Case Summaries for Published Court of Appeal Opinions (Non-SB 1437 Cases)
November 18, 2019—March 1, 2020[1]

[1] Cases are categorized based on the primary issue addressed by the Court of Appeal.

Competency

Case Name: *People v. Blanchard* (2019) 43 Cal.App.5th 1020 , **District:** 1DCA , **Division:** 3 , **Case #:** A156720
Opinion Date: 12/31/2019
Case Holding:
An appeal from an order finding a defendant incompetent to stand trial is not entitled to an independent review of the record by the court. Blanchard was adjudicated incompetent to stand trial on a probation revocation charge and was committed to the Department of State Hospitals. On appeal, counsel filed a brief seeking independent review of the record by the court pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Held: Appeal dismissed. In keeping with *Anders v. State of California* (1967) 386 U.S. 738, where appointed counsel files a brief that asserts no arguable issues in a criminal defendant's first appeal, the California Supreme Court in *Wende* adopted a procedure for the court to conduct its own independent review of the record. By its very terms, the *Anders/Wende* procedures apply to appointed counsel's representation of an indigent criminal defendant in the defendant's first appeal as of right. In both *In re Sade C.* (1996) 13 Cal.4th 952 (a parent's appeal from an order terminating parental rights) and *Conservatorship of Ben C.* (2207) 40 Cal.4th 529 (an appeal contesting the imposition of an LPS conservatorship), the Supreme Court found no reason to extend the independent review protection beyond a criminal defendant's first appeal as of right and concluded due process does not require an *Anders/Wende* review as a matter of fundamental fairness. Here, the court concluded the private interests at stake and the procedural protections in competency proceedings are similar to LPS commitments and that the process identified in *Ben C.* should be followed. Counsel filed a brief setting forth the relevant facts and the law, but no arguable issues, and advised Blanchard that he may file a supplemental brief on his behalf for the court to consider. Because the court did not receive a supplemental brief from Blanchard, the appeal was dismissed.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A156720M.PDF

Case Name: *People v. Leelu* (2019) 42 Cal.App.5th 1023 , **District:** 6 DCA, **Case #:** H045703
Opinion Date: 12/3/2019
Case Holding:
During a competency evaluation, the trial court's failure to appoint a second mental health expert was harmless error, as it was not reasonably probable the defendant would have been found competent had a second expert been appointed to evaluate her. Defendant was charged with stalking and trespass. In court, she made a number of odd, disjointed statements and was belligerent. The trial court declared a doubt as to her competency and suspended criminal proceedings (Pen. Code, § 1368). The appointed psychologist found defendant exhibited symptoms of paranoid schizophrenia and was incompetent to stand trial. After serving a commitment to Department of State Hospital (DSH), she was restored to competency and criminal proceedings resumed. On appeal she argued the trial court erred by failing to appoint a second mental health expert. Held: Affirmed. Under Penal Code section 1369, subdivision (a), a defendant or her attorney must expressly inform the court during the competency hearing that defendant is not seeking a finding of incompetence to initiate the requirement that the court appoint a second mental health expert. Defendant's attorney did not request a second expert and submitted on the report opining defendant was incompetent. However, when defendant learned of the expert's opinion, she had an angry outburst that her attorney interpreted as an objection to the findings. Assuming defendant's reaction constituted the notice necessary to require the trial court appoint a second expert, any error was a violation of defendant's statutory, rather than constitutional, rights and was harmless under the *Watson* standard.

Although defendant was restored to competency, her appeal of the section 1368 proceeding is not moot. The Attorney General argued defendant's appeal was moot because she had been restored to competency. Defendant countered that her appeal was relevant to calculation of conduct credits, which are awarded for jail custody but not for time spent in DSH (Pen. Code, § 4019). Defendant was correct. Her appeal will have a practical impact with respect to presentence credits and therefore was not moot.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/H045703.PDF

Confessions/Interrogations

Case Name: *People v. Morales* (2020) 44 Cal.App.5th 353 , **District:** 4DCA , **Division:** 2 , **Case #:** E070658
Opinion Date: 1/14/20
Case Holding:
Accusatory statements made by law enforcement in an interrogation are not, absent unusual circumstances, testimonial and, therefore, will not implicate the confrontation clause of the Sixth Amendment. During an investigation into lewd conduct on three minors, Morales was interviewed by Deputy Sheriff Manuel Campos in a police station. Campos repeatedly told Morales that he was not under arrest, but also repeatedly accused Morales of lying when he denied Campos's claims. Campos eventually arrested Morales and read him his *Miranda* rights. At trial, Campos was questioned by the People about the portions of the interrogation occurring after the *Miranda* warning. Morales later testified that his statements were coerced. After both sides rested, the People sought to introduce the full interrogation into evidence. It was admitted over Morales's Sixth Amendment objection. The jury found Morales guilty. He appealed. Held: Affirmed. The Sixth Amendment's confrontation clause bars admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36, 53–54.) In order for the bar to apply, the statement must (1) be offered for its truth, (2) have a sufficient degree of formality, and (3) be made with the primary purpose of at least creating evidence for the defendant's prosecution or creating an out-of-court substitute for trial testimony. Here, although it was unclear whether the statements were admitted for their truth, Campos's pre-*Miranda* statements lacked sufficient formality. The court declined to find that statements made by an interrogating officer are made for the purpose of creating evidence for the defendant's prosecution, because such a rule would "sweep too broadly, as it would make everything uttered by law enforcement in questioning a witness susceptible to confrontation clause challenges." [**Editor's Note:** In a footnote, the Court agreed with Morales that the fact that the full interrogation was admitted into evidence as late as it was effectively made Campos a witness who did not appear at trial with regard to the pre-*Miranda* statements for confrontation clause purposes.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/E070658.PDF

Evidence

Case Name: *People v. Winn* (2020) 44 Cal.App.5th 859 , **District:** 6DCA , **Case #:** H045157
Opinion Date: 1/30/2020
Case Holding:
Admission of photo of deceased victim while still alive did not prejudice defendant. Opinion on transfer from the California Supreme Court to consider application of Senate Bill No. 136. Defendant was convicted of killing his girlfriend's ex-husband. At trial, he argued self-defense, but witnesses testified defendant made pre-offense statements of his intent to kill the victim. On appeal, defendant challenged the trial court's admission of a photograph of the victim while still alive. Held: Affirmed; prior prison terms stricken. The California Supreme Court has cautioned against admission of photos of murder victims while alive unless the prosecution can establish their relevance because such photos tend to generate sympathy for the victim. Relevant evidence means evidence having any tendency in reason to prove or disprove a disputed fact that is material to the determination of the action (Evid. Code, § 210). The trial court should consider the actual relevance of such photos, set forth the grounds for their admission on the record, and thereafter restrain counsel from using the photo for a purpose beyond that for which it was admitted. Here, there was no issue regarding the victim's identity, so the photo had minimal probative value and the manner in which the prosecutor used the photo and the trial court's failure to restrain its usage was concerning. Nonetheless, there was no prejudice because the evidence against defendant was overwhelming.

The trial court erred by failing to inquire into defendant's allegations during a post-verdict *Marsden* hearing that his attorney had rested without consulting him about his desire to testify, but the error was harmless. After the verdict, defendant moved for new counsel under *Marsden*, claiming his attorney rested without calling the defense expert and without asking him whether he intended to testify. The trial court denied the motion, stating a *Marsden* hearing concerns only the adequacy of counsel's current and future representation, not the past actions taken by counsel. This was error. When a defendant seeks to discharge appointed counsel and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention. The trial court failed to inquire about defendant's desire to testify and focused on the adequacy of trial counsel's present or future representation without exploring whether counsel's performance at an earlier stage of the trial was deficient. The trial court should have

questioned counsel about defendant's complaints. However, this is one of the rare cases that does not compel reversal because the evidence was overwhelming.

Senate Bill No. 136 requires the Court of Appeal to strike defendant's enhancements for prior prison terms. SB 136 amended Penal Code section 667.5, subdivision (b) such that a one-year enhancement for a prior prison term shall be imposed only if the prior was for a sexually violent offense. When the Legislature amends a statute to reduce punishment for an offense, the reduction applies to all cases not yet final. Here, defendant's sentence included five prior prison term enhancements. None of the priors was for a sexually violent offense. Defendant argued, and the Attorney General agreed, the Court of Appeal should strike the enhancements. It did so.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/H045157A.PDF

Case Name: *People v. Royal* (2019) 43 Cal.App.5th 121, **District:** 4DCA , **Division:** 1 ,
Case #: D074343
Opinion Date: 12/10/2019
Case Holding:
Defendant's Sixth Amendment right to confront witnesses was not violated when the prosecution read the transcript of a witness's testimony from defendant's first trial to the jury. In his first trial for murder, Royal's ex-girlfriend, L.N., testified that Royal had confessed to murdering a man. The jury in Royal's first trial did not reach a verdict and a mistrial was declared. In his second trial, L.N. refused to testify. The trial court allowed her testimony in the first trial to be read to the jury. On appeal, Royal argued this evidentiary ruling denied him due process and the right to confrontation. Held: Affirmed. The confrontation clauses of the U.S. and state Constitutions guarantee defendants the right to confront the witnesses against them (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15). However, an exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Prior testimony may be admissible if the prosecution shows it made a good-faith effort to obtain the presence of the witness at trial. Under California law, the witness's prior recorded testimony may be introduced if the prosecution used due diligence in attempting to secure the missing witness. Here, the prosecution acted with due diligence in trying to locate L.N. Those steps included having Las Vegas police watch the witness's mother's house, telephone calls, and reaching out to law enforcement

agencies in other states in an effort to locate L.N. Though other means could have been employed to locate the witness, this was not required to show due diligence.

The trial court erred by admitting certain out-of-court statements under the past recollection recorded exception to the hearsay rule because the statements were made six years after the events. But the error was harmless. The victim was shot in May 2007. Police first interviewed L.N. about the incident in September 2013. She testified at Royal's first trial in September 2017. In the second trial, the prosecutor sought to introduce certain statements L.N. made in 2013 under the past recollection recorded exception to the hearsay rule. This was allowed. The Court of Appeal concluded the trial court abused its discretion by admitting the evidence. Hearsay is evidence of an out of court statement offered to prove the truth of the matter asserted therein and is inadmissible unless it falls within an exception. One exception based on past recollection recorded allows admission of statements that were made at a time when the fact recorded in the writing actually occurred or was fresh in the witness's memory. L.N.'s prior statements, admitted at the second trial, were made about six years after the murder. A length of time this considerable requires a party trying to admit the statements to lay a sufficient foundation to show that the facts were "fresh" in the declarant's mind at the time the statements were recorded. That did not occur here. However, given Royal's ability to cross examine L.N. in the first trial, the error was harmless under the *Watson* standard.

Royal was not denied his confrontation rights when he was precluded from cross-examining a prosecution expert about whether L.N.'s demands for money and immunity in exchange for her cooperation were consistent with the expert's profile of human trafficking victims. An expert in human trafficking testified that victims were often fearful to testify and suffered memory loss based on their abuse. The defense wanted to challenge the characterization of L.N. as a victim of trafficking by asking the expert about her demands for money and immunity in exchange for her testimony. This request was denied. On appeal Royal argued the ruling violated his Sixth Amendment rights by limiting the scope of his counsel's cross-examination of the expert. There was no error. An expert witness may be cross-examined about the matter upon which her opinion is based and the reasons for her opinion. However, the court found that there was no admissible evidence of L.N.'s demands before it at the time defense counsel sought to cross-examine the expert about the demands. It was only later that the demands were offered into evidence. If defense counsel felt it was important to ask the expert about L.N.'s demands, he could have recalled the expert and asked her about them. Further,

Royal does not explain how the expert's testimony about the impact of L.N.'s demands on her opinion would have produced a different impression of the expert's credibility.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/D074343.PDF

Case Name: *People v. Gonzalez* (2019) 42 Cal.App.5th 1144 , **District:** 1 DCA , **Division:** 5 , **Case #:** A150198
Opinion Date: 12/5/19
Case Holding:
The trial court erred in admitting uncertified, unauthenticated records to prove defendant suffered a prior felony conviction, requiring reversal. In a bifurcated jury trial on the allegation Gonzalez suffered a prior strike conviction, the prosecution requested the court take judicial notice of several documents. Gonzalez objected, arguing there was no foundation and the documents were not certified copies. The court granted the request after reviewing the records, noting that the name of one of the defendants listed in the records was an alias of Gonzalez's and that the 2004 minute orders used the same "Personal File Number" to identify Gonzalez as in the current case. The jury was provided the judicially noticed documents and found the allegation true. Held: Reversed. Certification serves to authenticate a copy of a writing. However, other evidence may establish that a purported copy of an official writing is authentic and reliable. (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187.) The proponent of a noncertified copy must produce additional authenticating evidence because a noncertified copy of an official writing does not constitute prima facie evidence of the existence and content of such writing. Here, although the trial court only maintained digital copies of court files on an electronic system, the trial court did not take notice of the digital copies or print out the records from the system itself. The prosecution represented the records were from the court's electronic system, but no evidence was introduced on this point. As the documents were the only evidence presented, the allegation was reversed for insufficient evidence and remanded to permit the People to retry the allegation.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A150198.PDF

Case Name: ***Fish v. Superior Court*** (2019) 42 Cal.App.5th 811 , **District:** 4DCA , **Division:** 1 , **Case #:** D076060
Opinion Date: 11/27/19
Case Holding:
General disclosure by a defendant to law enforcement officers about medications prescribed by a psychotherapist does not constitute waiver of defendant's psychotherapist-patient privilege. Following a fatal motor vehicle collision, Fish made statements to law enforcement officers that he was under the care of a psychotherapist who had prescribed him certain antidepressant and antipsychotic medications. The prosecution subpoenaed Fish's psychotherapist treatment records, arguing Fish waived his psychotherapist-patient privilege through his disclosures to law enforcement. The trial court denied Fish's motion to quash the subpoenas and indicated it would review the materials in camera. Fish petitioned for a writ preventing the trial court from reviewing his psychotherapy treatment records, and requiring the trial court to grant his motion to quash the subpoenas. Held: Writs issued. Confidential communications between a psychotherapist and patient are privileged. (Evid. Code, § 1014.) Once the claimant of the privilege establishes the existence of a psychotherapist relationship, the burden shifts to the opponent of the privilege to rebut the presumption of confidentiality, show waiver under Evidence Code section 912, or show the material sought falls under a statutory exception. Here, it was undisputed the psychotherapist-patient privilege applies and Fish had met his initial burden of proof. The District Attorney argued the trial court correctly concluded Fish waived the privilege by disclosing to responding law enforcement officers that his psychotherapist prescribed him certain medications for certain conditions. This is legally insufficient to waive the privilege that attached to Fish's communications with his therapist about those prescriptions and diagnoses. The disclosure of the existence of the psychotherapist-patient relationship does not reveal a significant part of the communication and does not constitute waiver. There is a difference between disclosure of a general description of treatment and disclosure of actual communications. The trial court erred in concluding otherwise.

