Autobrief 24

An automated system of
standard legal arguments
for California prosecutors

Office of the District Attorney, County of San Diego
District Attorney Summer Stephan
Deputy District Attorney Craig Fisher (Retired), Editor

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SUMMER STEPHAN
DISTRICT ATTORNEY

INTRODUCTION

AUTOBRIEF is a library of legal arguments written from a prosecutor's perspective intended to help prosecutors answer commonly encountered defense arguments in pretrial and in limine motions, during and after trial, and in writs and appeals. The arguments can be incorporated easily into points and authorities, saving research and writing time. They also can be used as a research tool leading a prosecutor to relevant cases and statutes. Of course, you should always cite check the cases and statutes within each AUTOBRIEF argument to make sure they remain good law.

The library of arguments has been updated and expanded over the years to maintain and improve its utility. Only published and final cases are included in *AUTOBRIEF*. Case citations within the library are uniform and follow the California Style Manual (4th ed. 2000). *AUTOBRIEF* is currently in its 24th edition and contains now over 1000 arguments.

Background

AUTOBRIEF was created in 1986 by Deputy District Attorney Paul M. Morley, primarily from arguments written and collected in the Appellate Division of the Office of the District Attorney here in San Diego County. The second editor, Deputy District Attorney Anthony Lovett, took over in 1996, but retired from the office after preparing *AUTOBRIEF* 16 in 2005.

Scope

Typically, each criminal law topic covered in *AUTOBRIEF* begins with a fairly broad argument that alone may be adequate to answer the defense position. For many topics, *AUTOBRIEF* also includes related and more specific arguments for commonly encountered situations. These may be used as "add-ons" to the more general argument.

Using the Written Manual

The major part of the *AUTOBRIEF* manual consists of hard copies of all *AUTOBRIEF* arguments listed by key number. The key number and one-line summary at the beginning of each argument will not be included when the argument is retrieved from the computer. The date following the one-line summary indicates when the argument was last updated or cite checked.

AUTOBRIEF includes a NUMERICAL AND TOPICAL INDEX. Each argument is a separate Microsoft Word document given a key number by which it is retrieved from the computer and located in the manual. The NUMERICAL AND TOPICAL INDEX includes a one-line summary of each argument followed by its key number. The index is cross-referenced.

The TOPICAL SUMMARY precedes the NUMERICAL AND TOPICAL INDEX. This outline lists all major topics and cross-references in alphabetical order and directs the reader to appropriate pages within the NUMERICAL AND TOPICAL INDEX.

Tips for Retrieving Arguments

All *AUTOBRIEF* arguments are available on CD for installation on a hard drive. (See INSTALLING AND UPDATING *AUTOBRIEF*.) Thereafter, the arguments are instantly available within a word processing program. This saves time by allowing the arguments to be incorporated into points and authorities without having to retype them. If you would like to install *AUTOBRIEF* on a personal computer, contact the person in your county responsible for distributing the printed manual and CD or, as a last resort, from the editor. (See *AUTOBRIEF* DISTRIBUTION LIST.)

To use an *AUTOBRIEF* argument, a prosecutor with access to a personal computer can simply retrieve the desired argument from *AUTOBRIEF* while drafting points and authorities.

Formatting

AUTOBRIEF is formatted for the San Diego County District Attorney's motion pleading practice. Our format may or may not conform to the motion pleading design in your office. We use a 13-point Times New Roman proportional font with 1.5 line spacing. This fits a 28- or 29-line pleading paper. (To save paper, smaller font, single spaced, was used in the manual.) We also use italics instead of underlining for case citations and emphasis in conformity with the Fourth Edition of the California Style Manual. As Word uses propositional spacing, it is no longer necessary to have two spaces at the end of a sentence. Instead, I have used only one space at the end of each sentence.

New for the 24th Edition

This is my latest attempt as editor to meet the high standards set by my predecessors. It remains a daunting task. In the years I have been working on this project I have tried to update and improve all the existing AUTOBRIEF arguments. The biggest challenge this time was working from home with limited legal research resources due to COVID-19 restrictions.

As you can see by DISTRIBUTION LIST below, *AUTOBRIEF* is used in district attorney's offices in nearly every California county, the Attorney General's Office and many city attorneys. It is also available to those able to log-in to the "Members only" section of the CDAA website.

Coverage

This edition of Autobrief includes United States Supreme Court, California Supreme Court and California Court of Appeal cases certified for publication and final (no petitions for rehearing or review pending) as of mid-September 2021. There are so many legislative changes in 2021 (many not effective until 2022, however, I was unable to update all of affected *AUTOBRIEF* arguments. Please double check all statutory references.

A Final Note

AUTOBRIEF is intended to make our job easier. I welcome your comment about errors, suggested improvement, or additional arguments.

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AUTOBRIEF DISTRIBUTION LIST

Electronic copies of the *AUTOBRIEF* manual and the library of arguments are distributed to California prosecutors on CD by the San Diego County District Attorney's Office. Within the San Diego County District Attorney's Office, *AUTOBRIEF* is installed on the local area network and deputies may obtain copies of the manual by contacting the editor. Our office is no longer able to cover the cost of printing and mailing hard copies of the manual. Instead only a CD with various version of the manual will be distributed. The recipient within your county is responsible for further copying and distributing to others within the office. The following people have agreed to serve as the *AUTOBRIEF* contact for their office. If they are no longer available, and have not been replaced, please contact the editor.

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INSTALLING AND UPDATING AUTOBRIEF

The *AUTOBRIEF* library is meant to be installed in an IBM-compatible personal computer or network so that the arguments can be retrieved into word processing documents.

AUTOBRIEF is shipped on a CD. Each argument is a separate Microsoft Word document file. Once the files are extracted to a hard drive, the user may be able to convert them to another word processing format. This edition is a complete replacement for any earlier edition.

I am told the process of installing *AUTOBRIEF* is not difficult. Unlike the previous editors, I am not very knowledgeable in such matters. The easiest way to install AUTOBRIEF as far as I know is to ask your local computer professional to do it for you. Otherwise, follow these instructions:

- Find out where your existing *AUTOBRIEF* edition is or decide where you want this edition to be stored**.**
- Put the *AUTOBRIEF* CD in the CD drive.
- Using a Windows file manager – e.g., My Computer or Windows Explorer – double click on the CD drive icon.
- Select all the files on the CD.
- Copy the selected files to your new folder, overwriting all the existing files if any.

The full *AUTOBRIEF* index is also included with the library on the CD. This index can be displayed on the screen like any argument under the title "index.doc."

You can verify that the computerized copy of *AUTOBRIEF* you are working with is current by retrieving the file "edition.doc."

TOPICAL SUMMARY

This is an alphabetical list of the topics covered within *AUTOBRIEF*. Major topics appear in **BOLDED UPPERCASE**—cross-references do not. Subtopics and available arguments can be found on the indicated page of the ***NUMERICAL AND TOPICAL INDEX***.

Numbers in brackets [ ] following cross-references reflect the approximate argument number of the primary reference.

DETENTION

Consensual Contact/Contact Less than Detention

Field Sobriety Test

Suspect cannot avoid lawful detention by fleeing into residence

Force to Detain

Length of Detention

See also – Detention can revert to a contact [2480.8]

Ordering Out of Vehicle

Reasonable Suspicion

See also – ARREST, Probable Cause, High area crime rate will support detention or arrest [670.5]

Request for Identification

Transport Detention

110.1-PC1111 jury instruction warranted only if evidence witness is "accomplice" 8/19

Penal Code section 1111 provides:

> A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

In this context, "testimony" includes an accomplice's out-of-court statements made under questioning by police or under other suspect circumstances. (*People v. Carrington* (2009) 47 Cal.4th 145, 190 (*Carrington*); *People v. Williams* (1997) 16 Cal.4th 153, 245.) The defense has the burden of establishing that a prosecution witness is an accomplice by a preponderance of evidence. (*Carrington*, *supra*, 47 Cal.4th at p. 191; but see *People v. Martinez* (2019) 34 Cal.App.5th 721, 729 [prosecution has burden to prove beyond a reasonable doubt that witness is accomplice when this is an element of the charged crime].)

To qualify as an accomplice under Penal Code section 1111, the witness must be liable to prosecution for the identical offense charged against the defendant. (*People v. Whalen* (2013) 56 Cal.4th 1, 55 (*Whalen*); *People v. Guiuan* (1998) 18 Cal.4th 558, 579, fn. 1; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1083-1084.) "To be so chargeable, the witness must be a principal under [Penal Code] section 31." (*People v. Avila* (2006) 38 Cal.4th 491, 564.) In other words, the witness must be liable as a perpetrator or as an aider and abettor. (*People v. Valdez* (2012) 55 Cal.4th 82, 145; *People v. Ybarra*, *supra*, 166 Cal.App.4th at pp. 1084-1085; *People v. Felton* (2004) 122 Cal.App.4th 260, 269.) To be an accomplice under an aiding and abetting theory, for example, the witness must act with knowledge of defendant's criminal purpose and with the intent to encourage or facilitate the commission of the offense charged against the defendant. (*Whalen*, *supra*, 55 Cal.4th at p. 59; *Carrington*, *supra*, 47 Cal.4th at p. 191; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.) Providing assistance without sharing the perpetrator's purpose and intent is insufficient to establish that a person is an accomplice. (*Carrington*, *supra*, 47 Cal.4th at p. 191; *People v. Sully* (1991) 53 Cal.3d 1195, 1227; *People v. Mohamed* (2016) 247 Cal.App.4th 152, 161-163.) An accessory after the fact, therefore, is not an accomplice. (*People v. Howard* (1992) 1 Cal.4th 1132, 1173.)

110.2-Whether witness is accomplice may be jury question 11/18

"[W]hether a witness is an accomplice is a question of fact for the jury unless no reasonable dispute exists as to the facts or the inferences to be drawn from them." (*People v. Manibusan* (2013) 58 Cal.4th 40, 93; see also *People v. Anderson* (2018) 5 Cal.5th 372, 410; *People v. Valdez* (2012) 55 Cal.4th 82, 145-146.) " 'If there is evidence from which the jury could find that a witness is an accomplice to the crime charged, the court must instruct the jury on accomplice testimony. [Citation.] But if the evidence is insufficient as a matter of law to support a finding that a witness is an accomplice, the trial court may make that determination and, in that situation, need not instruct the jury on accomplice testimony.' [Citation.]" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 302; see also *People v. McKinzie* (2012) 54 Cal.4th 1302, 1352.) On the other hand:

> "Whether a person is an accomplice within the meaning of section 1111 presents a factual question for the jury 'unless the evidence presents only a single inference.' [Citation.] Thus,

a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed.' [Citations.]" (*People v. Williams* [(1997)] 16 Cal.4th [635] at p. 679.)

(*People v. Carrington* (2009) 47 Cal4th 145, 191; see also *People v. Sattiewhite* (2104) 59 Cal.4th 446, 472; *People v. Whalen* (2013) 55 Cal.4th 1, 59.)

Reasonable dispute as to the witness' mental state is a common reason that the accomplice question is left to the jury. (*People v. Manibusan*, *supra*, 58 Cal.4th at p. 94 ["On this record, it was for the trier of fact to decide whether Contreras had the intent necessary to establish that she was an accomplice. … The court therefore properly refused to instruct the jury she was an accomplice as a matter of law."]; *People v. Williams* (2009) 43 Cal.4th 584, 637[evidence of acts assisting the crimes did not establish as a matter of law the requisite mental state]; *People v. Fauber* (1992) 2 Cal.4th 792, 834 [same]; *People v. Tewksbury* (1976) 15 Cal.3d 953, 960-961 [same]; *People v. Gordon* (1973) 10 Cal.3d 460, 467 ["where the facts are in dispute as to the knowledge and intent of the asserted accomplice, the witness'[s] liability for prosecution is a question of fact for the jury"].)

120.1-Only slight corroboration needed for accomplice testimony 12/18

Penal Code section 1111 provides:

> A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

"Section 1111 does not affect the admissibility of accomplice testimony but rather 'reflects a legislative determination of how accomplice testimony must be treated.' [Citations.]" (*People v. Romero and Self* (2015) 62 Cal.4th 32.) The corroboration requirement of section 1111 only applies to testimony that is used to convict a defendant, not accomplice testimony that is neutral or exonerating. (*People v. Smith* (2017) 12 Cal.App.5th 766, 780.)

" 'The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128.)' … (*People v. McDermott* (2002) 28 Cal.4th 946, 986.)" (*People v. Abilez* (2007) 41 Cal.4th 472, 505; see also *People v. Whalen* (2013) 56 Cal.4th 1, 55; *People v. Valdez* (2012) 55 Cal.4th 82, 147-148; *People v. Thompson* (2010) 49 Cal.4th 79, 124.) The corroboration "must raise more than a suspicion or conjecture of guilt, and is sufficient if it connects the defendant with the crime in such a way as to reasonably satisfy the trier of fact as to the truthfulness of the accomplice." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1178; see also *People v. Williams* (2013) 56 Cal.4th 630, 679.) "Independent evidence that corroborates portions of the accomplice's testimony, but which does not tend to connect the defendant to the crime, is not enough by itself to constitute sufficient corroboration under section 1111." (*People v. Pedroza* (2014) 231 Cal.App.4th 635, 656.) Nor is evidence that simply connects the accomplice to the crime. (*People v. Perez* (2018) 4 Cal.5th 421, 452.)

> "The entire conduct of the parties, their relationship, acts, and conduct may be taken into consideration by the trier of fact in determining the sufficiency of the corroboration." [Citations.] The evidence "need not independently establish the identity of the victim's assailant" [citation], nor corroborate every fact to which the accomplice testifies [citation], and " 'may be circumstantial or slight and entitled to little consideration when standing alone' " [Citation.]

(*People v. Romero and Self*, *supra*, 6 Cal.4th at pp. 32-33; see also *People v. Garton* (2018) 4 Cal.5th 485, 518.) For example, "[a] defendant's own conduct or statements may provide adequate corroboration for accomplice testimony." (*People v. Jones* (2018) 26 Cal.App.5th 420, 440.)

Note, however, "the testimony of one accomplice cannot corroborate that of another accomplice. [Citation.]" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1222.)

"The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime." (*People v. McDermott*, *supra*, 28 Cal.4th at p. 986; see also *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1128-1129 [conviction reversed because of insufficient corroboration].)

120.2-Accomplice corroboration requirement generally only applies at trial 4/20

Penal Code section 1111 provides:

> A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

The accomplice corroborating evidence rule does not apply at a preliminary hearing (*People v. McRae* (1947) 31 Cal.2d 184, 187; *People v. Cooks* (1983) 141 Cal.App.3d 224, 291) or during grand jury indictment proceedings (*Artega v. Superior Court* (2015) 233 Cal.App.4th 851, 862-869). It does not apply at juvenile delinquency jurisdictional hearings. (*In re Mitchell P.* (1978) 22 Cal.3d 946, 949; *In re Christopher B.* (2007) 156 Cal.App.4th 1557, 1560-1567.) It does apply, however, to the penalty phase of a capital case. (*People v. Nelson* (2011) 51 Cal.4th 198, 217; *People v. Hernandez* (2003) 30 Cal.4th 835, 874.)

The corroboration requirement of Penal Code section 1111 may be applied to some out-of-court statements of accomplices and co-conspirators when made under "special circumstances." (*People v. Hoyt* (2020) 8 Cal.5th 892, 946.) " 'The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police.' 'On the other hand, when the out-of-court statements are not given under suspect circumstances, those statements do not qualify as "testimony" and hence need not be corroborated under … section 1111.' " (*People v. Williams* (1997) 16 Cal.4th 153, 245; see e.g., *People v. Hoyt*, *supra*, 8 Cal.5th at pp. 946-947 [statements made to other witnesses].)

130.1-DA has broad discretion in charging function 1/21

The District Attorney has broad discretion in charging crimes.

> The prosecution—as part of the executive branch of our government—ordinarily has sole discretion to conduct criminal cases, including determinations of whom to charge and what charges to file. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451; *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1540.) A prosecutor's decision about filing criminal charges arises from complex law enforcement considerations that are not generally subject to judicial supervision. (*Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 552.)

(*People v. Childs* (2013) 220 Cal.App.4th 1079, 1103-1104.) "The prosecutor ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek." (*Dix v. Superior Court*, *supra*, 53 Cal.3d at p. 451.) "The prosecutor, in the exercise of discretion, may file any charges and enhancements when they are supported by probable cause." (*People v. Galvez* (2011) 195 Cal.App.4th 1253, 1260.) The breadth of this discretion was summarized in *People v. Brigham* (1989) 216 Cal.App.3d 1039:

> The Legislature, our Supreme Court, and this court (Div. Two), as well as other appellate courts in California, have recognized that the prosecutor, not the court or the defendant, exercises the discretion to decide which crimes will be charged and on what theory they will be prosecuted. Government Code section 26500 provides the prosecutor "shall attend the courts, and *within his or her discretion* shall initiate and conduct on behalf of the people all prosecutions for public offenses." (Italics added.) The courts have repeatedly indicated this prosecutorial discretion is a fundamental principle of our criminal justice system. "Prosecutors have broad decisionmaking power in charging crimes." *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1132.) "The district attorney must be vested with discretionary power in investigation and prosecution of such charges." (*Taliaferro v. City of San Pablo* (1960) 187 Cal.App.2d 153, 154.) "There can be no question but that discretion permeates the entire process of bringing charges against a person suspected of having committed a crime. And it is the district attorney who is vested with discretionary power to determine whether to prosecute. [Citation.] *There is no review by way of the appellate process of such a decision … .*" (*People v. Adams* (1974) 43 Cal.App.3d 697, 707-708, italics added.) Our Supreme Court has also cautioned against court action unduly trammeling the prosecutor's decision-making process, which "would improperly interfere with the prosecutor's free exercise of discretion to determine what if any criminal charges should be brought against particular individuals. [Citations.]" (*Daly v. Superior Court* (1977) 19 Cal.3d 132, 148-149.)

(*Brigham*, *supra*, 216 Cal.App.3d at p. 1052.)

130.2-Charging choice among applicable laws does not violate equal protection 1/21

A prosecutor's choice of what charges to bring among overlapping applicable statutes does not violate equal protection of the law.

> "[N]either the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles. [Citation.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) [¶] … "[N]umerous factors properly may enter into a prosecutor's decision to charge under one statute and not another, such as a defendant's background and the severity of the crime, and so long as there is no showing that a defendant 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' that is, ' "one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests[,]" ' the defendant cannot make out an equal protection violation. [Citation.]" (*Id*. at pp. 838-839.)

(*People v. Brown* (2016) 6 Cal.App.5th 1074, 1084-1085; see also *People v. Montelongo* (2020) 55 Cal.App.54th 1016, 1028.) "In short, prosecutors are permitted "to make charging decisions that implicate different penalty provisions, so long as those decisions are not made for invidious reasons (e.g., race, gender, etc.)." (*People v. Brown* (2017) 14 Cal.App.5th 320, 339-340; see also *People v. Munoz* (2019) 31 Cal.App.5th 143, 163.)

140.1-Charges can be amended without leave of court prior to arraignment 10/13

Penal Code section 1009 governs amendments to the accusatory pleading by the prosecution. Under this statute, a complaint or information may be amended by the prosecution without leave of court at any time before the defendant enters a plea or has a demurrer sustained. Leave of court is required after the defendant has entered a plea to the original pleading. In other words, the court must approve the filing of an amended charging document. (*People v. Leonard* (2014) 228 Cal.App.4th 465, 477; *People v. Lettice* (2013) 221 Cal.App.4th 139, 149.) "Requiring leave of court before the prosecution may amend an information following a defendant's plea has long been an important safeguard for the rights of the accused." (*People v. Leonard*, *supra*, 228 Cal.App.4th at p. 481.) "Although the prosecution normally requests leave to amend in writing, the trial court has authority to amend the information on an oral motion (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 133-134) or sua sponte on the court's own motion (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057.)" (*People v. Leonard*, *supra*, 228 Cal.App.4th at p. 477.) And, "[w]here, as here, an amended information was filed and no order explicitly approves its filing, we will presume in favor of the judgment that the amended information was filed with leave of court." (*Ibid*.)

140.2-Test for amending accusatory pleading under PC1009 11/19

Penal Code section 1009 permits amendment of an accusatory pleading "*for any defect or insufficiency*." This encompasses amendments to the substance as well as to the form of the charging document. (*People v. O'Moore* (1948) 83 Cal.App.2d 586, 591.) An accusatory pleading can be amended to add lesser included offenses. (See, e.g., *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1581-1584.) Criminal pleadings also may be amended to add penalty enhancement allegations. (See, e.g., *People v. Superior Court (Mendella)* (1983) 33 Cal.3d 754, 764, superseded by statute on another point as stated in *In re Jovan B.* (1993) 6 Cal.4th 801, 814, fn. 8; *People v. Hall* (1979) 95 Cal.App.3d 299, 313-314.) An information or indictment can be

amended to allege facts to explain why the statute of limitations has not been violated. (*Hudson v. Superior Ct.* (2017) 7 Cal.App.5th 999, 1012-1016.)

The power to amend is not without limits, and successful amendment can have procedural consequences. First, an information cannot be amended under Penal Code section 1009 to charge an offense not shown by the evidence taken at the preliminary hearing. (*People v. Calhoun* (2019) 38 Cal.App.5th 275, 303 (*Calhoun*); *People v. Arevalo-Iraheta*, *supra*, 193 Cal.App.4th at p. 1581.) The offense must also be transactionally related to the charged offenses. (See *People v. Superior Court (Mendella)*, *supra*, 33 Cal.3d at p. 764; *Calhoun*, *supra*, 38 Cal.App.5th at p. 303.) Immaterial variance and inconsistency between the preliminary hearing and trial testimony does not require a finding of lack of sufficient notice to the defense under normal circumstances. (*Calhoun*, *supra*, 38 Cal.App.5th at p. 304; *People v. Gil* (1992) 3 Cal.App.4th 653, 659; distinguish *People v. Burnett* (199) 71 Cal.App.4th 151, 178 [prosecution for felon in possession of gun changed to different weapon on different date].)

Second, after the amendment: "[T]he trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, *in which event a reasonable postponement, not longer than the ends of justice require, may be granted*." (Pen. Code, § 1009, emphasis added.)

Whether an offered amendment should be permitted is a matter within the sound discretion of the court. (*People v. Arevalo-Iraheta*, *supra*, 193 Cal.App.4th at p. 1581.) In the absence of an abuse of discretion, a ruling permitting the amendment will not be disturbed on appeal. (*People v. Miralrio* (2008) 167 Cal.App.4th 448, 458; *People v. Bolden* (1996) 44 Cal.App.4th 707, 716.) "Liberality appears to have been countenanced in allowing such amendments under statutory provisions therefor, to simplify procedure, to further the ends of justice, and to 'save indictments against defects and deficiencies *of substance and form* by amendment stating the offense intended to be charged.' [Citation.]" (*People v. O'Moore*, *supra*, 83 Cal.App.2d at p. 594, original emphasis.) For example, generally it is not an abuse of discretion to permit the prosecution to amendment the accusatory pleading after a defendant offers to plead guilty to the existing charges, but before the defendant's entry of the change of plea. (See *People v. Michaels* (2002) 28 Cal.4th 486, 513-514.)

The reported cases reveal exceedingly few circumstances in which it was an abuse of discretion to permit an amendment where the offered amendment appeared to comply with Penal Code section 1009. (See, e.g., *People v. Chapman* (1975) 47 Cal.App.3d 597 [improper to add a charge barred by the statute of limitations].)

140.3-Amendment of complaint/information may be at any stage 1/18

Penal Code section 1009 provides, in part: "The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint for any defect or insufficiency, at any stage of the proceedings … ." Penal Code section 1009 has been liberally applied to permit amendment at any stage of the proceedings, including amendments to the charges on the day of trial (*People v. Hall* (1979) 95 Cal.App.3d 299, 314; *People v. Byrd* (1960) 187 Cal.App.2d 840, 842), after jury selection *People v. Villagren* (1980) 106 Cal.App.3d 720, 724-725), in the middle of trial (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1580-1584 [before prosecution rested its case-in-chief], at the conclusion of the evidence (*People v. Miralrio* (2008) 167 Cal.App.4th 448, 454-459; *People v. Jones* (1985) 164 Cal.App.3d 1173, 1178-1179), during jury deliberations (*People v. Bolden* (1996) 44 Cal.App.4th

707, 716), and even after a mistrial (*People v. Williams* (1997) 56 Cal.App.4th 927, 932; *People v. Brown* (1973) 35 Cal.App.3d 317, 322-323; *People v. Flowers* (1971) 14 Cal.App.3d 1017, 1019-1021). (See, generally, *People v. Goolsby* (2015) 62 Cal.4th 360, 367-368; but see *People v. Wilford* (2017) 12 Cal.App.5th 827, 840 [amended information failed to notify defendant that People would seek increased sentence under a different subsection of statute than one alleged]; *People v. Hamernik* (2016) 1 Cal.App.5th 412, 423-425 [Pen. Code, § 1009 does not apply in appellate court after conviction].)

In addition, "[o]ral amendment of an accusatory pleading may suffice for statutory and due process purposes. (*People v. Pettie* (2017) 16 Cal.App.5th 23, 82.) "The informal amendment doctrine makes it clear that California law does not attach any talismanic significance to the existence of a written information." (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 133.) Under the informal amendment doctrine, there is no need for a written amendment of the charging doctrine during trial when the defendant's conduct or circumstances created by the defense amount to an implied consent to the informal amendment. (*Ibid*.; see, e.g., *People v. Whitmer* (2014) 230 Cal.App.4th 906, 919 [information charged defendant with grant theft auto but jury also instructed on grand theft of property valued over statutory minimum].) "The informal amendment doctrine therefore applies only when a defendant had reasonable notice of a sentence enhancement allegation despite an incomplete pleading." (*People v. Sawyers* (2017) 15 Cal.App.5th 713, 723 [notice of potential sentencing under Three Strikes law inadequate]; distinguish *People v. Pettie*, *supra*, 16 Cal.App.5th at pp. 83-84 [defendant had adequate notice of gun enhancement he faced when prosecutor orally amended information during trial].)

140.4-Amendment of charges may be proper even after waiver of PE 6/20

As a general rule, when no preliminary hearing is held, the defendant may not be charged with additional crimes not included in the complaint to which the defendant waived his or her right to a preliminary hearing, even if the amendment did not prejudice the defendant or the defendant had notice of the facts underlying the new charges. (*People v. Mora-Duran* (2020) 45 Cal.App.5th 589, 599 (*Mora-Duran*); *People v. Winters* (1990) 221 Cal.App.3d 997, 1006-1007.)

> Simply put, section 1009 prohibits adding new charges to an accusatory pleading after the defendant has waived his right to a preliminary hearing on that pleading. In enacting section 1009, the Legislature determined that an accusatory pleading cannot be amended based on evidence not taken at the preliminary hearing. And when, as here, no preliminary hearing is held, the pleading cannot be amended to add additional charges.

(*People v. Peyton* (2009) 176 Cal.App.4th 642, 654 (*Peyton*).) These principles also apply to conduct enhancements. (*People v. Rogers* (2016) 245 Cal.App.4th 1353, 1361-1366.)

Nevertheless, under some limited circumstances, Penal Code section 1009, permitting amendment of information at any stage of the proceedings, can apply even when no preliminary hearing is held, such as when it is waived by the defendant. (*Peyton*, *supra*, 176 Cal.App.4th at p. 654; *People v. Winters*, *supra*, 221 Cal.App.3d at pp. 1006-1008.) Amendments that do not allege new charges and that do not constitute a "significant variance" from the original are permissible. (*Mora-Duran*, *supra*, 45 Cal.App.5th at p. 599; *Peyton*, *supra*, 176 Cal.App.4th at pp. 659-660.)

Under due process, the test is one of adequate notice to the defense. (*Peyton*, *supra*, 176 Cal.App.4th at pp. 657-659.) "[T]he pleading on file at the time of the defendant's waiver must serve as the touchstone of due process notice to the defendant of the time, place, and circumstances

of the charged offenses." (*Id*. at p. 659.) In *Peyton*, "the only difference between the amended complaint, to which defendant waived his right to a preliminary hearing, and the second amended information, upon which defendant was convicted at trial, is that the bases of two of the four alleged [Penal Code] section 269 charges were changed from oral copulation to sexual penetration." (*Ibid*.) The appellate court found no Penal Code section 1009 violation:

> We therefore hold that defendant's convictions of the two counts of aggravated assault by sexual penetration were not in significant variance from the charges in the amended complaint; the convictions are therefore lawful. The operative pleading under which defendant was convicted did not charge him with violating a different Penal Code section from that alleged in the amended complaint. Both pleadings were based on the same course of conduct which occurred over an extremely limited time period and involved the same victim. Both pleadings dealt with the same underlying acts, oral copulation and sexual penetration. Defendant was not presented with a moving target; he was fully aware of what he had to defend against. Additionally, the punishment for the crimes charged in the amended complaint and the second amended information were identical. The substantial rights of defendant were simply not implicated.

(*Id*. at p. 660; distinguish *Mora-Duran*, *supra*, 45 Cal.App.5th at pp. 599-600 ["significant variance" found because, although charged with same crime, statutory amendments added additional elements].)

150.1-Conjunctive pleading of acts violating same statute OK 4/07

The courts have long approved of pleading alternative acts prohibited by a criminal statute in the conjunctive. In such a case, conviction may properly be based upon proof of any of the alternate acts. In *People v. Fritz* (1970) 11 Cal.App.3d 523, for example, the defendant was charged with "selling *and* furnishing a restricted dangerous drug." The applicable statute proscribed "selling *or* furnishing a restricted dangerous drug." The Court of Appeal found that the complaint was properly framed in the conjunctive, and the proof on only one of the acts, in that case "furnishing," as opposed to "selling and furnishing," was sufficient to sustain the crime charged. The appellate court indicated: "Where a statute enumerates several acts disjunctively which together or separately constitute a criminal offense, it is proper, indeed necessary, to charge the commission of more than one of such acts in the conjunctive. If commission of any one of the acts is established the defendant is guilty of the crime charged." (*Id.* at p. 526; similarly see *In re Bushman* (1970) 1 Cal.3d 767, 775; *People v. Turner* (1960) 185 Cal.App.2d 513, 518.)

170.1-Precise date of offense need not be alleged 12/19

Penal Code section 955 provides, "[t]he precise time at which the offense was committed need not be stated in the accusatory pleading, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense."

So long as the offense is within the statute of limitations, the defendant is not entitled to notice of the specific time of the offense. " ' "Beyond that, … the prosecution clearly has no duty to provide more explicit notice than human nature or science permit." ' " (*People v. Jennings* (1991) 53 Cal.3d 334, 358.) The courts often have upheld counts alleging commission of an offense over long periods of time (see, e.g., *People v. Fremont* (1941) 47 Cal.App.2d 341) or multiple offenses

alleged to have occurred over different time periods (see, e.g. *People v. Jones* (1990) 51 Cal.3d 294, 315-316 [multiple child molests alleged to have occurred in different two-month periods]; *People v. Garcia* (2016) 247 Cal.App.4th 1013, 1022 [child molests alleged to have occurred in different years]; *People v. Torres* (2019) 39 Cal.App.5th 849, 858 [dissuading a witness based on continuous course of conduct]).

No greater specificity is required in the date of offense merely because an alibi defense is asserted covering part of the period charged. (*People v. Fortanel* (1990) 222 Cal.App.3d 1641, 1644-1646.)

Finally, even after conviction, "[t]he evidence is not insufficient merely because it shows the offense was committed on another date." (*People v. Peyton* (2009) 176 Cal.App.4th 642, 660; see also *People v. Garcia*, *supra*, 247 Cal.App.4th at p. 1022; distinguish *People v. Rojas* (2015) 237 Cal.App.4th 1298, 1306-1307 [evidence did not establish whether offense took place before or after effective date of charged crime].) "The incongruence, if any, between the alleged dates … and the trial evidence 'is nothing more than a pleading error.' [Citation.]" (*People v. Torres*, *supra*, 39 Cal.App.5th at p. 858.)

180.1-Enhancement shown by PE may be added to information 1/10

Penal Code section 739 provides that any information may charge a defendant "with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed."

In the same manner, the prosecution may allege in an information a penalty enhancement which is supported by evidence taken at the preliminary examination though not charged at that stage. In *People v. Superior Court (Mendella)* (1983) 33 Cal.3d 754, the California Supreme Court set forth the rules on this subject, quoting extensively from prior cases: " 'California law under sections 739 and 1009 and relevant cases permit amendment of the information to add charges or enhancements which are supported by the actual evidence at the preliminary hearing, provided the facts show due notice by proof to the accused.' " (*Id.* at p. 764, superseded by statute on another point as stated in *In re Jovan B.* (1993) 6 Cal.4th 801, 814, fn. 8.)

It has also been held that the notice given by the evidence at the preliminary hearing alone does not deprive the defendant of any constitutional protection when the penalty enhancement is subsequently alleged. (*People v. Brice* (1982) 130 Cal.App.3d 201, 207; *People v. Donnell* (1976) 65 Cal.App.3d 227, 233.)

210.1-Offenses may be generally plead in language of statute 4/20

An accusatory pleading that does not substantially conform to the provisions of sections 950, 951, and 952 is subject to demurrer. (Pen. Code, § 1004, subd. (2).) Penal Code section 952, describing the standards to which an accusatory pleading must conform, provides:

> In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.

The defendant is thus apprised, in ordinary and concise language, of the acts alleged to have been committed in violation of a specified code section. Such pleading is sufficient. (*Ratner v. Municipal Court* (1967) 256 Cal.App.2d 925; *People v. Bishop* (1963) 220 Cal.App.2d 148.) The law does not require the pleadings specify what evidence forms the basis for the various counts. (*Huffman v. Superior Ct.* (2017) 16 Cal.App.5th 1086, 1095-1098 (*Huffman*).)

"Under modern pleading procedures, notice of the particular circumstances of an alleged crime is provided by the evidence presented to the committing magistrate at the preliminary examination, not by a factually detailed information." (*People v. Jennings* (1991) 53 Cal.3d 334, 358; see also *Huffman*, *supra*, 16 Cal.App.5th at p. 1092.) "In fact, ' "the time, place and circumstances of charged offenses are left to the preliminary hearing transcript; it is the touchstone of due process notice to a defendant." [Citations.]' (*Hoffman*, at p. 1092.)" (*Heidary v. Superior Ct.* (2018) 26 Cal.App.5th 110, 120.) The same principle applies when there is a grand jury transcript. (*Id*. at p. 124.) "Between the indictment, the contents of the thorough and detailed grand jury transcript, and the exhibits presented to the grand jury and contained in the record (including the record here), due process has been satisfied and petitioner has been given adequate notice of the charges against him." (*Ibid*.)

Thus, it has long been held that the particulars of an offense, including manner, means, place, or circumstances in general need not be alleged. It is sufficient if the essential elements of the offense are pleaded. (*People v. Soto* (1977) 74 Cal.App.3d 267, 273.) Nor does the theory of liability, such as whether the defendant is being prosecuted as a principle or an aider and abetter, need to be alleged in the accusatory pleading so long as the defense is given sufficient notice which theories are at issue during at trial. (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 70.) The same principle applies to establishing proper venue or territorial jurisdiction. (*People v. Carrington* (2009) 47 Cal.4th 145, 183 ["A simple allegation that an offense was committed in a particular county ordinarily is sufficient."].)

> These simplified pleading rules are still subject to due process requirements. "Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." [Citation.] However, "an otherwise proper pleading may … fail to afford due process notice" only "in unusual circumstances … ." [Citation

(*Huffman*, *supra*, 16 Cal.App.5th at p. 1092.) Such "unusual circumstances" could include a material variance between the charges and the crime actually proved at trial. " 'The test of the materiality of a variance is whether the indictment or information so fully and correctly informs the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense.' [Citations.]" (*People v. Hoyt* (2020) 8 Cal.5th 892, 923.)

Finally, Penal Code section 1159 gives the defense adequate notice that the defendant may be convicted of an uncharged attempt to commit the charged offense even if such attempt is not a lesser included offense of the completed crime. (*People v. Fontenot* (2019) 8 Cal.5th 57, 61-64.)

210.2-Murder charged in language of PC187 includes felony-murder 4/15

The failure to specifically allege felony murder did not prevent the prosecution from pursuing that theory at trial. In *People v. Morgan* (2007) 42 Cal.4th 593, the defendant was charged in the accusatory pleading with malice murder under Penal Code section 187. The jury was instructed on, and the defendant was convicted of, felony murder. On appeal, the defendant asserted that the court erred in instructing the jury on felony murder in that it was a " 'separate uncharged crime[ ].' " (*Id*. at p. 616, italics omitted.) The Supreme Court disagreed, stating that "a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187." (*Ibid*.; see also *People v. Hughes* (2002) 27 Cal.4th 287, 369 ["an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely."].) The California Supreme Court added that it continued "to reject, 'as contrary to our case law, the premise underlying defendant's assertion that felony murder and malice murder are two separate offenses.' [Citation.]" (*People v. Morgan*, *supra*, at p. 616; see also *People v. Campbell* (2015) 233 Cal.App.4th 148, 158 [substantial evidence supported giving second degree murder lesser included offense instructions even though prosecution proceeded only one first degree felony-murder theory because information used Penal Code section 187 language].)

210.3-Generic child abuse testimony provides sufficient notice 9/13

In *People v. Jones* (1990) 51 Cal.3d 294 (*Jones*), the California Supreme Court addressed problems arising in "resident child molester" cases in which prosecutions are based upon the testimony of young children repeatedly molested over months or years. The young victims in these cases typically are unable to give specific dates or details of individual crimes. Their "generic" testimony often shows a series of similar recurring acts often more numerous than the number of counts filed. " '[A] defendant must be prepared to defend against all [section 288] offenses of the kind alleged in the information as are shown by evidence at the preliminary hearing to have occurred within the timeframe pleaded in the information.' [Citation.]" (*Id*. at p. 317; see also *People v. Fernandez* (2013) 216 Cal.App.4th 540, 555.) The court held that so long as the testimony adequately describes the unlawful conduct, shows its frequency sufficiently to support the counts alleged, and describes a general time period within the statute of limitations, it is sufficient to support a conviction. (*Jones*, *supra*, 51 Cal.3d at pp. 313-316; see also *People v. Hord* (1993) 15 Cal.App.4th 711, 718-720.) "Does the victim's failure to specify precise date, time, place or circumstances render generic testimony insufficient? Clearly not. As many of the cases make clear, the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction." (*Jones*, *supra*, at pp. 315-316.)

Nor does such testimony deprive a defendant of due process. The appellate court in *Jones* emphasized the role of the preliminary hearing and pretrial discovery to give a defendant fair notice of the charges being faced. (*Jones*, *supra*, 51 Cal.3d at pp. 317-319.) The court rejected the assertion that such testimony of long-term abuse deprives a defendant of the ability to present an alibi defense since the cases center on the basic issue of credibility. (*Id*. at pp. 319-321.) Finally, the court held that evidence of several undifferentiated molestations equal in number or greater than those charged is sufficient to satisfy the requirement of jury unanimity. "[B]ecause credibility is usually the 'true issue' in these cases, 'the jury either will believe the child's testimony that the consistent, repetitive pattern of acts occurred or disbelieve it.' …" (*Id.* at p. 322.)

210.4-Defense can acquiesce to conviction of uncharged offense or enhancement 3/18

"A criminal defendant must be given fair notice of the charges against him in order that he may have a reasonable opportunity properly to prepare a defense and avoid unfair surprise at trial." (*People v. Anderson* (1975) 15 Cal.3d 806, 809.) But, "[s]ince a defendant who requests or acquiesces in conviction of a lesser offense cannot legitimately claim lack of notice, the court has jurisdiction to convict him of that offense." (*People v. West* (1970) 3 Cal.3d 595, 612; see also *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1237.) "The same rules apply to enhancement allegations." (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1438; see also *People v. Valenzuela*, *supra*, 199 Cal.App.4th at p. 1237 ["Counsel consented to the inclusion of the allegation without amendment of the information, and Valenzuela has therefore forfeited the claim that notice was inadequate."]; but see *People v. Nguyen* (2017) 18 Cal.App.5th 260, 270-272 [counsel's failure to object did not forfeit claim defendant was improperly given higher sentence for uncharged serious felony prior conviction which was only charged under the three strikes law]; *People v. Sawyers* (2017) 15 Cal.App.5th 713, 723-727 [record inadequate to show defendant's acquiescence to or forfeiture of potential for sentencing on uncharged strike prior].)

230.1-Prior felonies can be alleged at any time 6/20

Penal Code section 969a (§ 969a) states:

> *Whenever it shall be discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted* either in this State or elsewhere, *said indictment or information may be forthwith amended to charge such prior conviction or convictions*, and if such amendment is made it shall be made upon order of the court, and no action of the grand jury (in the case of an indictment) shall be necessary. Defendant shall promptly be rearraigned on such information or indictment as amended and be required to plead thereto.

(Emphasis added.)

The California Supreme Court in *People v. Superior Court (Mendella)* (1983) 33 Cal.3d 754, stated:

> The People are particularly concerned that they will be required to charge and prove prior convictions at the preliminary hearing stage. A specific statutory provision, however, permits amendment of the information and rearraignment of the defendant "Whenever it shall be discovered … ." (Pen. Code, § 969a.) *Nothing in this opinion is intended to question this statutory authorized procedure*.

(*Id.* at p. 764, fn. 9, emphasis added, superseded by statute on another point as stated in *In re Jovan B.* (1993) 6 Cal.4th 801, 814, fn. 8.)

Section 969a does not require amendment of an accusatory pleading as soon as the People discover evidence of prior felonies. When reviewing an amendment to a grand jury indictment, the appellate court in *People v. Finnegan* (1961) 192 Cal.App.2d 151, held that section 969a is "broad enough to permit the indictment to be amended to charge a prior conviction, even though the grand jury knew of the prior but did not charge it in the indictment." (*Id*. at p. 155.) It follows that section 969a is also broad enough to allow adding known to the People at the time of the preliminary hearing, as well as priors discovered later. It is well established that prior convictions that are not elements of an offense, such as strike and prison priors, need not be proved at the preliminary hearing. (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144, 151-159; *People v.*

Shaw (1986) 182 Cal.App.3d 682, 684-686.) Similarly, Penal Code section 666 priors need not be at the preliminary hearing. (*People v. Robinson* (2004) 122 Cal.App.4th 275, 281.)

Amendment to add prior allegations under section 969a may be appropriate during and after trial on the substantive charge. In *People v. Valladoli* (1996) 13 Cal.4th 590, three prior felony conviction enhancements had been alleged in the complaint but mistakenly were not alleged in the information. Interpreting section 969a, the California Supreme Court upheld adding these prior conviction allegations to an information after the jury found defendant guilty but before the jury was discharged. (*Id*. at p. 594.)

