatorship proceeding, whether the trier of fact must find that the individual is unwilling or unable to voluntarily accept meaningful treatment. The Court held that a trier of fact may *consider* a proposed conservatee's openness to treatment when evaluating whether the constraints of conservatorship are necessary under all attendant circumstances. But in a conservatorship trial, the only *elements* that must be proven are that the person (1) suffers from a mental health disorder that (2) renders him or her gravely disabled. Evidence bearing on the person's ability and willingness to accept treatment may assist the fact finder in resolving that question. But such willingness is neither an element that must be proven nor itself dispositive of the issue of grave disability.

Counsel may waive on behalf of the proposed conservatee the right to jury trial. *Conservatorship of C.O.* (2021) 71 Cal.App.5th 894, petn. for review pending, petn. filed December 21, 2021, S272328. In this LPS appeal following a court trial *to reestablish conservatorship*, appellant contended the trial court erred by failing to advise him on the record of his right to a jury trial and failing to obtain a personal waiver of that right. As a threshold matter, the Sixth District Court of Appeal declined to dismiss the appeal as moot because it raised an important issue capable of repetition but likely to evade review. The court further declined to find the claims forfeited even though they were not raised below. The Sixth District disagreed with *Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 381 and *Conservatorship of Kevin A.* (2015) 240 Cal.App.4th 1241, 1244, which extended the Supreme Court's analysis in *People v. Blackburn* (2015) 61 Cal.4th 1113 and *People v. Tran* (2015) 61 Cal.4th 1160 – finding the personal jury waiver right applicable to extended insanity and mentally disorderd offender commitment proceedings – to find LPS conservatees were also entitled to a personal jury trial waiver. The Sixth District concluded this extension was unjustified because of the significant

differences in the statutes governing LPS proceedings. "We hold that (absent circumstances suggesting the proposed conservatee's counsel lacked actual authority, counsel disregarded his client's wishes, or that the proposed conservatee was actually unaware of his right to a trial by jury) counsel may waive on behalf of the proposed conservatee his or her right to have the matter of establishment or reestablishment of the conservatorship decided by jury trial." The court also concluded that there was no due process violation and that an equal protection claim lacked merit because LPS conservatees are not similarly situated to MDO or NGI defendants with respect to the waiver of jury trial. The court did find that a proposed LPS conservatee must be directly advised by the trial court of his jury trial right, but the appellate court concluded that the error for failing to give this advisement was harmless under *Watson* and that the error was not structural.

Right to jury trial not violated where court offered the proposed conservatee a bench trial that day or a jury trial in nine months. *Conservatorship of Joanne R.* (2021) 72 Cal.App.5th 1009. In this LPS conservatorship appeal, appellant contended the trial court provided her an inadequate jury trial waiver advisement and improperly induced her to waive her right to a jury trial by stating she could either have a court trial that day or a jury trial nine months later. The Second District Court of Appeal found no violation of her statutory right to a jury trial despite expressing "concern" about the delay in conservatees obtaining jury trials during the COVID-19 pandemic. The appellate court "caution[ed] the superior court that a nine-month delay . . . absent a health emergency, raises serious constitutional concerns in light of the significant liberty interests at stake" in a conservatorship case and "urge[d] the superior court to dedicate the necessary additional resources to LPS jury trials so that conservatees may exercise their right to a jury trial in a timely manner." The court nevertheless concluded that there was no improper inducement to waive jury trial and that under the totality of the circumstances, appellant's jury trial waiver was knowing, intelligent, and voluntary. "[T]he trial court did not offer to reward Joanne for waiving her right to a jury trial, instead simply advising her of the reality of when she could have a court or jury trial."

The county's petition for compensation reversed where the court improperly delegated responsibility to the public guardian. *Conservatorship of A.B.* (2021) 66 Cal.App.5th 384. The county conservatorship agency and its attorney may seek "just and reasonable" compensation from a conservatee for services provided during the conservatorship. The First District Court of Appeal, Division Four, concluded that the trial court had sufficient information before it to enable consideration of the relevant factors enumerated in Probate Code section 2942, subdivision (b), but that the court failed to do so and improperly delegated the responsibility for determining the amount of compensation to the public guardian. The appellate court reversed the order granting the public guardian's petition for compensation.