The District Attorney is not entitled to discover defendant's psychotherapy records based on compelling need for the information to effectively prosecute defendant for serious driving-under-the-influence offenses. The psychotherapist-patient privilege is recognized as an aspect of a patient's constitutional right to privacy. Here, the District Attorney alternatively argued its compelling prosecutorial need for the requested materials outweighed Fish's countervailing privacy interest. The California Supreme Court has held that when no exception to the privilege has been established and there has

been no waiver, the state's claimed compelling need for the information to aid criminal prosecution does not justify invasion of the privilege. (*Menendez v. Superior Court* (1992) 3 Cal.4th 435.) The cases relied upon by the District Attorney are distinguishable because they either did not involve a privilege at all or because they involve a statutory exception to a privilege.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/D076060.PDF

Case Name: *People v. Anderson* (2019) 42 Cal.App.5th 780 , **District:** 2 DCA , **Division:** 8, **Case #:** B289456
Opinion Date: 11/27/2019
Case Holding:
It was not improper for trial court to admit evidence of a prior petty theft to prove defendant's intent to steal at a trial for attempted residential burglary. A neighbor identified Anderson as the man she saw forcefully shaking a window from outside her home. The window had pry marks, and pieces of the frame were damaged. The neighbor was scared because Anderson had previously threatened her and her family and stolen a lawn ornament. The jury convicted Anderson of attempted residential burglary, and the court imposed a life sentence because he had three prior strike convictions. He appealed, arguing that the court improperly admitted bad character evidence of prior threats and theft. Held: Affirmed. Character evidence is inadmissible when offered to prove a defendant's conduct on a specific occasion but may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. (Evid. Code, § 1101, subds. (a), (b).) Anderson argued that testimony about the lawn ornament theft was improperly admitted because stealing lawn ornaments and attempting to break into a home bear no similarity or connection. However, the earlier theft tended to support the inference Anderson intended to steal from the neighbor both times. Evidence of the theft therefore was admissible to show Anderson's intent when he attempted to break into the neighbor's home.

Evidence of Anderson's prior threats against the neighbor was admissible as to the neighbor's credibility as a trial witness. Here, the neighbor testified that Anderson had threatened her, her husband, and her dogs in the past. She also testified that he had broken her glass sliding window about a year before the incident in this case. Anderson's mother also left the neighbor notes that said "keep your mouth shut" and "don't talk about my children." On the 911 call, the neighbor stated she was afraid of Anderson.

Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) The jury was entitled to evaluate the neighbor's testimony knowing she testified under these circumstances. Admitting the threats was proper under Evidence Code section 352. The trial court limited the prosecution's introduction of Anderson's threats into evidence but defense counsel decided to ask many specific questions about the threats, thus opening the door to the prejudicial effect of the testimony.

The trial court did not abuse its discretion by denying defendant's request to strike two prior convictions under the Three Strikes law. Anderson argued the trial court should have stricken two of his three prior strikes because (1) his proposed alternate sentence of 19 years was sufficiently harsh and (2) his conviction for attempted burglary fell outside the spirit of the Three Strikes law. The Court of Appeal determined the first argument was irrelevant. As to the second argument, to determine whether a person is outside the spirit of the Three Strikes law, a trial court may consider a defendant's current and prior convictions, background, character, and prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Anderson's first strike was for residential burglary and his other two strikes were for making criminal threats. The facts here were "strikingly similar to the facts of the first residential burglary." Anderson's continuous criminal conduct, which includes threats of violence and burglarizing his neighbors, placed him within the law's spirit.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B289456.PDF

Habeas

Case Name: *In re Duval* (2020) 44 Cal.App.5th 401 , **District:** 4DCA , **Division:** 3 ,
Case #: G056247
Opinion Date: 1/21/20
Case Holding:
The People's failure to file a return to an order to show cause why the relief sought in defendant's petition for writ of habeas corpus should not be granted has the effect of conceding the factual allegations in the petition and the court may grant relief without holding an evidentiary hearing. Duval entered a plea agreement in exchange for a two year county jail sentence with a waiver pursuant to *People v. Cruz* (1988) 44 Cal.3d 1247, 1254, fn. 5. After Duval failed to appear at sentencing, the trial court

imposed a prison sentence of 9 years and 8 months. The next day, Duval appeared, and the court recalled its sentence and imposed a five-year county jail term. Duval's petitions for writ of habeas corpus were denied by the superior court and Court of Appeal. The Supreme Court granted a petition for review and directed the Court of Appeal to issue an order directing the People to show cause after the Attorney General conceded that the allegations in the petition established a prima facie showing of ineffective assistance of counsel. The matter was returned to the superior court for an evidentiary hearing. However, the People did not file a return or any other response to the order to show cause and no evidentiary hearing was held. The trial court granted relief to Duval over the People's objection. The People appealed. Held: Affirmed. When the Supreme Court orders the court to issue an order to show cause, it signifies its preliminary determination that the petitioner has made a prima facie statement of specific facts which, if established, entitle the petitioner to relief. The Penal Code then contemplates that the custodian of the confined person shall file a responsive pleading, called a return, justifying the confinement. (Pen. Code, § 1480; see also Cal. Rules of Court, rule 4.545 and 4.551(d).) If the return does not dispute the material factual allegations, the court may take them as true, and resolve the issues without an evidentiary hearing. Here, by failing to file a return, the People did not dispute the material factual allegations in the petition, and there was no need for the lower court to conduct an evidentiary hearing. The trial court accordingly acted within its habeas corpus authority when it imposed a time-served sentence of four years.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/G056247.PDF

Ineffective Assistance of Counsel

Case Name: *People v. Bernal* (2019) 42 Cal.App.5th 1160 , **District:** 6DCA , **Division:** H045620 , **Case #:** H045620
Opinion Date: 12/5/2019
Case Holding:
The appellate record failed to show that defendant's attorney unconstitutionally conceded guilt on some of the offenses where the record was silent as to the defendant's objective to maintain his innocence on all charges. Bernal was convicted of 10 offenses, including residential burglary and assault with a deadly weapon. Several prior serious felony convictions were found true. On appeal he argued his trial attorney was ineffective in violation of the Sixth Amendment because in final argument, the

attorney conceded his guilt on some of the counts. Held: Affirmed, but remanded for resentencing. In *McCoy v. Louisiana* (2018) 138 S.Ct. 1500, __ U.S. __, the U.S. Supreme Court found that an attorney may not concede guilt on a charge, even if to do so is a reasonable strategy given the evidence, when the defendant expresses his objective to maintain his innocence. However, in this case the record was silent on whether defendant disagreed with his attorney's concession of guilt on some of the charges and he did not ask to replace his attorney for doing so. Absent a contrary directive or timely objection by the defendant, conceding guilt on the charges for which there was overwhelming evidence would be a reasonable strategy for counsel to garner credibility and create a more favorable environment for the jury to consider the defense arguments on other charges that were reasonably in dispute. There was no ineffective assistance of counsel.

Defendant's attorney was not ineffective when he failed to object to drug evidence and disparaged his client during final argument. Bernal argued his attorney prejudicially failed to object to irrelevant and prejudicial drug use evidence and improperly disparaged him during final argument by telling the jury that some of the evidence showed he was a "bad guy" and "a criminal." To prevail on an ineffective assistance of counsel claim a defendant must show his attorney's performance fell below prevailing professional norms and that this deficient performance affected the outcome of the trial (*Strickland v. Washington* (1982) 466 U.S. 686). The drug use evidence was relevant to the charge of child endangerment and, in any event, counsel may have decided that evidence suggesting Bernal was under the influence of drugs during his crime spree could ultimately be more beneficial than harmful by providing an explanation for his conduct. With respect to the alleged negative comments trial counsel made about Bernal during argument, this appears to be part of a strategy to concede the near inevitable outcome on certain charges in order to gain credibility with respect to the defense arguments on other charges where the evidence was not as strong.

The trial court did not commit sentencing error. The trial court denied Bernal's request to strike his prior serious felony allegations (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497). This was not an abuse of discretion because there was support for the finding that Bernal fell within the spirit of the Three Strikes law given his "unrelenting" criminal behavior. Bernal also argued the trial court should have stayed the sentence for assault with a deadly weapon because it arose out of the same conduct as his auto burglary conviction. (Pen. Code, § 654.) The trial court did not abuse its discretion by finding that Bernal harbored separate intents when he broke into a car in a parking lot intending to steal items inside it, then pulled a knife on the car's owner when confronted,

with a new intention to get away. Though the trial court did not err in sentencing, the passage of Senate Bill No. 1393 since the time of sentencing requires the matter to be remanded so the trial court may decide whether to exercise its new discretion to strike a prior serious felony enhancement (Pen. Code, § 667, subd. (a)).

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/H045620.PDF

Jury Instructions

Case Name: *People v. Medellin* (2020) 45 Cal.App.5th 519 , **District:** 5DCA , **Case #:** F076022
Opinion Date: 2/20/2020
Case Holding:
Assault convictions and great bodily injury enhancements reversed where CALCRIM's ambiguous instructions created alternative-theory error and prosecution relied on legally invalid theory. Defendant punched two victims during a fight at a brewery causing each person a facial injury requiring several stitches to close. The jury found defendant guilty of two counts of felony assault (Pen. Code, § 245, subd. (a)(4)) and found true great bodily injury enhancements as to each count (Pen. Code, § 12022.7). He appealed, arguing that the prosecutor prejudicially misstated the law in closing argument by arguing an ambiguity in the pattern jury instructions. The Attorney General conceded the prosecutor misstated the law but alleged there was no resulting prejudice. Held: Reversed and remanded. When attacking the prosecutor's remarks to the jury, the defendant must show that in the context of the whole argument and given instructions, there was a reasonable likelihood the jury understood or applied the comments in an improper or erroneous manner. Great bodily injury is "significant or substantial physical injury. It is an injury that is greater than minor or moderate harm." (CALCRIM Nos. 875, 3160.) The prosecutor in this case argued harm greater than minor harm alone was sufficient. Under the plain language of the instruction, the jury could have convicted defendant if they believed either greater than minor harm *or* greater than moderate harm was sufficient. The instruction's "or" usage created an invalid legal theory as to what constitutes great bodily injury—greater than minor harm, which is invalid, and greater than both minor and moderate harms, which is valid. Because it was entirely possible the jury believed only that "more than minor" harm was sufficient to prove the elements, the error was not harmless beyond a reasonable doubt. The

convictions and enhancements were reversed and the cause remanded for further proceedings.

Defendant waived any error related to lesser included offense instructions. During a preliminary discussion regarding potential jury instructions, the court asked defense counsel about his position on lesser-included offenses. Counsel affirmatively stated he was not requesting instruction on lesser-included offenses. Although a trial court is obligated to give instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, a claim of error may be waived under the doctrine of invited error if trial counsel both intentionally caused the trial court to err and clearly did so for tactical reasons. The defendant here waived the issue by inviting the court to err.

The evidence was sufficient to prove each charge and enhancement. When considering a challenge to the sufficiency of the evidence to support a conviction, the court reviews the entire record in the light most favorable to the judgment. Reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. The only issue was whether the force defendant exerted was "likely to produce great bodily injury." Here, the defendant punched the first victim's jaw, creating a laceration requiring three stitches. The victim testified that the impact of this punch was "a little harder" than other attacks from other people. The second victim sustained a cut on his lip requiring seven stitches. Multiple witnesses described watching the defendant wind his arm back, run or hop towards the victim, and release a punch downward connecting with the victim's mouth. The evidence proved more than a mere possibility that the force actually used would result in greater than moderate harm.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/F076022.PDF

Juveniles Tried as Adults

Case Name: *People v. Johnson* (2020) 45 Cal.App.5th 123 , **District:** 4DCA , **Division:** 2 , **Case #:** E069732
Opinion Date: 1/30/20
Case Holding:
Juvenile court did not err by failing to secure an express personal waiver of the right to a juvenile fitness hearing from defendant. Johnson was charged with robbery, carjacking, and various kidnapping offenses. Johnson was 17 years old when he committed the offenses. Charges were originally filed in adult court, but when Proposition 57 was enacted during the pendency of criminal proceedings, Johnson's case was transferred to juvenile court to determine whether he was fit to proceed as a juvenile or should be tried as an adult. At the beginning of the fitness hearing, Johnson's attorney stipulated, in Johnson's presence, that the case should proceed in criminal court based on the probation officer's report and recommendation. In criminal court, Johnson was convicted by a jury and sentenced to life. On appeal, Johnson argued that the juvenile court prejudicially erred by failing to obtain a personal waiver from him of his right to a fitness hearing. Held: Reversed in part on other grounds and remanded. When an accused is represented by counsel, the accused surrenders all but a handful of fundamental personal rights to counsel's complete control of defense strategies and tactics. No clear set of criteria exists for deciding whether a right is so fundamental in nature as to require a personal waiver by the accused. An express waiver by a defendant is required if a constitutional right or "core autonomy interests" is at stake. (*People v. Trujillo* (2015) 60 Cal.4th 850, 859.) Unlike the fundamental matters arising from constitutionally-derived rights for which counsel cannot waive on behalf of his or her client, the right to a fitness hearing is merely statutory. The decision to waive the right to a fitness hearing is a tactical decision that counsel can make on behalf of his or her client.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/E069732.PDF

Case Name: *Andrew M. v. Superior Court* (2020) 43 Cal.App.5th 1116 , **District:** 1DCA , **Division:** 5 , **Case #:**
Opinion Date: 1/6/20
Case Holding: A158129
A conditional reversal and limited remand to the juvenile court to conduct a transfer hearing pursuant to Proposition 57 does not constitute a "new trial" for

purposes of exercising a Code of Civil Procedure section 170.6 challenge. In 2005, shortly before turning 18, Andrew M. committed an armed robbery, during which an accomplice shot and killed a police officer. Andrew M. was convicted of a special circumstance first degree murder, among other offenses and enhancements. After two direct appeals, Judge Brady re-imposed an LWOP sentence, plus 23 years. Andrew M. appealed again. Meanwhile, Proposition 57 became effective. The Court of Appeal remanded for a Proposition 57 transfer hearing. Andrew M.'s challenge under section 170.6 to the assignment of his transfer hearing to Judge Brady was denied. He sought writ relief and an order to show cause was issued. Held: Denied. Section 170.6 permits a party in civil and criminal actions to move to disqualify an assigned trial judge based on a simple allegation that the judge is prejudiced against the party. (*Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, 1248.) A section 170.6 challenge may be made following reversal on appeal "if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter." (Code Civ. Pro., § 170.2, subd. (a)(2).) A transfer hearing conducted pursuant to Proposition 57 is not a "new trial" because it is not a proceeding at which the minor's guilt or innocence would be determined. Proposition 57 requires prosecutors to move to transfer minors from juvenile court to a court of criminal jurisdiction. In delinquency proceedings, "trial" means the adjudicatory phase of the jurisdictional hearing. After a conditional remand for a Proposition 57 transfer hearing, the defendant "is not entitled to a jurisdictional hearing, or the equivalent of a second trial, in juvenile court." (*People v. Hargis* (2019) 33 Cal.App.5th 199, 208, fn. 4.) Guided by *Peracchi*, the court rejected Andrew M.'s argument that the transfer hearing is a new trial because Judge Brady would be exercising discretion and making factual findings. The conditional reversal and remand for transfer hearing did not disturb the verdict or vacate the sentence.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A158129.PDF