If the defendant has already entered a guilty plea in a felony case court approval is necessary to file an amended information or indictment under section 969a. (*People v. Lettice* (2013) 221 Cal.App.4th 139, 141.) In exercising this discretion, "a trial court that is considering whether to permit a post-plea amendment should consider several factors, including: the reason for the late amendment, whether the defendant is surprised by the attempted amendment, and whether the prosecution's initial failure to allege the prior convictions affected the defendant's decisions with respect to plea bargaining." (*Ibid*, citing *People v. Valladoli*, *supra*, 13 Cal.4th at p. 608.)

A related provision, Penal Code section 969.5, gives the court discretion to permit the amendment of a criminal complaint to add prior felony convictions even after a defendant has entered a guilty plea. (See *People v. Superior Court (Alvarado)* (1989) 207 Cal.App.3d 464, 472-476 [abuse of discretion to deny prosecution's request]; see also *People v. Carson* (1941) 45 Cal.App.2d 554, 557-558.)

These amendments may be done orally. (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 132-134.)

Finally, under Penal Code section 1025, the power to amend to add new priors ends once the jury is discharged, unless the defendant waives or forfeits the right to have the same jury try both guilt and the priors. (*People v. Tindall* (2000) 24 Cal.4th 767, 776; see also *People v. Gutierrez* (2001) 93 Cal.App.4th 15, 23-24; distinguish *People v. LaVoie* (2018) 29 Cal.App.5th 875 [after jury waiver prosecution can make minor, clerical or typographical amendments to existing charged priors, but not substantive changes adding new priors].)

250.1-General standards for PC1118.1 acquittal motion during jury trial 6/20

A defense motion for acquittal at a jury trial is governed by Penal Code section 1118.1 (§ 1118.1), which states in pertinent part:

> In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal.

Case law explains:

> " 'The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, "whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged." ' [Citation.] 'The purpose of a motion under section 1118.1 is to weed out as soon as possible those few

instances in which the prosecution fails to make even a prima facie case.' [Citations.] The question 'is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination.' [Citation.] The sufficiency of the evidence is tested at the point the motion is made. [Citations.] The question is one of law, subject to independent review." (*People v. Stevens* (2007) 41 Cal.4th 182, 200.)

(*People v. Lynch* (2010) 50 Cal.4th 693, 759; see also *People v. Whalen* (2013) 56 Cal.4th 1, 55; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1079.) "The court must evaluate the evidence in the light most favorable to the prosecution. [Citations.] If the record can reasonably support a finding of guilt, a motion for acquittal must be denied even if the record might also justify a contrary finding. [Citation.]" (*People v. Sigur* (2015) 238 Cal.App.4th 656, 667.)

250.2-Prosecution can reopen case to avoid granting of acquittal motion 6/20

Before ruling on an acquittal motion, the court has broad discretion to allow the prosecution to reopen to cure deficiencies in their case. (*People v. Riley* (2010) 185 Cal.App.4th 754, 764.) "The court always has discretion to allow the prosecution to reopen after a [Penal Code] section 1118 motion so long as the court is convinced that the failure to present evidence on the issue was a result of 'inadvertence or mistake on the part of the prosecutor and not from an attempt to gain a tactical advantage over [the defendant].' [Citation.]" (*People v. Goss* (1992) 7 Cal.App.4th 702, 708.) This discretion applies equally to a motion under section 1118.1. (*People v. Riley*, *supra*, 185 Cal.App.4th at p. 765, fn. 6.)

> [W]e conclude that section 1118.1 does not place a limitation on the trial court's discretion under [Penal Code] sections 1093 and 1094 to permit either party to reopen its case for good cause and when justice so requires. The purpose of section 1118.1 is to provide a procedure by which a defendant may promptly terminate a fatally deficient prosecution, not to provide the defendant with a tactical trap when the prosecution inadvertently fails to present evidence in its possession. In a situation such as this, where the prosecutor simply made a mistake and failed to present evidence that the prosecution had in its possession, the fact that the defendant moved for judgment of acquittal pursuant to section 1118.1 should not categorically prohibit the trial court from exercising the discretion granted to it under sections 1093 and 1094.

(*Id*.at p. 766; distinguish *People v. Velazquez* (2011) 201 Cal.App.4th 219, 231-232 [deficiency in proof at time of acquittal motion not cured by presentation of additional evidence in rebuttal].)

250.3-Court can substitute LIO before granting acquittal motion 6/20

One option available to the trial court after the defense makes a motion for acquittal under Penal Code section 1118.1 is to substitute a lesser included offense if the evidence supports it but not the greater offense. "Although the evidence may fail to support a conviction of the charged offense, the trial court has discretion to substitute a lesser included offense for the jury's consideration." (*People v. Powell* (2010) 181 Cal.App.4th 304, 311.)

> " '[I]n determining a motion pursuant to Penal Code section 1118.1, the trial judge is entitled to consider whether, although the evidence is insufficient to establish the commission of the crime specifically charged in the accusatory pleading, the evidence is sufficient to sustain a conviction of a necessarily included offense which the evidence tends to prove. A defendant may be convicted of a lesser offense if he was charged with a felony

which included the lesser offense.' " (*People v. Meyer* (1985) 169 Cal.App.3d 496, 507, quoting *People v. Wong* (1973) 35 Cal.App.3d 812, 828.)

(*People v. Powell*, *supra*, 181 Cal.App.4th at p. 311.) The substitution of the lesser included offense, however, must be done promptly and in conjunction with granting the acquittal motion on the charged offense. (*Id*. at pp. 311-314.)

300.1-General standard of proof and liability for aider and abettor 10/19

Penal Code section 31 provides, in part: "All persons concerned in the commission of a crime, … whether they directly commit the act constituting the offense, or aid and abet in its commission, … are principals in any crime so committed." (See also Pen. Code, § 971; *People v. Lisea* (2013) 213 Cal.App.4th 408, 414.) The California Supreme Court recognizes that multiple active participants in an offense are often both direct perpetrators and aiders and abettors such that "the dividing line between the actual perpetrator and the aider and abettor is often blurred." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120.) "The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role." (*Ibid*.)

Proof of aider and abettor liability requires proof in three distinct areas: (1) direct perpetrator's actus reus—a crime committed by direct perpetrator [including an attempted crime], (2) aider and abettor's mens rea—knowledge of direct perpetrator's unlawful intent and intent to assist in achieving those unlawful ends, and (3) aider and abettor's actus reus—conduct by aider and abettor that in fact assists achievement of crime. (*People v. Perez* (2005) 35 Cal.4th 1219, 1225; see also *People v. Lara* (2017) 9 Cal.App.5th 296, 315.)

In a specific intent crime, "an aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 560; see also *People v. Lee* (2003) 31 Cal.4th 613, 624.) But, the prosecution need not prove an intent to commit a specific offense.

> It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which *Beeman* holds must be found by the jury.

(*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5; see also *People v. Torres* (1990) 224 Cal.App.3d 763, 769-770.)

A person's intent to encourage or facilitate an offense must be formed before or during, but not after, the commission of the offense by the active perpetrator. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1039; *People v. Fleming* (2018) 27 Cal.App.5th 754, 766.) Many offenses, like robbery or burglary, have some duration. A person who forms the intent to encourage or facilitate an ongoing burglary at any time before the perpetrator's final exit from the structure being burglarized,

or an ongoing robbery before the robber escapes with the stolen property, is liable for any aid or encouragement given the perpetrator. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1043-1046 [burglary]; *People v. Cooper* (1991) 53 Cal.3d 1158, 1169-1170 [robbery].)

Whether a person has aided and abetted in the commission of the intended crime, or whether the crime ultimately committed was a natural and foreseeable consequence of the act aided and abetted, are questions of fact. (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.) Resolution of these fact issues " ' "will not be set aside [on appeal] unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it." ' [Citation.]" *(Ibid*.) Some of the factors to be considered in determining if a defendant is an aider and abettor, and therefore equally culpable for the charged offenses, are: (1) presence at the scene of the crime; (2) companionship with the principal defendant; (3) conduct before and after the offense; and (4) flight after the offense. (*Id*. at pp. 1094-1095; see also, *People v. Mitchell* (1986) 183 Cal.App.3d 325, 330.)

300.2-Aider and abettor's level of culpability determined by their mental state 10/19

"[O]utside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) Thus, if the offense charged is a so-called "specific intent" crime, the accomplice must share the perpetrator's specific intent. (*Ibid*.) "In contrast, if the charged offense is a so-called general intent crime, the aider and abettor need only knowingly and intentionally facilitate the direct perpetrator's commission of the crime, without intending some additional result or consequence not required for the crime." (*People v. White* (2014) 230 Cal.App.4th 305, 317; see also *People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1498-1502; *People v. Keovilayphone* (2005) 132 Cal.App.4th 491, 496.) The fact that an aider and abettor must harbor a specific intent to aid the direct perpetrator of general intent crime, however, "does not transform the underlying offense into a specific intent crime." (*People v. Keovilayphone*, *supra*, 132 Cal.App.4th at p. 497.)

Generally, a person who is found to have aided another person to commit a crime is equally guilty of that crime. (Pen. Code, § 31.) But "[b]ecause an aider and abettor's mental state 'floats free' from that of the direct perpetrator's," their degree of culpability may be different from the perpetrator's. (*People v. Loza* (2012) 207 Cal.App.4th 332, 351.) "It is therefore possible for a direct perpetrator and an aider and abettor to be guilty of different degrees of the same offense, depending on whether they harbored different mental states." (*People v. Daveggio & Michaud* (2018) 4 Cal.5th 790, 845-846.)

Thus, an aider and abettor can be found liable for a greater or lesser offense than the one committed by the direct perpetrator. (*People v. Amezcua & Flores* (2019) 6 Cal.5th 886, 917; *People v. McCoy*, *supra*, 25 Cal.4th at p. 1122; see also *People v. Loza*, *supra*, 207 Cal.App.4th at pp. 351-354; *People v. Nero* (2010) 181 Cal.App.4th 504, 517-520; *People v. Samaniego* (2012) 172 Cal.App.4th 1148, 1164-1165; but see *People v. Canizalez* (2011) 197 Cal.App.4th 832, 850-851 [limited to aiders and abettor of target crime, inapplicable to natural and probable consequences theory of liability].) Indeed, the aider and abettor may be found guilty even though the perpetrator has been acquitted by a prior separate jury. (See, e.g., *People v. Wilkins* (1994) 26 Cal.App.4th 1089.) In addition, a defendant can be criminally liable for aiding and abetting an offense which they legally cannot perpetrate. (*People v. Fraize* (1995) 36 Cal.App.4th 1722; but see *In re*

Meagan R. (1996) 42 Cal.App.4th 17.) Finally, an aider and abettor also can be found liable for many enhanced penalty allegations that may not apply to the perpetrator of the crime. (See, e.g., *People v. Calhoun* (2007) 40 Cal.4th 398, 401-404.)

300.3-Liability for "nontarget" offense under natural and probable consequences test 7/21

There are two kinds of aider and abettor liability. "First, an aider and abettor with the necessary mental state is guilty of the intended [or "target"] crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended [or "target"] crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted.' [Citation.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117; see also *People v. Smith* (2014) 60 Cal.4th 603, 611; *People v. Medina* (2009) 46 Cal.4th 913, 920.)

> [T]he natural and probable consequence doctrine, do[es] not distinguish among principals on the basis of whether they directly or indirectly aided and abetted the target crime, or whether they directly or indirectly aided and abetted the perpetrator of the nontarget crime. An aider and abettor of the target crime is guilty of any crime that any principal in that target crime commits if it was a natural and probable, i.e., reasonably foreseeable, consequence of the target crime.

(*People v. Smith*, *supra*, 60 Cal.4th at p. 613.) Thus, "the aider and abetter may be liable where he intentionally aids and encourages one criminal act, but the perpetrator actually commits some other, more serious, criminal act." (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1464-1465; see also *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1542.)

> "[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime [nontarget crime] that is the 'natural and probable consequence' of the target crime." [Citation.] To find an aider and abettor guilty of a nontarget crime under the natural and probable consequences theory, the jury must find that the defendant aided and abetted the target crime, that a coparticipant in the target crime also committed a nontarget crime, and that this nontarget crime was a natural and probable consequence of the target crime the defendant aided and abetted. [Citation.]

(*People v. Hardy* (2018) 5 Cal.5th 56, 92; see also *People v. Paredas* (2021) 61 Cal.App.5th 858, 865.)

> Aider and abettor culpability under the natural and probable consequences doctrine for a nontarget, or unintended, offense committed in the course of committing a target offense has a different theoretical underpinning than aiding and abetting a target crime. Aider and abettor culpability for the target offense is based upon the intent of the aider and abettor to assist the direct perpetrator commit the target offense. By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. (*People v. Garrison* (1989) 47 Cal.3d 746, 778 [accomplice liability is vicarious].) Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a

reasonable person could have foreseen the commission of the nontarget crime. It follows that the aider and abettor will always be "equally guilty" with the direct perpetrator of an unintended crime that is the natural and probable consequence of the intended crime.

(*People v. Canizalez* (2011) 197 Cal.App.4th 832, 852.)

300.4-Elements of natural and probable consequence liability 4/20

The elements of aider and abettor liability under natural and probable consequence theory are:

> [T]the defendant acted with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime; (4) the defendant's confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted. (*People v. Vasco* (2005) 131 Cal.App.4th 137, 161.)

(*People v. Miranda* (2011) 192 Cal.App.4th 398, 408.)

"To trigger application of the 'natural and probable consequences' doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed." (*People v. Prettyman* (1996) 14 Cal.4th 248, 269; see also *People v. Leon* (2008) 161 Cal.App.4th 149, 158.)

> The determination whether a particular criminal act was a natural and probable consequence of another criminal act aided and abetted by a defendant requires application of an objective rather than subjective test. [Citation.] This does not mean that the issue is to be considered in the abstract as a question of law. [Citation.] Rather, the issue is a factual question to be resolved by the jury in light of all of the circumstances surrounding the incident. [Citation.] Consequently, the issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant.

(*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) In other words, "the question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable." (*People v. Medina* (2009) 46 Cal.4th 913, 920, italics in original; see also *People v. Chavez* (2018) 22 Cal.App.5th 663, 684; *People v. Robins* (2020) 44 Cal.App.5th 413, 422.) Thus, for example, a juvenile's "immaturity and 'non-developed brain' " does not factor into the foreseeability aspect of natural and probable consequences doctrine. (*In re R.C.* (2019) 41 Cal.App.5th 283, 287.)

The "natural and probable consequences" test is broadly defined.

> "[A]lthough variations in phrasing are found in decisions addressing the doctrine—'probable and natural,' 'natural and reasonable,' and 'reasonably foreseeable'—the ultimate factual question is one of foreseeability." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107.) Thus, " '[a] natural and probable consequence is a foreseeable consequence'… ." (*Ibid*.) But "to be reasonably foreseeable '[t]he consequence need not

have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. …' [Citation.]" (*People v. Nguyen*, *supra*, 21 Cal.App.4th at p. 535.)

(*People v. Medina*, *supra*, 46 Cal.4th at p. 920; see also *People v. Smith* (2014) 60 Cal.4th 603, 611.) "If the prosecution can prove the nontarget crime was a reasonably foreseeable consequence of the crime the defendant intentionally aided and abetted, it should not additionally have to prove the negative fact that the nontarget crime was not committed for a reason independent of the common plan." (*People v. Smith*, *supra*, 60 Cal.4th at p. 617.) Such is merely a factor the jury may consider in determining whether the nontarget crime is a reasonably foreseeable consequence of the crime the defendant intentionally aided and abetted. (*Ibid*.)

Finally, as noted above, "[a] reasonably foreseeable consequence is a factual issue to be resolved by the jury who evaluates all the factual circumstances of the individual case." (*People v. Favor* (2012) 54 Cal.4th 868, 874; *People v. Lara* (2017) 9 Cal.App.5th 296, 315.)

300.5-Elimination of natural and probable consequences test in murder cases 7/21

Before the enactment of Senate Bill Number 1437 (Stats. 2018, chap. 1015), effective January 1, 2019, California law provided that, entirely separate from the felony-murder rule, the natural and probable consequence doctrine could make some non-killers who aided and abetted lesser crimes liable for murder committed by another principle. Cases held, for example, that "[t]he natural and probable consequences doctrine operates independently of the second degree felony-murder rule." (*People v. Culuko* (2000) 78 Cal.App.4th 307, 322; see also *People v. Karapetyan* (2006) 140 Cal.App.4th 1172, 1178.) "It allows an aider and abettor to be convicted of murder, without malice, even where the target offense is not an inherently dangerous felony." (*People v. Culuko*, *supra*, 78 Cal.App.4th at p. 322; see, e.g., *People v. Lucas* (1997) 55 Cal.App.4th 721, 732-733 [target offense of brandishing a firearm]; *People v. Laster* (1997) 52 Cal.App.4th 1450, 1463-1466 [target offense of discharging a firearm from a motor vehicle].) " '[W]here two or more defendants have committed an unlawful act in which a death has resulted, and the state has proven that one of the defendants actually harbored the malice necessary for a murder conviction (either express or implied), it may be appropriate to rely on the natural and probable consequence doctrine to hold the other defendants liable.' " (*People v. Culuko*, *supra*, 78 Cal.App.4th at p. 322; see also *People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.)

In addition, the appellate courts held that murder cannot be the natural and probable consequence of "trivial" criminal activities. (*People v. Prettyman* (1996) 14 Cal.4th 248, 269; *People v. Guillen* (2014) 227 Cal.App.4th 934, 993.) Nevertheless, "California cases have upheld convictions for murder or attempted murder where the jury was instructed a defendant's liability could result from aiding and abetting an assault or a battery. [Citations]" (*People v. Guillen*, *supra*, 227 Cal.App.4th at p. 993; see also *People v. Smith* (2014) 60 Cal.4th 603, 619-620 [gang members planned "jump out" assault or battery leading to killings]; *People v. Chavez* (2018) 22 Cal.App.5th 663, 685-687 [murder by co-defendant was natural and probable consequence of assault with a deadly weapon which defendant aided and abetted].)

Finally, the California Supreme Court held that a natural and probable consequences theory of liability cannot serve as a basis for a first degree premeditated and deliberate murder conviction. (*People v. Chiu* (2014) 59 Cal.4th 155, 166 (*Chiu*) [liability for first degree premeditated and deliberate murder must be based on aider and abettor having this state of mind, not just the actual

killer]; see also *In re Martinez* (2017) 3 Cal.5th 1216, 1218; *People v. Fleming* (2018) 27 Cal.App.5th 797, 801-802.) But the *Chiu* rule is inapplicable if the first degree murder conviction is based on a theory of lying-in-wait. (*People v. Gastellum* (2020) 45 Cal.App.5th 757, 765-770.)

Under Senate Bill Number 1437, these principles no longer completely apply to non-killer accomplices. "We hold that Senate Bill [Number] 1437 bars a conviction for second degree murder under the natural and probable consequences theory." (*People v. Gentile* (2020) 10 Cal.5th 830, 839.) Senate Bill Number 1437 "eliminates natural and probable consequences liability for murder regardless of degree." (*Id*. at p. 848.) "The effect of the new law was to eliminate liability for murder under the natural and probable consequences doctrine." (*People v. Offley* (2020) 48 Cal.App.5th 588, 594.) Penal Code, section 189, subdivision (e), requires such non-killers act either with express malice or be a major participant acting with reckless indifference to human life.

> The change did not, however, alter the law regarding the criminal liability of direct aiders and abettors of murder because such persons necessarily "know and share the murderous intent of the actual perpetrator." … One who directly aids and abets another who commits murder is thus liable for murder under the new law just as he or she was liable under the old law.

(*People v. Offley*, *supra*, 48 Cal.App.5th at pp. 595-596.) "We … conclude that when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1122.) In other words, "[a]pplication of aiding and abetting principles to the actus reus and mens rea elements of implied malice murder demonstrates that a person can … be culpable of implied malice murder on an aiding and abetting theory." (*People v. Powell* (2021) 63 Cal.App.5th 689, 712.)

> For the direct aider and abettor, the actus reus includes whatever acts constitute aiding the commission of the life endangering act. Thus, to be liable for an implied malice murder, the direct aider and abettor must, by words or conduct, aid the commission of the life endangering *act*, not the result of that act. The mens rea, which must be personally harbored by the direct aider and abettor, is knowledge that the perpetrator intended to commit *the act*, intent to aid the perpetrator in the commission of *the act*, knowledge that *the act* is dangerous to human life, and acting in conscious disregard for human life.

(*Id*. at p. 713, fn. omitted, italics in original.)

300.6-Failure to prevent crime to special victim can result in aider and abettor liability 11/13

"Generally, failure to prevent a crime is insufficient to establish aiding and abetting liability." (*People v. Ogg* (2013) 219 Cal.App.4th 173, 181; see also *People v. Culuko* (2000) 78 Cal.App.4th 307, 331.) But "[a]iding and abetting liability can be premised on a parent's failure to fulfill his or her common law duty to protect his or her child from attack." (*People v. Rolon* (2008) 160 Cal.App.4th 1206, 1219 [upholding mother's conviction for murder as aider and abettor based on failure to protect against deadly physical abuse of child in her presence after court order forbade contact with the abuser].) "[A] parent who knowingly fails to take reasonable steps to stop an attack on his or her child may be criminally liable for the attack if the purpose of nonintervention is to aid and abet the attack." (*Ibid*.)

In *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, for example, the appellate court found sufficient evidence to hold a mother to answer for two counts of committing lewd and lascivious acts upon her child, as an aider and abettor. The mother watched and did nothing to intervene while her boyfriend twice performed oral sex on the child in their bed. (*Id* at p. 744.)

Similarly, in *People v. Ogg*, *supra*, 219 Cal.App.4th 181, the appellate court upheld a mother's conviction for allowing her boyfriend and latter husband to commit continuous sexual molestations against her daughter.

> Sufficient evidence and reasonable inferences therefrom establish that Ogg knew the full extent of Daniel's criminal purpose and, by her inaction, intended to facilitate his sexual abuse. It is a reasonable inference that Ogg, the mother and caretaker of her minor daughter, knew Daniel had molested A.R. and would continue to molest her without intervention. A.R. told Ogg twice that Daniel was molesting her and Ogg believed her. Daniel also admitted to Ogg that he molested A.R. Ogg facilitated the continuing sexual abuse when she kept Daniel in the home, married him, and discouraged A.R. from reporting the abuse. She warned A.R. that if A.R. reported the abuse to the police, she would be placed in foster care and implied that she could be raped, and that Ogg would be incarcerated. This is substantial evidence to support the reasonable inference that Ogg's warnings were motivated by her selfish desire to continue her relationship with Daniel, and that she had no concern for A. R.'s protection.

(*Id*. at p. 181.)

310.1-Lookout and driver are aiders and abettors 4/20

In *People v. Masters* (1963) 219 Cal.App.2d 672 the appellate court recited a list of frequent acts constituting aiding and abetting:

> It has been held, therefore, that one who is present for the purpose of diverting suspicion, or to serve as a lookout, or to give warning of anyone seeking to interfere, or to take charge of an automobile and to keep the engine running, or to drive the "getaway" car and to give direct aid to others in making their escape from the scene of the crime, is a principal in the crime committed. [Citations.] Accordingly, any one of these purposes is sufficient to base an inference that such person was aiding and abetting in the commission of a particular robbery.

(*Id*. at p. 680, overruled on other grounds in *People v. Beeman* (1984) 35 Cal.3d 547, 557; similarly see *People v. Bishop* (1988) 202 Cal.App.3d 273, 281, fn. 6 [aiding and abetting escape]; see also *People v. Robins* (2020) 44 Cal.App.5th 413, 422-423 [sufficient evidence defendant, who waited in van with getaway driver while accomplice entered store to shoplift large quantity of clothing, aided and abetted the ensuing attempted robbery and reckless evading]; *People v. Hammond* (1986) 181 Cal.App.3d 463, 468 [attempted murder was natural and probable consequence of armed robbery which getaway driver aided and abetted].) "By protecting a burglar from being caught, a lookout necessarily encourages and facilitates the commission of the offense. 'Such conduct is a textbook example of aiding and abetting.' (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)" (*In re Gary F.* (2014) 226 Cal.App.4th 1076, 1081.)

400.1-Limited relief from untimely notice of appeal 4/20

"A timely notice of appeal, as a general matter, is 'essential to appellate jurisdiction.' " (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094; see also *In re G.C.* (2020) 8 Cal.5th 1119, 1127.)

> An untimely notice of appeal is "wholly ineffectual: The delay cannot be waived, it cannot be cured by nunc pro tunc order, and the appellate court has no power to give relief, but must dismiss the appeal on motion or on its own motion." [Citation.] The purpose of the requirement of a timely notice of appeal is, self-evidently, to further the finality of judgments by causing the [party] to take an appeal expeditiously or not at all.

(*People v. Mendez*, *supra*, 19 Cal.4th at p. 1094.) The superior court clerk should not file stamp an untimely received notice of appeal. (*People v. Funches* (1998) 67 Cal.App.4th 240, 243-245.)

In a juvenile delinquency case, for example, " ' "an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order." ' " (*In re S.B.* (2009) 46 Cal.4th 529, 532, quoting *Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1018; accord, *In re Isaiah W.* (2016) 1 Cal.5th 1, 1044; see also *In re G.C.*, *supra*, 8 Cal.5th at pp. 1126-1129 [unappealed error in not designating offense felony or misdemeanor at original disposition hearing could not be raised on appeal from later dispositional hearing].)

There is an exception known as the "constructive filing doctrine." (*In re Benoit* (1973) 10 Cal.3d 72, 85.) "Although adhering to the established rule that the time for filing a notice of appeal is jurisdictional, these decisions seek to alleviate the harshness of the rule's application in certain compelling circumstances by holding that an appellant's efforts should be deemed to be a constructive filing of the notice within the prescribed time limits." (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113.) "The classic example of the application of this policy is the determination that a notice of appeal was timely filed under the prison-delivery rule."(*Id*. at p. 114.) As another example, "when a notice of appeal in a criminal case is received by the trial court after the jurisdictional deadline to perfect the appeal, the appellate court may deem the notice of appeal to have been constructively filed in a timely manner if, prior to the deadline, the defendant expressly relied on his or her trial counsel to file it, but trial counsel neglected to do so." (*People v. Zarazua* (2009) 179 Cal.App.4th 1054, 1058.) Nevertheless, "[u]nless the notice [of appeal] is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal." (*In re Jordan* (1992) 4 Cal.4th 116, 121; see also *People v. Lyons* (2010) 178 Cal.App.4th 1355, 1361.)

410.1-No right to appeal most errors after guilty plea 10/19

" 'Other than search and seizure issues specifically reviewable under [Penal Code] section 1538.5, subdivision (m), all errors arising prior to entry of plea of guilty or nolo contendere are waived by the plea, except those based on "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings … ." ' [Citation.]" (*People v. McNabb* (1991) 228 Cal.App.3d 462, 470.) Applying this rule, the appellate courts have held that alleged errors of many kinds cannot be raised on appeal following the entry of a guilty or no contest plea. Outside of Penal Code section 1538.5, a guilty or no contest plea waives the right to appeal issues of the sufficiency or admissibility of evidence. (*Ibid.*; *People v. Halstead* (1985) 175 Cal.App.3d 772, 778; see also *People v. Voit* (2011) 200 Cal.App.4th 1353, 1370-1372 [challenge to the sufficiency of factual basis for plea distinguished from claim court failed to elicit factual basis as required by Pen. Code § 1192.5].) Similarly, the denial of a motion to dismiss an indictment or information for

insufficiency of the evidence under Penal Code section 995 may not be raised on appeal following a guilty or no contest plea. (*People v. Warburton* (1970) 7 Cal.App.3d 815, 821-822.) Other issues barred on appeal from a plea of guilty or nolo contender include the denial of motions to disclose the informant (*People v. Collins* (2004) 115 Cal.App.4th 137, 148; *People v. Barkins* (1978) 81 Cal.App.3d 30, 33), motions for sanctions relating to destruction of evidence (*People v. McNabb*, *supra*, 228 Cal.App.3d at pp. 470-471), *Miranda* motions (*People v. Cisneros-Ramirez* (2018) 29 Cal.App.5th 393, 406), motions to suppress a confession as involuntary (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896), challenges to the fairness of a pretrial lineup (*People v. Mink* (1985) 173 Cal.App.3d 766, 769-770; *People v. Stearns* (1973) 35 Cal.App.3d 304, 306), or motions to dismiss for lack of speedy trial on either statutory or constitutional grounds (*People v. Aguilar* (1998) 61 Cal.App.4th 615; *People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1357-1358). Even the issuance of a certificate of probable cause cannot make such issues subject to appeal. (*People v. Cisneros-Ramirez*, *supra*, 29 Cal.App.5th at pp. 406-409 *People v. Hunter* (2002) 100 Cal.App.4th 37, 41-42; *People v. Burns* (1993) 20 Cal.App.4th 1266, 1274.)

410.2-No right to appeal tentative pretrial rulings on admission of evidence 10/20

Tentative rulings are generally not appealable.

> A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself. [Citations.] " ' "Where the court rejects evidence temporarily or withholds a decision as to its admissibility, the party desiring to introduce the evidence should renew his offer, or call the court's attention to the fact that a definite decision is desired." ' " [Citation.]

(*People v. Holloway* (2004) 33 Cal.4th 96, 133; see also *People v. Ennis* (2010) 190 Cal.App.4th 721, 736.)

Similarly, "[i]t is well established that the denial of a motion to exclude impeachment evidence is not reviewable on appeal if the defendant subsequently declines to testify." (*People v. Ledesma* (2006) 39 Cal.4th 641, 731; see also *People v. Duong* (2020) 10 Cal.5th 36, 56-57.)

430.1-Failure to object in lower court precludes issue on review 4/20

A fundamental precept is that in order to argue error in a reviewing court, an objection must first have been raised in the lower court. (Evid. Code, § 353, subd. (a).) Failure to object below forfeits the right to review of the alleged error. (*People v. Rogers* (1978) 21 Cal.3d 542, 547-548 [appeal]; *Robison v. Superior Court* (1957) 49 Cal.2d 186, 187-188 [Pen. Code § 995].) "The forfeiture doctrine is a 'well-established procedural principle that, with certain exceptions, an appellate court will not consider claims of error that could have been—but were not— raised in the trial court. [Citation.]' [Citations.]" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.)

> Evidence Code section 353, subdivision (a) allows a judgment to be reversed because of erroneous admission of evidence only if an objection to the evidence or a motion to strike it was "timely made and so stated as to make clear the specific ground of the objection." Pursuant to this statute, " 'we have consistently held that the "defendant's failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable.' " (*People v. Partida* (2005) 37 Cal.4th 428, 433-434 … .)

(*People v. Demetrulias* (2006) 39 Cal.4th 1, 20-21.) "In accordance with this statute, we have consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable." (*People v. Seijas* (2005) 36 Cal.4th 291, 302; see also *People v. Nelson* (2011) 51 Cal.4th 198, 223; dist. *People v. People* (2016) 62 Cal.4th 718, 744 [Evid. Code, § 354 governs claims that evidence was improperly excluded].) "We stand by the traditional rule that a party must raise an issue in the trial court if they would like appellate review." (*People v. Lowery* (2020) 43 Cal.App.5th 1046, 1054.)

> What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.

(*People v. Partida*, *supra*, 37 Cal.4th at p. 453; see also *People v. Holford* (2012) 203 Cal.App.4th 155, 168-169; *People v. Cua* (2011) 191 Cal.App.4th 582, 591.)

A relevancy objection, for example, does not preserve an Evidence Code section 352 issue on appeal. (*People v. Harrison* (2005) 35 Cal.4th 208, 230.) Nor does a hearsay objection preserve an appellate claim of violation of the constitutional right to confrontation. (*People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14; *People v. Raley* (1992) 2 Cal.4th 870, 892.) "An appellate contention that the erroneous admission or exclusion of evidence violated a constitutional right is not preserved in the absence of an objection on that ground below. [Citations.]" (*People v. Daniels* (2009) 176 Cal.App.4th 304, 320, fn. 10.)

"An objection to evidence must generally be preserved by specific objection at the time the evidence is introduced; the opponent cannot make a 'placeholder' objection stating general or incorrect grounds (e.g., 'relevance') and revise the objection later in a motion to strike stating specific or different grounds." (*People v. Demetrulias*, *supra*, 39 Cal.4th at p. 22.)

Moreover, "[w]hen the nature of a question indicates that the evidence sought is inadmissible, there must be an objection to the question; a subsequent motion to strike is not sufficient." (*People v. Perry* (1972) 7 Cal.3d 756, 781, overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1, 27-36; accord *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 21.) Not only must there be an objection, but the objecting party must obtain a ruling or the point is deemed forfeited or abandoned. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1179.)

"The rationale for this rule is clear; a contrary rule would deprive the party offering the evidence of any opportunity to cure the defect at trial and would permit the nonobjecting party to gamble that the error will provide grounds for reversal of the matter." (*People v. Coleman* (1988) 46 Cal.3d 749, 777; similarly, see *People v. Bailey* (1991) 1 Cal.App.4th 459, 465.)

430.2-Failure to press for ruling on motion can forfeit issue on appeal 6/20

A defendant generally forfeits the issue of the trial court's failure to hold a hearing on a motion "by failing to press for a hearing or by acquiescing in the court's failure to hear the … motion." (*People v. Braxton* (2004) 34 Cal.4th 798, 814 (*Braxton*).) The California Supreme Court also stated the general rule that "a party may not challenge on appeal a procedural error or omission if the party acquiesced by failing to object or protest under circumstances indicating that the error or omission was probably inadvertent. [Citations.]" (*Id*. at pp. 813-814.) " ' "In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them." ' [Citations.]" (*Id*. at p. 814.) When the trial court's failure to hold a hearing on a motion appears to have been inadvertent, this general rule applies. (*Id*. at p. 813; see also *People v. Jones* (2012) 210 Cal.App.4th 355, 361 (*Jones*).) As the California Supreme Court has explained, " ' "If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal." ' [Citation.]" (*In re Seaton* (2004) 34 Cal.4th 193, 198.)

In *Braxton*, the court found the issue had not been forfeited, however, because "[t]he trial court's failure to hear defendant's new trial motion was not the result of inadvertence; it resulted instead from the court's repeatedly stated decision not to entertain any oral motion for a new trial. Defendant did all that could reasonably be expected or required under the circumstances to obtain a hearing of his new trial motion." (*Braxton*, *supra*, 34 Cal.4th at p. 814.)

In contrast, in *People v. Vera* (2004) 122 Cal.App.4th 970 (*Vera*), the trial court conducted a *Marsden* hearing but failed to inquire into and evaluate each of the defendant's claims. The defendant failed to renew his motion when invited to do so. On appeal, the appellate court stated:

> Defendant's failure to take advantage of this offer can only be interpreted as an abandonment of his unstated complaints. [Citation.] While we are aware of no precedent finding abandonment of a *Marsden* motion, it is established that a defendant's conduct may amount to abandonment of a request to represent himself … . [Citations.] If a defendant can abandon his request to substitute himself for counsel, a defendant can abandon his request to substitute another counsel.

(*Id*. at pp. 981-982.)

The question left open in *Vera* was answered in *Jones*.

> Here, defendant raised the *Marsden* issue by filing a handwritten motion in April 2010. However, he never again brought the matter to the trial court's attention despite having been present in court a dozen times before his trial began. The trial court's failure to conduct a hearing on the motion appears to have been the inadvertent result of the repeated continuances. [¶] Although *Braxton* did not deal with the trial court's failure to hold a hearing on a *Marsden* motion, the court's statement of the general rule of forfeiture by abandonment was not limited to the context of a motion for new trial. (*Braxton*, *supra*, 34 Cal.4th at pp. 813-814.) That general rule applies fully to the facts of this case. Defendant had the duty of bringing his motion to the trial court's attention at a time when the oversight could have been rectified. (*Ibid*.) We conclude defendant's failure to raise the issue before the matter proceeded to trial constituted abandonment of his claim.

(*Jones*, *supra*, 210 Cal.App.4th at p. 362.)

430.3-Doctrine of invited error 6/20

"The doctrine of invited error applies to estop a party from asserting an error when 'his own conduct induces the commission of error.' " (*People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) " 'The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal.' " (*People v. Marshall* (1990) 50 Cal.3d 907, 931.)

Thus, for example, "[t]he doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the instruction." (*People v. Lucero* (2000) 23 Cal.4th 692, 723; accord, *People v. Harris* (2008) 43 Cal.4th 1269, 1293; *People v. Riazati* (2011) 195 Cal.App.4th 514, 529.) Similarly, the doctrine of invited errors bars the defendant from challenging on appeal the trial court's failure to give a required jury instruction when, for tactical reasons, the defense persuaded the judge not to give the instruction. (*People v. O'Malley* (2016) 62 Cal.4th 944, 984; *People v. Beames* (2007) 40 Cal.4th 907, 927-928; *People v. Horning* (2004) 34 Cal.4th 871, 905-906; but see *People v. Kaufman* (2017) 17 Cal.App.5th 370, 389 ["the invited error doctrine does not apply where the trial court has a sua sponte duty to instruct"].) "Invited error will be found, however, only if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction." (*People v. Souza* (2012) 54 Cal.4th 90, 114; *People v. Medellin* (2020) 45 Cal.App.5th 519, 525.)

The doctrine of invited error can also apply when a party enters into a factual stipulation which is accepted by the court. (*People v. Elder* (2017) 11 Cal.App.5th 123, 134.) "[T]he doctrine applies only where the record affirmatively shows that counsel acted for tactical reasons and not out of ignorance or mistake. [Citation.]" (*People v. Lara* (1994) 30 Cal.App.4th 658, 673.) "If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical decision." (*People v. Cady* (2016) 7 Cal.App.5th 134, 1245.)

440.1-General principles on appeal 2/10

There are several basic principles applicable to virtually all criminal appeals.

> First, on appeal a judgment is presumed correct, and a party attacking the judgment, or any part of it, must affirmatively demonstrate prejudicial error. [Citation.] The second principle is stated in the California Constitution, article VI, section 13: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

(*People v. Garza* (2005) 35 Cal.4th 866, 881; see also *People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534.)

440.2-Review standard depends on whether issue is factual, legal or "mixed" 9/20

The proper standard of review is governed generally by the whether the issue raised is factual, legal or a "mixed" question of law and fact.

"Questions of law are reviewed under the de novo standard of review. [Citation.]" (*People v. Whaley* (2008) 160 Cal.App.4th 779, 792; see also *People v. Galvan* (2008) 168 Cal.App.4th 846, 852.) For example, the meaning and construction of a statute is a question of law, which the appellate courts decide independently. (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 189; see also *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) "[T]he construction of a statute is purely a question of law and is subject to de novo review on appeal. (*People v. Zeigler* (2012) 211 Cal.App.4th 638, 650.)" (*People v. Faranso* (2015) 240 Cal.App.4th 456, 461.) Similarly, appellate courts determine whether a challenged jury instruction correctly states the law using the independent or de novo standard of review. (*People v. Spaccia* (2017) 12 Cal.App.5th 1278, 1287.)

> Questions of fact concern the establishment of historical or physical facts; their resolution is reviewed under the substantial-evidence test. Questions of law relate to the selection of a rule; their resolution is reviewed independently. Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently. (See generally *People v. Louis* (1986) 42 Cal.3d 969, 985-987.)

(*Crocker National Bank v. City & County of San Francisco* (1989) 49 Cal.3d 881, 888.)

> The standards of review for questions of pure fact and pure law are well developed and settled. Trial courts and juries are better situated to resolve questions of fact, while appellate courts are more competent to resolve questions of law. Traditionally, therefore, an appellate court reviews findings of fact under a deferential standard (substantial evidence under California law, clearly erroneous under federal law), but it reviews determinations of law under a nondeferential standard, which is independent or de novo review. (See *People v. Lawler* (1973) 9 Cal.3d 156, 160.)
>
> Selecting the proper standard of appellate review becomes more difficult when the trial court determination under review resolves a mixed question of law and fact. Mixed questions are those in which the " 'historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.' " [Citations.]

(*People v. Cromer* (2001) 24 Cal.4th 889, 893-894.) Independent review is generally used to review mixed question determinations affecting constitutional rights. (*Id*. at p. 901.) " '[W]hen the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, [the appellate] court's review is de novo.' [Citation.]" (*In re Taylor* (2015) 60 Cal.4th 1019, 1035; see also *People v. Aguilera* (2020) 50 Cal.App.5th 894, 908-909; *In re Campbell* (2017) 11 Cal.App.5th 742, 753.)

Mixed questions that are predominately factual, however, are given deferential treatment by the reviewing courts.

> If application of the rule of law to the facts requires an inquiry that is "essentially factual," [citation]—one that is founded "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct," [citation]—the concerns of judicial administration will favor the [trial] court, and the [trial] court's determination should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.

(*People v. Louis*, *supra*, 42 Cal.4th at p. 987.)

440.3-General standard for sufficiency of evidence on appeal 9/21

On appeal, factual findings are reviewed under a deferential substantial evidence standard.

> The standard of appellate review for determining the sufficiency of the evidence is settled. On appeal, " 'we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" [Citation.] In conducting such a review, we " 'presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." [Citation.]

(*People v. Lee* (2011) 51 Cal.4th 620, 632; see also *People v. Clark* (2011) 52 Cal.4th 856, 942-943.) In other words, the factual finding supported by substantial evidence should stand even if there is other evidence, direct or circumstantial, supporting a contrary conclusion. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054; see also *People v. Jennings* (1970) 10 Cal.App.3d 712, 715.) "We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction." (*People v. Wilson* (2008) 44 Cal.4th 758, 806; see also *People v. Gonzales* (2011) 51 Cal.4th 894, 941.)

> "[T]he California Supreme Court recently clarified that appellate courts must also be mindful of the underlying standard of proof: preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. [Citation.] … The Court held "an appellate court should review the record for sufficient evidence in a manner mindful of the elevated degree of certainty required by this standard." [Citation.]

(*People v. Soriano* (2021) 65 Cal.App.5th 278, 284, citing *Conservatorship of O.B.* (2020) 9 Cal.5th 989.)