B. Sexually Violent Predator Commitment

Counsel is not obligated to advise defendant that SVP commitment is a possible consequence of his plea, and counsel is not ineffective for failing to do so. *People v. Codinha* (2021) 71 Cal.App.5th 1047. Appellant moved to withdraw his guilty plea because his trial attorney failed to advise him that a possible consequence of his plea was an indeterminate commitment as a sexually violent predator (SVP) at the end of any prison term. The Fourth District Court of Appeal concluded appellant did not meet the standard for demonstrating ineffective assistance of counsel under *Strickland v. Washington* (1984) 466 U.S. 668, even where trial counsel testified that he did not realize an SVP commitment was possible. The Court of Appeal found appellant did not establish either that his attorney's performance fell below an objective standard of reasonableness or that he was prejudiced by the allegedly deficient performance. The Court of Appeal went on to state "counsel was not obligated to advise Appellant that an SVP commitment was a possible consequence of his plea." The Court of Appeal rejected appellant's analogizing of potential SVP consequences to potential immigration consequences, where under federal and state law, defense counsel must provide such advice to the defendant. In the Court of Appeal's estimation, "[u]nlike the potential immigration consequences for a noncitizen defendant convicted of certain crimes, potential SVP consequences are neither 'enmeshed' in and 'intimately related to the criminal process' nor 'nearly an automatic result' for many offenses."

The failure to impose a personal jury waiver requirement in SVP proceedings may violate equal protection. *People v. Washington* (2021) 72 Cal.App.5th 453. In this appeal of the trial court's order committing appellant as a sexually violent predator following a court trial, appellant challenged the trial court's failure to advise him of his right to a jury trial and to obtain a knowing and intelligent waiver of that right. Appellant raised an equal protection challenge because other involuntary commitment statutes provide for jury trial advisements and express jury waivers from the committees, but the SVPA does not. The Second District Court of Appeal concluded that because appellant did not raise the claim in the trial court, the appellate court did not have an adequate record on which to evaluate the claim on appeal. However, the appellate court recognized that due to the nature of the alleged error, it would have difficult for Washington to raise his claim in the trial court. The Court of Appeal thus declined to find forfeiture and, after finding SVPs similarly situated to individuals facing other forms of civil commitment with respect to jury waiver requirements – remanded to the trial court to allow appellant to assert his equal protection challenge and the People to present a justification for the differential treatment of SVP's. The Court of Appeal noted that they "question whether the People will be able to show the dangerousness of SVP's is a constitutionally valid justification for differential treatment of alleged SVP's with respect to procedural protections of their right to a jury trial, as asserted

by the People at oral argument." (The court also held there was no due process right to a personal jury waiver in the SVP context.)

Defendant's due process right to a timely trial was not violated by a 10-plus year delay in bringing case to trial. *People v. Tran* (2021) 62 Cal.App.5th 330. The defendant was adjudicated an SVP after objecting to a pre-trial delay of more than 10 years. The Court of Appeal affirmed the trial court's adjudication and indeterminate state hospital commitment. The reviewing court concluded that defendant did not forfeit his federal due process challenge by failing to file a motion to dismiss where defendant objected to the delay. However, the Court of Appeal held the defendant's right to due process was not violated by the delay. Applying the criminal speedy trial violation test set forth in *Barker v. Wingo* (1972) 407 U.S. 514, the appellate court attributed most of the delay to the defense and found the delay did not prejudice the person's ability to defend against the SVP petition. In addition, applying the more general procedural due process test announced in *Mathews v. Eldridge* (1976) 424 U.S. 319, the appellate court explained that any risk of an erroneous deprivation of defendant's liberty was reasonably mitigated by the procedural requirements embedded in the SVP commitment framework and outweighed by the government's interest in public protection.

Evidence was sufficient to support finding that the 74-year-old defendant was an SVP. *People v. Hoffman* (2021) 61 Cal.App.5th 976. The Court of Appeal held that evidence was sufficient to support finding that the 74-year-old defendant was an SVP, thus, warranting his continued commitment, where defendant admitted that he could not guarantee that he would not molest another child upon release. The trial court believed defendant, and the Court of Appeal concluded, coupled with expert testimony, that was sufficient to support the SVP determination. According to the Court of Appeal, "'old age,' standing alone, does not relieve a person from SVP commitment. It is *a* factor to be considered by mental health professionals and the trier of fact in coming to an SVP determination."

Due process did not compel appointment of counsel or expert before petitioner set forth prima facie case for conditional release. *People v. McCloud* (2021) 63 Cal.App.5th 1. The trial court denied the SVP's conditional release petition (Welf. & Inst. Code, § 6608) – filed without the assistance of counsel or an expert – for failure to state a prima facie case. The Court of Appeal held that petitioner failed to make prima facie showing he would not engage in sexually violent criminal behavior if granted conditional release and that due process did not compel appointment of counsel or an expert at the initial pleading stage. By statute, the court need not appoint counsel or an expert until the conditional release petition clears the frivolousness bar and the matter is set for a hearing.