Case Name: *In re Jones* (2019) 42 Cal.App.5th 477 , **District:** 1 DCA, **Division:** 4 ,
Case #: A157877
Opinion Date: 11/22/2019
Case Holding:
It is not a violation of the equal protection clause to limit Penal Code section 1170, subdivision (d)(2)'s resentencing provision to juvenile offenders serving LWOP sentences, while denying the same opportunity to 18- to 25-year-old offenders serving LWOP. Jones filed a petition in superior court to recall his sentence pursuant to Penal Code section 1170, subdivision (d)(2), which applies to defendants who are serving

an LWOP sentence for offenses committed when the defendant was under 18 years old. Jones acknowledged that he was 19 when he committed the 1994 murder but argued that he should be permitted to petition to recall his LWOP sentence as a matter of equal protection. The superior court construed the pleading as a habeas petition and rejected it on the merits. Jones then filed a habeas petition in the Court of Appeal. Held: Petition denied. The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. Because LWOP offenders who were between the ages of 18 and 25 when they committed their offenses are adult offenders, they are not similarly situated to juvenile offenders described in section 1170, subdivision (d)(2). The United States Supreme Court has repeatedly found that children are constitutionally different from adults for purposes of sentencing because of their lack of maturity, vulnerability to negative influences, and incomplete character development. By drawing the line at a defendant's 18th birthday, the Legislature has chosen to target the youngest, and presumably the most deserving, of the group of youthful offenders. Even if similarly situated, the Legislature has a rational basis to treat the groups differently. Drawing a bright line at age 18 establishes an objective and easily implemented measure. While a different line could have been drawn, it is not entirely arbitrary to limit section 1170, subdivision (d)(2) to individuals who committed their crimes before they were 18 years old.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A157877.PDF

Offenses—General

Case Name: *People v. Abrahamian* (2020) 45 Cal.App.5th 314 , **District:** 2DCA , **Division:** 6 , **Case #:** B289162
Opinion Date: 2/18/2020
Case Holding:
Conviction for possessing a false notary public's acknowledgment was reversed where the evidence was insufficient to show that the document was completely filled out. Appellant, her husband, and her sister forged documents to convey a residential property to appellant. Appellant's sister was a notary public who allegedly authenticated the grantor's signature on the deed, though the owner of the residence denied signing the deed and denied owning a bank account jointly held with appellant's husband. A jury convicted appellant of knowingly procuring a forged quitclaim deed (Pen. Code, § 115)

and knowingly possessing a false completed notary public's acknowledgment with intent to defraud (Pen. Code, §§ 475, subd. (a), 470, subd. (d)). On appeal, appellant challenged the sufficiency of the evidence proving she possessed a false completed notary public's acknowledgement because the documents were incomplete. Held: Reversed in part. Penal Code section 475 prohibits the possession of any forged, altered, or counterfeit items, or any completed items contained in subdivision (d) of section 470. One of the items listed in section 470, subdivision (d) is the acknowledgement of any notary public. A notary public's certificate of acknowledgment is not a "completed item" within the meaning of section 475, subdivision (a) if it omits the date that the person seeking notarization appeared before the notary public. Here, the acknowledgments found in appellant's possession were either undated or were attached to unsigned affidavits. The requirement that the certificate of acknowledgment include the date and signature is not a mere formality. The conviction must be reversed.

A reviewing court cannot reduce a conviction of a completed crime to an attempt if the jury was not properly instructed of all the elements of the completed crime. Under Penal Code sections 1181 and 1260, an appellate court that finds that insufficient evidence supports the conviction for a greater offense may modify the judgment of conviction to reflect a conviction for a lesser included offense. (*People v. Bailey* (2012) 54 Cal.4th 740, 748.) For an attempt to qualify as a lesser included offense of the completed crime, the elements test requires that the greater offense include all the statutory elements of the lesser offense, such that a crime cannot be committed without also necessarily committing a lesser offense. An appellate court can reduce a conviction of a completed crime to an attempt to commit that crime only if the jury, by finding defendant guilty of the completed crime, impliedly found all the elements of the attempt offense were proven. An element of appellant's charged section 475, subdivision (a) offense was possession of a *completed* notary acknowledgment. "Since an attempt to commit a crime requires 'a specific intent to commit the crime' (§ 21a), it follows that an attempt to commit a violation of section 475(a) requires a specific intent to possess a false completed notary acknowledgment." Here, because the jury was not instructed on the requirement that the acknowledgment must be completed, it could not have found that appellant had attempted to possess a false completed notary acknowledgment. [**Editor's Notes:** (1) The Court of Appeal urged the Legislature to revisit this area of the law and clarify that possession of an incomplete forged notary document with the requisite criminal intent constitutes an attempted violation of section 475(a). (2) CALCRIM No. 1930, the jury instruction for section 475(a), does not require a finding of "completeness" where, as here, the defendant is charged under the second portion of the statute, which is

limited to the possession or receipt of completed items listed in section 470, subdivision (d). The Court of appeal noted the jury instruction should be modified to rectify this omission.]

Enhancement and fine that require the conviction of two related felonies must be reversed. The jury found true an aggravated white collar crime enhancement allegation that appellant had committed two related felonies which resulted in a loss of more than $500,000 (Pen. Code, § 186.11, subd. (a)(1), (2).). The court also imposed a $500,000 fine under section 186.11, subdivision (c), which is authorized only when a person has been convicted of two or more related felonies. Since the court reversed the section 475, subdivision (a) conviction and the conviction could not be reduced to an attempted violation of that section, appellant stood convicted of only one felony, not two related felonies. The court reversed the true finding on the aggravated white collar crime enhancement and struck the $500,000 fine. [**Editor's Note:** The Court of Appeal also concluded that uncharged acts were admissible to prove intent and commission of the charged offenses pursuant to a common design or plan and that appellant forfeited her *People v. Dueñas* (2019) 30 Cal.App.5th 1157 issue because she failed to raise it in the trial court.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B289162.PDF

Case Name: *People v. Bermudez* (2020) 45 Cal.App.5th 358 , **District:** 3DCA , **Case #:** C079168, C079169
Opinion Date: 2/18/20
Case Holding:
Penal Code section 16470, defining a "dirk or dagger," is not unconstitutionally vague. An officer stopped defendant, performed a pat down search, and found a solid metal object, about as thick as a pen, in defendant's front pant pocket. One end had been ground down to form a dull point, and the other end had red tape to form a handle, which pointed upwards in defendant's pocket. Defendant was convicted by a jury of carrying a concealed dirk or dagger (Pen. Code, § 21310). On appeal, he challenged the dirk statute as unconstitutionally vague. Held: Affirmed. To satisfy due process and survive a vagueness challenge, a criminal statute must (1) give adequate notice of what activity is prohibited, and (2) provide a standard for police enforcement and ascertainment of guilt. Section 16470 defines a dirk or dagger as "a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that *may inflict*

great bodily injury or death." (Italics added.) Here, defendant argued the term "may" and "great bodily injury" fail to give notice of what activity is prohibited, because an individual is left to guess whether an item has ever inflicted great bodily injury or could do so in the future. The court disagreed, finding the meaning of "may" can be objectively ascertained by reference to common experiences. When read with the statutory language prohibiting "a knife or other instrument . . . capable of ready use as a stabbing weapon," a person of ordinary intelligence can determine with a reasonable degree of certainty the nature of the instrument that may not be carried. Nor does the word "may" render the statute vague under *United States v. Johnson* (2015) 135 S.Ct. 2551, which has no application to laws that require gauging the riskiness of conduct in which a person engages. Further, to be guilty of carrying a concealed dirk, a defendant must *know* the concealed instrument could be readily used as a stabbing weapon. This knowledge requirement renders the statute sufficiently definite to provide a standard for police enforcement and ascertainment of guilt. Thus, section 16470 is not unconstitutionally vague.

A gang expert's testimony about gang enhancement predicate offenses does not violate *People v. Sanchez* (2016) 63 Cal.4th 665 so long as the predicate offenses do not involve defendant or individuals involved in the defendant's case. In a separate trial, defendant was convicted of assault with a deadly weapon with a vehicle and a gang enhancement was found true (Pen. Code, §§ 245, subd. (a)(1), 186.22, subd. (b)(1)) based on evidence defendant hit another car with his vehicle and made a reference to the Eastside Trece gang. At trial, a detective provided expert testimony about five predicate offenses establishing Eastside Trece as a criminal street gang. In this consolidated appeal, defendant argued the expert's testimony relayed case-specific facts in violation of *Sanchez*. *Sanchez* held that if an expert testifies to case-specific out-of-court statements to explain the bases for his or her opinion, those statements must be admitted through an applicable hearsay exception. "Case-specific facts" are facts relating to particular events and participants alleged to have been involved in the case being tried. Predicate offenses "are chapters in a gang's biography and constitute historical background information, not case-specific information." Here, none of the predicate offenses involved defendant. Thus, the expert's testimony about the predicate offenses related background information, not case-specific hearsay, and was not violative of *Sanchez*. In a footnote, the court acknowledged a split of authority among Courts of Appeal as to whether testimony about predicate offenses is case-specific information and disagreed with *People v. Ochoa* (2017) 7 Cal.App.5th 575. [**Editor's Note:** In the unpublished portion of the opinion, the court remanded for exercise of the trial court's discretion under Senate Bill No. 1393 to

consider striking the five-year prior serious felony sentencing enhancement (Pen. Code, § 667, subd. (a)). During that remand, defendant may request a hearing on his ability to pay the fines and fees imposed. The court also struck the one-year prior prison term (Pen. Code, § 667.5, subd. (b)) pursuant to Senate Bill No. 136.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/C079168A.PDF

Case Name: *People v. Robins* (2020) 44 Cal.App.5th 413 , **District:** 4DCA , **Division:** 3 , **Case #:** G057291
Opinion Date: 1/21/2020
Case Holding:
Because a completed *Estes* robbery necessarily includes a "successful attempt" to commit robbery, defendant was properly convicted of attempted robbery for his participation in a completed *Estes* robbery. Codefendant Benson was seen by a loss prevention officer (LPO) inside a store loading her arms with clothing. Benson then exited the store without paying for the merchandise and headed for a waiting car. The LPO attempted to stop her, knocking merchandise out of her hands. Defendant Robins and another man exited the waiting vehicle and threatened the LPO, who backed off. The defendants were thereafter chased and apprehended by the police. Robins was initially charged with robbery, but was held to answer for attempted robbery, and not robbery. Robbins was convicted of attempted robbery and felony reckless evading. On appeal Robins argued there is no such crime as attempted *Estes* robbery because once force is used in an effort to escape apprehension for a shoplifting, the crime is complete. Held: Affirmed. Robbery is the felonious taking of another's personal property, from his person or immediate presence, against his will, by means of force or fear. In an *Estes* robbery, the thief will have possessed the property, however temporarily, before using force. If the thief uses force while in possession of the property, the crime is complete when the force is used. But even if every attempted *Estes* robbery is necessarily a completed crime, a "successful attempt" is a rational concept established in the Penal Code and punishable under Section 663, which provides that a defendant may be convicted of an attempt even though the charged crime has been completed.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/G057291.PDF

Case Name: *People v. Roles* (2020) 44 Cal.App.5th 935 , **District:** 3DCA , **Case #:** C086645
Opinion Date: 1/8/20
Case Holding:
Insufficient evidence supported multiple convictions for criminal threats under Penal Code section 422 where the victim testified only to one period of sustained fear after listening to multiple verbal threats left on her voicemail. Over a period of four days, defendant left over twenty threatening messages regarding an ongoing family law dispute on the voicemail of his minor son's attorney, Jennifer B. The messages threatened Jennifer B., his wife, and his wife's attorney Heather S. Jennifer B. listened to the messages all at once when she returned to her office. Defendant was convicted of nine counts of criminal threats (Pen. Code, § 422) against Jennifer B., and one count against Heather S., as well as stalking and making annoying phone calls. Defendant appealed, arguing he could only be convicted of one count of criminal threats against Jennifer B, because she heard all the threats at the same time and experienced a single period of sustained fear. Held: Reversed in part. Section 422, which defines criminal threats, has five elements, one of which is that the threat actually caused the person threatened to be in sustained fear for her own safety or for her immediate family's safety. Section 422 authorizes only one conviction and one punishment per victim, per threatening encounter during which the victim suffers a single period of sustained fear. Here, the court concluded there was no evidence Jennifer B. experienced more than one period of sustained fear. She did not testify her fear increased or changed from one message to the next. Instead, Jennifer B. testified about her fear after hearing all of the messages, indicating it was the whole of the messages that placed her in sustained fear. Accordingly, substantial evidence did not support eight of defendant's nine convictions for criminal threats against Jennifer B.

Insufficient evidence supported conviction for criminal threat against a third party victim where there was no evidence the defendant intended the threat be conveyed to the third party victim. Defendant argued he could not be convicted of making criminal threats against Heather S. because she was not the recipient of the messages left on Jennifer B.'s voicemail and there was no evidence he intended Heather S. to hear the messages. The Court of Appeal agreed. Section 422, which defines criminal threats, has five elements, including that the defendant made the threat with the specific intent that the statement was to be taken as a threat by the victim. Where a threat was conveyed through an intermediary, the person making the threat must have intended it to be conveyed to the victim. Here, where the messages were left on Jennifer B's voicemail, no

substantial evidence supported the conclusion defendant specifically intended Jennifer B. to communicate the voice messages to Heather S. Although the three were together previously at an earlier court hearing, there was no evidence linking the messages with that hearing. Further, the threats were primarily against Jennifer B. Accordingly, the criminal threats conviction relating to Heather S. must be reversed.

Penal Code section 654 prohibits punishment for both the stalking and the criminal threats counts where the stalking count was based on messages left for the victim, which included the messages supporting the criminal threats counts. The stalking count was based on 28 voice messages defendant left for Jennifer B. between August 31 and September 3, which included the messages supporting the criminal threats counts. Defendant argued he cannot be punished for both stalking and criminal threats under section 654 because "the crimes comprise a single criminal act." The Court of Appeal agreed. Section 654's proscription against multiple punishment may apply when a course of criminal conduct violates more than one statute. Where a defendant's crimes are the result of a course of criminal conduct, courts endeavor to determine whether the course of conduct is divisible, i.e., whether it constitutes more than one criminal act. A course of conduct will give rise to more than one criminal act if the actions were incident to more than one objective. Here, the criminal threats and stalking convictions arise from the same course of conduct, that is, the voice mails defendant left for Jennifer B. The phone calls were incident only to one objective: to place Jennifer B. in fear. Thus, section 654 applies to prohibit separate punishments for the stalking and criminal threats convictions.