"The same standard applies when the conviction rests primarily on circumstantial evidence." (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1053; see also see *People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) For example, "a person's intent 'is a question of fact to be determined from all the

circumstances of the case, and usually must be proven circumstantially.' [Citation.]" (*Hudson v. Superior Ct.* (2017) 7 Cal.App.5th 1165, 1171.) " 'When two or more inferences can reasonably be deduced from the facts,' either deduction will be supported by substantial evidence and 'a reviewing court is without power to substitute its deductions for those of the trial court.' [Citations.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 527; see also *People v. Watkins* (2012) 55 Cal.4th 999, 1020.) "Accordingly, we must affirm the judgment if the circumstances reasonably justify the jury's finding of guilt regardless of whether we believe the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 879.) "The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)" (*People v. Cravens* (2012) 53 Cal.4th 500, 508.)

> "Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence." [Citation.] However, "[a] reasonable inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guesswork; a finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence." [Citation.] " ' "By definition, 'substantial evidence' requires evidence and not mere speculation." ' " Citation.]

(*People v. Grant* (2020) 57 Cal.App.5th 323, 330.)

440.4-Trial court's correct ruling on wrong basis will be affirmed 8/18

A reviewing court will not overturn a trial court ruling based on erroneous legal reasoning where any valid basis exists to support the ruling. "We may affirm the trial court's ruling if it is correct under any theory of the law applicable to the case, even if the ruling was based on an incorrect reason." (*People v. Zavala* (2018) 19 Cal.App.5th 335, 340.) Thus, the People may offer on review any legal justification for the ruling supported by the record even though it was not considered by the trial court. (*People v. Campbell* (1991) 230 Cal.App.3d 1432, 1443; but see *People v. Johnson* (2018) 21 Cal.App.5th 1026, 1032 [different approach when considering new theories offered on appeal to justify a challenged search or seizure under the Fourth Amendment].)

"On appeal we consider the correctness of the trial court's ruling *itself*, not the correctness of the trial court's *reasons* for reaching its decision." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145, original italics.)

> " 'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion. …' … ."

(*People v. Zapien* (1993) 4 Cal.4th 929, 976, internal citations omitted; see also *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1271-1272.) This rule is also compelled by the constitutional provision that permits a judgment to be reversed only when a miscarriage of justice has occurred. (Cal. Const., Art. VI, § 13.) In short, the appellate court reviews the correctness of the challenged ruling rather than the analysis used to reach it. (*In re Baraka H.* (1992) 6 Cal.App.4th 1039, 1045.)

440.5-Appellant must support each legal point with argument and authority 6/20

The California Rules of Court requires: "Each brief … [s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority … ." (Rule 8.204(a)(1)(B) [felony]; rule 8.883(a)(1)(A) [misdemeanor]; rule 8.928(a)(1)(A) [infraction].) "Failure to provide proper headings forfeits issues that may be discussed in the brief but are not clearly identified by a heading." (*Pizarro v. Reynoso* (2017) 10 Cal.App.5th 172, 179.) And where in a criminal case the defense fails to show by argument or authority that it has a right to the relief it seeks, the appellate court has no obligation to search for authorities in support of the defense position. (*People v. Paramount Citrus Association, Inc.* (1957) 147 Cal.App.2d 399, 407-408.)

> The judgment appealed from is presumed correct. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*).) The appellant must challenge it by "rais[ing] claims of reversible error or other defect [citation], and 'present[ing] argument and authority on each point made.' " (*In re Sade C.* (1996) 13 Cal.4th 952, 994.) "This means that an appellant must do more than assert error and leave it to the appellate court to search the record and the law books to test his claim." (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 557.) "It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness." (*Benach*, *supra*, at p. 852.) The appellant's claims of error must be presented in his or her opening brief; "points raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier [citation]." (*Nordstrom Commission Cases* (2010) 186 Cal.App.4th 576, 583.) The same rules apply to a party appearing in propria persona as to any other party. (*First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 958, fn. 1.)

(*Flores v. Dept. of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 204-205.)

The failure of appellate counsel to offer any authority or argument in support of his or her claim would justify the appellate court to "decline to address these contentions." (*People v. Foster* (2010) 50 Cal.4th 1301, 1352; see also *People v. Caro* (2019) 7 Cal.5th 463, 512; *People v. Gray* (2005) 37 Cal.4th 168, 198.) In short, the court "need not consider on appeal mere contentions of error unaccompanied by legal argument." (*People v. Earp* (1999) 20 Cal.4th 826, 884.)

440.6-Factual assertions must be supported by references to record 6/20

Appellate briefs must accurately state the facts with citation to the record. (*People ex rel. Resig v. Acuna* (2017) 9 Cal.App.5th 1, 9-10 (*Resig*).) The California Rules of Court requires that a brief "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Rule 8.204(a)(1)(C) [felony]; rule 8.883(a)(1)(B) [misdemeanor]; rule 8.928(a)(1)(B) [infraction].) The appellant's brief must "[p]rovide a summary of the significant facts limited to matters in the record." (Rule 8.204(a)(2)(C) [felony]; rule 8.883(a)(2)(C) [misdemeanor]; rule 8.928(a)(2)(C) [infraction].)

> Appellants misstate facts and law (despite taking almost a year to prepare the opening brief) and fail to support each factual assertion in their brief with a citation to the record … . … Appellants thus miss the point that they have the duty on appeal to state the evidence fairly, in the light most favorable to the trial court's ruling, and record citations are for the benefit of the reviewing court as well as the respondent.

(*Resig*, *supra*, 9 Cal.App.5th at p. 10.) These requirement also apply to writ petitions.

> " 'A party who challenges the sufficiency of the evidence to support a particular finding must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient.' " (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738; Cal. Rules of Court, rule 8.204.) "[A]n attack on the evidence without a fair statement of the evidence is entitled to no consideration … ." (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.)

(*Diaz-Barba v. Superior Court* (2015) 236 Cal.App.4th 1470, 1485, italics in original omitted.)

440.7-Abuse of discretion shown by capricious or arbitrary action 4/21

Trial courts have broad discretion to issue orders in many areas. The term judicial discretion "implies the absence of arbitrary determination, capricious disposition, or whimsical thinking." (*In re Cortez* (1971) 6 Cal.3d 78, 85.) To exercise judicial discretion, a trial court must know and consider all material facts, and all legal principles essential to an informed, intelligent, and just decision. (*Id*. at pp. 85-86; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) "This discretion … is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations.]" (*People v. Warner* (1978) 20 Cal.3d 678, 683.) "Discretion is compatible only with decisions 'controlled by sound principles of law, … free from partiality, not swayed by sympathy or warped by prejudice. …' [Citation.]" (*People v. Bolton* (1979) 23 Cal.3d 208, 216.) The exercise of " 'legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court (Alvarez*) (1997) 14 Cal.4th 968, 977.) "[W]here fundamental rights are affected by the exercise of discretion by the trial court, we recognize that such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action." (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496; see also *People v. Endsley* (2018) 28 Cal.App.5th 93, 104.)

A discretionary decision is reviewed for abuse of discretion. The abuse of discretion "standard is deferential … [b]ut it is not empty." (*People v. Williams* (1998) 17 Cal.4th 148, 162; see also *People v. Giordano* (2007) 42 Cal.4th 644, 663.) "[D]iscretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72; see also *People v. Williams*, *supra*, 17 Cal.4th at p. 162; *People v. Blocker* (2010) 190 Cal.App.4th 438, 444.) It is not enough that the facts allow for a difference of opinion. (*People v. Moya* (1986) 184 Cal.App.3d 1307, 1312.) In other words, a reviewing court may not substitute its judgment for that of the trial judge. (*Ibid*.) "Where … a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316, italics in original.) "Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) "A failure to exercise discretion may also constitute an abuse of discretion." (*People v. Sandoval* (2007) 41 Cal.4th 825, 847-848; see also *People v. Panozo* (2021) 59 Cal.App.5th 825, 837.)

450.1-California's harmless error standard (*Watson*) 10/11

The California Constitution contains the appellate standard for determining if an error in the trial court is harmless and, therefore, does not require reversal.

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. 6, § 13.) The California appellate courts have interpreted the test under this provision to be whether or not it is "reasonably probable that a result more favorable to defendant would have been reached in the absence of the alleged error. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*People v. Thomas* (2011) 52 Cal.4th 336, 356.) Under this test, the judgment is reversed when it appears from an examination of the record that there is a reasonable probability the defendant would have obtained a more favorable outcome had the error not occurred (the "*Watson*" standard). (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) " 'It is the general rule for error under [California] law … that reversal requires prejudice and prejudice in turn requires a reasonable probability of an effect on the outcome' under *People v. Watson* (1956) 46 Cal. 2d 818. [Citation.]" (*People v. Alvarez* (1996) 14 Cal.4th 155, 216.)

450.2-Federal constitutional harmless error standards (*Chapman*) 7/20

Harmless error analysis applies to most forms of federal constitutional error.

> The United States Supreme Court "has recognized that most constitutional errors can be harmless. [Citations.]" (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306 (*Fulminante*).) "The common thread connecting [cases in which the high court has applied the harmless error standard] is that each involved 'trial error'—error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id*. at pp. 307-308.)

(*People v. Allen* (2008) 44 Cal.4th 843, 870.) It is only when the federal constitutional error is deemed "structural error" that it cannot be found harmless. (*Fulminante*, *supra*, 499 U.S. at pp. 309-310; *People v. Romero* (2017) 14 Cal.App.5th 774, 783 [failure to excuse biased juror]; distinguish *People v. Anzalone* (2013) 56 Cal.4th 545, 560 [failure to poll jury not structural error].)

Non-structural federal constitutional error does not result in reversal if the error is found harmless beyond a reasonable doubt (the "*Chapman*" standard). (*Chapman v. California* (1967) 386 U.S. 18, 23-24.) "By contrast [to California's *Watson* standard (*People v. Watson* (1956) 46 Cal.2d 818)], it is the general rule for error under the United States Constitution that reversal requires prejudice and prejudice in turn is presumed unless the state shows that the defect was harmless beyond a reasonable doubt under *Chapman* … ." (*People v. Alvarez* (1996) 14 Cal.4th 155, 216, fn. 21.)

But there is a different standard for post-conviction habeas challenges.

> In a collateral proceeding, the test is different. For reasons of finality, comity, and federalism, habeas petitioners "are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' " *Brecht* [*v. Abrahamson* (1993) 507 U.S. 619] at 637, (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)). Under this

test, relief is proper only if the federal court has "grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict.' " *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). There must be more than a "reasonable possibility" that the error was harmful. *Brecht*, *supra*, at 637 (internal quotation marks omitted). The *Brecht* standard reflects the view that a "State is not to be put to th[e] arduous task [of retrying a defendant] based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." *Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (per curiam).

(*Davis v. Ayala* (2015) 576 U.S. 257, 267-268.)

450.3-Most instructional errors subject to *Watson* harmless error standard 6/20

"Prejudice from erroneous jury instructions may be measured in more than one way." (*In re Lucero* (2011) 200 Cal.App.4th 38, 50.)

In determining whether instructional error was harmless, relevant inquiries are whether "the factual question posed by the omitted instruction necessarily was resolved adversely to the defendant under other, properly given instructions" [citation] and whether the "defendant effectively conceded the issue" [citation]. A reviewing court considers "the specific language challenged, the instructions as a whole[,] the jury's findings" [citation], and counsel's closing arguments to determine whether the instructional error "would have misled a reasonable jury …" [citation].

(*People v. Eid* (2010) 187 Cal.App.4th 859, 883; see also *People v. Sojka* (2011) 196 Cal.App.4th 733, 738.)

"Any 'misdirection of the jury' (Cal. Const., art. VI, § 13), that is instructional error ([*People v. Breverman* (1998) 19 Cal.4th 142] at p. 173), cannot be the basis of reversing a conviction unless ' "an examination of the entire cause, including the evidence," ' indicates that the error resulted in a ' "miscarriage of justice." ' (*Ibid*.) 'Under such circumstances, "[t]he prejudicial effect of such error is to be determined, for purposes of California law, under the generally applicable reasonable-probability test" ' in *People v. Watson* (1956) 46 Cal.2d 818. (*Breverman*, *supra*, at p. 174.)" (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 858; see, e.g., *People v. Davis* (2013) 217 Cal.App.4th 1484, 1490 [failure to instruct on corroboration requirement of Pen. Code, § 1111.5 subject to *Watson* harmless error test].) Under California's *Watson* standard, "[w]hen considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229; see also *People v. Hicks* (2017) 17 Cal.App.5th 496, 505.)

Some instructional errors are subject to the federal constitutional harmless error set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). The *Chapman* standard is an objective test: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18; see also *People v. Gonzalez* (2010) 54 Cal.4th 643, 663; see, e.g., *People v. Wilkens* (2013) 56 Cal.4th 333, 348-350 [misdirection on escape rule element of felony-murder]; *People v. Aranda* (2012) 55 Cal.4th 342, 358-367, 374-375 [federal *Chapman* test applied to failure to give presumption of innocence/reasonable doubt instruction, but California's *Watson* standard used for failure to define "reasonable doubt" as required by state law]; *People v. Mil* (2012) 53 Cal.4th 400, 409-417 [same test when multiple

elements of special circumstance allegation omitted]; *People v. Thomas* (2013) 218 Cal.App.4th 630, 641-642 [failure to instruct on provocation and heat of passion as mitigating malice element of murder subject to *Chapman* test].)

Under either the *Watson* or *Chapman*, instructional error is harmless if the factual question posed by the omitted instruction necessarily was resolved adversely to the defendant under other, properly given instructions. (*People v. Lancaster* (2007) 41 Cal.th 50, 85; *People v. Wang* (2020) 46 Cal.App.5th 1055, 1072 [erroneous failure to give heat of passion voluntary manslaughter instruction harmless because jury found murder was premediated and deliberate].)

450.4-Test when alternative theories of liability, one bad and one good, given 6/20

Different standards of harmless error analysis apply when the jury is instructed on both an invalid theory of criminal liability as well as a valid alternative theory of criminal liability, termed "alternate-theory error." (*People v. Aledamat* (2019) 8 Cal.5th 1, 7, fn. 3 (*Aledamat*); see also *People v. Stringer* (2019) 41 Cal.App.5th 974, 984.)

A "factually inadequate theory" of criminal liability is incorrect only because the evidence does not support it. (*Aledamat*, *supra*, 8 Cal.5th at p. 7; *People v. Guiton* (1993) 4 Cal.4th 1116, 1128 (*Guiton*).) "If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*Guiton*, *supra*, 4 Cal.4th at p. 1129.) "[W]hen a prosecutor argues two theories to a jury, one of which is factually sufficient and one of which is not, … the reviewing court must assume that the jury based its conviction on the theory supported by the evidence." (*People v. Seaton* (2001) 26 Cal.4th 598, 645; see also *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 957.) Reversal is required, however, if the record contains affirmative indications that some jurors convicted on a theory not supported by substantial evidence. (*People v. Wear* (2020) 44 Cal.App.5th 1007, 1022; *People v. Marks* (2003) 31 Cal.4th 197, 233.)

A "legally inadequate theory" of criminal liability is incorrect because it is contrary to law. (*Aledamat*, *supra*, 8 Cal.5th at p. 7; *Guiton*, *supra*, 4 Cal.4th at p. 1128.) When the theory is legally erroneous—i.e., of a kind the jury is not equipped to detect—a higher standard must be met for the error to be found harmless. (*Aledamat*, *supra*, 8 Cal.5th at p. 7.) In cases involving alternate-theory error, the California Supreme Court in *Aledamat* concluded "that alternative-theory error is subject to the more general *Chapman* harmless error test. The reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt." (*Id.* at p. 13, adopting the federal harmless error standard from *Chapman v. California* (1967) 386 U.S. 18; see also *People v. Garcia* (2020) 46 Cal.App.5th 123, 156; *People v. Medellin* (2020) 45 Cal.App.5th 519, 535; *People v. Stringer*, *supra*, 41 Cal.App.5th at p. 984.) But if other aspects of the verdict or the evidence leave no reasonable doubt that the jury relied upon the correct legal standard, the erroneous instruction is deemed harmless. (*People v. Chun* (2009) 45 Cal.4th 1172, 1205; see also *In re Hansen* (2014) 227 Cal.App.4th 906, 921.)

450.5-Ambiguous or misleading instructions subject to *Watson* standard 5/20

An allegation that a jury instruction is ambiguous or confusing is subject to California's *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) standard of harmless error, requiring the reviewing court to determine whether there is a reasonable likelihood that the jury misunderstood and misapplied the challenged instruction. (*People v. Young* (2005) 34 Cal.4th 1149, 1202; *People v. Bedolla* (2018) 28 Cal.App.5th 535, 545.)

> Numerous cases have held that giving instructions that are contradictory or so inconsistent to confuse the jury was reversible error. (See, for example, *People v. Baker* (1954) 42 Cal.2d 550 [instruction on insanity and presumption were "confused, contradictory, and ambiguous"]; *People v. Dail* (1943) 22 Cal.2d 642, 653 [contradictory accomplice instructions; "Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury"]; *People v. Jeter* (2005) 125 Cal.App.4th 1212, 1217-1218 [conflicting instructions on assault with deadly weapons].)

(*People v. Lewelling* (2017) 16 Cal.App.5th 276, 299; but see *People v. Bedolla*, *supra*, 28 Cal.App.5th at p. 548 ["[T]he combined effect of the jury instructions, explicit and implicit arguments of counsel, and nature of the evidence itself, supports our conclusion that it was not reasonably likely that the jury misunderstood or misapplied the challenged instructions to the defendant's prejudice"].)

450.6-Failure to instruct on element of charge subject to *Chapman* standard 5/20

The failure to instruct on one or more elements of the charged offense is subject to the federal constitutional harmless error set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (*People v. Merritt* (2017) 2 Cal.5th 819, 825-831 [rejecting use of reversible per se standard]; see also *People v. McCloud* (2017) 15 Cal.App.5th 948, 956.)

> Instructions omitting or misdescribing an element of an offense are subject to harmless error analysis under the test of *Chapman*, as applied in *Sullivan* [*Sullivan v. Louisiana* (1993) 508 U.S. 275]. (See *People v. Flood* (1998) 18 Cal.4th 470, 503-507.) The essential inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan*, *supra*, 508 U.S. at p. 279; see also *People v. Breverman* (1998) 19 Cal.4th 142, 194.)

(*In re Lucero* (2011) 200 Cal.App.4th 38, 48, italics in original; see also *People v. Bay* (2019) 40 Cal.App.5th 126, 138.) But "[t]he omission of an element during jury instruction may be harmless when the factual issue is uncontested by the defense." (*People v. Adams* (2018) 28 Cal.App.5th 170, 191, citing *People v. Mil* (2012) 53 Cal.4th 400, 410.)

450.7-Error in instructions on defenses subject to *Watson* standard 6/20

When the instructional error arises from the failure to instruct on a defense to a charge it is most commonly analyzed under the California's harmless error test articulated in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*People v. Sojka* (2011) 196 Cal.App.4th 733, 738; *People v. Russell* (2006) 144 Cal.App.4th 1415, 1431-1432; but see *People v. Franklin* (2018) 21 Cal.App.5th 881, 890-891 [whether such an error amounts to federal constitutional error governed by *Chapman v. California* (1967) 386 U.S. 18 or constitutes an error of state law only subject to *Watson* review

remains unsettled]; see also *People v. Wang* (2020) 46 Cal.App.5th 1055, 1070 [same].) Under the *Watson* test, "[t]he judgment is reversed when it appears from an examination of the record that there is a reasonable probability the defendant would have obtained a more favorable outcome had the error not occurred. (*People v. Russell*, *supra*, 144 Cal.App.4th at 1432; *Watson*, *supra*, 46 Cal.2d at p. 836.)" (*People v. Sojka*, *supra*, 196 Cal.App.4th at p. 738.)

460.1-Mootness defined 1/21

A court should not decide a legal matter that is moot. "[A]s a general matter, an issue is moot if 'any ruling by [the] court can have no practical impact or provide the parties effectual relief.' (*Woodland Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888.)" (*People v. J.S.* (2014) 229 Cal.App.4th 163, 170; see also *People v. Dunley* (2016) 247 Cal.App.4th 1438, 1445.)

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (*Mills v. Green* (1895) 159 U.S. 651, 653, quoted in *Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863.) The proper disposition of a moot case is dismissal. (*Mills v. Green*, *supra*, at p. 653.)

(*In re Miranda* (2011) 191 Cal.App.4th 757, 762; see also *In re Arroyo* (2019) 37 Cal.App.5th 727, 732.) "It is a fundamental principle of appellate practice that an appeal will not be entertained unless it presents a justiciable issue." (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1489; see also *People v. Pipkin* (2018) 27 Cal.App.5th 1146, 1149-1150.)

> It is settled that "[a]n action that involves only abstract or academic questions of law cannot be maintained. [Citation.]" [Citation.] Moreover, " '[A]n action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal in such a case would be without practical effect, and the appeal will therefore be dismissed.' [Citation.]" (*In re Dani R.* (2001) 89 Cal.App.4th 402, 404.)

(*People v. Delong* (2002) 101 Cal.App.4th 482, 486 [completion of sentence or dismissal of case after completion of Proposition 36 does not moot pending appeal]; accord *People v. Buell* (2017) 16 Cal.App.5th 682, 687-688 [completion of jail term did not moot appeal of probation revocation].)

Appellate courts make rare exceptions to these basic principles.

> [T]here are three discretionary exceptions to the rules regarding mootness: (1) when the case presents an issue of broad public interest that is likely to recur [citation]; (2) when there may be a recurrence of the controversy between the parties [citation]; and (3) when a material question remains for the court's determination [citation].

(*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480; see also *In re M.R.* (2013) 220 Cal.App.4th 49, 56.) "When an issue 'is one likely to recur while evading appellate review [citations] and involves a matter of public interest [citations],' we may 'exercise [our] discretion to decide the issue for the guidance of future proceedings before dismissing the case as moot.' (*People v. Cheek* (2001) 25 Cal.4th 894, 897-898. …)" (*People v. Gregerson* (2011) 202 Cal.App.4th 306, 321; see also *People v. Redus* (2020) 54 Cal.App.5th 998, 1009-1010; *People v. Alsafar* (2017) 8 Cal.App.5th 880, 883, 886.) "An appellate court has discretion to decide a moot claim that presents questions of general public

concern, 'particularly in the area of the supervision of the administration of criminal justice.' (*In re Walters* (1975) 15 Cal.3d 738, 744.)" (*People v. Armogeda* (2015) 233 Cal.App.4th 428, 433; distinguish *People v. Pipkin*, *supra*, 27 Cal.App.5th at pp. 1152-1153 [appellate court refused to decide mooted issue].)

460.2-On remand for sentencing error, prison term may equal or exceed original 7/20

"[W]hen part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' [Citation.]" (*People v. Buycks* (2018) 5 Cal.5th 857, 893; see also *People v. Acosta* (2018) 29 Cal.App.5th 19, 26.)

> When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.

(*People v. Hill* (1986) 185 Cal.App.3d 831, 834; see also *People v. Castaneda* (1999) 75 Cal.App.4th 611, 613-614; *People v. Craig* (1998) 66 Cal.App.4th 1444, 1450-1452; but see *People v. Matthews* (2020) 47 Cal.App.5th 857, 866-868 [although enhancements defendant admitted in negotiated plea were eliminated by legislature while case on appeal, trial court could not increase sentence on remand because parties stipulated to specific and concurrent prison terms on all counts as part of bargain].) "[W]e hold that upon remand for resentencing after the reversal of one or more subordinate counts of a felony conviction, the trial court has jurisdiction to modify every aspect of the defendant's sentence on the counts that were affirmed, including the term imposed as the principal term." (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1259 (*Burbine*).)

"It is settled that a felony defendant's original aggregate prison term cannot be increased on remand for resentencing following a partially successful appeal." (*Burbine*, *supra*, 106 Cal.App.4th at p. 1253.) [But] "on remand following the reversal of a felony count for which a subordinate term had been imposed, neither lack of jurisdiction nor res judicata bars the trial court from reconsidering its prior sentencing choices made under the normal rules of felony sentencing, including imposing a higher term for the principal, or base, term, so long as the total prison term for all affirmed counts does not exceed the original aggregate sentence." (*Ibid*.) The appellate court in *Burbine* rejected the defense argument that it was unjust he received the same sentence on resentencing even though one of the felony counts upon which he was sentenced originally had been reversed in the first appeal. (*Id*. at p. 1256.) "[W]e conclude that, under principles already elucidated in the case law, the trial judge's original sentencing choices did not constrain him or her from imposing any sentence permitted under the applicable statutes and rules on remand, subject only to the limitation that the aggregate prison term could not be increased." (*Ibid*; see also *People v. Calderon* (1993) 20 Cal.App.4th 82, 84-85 [upheld the reimposition of the same term on resentencing following a partial reversal of lesser included offense and remand for resentencing].)

Finally, "if the original sentence was not legally authorized by law" a higher overall sentence can be imposed following appellate remand. (*People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1040; see also *People v. Reyes* (1989) 212 Cal.App.3d 852, 857.) "When [an unauthorized or illegal] sentence is set aside on appeal a correct, even if more severe, sentence may be imposed upon

retrial without offending the principles of double jeopardy." (*People v. Craig*, *supra*, 66 Cal.App.4th at p. 1449; see also *People v. Williams* (1998) 61 Cal.App.4th 649, 654, fn. 4 [also rejected claim of judicial vindictiveness].)

560.1-Arrest in public place (doorstep) requires no warrant 5/07

In *People v. Ramey* (1976) 16 Cal.3d 263, the California Supreme Court ruled that an arrest *within* a suspect's home without an arrest warrant is per se unreasonable. But, a warrantless probable cause arrest in a public place remains reasonable. (*United States v. Watson* (1976) 423 U.S. 411.) Thus, no warrant is required to arrest a suspect in the driveway to the suspect's home—the driveway is a public place. (*In re Gregory S.* (1980) 112 Cal.App.3d 764, 775.)

An officer can make a warrantless arrest immediately after the suspect steps outside the home at the officer's request or demand. "The privacy interests protected by *Ramey* were satisfied when appellant voluntarily stepped outside. Once he stepped outside, it was lawful for the officer to arrest him on probable cause. …" (*People v. Tillery* (1979) 99 Cal.App.3d 975, 979-980.) Similarly, in *People v. Trudell* (1985) 173 Cal.App.3d 1221, the appellate court held compliance with *Ramey* is excused when a suspect is arrested outside after acquiescing to the officers' demand that he or she exit the residence. (*Id*. at pp.1228-1230.)

Indeed, a warrantless arrest initiated on the arrestee's doorstep remains lawful even if the arrestee retreats inside the home before being physically taken into custody. (*United States v. Santana* (1976) 427 U.S. 38.)

560.2-Search warrant permits arrest in home 5/07

An officer authorized to enter and search a home pursuant to a search warrant may also lawfully make a probable cause arrest inside the house being searched—no separate arrest warrant is needed. In *People v. McCarter* (1981) 117 Cal.App.3d 894, a codefendant was arrested inside her home without an arrest warrant. The appellate court held there was no *Ramey* violation since the police had judicial authorization to enter the home under a validly issued and executed search warrant. "Given probable cause to arrest the existence of which is not challenged here, an officer may make an arrest outside the home without judicial authorization. If officers have authorization to enter the home, an arrest is of no greater constitutional significance than an arrest elsewhere." (*Id.* at p. 908.)

560.3-Consent of any occupant permits entry for arrest 5/07

In *People v. Ramey* (1976) 16 Cal.3d 263, the California Supreme Court ruled that an arrest within a suspect's home without an arrest warrant is per se unreasonable. But the common exceptions justifying warrantless action apply equally to arrests and searches. Thus: "A police entry into a residence is proper when the circumstances justify a good faith reasonable belief that a person on the premises has the authority to and does consent to such entry." (*In re Reginald B.* (1977) 71 Cal.App.3d 398, 403.) Entry to make arrest without an arrest warrant has often been upheld even though the person consenting to the entry is not the suspect about to be arrested. (*Ibid.*; see also *People v. Newton* (1980) 107 Cal.App.3d 568, 577-578; *People v. Ford* (1979) 97 Cal.App.3d 744.) Indeed, unless the suspect is present and objecting, a co-tenant can give consent to an officer's entry. (*Georgia v. Randolph* (2006) 547 U.S. 103; *Illinois v. Rodriguez* (1990) 497 U.S. 177.)

560.4-Any form of consent permits entry for arrest 5/07

Entry into a residence is valid when done with the occupant's consent. Such consent can be expressed by actions, such as stepping aside and gesturing with an arm, as well as by words. (*People v. James* (1977) 19 Cal.3d 99, 113; *People v. Harrington* (1970) 2 Cal.3d 991, 995.) Merely opening the door and stepping aside has been held to be sufficient manifestation of consent. (*People v. Quinn* (1961) 194 Cal.App.2d 172, 176.)

560.5-Preventing escape permits entry without warrant 9/21

A recognized exception to the rule that warrantless entry into a residence is per se unreasonable is invoked by "exigent circumstances." (*People v. Ramey* (1976) 16 Cal.3d 263.) Exigent circumstances include an emergency situation requiring swift action to prevent the imminent escape of a suspect. (*Id.* at p. 276; similarly see *People v. Williams* (1989) 48 Cal.3d 1112, 1138.) In each case the claim of an extraordinary situation must be measured by the facts known to the officers. (*People v. Ramey*, *supra*, 16 Cal.3d at p. 276.)

The fresh pursuit of a fleeing felon falls generally within the exigent circumstances exception to the warrant requirement. "[A]lthough 'fresh pursuit' of a fleeing felon must be substantially continuous and afford the law enforcement authorities no reasonable opportunity to obtain a warrant, it is not necessary that the suspect be kept physically in view at all times. (*People v. Escudero* (1979) 23 Cal.3d 800, 811.) In this case, a residential burglar fled when his crime was discovered by a witness. The witness followed the burglar, obtained the burglar's car registration, and called the police. Within an hour the police responded to an address obtained from the registration, entered without a warrant, and arrested the burglar. The appellate court approved the officers' warrantless entry and termed the hour-long pursuit from discovery of the crime to arrest a "fresh pursuit," and thus within the exigency exception. (*Id.* at pp. 808-814.)

There is no per se rule applicable to every situation because the existence of exigent circumstances is case-specific. (*Lange v. California* (2021) ___ U.S. ___, ___ [141 S.Ct. 2011, 2018-2022, ___ L.Ed.2d ___, ___] [rejecting categorical rule that pursuit of fleeing misdemeanor suspect into home is per se permissible under Fourth Amendment].) But "[w]here the pursuit into the home was based on an arrest set in motion in a public place, the fact that the offenses justifying the initial detention or arrest were misdemeanors is of no significance in determining the validity of the entry without a warrant." (*People v. Lloyd* (1989) 216 Cal.App.3d 1425, 1430; *People v. Abes* (1985) 174 Cal.App.3d 796, 807.)

An analogous situation arose in *People v. Ledesma* (2006) 39 Cal.4th 641, when police were looking to arrest the defendant for robbery. After lawfully entering the house with the consent of a house guest, the officer did not find the defendant but learned he was expected to be calling soon. When the phone rang an officer answered pretending to be another person. The defendant made incriminating statements. The California Supreme Court held that the warrantless interception of the phone call was justified by exigent circumstances. (*Id*. at p. 704.) "The information supplied by [the occupants of the house] gave [the officers] reason to believe that the incoming call would be from defendant and that, by answering it, they would obtain information leading to his imminent capture. … The delay required to obtain a warrant obviously would have resulted in the loss of this opportunity." (*Ibid*.)

560.6-Evidence destruction permits entry without warrant 6/20

A recognized exception to the rule that a warrantless entry into a residence is per se unreasonable is invoked by "exigent circumstances." (*People v. Ramey* (1976) 16 Cal.3d 263.) Exigent circumstances include an emergency situation requiring swift action to prevent the destruction of evidence. (*Id.* at p. 276; similarly see *People v. Williams* (1989) 48 Cal.3d 1112, 1138.) In each case the claim of an extraordinary situation must be measured by the facts known to the officers. (*People v. Ramey*, *supra*, 16 Cal.3d at p. 276.) The evidence must relate to a jailable, rather than a nonjailable, offense. (*People v. Hua* (2008) 158 Cal.App.4th 1027, 1035.)

An illustration of the exigent circumstances exception is *People v. Robinson* (1986) 185 Cal.App.3d 528. An undercover officer posing as a purchaser of drugs saw contraband in defendant's residence while standing at defendant's doorway. Because of defendant's obvious suspicion of the officer, it was reasonable to believe the delay in obtaining an arrest warrant would result in a destruction of the evidence. The appellate court held the immediate entry, arrest of the defendant and seizure of the contraband were lawful. (*Id.* at pp. 531-533; see also *People v. Ortiz* (1995) 32 Cal.App.4th 286.)

And, in *People v. Lanfrey* (1988) 204 Cal.App.3d 491, officers traced a stabbing suspect to his motel room 5½ hours after the crime, entered his room, and arrested him. The appellate court excused the absence of an arrest warrant by stressing that the immediate arrest would prevent the suspect from destroying his blood-stained clothing and knife. (*Id.* at pp. 507-509.)

Finally, although the exigent circumstances cannot be created by the officers, if "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to make an arrest and prevent the destruction of evidence is reasonable and thus allowed." (*Kentucky v. King* (2011) 563 U.S. 452, 462, fn. omitted.)

560.7-Exigent circumstances permit warrantless entry to arrest 6/20

An arrest within the suspect's own residence has been held presumptively unreasonable in absence of an arrest warrant, consent, or exigent circumstances. (*Payton v. New York* (1980) 445 U.S. 573, 586; *People v. Ramey* (1976) 16 Cal.3d 263, 276.) " '[W]arrentless arrests within the home are proscribed unless exigent circumstances exist.' [Citations.] The same proscription limiting warrantless arrests in the home has been extended to detentions that fall short of formal arrests." (*People v. Lujano* (2014) 229 Cal.App.4th 175, 182.) "But to fall within the exigent circumstances exception to the warrant requirement, an arrest or detention within a home or dwelling must be supported by *both* probable cause and the existence of exigent circumstances." (*Id*. at p. 183, italics in original; see also *People v. Celis* (2004) 33 Cal.4th 667, 676; *People v. Ormonde* (2006) 143 Cal.App.4th 282, 292.)

Exigent circumstances has been defined as an emergency situation requiring swift action to prevent physical harm to persons, serious property damage, the escape of a suspect, or destruction of evidence. (*People v. Ramey*, *supra*, 16 Cal.3d at p. 276.) "There is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers." (*Ibid*.; see also *People v. Mitchell* (1990) 222 Cal.App.3d 1306, 1313.) "Although there is no litmus test for determining whether the facts in any given case qualify as exigent circumstances, courts should consider, inter alia, the gravity of the underlying offense and whether delay would pose a threat to police or public safety. (See *People v. Ramey*, *supra*, 16 Cal.3d at p. 276; *Welsh v. Wisconsin* (1984) 466 U.S. 740, 753.)"

(*People v. Mitchell*, *supra*, 222 Cal.App.3d at pp. 1312 1313.) This analysis is completely objective. An action by law enforcement officers, including entering a residence, is reasonable under the Fourth Amendment, regardless of an officer's state of mind, as long as the circumstances, viewed objectively, justify the officers' action. (See *Brigham City v. Stuart* (2006) 547 U.S. 398, 404.)

In *People v. Wilkins* (1993) 14 Cal.App.4th 761, the appellate court upheld the warrantless arrest of a suspect in his home after officers were called to the residence late at night by the suspect's wife, who had been beaten by him. She met the officers outside the residence. The court based its determination of exigent circumstances upon her need for shelter, the possibility of further violence if she reentered, and the difficulty of obtaining a warrant at that time of night. (*Id.* at pp. 771-772; see also *People v. Frye* (1998) 18 Cal.4th 894, 989-990.)

570.1-Defendant has burden to attack arrest by warrant 6/10

An arrest warrant, like a search warrant, is presumptively valid and the burden of proving its invalidity, for lack of probable cause or otherwise, is on the defendant. (*People v. Ramirez* (1988) 202 Cal.App.3d 425, 428; see also *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 101.) The prosecution need only produce the warrant, or an abstract showing the existence of a facially valid warrant, to shift the burden to the defendant. (*People v. Alcorn* (1993) 15 Cal.App.4th 652, 660.)

" 'Probable cause to issue an arrest … warrant must … be based on information contained in an affidavit providing a substantial basis from which the magistrate can reasonably conclude there is a fair probability that a person has committed a crime … .' (*Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1111.)" (*People v. Richardson* (2008) 43 Cal.4th 959, 989.) A magistrate's finding of sufficient cause for arrest, when supported by competent evidence, shall not be disturbed on review. (*People v. Johnson* (1971) 21 Cal.App.3d 235, 243.)

570.2-Good faith reliance on bad arrest warrant negates suppression 4/11

In the landmark case of *United States v. Leon* (1984) 468 U.S. 897 the United States Supreme Court held that evidence will not be suppressed when the People establish that it was seized in objective good faith reliance on a search warrant, even if the warrant is later determined to have been issued without probable cause or to be otherwise defective. (*Id*. at p. 922.) Where the officer serving a warrant acts with objective good faith, no purpose is served by excluding the evidence seized. (*Id.* at pp. 918-920.)

California cases have extended the *Leon* reasoning to the execution of an arrest warrant later found to be defective. In *People v. Palmer* (1989) 207 Cal.App.3d 663, for example, the appellate court held:

> Excluding evidence obtained incident to an arrest under a subsequently invalidated arrest warrant cannot be justified by the deterrent effect on the issuing judge or magistrate because the exclusionary rule is not designed to punish judicial error. [Citation omitted.] Nor can exclusion be justified by its deterrent effect on the law enforcement officer because, by obtaining an arrest warrant and faithfully following its terms, the officer has acted as he is supposed to act.

(*Id.* at p. 669; similarly, see *People v. Ramirez* (1988) 202 Cal.App.3d 425, 428.)

The same is true for an arrest based on a quashed arrest warrant that was still listed as outstanding in a police computer system because a court clerk failed to notify the police that it had

been quashed. The high court held the arresting officer acted in objective good faith. Indeed, the officer was duty bound to make the arrest. (*Arizona v. Evans* (1995) 514 U.S. 1.)

Similarly, the exclusionary rule should not be applied when, due to negligent recordkeeping by the police department in a neighboring county, an arrest warrant for the defendant had not been recalled. (*Herring v. United States* (2009) 555 U.S. 135.)

580.1-Blood may be drawn with consent or probable cause to arrest 6/20

Under the Fourth Amendment a blood sample may be drawn with the free and voluntary consent of a criminal suspect. (*People v. Elder* (2017) 11 Cal.App.5th 123, 131.) Such consent can be given in advance such as by agreeing to a search and seizure waiver as a condition of probation. (*People v. Cruz* (2019) 34 Cal.App.5th 764, 771 [probation condition stated probationer, "[i]f arrested for driving under the influence of alcohol in violation of Section 23152 or 23153 of the Vehicle Code, shall not refuse to submit to a chemical test of your blood, breath or urine"].) Implied, voluntary consent exists when a driving under the influence suspect is correctly told he or she must, under threat of criminal and civil penalties, consent either to a breath or blood test and choses blood. (*People v. Nzolameso* (2019) 39 Cal.App.5th 1181, 1186-1187.) Actual consent can be found if the circumstances show, despite the threat of such penalties, that the choice of a blood test is otherwise free and voluntary. (*Id*. at pp. 1187-1189.) Finally, voluntary implied consent exists if the person is simply told they must submit to a blood test and they silently and without objection or resistance cooperate with the blood draw. (*People v. Lopez* (2020) 46 Cal.App.5th 317, 327-336 [breath test not offered because officer suspected person under influence of drugs].)

A blood sample can also be drawn without consent if done in a medically approved manner and there is probable cause exists to believe (1) the suspect has committed a crime, and (2) chemical analysis of the sample will yield evanescent evidence of the crime. (*Schmerber v. California* (1966) 384 U.S. 757, 770 (*Schmerber*); *People v. Deltoro* (1989) 214 Cal.App.3d 1417, 1423; *People v. Trotman* (1989) 214 Cal.App.3d 430, 437; and see *Cupp v. Murphy* (1973) 412 U.S. 291, 296.) Whether a warrant must be obtained before performing a non-consensual blood draw, however, depends on whether there are exigent circumstances. (*Missouri v. McNeely* (2013) 569 U.S. 141, 144 (*McNeely*).) "[W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in [*Schmerber*], it does not do so categorically. (*McNeely*, *supra*, 569 U.S. at p. 156.)" (*People v. Toure* (2015) 232 Cal.App.4th 1096, 1103 (*Toure*).) "Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not." (*Birchfield v. North Dakota* (2016) 579 U.S. ___, ___ [136 S.Ct. 2160, 2184, 195 L.Ed.2d 560, 587].) "[C]onsistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances." (*McNeely* , *supra*, 569 U.S. at p. 145; see also *People v. Meza* (2018) 23 Cal.App.5th 604, 610; *Toure*, *supra*, 232 Cal.App.4th at p. 1103.) "The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case." (*McNeely*, *supra*, 569 U.S. at p. 164; but see *Mitchell v. Wisconsin* (2019) 587 U.S. ___, ___ [139 S.Ct. 2525, 2539, 204 L.Ed.2d 1040, 1052] [warrantless blood draw from unconscious person suspected of driving under the influence of alcohol permissible under most circumstances].)

The subsequent chemical testing of a legally obtained blood sample without a warrant does not infringe upon the suspect's Fourth Amendment rights nor upon any other constitutional interests. (*People v. Ryan* (1981) 116 Cal.App.3d 168, 182; *People v. Puccinelli* (1976) 63 Cal.App.3d 742; but see *People v. Picard* (2017) 15 Cal.App.5th Supp. 12 [consent to blood alcohol test did not permit second warrantless test for presence of drugs].)

Finally, it is immaterial that no arrest for driving under the influence or a similar charge is actually made so long as probable cause to arrest exists. (*People v. Deltoro*, *supra*, 214 Cal.App.3d at p. 1425; *People v. Trotman*, *supra*, 214 Cal.App.3d at p. 437.) Nor is the legal authority to draw a blood sample for blood alcohol analysis lost simply because the suspect submits to a preliminary alcohol screening (PAS) test. (*People v. Wilson* (2003) 114 Cal.App.4th 953, 957-960; *People v. Bury* (1996) 41 Cal.App.4th 1194, 1205-1206.)

580.2-DUI blood draw may be done without warrant if exigent circumstances 5/20

"In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." (*Missouri v. McNeely* (2013) 569 U.S. 141, 152 (*McNeely*).) "We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." (*Id*. at p. 153.) Exigency excusing the warrant requirement may arise, however, from unavoidable delays, such as "where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident" leaving no time to seek out a magistrate to secure a warrant. (*Schmerber*, *supra*, 384 U.S. at pp. 770-771.) In addition, "exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process." (*McNeely*, *supra*, 569 U.S. at p. 156.) In short: "Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." (*Id*. 569 U.S. at p. 156.)