Admission of prison and state hospital records did not violate the rule prohibiting admission of multiple level or double hearsay. *People v. Orey*

(2021) 63 Cal.App.5th 529. The Court of Appeal held the trial court did not err in admitting prison and state hospital records, where the documents themselves were admissible under the business records and/or public records exceptions to the hearsay rule and the challenged contents of the documents – including statements made by defendant about his sexual attraction to young children – were admissible under the hearsay exception covering party admissions.

There is no hearsay exception authorizing the admission of SVP evaluator reports at the probable cause hearing to establish elements other than the existence of qualifying predicate offenses. *Walker v. Superior Court* (2021) 12 Cal.5th 177. The Supreme Court held that "Contrary to the Court of Appeal's reasoning, [Welfare and Institutions Code] section 6602, subdivision (a) does not create an exception that allows hearsay regarding nonpredicate offenses to be introduced via evaluation reports. What we hold is that nothing in the statutory language, its legislative history, its place in the broader SVPA statutory scheme, or comparisons to other statutory provisions indicates the existence of a hearsay exception for such hearsay in expert evaluations. Nor does anything in the SVPA or our case law indicate that the Legislature — in creating the hearing as a safeguard for SVP candidates to test the sufficiency of the evidence supporting the state's petition and prevent meritless ones from proceeding to trial — must have created an exception for hearsay on nonpredicate offenses to be introduced via evaluations. Under these circumstances, we decline to find that the Legislature explicitly or implicitly created a hearsay exception in section 6602, subdivision (a), for this evidence." Because the inadmissible hearsay was foundational to the trial court's probable cause determination, the Supreme Court reversed and remand to the Court of Appeal, with instructions for it to remand the matter to the trial court to conduct a new probable cause hearing.

In a bench trial, even where the court hears inadmissible case-specific hearsay, it is presumed to have applied *Sanchez* properly. *People v. Presley* (2021) 65 Cal.App.5th 1131. Appellant, who was found to be an SVP after a bench trial, asserted his commitment was in error because the expert testimony was based on inadmissible case-specific hearsay in violation of *People v. Sanchez* (2016) 63 Cal.4th 665. In ruling on pre-trial motion to exclude case-specific facts contained in hearsay statements relied upon by experts, the trial stated that because the proceeding was "a court trial," "not a jury trial," the trial court would be able to "differentiate what should be and what should not be admissible," and would "make the differentiation as the evidence [came] in." In affirming the judgment, the Court of Appeal acknowledged that the trial court may have heard inadmissible case-specific hearsay but concluded appellant could not overcome the presumption – found in Evidence Code section 664 – that the trial court applied *Sanchez* and properly ignored such material.

Exclusion of expert testimony in commitment proceeding under Sexually Violent Predator Act violated sex offender's right to due process. *People v. Jackson* (Feb. 14, 2022, G059593) ___ Cal.App.5th ___ [2022 WL 443887]. Because defense counsel failed to re-serve an expert designation, disclose to the prosecution the fact of the defense expert's meeting with appellant, and produce to the prosecution notes from that meeting, the trial court precluded the sole defense expert from testifying at trial. The Court of Appeal held that "a defendant in an SVP proceeding has a due process right to present expert witness testimony at trial" and that the trial court's exclusion of critical defense expert testimony to rebut the testimony of the prosecution's two expert witnesses deprived Jackson of a fair trial. The Court of Appeal held that the record did not support the prosecution's claims of undue prejudice as a result of the delayed disclosures or that absolute expert witness preclusion was the appropriate sanction under the circumstances of the case.

Petition for conditional release from civil commitment as sexually violent predator was not frivolous. *People v. Smith* (Feb. 17, 2022, A159649) ___ Cal.App.5th ___ [2022 WL 484922]. The Court of Appeal held the trial court applied an erroneous legal standard when considering a conditional release petition pursuant to Welfare and Institutions Code section 6608. The "repetitive-petition rule" only applies if the petition at issue repeats allegations from a prior petition that was denied as frivolous or on the merits following a hearing. In addition, the Court of Appeal held by moving the annual review and authorization provisions from former Welfare and Institutions Code section 6605 to section 6604.9, the Legislature did not intend for the change to permit committed persons to file unconditional discharge petitions without prior authorization.