The record affirmatively demonstrated defendant knowingly and intelligently waived his right to a jury trial, despite a lack of advisements by the trial court, where the defendant acknowledged he spoke about the meaning of a jury trial with his trial counsel before waiving that right. Defendant argued he did not make a knowing and intelligent waiver of his right to a jury trial where the trial court did not give specific advisements about the nature of his right to a jury trial and that a trial judge sitting alone would decide the case. The Court of Appeal disagreed. A defendant may waive his constitutional right to a jury trial, provided the waiver is knowing and intelligent. While the California Supreme Court in *People v. Sivongxxay* (2017) 3 Cal.5th 151, provided general guidance for trial courts, the court was careful to emphasize that this "guidance is not intended to limit trial courts to a narrow or rigid colloquy." The record shows defendant and his counsel had "extensive conversation[s]" about court and jury trials. Notably, defendant acknowledged he spoke about the meaning of a jury trial with his counsel as well and not just what it meant to waive the right to a jury.

Accordingly, the record affirmatively demonstrated defendant provided a knowing and intelligent waiver of his right to a jury trial.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/C086645M.PDF

Case Name: *People v. Romero* (2019) 44 Cal.App.5th 381 , **District:** 2DCA , **Division:** 2 , **Case #:** B293965
Opinion Date: 12/23/2019
Case Holding:
Sufficient evidence supported defendant's mayhem conviction even though victim refused to show that he did not have scars from multiple stab wounds because the trial court could infer from the evidence that the victim's wounds resulted in scars.
In 2017, Romero and several co-defendants attacked a victim. The victim was stabbed eight times, resulting in one to three centimeter lacerations. His wounds were closed with surgical staples and sutures. At trial, the victim testified to having three or four stab wounds that look like scrape marks. He further testified that, ten months later, everything had healed "back to normal like nothing happened," but refused to remove his shirt to show he did not have scarring. Evidence was presented that the victim feared retaliation for testifying against other gang members. Romero was convicted of aggravated mayhem, among other offenses, but the trial court reduced the conviction to mayhem. He appealed, arguing his mayhem conviction should be reversed because there was insufficient evidence the victim suffered permanent disfigurement or a disability that was more than slight or temporary. Held: Affirmed. "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless . . . is guilty of mayhem." (Pen. Code, § 203.) Permanent scarring constitutes a disfiguring injury. (*People v. Page* (1980) 104 Cal.App.3d 569, 578.) An injury within the meaning of mayhem is still considered permanent if modern technology effectively repairs the injury. (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1574.) Here, although there was no direct evidence of scars on the victim's body, the trial court could infer from the evidence presented that the victim's wounds resulted in scars, which satisfy the disfigurement element of mayhem. In light of the gang evidence, it was reasonable for the trial court to infer the victim wanted to avoid the consequences of testifying, not that he did not suffer scars from the stabbing. [**Editor's Note:** The Court of Appeal also concluded (1) the abstract of judgment must be corrected to reflect that the trial court reduced Romero's conviction from aggravated mayhem (Pen. Code, § 205) to mayhem (Pen. Code, § 203); (2) the trial court did not infringe on Romero's

constitutional rights by finding that his prior juvenile adjudication constituted a strike; and (3) remand was necessary for the trial court to impose a sentence on the count 3 GBI enhancement. Romero filed a petition for review, which was denied. Justices Liu and Groban were of the opinion the petition should have been granted.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B293965.PDF

Case Name: *People v. Ramirez* (2019) 43 Cal.App.5th 538 , **District:** 5 DCA , **Case #:** F076911
Opinion Date: 12/17/19
Case Holding:
Arranging a meeting with a minor for lewd purposes (Pen. Code § 288.4, subd. (a)) is a lesser included offense of meeting with a minor for lewd purposes (Pen. Code § 288.4, subd. (b)). Ramirez was convicted of arranging a meetings with a minor for lewd purposes (Pen. Code, § 288.4, subd. (a)) and meeting with a minor for lewd purposes (Pen. Code § 288.4, subd. (b)), among other offenses. On appeal, Ramirez argued her conviction for arranging a meeting with a minor for lewd purposes should be reversed as a lesser included offense of meeting with a minor for lewd purposes. The People conceded. Held: Reversed. A defendant cannot be convicted of both a greater offense and a lesser included offense. As applicable in this case, a lesser offense in necessarily included in a greater if the statutory elements of the greater offense include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. Subdivision (b) of section 288.4 expressly incorporates all of the elements of subdivision (a). A person who violates subdivision (b) therefore necessarily violates subdivision (a) as well. Thus, subdivision (a) is a lesser included offense of subdivision (b). [**Editor's Note:** The current bench note for CALCRIM No. 1126 states "Violations of section 288.4(a) may be lesser included offenses of violations of section 288.4(b). In the alternative, a violation of section 288.4(b) could be characterized as sentence enhancement of a violation of section 288.4(a)." This court clarified that subdivision (b) is not an enhancement because it does not provide for an additional term of imprisonment; it establishes an independent sentencing triad.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/F076911.PDF

Case Name: *People v. Drayton* (2019) 42 Cal.App.5th 612 , **District:** 1 DCA , **Division:** 5, **Case #:** A155725
Opinion Date: 11/22/2019
Case Holding:
Substantial evidence supported defendant's conviction of assault by means of force likely to cause great bodily injury (GBI) where he grabbed his ex-girlfriend and pushed her towards the path of an oncoming train. Drayton's ex-girlfriend and her son were standing on a train platform. As a train approached, Drayton placed his ex-girlfriend in a bear hug and pushed her towards the oncoming train. She screamed and he released her as the train passed by. Based on this act, Drayton was convicted of assault by means of force likely to cause GBI (Pen. Code, § 245, subd. (a)(4)). On appeal, Drayton argued the force he used was not "likely" to cause GBI and therefore, his conviction was unsupported by substantial evidence. Held: Affirmed. Whether an assault is likely to cause GBI depends on the force the defendant actually used, not the force that he might have used. Courts must assess the potential harm in light of the evidence. A mere possibility of injury is not enough. However, a person can be guilty of an aggravated assault despite causing no injury so long as the defendant's actions made a serious injury likely. Here, based on timing and proximity, substantial evidence supported the verdict because the ex-girlfriend was in genuine danger of being struck by a train when Drayton pushed her towards the tracks as a train approached and thus his action was likely to cause GBI.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A155725.PDF

Offenses—Kidnapping

Case Name: *People v. Harper* (2020) 44 Cal.App.5th 172 , **District:** 1DCA , **Division:** 2 , **Case #:** A152284
Opinion Date: 1/9/2020
Case Holding:
The *Williamson* rule did not bar defendant's convictions for kidnapping because there is no indication the Legislature intended defendant's conduct to be prosecuted solely under a more specific statute. Based on their acts involving an 18-year-old woman, Harper and others were convicted of numerous offenses including conspiracy to commit human trafficking, kidnapping, and sex offenses. On appeal Harper argued his convictions for kidnapping and kidnapping-for-extortion must be reversed because he

was prosecuted under general offenses rather than the specific offense intended for his conduct. Held: Affirmed. Under the *Williamson* rule, if each element of a general statute corresponds to an element of a special statute, or if violation of the special statute necessarily or commonly results in violation of the general statute, courts infer that the Legislature intended that the proscribed conduct be prosecuted exclusively under the special statute. Here, Harper argued his convictions of kidnapping (Pen. Code, § 207) and kidnapping-for-extortion (Pen. Code, § 209, subd. (a)) must be reversed because his conduct may only be prosecuted under Penal Code section 266a, which prohibits taking a person against her will and without her consent for the purpose of prostitution. However, no element of section 266a corresponds to the asportation element of kidnapping, which requires that the defendant moved the victim substantially. Further, a violation of 266a does not necessarily or commonly involve such an asportation, since a person could "take[]" a victim without consent and against her will for the purpose of prostitution, without moving the victim substantially. Thus, the *Williamson* rule did not bar Harper's prosecution for kidnapping.

Defendant's prosecution for kidnapping-for-extortion was not barred by the *Williamson* rule. The elements of kidnapping for extortion (Pen. Code, § 209, subd. (a)) include the element of extortion (i.e. obtaining property by wrongful use of force or fear), which does not correspond to an element of abduction or procurement by fraudulent inducement for prostitution (Pen. Code, § 266a). Nor does a violation of the special statute necessarily or commonly result in a violation of the general statute. Section 266a could be violated by a person taking a victim without consent and against the victim's will for the purpose of prostitution, without the person using force or fear to obtain property from the victim. Thus, the *Williamson* rule did not bar Harper's prosecution for kidnapping-for-extortion.

The evidence was sufficient to support defendant's convictions for kidnapping for extortion. Section 209, subdivision (a) describes four types of aggravated kidnapping: (1) for ransom; (2) for reward; (3) to commit extortion; and (4) to extract from a person money or valuables. Extortion does not require that the fruits of the extortion be obtained from a third party. Harper argued that he did not extort one of the victims he kidnapped because he sought only her "body" and "her sexual conduct," and that neither qualifies as property subject to extortion. However, Harper's convictions of kidnapping for extortion were based on his twice seizing the victim with the intent to obtain money from her through forced prostitution. His conduct qualified as extortion.

Although the instruction given the jury on kidnapping for extortion was incomplete, defendant was not prejudiced by this error. With respect to the kidnapping for extortion charge, the jury was instructed with CALCRIM No. 1202, which describes the elements of the offense. After describing in the first two elements the conduct against a victim the defendant must commit, the instruction provides: 3. The defendant did so for ransom, or for reward, or to commit extortion, or to get money or something valuable. This sentence corresponds to the four different types of aggravated kidnapping under section 209, subdivision (a). However, the fourth type of aggravated kidnapping is to extract "from another person" money or valuables, which means there must be both primary and secondary victims for conviction of this offense. Given that the prosecution relied upon kidnapping for extortion in this case, there is no reasonable likelihood that the jury applied the challenged instruction in an impermissible manner. The error was harmless.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A152284.PDF

Case Name: *People v. Taylor* (2020) 43 Cal.App.5th 1102 , **District:** 2DCA , **Division:** 8 , **Case #:** B293881
Opinion Date: 1/6/2020
Case Holding:
Defendant's movement of the victim several feet into a dark alley was merely incidental to a robbery and did not support a conviction for kidnapping to commit robbery. Taylor used a gun to back a victim four steps towards a dark alley, where he took the victim's wallet. Based on this evidence, Taylor was convicted of robbery and kidnapping to commit robbery. On appeal, Taylor challenged the sufficiency of the evidence to sustain the aggravated kidnapping conviction. Held: Reversed. The crime of kidnapping for robbery requires movement of the victim beyond the movement merely incidental to the robbery and the movement must increase the victim's risk of harm beyond that necessarily present in a robbery. (*People v. Daniels* (1969) 71 Cal.2d 1119.) No minimum distance is required if the movement is substantial. Here, the victim backed up four steps and ended up 12 inches into a dark alley, where the darkness screened the robbery and placed the crime out of view. The whole episode lasted one and one-half minutes. This movement was trivial and incidental to the robbery and does not support an aggravated kidnapping conviction. [**Editor's Note:** The California Supreme Court denied the Attorney General's request to depublish the opinion in this case and declined to review this matter on its own motion.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B293881.PDF

Case Name: *People v. Singh* (2019) 42 Cal.App.5th 175 , **District:** 1 DCA, **Division:** 3 ,
Case #: A154826
Opinion Date: 11/18/19
Case Holding:
Trial court was not required to further define the terms "illegal intent" or "illegal purpose" at a kidnapping trial. Singh was charged with felony kidnapping (Pen. Code, § 207, subd. (a)) and misdemeanor child endangerment (Pen. Code, § 273a, subd. (b)) when he picked up a stranger's one year old child while she was paying the bus fare, got off the bus, and took approximately five steps away from the bus before the mother ran out and yanked her son out of his arms. The jury was instructed that the People had to prove defendant used physical force to take and carry away an unresisting child, that he moved the child a substantial distance, that he moved the child with illegal intent or for an illegal purpose, and that the child was under 14 years old at the time of movement. A jury convicted Singh of kidnapping but was unable to reach a verdict on the child endangerment count, and the court ultimately dismissed that charge. Singh appealed, arguing that the court violated its sua sponte duty to instruct on all elements of kidnapping because it failed to further define the terms "illegal intent" or "illegal purpose." Held: Affirmed. A trial court has a sua sponte duty to instruct on all elements of an offense and on the general principles of law governing a case. However, when a word or phrase is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) The terms "illegal intent" and "illegal purpose" are commonly understood by those familiar with the English language and cannot reasonably be viewed as meaningless in the context of child kidnapping without further definition. Nor does defendant claim those have a technical, legal meaning. Accordingly, the court had no sua sponte duty to expand on the definition of these phrases.

Trial court was not required to instruct on associated crime of child endangerment if there was no evidence that defendant intended to inflict unjustifiable physical pain or mental suffering on victim. Singh also argued that the trial court erred by failing to modify the asportation element in CALCRIM No. 1201 sua sponte to instruct the jury to consider whether his movement of the child was incidental to the "associated

crime" of child endangerment. The Court of Appeal disagreed. Kidnapping requires proof of asportation, i.e., proof that the defendant moved the victim a "substantial distance." In a case involving an associated crime, the jury should be instructed to consider whether the distance a victim was moved was incidental to the commission of that crime in determining the movement's substantiality. An "associated crime" is any criminal act the defendant intends to commit where, in the course of its commission, the defendant also moves a victim by force or fear against his or her will. Here, an instruction regarding the associated crime factor was unnecessary. There was no evidence Singh intended to inflict unjustifiable physical pain or mental suffering on the child and, in the course of committing that criminal act, moved the child. The crux of defendant's testimony was that he moved the child to protect him. He never testified that his movement of the child was incidental to the child endangerment offense. There was no instructional error.