Since *McNeely*, however, the United States Supreme Court in *Mitchell v. Wisconsin* (2019) 587 U.S. ___ [139 S.Ct. 2525, 204 L.Ed.2d 1040] (*Mitchell*), carved out a significant exception to this "totality of the circumstances" test in situations involving an unconscious person suspected of driving under the influence of alcohol.

> When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment. We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.

(*Id*. 587 U.S. at p. ___ [139 S.Ct. at p. 2539, 204 L.Ed.2d at p. 1052.)

Consistent with the subsequent High Court opinion in *Mitchell*, the California appellate court in *People v. Toure* (2015) 232 Cal.App.4th 1096, found exigent circumstances justified the warrant blood draw of the defendant after his arrest for driving under the influence.

> [T]here was a traffic accident in which at least one person sustained injuries approximately 2000 feet from where the defendant finally came to a stop after blowing the tire of his semi-truck. The defendant was combative, requiring the administration of physical restraints, which delayed their investigation of the accident and prevented the officers from conducting field sobriety tests, unlike the defendant in *McNeely*. Defendant refused to provide officers with information, yelling profanities at them, thereby preventing the officers from determining when he had stopped drinking, also unlike the defendant in *McNeely*. [¶] The time it took to subdue defendant and transport him to the CHP station, after conducting a brief investigation of the accident scene consumed approximately two hours … : [¶] In this case, it would have been impossible to "calculate backward" to determine the defendant's blood alcohol level at the time of the accident.

(*Id*. at pp. 1104-1105; see also *People v. Jimenez* (2015) 242 Cal.App.4th 1337, 1365 [exigency created when officer heard defendant tell hospital nurse he "was withdrawing from methamphetamine"]; but see *People v. Meza* (2018) 23 Cal.App.5th 604, 611-612 [no explanation provided why officer did not seek warrant before ordering involuntary blood draw at hospital two hours after start of investigation of defendant for suspected driving under the influence resulting in an accident].)

580.3-Blood draw must be done in approved manner w/o unreasonable force 5/20

Under *Schmerber v. California* (1966) 384 U.S. 757 (*Schmerber*), " 'forcible, warrantless chemical testing may occur' " if, among other things, " 'the test is conducted in a medically approved manner.' " (*People v. Sugarman* (2002) 96 Cal.App.4th 210, 214.) "It is well established that the government may utilize the results of chemical analysis performed upon a blood sample forcibly removed provided that (a) the removal is done in a reasonable, medically approved manner; (b) is incident to the defendant's arrest; and (c) is based upon the reasonable belief that the person is intoxicated. [Citations.]" (*People v. Ryan* (1981) 116 Cal.App.3d 168, 182.) In some cases, a warrant may be required. (*Missouri v. McNeely* (2013) 569 U.S. 141.)

"With or without a warrant, the police may not use unreasonable force to perform a search or seizure of a person. (See *Graham v. Connor* (1989) 490 U.S. 386, 397.)" (*People v. Rossetti* (2014) 230 Cal.App.4th 1070, 1078.) Leaving a cooperative suspect handcuffed to a chair during the blood draw is not unreasonable. (*People v. Harris* (2015) 234 Cal.App.4th 671, 695-696.)

> Law enforcement must act reasonably and use only that degree of force which is necessary to overcome a defendant's resistance in taking a blood sample. Even where necessary to obtain a blood sample police may not act in a manner which will "shock the conscience." A defendant's arbitrary refusal to submit to a blood test will not excuse unlawful police conduct.

(*Carleton v. Superior Court* (1985) 170 Cal.App.3d 1182, 1187-1188, fn. omitted.)

> Appellant's contention that the blood sample in dispute was taken by way of police brutality and therefore was violative of his due process right, is not borne out by the record. All that has been shown was that appellant was restrained by five police officers while a technician removed the blood sample from his left arm. At the same time there is no evidence whatsoever that the police used more force than necessary to overcome appellant's resistance or introduced any wantonness, violence or beatings. As our Supreme Court repeatedly emphasized, the taking of the defendant's blood for an alcohol test in a

> medically approved manner did not constitute brutality or shock the conscience even if it takes place against the will of the defendant and that in such circumstance the nonconsenting defendant may not well complain of denial of due process under the rule pronounced in *Rochin v. California* [(1952)] 342 U.S. 165. (*People v. Duroncelay* (1957) 48 Cal.2d 766, 770; *People v. Haeussler* (1953) 41 Cal.2d 252, 257.)

(*People v. Ryan*, *supra*, 116 Cal.App.3d at p. 183.)

People v. Cuevas (2013) 218 Cal.App.4th 1278 involved a number of blood draw cases consolidated on appeal. All were found to be constitutionally reasonable by the appellate court. Several factors were considered, including whether the defendant initially consented to the blood draw, whether the person drawing the blood was a trained and experienced phlebotomist or blood technician, that a new needle from a sealed package was used and sanitary procedures where used to disinfect the injection site, whether the blood draw was otherwise done in a routine manner, and the degree to which the defendant cooperated during the blood draw. (*Id*. at pp. 1285-1286; accord *People v. Rossetti¸ supra*, 230 Cal.App.4th at pp. 1078-1079.)

That the blood draw took place somewhere other than in a hospital or medical facility does not render the process constitutionally unreasonable. (*Harris*, *supra*, 234 Cal.App.4th at pp. 693-695.)

Finally, the drawing of blood in a medically approved manner by a phlebotomist who does not qualify under Vehicle Code section 23158, subdivision (a), does not amount to a violation of the Fourth Amendment, or otherwise require the exclusion of the blood-test results. (*People v. Mateljan* (2005) 129 Cal.App.4th 367, 373-376; *People v. McHugh* (2004) 119 Cal.App.4th 202, 212-214; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1038-1039.)

580.4-Burden of proof on medically approved manner of drawing blood varies 5/20

The question of who bears the burden on the question of whether a bodily extraction, such as a blood draw, was done in a reasonable and medically approved manner depends on a number of factors. When a search warrant was obtained, "[w]e hold that, where the circumstances of the blood draw are typical and routine, i.e., not peculiarly within the knowledge of the People, the burden of proof is on the defendant." (*People v. Fish* (2018) 29 Cal.App.5th 462, 464.) But, [t]he official duty presumption [Evid. Code, § 664] and the preference accorded to search warrants do not automatically result in placing the burden of proof on defendant. If the relevant facts are peculiarly within the government's knowledge or control so that it is in a much better position than the defendant to present evidence concerning those facts, the burden of proof may rest on the People." (*Id*. at p. 469.)

> The circumstances of the blood draw here are typical and routine. The circumstances are not peculiarly within the government's knowledge or control and there is no suggestion that there was anything unusual about the blood draw. The blood was not drawn at a police station by a government employee. It was drawn at a hospital, presumably by a person legally licensed to draw blood. Defendant was in as good a position as Officer Ramos to observe the blood draw. If defendant's observations had led him to suspect that the blood draw was not performed in a reasonable manner, he could have subpoenaed the person who performed the blood draw.

(*Id*. at p. 470.)

Regardless who has the burden of proof, however, the testimony of a police officer who witnessed the procedure and was able to identify the person taking the sample as a nurse or a phlebotomist is sufficient to establish that the blood draw was taken in a medically approved manner. (*People v. Harris* (2015) 234 Cal.App.4th 671, 696-697; *People v. Cuevas* (2013) 218 Cal.App.4th 1278, 1285.)

580.5-Breath test may be required without a search warrant incident to DUI arrest 12/19

Under the Fourth Amendment a breath sample may be drawn from a driving under the influence suspect incident to arrest and without either consent or a search warrant. (*Birchfield v. North Dakota* (2016) 579 U.S. ___ [136 S.Ct. 2160, 195 L.Ed.2d 560].) "A breath test does not 'implicat[e] significant privacy concerns.' [Citation.]" (*Id*. at p. ___ [136 S.Ct. at p. 2178, 195 L.Ed.2d at p. 580].) "Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great." (*Id*. at p. ___ [136 S.Ct. at p. 2184, 195 L.Ed.2d at p. 587].)

> Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation.

(*Id*. at p. ___ [136 S.Ct. at p. 2185, 195 L.Ed.2d at p. 588]; see also *People v. Nzolameso* (2019) 39 Cal.App.5th 1181, 1185; *People v. Arter* (2017) 19 Cal.App.5th Supp. 1, 8 [rule applied to boating under the influence arrest].)

600.1-General standard for citizen arrest 11/10

It is well established that a citizen in whose presence a misdemeanor has been committed or attempted may make a citizen's arrest, and in so doing may both summon the police for assistance and delegate to police the physical act of taking the offender into custody. (Pen. Code, §§ 837, 839; *People v. Johnson* (1981) 123 Cal.App.3d 495, 499.)

> Any person, though not an officer, may arrest another for committing or attempting to commit a public offense in his presence. ([Pen. Code] § 837; *People v. Score* (1941) 48 Cal.App.2d 495, 498.) The "presence" requirement is found in both sections 836 and 837, and has been liberally construed. (*People v. Sjosten* (1968) 262 Cal.App.2d 539, 543-544.) A warrantless arrest by a citizen for a misdemeanor occurring in the citizen's presence is lawful. (*Johanson v. Department of Motor Vehicles* (1995) 36 Cal.App.4th 1209, 1216.)

(*People v. Bloom* (2010) 185 Cal.App.4th 1496, 1501 (*Bloom*).)

To validate a police officer's arrest as a citizen's arrest, there must be some evidence to the effect that the citizen requested the police officer to perform the physical act of taking the suspect into custody. But the citizen's request need not be express—the request may be implied by the citizen's conduct in summoning police, reporting the offense, and pointing out the offender. (*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1030-1031; *People v. Johnson*, *supra*, 123 Cal.App.3d at p. 499; *Green v. Department of Motor Vehicles* (1977) 68 Cal.App.3d 536, 541.)

In *Green v. Department of Motor Vehicles*, *supra*, 68 Cal.App.3d 536 the citizen observed a motorist driving erratically and followed her to her private driveway. The citizen left to get police help and returned 35 to 40 minutes later to finally make the arrest of the motorist for driving under

the influence of alcohol. In upholding the arrest the appellate court held there is no requirement that the citizen keep the offender within view throughout the time intervening between observation of the offense and the arrest. (*Id*. at p. 541.) Nor was there any impropriety in the officer ordering the suspect out of the vehicle to perform a "field sobriety test" before any citizen's arrest was pronounced. (*Id.* at pp. 541-542.)

Another requirement for a valid citizen's arrest is that it "must be made promptly after the offense is committed in the arrestor's presence." (*Bloom*, *supra*, 185 Cal.App.4th at p. 1501.)

> An arrest for a misdemeanor without a warrant cannot be justified if made after the occasion has passed, though committed in the presence of the person making the arrest. (*Hill v. Levy* (1953) 117 Cal.App.2d 667, 670.) This only means that the arrestor must proceed as soon as possible to make the arrest, and if instead of doing so he goes about other matters unconnected with the arrest, the right to make the arrest ceases. (*Ibid*.; *People v. Hesslink* (1985) 167 Cal.App.3d 781, 788.)

(*Bloom*, *supra*, at pp. 1501-1502.)

The defendant in *Bloom* made a harassing and annoying telephone call to a civilian 9-1-1 police operator. The operator filled out a citizen's arrest form and immediately dispatched officers to take the defendant into custody. The appellate court found the citizen's arrest was lawful. (*Bloom*, *supra*, 185 Cal.App.4th at pp. 1502-1503.)

> Here, the dispatcher proceeded as soon as possible to make the arrest by dispatching an officer and promptly executing a citizen's arrest form. The dispatcher proceeded as soon as possible, and the record reveals defendant was still in the location of the most recent calls, showing that no appreciable lapse of time had occurred and that the calls would have persisted absent the arrest.

(*Id*. at p. 1502.) "Thus, the dispatcher lawfully arrested defendant for making the calls and she was not required to physically restrain him or to be present at the time of the arrest." (*Id*. at p. 1503.)

630.1-Bad DUI arrest may be good attempted DUI or PC647(f) arrest 5/07

Even if the evidence is insufficient to uphold an arrest for driving under the influence of alcohol under Vehicle Code section 23152, it still may support an arrest for attempted driving under the influence, or for public intoxication in violation of Penal Code section 647, subdivision (f). In *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, at page 769, the California Supreme Court explained that an intoxicated person behind the wheel of a motor vehicle would not be subject to arrest for driving under the influence if the officer observed no movement of the vehicle, but still might be arrested for an attempt to commit that crime or for a violation of Penal Code section 647, subdivision (f). Similarly, in *People v. Kelley* (1970) 3 Cal.App.3d 146, the appellate court held that the arrest was not invalidated by the fact that the officer told the defendant he was being arrested for drunk driving. (*Id.* at p. 151.) The appellate court held it was unnecessary to decide whether the circumstances justified an arrest for Vehicle Code section 23152, since there were sufficient grounds to arrest for the different but related misdemeanor violation of Penal Code section 647, subdivision (f). (*Ibid*.) The officer's announcement of the wrong offense did not make the arrest unlawful. (*Ibid*.; see generally, *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1262-1265; *People v. Lewis* (1980) 109 Cal.App.3d 599, 609.)

630.2-Arrest for "driving" under influence does not require movement of vehicle 6/07

An officer with probable cause to believe the suspect has been "driving" under the influence may properly make an arrest under the Fourth Amendment even if the officer did not observe "driving" within the meaning of Penal Code section 836, subdivision (a)(1) (section 836(a)(1)).

Vehicle Code section 23152 makes it unlawful for a person "to drive a vehicle" while under the influence of any alcoholic beverage or drug, or with a blood alcohol level of .08 or greater. What, then, is "driving?" For purposes of this provision, a "driver" is "a person who drives or is in actual physical control of a vehicle." (Veh. Code, § 305; see also *In re Queen T.* (1993) 14 Cal.App.4th 1143, 1145 [steering while another operated pedals]; *People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1183-1184 [steering coasting vehicle after it stalled].)

In *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, the California Supreme Court held that, for purposes of misdemeanor arrest and application of the implied consent law, "driving" required that the officer observe some volitional movement of the vehicle. Penal Code section 836(a)(1) requires the misdemeanor offense be committed in the officer's presence. The court in *Mercer* ruled the arrest was improper because the officer saw no movement, only the driver slumped over the wheel of a legally parked car with its engine running. (*Id*. at pp. 768-770; distinguish *Henslee v. Department of Motor Vehicles* (1985) 168 Cal.App.3d 445 [car lurched forward when driver awoke and put it in gear].)

Mercer is inapplicable in the present proceeding because it arose in the context of an *administrative* proceeding to suspend a driver's license for refusal to take a blood-alcohol test. In *People v. Trapane* (1991) 1 Cal.App.4th Supp. 10, the Appellate Department of the San Diego County Superior Court held that *Mercer* does not apply to a motion to suppress evidence in a *criminal* proceeding. The Fourth Amendment requires only that arrest be supported by probable cause. The additional statutory requirement of Penal Code section 836(a)(1), that the crime occur in the officer's presence, is not required by the Fourth Amendment. The exclusionary rule redresses only federal constitutional violations. (*People v. Trapane*, *supra*, at pp. 13-14; accord, *People v. Donaldson* (1995) 36 Cal.App.4th 532, 535-539; see generally, *In re Lance W.* (1985) 37 Cal.3d 873, 890 [interpreting former subd. (d), now subd. (f)(2), of Cal. Const., art. 1, § 28].)

Of course, the requirements of Penal Code section 836(a)(1) are not relevant at trial. As the California Supreme Court in *Mercer* stressed, observed movement is not necessary to support a *conviction* of driving under the influence since movement of the vehicle may be inferred from circumstantial evidence. In so holding, the court endorsed the similar conclusion reached in *People v. Wilson* (1985) 176 Cal.App.3d Supp. 1, and cases there cited. (*Mercer v. Department of Motor Vehicles*, *supra*, 53 Cal.3d at pp. 756-757, 769-770.)

One of the cases relied on in *Wilson* was *People v. Hanggi* (1968) 265 Cal.App.2d Supp. 969, decided by the Appellate Department of the San Diego County Superior Court. *Hanggi* affirmed a conviction for driving under the influence where the only proof of "driving" was circumstantial. That appellate panel stated: "From the combination of circumstances—defendant's sitting in a vehicle in the center of the street—behind the wheel—engine running—lights on, it can be inferred that defendant must have placed himself in such position, and that he accomplished this by driving the car to the place at which he was found." (*Id.* at p. 972.)

630.3-Any accident permits arrest for DUI under VC 40300.5 7/09

Vehicle Code section 40300.5 allows a peace officer to arrest a person for driving under the influence, without a warrant on probable cause alone, when:

(a) The person is involved in a traffic accident.

(b) The person is observed in or about a vehicle that is obstructing a roadway.

(c) The person will not be apprehended unless immediately arrested.

(d) The person may cause injury to himself or herself or damage property unless immediately arrested.

(e) The person may destroy or conceal evidence of the crime unless immediately arrested.

These exceptions to the general rule that an officer has statutory authority to make a misdemeanor arrest only for an offense committed in the officer's presence (Pen. Code, § 836, subd. (a)(1)) must be liberally construed to promote public safety. (Veh. Code, § 40300.6; *McNabb v. Department of Motor Vehicles* (1993) 20 Cal.App.4th 832, 836.)

Involvement in a traffic accident is the most interpreted provision of Vehicle Code section 40300.5. A "traffic accident" refers to an accident involving at least one vehicle; the use of the word "traffic" in the statute is intended to describe the type of accident. (*People v. Ashley* (1971) 17 Cal.App.3d 1122, 1127.) The use of the word "accident" in the statute refers to an unexpected happening, mishap, or unfortunate occurrence. It is well settled that an accident involving a single vehicle satisfies the requirement of Vehicle Code section 40300.5. (*Cowman v. Department of Motor Vehicles* (1978) 86 Cal.App.3d 851; *People v. Jordan* (1977) 75 Cal.App.3d Supp. 1, 14.) And, "accident" must be interpreted in the broadest sense to include both unintentional and intentional conduct. (*McNabb v. Department of Motor Vehicles*, *supra*, 20 Cal.App.4th at pp. 838-839.) The arrest may be made within a reasonable time and distance away from the accident scene. (*Corrigan* v. *Zolin* (1996) 47 Cal.App.4th 230, 235.)

The destruction-of-evidence exception is interpreted to include "burn off"—the metabolic destruction of alcohol or drugs by the mere passage of time. The exception does not require that the officer believe a drinking driver may intentionally or willfully conceal or destroy evidence unless immediately arrested. (*People v. Schofield* (2001) 90 Cal.App.4th 968, 974-975, disapproved on other grounds by *People v. Thompson* (2006) 38 Cal.4th 811, 828, fn. 3.)

650.1-No suppression for arrest for misd. offense not in officer's presence 11/13

A peace officer may arrest a person without a warrant for a misdemeanor whenever "[t]he officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence." (Pen. Code, § 836(a)(1).) Violation of this state statutory provision alone does not implicate the exclusionary rule of the Fourth Amendment.

The requirement that the offense be committed in the officer's presence is merely statutory—it is not grounded in the Fourth Amendment. The Fourth Amendment requires only that an arrest be supported by probable cause. Since the adoption of Proposition 8, suppression of evidence is not proper when a misdemeanor arrest is supported by probable cause regardless of whether the crime occurred in the officer's presence. (*People v. Donaldson* (1995) 36 Cal.App.4th 532, 535-539; *People v. Burton* (2013) 219 Cal.App.4th Supp. 9, 13-15; *People v. Trapane* (1991) 1 Cal.App.4th Supp. 10, 13-14; see also *People v. McKay* (2002) 27 Cal.4th 601; see generally, *In re Lance W.* (1985) 37 Cal.3d 873, 896)

The United States Supreme Court in *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, held that the Fourth Amendment permits a warrantless custodial arrest for a very minor, fine-only criminal offense based on probable cause. (*Id*. at pp. 323, 340, 353.) The offense for which Ms. Atwater was arrested was committed in the officer's presence. Thus, the Court did not decide whether it was necessary for the offense to have been committed in the officer's presence for a misdemeanor arrest to be reasonable under the Fourth Amendment. (*Id.* at p. 341, fn. 11.)

> It will come as no surprise, then, that the United States Supreme Court has never ordered a state court to suppress evidence that has been gathered in a manner consistent with the federal Constitution but in violation of some state law or local ordinance. To the contrary, the high court has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law.

(*People v. McKay*, *supra*, 27 Cal.4th at p. 610.)

Pre-Proposition 8 cases liberally construed the term "in [the officer's] presence." (*People v. Welsch* (1984) 151 Cal.App.3d 1038, 1042.) Neither physical proximity nor sight is essential. (See *People v. Burgess* (1959) 170 Cal.App.2d 36.) "The test is whether the misdemeanor 'is apparent to the officer's senses.' [Citation.] Any and all of the senses are included." (*In re Alonzo* (1978) 87 Cal.App.3d 707, 712.)

650.2-Under PC647(f) public place is area of common use 6/07

Penal Code section 647, subdivision (f) prohibits being found in a public place under the influence of intoxicating liquor, drugs, or controlled substances and being unable to exercise care for one's safety or the safety of others. In this context, California courts have defined "public place" variously as a place, " ' "Common to all or many; general; open to common use," ' and ' "Open to common, or general use, participation, enjoyment, etc. …" ' " (*In re Zorn* (1959) 59 Cal.2d 650, 652.) It is " 'a place where the public has a right to go and to be, … [o]pen to the free and unrestricted use of the public …' " (*People v. Perez* (1976) 64 Cal.App.3d 297, 300; *People v. Belanger* (1966) 243 Cal.App.2d 654, 652.)

Applying these definitions, the courts have found "public place" may include private property, such as businesses open to the public. (*In re Zorn*, *supra*, 59 Cal.2d at p. 652.) The interior of a privately owned automobile parked on a public street is a "public place." (*People v. Belanger*, *supra*, 243 Cal.App.2d at p. 662.) It includes hallways outside an apartment. (*People v. Perez*, *supra*, 64 Cal.App.3d at p. 301.) And, it may include the front yard, driveway and porch of a private dwelling if the area is unfenced and open to the public. (*People v. Olsen* (1971) 18 Cal.App.3d 592, 598; distinguish *People v. Krohn* (2007) 149 Cal.App.4th 1294 [electric gates surrounded apartment complex's courtyard] and *People v. White* (1991) 227 Cal.App.3d 886 [fenced and gated front yard].)

650.3-No suppression for PC arrest in violation of statutory arrest procedures 7/09

Various provisions of the Penal and Vehicle Codes limit the circumstances under which an officer may make a custodial arrest (rather than issue a citation) for a minor offense. Violation of any such state statutory provision alone does not implicate the exclusionary rule of the Fourth Amendment.

The Fourth Amendment permits a warrantless custodial arrest for a misdemeanor, or lesser criminal offense punishable only by a fine, based on probable cause. In *Atwater v. City of Lago*

Vista (2001) 532 U.S. 318 (*Atwater*), the United States Supreme Court held: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." (*Id.* at p. 354.) The High Court did not decide whether it was necessary for the offense to have been committed in the officer's presence for a misdemeanor arrest to be reasonable under the Fourth Amendment. (*Id.* at p. 341, fn. 11.)

The California Supreme Court embraced *Atwater* in *People v. McKay* (2002) 27 Cal.4th 601. An officer took McKay into custody for a traffic infraction—riding a bicycle the wrong way down a street. Search incident to arrest revealed drugs. The court held the drugs were lawfully seized even though the arrest allegedly was not authorized by Vehicle Code section 40302(a). (*Id*. at p. 618.) The court agreed with *Atwater* that a custodial arrest for a fine-only offense does not violate the Fourth Amendment. (*Ibid*.) Further, California statutory arrest procedures are not a component of the Fourth Amendment. (*Id.* at p. 605.) Thus, "so long as an officer has probable cause to believe that an individual has committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment." (*Id.* at p. 618.)

> It will come as no surprise, then, that the United States Supreme Court has never ordered a state court to suppress evidence that has been gathered in a manner consistent with the federal Constitution but in violation of some state law or local ordinance. To the contrary, the high court has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law.

(*Id*. at p. 610; see also *People v. Gomez* (2004) 117 Cal.App.4th 531, 539 ["Thus, it is irrelevant that a seatbelt violation typically would result in a brief detention for purposes of issuing a citation."].)

670.1-General standard for arrest 6/20

A warrantless custodial arrest is reasonable under the Fourth Amendment whenever a police officer has probable cause to believe the person arrested has committed a criminal offense. (*People v. Kraft* (2000) 23 Cal.4th 978, 1037; *People v. Moore* (1975) 51 Cal.App.3d 610, 616; *People v. Braun* (1973) 29 Cal.App.3d 949, 966-967.) The probable cause standard applies to all offenses, from felonies to very minor criminal offenses punishable only by a fine. (*Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323, 340, 353; *People v. McKay* (2002) 27 Cal.4th 601, 605, 618.)

Probable cause to arrest exists when the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information would lead an officer of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested has committed a crime. (*Beck v. Ohio* (1964) 379 U.S. 89, 91; *People v. Kraft*, *supra*, 23 Cal.4th at p. 1037; *People v. Price* (1991) 1 Cal.4th 324, 410; see also *Safford Unified School Dist. #1 v. Redding* (2009) 557 U.S. 364, 370; *People v. Scott* (2011) 52 Cal.4th 452, 474.) Stated simply: "Probable cause to arrest exists where facts known to the arresting officer would be sufficient to persuade a person of 'reasonable caution' that the individual arrested committed a crime." (*People v.* Spencer (2018) 5 Cal.5th 642, 664.) Probable cause to arrest requires only a fair probability of criminal activity, not a prima facie showing. (*Illinois v. Gates* (1983) 462 U.S. 213, 235; *People v. Lewis* (1980) 109 Cal.App.3d 599, 608; *People v. Moore* (1970) 13 Cal.App.3d 424, 436.) Nor does probable cause require that the officer's belief "be correct or more likely true than false." (*Texas v. Brown* (1983) 460 U.S. 730, 742.)

> [P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to sub silentio impose a drastically more rigorous definition of probable cause than the security of our citizens' demands. … In making a determination of probable cause the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of noncriminal conduct.

(*Illinois v. Gates*, *supra*, 462 U.S. at p. 243, fn. 13; see also *Dist. of Columbia v. Wesby* (2018) 583 U.S. ___, ___ [138 S.Ct. 577, 588, 199 L.Ed.2d 453, 466].)

Probable cause must be viewed in the totality of the circumstances, not based on any isolated event." (*In re J.G.* (2010) 188 Cal.App.4th 1501, 1506.) "The 'totality of the circumstances' requires courts to consider 'the whole picture.' [Citation.]" (*Dist. of Columbia v. Wesby*, *supra*, 583 U.S. at p. ___ [138 S.Ct. at p. 588, 199 L.Ed.2d at p. 466].) Probable cause is a practical, nontechnical concept to be determined upon the facts and circumstances of each case. (*Maryland v. Pringle* (2003) 540 U.S. 366, 370-371.) "To determine whether an officer had probable cause for an arrest, 'we examine the events leading up to the arrest, and then decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." ' [Citations.]" (*Dist. of Columbia v. Wesby*, *supra*, 583 U.S. at p. ___ [138 S.Ct. at p. 586, 199 L.Ed.2d at p. 463].) There is no exact formula for determining whether probable cause to arrest exists. (*People v. Guajardo* (1994) 23 Cal.App.4th 1738, 1742 [experienced officer saw known drug dealer engaged in hand-to-hand transaction of small object in area of high street narcotics activity].)

The evidence supporting probable cause need not be admissible at trial on the issue of guilt. (*People v. Ingle* (1960) 53 Cal.2d 407, 412-413.)

670.2-Probable cause is objective rather than subjective standard 8/19

Probable cause, whether to arrest or search, is measured by an objective standard—the officer's subjective belief is immaterial. (*Scott v. United States* (1978) 436 U.S. 128, 138; *People v. Uribe* (1993) 12 Cal.App.4th 1432, 1436.) Thus, whether an officer actually entertains a belief that probable cause exists is inconsequential if, viewed objectively, the officer's actions are reasonable under the Fourth Amendment. (*People v. Gonzales* (1989) 216 Cal.App.3d 1185, 1190.) "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." (*Scott v. United States*, *supra*, 436 U.S. at p. 128.) The validity of an arrest or search is to be measured "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." (*Ibid.*; see also *Arkansas v. Sullivan* (2001) 532 U.S. 769; *People v. Gonzales*, *supra,* 216 Cal.App.3d at p. 1190.) In other words, "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. [Citations.] That is to say, the officer's subjective reasons for making the arrest need not be the criminal offense as to which the known facts provide probable cause." (*Devenpeck v. Alford* (2004) 543 U.S. 146, 153; see also *Nieves v. Bartlett* (2019) 587 U.S. ___, ___ [139 S.Ct. 1715, 1725, 204 L.Ed.2d 1, 13].)

California case authorities applying a subjective standard are no longer controlling after the adoption of Article I, section 28, subdivision (f)(2) [formerly subd. (d)] of the California

Constitution. (*People v. Gonzales*, *supra*, 216 Cal.App.3d at p. 1190, fn. 2; see generally, *In re Lance W.* (1985) 37 Cal.3d 873, 890.)

670.3-Officer's experience considered for probable cause 6/07

An officer's experience is also an important factor to be considered in determining the existence of probable cause. Observations by a trained and experienced police officer are to be distinguished from those of a person of ordinary care and prudence. Circumstances and conduct that may not excite the suspicion of the citizen on the street might be highly significant to an officer with extensive training and experience. (*Ornelas v. United States* (1996) 517 U.S. 690, 700; *People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 827; *People v. Mims* (1992) 9 Cal.App.4th 1244, 1247.)

> "[E]xperienced police officers naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult tasks of protecting the security and safety of law-abiding citizens. The benefit thereof should not be lost because the cold record before a reviewing court does not contain all the particularized perceptions which may have been so meaningful at the scene." [Citation.]

(*People v. Gale* (1973) 9 Cal.3d 788, 795-796; see also, *People v. Rich* (1977) 72 Cal.App.3d 115, 121.)

670.4-Use of official channels does not hurt probable cause 6/07

"It is well settled in California officers can make arrests based on information and probable cause furnished by other officers. [Citations.]" (*People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1553.) "Reliable information furnishing probable cause for an arrest does not lose its reliability when it is transmitted through official channels to arresting officers, and the latter may rely upon it when making an arrest." (*People v. Hogan* (1969) 71 Cal.2d 888, 891; see also *People v. Alcorn* (1993) 15 Cal.App.4th 652, 655; *People v. Conway* (1990) 222 Cal.App.3d 806, 810.)

Indeed, an officer making an arrest at the direction of another officer need not be informed of the precise nature of the probable cause. "[W]hen police officers work together to build 'collective knowledge' of probable cause, the important question is not what each officer knew about probable cause, but how valid and reasonable the probable cause was that developed in the officers' collective knowledge." (*People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1555; accord, *People v. Gomez* (2004) 117 Cal.App.4th 531, 538-541.)

670.5-High area crime rate will support detention or arrest 6/07

A detention or arrest cannot be justified simply because it occurred in an area known for its high crime rate. But the reputation of the area is an appropriate objective factor to consider in judging the reasonableness of police action. (*People v. Souza* (1994) 9 Cal.4th 224, 240.)

> "[I]t would be the height of naiveté not to recognize that the frequency and intensity of these sorry conditions are greater in certain quarters than in others. Consequently, we must allow those we hire to maintain our peace as well as to apprehend criminals after the fact, to give appropriate consideration to their surroundings and to draw rational inferences therefrom, unless we are prepared to insist that they cease to exercise their senses and their reasoning abilities the moment they venture forth on patrol."

(*Id*. at p. 241, quoting with approval from *People v. Holloway* (1985) 176 Cal.App.3d 150, 155; similarly, see *People v. Mims* (1992) 9 Cal.App.4th 1244, 1248.)

670.6-Flight can support probable cause 3/18

" '[U]nprovoked flight upon noticing the police,' we have explained, 'is certainly suggestive' of wrongdoing and can be treated as 'suspicious behavior' that factors into the totality of the circumstances" supporting probable cause to arrest. (*Dist. of Columbia v. Wesby* (2018) 583 U.S. ___, ___ [138 S.Ct. 577, 587, 199 L.Ed.2d 453, 464-465, citing *Illinois v. Wardlow* (2000)528 U.S. 119, 124-125.) "In fact, 'deliberately furtive actions and flight at the approach of … law officers are *strong* indicia of *mens rea*.' " (*Dist. of Columbia v. Wesby*, *supra*, 583 U.S. at p. ___ [138 S.Ct. at p. 587, 199 L.Ed.2d at p. 465] citing *Sibron v. New York* (1968) 392 U.S. 40, 66, emphasis in original.)

670.7-False statements support probable cause 6/07

A patently false denial of guilt or a false exculpatory statement is an objective factor weighing on probable cause to arrest or search. (*People v. Carrillo* (1995) 37 Cal.App.4th 1662, 1669-1671.) In *Carrillo*, officers suspected the defendant had drugs in his car. While defendant had a car key in his pocket, he denied owning a car and claimed someone gave him a ride into the area. Officers found a car registered to the defendant parked nearby, searched it, and found cocaine. The appellate court held the officer's suspicion was elevated to probable cause when defendant falsely denied owning a car. (*Id*. at p. 1669.) After reviewing authorities in which false exculpatory statements were held to show consciousness of guilt or to provide probable cause to arrest, the court wrote: "We conclude false statements designed to mislead or ward off suspicion a particular vehicle may contain contraband can similarly be one of the circumstances providing probable cause to search a vehicle." (*Id.* at p. 1671; see also, *In re Lennies H.* (2005) 126 Cal.App.4th 1232, 1238-1239 [minor falsely denied having key to stolen vehicle].)

670.8-Sense of touch may supply probable cause 6/07

It is well established that an officer's observation of contraband in plain view provides probable cause to arrest. But contraband can also be identified by senses other than sight, including smell and even touch. Equating seizures based upon an officer's sense of touch to plain-view seizures, the United States Supreme Court in *Minnesota v. Dickerson* (1993) 508 U.S. 366 said:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context. [Fn. omitted.] [¶] … Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband. Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.

(*Id*. at pp. 375-376.)

In *People v. Lee* (1987) 194 Cal.App.3d 975, an officer conducting a pat-down search for weapons felt what he recognized from experience to be rolled balloons in defendant's pocket. The

officer reasonably believed the rolled balloons were containers of narcotics. The appellate court held these facts provided the officer probable cause for further search and arrest of defendant:

> Knowledge gained by a police officer through the sense of touch is as meaningful as knowledge gained through other senses. [Citation.] " 'Reasonable grounds for believing a package contains contraband may be adequately afforded by its shape, its design, and the manner in which it is carried.' " [Citations.] The present situation presents the tactile equivalent of cases where an officer permissibly and reliably detects contraband through sight or smell and thereupon arrests the defendant.

(*Id.* at p. 984; similarly, see *People v. Thurman* (1989) 209 Cal.App.3d 817, 826.)

Probable cause may also be provided by touch coupled with other circumstances creating a reasonable inference the item touched is contraband or other evidence of a crime. In *People v. Dibb* (1995) 37 Cal.App.4th 832, for example, the appellate court held an officer could conclude a lump in an unusual place in a suspect's clothing was contraband because the suspect also possessed a gram scale smelling of methamphetamine, two beepers, a small plastic bag, and a magazine for a pistol. (*Id*. at p. 837.) In *In re Lennies H.* (2005) 126 Cal.App.4th 1232, the appellate court found that the plain feel of a key in the minor's pocket, combined with the other facts known to the officer, provided probable cause to believe the key was evidence linking the minor to a reported carjacking. (*Id*. at pp. 1237-1239.)

670.9-Under the influence arrest based on experienced officer's observations 6/07

Arrests for controlled substance abuse have often been upheld when the arresting officer has relied on training and experience in interpreting the suspect's physical manifestations to provide probable cause for arrest. For example, the appellate court in *People v. Herrera* (1963) 221 Cal.App.2d 8 upheld an arrest for substance abuse based on a trained narcotics officer's observations of needle marks, constricted pupils, a general somnolent condition and slurred speech. (*Id*. at pp. 10-12.) Similarly, the appellate court in *People v. Garcia* (1970) 7 Cal.App.3d 314 upheld an arrest by an experienced officer for controlled substance abuse based on the defendant's lethargic condition, slow reaction, constricted pupils and needle marks. (*Id*. at pp. 320-321; see also *People v. Sanchez* (1987) 195 Cal.App.3d 42, 45-46.)

> The crucial test for probable cause to arrest for drug use depends upon the manifestations of drug use identified by an *experienced* police officer. It was observed in *People v. Goldberg* (1969) 2 Cal.App.3d 30, 34, … that "manifestations of drug use such as dilated pupils, slurred speech and difficulty in balancing, when observed by an *experienced* officer, present grounds for a valid arrest."

(*People v. Dunkel* (1977) 71 Cal.App.3d 928, 932, italics added.)

670.10-Hand-rolled cigarettes may be probable cause 3/19

The appellate courts have found probable cause to believe that hand-rolled cigarettes contained marijuana under certain suspicious circumstances by officers with appropriate training and expertise. (See, e.g., *People v. Stanfill* (1985) 170 Cal.App.3d 420; *People v. Poole* (1975) 48 Cal.App.3d 881; see also *People v. Walls* (1973) 34 Cal.App.3d 94.) The officer's training and experience to reach such a conclusion need not be such as to qualify him as an expert. (*Wimberly v. Superior Court* (1976) 16 Cal.3d 557, 565.)

670.11-All occupants of drug carrying car subject to arrest 6/07

Officers who find a commercial quantity of drugs in a car have probable cause to arrest all the occupants of the car. In *Maryland v. Pringle* (2003) 540 U.S. 366 officers found five packages of cocaine concealed between the rear seat armrest and the rear seat and $763 in the glove box during a consensual search of a car stopped for speeding. All three occupants of the car denied knowing anything about the drugs or money. The United States Supreme Court held that all three—the driver, front seat passenger, and rear seat passenger—were lawfully arrested for drug possession. (*Id*. at pp. 372-373.) "Here we think it was reasonable for the officer to infer a common enterprise among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." (*Id.* at p. 373.)

680.1-Search incident to arrest lawful for any custodial arrest 3/17

"One of the specifically established exceptions to the Fourth Amendment's warrant requirement is 'a search incident to a lawful arrest.' [Citation.]" (*People v. Diaz* (2011) 51 Cal.4th 84, 90 (*Diaz*); see also *People v. Macabeo* (2016) 1 Cal.5th 1206, 1213.) An officer may always thoroughly search a person incident to arrest when the person is taken into lawful custody, regardless of the offense for which the arrest is made. (*United States v. Robinson* (1973) 414 U.S. 218; *Gustafson v. Florida* (1973) 414 U.S. 260; *People v. Monroe* (1993) 12 Cal.App.4th 1174, 1195; *People v. Boren* (1987) 188 Cal.App.3d 1171, 1175-1176.) Even a minor criminal offense punishable only by a fine can support a custodial arrest and, thus, a search incident to arrest. (*Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323, 340, 353; *People v. McKay* (2002) 27 Cal.4th 601, 605, 618; distinguish *People v. Macabeo*, *supra*, 1 Cal.5th at p. 1218 ["There is no exception for search incident to citation."].) The right to search attaches once the person is taken into custody—it does not matter that he or she will be released without booking. (*People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1228; see also *People v. Humberto O*. (2000) 80 Cal.App.4th 237, 242-243 [juvenile transported to school after truancy arrest]; *In re Charles C.* (1999) 76 Cal.App.4th 420, 424-425 [juvenile taken to station after curfew arrest]; *In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1247-1248 [minor in custody for transportation home]; accord, *In re Ian C.* (2001) 87 Cal.App.4th 856, 860.)

Incident to the arrest officers may conduct a limited search "(1) for instrumentalities used to commit the crime, the fruits of that crime, and other evidence thereof which will aid in the apprehension or conviction of the criminal; (2) for articles the possession of which is itself unlawful, such as contraband or goods known to be stolen; and (3) for weapons which can be used to assault the arresting officer or to effect an escape." (*People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 312-313.) But the right to search does not depend on the probability that any of these items will be found. (*Diaz*, *supra*, 51 Cal.4th at pp. 90-91.) The fact of a lawful custodial arrest alone establishes the authority to search—no additional justification or suspicion is required. (*United States v. Robinson*, *supra*, 414 U.S. at pp. 234-235; *Gustafson v. Florida*, *supra*; *People v. Superior Court (Kiefer)*, *supra*, 3 Cal.3d at p. 813.)

The right to search extends to the area within the immediate control of the person arrested "from within which he might gain possession of a weapon or destructible evidence." (*Chimel v. California* (1969) 395 U.S. 752, 763 [sometimes referred to as the "grabbing area" or "reaching distance]

680.2-Search may precede or follow custodial arrest 3/17

A search incident to arrest can lawfully precede a custodial arrest. "[I]f before making a search and seizure officers are justified in making an arrest it is immaterial that the search and seizure preceded rather than followed the arrest." (*People v. Cockrell* (1965) 63 Cal.2d 659, 666; *People v. Gonzales* (1989) 216 Cal.App.3d 1185, 1189; *In re Jonathan M.* (1981) 117 Cal.App.3d 530, 536.) But a custodial arrest must be both legally permissible and contemplated for this principle to apply.

> When a custodial arrest is made, and that arrest is supported by independent probable cause, a search incident to that custodial arrest may be permitted, even though the formalities of the arrest follow the search. [*Rawlings v. Kentucky* (1980) 448 U.S. 98] There is no exception for a search incident to citation. [*Knowles v. Iowa* (1998) 525 U.S. 113.] If an actual arrest takes place, a search incident to that arrest is allowed if it is supported by federal Fourth Amendment jurisprudence, more restrictive state law notwithstanding. [*Virginia v. Moore* (2008) 553 U.S. 164.] Even the search-incident exception may be limited when attendant circumstances show the arrestee had no potential to put an officer in jeopardy, to escape, or to destroy evidence. [Citations.] [¶] These authorities make clear that *Rawlings* does *no*t stand for the broad proposition that probable cause to arrest will always justify a search incident as long as an arrest follows. Otherwise, *Knowles* would have been decided differently. The officer in *Knowles* had probable cause to arrest for a traffic infraction, but elected not to do so. (*Knowles*, *supra*, 525 U.S. at p. 114.) Once it was clear that an arrest was *not* going to take place, the justification for a search incident to arrest was no longer operative.

(*People v. Macabeo* (2016) 1 Cal.5th 1206, 1218-1219, italics in original [officers unlawfully searched cell phone of defendant when probable cause for arrest was based only on the citeable offense of running a stop sign on a bicycle].)