There was substantial evidence of illegal intent or purpose and asportation. Singh argued there was insufficient evidence to establish that he acted with illegal intent because there was no evidence he picked up the victim with "nefarious intent." He also argued that insufficient evidence supported the asportation element because the victim's movement was incidental to the child endangerment count, the movement occurred in the daytime, and the distance involved was very short. The evidence was undisputed that defendant took the child away from his mother without her knowledge or consent. To satisfy the illegal intent or purpose requirement, the lack of a lawful purpose for separating a child from his or her parent without the parent's knowledge and consent "is all that the law requires." (*People v. Westerfield* (2019) 6 Cal.5th 632, 717.) Regarding asportation, the Supreme Court has repeatedly stated no minimum distance is required to satisfy the asportation requirement. Accepting the parties' assessment that defendant moved the child ten or so feet from his mother, the movement cannot be described as insubstantial considering the totality of the circumstances. The one-year-old victim was extremely vulnerable and had no means of fending off an adult kidnapper or protecting himself or finding his mother after a physical separation. The change in environment from inside the bus, where his mother was, to off the bus could have substantially increased the risk of harm and enhanced defendant's opportunity to commit additional crimes. A jury could reasonably conclude that the distance defendant moved the child was substantial.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A154826.PDF

Offenses—Murder

Case Name: *People v. Gastelum* (2020) 45 Cal.App.5th 757 , **District:** 4DCA , **Division:** 1 , **Case #:** D075368
Opinion Date: 2/25/20
Case Holding:
The holding in *People v. Chiu*, that a defendant cannot be convicted of premeditated first degree murder as an aider and abettor based on the natural and probable consequences doctrine, does not extend to lying-in-wait murder. Gastelum was convicted of first degree murder after his cousin Gamboa shot and killed a man named Rodgers. A lying-in-wait special circumstance was found true. He was also convicted of the premeditated attempted murder of J.W. The jury found that Gastelum participated in the offenses with the knowledge that another principal was armed with a gun. On appeal, he challenged the trial court's special circumstances instruction that allowed the jury to convict him of first degree lying-in-wait murder under the natural and probable consequences doctrine. Held: Affirmed. In *People v. Chiu* (2014) 59 Cal.4th 155, the court held that an aider and abettor may not be convicted of premeditated first degree murder under the natural and probable consequences doctrine because the killer's uniquely subjective and personal mental state is too attenuated from the aider and abettor's culpability to impose such liability. But first degree lying-in-wait murder is characterized by the objective facts of the killing, and requires proof that: (1) the killer concealed his purpose from the victim; (2) the killer watched and waited for an opportunity to act; and (3) from a position of advantage, he intended to and did make a surprise attack on the victim. Because lying-in-wait murder requires proof of certain conduct, rather than the uniquely subjective and personal mental state of deliberation, the reasoning of *Chiu* is inapplicable. Therefore, an aider and abettor may be convicted of first degree lying-in-wait murder based on the natural and probable consequences doctrine.

Defendant forfeited his instructional claim regarding the lying-in-wait special circumstance by failing to object in the trial court. The trial court instructed the jury on the special circumstance of lying-in-wait (CALCRIM No. 702) which stated that if the jury decided defendant was guilty of first degree murder but was not the killer, it must decide whether he acted with intent to kill in order to find the special circumstance true. Gastelum argued the instruction erroneously failed to specify *whom* Gastelum must have intended to kill, which allowed the jury to potentially base its true finding on his intent to kill J.W., the victim of the attempted murder. However, Gastelum forfeited his claim the

instruction was incomplete by failing to lodge an objection in the trial court. Further, Gastelum's alternative claim of ineffective assistance of trial counsel for failing to object to the instruction fails for lack of prejudice, as there was strong evidence of his intent to kill Rodgers.

Gastelum's one-year prior prison term enhancement must be stricken because it was not imposed for a sexually violent felony. In bifurcated proceedings, the trial court found true that Gastelum had suffered a prior prison term and had not remained free of custody or subsequent offense for five years thereafter. (Former Pen. Code, § 667.5, subd. (b).) Following the court's original opinion in October 2019, Gastelum petitioned for review and raised the additional argument that Senate Bill No. 136 should apply to him. The Supreme Court granted review and transferred the matter back to the Court of Appeal with directions to reconsider the cause in light of SB 136, which amended section 667.5, subdivision (b) to limit the one-year prior prison term enhancements to sexually violent offenses. SB 136 applied here because the judgment against Gastelum was not yet final. (*People v. Lopez* (2019) 42 Cal.App.5th 337, 341.) Because Gastelum's prior prison term was for spousal abuse, not a sexually violent offense, the one-year prior prison term enhancement can no longer be imposed on him. Rather than remanding for resentencing, the judgment was modified to strike the one-year prior prison term because the trial court already imposed the maximum possible sentence.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/D075368A.PDF

Case Name: *People v. Wear* (2020) 44 Cal.App.5th 1007 , **District:** 1DCA , **Division:** 1 , **Case #:** A152732
Opinion Date: 2/4/2020
Case Holding:
Conviction for first degree murder reversed where the prosecution proceeded on several theories, the record affirmatively showed the jury was divided as to the two theories, and the evidence was insufficient to support one of them. Wear and his friend Lowell met an acquaintance named Rossknecht to buy or steal a gun. A fight ensued and Rossknecht killed Lowell. Wear seized Rossknecht's gun and fatally shot him. Wear was convicted of first degree murder of Rossknecht. On appeal he argued the evidence did not support the conviction. Held: Reversed. Murder that is perpetrated by a deliberate and premeditated killing or in the commission of a robbery, is first degree murder. When a jury is instructed on two theories of first degree murder, the verdict will

be upheld if there is sufficient evidence of one of the theories unless the record shows the verdict rested on an inadequate ground. Here, the record reflects the jury was split as to the theories of murder. With respect to premeditated murder, the evidence sufficient to sustain a finding of first degree murder includes (1) defendant's conduct prior to the killing which reflects "planning;" (2) motive to kill the victim; and (3) facts showing the manner of killing was so particular that it proved the defendant killed according to a preconceived design to take the victim's life in a particular way. Here, there was a lack of evidence of planning activity or pre-existing intent to kill and relatively weak evidence of motive. The evidence supported a finding of felony murder, but was insufficient to prove premeditation. As the verdict may have rested on the unsupported ground, reversal was required.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A152732.PDF

Case Name: *People v. Palomar* (2020) 44 Cal.App.5th 969 , **District:** 2DCA , **Division:** 6 , **Case #:** B292450
Opinion Date: 2/3/2020
Case Holding:
Defendant's surprise attack on another man, which caused a fatal head injury, satisfied the elements of implied malice murder. Palomar was at a bar and became upset with another man who was making obnoxious comments. He threatened to hurt the man, then followed the man when he left the bar. With no warning, Palomar violently punched the man in the face. The man fell to the ground striking his head on a cement curb. He died from his injuries. Palomar was convicted of second degree murder and two strike priors were found true. On appeal he argued the evidence of implied malice was insufficient to sustain the conviction. Held: Affirmed. Murder is the unlawful killing of a human being with malice aforethought. Malice may be either express or implied. It is implied when the killing is proximately caused by an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. An assault with the fist may be made in such a manner as to render the killing murder. Palomar attacked an intoxicated man by surprise, "sucker punching" him with a powerful blow to the face in a location where he knew the man would fall on concrete. This supported the jury's finding the violent act was predictably dangerous to human life. Further, before leaving the bar, Palomar announced his intention to attack the man. After knocking the man to the ground and splitting his head open, Palomar walked

away without taking any steps to ascertain the man's condition. This reflected a callous indifference to human life. The evidence of implied malice was sufficient. [**Editor's Note:** Justice Perren dissented. A petition for review was denied in this case. Justices Liu and Groban were of the opinion the petition should have been granted.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B292450A.PDF

Parole / PRCS

Case Name: *People v. Johnson* (2020) 45 Cal.App.5th 379 , **District:** 4DCA , **Division:** 1 , **Case #:** D075097
Opinion Date: 2/18/2020
Case Holding:
Trial courts have the jurisdiction to determine whether a defendant was erroneously placed on parole rather than post release community supervision (PRCS). Johnson was sentenced to 16 months in prison for possession of child pornography. He was erroneously scored as a high risk offender on a Static-99 evaluation and therefore was placed on parole rather than PRCS when released from prison. He was subsequently arrested on parole violations based on petitions filed by CDCR. CDCR acknowledged the error in assigning Johnson an incorrect Static-99R score but denied his request for PRCS because he had spent 60 days under parole supervision since his release from prison. Johnson appealed to the trial court, which dismissed the parole revocation petition and transferred Johnson to PRCS. The prosecution appealed. Held: Affirmed. Penal Code section 1203.2 gives the trial court jurisdiction to modify supervision. Parole now applies only to high-level offenders, such as Three Strike defendants and high risk sex offenders. All other released persons are placed on PRCS. CDCR decides the post-release classification of inmates being released from prison, but the trial court hears petitions to revoke parole. Though the trial court is prohibited from terminating parole as a sanction for the parolee's violation of the conditions of parole, it may modify or revoke parole in the interests of justice. This includes the power in a parole revocation proceeding to consider the issue of whether the defendant was improperly placed on parole supervision rather than PRCS and, if appropriate, to order that supervision be transferred from parole to PRCS.

The fact that Johnson had been on parole for 60 days did not preclude the trial court from transferring him from parole to PRCS. Under Penal Code section 3000.08,

subdivision (l), a defendant may be transferred from parole to PRCS if he has not yet served 60 days on parole supervision. Here, the trial court found this provision did not prohibit its order because the end of the 60-day period was the date on which defendant postmarked his appeal to CDCR, which occurred 58 days after his initial release to parole supervision. The Court of Appeal found that time the defendant spent in custody for parole violations, during which he is under the legal custody and jurisdiction of a county facility awaiting parole revocation proceedings and not under the supervision of parole authorities, does not count towards the 60 days on parole.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/D075097.PDF

Pretrial Issues

Case Name: *People v. Mora-Duran* (2020) 45 Cal.App.5th 589 , **District:** 3DCA , **Case #:** C085192
Opinion Date: 2/21/2020
Case Holding:
When a preliminary hearing is waived, the prosecution may not amend the information to add offenses that significantly differ from the original charges.
Defendant was charged with growing marijuana. He waived preliminary hearing and entered a plea to felony marijuana cultivation (former Health & Saf. Code, § 11358). Before sentencing, Proposition 64 was passed, which amended section 11358, narrowing the scope of conduct constituting felony marijuana cultivation (Health & Saf. Code, § 11358, subd. (d)(3)). Defendant asked the trial court to designate the offense a misdemeanor. Instead, the court rejected the plea and reinstated charges. The prosecution amended the information to modify the second count to allege felony marijuana cultivation under the new subdivision (d)(3)(C) of section 11358 (relating to contamination of state waters). The trial court deemed the amended information a complaint and set the matter for preliminary hearing. Before hearing, defendant pleaded no contest to the new charge. On appeal defendant argued the prosecution violated Penal Code section 1009 by amending the information after preliminary hearing was waived. Held: Reversed. When a preliminary hearing is waived, the prosecution may not amend the information to add new offenses or allegations that constitute a significant variance from the original charges. Here, the charge of felony cultivation was the same, but the scope of culpable conduct increased to encompass violation of Fish and Game laws, which would require defendant to defend against allegations not encompassed within the

original charge. This was error. [**Editor's Note:** Given the court's holding, it did not address defendant's ex post facto claim.]

The trial court did not abuse its discretion by rejecting the plea agreement. Defendant alleged the trial court abused its discretion by rejecting the plea agreement. There was no error. Prior to sentencing a trial court has broad discretion to withdraw its prior approval of a negotiated plea, including when it believes the agreement is unfair, new facts have come to light, the court becomes more informed about the case, or when the court believes the agreement is not in the best interests of society. Further, the trial court's rejection of the plea did not run afoul of Proposition 64's provision to allow a defendant to petition for reduction of sentence, because defendant was not yet serving a sentence for a conviction. In any event, nothing in Proposition 64 precludes the trial court from exercising its Penal Code section 1192.5 discretion to withdraw its approval of a plea agreement prior to sentencing.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/C085192.PDF

Case Name: *Zemek v. Superior Court* (2020) 44 Cal.App.5th 535 , **District:** 4DCA , **Division:** 2 , **Case #:** E072844
Opinion Date: 1/22/2020
Case Holding:
Trial court's denial of defendant's Penal Code section 995 motion was upheld even though the magistrate found no evidence of express malice, where the evidence of implied malice supported the murder charge. Powell, who was age 69, suffered from serious illnesses and was prescribed a number of medications. On several occasions, Powell overdosed on her medications and was hospitalized. Appellant was Powell's paid care giver in May of 2016 and knew that she needed constant supervision and was at risk of overdosing. On May 27, appellant removed Powell from the hospital against medical advice. The next day, she took Powell to an attorney to revise estate documents to leave Powell's estate to appellant. A short time later, appellant left Powell alone for two to four days, during which time Powell died of a drug overdose. After Powell's death, appellant drained Powell's bank accounts and used her credit cards. She was held to answer on charges of murder, elder abuse, grand theft, and other offenses. Her section 995 motion to dismiss the information was denied. She sought writ review, arguing there was no evidence of malice. Held: Denied. To prevail on a section 995 motion, the defendant must show she was committed without probable cause. A conviction for murder requires

either express or implied malice. Malice may be implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, which act is done with conscious disregard of that danger. Though she had a legal duty to care for Powell, appellant left her alone for days despite knowing that Powell was totally unable to provide the basic necessities for herself, and was prone to taking excess medication and to falling. This raises a strong suspicion of implied malice. Further, events occurring just before Powell's death furthered this suspicion; Powell died weeks after leaving her estate to appellant and appellant emptied Powell's bank accounts after she died.

There was sufficient evidence of causation to bind appellant over on murder charges. An element of homicide is that the defendant's criminal act or omission be the proximate cause of death. Proximate cause is established where the act is directly connected to the injury. The consequences of the defendant's act need not have been a strong possibility; a possible consequence which might reasonably have been contemplated is sufficient. Here, there was probable cause to believe that appellant's act or omission in leaving Powell alone for days in a critically weak condition set in motion a chain of events culminating in Powell's death.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/E072844.PDF

Case Name: *People v. Villatoro* (2020) 44 Cal.App.5th 365 , **District:** 2DCA, **Division:** 5 , **Case #:** B296613
Opinion Date: 1/16/2020
Case Holding:
Trial court did not have authority to initiate infraction proceedings under Penal Code section 29810 and impose punishment because the prosecutor never charged defendant with a violation of this section. Villatoro was convicted of a felony and placed on probation. The court ordered him to complete a Prohibited Persons Relinquishment Form, requiring him to declare any firearms in his possession and their location. (See Pen. Code, § 29810, subd. (a)(2).) Villatoro refused, invoking the Fifth Amendment. Concluding that the Fifth Amendment did not apply because Villatoro had no prior convictions, the court fined him $100 under section 29810, which makes the failure to complete the form an infraction. (See Pen. Code, § 29810, subd. (c)(5).) The district attorney was present and remained silent. Villatoro argued on appeal that the fine was unauthorized because the prosecutor never charged him with the infraction. Held:

Order imposing $100 fine reversed. A criminal complaint cannot be filed without the district attorney's authorization. "Here, the trial court essentially charged defendant with an infraction, conducted a trial, found him guilty, and imposed the $100 fine on him for violating section 29810—all in the presence of the district attorney. Yet, the district attorney did not charge or approve the charging of an infraction." Indeed, there is no authority for the court to initiate proceedings at all, with or without the prosecutor's consent, express or implied. The Court of Appeal recognized "the practical dilemma that trial courts and district attorneys may face in order to secure defendants' compliance with a law founded on strong public policy. However, frustration is not a substitute for authority." This was a matter for the Legislature to contend with. The court expressed no opinion whether completing the form could be included as a term of probation.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B296613M.PDF

Case Name: *Bom v. Superior Court* (2020) 44 Cal.App.5th 1 , **District:** 2DCA , **Division:** 1 , **Case #:** B292788, B292846
Opinion Date: 1/6/2020
Case Holding:
Trial court erred in holding petitioners to answer to child abuse charge where petitioners did not have an affirmative duty to exert control over the persons who directly inflicted the fatal injuries on the child. Petitioners were social workers with the Los Angeles County Department of Children and Family Services (DCFS). In 2012 and 2013, petitioners provided services to 7-year-old Gabriel and his family members. Approximately six weeks after DCFS closed its case, Gabriel died of child neglect and head trauma inflicted by his mother and her boyfriend. Both were convicted of murder. Petitioners were charged with felony child abuse (Pen. Code, § 273a, subd. (a)), and moved to dismiss the information under Penal Code section 995. The trial court denied the motions, and petitioners petitioned for a writ of prohibition. Held: Writ issued. Penal Code section 273a, subdivision (a) proscribes causing or permitting a child to suffer; inflicting unjustifiable physical pain or mental suffering on a child; or committing specific criminal acts or omissions while having the care or custody of a child. A non-caretaker who willfully permits injury to be inflicted on a child is subject to criminal penalty only when the non-caretaker has an affirmative duty to exert control over the person who inflicts injury on the child. While a social worker may have some ability to control a suspected child abuser—such as by taking the child into protective custody or initiating dependency proceedings—that ability is discretionary. Because petitioners had

no legal duty to control Gabriel's abusers, did not actually inflict Gabriel's injuries, and did not assume caregiver duties for Gabriel, they cannot be held to answer for the crime of willfully permitting a child to suffer under section 273a, subdivision (a).

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B292788.PDF

Case Name: *Short v. Superior Court of Santa Clara County (People)* (2019) 42 Cal.App.5th 905 , **District:** 6 DCA , **Case #:** H046372
Opinion Date: 11/27/2019
Case Holding:
Penal Code section 654's bar on successive prosecutions did not apply where the prosecution sought to add additional charges after the jury convicted on some counts and hung on others, because this did not constitute harassment of the defendant or waste public resources. Short was tried for seven sexual offenses allegedly committed against his adopted daughter when she was a child. The jury hung on four of the counts. The trial court then granted the prosecution's motion to amend the information to add eight new, alternative counts based on the same conduct underlying the four counts on which the jury hung (Pen. Code, § 1009). Short objected that this amendment violated section 654 and constituted vindictive prosecution. He petitioned for writ of prohibition/mandate. Held: Denied. Section 654 provides that an acquittal or conviction and sentence under any one provision of law bars a prosecution for the same act under any other provision of law. But this bar on successive prosecutions is not applied where doing so will not serve the policies underlying section 654, i.e., to prevent harassment of the defendant and the waste of public resources through relitigation of issues. That policy was not violated here where the trial court approved amendment of the information and thus made the determination that the amendment was not unfair. Further, the new charges involved the same underlying conduct as the charges on which the jury hung, so their addition will have minimal, if any, impact on the nature of the trial and on the public fisc. There was no error.

The prosecutor's decision to add charges after the jury hung on four of the charged counts did not raise a presumption of vindictive prosecution because the added charges did not increase defendant's maximum exposure. The due process clauses of the state and federal Constitutions prohibit prosecutors from punishing criminal defendants for exercising their constitutional rights. Vindictive prosecution exists where the government attempts to "up the ante" by bringing new or more serious charges in

response to the exercise of protected rights. An inference of vindictive prosecution is raised where the government adds additional charges that subject the defendant to greater potential punishment after a mistrial. Here, the prosecution's additional charges did not increase Short's exposure and therefore were not vindictive.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/H046372.PDF

Case Name: *Daws v. Superior Court of Contra Costa (People)* (2019) 42 Cal.App.5th 81, **District:** 1 DCA , **Division:** 4 , **Case #:** A157383
Opinion Date: 11/14/2019
Case Holding:
Trial courts have inherent authority to determine by local rule or as a matter of courtroom practice what "proper notice" under Penal Code section 1382 means, so long as a defendant's speedy trial rights are protected. In November 2018, Daws was charged with misdemeanor offenses. At arraignment he gave a time waiver. At a pretrial conference, Daws' attorney gave verbal notice that Daws was withdrawing his time waiver and invoking his speedy trial right. The trial court rejected his request, explaining that two days written notice to the prosecution was required before withdrawing a time waiver in open court. No written request was made, but 30 days after the oral notice, Daws filed a motion to dismiss. His motion was denied. Daws petitioned for writ of mandate, arguing the oral notice to withdraw a time waiver is proper. Held: Writ denied. A defendant has a right to a speedy public trial (U.S. Const., Sixth Amend.; Calif. Const., art. I, § 15). A defendant charged with a misdemeanor must be brought to trial within 30 days of his arraignment or plea if he is in custody, or within 45 days is he is not in custody (Pen. Code, § 1382). A defendant may waive his speedy trial right and withdraw the waiver at a later time in open court, whereupon a trial date shall be set within 30 days of the withdrawal and all parties properly notified of that date. Section 1382 does not mandate a particular notice rule. In the absence of a uniform statewide rule or a local rule of court, individual trial courts are empowered to determine what type of notice is reasonable in light of local practice, so long as the "proper notice" adopted is consistent with the defendant's speedy trial rights.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A157383.PDF

Proposition 47

Case Name: *People v. Jennings* (2019) 42 Cal.App.5th 664 , **District:** 4 DCA , **Division:** 1 , **Case #:** D074352
Opinion Date: 11/26/2019
Case Holding:
Because burglary and shoplifting are two distinct offenses after Proposition 47, in a burglary prosecution, state must prove that defendant's conduct did not constitute shoplifting. In January 2017, Jennings went into a hobby shop with a stolen drone and attempted to trade it for a radio controlled car. The store was not interested so Jennings left the business without taking any merchandise. This conduct led to charges of burglary of the hobby store. On appeal Jennings argued that Proposition 47 required the prosecution to prove that he intended to take property valued greater than $950. Held: Reversed. Proposition 47, enacted in 2014, created the new misdemeanor offense of shoplifting (Pen. Code, § 459.5), which is defined as entering a commercial establishment with the intent to commit larceny while that business is open during regular business hours where the value of the property taken or intended to be taken does not exceed $950. In order for the prosecution to prove the charge of burglary (Pen. Code, § 459) it must prove beyond a reasonable doubt that the defendant did not commit shoplifting. Because burglary and shoplifting are separate and distinct offenses, in order for the prosecution to prove the charge of burglary it must prove beyond a reasonable doubt that the defendant did not commit shoplifting. That was not shown in this case, as there was no evidence of the value of the radio controlled car defendant wanted to take in trade.

In a burglary case the trial court is required to instruct the jury that the prosecution must prove that defendant intended to take property worth more than $950 when he entered the store. The trial court gave the standard jury instruction on burglary (CALCRIM No. 1700). This instruction does not include language to support a defense theory that the crime was instead section 459.5 shoplifting. That omitted language should have been added as a burglary prosecution requires the prosecution to disprove that the defendant committed shoplifting. The trial court has a sua sponte duty to instruct the jury on all elements of the offense and on general principles of law commonly or closely and openly connected to the facts before the court and necessary for the jury's understanding of the case. Whether evaluated as the omission of an element of the burglary charge or a failure to instruct on a general principle of law, the trial court prejudicially erred by failing to instruct on the prosecution's need to disprove a shoplifting. [**Editor's Notes:** (1) See also *People v. Lopez* (2020) 9 Cal.5th 254, which the California Supreme Court

decided after this case. *Lopez* discusses what is required when a defendant is charged with burglary instead of shoplifting. (2) The court also concluded Senate Bill No. 136 applies retroactively to Jennings' case pursuant to *In re Estrada* (1965) 63 Cal.2d 74 and therefore reversed the court's imposition and execution of a consecutive one-year section 667.5, subdivision (b) prior prison term enhancement.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/D074352.PDF

Case Name: *People v. Martell* (2019) 42 Cal.App.5th 225 , **District:** 4 DCA , **Division:** 2 , **Case #:** E069369
Opinion Date: 11/19/2019
Case Holding:
Since there is a reasonable chance the jury convicted defendant of Vehicle Code section 10851 under an improper theory, the defendant is entitled to have his conviction reduced to a misdemeanor or to be retried for a felony under a proper legal theory. Martell drove away in his girlfriend's car but did not return it as promised. Four days later, she reported it to the police as stolen. Martell and his girlfriend slowly reconciled, and Martell continued driving the car. Several weeks later, Martell was arrested for driving with a suspended license and charged with violating section 10851. At trial, the court gave the then-standard jury instruction on unlawful taking or driving a vehicle which did not require the jury to find that the vehicle was worth more than $950. The jury convicted Martell, and he appealed. Held: Reversed and remanded. Proposition 47 reduced certain theft felonies to misdemeanors. This includes section 10851 offenses involving the permanent taking of vehicles worth $950 or less but does not apply to prosecutions of posttheft driving. (*People v. Page* (2017) 3 Cal.5th 1175, 1188.) Since Martell cannot be convicted of violating section 10851 on a taking theory without evidence of the car's value, but can be convicted on a posttheft driving theory without such evidence, the trial court instructed the jury under valid and invalid theories of guilt. In such cases, the conviction must be reversed unless the court determines the error was harmless beyond a reasonable doubt. Here, there is substantial evidence supporting a finding that Martell took the car, and also substantial evidence that he engaged in posttheft driving. At the same time, substantial evidence also supports a finding that he neither took the car nor engaged in posttheft driving. The prosecutor's focus at closing argument on the taking theory strongly suggests the jury focused on this improper theory of guilt. The sentence is vacated and the case remanded for the prosecution to decide

whether to accept a reduction of the conviction to a misdemeanor or retry Martell for a felony violation of section 10851 under a proper theory of liability.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/E069369A.PDF

Proposition 66

Case Name: *Salcido v. Superior Court of San Mateo County (People)* (2020) 44 Cal.App.5th 998 , **District:** 1DCA , **Division:** 4 , **Case #:** A158016
Opinion Date: 2/4/2020
Case Holding:
After the passage of Proposition 66, once the California Supreme Court has transferred a pending a habeas petition in a capital case to the sentencing court pursuant to Penal Code section 1509, subdivision (g), the sentencing court is not permitted to transfer the petition to another court for any reason. In 1989, the Salcido was charged with capital murder in Sonoma County. Because of pretrial publicity, the case was transferred to San Mateo County. The jury convicted him and determined that his punishment should be death. Salcido was seeking relief by way of habeas corpus when Proposition 66 went into effect, which, among other changes, ended the practice of capital defendants initiating habeas proceedings in the Supreme Court. Instead, the petition must be filed in the superior court that imposed the sentence. The Supreme Court was permitted to transfer any habeas petitions pending before it to the court that imposed sentence. The Supreme Court transferred the Salcido's pending petition to San Mateo County. On motion of the prosecutor, the superior court transferred the matter to Sonoma County. Salcido sought a writ of mandate to compel the superior court to deny the prosecution's motion to transfer. Held: Petition for writ of mandate issued. The Supreme Court determined that San Mateo County must decide the habeas petition pursuant to Penal Code section 1509, subdivision (g), which gives the Supreme Court discretion to transfer a habeas petition "to the court which imposed the sentence." By transferring the petition to San Mateo County pursuant to section 1509, subdivision (g), the Supreme Court necessarily determined that San Mateo County is the court which imposed the sentence. As the court that imposed the sentence, San Mateo County was not permitted to transfer the petition to another court. There is nothing in section 1509 that authorizes a sentencing court to transfer a capital habeas petition to another court. The meaning of "court which imposed the sentence" is clear and unambiguous—it means the

court where a defendant was sentenced. The court also cited the reasoning in *Ashmus v. Superior Court of San Mateo (People)* (2019) 42 Cal.App.5th 1120.

The San Mateo court erred in relying on California Rules of Court, rule 4.150. The San Mateo trial court erroneously relied on rule 4.150 (the current rule governing the transfer of venue in a criminal trial that requires post-verdict proceedings, including sentencing, to be heard in the transferring court), because that rule did not exist at the time of the transfer to San Mateo County for the trial. The rules in effect at that time did not preserve any jurisdiction with the transferring court. (See Cal. Rules of Court, former rule 844.) [**Editor's Note:** There was no discussion regarding the applicability of a Rule of Court that is contrary to statutory language.]

Section 1509, subdivision (a) does not permit the transfer from the sentencing court to another county. Even if this petition were subject to section 1509, subdivision (a), a transfer from the sentencing court to another county is not permitted. Subdivision (a) explicitly provides only for a one-way transfer from any court other than the court which imposed the sentence to the sentencing court, unless good cause is shown. But subdivision (a) applies solely to new petitions, filed on October 25, 2017, or later (the effective date of Proposition 66). The Supreme Court transferred the case under subdivision (g) which carries no language regarding "for good cause."