The opposite is equally true—search incident to arrest need not immediately follow the custodial arrest. "[S]earches and seizures that could have been made on the spot at the time of the arrest may legally be conducted later when the accused arrives at the place of detention." (*United States v. Edwards* (1974) 415 U.S. 800, 803; *In re Charles C.* (1999) 76 Cal.App.4th 420, 425.)

680.3-Search incident to arrest extends to purses, etc., but not cell phones 8/21

Search incident to a lawful arrest extends to any item immediately associated with the person of the arrestee or otherwise within the immediate control of the person at the time of arrest. (*United States v. Chadwick* (1977) 433 U.S. 1, 14; *Chimel v. California* (1969) 395 U.S. 752, 763.)

In *People v. Brocks* (1981) 124 Cal.App.3d 959, the appellate court upheld the search of a gentleman's coin purse incident to arrest, adopting the following passage from *People v. Flores* (1979) 100 Cal.App.3d 221, 230:

> The generally accepted "search incident to arrest" rule has been interpreted to include a … purse as a normal extension of the person subject to search as an item "customarily carried by an arrested person … [and] within the area of her immediate control." [Citations.] The *Belvin* [*People v. Belvin* (1969) 275 Cal.App.2d 955, 958] court reasoned that an arrestee's personal articles such as a purse, wallet or coat actually in use—though not necessarily on his person—at the moment of arrest "… serve as possible sources of concealed weapons and of evidentiary items … [and] normally accompany the arrested

person on his removal to some other place. Their search thus serves the dual function of security and of legitimate investigation. We conclude that defendant's purse, apparently in use by her at the time of her arrest, legally amounted to an extension of her person and could be searched on her arrest. …"

(*People v. Brocks*, *supra*, 124 Cal.App.3d at pp. 963-964.)

In contrast, in *People v. Mendoza* (1986) 176 Cal.App.3d 1127 the police arrested three men in the bathroom of a house on suspicion of possessing cocaine. The police then brought one of the men, the defendant, into the presence of a shoulder bag that he had carried into the house and searched the bag. The appellate court concluded: "Returning to the original rationale of *Chimel* [*v. California* (1969) 395 U.S. 752], we cannot condone the search of the bag under its holding. The arrestees could not have obtained a weapon or destroyed contraband in the shoulder bag from the place they were brought under police control, the bathroom." (*Id*. at p. 1132.)

Finally, although devices providing access to large amounts of often personal data, such as cell phones and computers, may be seized incident to arrest, the contents of such devices may not be searched absent a search warrant, consent, exigent circumstances, or some other exception to the Fourth Amendment warrant requirement. (*Riley v. California* (2014) 573 U.S. 373; see also *People v. Tousant* (2021) 64 Cal.App.5th 804, 817-818 [same principles apply to cell phone seized without warrant under automobile exception].)

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when ' "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.' " [Citations.] Such exigencies could include the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury.

(*Riley v. California*, *supra*, 573 U.S. at pp. 401-402; but see California Electronic Communications Privacy Act, Pen. Code, §§ 1546-1546.4.)

680.4-Search of items immediately associated with arrestee is broad 8/14

The California Supreme Court in *People v. Diaz* (2011) 51 Cal.4th 84 (*Diaz*) held that the authority to search items "immediately associated with the person of the arrestee" is broader than the right to search other items merely under the "immediate control" of the arrestee under the search incident arrest exception to the Fourth Amendment. (*Id*. at p. 93.)

If the item searched is merely "within the immediate control" or "reaching distance" of the arrestee, then the search incident to arrest generally must occur contemporaneously with the arrest. (*Diaz*, *supra*, 51 Cal.4th at p. 93.)

[W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the "search is remote in time or place from the arrest," [citation], or no exigency exists. Once law enforcement officers have reduced luggage or other personal property *not immediately associated with the person of the arrestee* to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

(*United States v. Chadwick* (1977) 433 U.S. 1, 15, italics added.)

In contrast, if the item is "immediately associated with the person of the arrestee" then the search incident to arrest need only take place within a "substantial period of time" after the arrest. (*Diaz*, *supra*, 51 Cal.4th at pp. 93-95.)

> [O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant *even though a substantial period of time has elapsed* between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the "property room" of the jail, and at a later time searched and taken for use at the subsequent criminal trial. The result is the same where the property is not physically taken from the defendant until sometime after his incarceration.

(*United States v. Edwards* (1974) 415 U.S. 800, 807-808, fns. omitted, italics added.)

680.5-Search of area after arrestee removed must be justified 4/11

The question remains, particularly in light of the United States Supreme Court decision regarding the scope of vehicle searches incident to arrest (*Arizona v. Gant* (2009) 556 U.S. 332 (*Gant*)), whether the right to search incident to arrest includes areas from which the arrestee has been removed. "[W]here there is no threat to the officers because the suspect has been immobilized, removed, and no one else is present, it makes no sense that the place he was removed from remains subject to search merely because he was previously there." (*People v. Summers* (1999) 73 Cal.App.4th 288, 290-291 (*Summers*).)

In *Summers* the officers searched a bed in a small trailer. The suspect had been sleeping on the bed when arrested. But when the bed was searched, the suspect was in handcuffs, about 10 feet away from the bed, being escorted out of the room. Indeed, the suspect may have already been just outside the trailer door. The appellate court upheld the search under the officers' safety rationale of *Chimel*. (*Summers*, *supra*, 73 Cal.App.4th at p. 290.) This was because one of the arrestee's roommates was present and free of police control and another roommate was unaccounted for. (*Id*. at p. 291.)

The appellate court in *People v. Rege* (2005) 130 Cal.App.4th 1584 went further, holding the scope of the search incident to arrest extends to areas the person could have reached or grabbed at the time of arrest. (*Id*. at p. 1590.) The defendant was arrested, handcuffed and placed on the floor near a bed in her motel room. An officer lifted the mattress at a point about three feet away from her and found narcotics and narcotics related paraphernalia. "[I] is clear that a valid search incident to arrest may take place even after the suspect has been arrested or immobilized." (*Id*. at p. 1589.) It is only necessary that "[t]he search [be] reasonably contemporaneous with the arrest, and no subsequent events … rendered such a search unreasonable." (*Id*. at p. 1590.) The appellate court upheld the search. "Here, the search was conducted within the area into which defendant could have reached at the time of her arrest. The search was reasonably contemporaneous with the arrest, and no subsequent events had rendered such a search unreasonable." (*Ibid*.)

The appellate court in *People v. Leal* (2009) 178 Cal.App.4th 1051 examined a situation where the defendant had been arrested on a misdemeanor warrant at his front door. He was removed from the home in handcuffs and placed in a patrol car. The house had been secured to make sure no

one else was present, when the arresting officer searched the area around the front door. An illegal firearm was found under a piece of clothing in a recliner. Applying the *Summers* test in light of *Gant*, the appellate court found the search was not properly justified as being incident to arrest.

> In contrast to *Summers*, in which the suspect "was still being removed" (*People v. Summers*, supra, 73 Cal.App.4th at p. 291), "one roommate was present and free of police control" (*ibid*.), and "another was unaccounted for" (*ibid*.), the police here had determined that defendant was the only one on the premises during his arrest and they had safely confined him outside his house and fully secured the scene. Neither he nor anyone else was in a position to jeopardize the officers' safety or destroy evidence.

(*Id*. 178 Cal.App.4th at pp. 1060-1061.)

680.6-Small quantity of cannabis may permit search of person 3/19

Proposition 64, effective November 9, 2016, legalized the of possession of small quantities of cannabis under some circumstances, but not all. In the latter situation, a person can still be detained and arrested for illegal possession of less than an ounce of cannabis. Although such persons are ordinarily are given only a citation and released, the appellate court in *People v. Brocks* (1981) 124 Cal.App.3d 959 distinguished such arrests from ordinary traffic infraction arrests. Traffic offenses generally do not justify a search for "fruits" of the offense. But it is clearly reasonable to believe a person illegally possessing a small amount of cannabis could also have a larger quantity. Thus a search incident to arrest for illegal possession of cannabis for the instrumentalities of the crime and for other contraband is reasonable. (*Id*. at p. 963.) No further justification for the search is required. (*Ibid*.) The right to search under these circumstances extends to items within the arrestee's possession, including purses and other closed containers. (*Ibid*.; similarly, see *People v. Coleman* (1991) 229 Cal.App.3d 321, 325-328; *People v. Knutson* (1976) 60 Cal.App.3d 856.) Of course, if the suspect is taken into custody rather than cited and released, traditional search incident to arrest rules apply. (See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323, 340, 353; *People v. McKay* (2002) 27 Cal.4th 601, 605, 618.)

690.1-Search even after traffic arrest permitted by Prop. 8 6/20

A person taken into custody for a traffic offense may be thoroughly searched incident to arrest. (*United States v. Robinson* (1973) 414 U.S. 218 (*Robinson*); *Gustafson v. Florida* (1973) 414 U.S. 260 (*Gustafson*).) Under federal law an officer may always thoroughly search a person incident to a lawful custodial arrest regardless of the offense for which the arrest was made. In *Robinson,* for example, the court upheld the full search of a motorist lawfully taken into custody for driving on a revoked license. The United States Supreme Court's "bright-line rule" authorizing search incident to custodial arrest is based on concern for officer safety and the possible destruction or loss of evidence. But the right to search does not depend either on the probability that any evidence exists, on the officer's subjective fear of the defendant, or on any suspicion that the defendant is armed. The fact of a lawful custodial arrest alone establishes the authority to search—no additional justification or suspicion is required. (*Robinson, supra*, 414 U.S. at pp. 234-235.) The arresting officer is not limited by standards governing the cursory search for weapons as part of an investigative detention. (*Ibid.*) In the companion case, the United States Supreme Court likewise upheld the validity of a full search incident to the custodial arrest of a motorist for driving without a driver's license in his possession. (*Gustafson*, *supra,* 414 U.S. at p. 266.) The search was held

reasonable even though the officer neither indicated any subjective fear of defendant nor believed defendant was armed. (*Ibid*.) This "bright-line rule" requires a custodial arrest and, thus, does not permit a search incident to arrest when a motorist is simply issued a traffic citation in lieu of being taken into custody. (*Knowles v. Iowa* (1998) 525 U.S. 113.)

Prior California law rejecting the "bright-line rule" of *Robinson-Gustafson* was abrogated when article I, section 28, subdivision (d) [now subd. (f)(2)] of the California Constitution was adopted as part of Proposition 8, abolishing the use of independent state grounds to exclude relevant evidence from criminal proceedings. (*In re Lance W.* (1985) 37 Cal.3d 873, 887-888.) As a result, court must "look to the once rejected *Robinson-Gustafson* rule to determine if the evidence at issue should have been suppressed." (*In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1247.)

In *People v. Gutierrez* (1984) 163 Cal.App.3d 332, the defendant was stopped for mechanical violations and for weaving, and was placed under arrest for driving under the influence. The appellate court upheld a search of the defendant and the resulting seizure of a baggie of marijuana and a cardboard pillbox containing stolen jewelry. "Under applicable federal law, a lawful custodial arrest creates a situation which justifies the full contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches are considered valid because of the need to remove weapons and to prevent the concealment or destruction of evidence." (*Id.* at pp. 334-335.)

The right to search attaches once the person is lawfully taken into physical custody—it does not matter that he or she will be released without booking. (*In re Demetrius A.*, *supra*, 208 Cal.App.3d at pp. 1247-1248; see also *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1228.) Often the only issue is whether the officer had the authority to make a custodial arrest instead of issuing a citation. (See, e.g., *People v. Monroe* (1993) 12 Cal.App.4th 1174, 1190, 1195.)

700.1-Arrest for wrong offense requires no suppression 3/18

Evidence seized incident to arrest should not be suppressed merely because the officer arrested the suspect for the wrong offense. Probable cause to arrest is measured by an objective standard rendering the officer's subjective belief is immaterial. (*Scott v. United States* (1978) 436 U.S. 128, 138; *People v. Uribe* (1993) 12 Cal.App.4th 1432, 1436.) When objective probable cause exists to arrest a suspect for an offense, the arrest is reasonable under the Fourth Amendment even when the officer makes the arrest for a different offense that is unsupported by probable cause. (*Devenpeck v. Alford* (2004) 543 U.S. 146, 153; *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1262-1267; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 179; see also *People v. Lewis* (1980) 109 Cal.App.3d 599, 609; *In re Donald L.* (1978) 81 Cal.App.3d 770, 775.) "[Because probable cause is an objective standard, an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking." (*Dist. of Columbia v. Wesby* (2018) 583 U.S. ___, ___, fn. 2 [138 S.Ct. 577, 584, fn. 2, 199 L.Ed.2d 453, 461, fn. 2].) "The fact an officer may place a person under arrest for the wrong offense does not invalidate the arrest and require exclusion of evidence seized incident to the arrest, if the officer nevertheless had probable cause to arrest the person for another offense." (*In re Donald L.*, *supra*, 161 Cal.App.3d at p. 775.) In other words, "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. [Citations.] That is to say, his subjective reasons for making the arrest need not be the criminal offense as to which the known facts provide probable cause." (*Devenpeck v. Alford*, *supra*, 543 U.S. at p. 153.)

700.2-Arrest of wrong person in good faith requires no suppression 12/09

Long before the United States Supreme Court decided *United States v. Leon* (1984) 468 U.S. 897, the courts recognized that evidence seized by officers acting under a reasonable and good faith mistake of fact will not be suppressed.

In *People v. Hill* (1968) 69 Cal.2d 550, the police had probable cause to arrest Hill. But they mistakenly arrested Miller, honestly and reasonably believing him to be Hill. Miller was found in Hill's apartment when Hill was not at home. Miller also matched Hill's description. Miller denied being Hill and produced identification in his true name. The police were unimpressed and arrested Miller, then searched the apartment incident to arrest. The California Supreme Court upheld the arrest and search, approving cases going back to the mid-1950's. "[W]e hold that the reasonable but mistaken beliefs of the police did not render their conduct unreasonable in a constitutional sense. Mistake of identity does not negate probable cause to arrest, and a search based on a valid but mistaken arrest is not unreasonable as an unwarranted invasion of either the arrestee's or the defendant's privacy." (*Id.* at p. 555.) This holding was affirmed on certiorari in *Hill v. California* (1971) 401 U.S. 797.

The United States Supreme Court in *Hill* looked to *Brinegar v. United States* (1949) 338 U.S. 160 for guidance. *Brinegar* ruled on probable cause to search a bootlegger's vehicles without a warrant, and states: "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." (*Id.* at p. 176.)

Post-*Hill* California cases agree. (*People v. Collins* (1997) 59 Cal.App.4th 988, 995-996; *People v. Washington* (1982) 131 Cal.App.3d 434, 439; *People v. Tellez* (1982) 128 Cal.App.3d 876, 880-881.)

750.1-Elements of arson 7/20

A person is guilty of committing arson as defined in Penal Code section 451 if they "set fire to or burns or causes to be burned … any structure, forest land, or property." "According to a longstanding interpretation of arson, ' " 'the burning of any part, however small, completes the offense.' " [Citation.]" (*People v. Ashbey* (2020) 48 Cal.App.5th 373, 382.) Thus, a new and separate violation of Penal Code section 451 is completed each time a new and separate burning, however slight, occurs. (*Id*. at p. 383 [defendant set several fires on one parcel of forest land at one time].)

A more severe punishment applies if the person "causes an inhabited structure or inhabited property to burn." (Pen. Code, § 451, subd. (b).) Something is burned or " 'consumed' if it is destroyed or devastated in whole or in any part by fire." (*People v. Mentzer* (1985) 163 Cal.App.3d 482, 484-485.) The charring of a wooden cabinet or melting of plastic light fixtures is sufficient to constitute "burning." (*In re Jesse L.* (1990) 221 Cal.App.3d 161, 166-168.) Arson of a structure includes any part or "fixture" or such structure. (*People v. Lee* (1994) 24 Cal.App.4th 1773, 1776-1778 [wall-to-wall carpeting].)

To be guilty of arson the defendant must act "willfully and maliciously." (Pen. Code, § 451.) This makes arson a general intent crime. (*People v. Atkins* (2001) 25 Cal.4th 76, 84; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1010.) "Thus, there must be a general intent to willfully commit the act of setting on fire under such circumstances that the direct, natural, and highly probable

consequences would be the burning of the relevant structure or property." (*People v. Atkins*, *supra*, 25 Cal.4th at p. 89; see also *In re V.V.* (2011) 51 Cal.4th 1020, 1029 [juvenile threw lighted firecracker into dry brush on a hillside]; *Mason v. Superior Court* (2015) 242 Cal.App.4th 773, 784-785, 790-791 [defendant brought illegal fireworks, designed to shoot flares into the air, and exploded one in a swimming hole at the bottom of a narrow dry wooded canyon during extreme fire conditions].)

760.1-Arson is proven by circumstantial evidence 8/11

"[T]he very nature of the crime of arson ordinarily dictates that the evidence will be circumstantial." (*People v. Beagle* (1972) 6 Cal.3d 441, 449.) "Consequently, the lack of an eyewitness placing defendant at the scene or other direct evidence to establish his guilt does not render the jury's verdict of guilty of arson constitutionally deficient. [Citation.]" (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1010.) In *People v. Belton* (1980) 105 Cal.App.3d 376, for example, the appellate court held that circumstantial evidence supported an arson conviction, including the defendant's prior presence in the building, the lack of evidence of any natural or accidental cause, the evidence of an intentional cause, and the existence of more than one fire with temporal or spatial proximity. (*Id*. at p. 380.)

770.1-Elements of assault 7/21

"In order to convict on assault, the jury need only find that the defendant (1) willfully committed an act which by its nature would probably and directly result in the application of physical force against another and (2) was aware of facts that would lead a reasonable person to realize this direct and probable consequence of his or her act. [Citation.] "The imminence of the threat is significant in the law of assault." (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 459.) Thus, the crime does not require any intent to cause an application of physical force, or a substantial certainty that an application of force will result. (*People v. Colantuono* (1994) 7 Cal.4th 206, 214-220.)" (*People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1186-1187; see also *People v. White* (2015) 241 Cal.App.4th 881, 884.) "[A]ssault requires only a general criminal intent and not a specific intent to cause injury. [Citation.]" (*People v. Williams* (2001) 26 Cal.4th 779, 782.) The "test for assault is whether a reasonable person, viewing the facts known to [the defendant], would find that the act in question would directly, naturally, and probably result in physical force being applied to another, i.e., a battery. (*People v. Williams*, *supra*, 26 Cal.4th at pp. 787-788 & fn. 3.)" (*People v. Bipialaka*, *supra*, 34 Cal.App.5th at p. 459.)

"[I]t is a defendant's action enabling him to inflict a present injury that constitutes the actus reus of assault." (*People v. Chance* (2008) 44 Cal.4th 1164, 1172.) "Assault requires an act that is closer to the accomplishment of injury than is required for other attempts. When discussing the intent requirement, we have characterized assault as 'unlawful conduct immediately antecedent to battery.' [Citations.]" (*Id*. at p. 1167.) "Numerous California cases establish that an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term." (*Id*. at p. 1168.) "The present ability element of assault 'is satisfied when "a defendant has attained the means and location to strike immediately." ' [Citation.]" (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1139, citing *People v. Chance*, *supra*, 44 Cal.4th at p. 1168.)

As to the mental element of assault, proof of specific intent is unnecessary to establish the offense. (*People v. Colantuono*, *supra*, 7 Cal.4th at p. 214; *People v. Rocha* (1971) 3 Cal.3d 893, 899, fn. 8.) "[A] defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*People v. Williams*, *supra*, 26 Cal.4th at p. 788, fn. 3; see also *People v. White*, *supra*, 241 Cal.App.4th at p. 885.) "The pivotal question is whether the defendant intended to commit an act likely to result in such physical force, not whether he or she intended a specific harm." (*People v. Colantuono*, *supra*, 7 Cal.4th at p. 218.) Thus, it is immaterial whether a defendant intended any particular injury or even to severely injure another. (*People v. Rocha*, *supra*, 3 Cal.3d at p. 899.) "There is no requirement that the defendant be subjectively aware of the risk that a battery might occur." (*People v. White*, *supra*, 241 Cal.App.4th at p. 885.) " '[R]eckless conduct' is insufficient to establish the mental state for assault *only* when that term is used in its historical sense as a synonym for criminal negligence." (*People v. Brugman* (2021) 62 Cal.App.5th 608, 624, original italics [explaining why in this context "recklessness" excludes modern definition requiring subjective appreciation of risk of harm which can support an assault or battery conviction].)

780.1-ADW is general intent crime 6/20

Like other types of assault, the crimes of assault with a deadly weapon or by means of force likely to produce great bodily injury in violation of Penal Code section 245, subdivisions (a)(1) and (a)(4), respectively, require only "the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury of another." (*People v. Rocha* (1971) 3 Cal.3d 893, 899; similarly, see *People v. Colantuono* (1994) 7 Cal.4th 206, 214.)

> [W]e hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.

(*People v. Williams* (2001) 26 Cal.4th 779, 790; see also *People v. Golde* (2008) 163 Cal.App.4th 101, 108.) "This defines the mental state as a species of negligent conduct, a negligent assault. Where the negligent conduct involves the use of a deadly weapon … the offense is assault with a deadly weapon." (*People v. Wright* (2002) 100 Cal.App.4th 703, 706.)

780.2-"Deadly weapon" defined 6/20

Under the "deadly weapon" theory of aggravated assault pursuant to Penal Code section 245, subdivision (a)(1), some objects, such as dirks and blackjacks, are inherently deadly weapons as a matter of law. (*People v. Aledamat* (2019) 8 Cal.5th 1, 6; *In re D.T.* (2015) 237 Cal.App.4th 693, 698; *People v. Brown* (2012) 210 Cal.App.4th 1, 6.) Other objects which have ordinary uses, such as box cutters and knives, are not classified as inherently deadly weapons as a matter of law. (*People v. Aledamat*, *supra*, 8 Cal.5th at p. 6; *In re Raymundo M.* (2020) 52 Cal.App.5th 78, 86; *People v. Stutelberg* (2018) 29 Cal.App.5th 314, 317.) But any object can be a deadly weapon when used in a manner capable of producing and likely to produce death or great bodily injury. (*In re B.M.* (2018) 6 Cal.5th 528, 533; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) "A mere possibility of serious injury is not enough." (*In re B.M.*, *supra*, 6 Cal.5th at p. 535.) In determining whether an

object not inherently deadly becomes so, the trier of fact may look at the nature of the weapon, the manner of its use, and all other factors that are relevant to the issue. (*People v. Aledamat*, *supra*, 8 Cal.5th at p. 6; *People v. Aguilar*, *supra*, 16 Cal.4th at pp. 1028-1029.) The question is essentially one for the trier of fact. (See, e.g., *People v. Koback* (2019) 36 Cal.App.5th 912, 918-926 [placing sharp key end between fingers and attempting to stab someone sufficient evidence key fob used as deadly weapon]; *People v. Page* (2004) 123 Cal.App.4th 1466, 1473 [sharp pencil held up to neck]; *People v. Henderson* (1999) 76 Cal.App.4th 453, 467-470 [pit bull can be a deadly weapon under Pen. Code, § 417.8]; *People v. Simons* (1996) 42 Cal.App.4th 1100, 1106-1108 [screwdriver can be a deadly weapon under Pen. Code, § 417.8]; but see *In re B.M.*, *supra*, 6 Cal.5th at pp. 536-539 [small serrated butter knife not used in a manner likely to produce great bodily injury]; *In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1496-1498 [small rounded butter knife not deadly weapon].) "Use" of a deadly weapon can include cutting the brake lines on the victim's car (*People v. Marsh* (2019) 37 Cal.App.5th 474, 487-488) or pushing the victim in front of a moving vehicle (*People v. Russell* (2005) 129 Cal.App.4th 776, 778-785).

780.3-ADW does not require actual injury 6/20

As to the "deadly weapon" theory of Penal Code section 245, subdivision (a)(1), "[w]hether or not the victim is injured is immaterial because the statute focuses on use of a deadly weapon or instrument." (*People v. Marsh* (2019) 37 Cal.App.5th 474, 484.) Similarly, under the "force likely" theory of Penal Code section 245, subdivision (a)(4), it is immaterial that the force used actually resulted in less than great bodily harm or no harm whatever. (*People v. Wingo* (1975) 14 Cal.3d 169, 176-177; *People v. White* (2015) 241 Cal.App.4th 881, 884.) "The assault charges did not require a specific intent to injure the victims or a substantial certainty that an application of physical force will result." (*People v. White*, *supra*, 241 Cal.App.4th at p. 884, citing *People v. Williams* (2001) 26 Cal.4th 779, 788.) "[A] mere possibility of injury is not enough. But the evidence may show that serious injury was likely, even if it did not come to pass." (*In re B.M.* (2018) 6 Cal.5th 528,535; see also *People v. Drayton* (2019) 42 Cal.App.5th 612, 618.) Furthermore, it is correct to instruct a jury that " '[a]ctual bodily injury is not a necessary element of the crime, but, if such injury is inflicted, its nature and extent are to be considered in connection with all the evidence in determining whether the means used and the manner in which it was used were such that they were likely to produce great bodily injury.' " (*People v. LaFargue* (1983) 147 Cal.App.3d 878, 887-888.)

780.4-Present ability element of ADW includes pointing deadly weapon 6/20

Assault with a deadly weapon does not require that the defendant actually try to use the weapon on the victim's person. The test is whether the defendant demonstrates the "present ability" to complete the attack. The present ability element is satisfied when a defendant has attained the means and location to strike immediately, which means that the defendant must have the ability to inflict injury on the present occasion although the defendant need not have the ability to inflict injury instantaneously. (*People v. Chance* (2008) 44 Cal.4th 1164.) "Numerous California cases establish that an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term." (*Id*. at p. 1168.)

As this court explained more than a century ago, "Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range,

have been held to constitute an assault. So, any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault." [Citations.]

(*People v. Colantuono* (1994) 7 Cal.4th 206, 219.)

The defendant in *People v. Chance*, *supra*, 44 Cal.4th 1164 was held to have the "present ability" to inflict injury, as required for the crime of assault on police officer, even though there was no round in firing chamber of his gun and he did not point gun at officer. The defendant hid behind a trailer and pointed the loaded gun at a place where he believed Sergeant Murdoch would appear. The officer instead approached defendant from behind thwarting the defendant's plan.

> Here, defendant's loaded weapon and concealment behind the trailer gave him the means and the location to strike "immediately" at Sergeant Murdoch, as that term applies in the context of assault. Murdoch's evasive maneuver, which permitted him to approach defendant from behind, did not deprive defendant of the "present ability" required by section 240. Defendant insists that … he never pointed his weapon in Murdoch's direction. That degree of immediacy is not necessary … .

(*Id*. at pp. 1175-1176.)

Similarly, in *People v. Raviart* (2001) 93 Cal.App.4th 258, two officers went to a motel to arrest the defendant. As they rounded a corner, with Officer Wagstaff nearer to the building than Officer Keller, Officer Keller saw the defendant pointing a gun at him. When the defendant's gun was recovered, it was loaded but unfired. The defendant's conviction for assaulting both officers was upheld. (*Id*. at pp. 263-267.) The appellate court rejected defendant's contention that he could not be convicted of an assault against Officer Wagstaff because pointing the gun at Officer Keller was not the " 'last proximate step'" toward committing a battery against Officer Wagstaff. (*Id*. at pp. 266-267.) The court also rejected the claim that the defendant lacked the "present ability" to injure Officer Wagstaff because the officer was protected by the corner of the building. (*Id*. at p. 267.) The court noted that Officer Wagstaff was not at all times behind the corner, and in any event:

> [T]he fact that Officer Wagstaff may have been sheltered, in whole or in part, by the building did not preclude the jury from finding defendant had the present ability to injure him. "Once a defendant has attained the means and location to strike immediately he has the 'present ability to injure.' The fact an intended victim takes effective steps to avoid injury has never been held to negate this 'present ability.' " [Citation.]

(*Ibid*.)

Other case examples also illustrate when a defendant's behavior is sufficient to complete the crime of assault with a deadly weapon. In *In re Raymundo M.* (2020) 52 Cal.App.5th78, the assailant raised a switchblade knife from waist-high to head-high, then lunged and ran toward the victim from 10 to 12 feet away. In *People v. Bipialaka* (2019) 34 Cal.App.4th 455, the appellate court upheld the assault with a deadly weapon conviction of a defendant who drove his car at another car scaring the other driver into believing a serious collision is imminent is guilty of assault with a deadly weapon even though the defendant swerved to avoid the crash. In *People v. Nguyen* (2017) 12 Cal.App.5th 44, the appellate court upheld the defendant's conviction for aggravated assault on a police officer when he wielded a large knife and stepped toward the officer, rejecting the argument that being 10 to 15 feet away deprived the defendant of the present ability to inflict injury. In *People v. Escobar* (1992) 11 Cal.App.4th 502, the appellate court upheld a conviction when the victim heard the defendant cock a loaded firearm, even though the gun was concealed in a

leather purse, and the defendant never pointed the weapon. Defendant's conviction of assault with a deadly weapon was upheld in *People v. Orr* (1974) 43 Cal.App.3d 666, when he pointed a loaded rifle at the victim, backed him into a ditch, and then fled. In *People v. Thompson* (1949) 93 Cal.App.2d 780, the conviction was upheld when the defendant pointed a loaded pistol towards the police officers and said he would not submit to arrest. (Similarly, see *People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1326.)

780.5-Use of hands and fists alone may be ADW 6/20

The term "deadly weapon" encompasses objects extrinsic to the body and thus does not include hands and feet. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1030.) But the use of hands or fists alone has often been held sufficient to support a conviction of assault "by means of force likely to produce great bodily injury." (*Id.* at p. 1028; see also *People v. Fierro* (1991) 1 Cal.4th 173, 251, fn. 27; *People v. Wingo* (1975) 14 Cal.3d 169, 176; *People v. Rupert* (1971) 20 Cal.App.3d 961, 967.)

> "The force likely to produce bodily injury can be found where the attack is made by use of hands or fists. [Citation.] Whether a fist used in striking a person would be likely to cause great bodily injury is to be determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied." [Citation.] A solitary punch may violate [Pen. Code] section 245, subdivision (a)(4). [Citation.]

(*People v. Medellin* (2020) 45 Cal.App.5th 519, 528 [defendant injured two separate victims, each by single punches to the head].)

For example, the appellate court in *People v. Hopkins* (1975) 44 Cal.App.3d 669 affirmed a conviction of assault by means of force likely to produce great bodily injury when an 89-year-old woman was struck in the face with a package of salami. (*Id*. at p. 676.) Similarly, the appellate court in *People v. Hamilton* (1968) 258 Cal.App.2d 511 upheld a conviction when the assault consisted of several blows to the face of the female victim which knocked the girl down, causing her nose and mouth to bleed and her eyes to become discolored. (*Id*. at pp. 517-518.) And in *In re Nirran W.* (1989) 207 Cal.App.3d 1157 the appellate court held a single punch to the side of a woman's face, knocking her down and causing problems with her jaw, was sufficient to support a conviction. (*Id*. at pp. 1161-1162; similarly, see *People v. Kinman* (1955) 134 Cal.App.2d 419.)

780.6-Automobile driving in unreasonable manner may be ADW 7/21

"Traditionally, cars can be deadly weapons." (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 458.) A car driven in an unreasonable manner is a deadly weapon likely to produce death or great bodily injury. (*People v. Wright* (2002) 100 Cal.App.4th 703, 706; *People v. Claborn* (1964) 224 Cal.App.2d 38; *People v. Mortensen* (1962) 210 Cal.App.2d 575, 582.) "The act of intentionally driving a vehicle into another vehicle at high speed provides substantial evidence to support a conviction for assault with a deadly weapon." (*People v. Brugman* (2021) 62 Cal.App.5th 608, 626.) Even if the defendant did not intend to crash into the victim's vehicle, "the test is whether an objectively reasonable person with knowledge of these facts would appreciate that an injurious collision, i.e., a battery, would directly and probably result from his actions." (*People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1189; see also *People v. Brugman*, *supra*, 62 Cal.App.5th at p. 626.) Thus, appellate courts uphold convictions of violating Penal Code section 245, subdivision (a)(1), for driving an automobile into the victim. (See, e.g., *People v. Golde* (2008) 163 Cal.App.4th 101,

109; *People v. Finney* (1980) 110 Cal.App.3d 705, 716; *People v. Dewson* (1957) 150 Cal.App.2d 119, 132-133.) This offense can also be committed by driving a vehicle so as to throw the victim from it. (See, e.g., *People v. Fox* (1947) 82 Cal.App.2d 913, 916.) In addition, pushing a person in front of a moving vehicle has been found to be using the vehicle as a deadly weapon. (*People v. Russell* (2005) 129 Cal.App.4th 776.) Also, "a driver who deliberately races through a red light at a busy intersection and collides with another vehicle, causing injury to another, can be convicted of assault with a deadly weapon." (*People v. Aznavoleh*, *supra*, 210 Cal.App.4th at p. 1183.) Finally, a defendant who drives at another car scaring the other driver into believing a serious collision is imminent is guilty of assault with a deadly weapon even if the defendant swerves to avoid the crash. (*People v. Bipialaka*, *supra*, 34 Cal.App.4th at p. 459.)

780.7-Conditional threat may be ADW 12/09

Where the ability to commit battery is clear, exhibition of a deadly weapon in a menacing or threatening manner completes the crime of assault, even though the threat of battery was conditioned on immediate compliance by the victim on the defendant's demands. (*People v. McCoy* (1944) 25 Cal.2d 177, 189, 193.)

> Ordinarily, "[a]n assault occurs whenever ' "[t]he next movement would, at least to all appearance, complete the battery." ' [Citation.]" (*People v. Williams* (2001) 26 Cal.4th 779, 786, italics omitted … .) But there can also be an assault when the battery is only threatened. (*People v. McCoy* (1944) 25 Cal.2d 177.) " 'Where a party puts in a condition which must be at once performed, and which condition he has no right to impose, and his intent is immediately to enforce performance by violence, and he places himself in a position to do so, and proceeds as far as it is then necessary for him to go in order to carry out his intention, then it is as much an assault as if he actually struck, or shot, at the other party, and missed him.' " (*Id*. at p. 193, italics omitted, quoting *People v. McMakin* (1857) 8 Cal. 547, 548-549.) A conditional *future* threat will not suffice. (See *ibid*.)

(*People v. Page* (2004) 123 Cal.App.4th 1466, 1473.) In *Page*, the defendant's threat to break a pencil she was holding and stab the victim with it if he called the police was sufficient to constitute the crime of assault with a deadly weapon. (*Id*. at pp. 1473-1474.)

790.1-Elements of battery 12/19

The crime of battery is "any willful and unlawful use of force or violence upon the person of another." (Pen. Code, § 242.) Thus, it requires "(1) a use of force or violence that is (2) willful and unlawful. The first element is satisfied by any touching. [Citation.] The second element of battery, willfulness and unlawfulness, is satisfied by any touching that is harmful or offensive." (*People v. Shockley* (2013) 58 Cal.4th 400, 404 (*Shockle*y).) Battery is a general intent crime. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1220; *People v. Francis C.* (2019) 40 Cal.App.5th 399, 405.) "As with all general intent crimes, 'the required mental state entails only an intent to do the act that causes the harm … .' " (*People v. Lara* (1996) 44 Cal.App.4th 102, 107, quoting *People v. Davis* (1995) 10 Cal.4th 463, 519, fn. 15.) It includes doing an intentional act knowing it "would directly, naturally and probably result in a battery." (*People v. Hayes* (2006) 142 Cal.App.4th 175, 180.) It does not include doing an act negligently. (*People v. Lara*, *supra*, 44 Cal.App.4th at pp. 107-108.)

" 'It has long been established that "the least touching" may constitute battery. In other words, force against the person is enough; it need not be violent or severe, it need not cause bodily

harm or even pain, and it need not leave a mark.' " (*Shockley*, *supra*, 58 Cal.4th at p. 405.) "Even a slight touching may constitute a battery, 'if it is done in a rude or angry way.' " (*People v. Hernandez* (2011) 200 Cal.App.4th 1000, 1006.) And the touching can be direct or indirect. (See, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1210 [punch to face "plainly sufficient to constitute a battery"]; *People v. Dealba* (2015) 242 Cal.App.4th 1142, 1150-1153 [defendant drove his car into victim's car]; *In re B.L.* (2015) 239 Cal.App.4th 1491, 1496-1497 [knocking object out of person's hand]; *People v. Hayes*, *supra*, 142 Cal.App.4th at p. 180 [defendant kicked can which hit victim];

850.1-Abandonment after overt act no defense to attempt 6/07

The California Supreme Court in *People v. Dillon* (1983) 34 Cal.3d 441 reiterated that when a person intends to commit a specific crime and, in carrying out this intent, commits an act causing harm or a sufficient danger of harm, it is immaterial the intended crime is not completed for some collateral reason. Thus, facts showing abandonment are irrelevant once the requisite intent and act are proved since voluntary abandonment thereafter is no longer a defense. (*Id.* at pp. 453-454.)

860.1-Factual impossibility is not a defense to attempt 4/21

Factual impossibility is not a defense to an attempt to commit a crime. (*People v. Moses* (2020) 10 Cal.5th 893, 900.) "Where a defendant has the requisite criminal intent but 'elements of the substantive crime [are] lacking' due to 'circumstances unknown' to him, he can only be convicted of attempt—and not the substantive crime itself." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) "Our courts have repeatedly ruled that persons who are charged with attempting to commit a crime cannot escape liability because the criminal act they attempted was not completed due to an impossibility which they did not foresee: 'factual impossibility is not a defense to a charge of attempt.' [Citations.]" (*People v. Reed* (1996) 53 Cal.App.4th 389, 396 [attempt to molest fictional child of undercover detective].)

> Mere intention to commit a crime does not of itself amount to an "attempt" as that word is employed in the criminal law. Some act done toward the ultimate accomplishment of the intended crime is necessary. [Citation.] But if a person formulates the intent and then proceeds to do something more which in the usual course of natural events will result in the commission of a crime, the attempt to commit that crime is complete. And even though the intended crime could not have been completed, due to some extrinsic fact unknown to the person who intended it, still he is guilty of attempt. [¶] "If there is an apparent ability to commit the crime in the way attempted, the attempt is indictable, although, unknown to the person making the attempt, the crime cannot be committed, because the means employed are in fact unsuitable, or because of extrinsic facts, such as the nonexistence of some essential object, or an obstruction by the intended victim, or by a third person." [Citation.]

(*People v. Siu* (1954) 126 Cal.App.2d 41, 44; see also *People v. Grant* (1951) 105 Cal.App.2d 347, 356 [to be guilty of attempting to commit a crime, "[i]t is not necessary that there be a 'present ability' to complete the crime, nor is it necessary that the crime be factually possible"]; see, e.g., *People v. Pham* (2011) 192 Cal.App.4th 552, 560 [unknown to defendant, intended murder victim not in crowd where defendant fired shots]; *People v. Cecil* (1982) 127 Cal.App.3d 769, 775-777 [method chosen in attempt to burn victim's car would not have worked].)

880.1-Attempt to commit crime shown by intent and overt act 5/13

Penal Code section 664 provides criminal punishment for "[e]very person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration." An attempt to commit a crime may be established upon proof that the defendant (1) had the specific intent to commit a crime and (2) had committed some ineffectual or overt act towards its accomplishment that went beyond mere preparation. (*People v. Toledo* (2001) 26 Cal.4th 221, 229; *People v. Welch* (1972) 8 Cal.3d 106, 118; *People v. Sanchez* (1998) 60 Cal.App.4th 1490, 1497.)

The intent to commit a particular crime is generally proven by circumstances surrounding the offense and is a question for the trier of fact. (Pen. Code, § 21, subd. (a); see generally, *People v. Lucas* (1997) 55 Cal.App.4th 721, 741; *People v. Johnson* (1972) 28 Cal.App.3d 653, 657-658.)

"The overt act element of attempt requires conduct that goes beyond 'mere preparation' and 'show[s] that [defendant] is putting his or her plan into action.' [Citation.]" (*People v. Watkins* (2012) 55 Cal.4th 999, 1021.) "Whether acts done in contemplation of the commission of a crime are merely preparatory or whether they are instead sufficiently close to the consummation of the crime is a question of degree and depends upon the facts and circumstances of a particular case." (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 14.) "However, '[a]n overt act need not be the ultimate step toward the consummation of the design; it is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made.' " (*People v. Memro* (1985) 38 Cal.3d 658, 698; see also *People v. Superior Court (Decker)*, *supra*, 41 Cal.4th at p. 7.) Indeed, there is no requirement that any element of the underlying crime be completed if the requisite intent is present. (*People v. Dillon* (1983) 34 Cal.3d 441, 453-454; *People v. Superior Court (Decker)*, *supra*, 41 Cal.4th at p. 7.) "[T]he law of attempts would be largely without function if it could not be invoked until the trigger was pulled, the blow struck, or the money seized." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 455; see also *People v. Nelson* (2011) 51 Cal.4th 198, 212.)

"[W]e have long recognized that '[w]henever the design of a person to commit crime is clearly shown, slight acts in furtherance of the design will constitute an attempt.'… " (*People v. Superior Court (Decker)*, *supra*, 41 Cal.4th at p. 8, citing *People v. Anderson* (1934) 1 Cal.2d 687, 690.) " 'When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime.' " (*People v. Toledo*, *supra*, at p. 230.)

880.2-Act is more likely overt when there is additional evidence of intent 11/16

When there is additional evidence of a defendant's intent, such as a confession or prior similar acts, the appellate courts have more readily labeled an act as overt rather than preparatory.

> Some Courts of Appeal have suggested focusing on the accused's intent rather than on the degree to which the acts go beyond "mere preparation." Thus, "*[w]henever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt*, and the courts should not destroy the practical and common-sense administration of the law with subtleties as to what constitutes preparation and what constitutes an act done toward the commission of a crime." [Citation.]

(*People v. Memro* (1985) 38 Cal.3d 658, 698 (*Memro*), emphasis added.) Indeed, "the plainer the intent to commit the offense, the more likely that steps in the early stages of the commission of the crime will satisfy the overt act requirement." (*People v. Dillon* (1983) 34 Cal.3d 441, 455.)