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A158016.PDF

Case Name: *Ashmus v. Superior Court of San Mateo County (People)* (2019) 42 Cal.App.5th 1120 , **District:** 1DCA , **Division:** 2 , **Case #:** A158011
Opinion Date: 12/4/2019
Case Holding:
When the California Supreme Court transfers a pending habeas petition pursuant to Proposition 66 in a case where venue changed, the petition is transferred to "the court which imposed the sentence." Ashmus' petition for writ of habeas corpus regarding his conviction for a capital offense was pending in the California Supreme Court when Proposition 66 passed in 2016. Proposition 66 extensively revamped the procedures governing habeas corpus petitions in capital cases. Previously, habeas proceedings in capital cases were initiated in the California Supreme Court, but now are to be filed first in superior court. The proposition added Penal Code section 1509, subdivision (g), which provides "If a habeas corpus petition is pending on the effective

date of this section [October 25, 2017], the court may transfer the petition to the court which imposed the sentence." Ashmus was sentenced to death out of San Mateo County, where he had been tried as a result of change of venue from Sacramento County. The Attorney General moved to have the petition transferred to Sacramento County, and the San Mateo County trial court granted the motion. Ashmus filed a petition for writ of mandate challenging that transfer. Held: Petition granted. The language of section 1509 is clear and unambiguous in this regard. California Rules of Court, Rule 4.150 (which governs change of venue in criminal cases), to the extent it may suggest that a capital habeas corpus petition should be transferred to the county where the offense took place rather than where the defendant was sentenced, is inconsistent with the statute and therefore cannot control. While section 1509, subdivision (a) contains a "good cause" exception to transferring a habeas petition to the sentencing court when the habeas petition is filed in any other court on October 25, 2017 or later, subdivision (g) (which governs this case) does not mention "good cause" for transfer to a court other than the sentencing court. In any event, there was no good cause shown for such a transfer here.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A158011M.PDF

Search and Seizure

Case Name: *People v. Mendoza* (2020) 44 Cal.App.5th 1044 , **District:** 4DCA , **Division:** 2 , **Case #:** E071835
Opinion Date:
Case Holding:
Officer's decision to stop defendant based on her suspicious reaction to his presence was not reasonable when officer did not identify himself as law enforcement. A jury convicted Mendoza of transporting narcotics for sale based on evidence a U.S. Customs and Border Protection agent acquired after a traffic stop. Mendoza sought to exclude the evidence, arguing the agent did not have reasonable suspicion she was engaged in criminal activity when he stopped her. The agent said he decided to stop Mendoza because she was driving in a known smuggling corridor in a car that had crossed the U.S.-Mexico border in the prior week; she slowed and changed lanes after he pulled alongside her in an unmarked car, rolled down his window, and stared at her; she drove at about 50 miles per hour to stay behind him; and then she refused to look at him when she ultimately passed him a few minutes later. The trial court held that the stop was justified, and a jury later convicted her of transporting drugs for sale. She appealed. Held:

Reversed and remanded. To justify an investigative stop or detention, the circumstances known or apparent to the officer must include specific or articulable facts causing him to suspect that some activity relating to crime has taken place or is occurring or is about to occur, and the person he intends to stop or detain is involved in that activity. (*In re Tony C.* (1978) 21 Cal.3d 888, 893.) An officer may properly draw on their own experience and specialized training to make inferences from and deductions about the cumulative information, but the suspicion must be objectively reasonable. Here, it was not objectively reasonable to suspect Mendoza was involved in criminal activity based on her driving in a known drug trafficking corridor in a car that had recently crossed the border. The officer made no attempt to identify himself as law enforcement, so the most natural interpretation of Mendoza's conduct is that she sought to avoid him because she found his conduct threatening and potentially aggressive. For such a reaction to evince guilt, rather than general fear or caution, there must be some indication the person is aware they are being observed by law enforcement. The officer's "good faith suspicion" that Mendoza was engaged in criminal activity was not reasonable.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/E071835M.PDF

Case Name: *People v. Rubio* (2019) 43 Cal.App.5th 342 , **District:** 1DCA , **Division:** 4 ,
Case #: A152455
Opinion Date: 12/12/2019
Case Holding:
Gunshots discharged from outside a dwelling did not justify a warrantless search of the dwelling under the emergency aid exception absent specific and articulable facts showing that an intrusion into the home was necessary. Opinion on rehearing. Police in East Palo Alto responded to a "shots fired" alert in a high-crime neighborhood. They found shell casings outside a residence near a garage. They suspected there could be a victim or an armed gunman inside the garage, so they knocked on the door and announced their presence. Police heard someone inside the garage barricading the door. They talked to defendant's father at the front door to the residence and got his consent to search the house and garage. Defendant then emerged from the garage, acting erratically and challenging police to shoot him. Defendant was arrested and police entered the garage. They found an explosive device and a gun and on this basis obtained a warrant. This led to the discovery of weapons and a video of defendant firing a gun. After his motion to suppress evidence was denied, defendant pleaded no contest to drug charges. He appealed. Held: Reversed. Under the Fourth Amendment, warrantless searches are

presumptively unreasonable. The warrant requirement is subject to exceptions, including the emergency aid exception, which allows police to enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. Here, officers lacked specific and articulable facts that would lead a reasonable person to conclude that shots fired outside the garage apartment required a forcible entry to rescue someone inside the garage. The warrantless entry violated the Fourth Amendment.

The police action in this case was not justified by the exigent circumstances exception to the warrant requirement. An emergency situation that requires swift action to prevent imminent danger to life or serious damage to property, or to forestall a suspect's escape or destruction of evidence, may justify a warrantless entry into a home. Here, although police may have harbored a suspicion that activities intended to be hidden were continuing in the garage apartment, this conjecture does not rise to the level of probable cause to believe a shooting suspect was in the garage. To fall within the exigent circumstances exception to the warrant requirement, an arrest or detention within the home must be supported by both probable cause *and* exigent circumstances. Thus, lacking probable cause to believe a shooting suspect was inside the garage, the police could not rely on exigent circumstances to justify the warrantless entry.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A152455A.PDF

Sentencing—General Issues

Case Name: *People v. Alexander* (2020) 45 Cal.App.5th 341 , **District:** 2DCA , **Division:** 6 , **Case #:** B296184
Opinion Date: 2/18/2020
Case Holding:
Senate Bill No. 1393, authorizing the trial court to strike prior serious felony enhancements, is not retroactive to final judgments. In 2016, Alexander pleaded guilty to robbery and admitted four prior serious felony convictions alleged under Penal Code section 667, subdivision (a), along with five prior strike convictions. After striking four of the prior strike convictions, the court sentenced Alexander to 24 years in prison (the doubled lower term for robbery plus five years for each of the four prior serious felony convictions). Alexander did not appeal and his judgment became final in 2017. In 2019, he moved for resentencing under SB 1393, which restored to trial courts the discretion to

strike enhancements for prior serious felony convictions. The trial court denied the motion because the judgment was final. Alexander appealed. Held: Appeal dismissed. Under *In re Estrada* (1965) 63 Cal.2d 740, ameliorative statutes are presumed to be retroactive to judgments that are not yet final, in the absence of a clear indication by the Legislation that it was intended to operate prospectively only. There being no contrary indication here, SB 1393 is retroactive under *Estrada* principles, but the retroactivity applies only to judgments that were not final when the legislation went into effect. Alexander's judgment was final before SB 1393 went into effect. Although the Legislature can make ameliorative provisions fully retroactive even to final judgments, it must be clear that the Legislature so intended. Otherwise, Penal Code section 3 applies to final judgments: "No part of [the Penal Code] is retroactive, unless expressly so declared." There is nothing to support a conclusion that the Legislature intended SB 1393 to be retroactive to final judgments. The order denying the motion did not affect Alexander' substantial rights, and therefore was not an appealable order. Additionally, equal protection principles do not compel retroactive application of SB 1393 to final convictions.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B296184.PDF

Case Name: *People v. Humphrey* (2020) 44 Cal.App.5th 371 , **District:** 4DCA , **Division:** 1 , **Case #:** D074473
Opinion Date: 1/16/2020
Case Holding:
The trial court's correction of defendant's abstract of judgment at the recommendation of CDCR did not constitute a resentencing. In 2011, Humphrey pleaded guilty to four counts of robbery and admitted the use of a firearm on one count (Pen. Code, § 12022.5, subd. (a)) and use of deadly weapon on each of the remaining three. He was sentenced to the upper term of five years for one robbery, plus ten years for the use of a firearm, and consecutive sentences on the remaining three counts (one third of the middle terms of each count and its enhancement), for a total of 19 years. In 2017, CDCR notified the trial court that the abstract of judgment appeared to be in error. At a hearing in 2018, the trial court clarified how the original sentence had been reached and did not change the sentence, but ordered that the abstract of judgment, which did not correctly track the judgment pronounced in 2011, be corrected accordingly. Shortly thereafter, Humphrey filed a motion to strike the firearm enhancement under recently enacted Senate Bill No. 620 (which restored to the courts the discretion to strike or

dismiss firearm use enhancements). The trial court denied the motion, concluding that Humphrey's judgment from 2011 was final. He appealed. Held: Affirmed. Although Penal Code section 1170, subdivision (d)(1) permits a court to recall a sentence within 120 days on its own motion or anytime thereafter on request of the CDCR or other specified entities, there was no indication that the court recalled the sentence or that the letter from CDCR informing the court of the error was a recommendation for recall. This was purely and simply a correction of an abstract of judgment, which may be done at any time, and the trial court merely clarified and reiterated the structure of the sentence imposed originally that was not correctly recorded in the original abstract of judgment. It was not a resentencing. Because Humphrey's case became final in 2011 before SB 620 took effect, he was not entitled to its benefit.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/D074473.PDF

Case Name: *People v. Venegas* (2020) 44 Cal.App.5th 32 , **District:** 2DCA , **Division:** 8 , **Case #:** B292976
Opinion Date: 1/7/2020
Case Holding:
There was no reason to remand the defendants' cases to allow the trial court an opportunity to strike their gun enhancements because the trial court said there was no good cause to do so. Venegas and Santana, both gang members, were trying to shoot a rival gang member but instead shot and killed another man who belonged to no gang and was just passing through the area. The two defendants were tried by separate juries. One jury found Venegas guilty of first degree murder, while the second jury convicted Santana of aiding and abetting a second degree murder. Both defendants suffered true findings on gun use enhancements. They appealed, urging remand so the trial court could consider striking the gun enhancements. Held: Affirmed. Pursuant to Senate Bill No. 620, courts now have discretion to strike gun use enhancements. Because the defendants' cases were not final, the new law applied retroactively to them. However remand for this purpose would be pointless. The trial court plainly stated it would be against the interests of justice to reduce their sentences. As to Venegas, whose attorney did not ask the court to strike the gun use enhancement, the court said that even if it were asked to strike the enhancement, it would not because there was no good cause to do so. As to Santana, whose attorney did advocate striking the enhancement, the trial court refused based on his criminal history.

Evidence of text messages from Santana to his brother about the sale of a gun, which was the same caliber as the murder weapon, was admissible. Venegas argued the admission of text messages Santana exchanged with his brother was error because the texts were hearsay and he was denied his right to confrontation. The statements were relevant because the prosecution claimed this gun was the murder weapon. They were not unduly prejudicial because the exchange was brief and lacked visceral impact. The texts were not offered for the truth of the matter, so were not hearsay. Finally, Venegas's right of confrontation was not violated, as *Crawford v. Washington* (2004) 541 U.S. 36, does not apply to nonhearsay.

Santana is not entitled to a remand pursuant to Senate Bill No. 1393, which allows trial courts to strike a prior serious felony enhancement. Santana received a five-year enhancement for a prior serious felony (Pen. Code, § 667, subd. (a)). Pursuant to SB 1393, as of January 1, 2019, trial courts have the discretion to strike a prior serious felony enhancement. Though the new law is retroactive to cases not yet final, there is no reason to remand Santana's case for this purpose because at the time of sentencing, the trial judge noted the new law and said he would not strike the prior.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B292976.PDF

Case Name: *People v. Brantley* (2019) 43 Cal.App.5th 917 , **District:** 3DCA , **Case #:** C087675
Opinion Date: 12/24/2019
Case Holding:
Penal Code section 1170.1, subdivision (c), does not apply to a prisoner who commits a felony while serving a state prison sentence but is sentenced for the in-prison felony after completing the prison term. Brantley committed the crime of possession of marijuana while in state prison, but both his guilty plea and sentencing took place after his release from prison. While awaiting sentencing, he was convicted and sentenced in an unrelated case for offenses committed after his release from prison. The trial court concluded that section 1170.1, subdivision (c) applied, which addresses sentencing for in-prison offenses and requires that a consecutive sentence commence from the time the person would otherwise have been released from prison. The trial court ordered that the term for the possession (in-prison) offense be served consecutively with the new sentence he was serving for the unrelated case, and that it was to be full term, commencing when he would otherwise be released on the term for the unrelated case.

Brantley appealed. Held: Sentence vacated and remanded. Section 1170.1, subdivision (c), does not apply because Brantley had completed the prison term he was serving at the time of his in-prison possession offense before being sentenced on that possession offense. Further, even where section 1170.1, subdivision (c) applies, it applies only to one of the offenses. The sentence for any additional in-prison felony is subject to the one-third middle term limitation of subdivision (a). Thus, the trial court's conclusion resulted in Brantley having to serve a longer sentence than had he committed both the possession offense and the unrelated case offense while serving his initial prison sentence, because one of the two would be subordinate to the other and be subject to the one-third middle term limitation. That is not what the statute intended. On remand, the trial court must determine pursuant to section 1170.1, subdivision (a) which of the two offenses is the principal term and then impose a concurrent or consecutive term (limited to one-third the middle term) for the other offense.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/C087675.PDF

Case Name: *People v. Cutting* (2019) 42 Cal.App.5th 344 , **District:** 2 DCA , **Division:** 2 , **Case #:** B295298
Opinion Date: 11/20/2019
Case Holding:
Defendant is entitled to a new sentencing hearing because he was not present when the trial court resentenced him on remand, in violation of his constitutional right to be present at a critical stage of the proceedings. Cutting entered an open plea of no contest to four offenses, including a drug offense. He also admitted three prior convictions for drug offenses, and two other prior convictions. He was sentenced to 19 years (plus eight months for a probation violation). The sentence included a nine-year enhancement under Health and Safety Code section 11370.2, subdivision (a) based on the prior drug convictions. While his first appeal was pending, the law changed and he was no longer subject to the nine-year enhancement. The matter was remanded for resentencing. During the resentencing, Cutting was not present and his trial counsel advised the court that his presence at the resentencing hearing was not required by law, because the post-remand sentence would be less than the original sentence. Instead of reducing Cutting's sentence by 9 years (for an aggregate sentence of 10 years eight months), the trial court resentenced him to 12 years 8 months, running all of the counts and the probation violation consecutively instead of concurrently. Cutting appealed. Held: Reversed. Under the confrontation clause of the Sixth Amendment and the due

process clause of the Fourteenth Amendment, a defendant has the right to be present at all critical stages of the criminal proceedings. Section 15 of article I of the California Constitution and Penal Code sections 977 and 1043 further guarantee that right. Resentencing following a remand is a critical stage because the trial court has discretion to reconsider the entire sentence. Here, Cutting did not waive his right to be present, and his attorney did not represent to the court that he had surrendered it. Applying *Chapman v. California* (1967) 386 U.S. 18, the court could not conclude beyond a reasonable doubt that Cutting's presence at the hearing would not have affected the outcome.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B295298.PDF

Case Name: *People v. Yanez* (2019) 42 Cal.App.5th 91 , **District:** 1DCA , **Division:** 2 ,
Case #: A156074
Opinion Date: 11/15/2019
Case Holding:
Equal protection requires that the conduct credits available under Penal Code section 4019 for individuals serving post-judgment electronic home detention under Penal Code section 1203.016 must be made available to pre-sentence individuals on electronic home detention under Penal Code section 1203.018. Yanez was sentenced to five years and eight months in prison. He was given actual credit, but not conduct credit, for 555 days of electronic home confinement that he had served prior to sentencing. He appealed. Held: Reversed in part. Section 1203.018 provides that pretrial detainees may be held in an electronic home detention program under specified conditions in lieu of presentence confinement in jail or a correctional facility. Section 1203.016 authorizes post-judgment electronic home detention in lieu of confinement in jail or other county correctional facility. Section 4019 authorizes conduct credits for good behavior in local custody and other non-prison settings and, after a 2015 amendment, specifically grants credit for prisoners participating in a post-judgment electronic home detention program under section 1203.016. It is silent regarding time spent in a pre-sentence electronic home detention program under section 1203.018. Distinguishing cases decided before the 2015 change in the law and relying on the reasoning in *People v. Sage* (1980) 26 Cal.3d 498, the Court of Appeal could not conceive of a "legitimate, much less a compelling, reason for treating people participating in an electronic monitoring program on home detention while awaiting trial and sentencing differently for purposes of conduct credits than someone serving a sentence in an electronic monitoring program." The court held the "disparity in eligibility for conduct credits between pretrial

and postjudgment electronic monitoring home detainees violates equal protection[.]" Yanez was entitled to conduct credits for the time spent in electronic home detention prior to sentencing.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/A156074.PDF