In *Memro*, the California Supreme Court held a murder was committed in the attempted commission of a lewd act, by evaluating the defendant's course of conduct in the light of his confessed intent and his prior similar murders. (*Memro*, *supra*, 38 Cal.3d at p. 669; see also *People v. Weddington* (2016) 246 Cal.App.4th 468, 471 ["Here … the completed burglary together with appellants' strikingly similar methods of operation for every one of the targeted residences clearly demonstrated their intent to burglarize homes in the area."]; *People v. Ansaldo* (1998) 60 Cal.App.4th 1190, 1197 ["There can be no doubt, based on Ansaldo's strikingly similar methods of operation involving all three victims, that his intent to commit lewd and lascivious acts on the second victim was clearly shown. … Ansaldo's attempt to have the second victim ingest drugs, his comment, which frightened her, and his offer of money for sex went beyond mere preparation."].)

1110.1-Search within reaching distance permitted incident to arrest of occupant 4/21

In *Arizona v. Gant* (2009) 556 U.S. 332 (*Gant*), the United States Supreme Court promulgated new rules for searches incident to arrest of occupants of a vehicle. "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Gant*, *supra*, 556 U.S. at p. 351; see also *Davis v. United States* (2011) 564 U.S. 229, 234-235; *People v. Evans* (2011) 200 Cal.App.4th 735, 745.)

The High Court in *Gant* rejected a widely-held interpretation that *New York v. Belton* (1981) 453 U.S. 454 (*Belton*) permitted all warrantless searches of the passenger compartment of a vehicle incident to the arrest of a recent occupant, even if the passenger compartment was not within the arrestee's reach at the time of the search. "[W]e reject this reading of *Belton* and hold that the *Chimel* [*Chimel v. California* (1969) 395 U.S. 752] rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." (*Gant*, *supra*, 556 U.S. at p. 343.) "Accordingly, we hold that *Belton* does not authorize a vehicle search incident to recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." (*Id*. 556 U.S. at p. 335.) "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, [the] justifications for the search-incident-to-arrest exception are absent and the rule does not apply." (*Id*. at p. 339; see also *People v. Evans*, *supra*, 200 Cal.App.4th at p. 745 [first prong of the *Gant* test is not met if the arrestee is Tased and lying face down on the ground outside the car with officers on top of him].) The appellate court in *People v. Sims* (2021) 59 Cal.App.5th 943, held that the search of the backseat of a car was proper under *Gant* while a paralyzed arrestee was still in the front passenger seat. "The backseat of a passenger compartment is generally reachable by an unrestrained person seated in the front of the compartment, irrespective of whether the area was reachable by the defendant in this particular instance." (*Id*. at p. 955.)

While generally narrowing searches permissible under *Belton,* the High Court in *Gant* reaffirmed other warrantless vehicle search exceptions. These included situations where there is reasonable suspicion that an individual, whether or not an arrestee, is dangerous and might gain access to a weapon (citing *Michigan v. Long* (1983) 463 U.S. 1032) or when there is probable cause to believe any part of the vehicle contains evidence of a crime (citing *United States v. Ross* (1982) 456 U.S. 798). (*Gant*, *supra*, 556 U.S. at pp. 346-347.)

Finally, it appears a search incident to arrest of a vehicle under *Gant* still requires a custodial arrest. The High Court in *Gant* did not overrule it previous holding prohibiting a search incident to

arrest when a motorist is simply issued a traffic citation in lieu of being taken into custody. (See *Knowles* v. *Iowa* (1998) 525 U.S. 113.)

1110.2-Search of vehicle interior permitted for items related to offense of arrest 4/21

The United States Supreme Court in *Arizona v. Gant* (2009) 556 U.S. 332 (*Gant*), established a new warrantless automobile search exception, adopting language from Justice Scalia's concurring opinion in *Thornton v. United States* (2004) 541 U.S. 615 (*Thornton*): "[W]e also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is *reasonable to believe that evidence of the offense of arrest might be found in the vehicle*." (*Gant*, *supra*, 556 U.S. at p. 335, emphasis added; see also *Davis v. United States* (2011) 564 U.S. 229, 234-235.)

The "reasonable to believe" standard set forth in *Gant* is less than probable cause. This interpretation is supported both by the language chosen the Court, "*reasonable* to believe that evidence … *might* be found" (emphasis added), clearly describing a quantum of proof less demanding than probable cause (Cf. *California v. Hodari D.*(1991) 499 U.S. 621, 635) and by the Court's note that the warrantless search of a vehicle for evidence of criminal activity unrelated to the arrest of an occupant (i.e., the traditional automobile exception reaffirmed in *Ross*) requires more demanding proof, namely "probable cause." (*Gant*, *supra*, 556 U.S. at p. 347.)

To satisfy the new *Gant* exception, the "offense of arrest" need only be one where it is reasonable for an officer to believe evidence relevant to the crime might be present. (*Gant*, *supra*, 556 U.S at pp. 343-344.) While this may not include most traffic offense, it certainly would include most narcotics offenses. (*Ibid*.) And an arrest for driving under the influence of alcohol or drugs provides justification for a search of the passenger compartment for items related to alcohol or drug consumption. (*People v. Quick* (2016) 5 Cal.App.5th 1006, 1012-1013; *People v. Evans* (2011) 200 Cal.App.4th 735, 750 (*Evans*); *People v. Nottoli* (2011) 199 Cal.App.4th 531, 553; see also *People v. Sims* (2021) 59 Cal.App.5th 943, 955 [defendant arrested inside parked car for public intoxication].) Certainly an arrest for illegal possession of a loaded firearm justifies a search incident to arrest for additional evidence of illegal weapons possession. (See *People v. Osbourne* (2009) 175 Cal.App.4th 1052, 1063-1065 [officer justified in searching a backpack on the left front floorboard after arresting the owner-occupant of a car for illegal possession of a loaded firearm].)

> *Gant* did not otherwise elaborate on the circumstances under which it would be reasonable to believe offense-related evidence might be found in the arrestee's vehicle, thereby leaving some ambiguity in regard to the precise parameters of the newly created exception. … Outside the context of minor traffic offenses, which *Gant* held would not provide an evidentiary basis for a search, courts have generally adopted one of two approaches to the question. Some courts have concluded or implied that whether it is reasonable to believe offense-related evidence might be found in a vehicle is determined solely by reference to the nature of the offense of arrest, rather than by reference to the particularized facts of the case. Others have required some level of particularized suspicion, based at least in part on the facts of the specific case.

(*People v. Evans*, *supra*, 200 Cal.App.4th 735, 746-747.) *Evans* took the latter approach. "We conclude a reasonable belief to search for evidence of the offense of arrest exists when the nature of the offense, considered in conjunction with the particular facts of the case, gives rise to a degree of suspicion commensurate with that sufficient for limited intrusions such as investigatory stops." (*Id*.

at p. 751 [arrest for resisting an officer, under the facts presented, did not establish the requisite reason to believe any evidence of the offense would be present in the car].) Other California appellate courts have taken the former approach. (*People v. Quick*, *supra*, 5 Cal.App.5th at p. 1012 [the nature of the offense of arrest alone is the focus of the *Gant* inquiry]; *People v. Nottoli*, *supra*, 199 Cal.App.4th at p. 556 [specific, articular facts that relevant evidence of crime of arrest would be found in passenger compartment or any containers therein not requirement by *Gant*].)

1110.3-Scope of vehicle search incident to arrest 5/20

Continuing the principle established in *New York v. Belton* (1981) 453 U.S. 454 (*Belton*), a search incident to arrest of a vehicle under the new "reasonable to believe" exception "will supply a basis for searching *the passenger compartment* of an arrestee's vehicle and *any containers therein*." (*Arizona v. Gant* (2009) 556 U.S 332, 344 (*Gant*), emphasis added.) In addition, nothing in *Gant* overruled prior case law holding that property within the passenger compartment which the officer knows to belong to a third party is also subject to search incident to arrest of a recent occupant. (*People v. Mitchell* (1995) 36 Cal.App.4th 672, 674-677; *People v. Prance* (1991) 226 Cal.App.3d 1525, 1532-1533; cf. *Wyoming v. Houghton* (1999) 526 U.S. 295 [passenger's personal property lawfully searched on probable cause to search car].)

In addition, "while an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him." (*Thornton v. United States* (2004) 541 U.S. 615, 622 (*Thornton*).) "Under our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest." (*Gant*, *supra*, 556 U.S. at p. 346.)

Belton "allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both 'occupants' and 'recent occupants' " (*Thornton*, *supra*, 541 U.S. at pp. 622-623; see also *People v. Boissard* (1992) 5 Cal.App.4th 972, 980-983; *People v. Stoffle* (1991) 1 Cal.App.4th 1671, 1681.) Nothing in the High Court's opinion in *Gant* suggests that these principles do not apply to the newly established evidence-gathering searches under the "reasonable to believe" test, even though the arrestee is no longer within arm's reach of the passenger compartment. But the search incident to arrest under the *Gant* rule must occur " 'when and where the perpetrator of a crime is lawfully arrested.' (*Thornton v. United States*, *supra*, 541 U.S. at p. 630 (conc. opn. of Scalia, J.)" (*People v. Johnson* (2018) 21 Cal.App.5th 1026, 1037 [arrest two blocks away from vehicle did not justify search incident to arrest].)

1120.1-Vehicle may be seized and searched as instrumentality 6/13

There is no reason to distinguish automobiles from other tangible items seized as evidentiary objects. "[T]he California Supreme Court has upheld vehicle searches on the basis that the vehicle was an instrumentality of the crime or was itself evidence." (*People v. Diaz* (2013) 213 Cal.App.4th 743, 754.) Thus, officers may seize an automobile for its evidentiary value or as an instrumentality of the crime. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1023-1025; *North v. Superior Court* (1972) 8 Cal.3d 301; *People v. Teale* (1969) 70 Cal.2d 497.) In *People v. Rogers* (1978) 21 Cal.3d 542, the California Supreme Court said: "[W]hen officers, incidental to a lawful arrest, seize an automobile or other object in the reasonable belief that the object *is itself evidence* of the commission of the

crime for which the arrest is made, any subsequent examination of the object for the purpose of determining its evidentiary value does not constitute a 'search' as that term is used in the California and federal constitutions." (*Id.* at p. 549, italics in original.) Similarly, in *People v. Bittaker* (1989) 48 Cal.3d 1046, the Supreme Court upheld the seizure of items of evidence found during an inspection of the interior of a vehicle seized as an instrumentality. (*Id*. at pp. 1075-1078.) Moreover, "when the police lawfully seize a car which is itself evidence of a crime rather than merely a container of incriminating articles, they may postpone searching it until arrival at a time and place in which the examination can be performed in accordance with sound scientific procedures." (*People v. Diaz*, *supra*, 213 Cal.App.4th at p. 755, internal citations omitted.) The instrumentality of the crime exception to the warrant requirement extends to any object attached to or otherwise part of the vehicle, including computer modules capturing driving data. (*Id*. at pp. 756-757.)

1130.1-Impound and inventory to protect contents of vehicle proper 5/20

Vehicle inventory searches are a well-defined exception to the warrant requirement of the Fourth Amendment. (*Colorado v. Bertine* (1987) 479 U.S. 367, 371 (*Bertine*); *People v. Quick* (2016) 5 Cal.App.5th 1006, 1010.) 372-373 (*Quick*).) "The justification for such searches does not rest on probable cause, and hence the absence of a warrant is immaterial to the reasonableness of the search." (*Illinois v. Lafayette* (1983) 462 U.S. 640, 643 (*Lafayette*).) With the adoption of Article I, section 28, subdivision (f)(2) [formerly subd. (d)] of the California Constitution, an officer's ability to perform warrantless impound and inventory searches of vehicles under the Fourth Amendment was clearly recognized in California. (*People v. Burch* (1986) 188 Cal.App.3d 172, 176-177.)

" 'There is little doubt that law enforcement authorities under certain conditions have the right, and often the duty, to impound a motor vehicle.' [Citation.]" (*People v. Green* (1996) 46 Cal.App.4th 367, 372.) "A so-called inventory search is not an independent legal concept but rather an incidental administrative step following [impound] … ." (*LaFayette*, *supra*, 462 U.S. at p. 644.) Moreover, " 'if during the course of the inventory contraband or other evidence of crime is observed, it may be seized for legally permitted confiscation, or for use as evidence in a later criminal prosecution.' [Citation.]" (*People v. Green*, *supra*, 46 Cal.App.4th at p. 374.)

The officer's impound decision is often the more relevant than the inventory decision because "an inventory search conducted pursuant to an unreasonable impound is itself unreasonable." (*People v. Williams* (2006) 145 Cal.App.4th 756, 761.) The decision to impound a car should be based upon the officer's community caretaking function, such as to remove a vehicle impeding traffic and, thus, threatening public safety and convenience (*Quick*, *supra*, 5 Cal.App.5th at p. 1010) or to protect the car itself from being broken into or stolen after the driver is arrested (*People v. Torres* (2010) 188 Cal.App.4th 775, 787).The inventory following an impound is similarly part of the officer's community caretaking function when done to protect the owner's property while in police possession, to protect the tow company police from claims over lost or stolen property, and to protect police from potential danger. (*Florida v. Wells* (1990) 495 U.S. 1, 4; *South Dakota v. Opperman* (1976) 428 U.S. 364, 369 (*Opperman*); *Quick*, *supra*, 5 Cal.App.5th at p. 1011.) "It is well settled that inventories of impounded vehicles are reasonable where the process is aimed at securing or protecting the car and its contents." (*People v. Steeley* (1989) 210 Cal.App.3d 887, 891.)

Finally, "[t]he decision to impound the vehicle must be justified by a community caretaking function 'other than suspicion of evidence of criminal activity.' (*Bertine*, *supra*, 479 U.S. at p. 375)

… .” (*People v. Torres*, *supra*, 188 Cal.App.4th at p. 787.) Therefore, “courts will explore police officers’ subjective motivations for impounding vehicles in inventory search cases. …” (*Id*. at p. 788.) “[C]ourts invalidate inventory searches when the police impound vehicles without serving a community caretaking function, suggesting the impounding were pretexts for conducting investigatory searches without probable cause.” (*Ibid*. [officer testified inventory search used to look for narcotics-related evidence]; see also *People v. Wallace* (2017) 15 Cal.App.5th 82, 90 [no evidence officers discussed need to impound vehicle before search or that standardized inventory form was ever filled out]; *People v. Aguilar* (1991) 228 Cal.App.3d 1049, 1053 [impound decision made solely to look for evidence of suspected criminal activity].)

1130.2-Impound and inventory pursuant to standardized procedure is proper 5/20

The decision to impound and inventory a vehicle for safekeeping under the officer’s community caretaking function need only be reasonable under the all the circumstances to satisfy the Fourth Amendment. (*People v. Quick* (2016) 5 Cal.App.5th 1006, 1010.) “Under the community caretaking doctrine, police may, without a warrant, impound and search a vehicle so long as they do so in conformance with the standardized procedures of the local police department and in furtherance of a community caretaking purpose. [Citation.]” (*Ibid*.)

“Nothing in *Opperman* [*South Dakota v. Opperman* (1976) 428 U.S. 364] or *Lafayette* [*Illinois v. Lafayette* (1983) 462 U.S. 640] prohibits the exercise of police discretion in determining whether to impound or inventory a vehicle so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.” (*Colorado v. Bertine* (1987) 479 U.S. 367, 375; see also *People v. Benites* (1992) 9 Cal.App.4th 309, 326-327.) If no such discretion is exercised, however, and the officer simply impounds every car following any arrest, these requirements are not met. (*People v. Williams* (2006) 145 Cal.App.4th 756, 763 [no community caretaking function involved because car safely parked at curb in front of defendant’s residence].) Instead, the facts of the individual case must establish the reasonableness of the impound decision. (*People v. Quick*, *supra*, 5 Cal.App.5th at pp. 1010-1011 [car parked two feet into roadway and blocking driveway]; *People v. Torres* (2010) 188 Cal.App.4th 775, 791-792; see e.g., *People v. Benites*, *supra*, 9 Cal.App.4th at pp. 326-327 [no validly licensed driver to take control of car to be parked late at night on a dark and isolated stretch of road miles outside town]; *People v. Steeley* (1989) 210 Cal.App.4th 887, 892 [unlicensed driver was cited but not arrested and thus could have illegally driven car away after officer left; car was also blocking a driveway]; *People v. Burch* (1986) 188 Cal.App.3d 172, 180 [officer impounded every car after issuing driving on suspended license citation to prevent driver from getting back into car and driving away after officer left the scene].)

If a law enforcement agency does have impound and inventory policies and procedures, they need not be written. (*People v. Needham* (2000) 79 Cal.App.4th 260, 266; *People v. Steeley*, *supra*, 210 Cal.App.3d at pp. 889-891.) Indeed, in *People v. Green* (1996) 46 Cal.App.4th 367, the appellate court found that the specific statutory vehicle impound authority, coupled with the officer’s matter-of-fact testimony that an inventory search followed impound under such authority, was sufficient to show a standardized departmental procedure such that the resulting search was reasonable. (*Id*. at pp. 373-375.) “Statutes authorizing impounding under various circumstances ‘may constitute a standardized policy guiding officers’ discretion’ [citation], though ‘statutory authorization does not, in and of itself, determine the constitutional reasonableness of the seizure’

[Citation].” (*People v. Torres*, *supra*, 188 Cal.App.4th at p. 787.) Additionally, policies or procedures which allow for all closed containers to be inventoried are reasonable. (*Florida v. Wells* (1990) 495 U.S. 1, 4; *People v. Salcero* (1992) 6 Cal.App.4th 720, 723 [officer allowed to search tote bag before determining whether to release to driver].)

1130.3-Removal of vehicle under Veh. Code permits proper inventory search 3/17

Statutes authorizing impounding under various circumstances ‘may constitute a standardized policy guiding officers’ discretion’ [citation], though ‘statutory authorization does not, in and of itself, determine the constitutional reasonableness of the seizure’ [Citation].” (*People v. Torres* (2010) 188 Cal.App.4th 775, 787.) Vehicle Code section 22650 et seq. provide a lengthy catalog of bases upon which a motor vehicle may be impounded by peace officers and other persons. In *People v. Green* (1996) 46 Cal.App.4th 367, the appellate court held that Vehicle Code section 22651 provided standardized impound procedures sufficient to satisfy the Fourth Amendment even though there was no testimony that the police department had specific policies or procedures to implement it. (*Id*. at pp. 373-375; see also *People v. Benites* (1992) 9 Cal.App.4th 309, 327-328.) Moreover, “[w]hile section 22651, subdivision (p) only authorizes impoundment, the court has clearly upheld the inevitable inventory search.” (*Id*. at p. 328.) For example, in *People v. Auer* (1991) 1 Cal.App.4th 1664, the appellate court upheld the impound and inventory of a vehicle driven by someone whose driving privilege had been suspended. The appellate court relied on Vehicle Code section 22655.5, which authorizes the removal of a vehicle where there is probable cause to believe it was used “as a means of committing a public offense,” and section 22651, subdivision (p), which authorizes removal of a vehicle driven by an unlicensed driver or one whose privilege has been suspended. (*Id*. at pp. 1668-1670.) Similarly, in *People v. Salcero* (1992) 6 Cal.App.4th 720, the appellate court upheld an impound of a car driven by and unlicensed driver under section 22651, subdivision (p). (*Id.* at p. 723.)

1130.4-Impound and inventory may be reasonable without standardized policies 3/17

The decision to impound and inventory a vehicle for safekeeping under the officer’s community caretaking function must be reasonable under the all the circumstances to satisfy the Fourth Amendment. (*People v. Quick* (2016) 5 Cal.App.5th 1006, 1010.) But, as case law explains, a routine automobile impound, as well as the resulting inventory search, need not necessarily be based upon department policy, a standardized procedures, or an established routine to be reasonable under the Fourth Amendment.

> [T]he court in [*Colorado v.*] *Bertine* [(1987)] 479 U.S. 367, stated that the Fourth Amendment does not prohibit the exercise of police discretion to impound a vehicle “so long as that discretion is exercised according to standard criteria.” (*Bertine*, *supra*, at p. 375.) It is notable, however, that the court went on to state that its decision was governed by the principles enunciated in [*South Dakota v.*] *Opperman* [(1976)] 428 U.S. 364. (*Bertine*, *supra*, at p. 376.) Thus it seems clear that the majority in *Bertine* did not intend to impose a categorical test—requiring that a decision to impound a vehicle be governed in all instances by “standard criteria”—that would supplant the governing principles stated in *Opperman*. In other words, the overarching test under the Fourth Amendment remains the same as for any other challenged search—whether it was “unreasonable” under all the

circumstances. As the majority in *Opperman* noted, applying the Fourth Amendment standard of reasonableness to inventory searches is constitutionally permitted. (*Opperman*, *supra*, at pp. 369-371.)

(*People v. Shafrir* (2010) 183 Cal.App.4th 1238, 1245-1246.)

We … read *Bertine* to indicate that an impoundment decision made pursuant to standardized criteria is more likely to satisfy the Fourth Amendment than one not made pursuant to standardized criteria. [Citation.] However, the ultimate determination is properly whether a decision to impound or remove a vehicle, pursuant to the community caretaking function, was reasonable under all the circumstances. [Citation.]

(*Id*. at p. 1247.)

1130.5-Scope of proper inventory search 6/20

An inventory search following the proper impound of a vehicle is a permissible part of the officer's community caretaking function. (*South Dakota v. Opperman* (1976) 428 U.S. 364, 369 (*Opperman*); *People v. Quick* (2016) 5 Cal.App.5th 1006, 1011.) "It is well settled that inventories of impounded vehicles are reasonable where the process is aimed at securing or protecting the car and its contents." (*People v. Steeley* (1989) 210 Cal.App.3d 887, 891; see also *People v. Zavala* (2018) 19 Cal.App.5th 335, 340 (*Zavala*).) "An inventory search may extend to the car's trunk, glove compartment, and closed containers located within the car." (*People v. Smith* (2020) 46 Cal.App.5th 375, 393 [inventory search of motorcycle's locked compartment equivalent to permissible inventory search of car truck], citing *Colorado v. Bertine* (1987) 479 U.S. 367, 375.) "A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." (*Florida v. Wells* (1990) 495 U.S. 1, 4.)

In *Colorado v. Bertine*, *supra*, 479 U.S. 367, the United States Supreme Court upheld as reasonable a vehicle inventory search that extended into canisters located in a closed backpack behind the driver's seat. (*Id*. at p. 369.) The officer was following standardized procedures searching a van that was being impounded after arresting the driver for driving under the influence of alcohol. (*Id*. at pp. 368, 372.) The inventory was not performed in bad faith or for the sole purpose of investigation, and the standardized procedures mandated the opening of closed containers and the listing of their contents. (*Id*. at p. 374, fn. 6.) The High Court rejected the state court's view that police should weigh the individual's privacy interest in a container against the possibility it may contain valuable or dangerous items, in part to allow for the prompt and efficient completion of a legitimate, precisely defined search. (*Id*. at p. 375.)

In contrast, the Supreme Court in *Florida v. Wells*, *supra*, 495 U.S. 1, held that the search of a locked suitcase in the trunk of an impounded car was unreasonable as an inventory search because the police agency had no policy with regard to the opening of closed containers. (*Id*. at pp. 4-5.) The court stressed that "standardized criteria or ... established routine [citation] must regulate the opening of containers found during inventory searches" to assure that an inventory search does not turn into " 'a purposeful and general means' " of discovering incriminating evidence. (*Id*. at p. 4.)

"The *Opperman* court explained that standard automobile inventories will include a search of the glove compartment because it is 'a customary place' for ownership and registration documents and for 'the temporary storage of valuables.' ([*Opperman*, *supra*, 428 U.S.] at p. 372.)" (*Zavala*, *supra*, 19 Cal.App.5th at p. 340.) The appellate court in *Zavala* held the removal of the dashboard

console looking for a secret storage compartment, however, exceeded the scope of a reasonable inventory search. (*Id*. at pp. 340-343.)

1140.1-General search of vehicle on probable cause standard (short) 6/20

When police officers have probable cause to believe an automobile contains contraband or evidence of a crime, or is itself an instrumentality of a crime, they may search the vehicle for such contraband or evidence without a search warrant. (*United States v. Ross* (1982) 456 U.S. 798; *People v. Chavers* (1983) 33 Cal.3d 462, 468-469; *People v. Zabala* (2018) 19 Cal.App.5th 335, 343.) Such a search may extend to every part of the vehicle and all closed containers within it. (*People v. Chavers*, *supra*, 33 Cal.3d at pp. 469-473; see also, *California v. Acevedo* (1991) 500 U.S. 565.) The only limitation is that the scope of the search be reasonably related to the object sought. (*United States v. Ross*, *supra*, at p. 824; *Wyoming v. Houghton* (1999) 526 U.S. 295, 301.)

1140.2-General search of vehicle on probable cause standard 6/20

"Hornbook law states that the Fourth Amendment to the United States Constitution permits the warrantless search of an automobile with probable cause. [Citations.]" (*People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1059.) When police officers have probable cause to believe an automobile contains contraband or evidence of a crime, or is itself an instrumentality of a crime, they may search the vehicle for such contraband or evidence without a search warrant. (*United States v. Ross* (1982) 456 U.S. 798 (*Ross*); *People v. Chavers* (1983) 33 Cal.3d 462, 468-469; *People v. Zabala* (2018) 19 Cal.App.5th 335, 344.) "The automobile exception is rooted in the reduced expectation of privacy in a vehicle, the fact a vehicle is inherently mobile, and the historical distinctions between searches of automobiles and dwellings. [Citations.]" (*People v. Evans* (2011) 200 Cal.App.4th 735, 753.)

Because of the reduced expectation of privacy in vehicles and their ready mobility, no further showing of exigent circumstances is required before conducting a probable cause search. (*Maryland v. Dyson* (1999) 527 U.S. 465; *Pennsylvania v. Labron* (1996) 518 U.S. 938; *California v. Carney* (1985) 471 U.S. 386; *Michigan v. Thomas* (1982) 458 U.S. 259, 261.) The right to search a vehicle necessarily includes the right to seize the vehicle for a reasonable amount of time to prevent the loss or destruction of evidence pending the search. (*People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 97.) The right to seize a vehicle includes the right to move the vehicle to an appropriate location to conduct the search, such as to a crime laboratory to search for and conduct scientific analysis of trace evidence. (*Ibid*.) Thus, the right to search without a warrant continues even after the vehicle is towed to the police station and after closed containers are removed for search at a later time. (*United States v. Johns* (1985) 469 U.S. 478, 484-487; *People v. Nicholson* (1989) 207 Cal.App.3d 707, 711-712.)

The automobile exception applies to a variety of vehicles operated on public streets. (See, e.g., *California v. Carney* (1985) 471 U.S. 386 [motorhome]; *People v. Needham* (2000) 79 Cal.App.4th 260, 267 [motorcycle]; *People v. Allen* (2000) 78 Cal.App.4th 445, 449-450 [bicycle].) The automobile exception applies not only to vehicles on a street or highway, but also found in a parking lot or carport. (*People v. Hochstraser* (2009) 178 Cal.App.4th 883, 903-904.) It applies "whenever a car is capable of being used as a car, i.e., for transportation, regardless of whether it happens to be parked in a carport next to a residence, on a public street in front of a residence, or in a downtown parking lot … ." (*Id*. at p. 904.) A search warrant or some other warrant exception may

be needed, however, to gain access to the area where the vehicle is located, such as a garage, carport or enclosed tent. (*Collins v. Virginia* (2018) 584 U.S. ___ [138 S.Ct. 1663, 201 L.Ed.2d 9] [search warrant needed to approach motorcycle covered by tarp in partially enclosed driveway adjacent to residence]; *People v. Hughston* (2008) 168 Cal.App.4th 1062, 1068-1071 [most of vehicle, except bumper and license plate, enclosed within large makeshift tarp structure in camping area].)

1140.3-Scope of automobile exception search is broad 6/20

Under the automobile exception, a warrantless vehicle search based on probable cause extends to closed containers, as well as the personal belongings of any passengers within the vehicle. (*United States v. Ross* (1982) 456 U.S. 798, 824 (*Ross*).) The only limitation is that the scope of the search be reasonably related to the object sought. (*Id*. at p. 825; *Wyoming v. Houghton* (1999) 526 U.S. 295, 301.)

> [T]he scope of the warrantless search authorized by [the so-called "automobile exception"] is no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

(*Ross*, *supra*, 456 U.S. at p. 825.) And no warrant is required even if the probable cause relates solely to a container within the vehicle, contrary to earlier cases. (*California v. Acevedo* (1991) 500 U.S. 565.) A probable cause search also covers the vehicle's trunk. (*People v. Hunter* (2005) 133 Cal.App.4th 371, 381-382; *People v. Hunt* (1990) 225 Cal.App.3d 498, 509.) Finally, the automobile exception applies to searches for trace evidence. (*People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 101.)

1140.4-Probable cause to search definition 8/21

Probable cause to search exists when based on the totality of the circumstances "there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238; see also, *United States v. Grubbs* (2006) 547 U.S. 90, 95; *People v. Farley* (2009) 46 Cal.4th 1053, 1098; *People v. Zabala* (2018) 19 Cal.App.5th 335, 344; *People v. Tousant* (2021) 64 Cal.App.5th 804, 815.) Stated alternatively, "[a] police officer has probable cause to conduct a search when 'the facts available to [him] would "warrant a [person] of reasonable caution in the belief" ' that contraband or evidence of a crime is present. …" (*Florida v. Harris* (2013) 568 U.S. 237, 243.) Probable cause to search, "while by nature a fluid concept incapable of ' "finely-tuned standards," ' is said to exist 'where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found' … ." (*People v. Hunter* (2005) 133 Cal.App.4th 371, 378, citing *Ornelas v. United States* (1996) 517 U.S. 690, 696.) In other words, "[p]robable cause for a search exists where an officer is aware of facts that would lead a man of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched. [Citations.]" (*People v. Dumas* (1973) 9 Cal.3d 871, 885.) Probable cause refers to "evidence which inclines the mind to believe, but leaves room for doubt." (*People v. Ingle* (1960) 53 Cal.2d 407, 413.) "A probable cause determination must be based on objective facts." (*People v. Evans* (2011) 200 Cal.App.4th 735, 753.) The question of probable cause must be tested by the facts and circumstances which the record shows were known to the officer at the time the officer was required

to act. (*People v. Garcia* (1970) 7 Cal.App.3d 314, 320.) Also, an officer's training, education, and experience are to be taken into consideration in the determination of probable cause. (*Ornelas v. United States*, *supra*, 517 U.S. at p. 696; *People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 827.)

1140.5-Vehicle search for alcohol containers if they may be present 4/21

Probable cause exists to search a vehicle for open containers of alcohol where the circumstances indicate their possible presence. For example, in *People v. Sims* (2021) 59 Cal.App.5th 943, at 3:00 a.m. officers pulled into a downtown San Diego parking lot where people were known to congregate and drink after the bars closed at 2:00 a.m. Defendant was contacted in the passenger seat of a car obviously intoxicated. The appellate court upheld the officers' warrantless search of the vehicle because there was probable cause to believe they would find evidence supporting the suspected violation of a municipal ordinance prohibiting public intoxication. (*Id*. at pp. 951-952.) "Given the defendant's clear state of intoxication, it was reasonable for the officers to believe a search of the vehicle in which the defendant was passed out would produce evidence of alcohol consumption, such as unsealed alcohol containers." (*Id*. at p. 951.) They also rejected the defense argument that the search was illegal under the Fourth Amendment because the officers did not need further evidence to support the suspected criminal violation. (*Id*. at p. 952.)

In *People v. Evans* (1973) 34 Cal.App.3d 175, an officer stopped a vehicle for speeding. When the driver rolled down a window, the officer detected a strong odor of an alcoholic beverage. The odor was too strong to be coming from someone's breath. Although the officer could not see an open container, he ordered the occupants out and entered the vehicle to search for open containers. The appellate court upheld the officer's conduct and stated that, without any doubt, the officer was entitled to search for an open container. (*Id.* at pp. 179-180; see also *People v. Molina* (1994) 25 Cal.App.4th 1038, 1042.) Similarly, seeing one open container in a vehicle provides probable cause to believe others may be found inside. (*People v. Souza* (1993) 15 Cal.App.4th 1646, 1653; *People v. Suennen* (1981) 114 Cal.App.3d 192, 202.)

1140.6-Odor of controlled substance from vehicle may permit search 10/21

The odor associated with a controlled substance, such as the ether-like odor associated with PCP, emitting from a vehicle is sufficient probable cause for a police officer to conduct an immediate search of the vehicle for the source of the odor under the automobile exception to the Fourth Amendment's warrant requirement. (*People v. Weaver* (1983) 143 Cal.App.3d 926, 931 [odor of PCP emanating from driver or interior of vehicle]; *People v. Superior Court (Gilbert)* (1981) 116 Cal.App.3d 450453-455 [odor of PCP that seemed to be coming from engine compartment].)

1140.7-Presence of small amount of narcotics justifies auto search 10/21

It is well established that the discovery of a controlled substance sufficient for personal use within the passenger compartment can provide probable cause to believe additional contraband might be found in other parts of the vehicle, including containers and the trunk. (*People v. Zabala* (2018) 19 Cal.App.5th 335, 344 (*Zabala*); *People v. Perez* (1996) 51 Cal.App.4th 1168, 1179 (*Perez*); *People v. Hunt* (1990) 225 Cal.App.3d 498, 509 (*Hunt*); *People v. Varela* (1985) 172

Cal.App.3d 757, 762 (*Varela*).) In *Zabala*, the discovery of blue baggies containing suspicious white powder provided probable cause to search hidden compartment behind dashboard console for other suspected narcotics. (*Zabala*, *supra*, 19 Cal.App.5th at p. 344.) In *Perez*, discovery of methamphetamine inside the passenger compartment of a pickup truck provided probable cause to search the back of the truck and the containers there for more drugs. (*Perez*, *supra*, 51 Cal.App.4th at p. 1179.) In *Hunt*, the discovery of cocaine in the passenger compartment of a car provided officers with probable cause to suspect more drugs would be found in the trunk. (*Hunt, supra*, 225 Cal.App.3d at p. 509.) And in *Varela*, drugs seized from an arrestee's person provided probable cause to search for more drugs in the trunk of the car he had been driving while under the influence of drugs. (*Varela*, *supra*, 172 Cal.App.3d at p. 762.)

1140.8-Discovery of cannabis may permit vehicle search depending on facts 10/21

Prior to the passage of Proposition 64, effective November 9, 2016, legalizing many forms of possessing and using small quantities of cannabis, "California courts … concluded the odor of unburned marijuana or the observation of fresh marijuana may furnish probable cause to search a vehicle under the automobile exception to the warrant requirement." (*People v. Waxler* (2014) 224 Cal.App.4th 712, 719 (*Waxler*); accord *Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1254 (conc. opn. of Liu, J.) [noting the "settled proposition that the smell of marijuana can establish probable cause to search and, in the context of an automobile search …, can provide a sufficient basis to proceed without a warrant"].) Pre-Proposition 64 appellate decisions were in accord. "We hold a law enforcement officer may search a vehicle pursuant to the automobile exception to the warrant requirement where the officer smells burnt marijuana and sees burnt marijuana in the defendant's car." (*Waxler*, *supra*, 224 Cal.App.4th at p. 725; see also *People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1058-1060 (*Strasburg*) [police officer had probable cause to search the defendant's car when the officer smelled marijuana immediately after the defendant opened the driver's side door].)

Post-Proposition 64, whether an officer can conduct a vehicle search for cannabis depends on the facts and circumstances. Proposition 64 included Health and Safety Code section 11362.1, subdivision (c) which provides "[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest." Given other statutory regulations placed on cannabis possession, however, "section 11362.1, subdivision (c) does not apply when the totality of the circumstances gives rise to a fair probability that an existing marijuana regulation was violated when the search occurred." (*People v. Johnson* (2020) 50 Cal.App.5th 620, 626, citing *People v. Fews* (2018) 27 Cal.App.5th 553, 563 (*Fews*).) "The continuing regulation of marijuana leads us to believe that *Strasburg* and *Waxler* still permit law enforcement officers to conduct a reasonable search to determine whether the subject of the investigation is adhering to the various statutory limitations on possession and use, and whether the vehicle contains contraband or evidence of a crime." (*Fews*, *supra,* 27 Cal.App.5th at p. 562 [odor and presence of small amounts of marijuana, combined with other factors, sufficient to justify patsearch of passenger in car, as well as provide probable cause to search car].)

Appellate decisions now hold that application of the automobile exception to the discovery of legal amounts of cannabis requires that there be additional evidence which would support probable cause to believe evidence of a crime, such as an illegal quantity of cannabis, would be

found in the vehicle. (*People v. Lee* (2019) 40 Cal.App.5th 853, 862 (*Lee*).)

> In evaluating the People's reliance on the automobile exception to the warrant requirement, we weigh the totality of the circumstances to determine whether officers had probable cause to search Lee's car. Our analysis, like that of the trial court, does not overlook the small, permissible amount of marijuana found in Lee's pocket. But following the legalization of marijuana in 2016, California law now expressly provides that legal cannabis and related products "are not contraband" and their possession and/or use "shall not constitute the basis for detention, search, or arrest." (Health & Saf. Code, § 11362.1, subd. (c).) As a result, the trial court properly concluded that Lee's possession of a small amount of marijuana was of little relevance in assessing probable cause. Because the other factors relied on by the People were also of minimal significance, we conclude that even considering the totality of circumstances known to the officer there did not exist " ' "a fair probability that contraband or evidence of a crime will be found." ' " (*Alabama v. White* (1990) 496 U.S. 325, 330.)

(*Lee*, *supra*, 40 Cal.App.5th at p. 856.) *Lee* called into question the continued viability of previous case decisions such as *Waxler* and *Strasburg*, while distinguishing *Fews*. (*Id*. at pp. 861-867.)

In *People v. McGee* (2020) 53 Cal.App.5th 796, officers pulled over a vehicle for expired registration and smelled unburnt marijuana. They saw an open baggie of marijuana possessed by the passenger, which is still prohibited under Proposition 64. This lead to the search of the passenger's purse and a loaded handgun which the defendant, an ex-felon, admitted possessing. The appellate court held the officers, upon seeing the open container of cannabis on the passenger in violation of Health and Safety section 11362.3, subdivision (a)(4), officers had probable cause to search the passenger and her purse under the automobile exception to the Fourth Amendment. (*Id*. at pp. 803-805; see also *People v. Moore* (2021) 64 Cal.App.5th 291, 298-302 [experienced officer articulated a reasonable basis for his belief, based on the totality of suspicious circumstances, that the vehicle contained an unlawful amount of cannabis, thus permitting search of backpack left on passenger seat].)

Examples of improper searches include *People v. Johnson*, *supra*, 50 Cal.App.5th 620, where the appellate court held there was no probable cause to search a parked vehicle simply because the officers could smell cannabis and could see a tied bag containing a small amount of cannabis. (*Id*. at pp. 628-635; accord *People v. Hall* (2020) 57 Cal.App.5th 946, 952-959; see also *People v. Shumake* (2019) 45 Cal.App.5th Supp. 1 [no discussion of *Waxler* or *Strasburg* decisions].)

1150.1-Proper to search vehicle for registration, but not necessarily for ID/CDL 4/20

A police officer may lawfully search a vehicle for registration documents when a motorist is unable or unwilling to produce these items on the officer's proper demand. (*People v. Arturo D*. (2002) 27 Cal.4th 60, 65, 68-76 (*Arturo D.*); see also *People v. Lopez* (2019) 8 Cal.5th 353, 360-362, & fn. 2 (*Lopez*) [overruling *Arturo D.* on other grounds].) A motorist is required to present evidence of registration during a traffic stop. (Veh. Code, § 4462, subd. (a).) When a motorist fails to produce the required registration documents, an officer may lawfully conduct a warrantless search for them, limited to places within the vehicle where the documents reasonably may be expected to be found. (*People v. Turner* (1994) 8 Cal.4th 137, 181-183; *People v. Webster* (1991) 54 Cal.3d 411, 430-431.) Additionally, for self-protection, the officer may enter the vehicle to obtain the registration slip rather than asking or allowing the motorist to do so. (*People v. Webster*, *supra*, 54

Cal.3d at p. 431; *People v. Martin* (1972) 23 Cal.App.3d 444, 447.) The officer need not first try to obtain ownership information through radio checks, computer terminals, or other less intrusive means before searching. (*People v. Turner*, *supra*, 8 Cal.4th at pp. 182-183.) In addition, Vehicle Code section 2805, subdivision (a), permits California Highway Patrol Officers, among others, to inspect a registerable vehicle and its title to determine ownership. (*People v. Webster*, *supra*, 54 Cal.3d at p. 430.)

The same rules do not necessarily apply when a person detained for a traffic violation is unable to produce some form of satisfactory identification such as a required driver's license (Veh. Code, § 40302, subd. (a)). The California Supreme Court overruled *Arturo D.* on this point in *Lopez*. (*Lopez*, *supra*, 8 Cal.5th at pp. 380-381.) "We now hold the Fourth Amendment does not contain an exception to the warrant requirement for searches to locate a driver's identification following a traffic stop." (*Id*. at p. 381.) But if the officer has probable cause to believe the driver is lying about his or her identify, thus committing a new crime, and evidence of this offense may be present in the vehicle, other recognized exceptions to the warrant requirement may come into play, including the automobile exception (*United State v. Ross* (1982) 456 U.S. 798) and the search incident to arrest exception (*Arizona v, Gant* (2009) 556 U.S. 332). (*Lopez*, *supra*, 8 Cal.5th at pp. 372-373.)

1150.2-Inspection of VIN, including opening door, is not search 6/07

Both federal and state cases recognize the lack of any intrusion on a defendant's rights just because an officer chooses to look at a vehicle's identification number (VIN). "Because of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to insure that the vehicle identification number is placed in plain view, we hold that there was no reasonable expectation of privacy in the VIN." (*New York v. Class* (1986) 475 U.S. 106, 114; see also *People v. Lindsey* (1986) 182 Cal.App.3d 772, 778-779.)

In *People v. Davitt* (1976) 56 Cal.App.3d 845, the officer pulled over a car because it displayed expired registration stickers. The officer opened the door to check the VIN and, as a result, smelled marijuana. The appellate court found "the officers acted reasonably and properly in opening the car door to check for the vehicle identification number on the door jamb." (*Id.* at p. 847.)

> Here the only conduct of which appellant complains is that the officer opened the car door for the purpose of seeing the VIN which he knew to be on the door jamb of this model automobile. A cursory examination of the door jamb for the VIN cannot be likened to a search of the automobile. It is a minimal intrusion on the privacy of the driver and occupants of the automobile.

(*Id*. at p. 848.)

1160.1-Vehicle may be searched for possible firearm violations 2/14

Penal Code section 25850, subdivision (b), provides:

> In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace

officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.