Case Name: *People v. Lopez* (2019) 42 Cal.App.5th 337 , **District:** 5 DCA , **Case #:** F075765
Opinion Date: 11/20/2019
Case Holding:
Defendant's four prior prison term enhancements must be stricken based on Senate Bill No. 136, which applies retroactive to judgments that were not final on January 1, 2020. Lopez received a sentence of 17 years and eight months. Four years were based on four prior prison terms (Pen. Code, § 667.5, subd. (b)). Lopez appealed. Held: Prior prison term enhancements stricken. SB 136, which amends section 667.5, subdivision (b), was signed into law on October 8, 2019 and went into effect on January 1, 2020. Under the amendment, a one-year prior prison term enhancement only applies if a defendant served a prior prison term for a sexually violent offense as defined in Welfare and Institutions Code section 6600, subdivision (b). Here, it was undisputed none of Lopez's four prior prison terms were for sexually violent offenses. The Attorney General also conceded the law applies retroactively to Lopez under *In re Estrada* (1965) 63 Cal.2d 740, 742, because it was unlikely Lopez's judgment would be final on January 1, 2020. The Court of Appeal agreed and struck the enhancements without remanding for resentencing because the trial court had already imposed the maximum possible sentence and did not need to exercise any sentencing discretion. [**Editor's Note:** In an unpublished portion of the opinion, the court concluded a three-year prior felony drug conviction enhancement pursuant to Health and Safety Code section 11370.2 should also be stricken.]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/F075765.PDF

Sentencing—Penal Code Section 654

Case Name: *People v. Vasquez* (2020) 44 Cal.App.5th 732 , **District:** 2DCA , **Division:** 5 , **Case #:** B295698
Opinion Date: 1/27/20
Case Holding:
Multiple punishments for attempted murder and mayhem are permissible under Penal Code section 654 where substantial evidence shows defendant did not intend to kill the victim when he bit off the tip of her finger. Vasquez ran after his ex-girlfriend E.R., stabbed her, and twisted the blade. When E.R. tried to defend herself by putting her fingers in Vasquez's eyes, Vasquez bit off the tip of her finger. Among other charges and enhancements, Vasquez was convicted of attempted murder and mayhem based on the act of severing one of E.R.'s fingers. On appeal, he argued that the sentence for mayhem must be stayed under section 654, because it was part of a continuous course of conduct and committed with the same criminal intent as the attempted murder. Held: Affirmed. Section 654 provides that an act or omission that is punishable in different ways by different provisions shall not be punished under more than one provision. However, if the defendant entertained multiple criminal objectives which were independent of each other, he may be punished for independent violations committed in pursuit of each objective, even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. Objectives may be separate when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous. Here, the attempted murder conviction reflects Vasquez's intent to kill E.R. Moreover, as the prosecution pointed out in the trial court, and substantial evidence supports, the conclusion that it was not Vasquez's intent to kill E.R. by biting her fingers, but to retaliate against her for using her fingers to injure him. Thus, substantial evidence supports the trial court's implicit finding that Vasquez acted with a separate objective and intent when he stabbed E.R. than when he bit her, and is therefore more culpable, and deserving of punishment for each offense.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B295698.PDF

Case Name: *People v. Gaynor* (2019) 42 Cal.App.5th 794 , **District:** 4 DCA , **Division:** 1 , **Case #:** D073763
Opinion Date: 11/27/2019
Case Holding:
Punishment for both possessing a completed check with intent to defraud and use of the personal identifying information of another in an attempt to cash the check, are not barred by Penal Code section 654 where the acts are temporally distinct. Gaynor obtained a check payable to another person and entered a bank with the intent to cash it. He showed the bank teller a fake driver's license in the name of the payee. Suspicious, the teller called police and Gaynor was arrested. He was convicted of using the personal identifying information of another (Pen. Code, § 530.5, subd. (a)) and possessing a completed check with the intent to defraud (Pen. Code, § 475, subd. (c)), among other offenses. At sentencing the court imposed a concurrent term for possessing the completed check. Gaynor appealed, arguing the sentence should have been stayed under section 654. Held: Affirmed on this point, but remanded on another matter. An act that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but shall not be punished under more than one provision. This applies when a defendant engages in an indivisible course of conduct with a single intent and objective, unless it is divisible in time. There was substantial evidence that Gaynor possessed the check with the intent to use it fraudulently prior to the time he entered the bank and presented the identifying information of another person in an attempt to cash it. The crimes were temporally distinct, giving Gaynor time to reflect on his actions prior to attempting to cash the check. Accordingly, the trial court did not err by imposing concurrent terms.

Gaynor is entitled to a remand so the trial court may exercise its discretion in imposing a restitution fine and parole revocation restitution fine that are not based on counts where the sentences were stayed. The Court of Appeal accepted the Attorney General's concession that two of Gaynor's counts of conviction should be stayed pursuant to section 654. On appeal, Gaynor argued the case should be remanded so that restitution could be reduced. The Court of Appeal agreed. The section 654 ban on multiple punishment is violated when the court considers a felony conviction for which sentence should have been stayed as part of the court's calculation of the restitution fine under the formula set forth in section 1202.4 subdivision (b)(2), which allows the court to calculate the fine based on the number of years of imprisonment. While it is unclear from the record the precise manner by which the trial court calculated the restitution fine, the court did mention the number of years of the sentence during the sentencing hearing.

Because it is reasonably probable that the court would have imposed a lesser fine if it had properly stayed sentences on two of the counts, the case was remanded for reconsideration of the fine and corresponding parole revocation restitution fine. The court disagreed with *People v. Sencion* (2012) 211 Cal.App.4th 480.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/D073763.PDF

Sentencing—Three Strikes

Case Name: *People v. Strike* (2020) 45 Cal.App.5th 143 , **District:** 4DCA , **Division:** 3 ,
Case #: G056949
Opinion Date: 2/11/20
Case Holding:
Trial court engaged in impermissible factfinding under *Gallardo* when it relied upon facts alleged in a charging document that were not specifically admitted by the defendant as part of his plea to find a strike allegation true. In 2007, Strike pleaded guilty to one felony count of gang participation (Pen. Code, § 186.22, subd. (a)). Although the charging document alleged Strike and a codefendant committed a requisite felony offense, the factual basis for the plea did not indicate another gang member committed a felony offense with Strike. In 2017, Strike was convicted of drug-related offenses. The trial court found, based on the allegations in the charging document, that Strike's section 186.22, subdivision (a) conviction qualified as a strike and he was sentenced under the Three Strikes law. Strike appealed, arguing the trial court engaged in impermissible judicial factfinding by ruling his prior conviction qualified as a strike. Held: Prior strike was stricken, sentence vacated, and matter remanded. In 2012, the California Supreme Court clarified that section 186.22, subdivision (a) is not violated by a gang member acting alone but only when an active gang member commits a felony offense with one or more members of his or her gang. (*People v. Rodriguez* (2012) 55 Cal.4th 1125.) Because Strike was convicted of gang participation prior to *Rodriguez*, the trial court had to find that Strike committed a felony with another member of his gang to find the section 186.22, subdivision (a) strike allegation true in this case. However, the court could only rely on facts that were established by virtue of the conviction itself (facts that the defendant admitted as the factual basis for a guilty plea). (*People v. Gallardo* (2016) 4 Cal.5th 120, 136.) Here, the trial court strayed beyond its limited role by relying on the charging document, which contained facts that were not specifically admitted by Strike as part of his guilty plea. On remand, the prosecution has the option of retrying the

enhancement and may provide additional evidence, such as a reporter's transcript, shedding light on whether Strike admitted any additional facts as part of his plea.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/G056949.PDF

Case Name: *People v. Marcus* (2020) 45 Cal.App.5th 201 , **District:** 3DCA , **Case #:** C087059
Opinion Date: 2/13/2020
Case Holding:
Proposition 36, which reformed the Three Strikes law, did not abrogate the trial court's discretion to sentence certain serious and violent felonies concurrently, as provided in *People v. Hendrix*. Marcus and an accomplice were found guilty of committing a home invasion robbery during which one of the victims was shot. A prior strike was found true. At sentencing the trial court said it intended to impose several of the offenses concurrently. The prosecutor objected, arguing that Proposition 36 removed the court's discretion to run the sentences concurrently. The court agreed and imposed consecutive terms. Marcus appealed. Held: Remanded for resentencing. Prior to the Three Strikes Reform Act (Prop. 36), a trial court had discretion to impose concurrent sentences (Pen. Code, §1170.12, subd. (a)(6)-(7)), where there were multiple current convictions for serious or violent felonies that were committed on the same occasion or arose from the same set of operative facts, and where consecutive sentencing was not mandated by some other statute. (*People v. Hendrix* (1997) 16 Cal.4th 508.) The court discussed a change that Proposition 36 made to the sentencing provisions in the voter initiative version of the Three Strikes law (Pen. Code, §1170.12, subd. (a)(7)), and concluded that the revision did not alter the long-standing rule that trial courts have discretion to sentence defendant concurrently for multiple current convictions when those felonies were committed on the same occasion and arose from the same set of operative facts.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/C087059.PDF

Case Name: *People v. Gangl* (2019) 42 Cal.App.5th 58, **District:** 3 DCA , **Case #:** C086719
Opinion Date: 11/14/2019
Case Holding:
Trial court erred in finding it was mandated to impose consecutive sentences for the current felony convictions based on the Three Strikes law. Defendant was convicted of residential robbery and other offenses. A prior strike conviction was found true. At sentencing, the trial court found the Three Strikes law required it to impose consecutive sentences on all of the current serious felony convictions. On appeal defendant raised several sentencing claims, including that the trial court had discretion to impose concurrent terms. Held: Reversed and remanded. Prior to the enactment of the Three Strikes Reform Act (Prop. 36), a trial court had discretion to impose concurrent sentences (Pen. Code, § 1170.12, subd. (a)(6)-(7)), where there were multiple convictions for serious or violent felonies that were committed on the same occasion or arose from the same set of operative facts, and where consecutive sentencing was not mandated by some other statute. (*People v. Hendrix* (1997) 16 Cal.4th 508.) The court analyzed a change that Proposition 36 made to the sentencing provisions in the voter initiative version of the Three Strikes law (Pen. Code, § 1170.12, subd. (a)(7)), and agreed with *People v. Torres* (2018) 23 Cal.App.5th 185. Trial courts have the discretion to impose concurrent sentences on serious and violent felony convictions committed on the same occasion and arising from the same set of operative facts. Those serious felonies must then be sentenced consecutively to the sentences for non-serious convictions.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/C086719.PDF

Sentencing—Dueñas

Case Name: *People v. Petri* (2020) 45 Cal.App.5th 82 , **District:** 6DCA, **Case #:** H045990
Opinion Date: 2/10/2020
Case Holding:
Trial court did not err by imposing the restitution fine, court operations assessment, and court facilities assessment without a finding that defendant had the ability to pay them. Petri pleaded no contest to felony offenses in two separate cases. At a combined sentencing hearing, prior to imposing any fines or fees, the trial court stated that the court "assume[s] that [defendant] doesn't have any ability to pay fines and fees

based on an inability to pay." The court stated that it would not impose a $10 fine (Pen. Code, § 1202.5) or a booking fee (see Gov. Code, §§ 29550, 29550.1, 29550.2) "based on inability to pay." But the court ordered Petri to pay a restitution fine of $300 (Pen. Code, § 1202.4, subd. (b)), a court operations assessment of $40 (Pen. Code, § 1465.8), and a court facilities assessment of $30 (Gov. Code, § 70373) in each case. On appeal, Petri argued that, based on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, the trial court violated his due process rights under the California and federal Constitutions because the court failed to find that he had the present ability to pay the amounts imposed. Held: Affirmed on this point. The Courts of Appeal have reached conflicting conclusions regarding whether *Dueñas* was correctly decided, and the issue is currently before the California Supreme Court. (See *People v. Kopp* (2019) 38 Cal.App.5th 47, 95, review granted 11/13/2019 (S257844/D072464). Citing *People v. Hicks* (2019) 40 Cal.App.5th 320, the court here concluded *Dueñas* is not persuasive, and that the trial court did not err in imposing the restitution fine, court facilities assessment, and court operations assessment without first determining Petri's ability to pay those amounts. The court declined to review Petri's restitution fine under the excessive fines clause of the Eighth Amendment. The court noted that Courts of Appeal have reached different conclusions regarding whether a due process claim under *Dueñas* is forfeited if the defendant failed to object in the trial court, but the court assumed Petri did not forfeit his claim. [**Editor's Notes:** (1) The Court of Appeal also struck a section 667.5, subdivision (b) enhancement because Petri's case was not final when Senate Bill No. 136 went into effect. (2) The California Supreme Court denied Petri's petition for review without prejudice to any relief to which he might be entitled after the court decides *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted 11/13/2019 (S257844/D072464).]

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/H045990.PDF

Case Name: *People v. Torres* (2020) 44 Cal.App.5th 1081 , **District:** 2DCA , **Division:** 1 , **Case #:** B296587
Opinion Date: 2/6/2020
Case Holding:
Penal Code section 1237.2, which was enacted to allow trial courts to correct errors in fines and assessments notwithstanding a pending direct appeal, does not apply after the defendant's direct appeal has concluded. In 2014, Torres was convicted of criminal offenses and his judgment was affirmed on appeal in 2016. He did not challenge the $70 court assessments or the $10,000 restitution fine on appeal. In 2018, the trial

court denied Torres' motion for modification of the restitution fine, filed on the ground that the court had not determined his ability to pay the restitution fine. (See *People v. Dueñas* (2019) 30 Cal.App.5th 1157.) Torres appealed and the People argued that the order denying Torres' motion was not appealable. Torres argued the order was appealable because the trial court had jurisdiction over his motion pursuant to section 1237.2. Held: Appeal dismissed. Generally, once a judgment is rendered and execution of the sentence has begun, the trial court does not have jurisdiction to vacate or modify the sentence. However, section 1237.2 provides, in pertinent part, "The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs upon the defendant's request for correction," if the sole issue on appeal is a challenge to those monetary orders. The Court of Appeal disagreed that section 1237.2 provided the trial court with jurisdiction to rule on his motion. Section 1237.2 does not vest the trial court with ongoing jurisdiction after the appeal has concluded and the judgment is final. Its statutory language and legislative history indicate that the intent was to allow the superior court to modify the sentence as stated while the case was pending appeal, not after the conclusion of the appeal. Additionally, Torres' claim under *Dueñas*, which was based upon factual arguments concerning his ability to pay, does not fall within any other exceptions to the general rule regarding the trial court's loss of jurisdiction.

The full opinion is available on the court's website here:
https://www.courts.ca.gov/opinions/archive/B296587.PDF