In *People v. Greer* (1980) 110 Cal.App.3d 235 the appellate court held that when an officer has reason to believe that a firearm is in a car, the officer need not ask the possessor's permission before searching for, seizing, and examining it. (*Id*. at pp. 238-239.) The court held that former Penal Code section 12031, subdivision (e) [now section 25850, subd. (b)], authorizes examination of a firearm in a vehicle, and there are no preconditions to that examination. (*Ibid*., but see, *People v. Kern* (1979) 93 Cal.App.3d 779, 783-784 [officer must ask and be refused permission before conducting an inspection under this code section].)

1160.2-Immediate vehicle search for firearm violations proper 12/09

Where there is reasonable cause to believe a vehicle contains a weapon under circumstances justifying its seizure, an immediate warrantless search for the weapon is proper. Regarding such a search, the appellate court in *People v. Superior Court (Sanders)* (1979) 99 Cal.App.3d 130 stated, "the nature of weapons is such that one does not measure probabilities by the standards that apply to other objects." (*Id*. at p. 135.) Officers are not required to stop searching after finding a single weapon. (*Ibid.*)

1160.3-Pat-down search of vehicle for firearms if fear reasonable 6/07

In *Michigan v. Long* (1983) 463 U.S. 1032, the United States Supreme Court approved the "pat-down" or cursory search of a vehicle for weapons without the need for any warrant. The High Court held the passenger compartment of a vehicle may be searched, even during a traffic stop, if the officer possesses a reasonable belief the suspect is dangerous and may gain immediate control of a weapon, based on specific and articulable facts and their rational inferences. (*Id.* at p. 1049; similarly, see *People v. Bush* (2001) 88 Cal.App.4th 1048; *People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1506; *People v. Lafitte* (1983) 211 Cal.App.3d 1429.) This rule applies even where a defendant is outside his car and nominally under the control of law enforcement officers. (*Michigan v. Long*, *supra*, 463 U.S. at pp. 1051-1052; *People v. Bush*, *supra*, 88 Cal.App.4th at p. 1052.) The sole basis for this exception is protection of police officers and others nearby. (*Michigan v. Long*, *supra*, 463 U.S. at p. 1049, fn. 14.) As the High Court noted, one study revealed that 30 percent of police shootings occurred when a police officer approached a suspect seated in an automobile. (*Id.* at p. 1048, fn. 13, citing *Adams v. Williams* (1972) 407 U.S. 143, 148, fn. 3.)

1160.4-Public safety permits weapon search on reasonable cause alone 6/07

In *Cady v. Dombrowski* (1972) 413 U.S. 433, the United States Supreme Court upheld the search of a vehicle for a weapon reasonably believed to be present where there was potential danger of its being obtained by an intruder. There, a vehicle involved in an accident was believed to contain a pistol belonging to the owner, another police officer. Although no criminal activity was suspected, under the police "caretaking" function an officer may conduct such a search based upon "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the … vehicle." (*Id.* at p. 447.)

1200.1-General standards setting bail amount 9/21

Both the Eighth Amendment to the United States Constitution, and Article I, section 12 of the California Constitution, prohibit excessive bail. "The nature of the offense charged, not the punishment actually faced, controls the availability of bail." (*In re Bright* (1993) 13 Cal.App.4th 1664, 1671; see also *In re Christie* (2001) 92 Cal.App.4th 1105, 1109.) Before the voters' 1982 amendment of section 12, only people charged with capital crimes could be held without bail. But Proposition 4 added two additional circumstances in which bail can be denied: (1) felony acts of violence where "there is substantial likelihood the person's release would result in great bodily harm to others," and (2) any felony in which there is "clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released." (*In re Bright*, *supra*, 13 Cal.App.4th at p. 1667, fn. 4; see, generally, *In re White* (2020) 9 Cal.5th 455.)

Proposition 4 added another provision which states, "[i]n fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case."

Citing constitutional concerns, the California Supreme Court in *In re Humphrey* (2021) 11 Cal.5th 135 (*Humphrey*) made the ability of the defendant to pay as the primary consideration in setting the amount of bail in most cases.

> In those cases where the arrestee poses little or no risk of flight or harm to others, the court may offer OR release with appropriate conditions. (See Pen. Code, § 1270.) Where the record reflects the risk of flight or a risk to public or victim safety, the court should consider whether nonfinancial conditions of release may reasonably protect the public and the victim or reasonably assure the arrestee's presence at trial. If the court concludes that money bail is reasonably necessary, then the court must consider the individual arrestee's ability to pay, along with the seriousness of the charged offense and the arrestee's criminal record, and—unless there is a valid basis for detention—set bail at a level the arrestee can reasonably afford. And if a court concludes that public or victim safety, or the arrestee's appearance in court, cannot be reasonably assured if the arrestee is released, it may detain the arrestee only if it first finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect those interests.

(*Id*. at p. 154.) Thus, "trial courts have authority to impose reasonable conditions related to public safety on persons released on bail." (*In re Webb* (2019) 7 Cal.5th 270, 278.)

But:

> In unusual circumstances, the need to protect community safety may conflict with the arrestee's fundamental right to pretrial liberty—a right that also generally protects an arrestee from being subject to a monetary condition of release the arrestee can't satisfy—to such an extent that no option other than refusing pretrial release can reasonably vindicate the state's compelling interests. In order to detain an arrestee under those circumstances, a court must first find by clear and convincing evidence that no condition short of detention could suffice and then ensure the detention otherwise complies with statutory and constitutional requirements.

(*Humphrey*, *supra*, 11 Cal.5th at p. 143.)

1200.2-Standard for increasing or decreasing bail 11/18

Once set, a motion to increase or reduce bail is governed by Penal Code section 1289 and requires a finding of good cause. "[T]he good cause must be founded on changed circumstances relating to the defendant or the proceedings, not on the conclusion that another judge in previously setting bail committed legal error." (*In re Alberto* (2002) 102 Cal.App.4th 421, 430.) The superior court's statement of reasons for increasing or reducing bail shall " 'contain more than mere findings of ultimate fact or a recitation of the relevant criteria for release on bail; the statement should clearly articulate the basis for the court's utilization of such criteria.' " (*In re Christie* (2001) 92 Cal.App.4th 1105, 1107.) Appellate courts "review a superior court's decision to increase or reduce bail for an abuse of discretion." (*In re Avignone* (2018) 26 Cal.App.5th 195, 204.)

1200.3-Appellate review standard on bail setting amount 11/18

"The role of [an appellate] court in reviewing a bail setting is to determine whether the trial court abused its discretion." (*In re Christie* (2001) 92 Cal.App.4th 1105, 1107; see also *In re Avignone* (2018) 26 Cal.App.5th 195, 204.) In reviewing an order concerning bail the appellate court considers "the character of the crimes … the moral turpitude involved and the dangerous results to the public from their commission, as well as the punishment imposed or authorized by law." (*In re Horiuchi* (1930) 105 Cal.App. 714, 715; see also *In re Williams* (1889) 82 Cal. 183, 184; *Ex parte Ruef* (1908) 7 Cal.App. 750, 753.) In *Ex parte Duncan* (1879) 53 Cal. 410, the California Supreme Court observed:

> We are not to assume in this case the functions of the Court committing the prisoner, or substitute our own for its judgment in fixing the amount of bail. Before we are authorized to interfere the bail demanded must be … "*per se* unreasonably great and clearly disproportionate to the offense involved," etc. [¶] A case might, of course, be presented in which the amount of bail demanded would be so great as to shock the common sense, and be seen to be utterly disproportionate to the offense charged, and in such a case it would be our duty to interfere. But the present case is not seen to be one of that character.

(*Id*. at pp. 411-412, original italics.)

1210.1-General standard for setting bail on appeal 6/19

Appellants in felony cases have no right to bail pending appeal. Trial courts have discretion to deny convicted felons bail pending appeal. (Cal. Const., art. I, § 12; Pen. Code, § 1272, subd. 3; *In re Podesto* (1976) 15 Cal.3d 921, 929 (*Podesto*).) Defendants seeking bail on appeal must prove by clear and convincing evidence that they satisfy the relevant statutory and decisional criteria. (*In re Hernandez* (1991) 231 Cal.App.3d 1260, 1263-1264; Pen. Code, § 1272.1.)

According to *Podesto*, the primary purpose of bail, both before and after conviction, is to assure the defendant/appellant will attend court when required. (*Podesto*, *supra*, 15 Cal.3d at p. 934.) The court recognized a "multiplicity of factors" relate to the likelihood a defendant will "jump bail." (*Ibid*.) Since *Podesto,* the criteria have been codified in Penal Code section 1272.1. The statute requires the defendant to demonstrate by clear and convincing evidence that he or she is not likely to flee, considering (1) ties to the community through employment, residency, family attachments and property ownership, (2) the record of appearances at past court hearings or of flight to avoid prosecution, and (3) the severity of the sentence faced. (*Id.* at p. 934-935; Pen. Code, § 1272.1, subd. (a).)

In addition to the likelihood of flight, the defendant must show by clear and convincing evidence that he or she does not pose a danger to the safety of another or the community. (Pen. Code, § 1272.1, subd. (b).)

Finally, the defendant must show the appeal is not taken for the purpose of delay and raises a substantial legal question which, if decided in the defendant's favor is likely to result in reversal. (Pen. Code, § 1272.1, subd. (c).) "For purposes of this subdivision, a 'substantial legal question' means a close question, one of more substance than would be necessary to a finding that it was not frivolous. In assessing whether a substantial legal question has been raised on appeal by the defendant, the court shall not be required to determine whether it committed error." (*Ibid*.)

In addition to these statutory requirements, the *Podesto* court approved consideration of whether the defendant's health would be seriously jeopardized by incarceration. (*Podesto*, *supra*, 15 Cal.3d at p. 934, fn. 8.)

In applying these criteria, the primary discretion belongs to the trial judge. When the trial judge has passed on the merits of a bail application, the ruling will not be disturbed unless a "manifest abuse of discretion" appears. (*Podesto*, *supra*, 15 Cal.3d at p. 937.) The trial court has a duty to provide a brief statement of reasons for granting or denying bail. (Pen. Code, § 1272.1.) A failure to state reasons, however, does *not* alone itself justify concluding denial of bail was an abuse of discretion. (*In re Pipinos* (1982) 33 Cal.3d 189, 203.) Given such a failure, the reviewing court still must review the record to determine if denial of bail is supported by the totality of facts. (*Ibid*.) In the alternative, the matter may be remanded to the trial court for an adequate statement of reasons. (See, e.g., *In re Christie* (2001) 92 Cal.App.4th 1105, 1107, 1110-1111.)

1330.1-"Building" defined 10/12

Penal Code section 459 includes a number of structures, vehicles and other items that can be burglarized, including the catchall "other building." The term "building" is broadly interpreted to include any structure that is built with four walls and a roof. (*People v. Gibbons* (1928) 206 Cal. 112, 113 *People v. Chavez* (2012) 205 Cal.App.4th 1274, 1281.) What can qualify as a wall or roof is liberally construed. (*People v. Labaer* (2001) 88 Cal.App.4th 289, 296 [partially dismantled mobile home with plastic sheeting for walls and half of roof removed satisfied definition]; *People v. Nunez* (1970) 7 Cal.App.3d 655, 657, fn. 1 [telephone booth with three walls, door enclosing fourth side, and roof was building for purposes of burglary]; *People v. Burley* (1938) 26 Cal.App.2d 213, 214 [popcorn stand measuring 8 by 10 by 7 feet, mounted on wheels, and having four walls and roof was building within meaning of burglary statute].)

A structure without four complete walls may also be burglarized if it an appurtenance of a qualifying building. "A structure is an appurtenance of a building for purposes of burglary if it is an 'integral part' or a 'functional part' of the building. (*People v. Chavez*, *supra*, 205 Cal.App.4th at p. 1282; see, e.g., *People v. Brooks* (1982) 133 Cal.App.3d 200, 204-208 [loading dock attached to back of store was building because it had roof, two solid walls, and two walls made of chain link fence and tin]; *In re Christopher J.* (1980) 102 Cal.App.3d 76, 78-79 [carport with roof, wall on one side, half wall on another side, and open on two sides could be burglarized because it was integral part of house to which it was attached].)

A balcony can also constitute part of a building under certain circumstances.

> Whenever a private, residential apartment and its balcony are on the second or a higher floor of a building, and the balcony is designed to be entered only from inside the apartment

(thus extending the apartment's living space), the balcony is part of the apartment. The railing of such a balcony marks the apartment's "outer boundary" [citation], any slight crossing of which is an entry for purposes of the burglary statute.

(*People v. Yarbrough* (2012) 54 Cal.4th 889, 894.)

The definition of "building" for purposes of Penal Code section 459, does not include, however, other enclosed areas. (See, e.g., *People v. Gibbons*, *supra*, 206 Cal. at p. 114 [storage "bin" six or eight feet high, with three sides and a roof consisting of the floor of a building above, and the fourth side opening onto a fenced yard]; *People v. Chavez*, *supra*, 205 Cal.App.4th at p. 1283 [fully enclosed fenced yard around junkyard]; *In re Amber S.* (1995) 33 Cal.App.4th 185, 186-187 ["open pole barn" consisting of roof supported on poles with no walls]; *People v. Knight* (1988) 204 Cal.App.3d 1420, 1423-1424 [electrical gang box where tools stored].)

1330.2-"Room" defined 10/16

Penal Code section 459 includes a number of structures, vehicles and other items that can be burglarized, including a "room." One "common definition of a room" is " 'a part of the inside of a building, shelter or dwelling usually set off by a partition.' … " (*People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1257.)

In *People v. Sparks* (2002) 28 Cal.4th 71 (*Sparks*), the California Supreme Court explored the meaning of the term "room" in section 459. The concept of a "room" is broadly defined under section 459. (*Id*. at pp. 80-81.) The court in *Sparks* concluded that "a defendant's entry into a bedroom within a single-family house with the requisite intent can support a burglary conviction if that intent was formed only after the defendant's entry into the house," because entry into the bedroom constitutes entry into a separate room for the purposes of section 459. (*Id*. at p. 73.) " 'Just as the initial entry into a home carries with it a certain degree of danger [to personal safety], subsequent entries into successive rooms of the home raise the level of risk that the burglar will come into contact with the home's occupants with the resultant threat of violence and harm.' [Citation.]" (*Id*. at p. 82.) Another policy behind the burglary statute is to prevent intrusion into an area of the home in which the occupants "reasonably could expect significant additional privacy and security." (*Id*. at p. 87.)

The appellate court in *In re M.A.* (2012) 209 Cal.App.4th 317, concluded that the "entryway closet at issue here is a 'room' within the meaning of the burglary statute." (*Id*. at pp. 322-323.)

Treating a defendant's entry into a home's closet as an entry into a room for the purpose of the burglary statute is fully consistent with the personal security concerns behind the statute. When a defendant, without permission, enters a closet in a home, he creates the risk that he will come into contact with the occupants of the home who object to his entry into the closet, either during his perpetration of the crime or his escape, and that violence will ensue. Indeed, the occupants of a building could react violently to an intruder's unauthorized entry into a closet, especially a closet containing guns, just as to an intruder's entry into another type of room.

(*Id* . at p. 322.) In addition, "a closet must be treated as a room for the purposes of section 459 because occupants of a house reasonably expect additional privacy and security for the contents of their closets regardless of whether they have invited the defendant to enter the living areas of the home." (*Ibid*.)

Treating a closet as a room for the purposes of section 459 is also consistent with the common definition of the word "room." We look to the commonly understood meaning because *Sparks* established that "the unadorned word 'room' in section 459 reasonably must be given its ordinary meaning." (*Sparks*, *supra*, 28 Cal.4th at p. 87.) … A closet falls squarely within that common definition of a room because it is part of the structural interior of a home, set off by walls and a door.

(*In re M.A.*, *supra*, 209 Cal.App.4th at p. 323.)

1330.3-Multiple entries within single structure can be multiple burglaries 10/16

Penal Code section 459 includes a number of structures, vehicles and other items that can be burglarized, including a "room." In *People v. Garcia* (2016) 62 Cal.4th 1116 (*Garcia*), the California Supreme Court defined under what circumstances multiple entries of rooms within a single structure by a defendant the requisite criminal intent can support multiple burglary convictions.

What we conclude is this: the simple fact that a defendant has committed two entries with felonious intent into a structure and a room within that structure does not permit multiple burglary convictions. Where a burglar enters a structure enumerated under section 459 with the requisite felonious intent, and then subsequently enters a room within that structure with such intent, the burglar may be charged with multiple burglaries only if the subsequently entered room provides a separate and objectively reasonable expectation of protection from intrusion relative to the larger structure. Such a separate expectation of privacy and safety may exist where there is proof that the internal space is owned, leased, occupied, or otherwise possessed by a distinct entity; or that the room or space is secured against the rest of the space within the structure, making the room similar in nature to the stand-alone structures enumerated in section 459.

(*Id*. at p. 1119.)

In many cases, an intruder's entry into a structure will invade an occupant's possessory interest and create a potentially dangerous situation for personal security and privacy at the moment the intruder enters—and subsequent entries into internal spaces will not heighten those risks. For instance, in the ordinary case in which a burglar enters a home, a warehouse, or a storefront, his subsequent movement throughout the structure will not meaningfully exacerbate the risk to personal security and privacy or to the occupant's possessory interest. [Citation.] Similarly, when an interior room in a storefront or warehouse is open and unlocked to passersby, a reasonable person would not likely suspect that room to be owned or occupied by a distinct entity. In these cases, it makes sense to think of a defendant's initial entry into the covered structure as subsuming all subsequent entries for purposes of the burglary statute. Charging the defendant with burglary for the initial entry alone adequately accounts for the increased risk of danger and personal harm that the defendant has created. Multiple charges and convictions will be unnecessarily redundant.

But in other cases, the initial entry into the structure will not account for the possibility of harm to possessory or security interests that could arise if the intruder subsequently enters interior spaces. An interior space may be different in character from its enclosing structure. It may be owned or occupied by a different entity than that possessing

> the overarching structure, or it may be separately secured against outside entry. The internal space could provide a separate and objectively reasonable expectation of protection from intrusion, distinct from that provided by the security of the overarching structure. When an intruder enters that space with a felonious intent, we believe it most consistent with the Legislature's intended purpose and a reasonable interpretation of the statute's text and history to permit him or her to be convicted of burglary—notwithstanding whether he or she has already committed a burglary of the enclosing structure.

(*Id*. at pp. 1126-1127, fns. omitted.)

1340.1-Least entry of building constitutes burglary 11/16

The slightest entry of a building or room with felonious intent is sufficient to establish burglary. (*Magness v. Superior Court* (2012) 54 Cal.4th 270, 273.) "A burglarious entry may occur when an intruder penetrates the space beyond a door or a window whether it is open or closed, because a reasonable person would understand such portals may not be crossed without permission from the owner." (*People v. McEntire* (2016) 247 Cal.App.4th 484, 493.)

Entry is the introduction of any part of the intruder's body, or a tool or instrument wielded by the intruder, within the outer boundary of the structure. (*Magness v. Superior Court*, *supra*, 54 Cal.4th at p. 273; see also *People v. Goode* (2015) 243 Cal.App.4th 484, 489.) The body part or instrument may be used either to effect entry or to accomplish the intended larceny or felony. (*People v. Davis* (1998) 18 Cal.4th 712, 717-718; *People v. Glazier* (2010) 186 Cal.App.4th 1511, 1156, 1159-1160 [burglary-by-instrument doctrine is not restricted to larceny—it covers putting flaming pole into crawl space to commit arson].)

> [When] the outer boundary of a building for purposes of burglary is not self-evident, … a reasonable belief test generally may be useful in defining the building's outer boundary. Under such a test … a building's outer boundary includes any element [of the structure] that encloses an area into which a reasonable person would believe that a member of the general public could not pass without authorization. … The test reflects and furthers the occupant's possessory interest in the building and his or her personal interest in freedom from violence that might ensue from unauthorized intrusion."

(*People v. Valencia* (2002) 28 Cal.4th 1, 11; see also *People v. Thorn* (2009) 176 Cal.App.4th 255, 264.) "Applying the reasonable belief test, we conclude that the open entrance to the carport marked the outer boundary of the apartment building for purposes of burglary." (*People v. Thorn*, *supra*, at p. 265 [three-sided carport located underneath apartments].) It is also no defense that the point of entry did not have any physical barrier. (*Ibid*.)

Case law provides other examples. Kicking open the door to a home is sufficient entry to constitute a completed burglary assuming the person's foot crossed into the interior of the building. (*People v. Calderon* (2007) 158 Cal.App.4th 137, 145.) Entry also may be effected by merely placing a hand through an open window. (*People v. Failla* (1966) 64 Cal.2d 560, 569; *People v. Lamica* (1969) 274 Cal.App.2d 640, 644.) Entry can be accomplished by as little as penetrating a window screen, even one covering a closed window, or screen door. (*People v. Valencia, supra,* 28 Cal.4th at p. 13; *People v. Moore* (1994) 31 Cal.App.4th 489; *People v. Nible* (1988) 200 Cal.App.3d 838, 843-846.) Entry can include simply by putting a pry bar into a door jamb. (*People v. Garcia* (2004) 121 Cal.App.4th 271, 281.) Even forcing passage through a locked security gate at the foot of a partially enclosed, attached, exterior stairway leading to the front doors of a triplex

apartment constitutes sufficient entry. (*People v. Wise* (1994) 25 Cal.App.4th 339.) Finally, passing the threshold of an open screen door to reach for the sliding glass door beyond is a completed burglary. (*People v. McEntire*, *supra*, 247 Cal.App.4th at p. 486.)

In contrast, a "defendant who opens a door but does not enter the structure may be charged with attempted burglary, but not with a completed burglary." (*Magness v. Superior Court*, *supra*, 54 Cal.4th at p. 278 [while standing in driveway defendant used remote control to open garage door]; but see *People v. Goode*, *supra*, 243 Cal.App.4th at pp. 489-491 [opening outer storm door to try to open front door was sufficient entry to support a completed burglary conviction].) In addition, merely "[i]nserting a stolen ATM card into an ATM, or placing a forged check in a chute in the window of a check-cashing facility, is not using an instrument to effect an entry within the meaning of the burglary statute." (*People v. Davis*, *supra*, 18 Cal.4th at p. 722.)

1340.2-Right of entry does not necessarily preclude burglary charge 3/18

A person may be guilty of burglary despite having consent to enter the house or other building. A burglar need not be a trespasser. "[S]ince burglary is a breach of the occupant's possessory rights, a person who enters a structure enumerated in [Penal Code] section 459 with the intent to commit a felony is guilty of burglary … ." (*People v. Salemme* (1992) 2 Cal.App.4th 775, 781 (*Salemme*).) Thus, for example, "the settled interpretation of the statute is that one who enters a room or building with the intention to commit larceny is guilty of burglary even though express or implied permission to enter has been given to him personally or as a member of the public." (*People v. Deptula* (1962) 58 Cal.2d 225, 228; similarly, see *People v. Edwards* (1971) 22 Cal.App.3d 598, 602.)

Examples of this rule abound. An open retail store can be burglarized when one enters intending to steal rather than buy. (*People v. Barry* (1892) 94 Cal. 481, 483.) Burglary can occur when a salesperson enters a private home intending to sell fraudulent securities. (*Salemme*, *supra*, 2 Cal.App.4th at pp. 777-778.) And consensual entry with intent to buy personal property from a householder using a check on a closed account is burglary. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 30-35.)

There are exceptions to this rule. "An occupant with an unconditional possessory right to enter a structure may not burglarize it. (*People v. Gauze* (1975) 15 Cal.3d 709, 714; *People v. Garcia* (2017) 17 Cal.App.5th 211, 223 (*Garcia*).) But an invited overnight guest does not have an unconditional possessory right to the enter the home, or a bedroom within the home, with intent to commit a felony (*Garcia*, *supra*, 17 Cal.App.5th at p. 225 [overnight guest entered bedroom to commit forcible sexual acts upon a child].) Similarly, a former occupant who has been excluded by court order does not have such an unconditional right of entry. (See *People v. Smith* (2006) 142 Cal.App.4th 923, 930-931.) Indeed a former occupant who voluntarily relinquishes their unconditional right of entry is also legal capable of committing burglary of the premises. (See *People v. Ulloa* (2009) 180 Cal.App.4th 601, 606-610 [estranged husband moved out of apartment and broke in taking money from his wife's purse]; *People v. Gill* (2008) 159 Cal.App.4th 149, 161 [husband agreed to leave house, took his possessions, and gave wife his house key].)

Another exception is that a person who has been invited inside the building by the occupant who knows of or endorses the invitee's felonious purpose may not be guilty of burglary. (*People v. Pendleton* (1979) 25 Cal.3d 371, 382; see also *Garcia*, *supra*, 17 Cal.App.5th at p. 223; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1397-1398; *Salemme*, *supra*, 2 Cal.App.4th at pp. 779-781.) But

an invited entry for the purpose of committing a felony against a cotenant who does not know of or endorse the invitee's intent remains a burglary. (*People v. Clayton* (1998) 65 Cal.App.4th 418, 423-424 [burglary occurred when husband invited defendant into home to kill wife].) Similarly, entry to have felonious sexual activity done with permission of a minor but without authority from or knowledge of her parent homeowners is also burglary. (*People v. Sigur* (2015) 238 Cal.App.4th 656, 672-674.)

The defendant has the burden of raising a reasonable doubt of such a consent defense. (*People v. Sherow* (2011) 196 Cal.App.4th 1296 (*Sherow*) [defense theory that pawn broker knew the items defendant brought into store to sell were stolen].) The prosecution does not have the burden of proving the absence of consent. (*Garcia*, *supra*, 17 Cal.App.5th at p. 228.)

> The burden of proof regarding the consent defense is on the defendant, because the exonerating facts establishing the consent defense are particularly within the knowledge of the defendant. (*Sherow*, at pp. 1304-1305.) But the defendant's burden is simply to raise a reasonable doubt as to the facts underlying the consent defense: (1) whether an owner/possessor invited defendant to enter; (2) whether the owner/possessor knew of defendant's felonious intention; and (3) whether defendant knew the owner/possessor knew of defendant's felonious intent.

(*People Sigur*, *supra*, 238 Cal.App.4th at p. 667.)

1370.1-Proof of intent for burglary 6/07

Burglary is the entry of any building or room with the specific intent to commit theft or any felony. (Pen. Code, § 459.) Entry of a room with this intent is sufficient even though there was no intent at the initial entry into the building. (*People v. Sparks* (2002) 28 Cal.4th 71, 86-87; *People v. McCormack* (1991) 234 Cal.App.3d 253, 257.)

The existence of specific intent at the time of entry is rarely susceptible of direct proof and must usually be inferred from all the facts and circumstances disclosed by the evidence. (*People v. Price* (1991) 1 Cal.4th 324, 462.) A nonconsensual entry into the structure of another is circumstantial evidence of a defendant's intent to steal. Indeed, one can reasonably infer burglarious intent from just the unlawful entry alone. (*People v. Wolfe* (1967) 257 Cal.App.2d 420, 425, citing *People v. Jordan* (1962) 204 Cal.App.2d 782, 786.)

The fact that no theft or other felony was committed after entry into a structure does not preclude a finding of felonious intent at the time of entry. (*People v. Moody* (1976) 59 Cal.App.3d 357, 363.) Actual commission of the intended theft or felony after entry is not an element of burglary. The offense is completed when entry is made with the requisite intent. (*People v. Lamica* (1969) 274 Cal.App.2d 640, 644.) And the intent may be to commit a crime at another place or in the future so long as the entry is closely connected with, and is made to facilitate the intended crime. (*People v. Griffin* (2001) 90 Cal.App.4th 741, 748-749; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1246-1248.)

1380.1-No proof of degree of burglary necessary before trial 8/09

It is well settled that when a crime is divided into degrees, it is for the jury, not the magistrate, to determine the degree of which the defendant is guilty. (Pen. Code, § 1157; *People v. Buckley* (1986) 185 Cal.App.3d 512, 520-522; *People v. Coston* (1948) 84 Cal.App.2d 645, 648.) Indeed, "the magistrate has no power or obligation to determine factual support for an offense divided into degrees." *People v. Estrada* (1987) 188 Cal.App.3d 1141, 1147.)

The general charge of burglary alone is sufficient to present the issue of the degree of the burglary to the jury. (*People v. Hawkins* (1978) 85 Cal.App.3d 960, 966; *People v. Nunez* (1970) 7 Cal.App.3d 655, 663.) "[A]n accusation charging burglary in the language of the statute is sufficient to constitute a felony charge [citations]; while better pleading practice may indicate the inclusion of allegations relevant to the degree [citation], it is unnecessary to allege the particular degree or facts establishing such degree [citations]." (*People v. Hawkins*, *supra*, 85 Cal.App.3d at p. 966.)

1380.2-First degree burglary covers variety of inhabited dwellings 5/20

Penal Code section 459 provides in pertinent part that "[e]very person who enters any house, room, apartment, tenement … with intent to commit grand or petit larceny or any felony is guilty of burglary." Penal Code section 460, subdivision (a), provides in pertinent part that "[e]very burglary of an inhabited dwelling house … is burglary of the first degree." Thus, a conviction for first degree burglary requires "entry" of an "inhabited dwelling house" with the intent to commit theft or any felony. (*People v. Thorn* (2009) 176 Cal.App.4th 255, 261 (*Thorn*).)

"[T]he term 'inhabited dwelling house' means a 'structure where people ordinarily live and which is currently being used for dwelling purposes. [Citation.] A place is an inhabited dwelling if a person with possessory rights uses the place as sleeping quarters intending to continue doing so in the future.' [Citations.]" (*People v. Cruz* (1996) 13 Cal.4th 764, 776 (*Cruz*).) "Thus, 'it is the element of habitation, not the nature of the structure that elevates the crime of burglary to first degree.' [Citation.]" (*People v. Trevino* (2016) 1 Cal.App.5th 120, 125.)

"Courts have broadly interpreted the term 'inhabited dwelling house' to include a variety of structures and places (see [*Cruz*, *supra*, 13 Cal.4th]. at p. 777 [inhabited vessel qualifies as inhabited dwelling house]; *People v. Wilson* (1992) 11 Cal.App.4th 1483, 1488 [tent qualifies as inhabited dwelling house]) in order to effect the legislative purpose of the burglary statutes—'to protect the peaceful occupation of one's residence' against intrusion and violence. (*Cruz*, *supra*, 13 Cal.4th at p. 775.)" (*Thorn*, *supra*, 176 Cal.App.4th at p. 261.) For example, an RV used as the sole place of abode where the victims sleep and store their possessions can be an inhabited dwell. (*People v. Trevino*, *supra*, 1 Cal.App.5th at p. 126.) A hotel or motel room used to conduct business, even an illicit business, such as prostitution, may also be considered "inhabited." (See *People v. Long* (2010) 189 Cal.App.4th 826, 833-838 [first degree robbery case].)

> [S]urvey of precedent tells us that a popular test for whether a building is "inhabited" is whether someone is using it as a temporary living quarters; in other words, whether the building is serving as the functional equivalent of a home away from home. This characterization should be made from the perspective of the victim …, not the criminal … .

(*Id*. at p. 837.)

Finally, "[i]t is well settled that burglary of an inhabited dwelling house may be accomplished even if the specific room that the burglar unlawfully enters is not a space where people live." (*In re M.A.* (2012) 209 Cal.App.4th 317, 323 [entryway closet].) Thus, a balcony

extending from an apartment and only accessible from inside the living area can qualify as part of the inhabited dwelling. (*People v. Jackson* (2010) 190 Cal.App.4th 918, 924-926.)

1380.3-Building may still be inhabited even if occupants absent 11/15

Penal Code section 459 provides in pertinent part that "[e]very person who enters any house, room, apartment, tenement … with intent to commit grand or petit larceny or any felony is guilty of burglary." Penal Code section 460, subdivision (a) provides in pertinent part that "[e]very burglary of an inhabited dwelling house … is burglary of the first degree." Thus, a conviction for first degree burglary requires "entry" of an "inhabited dwelling house" with the intent to commit theft or any felony. (*People v. Thorn* (2009) 176 Cal.App.4th 255, 261.)

The term " 'inhabited' means currently being used for dwelling purposes, whether occupied or not." (Pen. Code, § 459; see also *People v. Tessman* (2014) 223 Cal.App.4th 1293, 1297.) "[T]he term 'inhabited dwelling house' means a 'structure where people ordinarily live and which is currently being used for dwelling purposes. [Citation.] A place is an inhabited dwelling if a person with possessory rights uses the place as sleeping quarters intending to continue doing so in the future.' [Citations.]" (*People v. Cruz* (1996) 13 Cal.4th 764, 776.) But, "[t]he use of a house as sleeping quarters is not determinative, but instead is merely a circumstance used to determine whether a house is inhabited." (*People v. Hughes*, *supra*, 27 Cal.4th at p. 354.) "[T]he Legislature has specifically rejected the view that the use of a dwelling as sleeping quarters is critical." (*People v. Aguilar* (2010) 181 Cal.App.4th 966, 971.) "Rather, such use is merely one circumstance the fact finder may consider." (*People v. Hernandez* (1992) 9 Cal.App.4th 438, 441.)

"[T]he issue of habitability under [Penal Code] section 459 is viewed through the eyes of the person with the possessory right to the dwelling (i.e., the alleged victim of the burglary)." (*People v. Aguilar*, *supra*, 181 Cal.App.4th at p. 970 [apartment resident moved out after fire but believed he would returning once it was fixed].)

> [A structure or dwelling] is "inhabited" if it is currently being used for residential purposes, even if it is temporarily unoccupied, i.e., no person is currently present. A formerly inhabited dwelling becomes uninhabited only when its occupants have moved out permanently and do not intend to return to continue or to resume using the structure as a dwelling. … [¶]… [¶]… If the person is using the structure as a habitation when the burglary or robbery occurs, his possible intent to abandon the habitation in the future does not alter its character as an inhabited dwelling.

(*People v. Villalobos* (2006) 145 Cal.App.4th 310, 320 [motel room rented for one night]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 354-355 [victim in process of moving out]; *People v. Vasquez* (2015) 239 Cal.App.4th 1512, 1517 [victim in process of renovating and moving into new house while temporarily sleeping at friend's house]; *People v. Galindo* (2010) 186 Cal.App.4th 1151, 1161 [victims intended to return after remodeling]; *People v. Meredith* (2009) 174 Cal.App.4th 1257, 1266-1269 [evidence supporting finding that elderly man, suffering from dementia and living in nursing home, still intended to return to his home]; accord *People v. Marquez* (1983) 143 Cal.App.3d 797.) But "[u]nder established California precedent, it is not enough to show the home was suited for use as a residence and its owner had declared his intent to move in, or that it had been recently used or would be imminently used." (*People v. Burkett* (2013) 220 Cal.App.4th 572, 582 [owner intended to reoccupy vacant house in future after renter moved out, but had taken no steps to do so at time of burglary].)

Finally, "[a] house that is being used as a dwelling does not lose its character as a dwelling simply because the owner or occupant, or an agent of the owner or occupant, is conducting business in the house at the time the burglar enters." (*People v. Tessman*, *supra*, 223 Cal.App.4th at pp. 1298-1299 [homeowner absent while real estate agent conducted "open house"]; see also *People v. Little* (2012) 206 Cal.App.4th 1364, 1368-1370 [same].)

1380.4-Attached structures are part of an inhabited dwelling 5/20

"In determining whether a structure is part of an inhabited dwelling, the essential inquiry is whether the structure is 'functionally interconnected with and immediately contiguous to other portions of the house.' (Citation.)" (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107 (*Rodriguez*).) " 'Functionally interconnected' means used in related or complementary ways. 'Contiguous' means adjacent, adjoining, nearby or close. [Citations.]" (*Ibid*.; see also *People v. Thorn* (2009) 176 Cal.App.4th 255, 262.) The appellate court in *Rodriguez* rejected the defendant's contention that a home office attached to a residence "was not part of the family living space" because "[t]he question is not whether the specific area is used for sleeping or everyday living, but whether the area is functionally interconnected to and immediately contiguous to the residence, which is used for sleeping or everyday living." (*Rodriguez*, *supra*, 77 Cal.App.4th at p. 1110.)

Other appellate courts have concluded that attached garage or carport type structures not normally considered part of the living space are nevertheless functionally connected to the dwelling for purposes of the burglary statutes. (See, e.g., *People v. Harris* (2014) 224 Cal.App.4th 86, 90-91 [attached garage converted to unoccupied rental unit without direct access to main house still part of residence for purposes of § 460, subd. (a); *In re Edwardo V.* (1999) 70 Cal.App.4th 591, 594-595 [attached garage at rear of duplex shared by tenants, not accessible from either duplex and entered only through an exterior door, was functionally interconnected to duplex]; *People v. Zelaya* (1987) 194 Cal.App.3d 73, 75-76 [storage rooms in basement area under apartment house were functionally connected to the building's living quarters].) "Moreover, … a structure may be functionally interconnected to an inhabited dwelling even where access to the structure is from a common area." (*People v. Thorn*, *supra*, 176 Cal.App.4th 255, 262-263 [three sided carport below apartment complex connected to tenants' apartments via public walkways and stairways]; see also *People v. Woods* (1998) 65 Cal.App.4th 345, 347 [defendant convicted of first degree burglary of a laundry room on the ground floor of a two-story, U-shaped apartment block, where entry to the individual apartments was via an unlocked open-air courtyard in the middle of the building].)

1430.1-Do not cite unpublished or depublished opinions 10/16

"A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published." (Cal. Rules of Ct., rule 8.1115(d); see *Jonathan M. v. Superior Court* (2006) 141 Cal.App.4th 1093, 1099 [citing former version of this rule of court].) But the California Supreme Court can order such an opinion to be depublished making it unciteable. (Cal. Rules of Ct., rule 8.1105(e)(2); *People v. Williams* (2009) 176 Cal.App.4th 1521, 1529.) And, "[u]nless otherwise ordered …, [a]n opinion is no longer considered published if the rendering court grants rehearing." (Cal. Rules of Ct., rule 8.1105(e)(1)(A).) But, absent a contrary order from the California Supreme Court after granting review, a published opinion of the Court of Appeal may be cited so long as it is "accompanied by a predominant notation advising that review by the Supreme Court has been granted." (Cal. Rules of Ct., rule 8.1105(e)(1)(B)-(e)(2).)

With very limited exceptions, "an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Ct., rule 8.1115(a); see also *Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 108-110.) An unpublished opinion has no precedential value. (*Waranch v. Gulf Insurance Co.* (1990) 218 Cal.App.3d 356, 360, fn. 1.) "We realize that depublished and unpublished decisions are now as readily available as published cases, thanks to the Internet and technologically savvy legal research programs. That does not give counsel an excuse to ignore the rules of court. Indeed, persistent use of unpublished authority may be cause for sanctions. (See *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 885.)" (*People v. Williams*, *supra*,176 Cal.App.4th at p. 1529.)

1430.2-There is an ethical duty to cite contrary case authority 1/13

"Attorneys are officers of the court and have an ethical obligation to advise the court of legal authority that is directly contrary to a claim being pressed. (*Batt v. City and County of San Francisco* (2007) 155 Cal.App.4th 65, 82, fn. 9.)" (*In re Reno* (2012) 55 Cal.4th 428, 510.) Thus, for example, an attorney is required "to disclose whether a particular claim, raised in a petition for a writ of habeas corpus, is subject to a procedural bar … ." (*Ibid*.) "If a petition raises a claim that according to controlling legal authority is procedurally improper, the petition must disclose that fact and forthrightly address why the court should nevertheless consider the claim." (*Id* . at p. 511.) "Accordingly, failure to affirmatively address the applicability of procedural obstacles to consideration of the claims raised in a habeas corpus petition justifies summary denial without the court's consideration of the merits." (*Ibid*.) There may be other consequences when an attorney fails to cite controlling authority contrary to their position, such as financial sanctions. (*Ibid*.; see, e.g., *In re White* (2004) 121 Cal.App.4th 1453, 1489.)

1440.1-Collateral estoppel avoids rehearing finally decided issue 8/20

The doctrine of collateral estoppel is applicable to criminal cases. (*Ashe v. Swenson* (1970) 397 U.S. 436, 443.) "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (*Ibid*.) "The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy." (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 811; see also *People v. Garcia* (2006) 39 Cal.4th 1070, 1077.)The burden is on the party seeking to invoke principles of collateral estoppel to establish the factual predicate for the doctrine to apply. (*People v. Yokely* (2010) 183 Cal.App.4th 1264, 1273.)

> In criminal cases, the doctrine of collateral estoppel is not to be applied with hypertechnicality, "but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' "

(*People v. Gordon* (2009) 177 Cal.App.4th 1550, 1557, citing *Ashe v. Swenson*, *supra*, 397 U.S. at pp. 443-444.)

In *Lucido v. Superior Court* (1990) 51 Cal.3d 335, the California Supreme Court defined the requirements of the doctrine:

> Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.] The party asserting collateral estoppel bears the burden of establishing these requirements.

(*Id.* at p. 341; see also *People v. Vizcarra* (2015) 236 Cal.App.4th 422, 429; *People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1288-1291)

Thus, under some circumstances, collateral estoppel can bar finding a defendant guilty in a separate trial of charges related to charges for which he or she was previous acquitted. (See *People v. Gordon*, *supra*, 177 Cal.App.4th at pp. 1558-1560.) "In other words, a second trial is prohibited only if conviction would require the prosecutor to prevail on a factual issue the jury necessarily resolved in the defendant's favor in the first trial." (*People v. Sanchez* (2020) 49 Cal.App.5th 961, 975.) Collateral estoppel also can bar a defendant from relitigating certain issues, such as whether there was probable cause to arrest, when the exact issue was decided on appeal in a previous criminal case in another county. (*People v. Vogel* (2007) 148 Cal.App.4th 131; distinguish *People v. Ruiz* (2020) 49 Cal.App.5th 1061, 1069 [defendant not estopped from bringing new Pen. Code § 1473.7 motion because legislature lowered the standard necessary to receive relief].))

Collateral estoppel does not apply, however, to findings in criminal cases in which the defendant did not participate. (*Beets v. County of Los Angeles* (2011) 200 Cal.App.4th 916, 928.) "Accordingly, the appearance of justice the criminal justice system needs is best served if all participants in alleged criminal conduct are tried on their cases' own merits, without concern for the results of other trials." (*People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 16.)

1440.2-Collateral estoppel does not bar trial after prior related hearing 3/12

Even where the threshold requirements for collateral estoppel have been established by a party, a court must look at the public policies underlying the doctrine to determine if it should be applied. (*People v. Ochoa* (2011) 191 Cal.App.4th 664, 669.) Collateral estoppel is a flexible policy whose application depends upon whether, in a particular circumstance, it would be fair to the parties and constitute a sound judicial policy. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342-343 (*Lucido*).) " 'In deciding whether the doctrine is applicable in a particular situation a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case.' [Citation.]" (*People v. Vogel* (2007) 148 Cal.App.4th 131, 136.) "[T]he public policies underlying collateral estoppel—preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation—strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy." (*Lucido*, *supra*, 51 Cal.3d at p. 343.)

For example, because probation revocation hearings and criminal trials serve different purposes and there are significant differences in the manner in which the two are conducted, the California Supreme Court has refused to apply collateral estoppel to them. Thus, a finding that the People failed to prove a violation of probation does not preclude a criminal trial involving the same conduct. (*Lucido*, *supra*, 51 Cal.3d at pp. 347-349; *People v. Ochoa*, *supra*, 191 Cal.App.4th at p. 673; distinguish *People v. Quarterman* (2012) 202 Cal.App.4th 1280 [collateral estoppel precludes second probation violation hearing after defendant found not in violation based on same allegation in prior formal probation revocation hearing].) Similarly, the resolution of a contested jurisdictional hearing on a dependency petition pursuant to Welfare and Institutions Code section 300 does not bar criminal trial of the parents for the same conduct which was the subject in the dependency hearing. (*People v. Percifull* (1991) 9 Cal.App.4th 1457, 1461-1463; but see *People v. Garcia* (2006) 39 Cal.4th 1070 [welfare fraud prosecution barred by failure of evidence at administrative fair hearing]; *People v. Sims* (1982) 32 Cal.3d 468 [accord].)

1450.1-Law of case requires following appellate decision in same case 12/17

The doctrine of the law of the case is one of the fundamental rules of appellate review specifically designed to preclude multiple litigation of the same issue. It applies to criminal cases as well as civil matters. (*People v. Gray* (2005) 37 Cal.4th 168, 197; *People v. Whitt* (1990) 51 Cal.3d 620, 638.) The doctrine of law of the case provides that when an appellate court has rendered a decision and states in its opinion a rule of law necessary to the decision, that rule is to be followed in all subsequent proceedings in the same action whether in the trial or appellate court, even if the current court believes the former decision is erroneous. (*People v. Whitt*, *supra*; see also *People v. Murtishaw* (2011) 51 Cal.4th 574, 589; *People v. Alexander* (2010) 49 Cal.4th 846, 870; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1242.)

The doctrine applies to issues resolved on their merits either on appeal or by petition for extraordinary relief. (See *People v. Jurado* (2006) 38 Cal.4th 72, 94 [Supreme Court applies doctrine on automatic death penalty to pretrial writ decision by Court of Appeal].) It does not apply, however, to the summary denial of a writ petition. (*Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 230.) Nor does it apply to prior trial court rulings. (*People v. Sons* (2008) 164 Cal.App.4th 90, 100.)

The doctrine is based on the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 811; similarly see *People v. Whitt*, *supra*, 51 Cal.3d 620.) The doctrine of law of the case, however, will not be adhered to where application would result in an unjust decision. (*People v. Scott* (1976) 16 Cal.3d 242, 246; *People v. Vizcarra* (2015) 236 Cal.App.4th 422, 429.) Thus, the law of the case doctrine does not apply when there is an intervening change in law. (*People v. Stanley* (1995) 10 Cal.4th 764, 787 [law of the case doctrine will not be adhered to where the "controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations"]; accord *People v. Iraheta*, *supra*, 14 Cal.App.5th at p. 1244.)

"The law-of-the-case doctrine binds the trial court as to the law but controls the outcome only if the evidence on retrial or rehearing of an issue is substantially the same as that upon which the appellate ruling was based." (*People v. Mattson* (1990) 50 Cal.3d 826, 850 (*Mattson II*); see also *People v. Anderson* (2008) 169 Cal.App.4th 321, 332.) "Stated differently, a party is entitled to have

a … motion redetermined on remand only if the party offers 'new or different' evidence from the evidence considered by the original trial court." (*People v. Anderson*, *supra*, at p. 333, citing *Mattson II*, *supra*, at p. 853.) "Accordingly, in order to qualify as 'new or different' evidence under *Mattson II*, the evidence presented on remand must *raise material factual or legal issues not considered by the original trial judge or create the realistic possibility that the factual findings of that judge were in error*." (*People v. Anderson*, *supra*, italics in original.)

> Under the law-of-the-case doctrine, the determination by an appellate court of an issue of law is conclusive in subsequent proceedings in the same case. [Citation.] The doctrine applies only if the issue was actually presented to and determined by the appellate court. [Citation.] The doctrine is one of procedure that prevents parties from seeking reconsideration of an issue already decided absent some significant change in circumstances. [Citation.] But the law-of-the-case doctrine does not limit the evidence that may be offered on the retrial of an issue of fact, and it controls the outcome of a retrial only if the evidence is substantially the same. [Citations.] Accordingly, the law-of-the-case doctrine does not preclude the presentation of new evidence on a suppression issue after a conviction has been reversed and the cause remanded for a new trial.

(*People v. Yokely* (2010) 183 Cal.App.4th 1264, 1273 [determination by federal court that witness' live lineup identification was inadmissible did not preclude trial court on remand from admitting in-court identification upon finding it had independent source].)

1460.1-Holdings, but not dicta, of higher courts are binding on lower courts 4/19

Stare decisis requires lower courts to follow decisions of higher state courts. This rule is summarized in *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450:

> The decisions of [the Supreme Court] are binding upon and must be followed by all the state courts of California. Decisions of every division of the District Courts of Appeal are binding upon … all the superior courts of this state, as this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court.

(*Id*. at p. 455; see also *People v. Martin* (2018) 26 Cal.App.5th 825, 832-833; *People v. Wolfe* (2018) 20 Cal.App.5th 673, 692.) Thus, for example, "a trial court has not discretion to refrain from following bindings Supreme Court authority." (*People v. Superior Court (Tejeda)* (2016) 1 Cal.App.5th 892, 901.)

This obligation to follow decisional law exists no matter how old the case and whether or not the deciding court's composition has changed. (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1298; *Mehr v. Superior Court* (1983) 139 Cal.App.3d 1044, 1048, fn. 3.)

There is "no horizontal stare decisis" requiring a California Court of Appeal to follow a prior decision on the same issue by another Court of Appeal. (*People v. Kisling* (2014) 223 Cal.App.4th 544, 547-548; *People v. McDonald* (2013) 214 Cal.App.4th 1367, 1377.) And where Court of Appeal decisions on an issue conflict, the lower court may follow whichever line of authority it finds persuasive. While practical considerations may favor the court following the line of cases from the appellate district in which it sits, the lower court is not required to do so. (*Auto Equity Sales v. Superior Court*, *supra*, 57 Cal.2d at p. 456; *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4.)

But no matter how lofty the court, decisions are not controlling authority for propositions not considered by that court. (*People v. Banks* (1993) 6 Cal.4th 926, 945; see also *People v. Williams* (2018) 26 Cal.App.5th 71, 84.) Similarly, "[a]n observation unnecessary to the decision of a court does not constitute binding precedent." (*People v. Lucatero* (2008) 166 Cal.App.4th 1110, 1116.) " 'An appellate decision is not authority for everything said in the court's opinion but only "for the points actually involved and actually decided." [Citations.]' [Citation.]" (*People v. Morris* (2015) 242 Cal.App.4th 94, 103; see also *People v. Williams*, *supra*, 26 Cal.App.5th at p. 85.)

Even if properly characterized as dictum, however: "When the Supreme Court has conducted a thorough analysis of the issues and such analysis reflects compelling logic, its dictum should be followed." (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169; see also *People v. Baldwin* (2018) 30 Cal.App.5th 648, 657; *People v. Williams*, *supra*, 26 Cal.App.5th at p. 87; *Artega v. Superior Court* (2015) 233 Cal.App.4th 871, 865.) "Supreme Court dicta generally should be followed, particularly where the comments reflect the court's considered reasoning." (*People v. Rios* (2013) 222 Cal.App.4th 542, 563; accord *People v. Tovar* (2017) 10 Cal.App.5th 750, 759.) Similarly, the concurring opinion from a California Supreme Court opinion, while not binding, "may nevertheless be persuasive, providing guidance to trial courts in certain circumstances." (*Carrington v. Starbucks Corp.* 92018) 30 Cal.App.5th 504, 527, fn. omitted; see also *People v. Barba* (2013) 215 Cal.App.4th 712, 734, fn. 7 [concurring opinion signed by four justices "a reliable indicator of how a majority of the court would rule"].)

1460.2-Decisions of lower federal courts not binding 7/17

California states courts, including the California Supreme Court, have no authority to overturn decisions of the United States Supreme Court. (*People v. Weaver* (2012) 53 Cal.4th 1056, 1086.) But, while the decisions of the lower federal courts may be persuasive and entitled to great weight, California state courts are not bound to follow them. (*People v. Brooks* (2017) 3 Cal.5th 1, 762; *People v. Linton* (2013) 56 Cal.4th 1146, 1182, fn. 8; see also *People v. Harrison* (2013) 215 Cal.App.4th 647, 6578; *People v. Uribe* (2011) 199 Cal.App.4th 836, 875.) "[A]lthough we are bound by decisions of the United States Supreme Court interpreting the federal Constitution [citations], we are not bound by the decisions of the lower federal courts even on federal questions." (*People v. Bradley* (1969) 1 Cal.3d 80, 86; similarly, see *People v. Burton* (1989) 48 Cal.3d 843, 854, fn. 2; see also *People v. Spector* (2011) 194 Cal.App.4th 1335, 1408; *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1583.)

> Decisions of federal district or appellate courts are not binding on us in the absence of a United States Supreme Court decision that is on point. [Citation.] In determining federal law in the absence of a definitive United States Supreme Court decision, we are bound by California Supreme Court cases construing federal constitutional provisions. [Citation.] If there is no conflict between state and federal law, state law governs. [Citation.]

(*People v. Racklin* (2011) 195 Cal.App.4th 872, 877.) "It goes without saying that, other than a decision by the United States Supreme Court on a point of federal law, no federal decision binds us as precedent." (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 760.) Finally, when there is a conflict among the federal circuits, decisions from the Ninth Circuit, which includes California, are entitled to no more weight than decisions from any other federal circuit. (*Elliott v. Albright* (1989) 209 Cal.App.3d 1028, 1034.)

1460.3-Decisions of other states' courts not binding 4/15

The California Supreme Court has stated, "we are not bound by decisions of other states' courts … ." (*J.C. Penney Casualty Ins. Co. v. M.K.* (1991) 53 Cal.3d 1009, 1027.) Accordingly, California appellate and trial courts are not bound to follow foreign state authority. (*People v. Artega* (2015) 233 Cal.App.4th 851, 868; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1408.)

1480.1-There are four categories of felony child abuse 5/20

Penal Code section 273a, subdivision (a), provides:

> Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.

Felony child abuse under this omnibus statute:

> [C]an occur in a wide variety of situations: the definition broadly includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect. Two threshold considerations, however, govern all types of conduct prohibited by this law: first, the conduct must be willful; second, it must be committed "under circumstances or conditions likely to produce great bodily harm or death." [Citation.]

(*People v. Smith* (1984) 35 Cal.3d 798, 806; see also *People v. Sargent* (1999) 19 Cal.4th 1206, 1215-1216.) In other words, there are four branches of conduct. (*In re L.K.* (2011) 199 Cal.App.4th 1438, 1445.)

> These four branches or prongs are: " 'Any person who, under circumstances or conditions likely to produce great bodily harm or death, [1] willfully causes or permits any child to suffer, or [2] inflicts thereon unjustifiable physical pain or mental suffering, or [3] having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or [4] willfully causes or permits that child to be placed in a situation where his or her person or health is endangered … .' " (*People v. Valdez* (2002) 27 Cal.4th 778, 783.)

(*In re L.K.*, *supra*.)

> Felony child abuse does not require force likely to produce great bodily injury. It requires the willful infliction of injury under circumstances and conditions likely to produce great bodily injury. While force may be one circumstance or condition, it is not the only circumstance or condition that may support a conviction for felony child abuse.

(*People v. Clark* (2011) 201 Cal.App.4th 235, 243.)

Conduct amounting to felony child abuse may occur in a single act, or it may encompass repeated, sometimes serious, injuries inflicted over a span of time. (See *People v. Napoles* (2002) 104 Cal.App.4th 108, 116.) In the latter instance, the nature, severity and number of such injuries are such to preclude an inference of accident. (*People v. Ewing* (1977) 72 Cal.App.3d 714, 717.)

If the defendant is accused of permitting the abuse to occur rather than directly inflicting it under the first two categories of Penal Code section 273a, subdivision (a), there must be a special relationship between the abuser and the defendant such as give rise to a legal duty to control or

prevent the abuser from inflicting pain or suffering on the child. (*Bom v. Superior Court* (2020) 44 Cal.App.5th 1, 13-17.) If the defendant is accused of felony child abuse under the "care and custody" provisions of Penal Code section 273a, subdivision (a), "in contrast with the first category of crimes under the statute, which was focused on the relationship between the defendant and the abuser, the third and fourth categories are focused on the relationship between the defendant and the victim" (*Id*. at p. 17.)

1480.2-Felony child abuse requires willfulness 5/20

The term "willfully" as used in Penal Code section 273a, subdivision (a), requires no intent to injure the child, but simply a purpose or willingness to commit or omit an act. No intent to violate the law, injure another, or gain any advantage is necessary. (*People v. Atkins* (1975) 53 Cal.App.3d 348, 358.) The charge of felony child abuse involving the direct infliction of abuse requires proof of only general criminal intent. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1224; *People v. Clair* (2011) 197 Cal.App.4th 949, 955.) But an offense involving the other three types of conduct, including indirect infliction of harm to a child, requires proof of criminal negligence. (*People v. Valdez* (2002) 27 Cal.4th 778, 787-791; *In re L.K.* (2011) 199 Cal.App.4th 1438, 1445.) Criminal negligence, "means that the defendant's conduct must amount to a reckless, gross or culpable departure from the ordinary standard of due care; it must be such a departure from what would be the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life." (*People v. Peabody* (1975) 46 Cal.App.3d 43, 48-49.)

1480.3-Actual infliction of great bodily injury not required 5/20

While the felony child abuse statute (Pen. Code § 273a, subd. (a),) requires the presence of conditions or circumstances "likely to produce great bodily harm," there is no requirement that the actual result be great bodily injury. (*People v. Clair* (2011) 197 Cal.App.4th 949, 956; *Cline v. Superior Court* (1982) 135 Cal.App.3d 943, 948; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835.) In other words, "[a]ctual physical injury is not an element of felony child endangerment." (*People v. Wilson* (2006) 138 Cal.App.4th 1197, 1205.)

> We … conclude that "likely" as used in section 273a means a substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death. We believe in the context of child endangerment this definition of the term "likely" draws a fair balance between the broad protection the Legislature intended for vulnerable children and the level of seriousness required for a felony conviction.

(*Id*. at p. 1204; see also *People v. Chaffin* (2009) 173 Cal.App.4th 1348, 1351.)

> [T]he word "likely" in section 273a does not serve as a measure for making the difficult and imprecise task of predicting future human behavior. Rather, it is merely a measure for determining the risk of present injury created by external and tangible circumstances or conditions. [Citation.] Case law has long recognized that the phrase "likely to produce great bodily harm or death" in section 273a means " 'the probability of serious injury is great.' " [Citation.]

(*People v. Chaffin*, *supra*, 173 Cal.App.4th at p. 1352, citing *People v. Sargent* (1999) 19 Cal.4th 1206, 1223.) "Expert testimony is not necessary to prove that the abuse was likely to cause great bodily harm." (*People v. Clair*, *supra*, 197 Cal.App.4th at p. 956.)

1480.4-Liability for those having care and custody of abused child 5/20

The third and fourth categories of felony child abuse under Penal Code section 273a, subdivision (a), apply only to persons who committed specified criminal acts or omissions while having the "care or custody" of the child victim. (*People v. Sargent* (1999) 19 Cal.4th 1206, 1227 (conc. opn. of Mosk, J.); *Bom v. Superior Court* (2020) 44 Cal.App.5th 1, 12.) "Persons convicted under the care or custody prongs of Penal Code section 273a are typically parents of the child victims. [Citations.] Courts of Appeal have, however, upheld convictions of persons who were not parents of the abused child when they assumed a role as his or her caretaker or caregiver." (*Id*. at p. 18.)

Thus, a defendant's liability for felony child abuse under the care and custody provisions does not require a family relationship or formalized duty of care. (*People v. Morales* (2008) 168 Cal.App.4th 1075, 1083.)

> Section 273a does not require that a defendant be related to a child. As stated in *People v. Cochran* (1998) 62 Cal.App.4th 826, 832, "[t]he terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." There is "no special meaning to the terms 'care or custody' beyond the plain meaning of the terms themselves" that is indicated or intended. (*Ibid.*) Interpreting *Cochran,* the court in *People v. Perez* (2008) 164 Cal.App.4th 1462, 1476, stated: "[T]he relevant question in a situation involving an individual who does not otherwise have a duty imposed by law or formalized agreement to care for a child (as in the case of parents or babysitters), is whether the individual in question can be found to have undertaken the attendant responsibilities at all. 'Care,' as used in the statute, may be evidenced by something less than an express agreement to assume the duties of a caregiver. That a person did undertake caregiving responsibilities may be shown by evidence of that person's conduct and the circumstances of the interaction between the defendant and the child; it need not be established by an affirmative expression of a willingness to do so." (Fn. omitted.)

(*People v. Morales*, *supra*, 168 Cal.App.4th at p. 1083)

1490.1-Standard for suspending proceedings to determine competency 3/21

"The United States Supreme Court has 'repeatedly and consistently recognized that "the criminal trial of an incompetent defendant violates due process." ' " (*People v. Lightsey* (2012) 54 Cal.4th 668, 690.) To safeguard a defendant's right to due process and a fair trial, the trial court has an obligation to hold a hearing to inquire into the defendant's competence when there is a bona fide doubt as to the defendant's competence to stand trial, and failure to do so is reversible error. (*Pate v. Robinson* (1966) 383 U.S. 375, 385; *People v. Ghobrial* (2018) 5 Cal.5th 250, 269.)

"Both federal due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial. ([Pen. Code,] § 1368; *Drope v. Missouri* [(1975)] 420 U.S. [162,] 181].)" (*People v. Rogers* (2006) 39 Cal.4th 826, 847).) "[I]f a qualified mental health expert who has examined the defendant ' "states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or

cooperating with counsel," ' that is substantial evidence of incompetence." (*People v. Lewis* (2008) 43 Cal.4th 415, 525) But absent such testimony, no single factor is necessary to establish sufficient doubt of a defendant's competence as to require a hearing. (*People v. Ghobrial*, *supra*, 5 Cal.5th at p. 270.) Rather, a court must consider the "aggregate of th[e] indicia" of the defendant's competence. (*Drope v. Missouri*, *supra*, 420 U.S. at p. 180.) "Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations. [Citations.]" (*People v. Rogers*, *supra*, 39 Cal.4th at p. 847.) Defense counsel or even advisory counsel for a pro per defendant should be permitted to declare their doubts as to the defendant's competence. (*In re* Sims (2018) 27 Cal.App.5th 195, 208.) "[D]efense counsel will often have the best-informed view of the defendant's ability to participate in his defense." (*Medina v. California* (1992) 505 U.S. 437, 450; see also *People v. Easter* (2019) 34 Cal.App.5th 226, 243; distinguish *People v. Hines* (2020) 58 Cal.App.5th 583, 608 ["neither the psychiatrist nor the attorney explained with particularity why they thought Hines's condition limited his ability to understand the proceedings or provide rational assistance to defense counsel"].)

The evidence must bear on the defendant's competency to stand trial, however, rather than simply establish the existence of a mental illness that could conceivably affect his ability to understand the proceedings or assist counsel. (*People v. Rogers*, *supra*, 39 Cal.4th at p. 847.) "[M]ore is required to raise a doubt than mere bizarre actions [citation] or bizarre statements [citation] or statements of defense counsel that defendant is incapable of cooperating in his defense [citation] or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense [citation]." (*People v. Laudermilk* (1967) 67 Cal.2d 272, 285; see also *People v. Ghobrial*, *supra*, 5 Cal.5th at p. 270.) "[E]ven a history of serious mental illness does not necessarily constitute substantial evidence of incompetence that would require a court to declare a doubt … ." (*People v. Blair* (2005) 36 Cal.4th 686, 714.)

"Unless the record contains substantial evidence of present mental incompetence, we review a trial court's failure to initiate the competency inquiry only for abuse of discretion." (*People v. Johnson* (2018) 6 Cal.5th 541, 575.) " '[A]bsent a showing of "incompetence" that is "substantial" as a matter of law, the trial judge's decision not to order a competency hearing is entitled to great deference, because the trial court is in the best position to observe the defendant during trial.' " (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 465.) " 'Whether to order a present sanity hearing is for the discretion of the trial judge, and only where a doubt as to sanity may be said to appear as a matter of law or where there is an abuse of discretion may the trial judge's determination be disturbed on appeal.' [Citation.]" (*People v. Ghobrial*, *supra*, 5 Cal.5th at p. 269; see also *People v. Woodruff* (2018) 5 Cal.5th 697, 721.) The appellate court's task is to examine "the inferences that were to be drawn from the undisputed evidence" and to ask "whether, in light of what was then known, the failure to make further inquiry into petitioner's competence to stand trial, denied him a fair trial." (*Drope v. Missouri*, *supra*, 420 U.S. at pp. 174-175.) The focus is the evidence that "was in fact part of the record presented or otherwise made available to the trial court." (*People v. Mickel* (2016) 2 Cal.5th 181, 197).) "We do not require a trial court to evaluate a defendant's competence based on evidence not before it at the time of its decision." (*Ibid*.)

1490.2-Changed circumstances may require new competency hearing 12/19

"If, after a competency hearing, the defendant is found competent to stand trial, a trial court may rely on that finding unless the court ' "is presented with a substantial change of circumstances or with new evidence" casting a serious doubt on the validity of that finding.' (*People v. Jones* (1991) 53 Cal.3d 1115, 1153; accord, *People v. Mendoza* (2016) 62 Cal.4th 856, 884.)" (*People v. Rodas* (2018) 6 Cal.5th 219, 231 (*Rodas*); distinguish *People v. Gonzales* (2019) 34 Cal.App.5th 1081, 1085-1087 [once doubt declared court must hold competency hearing even if defense counsel subsequently withdraws claim of incompetency].) "Whether there has been a change in circumstances sufficient to call for a new competency hearing is necessarily a fact-specific inquiry." (*Rodas*, *supra*, 6 Cal.5th at p. 235; see, e.g., *People v. Tejeda* (2019) 40 Cal.App.5th 785, 795-796 [defendant taking stand against counsel's advice and presented his delusions as a defense was substantial change of circumstance following restoration of sanity order based on finding defendant could "compartmentalize" these delusions]; *People v. Easter* (2019) 34 Cal.App.5th 226, 242-249 [another competency hearing should have been ordered because defense attorney reported defendant was displaying new and different symptoms including incoherent conversations perhaps tied to recent change in medication].)

"We have also said that when a competency hearing has already been held, 'the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state,' particularly if the defendant has 'actively participated in the trial' and the trial court has had the opportunity to observe and converse with the defendant." (*Rodas*, *supra*, 6 Cal.5th at p. 234, citing *People v. Jones*, *supra*, 53 Cal.3d at p. 1153.) "The effect of the *Jones* rule is simply to make clear that the duty to suspend is not triggered by information that substantially duplicates evidence already considered at an earlier, formal inquiry into the defendant's competence; when faced with evidence of relatively minor changes in the defendant's mental state, the court may rely on a prior competency finding rather than convening a new hearing to cover largely the same ground." (*Rodas*, *supra*, 6 Cal.5th at pp. 234-235.)

> As a general rule, once a defendant has been found competent to stand trial, a trial court may rely on that finding absent a substantial change of circumstances. But when a formerly incompetent defendant has been restored to competence solely or primarily through administration of medication, evidence that the defendant is no longer taking his medication and is again exhibiting signs of incompetence will generally establish such a change in circumstances and will call for additional, formal investigation before trial may proceed. In the face of such evidence, a trial court's failure to suspend proceedings violates the constitutional guarantee of due process in criminal trials. (*People v. Rogers* (2006) 39 Cal.4th 826, 847.)

(*Rodas*, *supra*, 6 Cal.5th at p. 223.)

1495.1-Defendant has burden of proof as to competency to stand trial 4/19

"As a matter of due process, '[a] defendant may not be put to trial unless he " 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding … [and] a rational as well as factual understanding of the proceedings against him.' " ' (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354, quoting *Dusky v. United States* (1960) 362 U.S. 402, 402 (per curiam) (*Dusky*).)" (*People v. Buenrostro* (2018) 6 Cal.5th 367, 386 (*Buenrostro*).) This standard is codified in Penal Code section 1367, subdivision (a), which precludes trial of a defendant who "as a

result of mental disorder or developmental disability … is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (*People v. Rodas* (2018) 6 Cal.5th 219, 230.)

> Penal Code section 1369 specifies the order of proof in a competency trial. First, defense counsel offers evidence in support of the allegation of mental incompetence (*id*., subd. (b)(1)); next, the prosecution presents its evidence on the issue of the defendant's present mental competence (*id*., subd. (c)); finally, "[e]ach party may offer rebutting testimony, unless the court, for good reason in furtherance of justice, also permits other evidence in support of the original contention" (*id*., subd. (d)). Beyond these specifications, the order of proof is generally within the court's discretion. (Evid. Code, § 320.)

(*Buenrostro*, *supra*, 6 Cal.5th at p. 403.) "In competency proceedings, each party may offer evidence to rebut evidence offered by the other side. (Pen. Code, § 1369, subd. (d).)" (*Id*. at p. 394.)

"The law presumes a person is competent to stand trial. (Pen. Code, § 1369, subd. (f).)" (*Buenrostro*, *supra*, 6 Cal.5th at p. 387.) Therefore, "[w]hen the defendant puts his or her competence to stand trial in issue, the defendant bears the burden of proving by a preponderance of the evidence that he or she lacks competence." (*People v. Mendoza* (2016) 62 Cal.4th 856, 871.)

1500.1-No standing to raise 5th and 6th Amend. rights of another 5/16

A defendant has no standing to object to a violation of another person's Fifth and Sixth Amendment rights. These are personal rights and cannot be asserted vicariously. In the landmark case of *People v. Varnum* (1967) 66 Cal.2d 808, officers discovered a murder weapon by questioning codefendants in violation of their Fifth and Sixth Amendment privileges. When the weapon was introduced against the defendant, he objected based upon violation of the codefendants' rights. The objection was overruled. The California Supreme Court held that in the absence of physically or psychologically coercive tactics, a defendant lacks standing to contest violations of another's Fifth and Sixth Amendment rights. "Accordingly, in the absence of such coercive tactics, there is no basis for excluding physical or other nonhearsay evidence acquired as a result of questioning a suspect in disregard of his Fifth and Sixth Amendment rights when such evidence is offered at the trial of another person." (*Id.* at p. 813.)

Under this rule, a defendant cannot complain that another's statement was involuntary based on that person's intoxication, or that the statement was not preceded by a *Miranda* warning. (*People v. Enriquez* (1982) 132 Cal.App.3d 784, 792-793; *People v. Felix* (1977) 72 Cal.App.3d 879, 885; *People v. McFadden* (1970) 4 Cal.App.3d 672, 688.)

California Supreme Court holdings, decided after enactment of the truth-in-evidence provisions of Proposition 8 (Cal. Const., Art. I, § 28, subd. (f)(2)), agree that a defendant has no standing to assert any violation of another person's right against self-incrimination or right to counsel. (*People v. Jenkins* (2000) 22 Cal.4th 900, 965; *People v. Badgett* (1995) 10 Cal.4th 330, 343-344.) A defendant lacks standing to object to any perceived violation of a third party's privilege against self-incrimination. (*People v. Badgett*, *supra*, at p. 343; *People v. Leon* (2016) 243 Cal.App.4th 1003, 1016.) Any basis for excluding the third party's testimony must be found in federal constitutional right personal to defendant." (*People v. Badgett*, *supra*, at p. 343; see generally, *People v. Markham* (1989) 49 Cal.3d 63, 71.)

A defendant has limited standing, however, to complain that the trial testimony of another was coerced, or was the product of coercion, and its reliability thus impaired. Use of unreliable

testimony may result in a fundamentally unfair trial and thus violate a defendant's own Fifth Amendment right to due process of law. The defendant bears the burden of proving both coercion and that the witness's trial testimony was actually tainted by the coercion. (*People v. Williams* (2010) 49 Cal.4th 405, 452-453; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 966; *People v. Badgett*, *supra*, 10 Cal.4th at pp. 344-348; *People v. Leon*, *supra*, 243 Cal.App.4th at pp. 1016-1017.)

1510.1-Preponderance of evidence is standard for confessions and *Miranda* 5/20

In *Lego v. Twomey* (1972) 404 U.S. 477 the United States Supreme Court held that the standard of proof for the admissibility of a confession, including the voluntariness requirement, is a simple preponderance of the evidence. (*Id*. at p. 489.) This standard applies as well to questions of compliance with *Miranda v. Arizona* (1966) 384 U.S. 436. (*Colorado v. Connelly* (1986) 479 U.S. 157, 168-169.) California uses the same standard. The prosecution's burden of proof of the voluntariness of a defendant's *Miranda* waiver, as well as a defendant's confession, is by a preponderance of the evidence. (*People v. Winbush* (2017) 2 Cal.5th 402, 452; *People v. Jackson* (2016) 1 Cal.5th 269, 339; see also *People v. Dykes* (2009) 46 Cal.4th 731, 751; *People v. Bradford* (1997) 14 Cal.4th 1005, 1034.) Indeed, with the adoption of Article I, section 28, subdivision (f)(2) (originally subd.(d)) to the California Constitution by the electorate in 1982, California courts cannot set a higher standard for the exclusion of evidence than that required by the federal Constitution. (*People v. Markham* (1989) 49 Cal.3d 63, 71.)

1510.2-Appellate review standard on *Miranda* motion and voluntariness 5/20

In reviewing a trial court's denial of a suppression motion on *Miranda* grounds, the appellate court must "accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence." (*People v. Cunningham* (2001) 25 Cal.4th 926, 992 (*Cunningham*); see also *People v. Gamache* (2010) 48 Cal.4th 347, 385 (*Gamache*); *People v. Franzen* (2012) 210 Cal.App.4th 1193, 1200 (*Franzen*.) The appellate court will "independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained." (*Cunningham*, *supra* 25 Cal.4th at p. 992.) "Where … an interview is recorded, the facts surrounding the admission or confession are undisputed and we may apply independent review." (*People v. Duff* (2014) 58 Cal.4th 527, 551; see also *In re T.F.* (2017) 16 Cal.App.5th 202, 214.) "To the extent mixed questions of fact and law are present, they are reviewed de novo if predominantly legal and for substantial evidence if predominantly factual. [Citations.]" (*Gamache*, *supra*, 48 Cal.4th at p. 385; see also *Franzen*, *supra*, 210 Cal.App.4th at p. 1200.)

This same approach is taken as to voluntariness of a defendant's statements to the police.

> As with *Miranda* claims, the trial court's legal conclusion as to the voluntariness of a confession is subject to independent review on appeal. [Citations.] The trial courts resolution of disputed facts and inferences, its evaluation of credibility, and its findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence. [Citations.]

(*People v. Dykes* (2009) 46 Cal.4th 731, 752-753; see also *People v. Thomas* (2012) 211 Cal.App.4th 987, 1008.)

Whether based on a claimed violation of *Miranda* or upon a claim of involuntariness, California appellate courts review issues concerning the suppression of defendants' statements

under federal constitutional standards. (*People v. Jackson* (2016) 1 Cal.5th 269, 339; *People v. Nelson* (2012) 53 Cal.4th 367, 374.)

1520.1-*Miranda* applies only when suspect is in custody 12/19

"It is settled that *Miranda* advisements are required only when a person is subjected to 'custodial interrogation.' [Citations.]" (*People v. Davidson* (2013) 221 Cal.App.4th 966, 970.) "[S]tatements made in a noncustodial setting are admissible against the speaker" even when they are not preceded by *Miranda* warnings. (*People v. Battaglia* (1984) 156 Cal.App.3d 1058, 1065.)

Custodial interrogation has long been defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda v. Arizona* (1966) 384 U.S. 436, 444; *People v. Salinas* (1982) 131 Cal.App.3d 925, 935.)

In *Oregon v. Mathiason* (1977) 429 U.S. 492 the United States Supreme Court held:

> [P]olice officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

(*Id.* at p. 495.)

"[T]he ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (*California v. Beheler* (1983) 463 U.S. 1121, 1125; see also *Stansbury v. California* (1994) 511 U.S. 318, 322; *People v. Stansbury* (1995) 9 Cal.4th 824, 830.) A suspect is not in custody if, under the circumstances, a reasonable person in the suspect's position would have felt free to end the questioning and leave. (*In re I.F.* (2018) 20 Cal.App.5th 735, 759.)

The test is entirely objective. (*People v. Davidson*, *supra*, 221 Cal.App.4th at p. 971.) Whether a person is in custody depends on the objective circumstances of the interrogation rather than on the subjective view of either party. (*Stansbury v. California*, *supra*, 511 U.S. at p. 323.) Where no formal arrest takes place, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442, fn. omitted; see also *People v. Torres* (2018) 25 Cal.App.5th 162, 172.)

Whether the person is in *Miranda* custody is only judged by the circumstances at the time of questioning. (*People v. Thomas* (2011) 51 Cal.4th 449, 477-478 ["Even were we to conclude that defendant had been in custody when he was detained in the patrol car, it does not necessarily follow that he remained in custody when he was released from the vehicle before he was interviewed."].)

The *Miranda* custody test was well described in *Thompson v. Keohane* (1995) 516 U.S. 99:

> Two discrete inquires are essential to the determination: first, what were the circumstances surrounding the interrogation; and, second given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and action are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. [Citations.] The first inquiry all agree, is distinctly factual. … The second inquiry, however, calls for the

application of the controlling legal standard to the historical facts.
(*Id.* at p. 112, internal quotation marks omitted.)

1520.2-Factors relevant to determining if suspect in custody per *Miranda* 12/19

When determining whether a suspect is in "custody" for purposes of *Miranda*, the court must consider all of the circumstances surrounding the questioning.

> Courts have identified a variety of relevant circumstances. Among them are whether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation.

(*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162; see also *People v. Torres* (2018) 25 Cal.App.5th 162, 172-173; *In re I.F.* (2018) 20 Cal.App.5th 735, 759; *People v. Saldana* (2018) 19 Cal.App.5th 432, 455.)

Lengthy and detailed questioning, even over several hours, would not lead a reasonable person to believe his or her freedom of movement had been impaired where the tone is generally nonaccusatory. But even pointed questioning about a suspect's involvement does not necessarily convert the questioning into a custodial interrogation. (*People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1164; *People v. Spears* (1991) 228 Cal.App.3d 1, 21-26.) Nor does the fact that questioning occurs at the police station at the officer's request show one is in custody. (*California v. Beheler* (1983) 463 U.S. 1121; see also *People v. Zaragoza* (2016) 1 Cal.5th 21, 56-57; *People v. Kopatz* (2015) 61 Cal.4th 62, 79-82; *People v. Stansbury* (1995) 9 Cal.4th 824.) In fact, several leading cases hold the interrogation was non-custodial despite the presence of many of these factors. (*People v. Stansbury*, *supra*; *Oregon v. Mathiason* (1997) 429 U.S. 492; see also *People v. Moore* (2011) 51 Cal.4th 386, 394-404; *People v. Spears*, *supra*, 228 Cal.App.3d at pp. 21-26; but see, *People v. Torres*, *supra*, 25 Cal.App.5th at pp. 176-180 [although defendant voluntarily sat in patrol car for interview, detectives used numerous pressure tactics, including lying about DNA evidence, to continually accuse him of child molestation eventually converting the encounter into a custodial interrogation]; *People v. Saldana*, *supra*, 19 Cal.App.5th at p. 455-463 [although defendant originally went to police station voluntarily, the subsequent accusatory interrogation in a closed interview room eventually became custodial]; *People v. Aguilera*, *supra*, 51 Cal.App.4th at pp. 1164-1165 [accusatory questioning after telling suspect they would take him home if he told the truth held custodial].)

1520.3-Focus of investigation does not require *Miranda* unless suspect in custody 12/19

The phrase "focus of the investigation" as a factor to be considered in determining whether a suspect must be informed of his *Miranda* rights, has led to much confusion. (*People v. Bellomo* (1992) 10 Cal.App.4th 195, 199-200.) An officer's uncommunicated intent to arrest a suspect, even coupled with the existence of probable cause, has no bearing upon whether a suspect is "in custody." (*Ibid.*; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1163-1164; see also, *Berkemer v. McCarty* (1984) 468 U.S. 420, 442.) " ' "It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning." ' " (*Berkemer v. McCarty*, *supra*, at p. 442, fn. 35; similarly, see *People v. Bellomo*, *supra*.) Thus, "*Miranda* warnings are not required simply because a person has become a suspect in the officer's mind." (*People v. Linton* (2013) 56 Cal.4th 1146, 1167.)

The United States Supreme Court has made it clear that "focus of suspicion" is only a single circumstance amongst many, and is an objective factor independent of the subjective views of either the officer or the person being interviewed. A line of cases from *Beckwith v. United States* (1976) 426 U.S. 341, 345, through *Minnesota v. Murphy* (1984) 465 U.S. 420, 430, to *Stansbury v. California* (1994) 511 U.S. 318, firmly establish "that an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody." (*Id.* at p. 319.) The officer's subjective belief is important only to the extent it is communicated or otherwise manifested to the person being questioned. Even then, such belief is relevant "only to the extent [it] would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her ' "freedom of action." ' [Citation.]" (*Id.* at p. 325.)

1520.4-A juvenile suspect's age may be a factor in *Miranda*'s custody analysis 5/18

If the suspect is juvenile, their age "properly informs the *Miranda* custody analysis." (*J.D.B. v. North Carolina* (2011) 564 U.S. 261, 265.)

> In some circumstances, a child's age "would have affected how a reasonable person" in the suspect's position "would perceive his or her freedom to leave." [Citation.] That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

(*Id*. 564 U.S. at pp. 271-272.)

> [W]e hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case. … It is, however, a reality that courts cannot simply ignore.

(*Id*. 564 U.S. at p. 277; see also *In re I.F.* (2018) 20 Cal.App.5th 735, 760; *In re Joseph H.* (2015) 237 Cal.App.4th 517, 531.)

"We observe that courts routinely consider the presence or absence of a parent or guardian in deciding whether an interrogation is custodial. [Citations.]" (*In re I.F.*, *supra*, 20 Cal.App.5th at p. 762.) If one exists, "[w]e conclude that we must also consider a parent's conflict of interest,

provided the conflict has some bearing on how a reasonable child would perceive the interrogation." (*Id*. at p. 763 [rejecting categorical rule excluding all statements by minors with conflicted parent].)

1520.5-*Miranda* not required during detention 12/19

It is well established that *Miranda* warnings are not required where a person is temporarily detained for brief questioning by police. (*People v. Hill* (1974) 12 Cal.3d 731, 767; overruled on another point in *People v. DeVaughn* (1977) 18 Cal.3d 889, 896, fn. 5; *People v. Vasquez* (1993) 14 Cal.App.4th 1158, 1162-1164; *People v. Manis* (1969) 268 Cal.App.2d 653, 669.) This includes ordinary traffic stops. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 440; *People v. Tully* (2012) 54 Cal.4th 952, 983.) Whether a person is seized for Fourth Amendment purposes and whether that person is in custody for *Miranda* purposes are two different issues. (*People v. Bejasa* (2012) 205 Cal.App.4th 26, 38.)

"*Miranda* warnings are not required during the course of a brief detention unless the suspect is placed under restraints normally associated with a formal arrest." (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404.) "Handcuffing a suspect during an investigative detention does not automatically make it custodial interrogation for purposes of *Miranda*." (*People v. Davidson* (2013) 221 Cal.App.4th 966, 972; but see *People v. Pilster*, *supra*, 138 Cal.App.4th at p. 1404 [handcuffing transformed detention into arrest].)

> Several cases hold a temporary detention which results in preliminary questioning does not require *Miranda* warnings. " 'We conclude that persons temporarily detained for brief questioning by police officers who lack probable cause to make an arrest or bring an accusation need not be warned about incrimination and their right to counsel, until such time as the point of arrest or accusation has been reached or the questioning has ceased to be brief and casual and become sustained and coercive.' [Citation.]" [Citations.]

(*In re Victor B.* (1994) 24 Cal.App.4th 521, 524-525.) A temporarily detained suspect is not in custody for *Miranda* purposes regardless of whether officers have an uncommunicated intent to arrest supported by probable cause. (*Berkemer v. McCarty*, *supra*, 468 U.S. at p. 442; *People v. Bellomo* (1992) 10 Cal.App.4th 195, 199-200; see also *Stansbury v. California* (1994) 511 U.S. 318.)

> There is a valid reason for the rule that *Miranda* warnings are not required when the questioning is incident to detention. " 'When circumstances demand immediate investigation by police, the most useful, the most available tool for such investigation is general on-the-scene questioning, designed to bring out the person's explanation or lack of explanation of the circumstances which aroused the suspicion of the police, and enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.' " [Citations.]

(*People v. Haugland* (1981) 115 Cal.App.3d 248, 256; see also *People v. Davidson*, *supra*, 221 Cal.App.4th at p. 971.)

In *In re Joseph R.* (1998) 65 Cal.App.4th 954, for example, an officer detained a minor, put him in handcuffs, and told him to sit in the back of a patrol car. The officer carried on another part of his investigation. He returned after about five minutes, released the minor from the patrol car, and removed the handcuffs. The minor then made admissions in response to the officer's questions without benefit of the *Miranda* warnings. The appellate court affirmed the judgment of conviction, holding that the questioning was not custodial. (*Id*. at p. 961; see also *In re Victor B.*, *supra*, 24

Cal.App.4th at p. 524; but see *People v. Bejasa*, *supra*, 205 Cal.App.4th at pp. 35-39 [handcuffing and placing parolee in patrol car, under totality of circumstances, was custody requiring *Miranda* warnings before further questioning].)

1520.6-*Miranda* not applicable to preliminary DUI questioning or FSTs 12/19

Miranda is not applicable during "preliminary questioning" such as that involved in a traffic stop because the officer suspects the driver is under the influence. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 435-442 (*Berkemer*); *People v. Carter* (1980) 108 Cal.App.3d 127, 130-131 (*Carter*).) In *Carter*, the officer made a traffic stop, noticed the defendant's breath smelled of alcohol and his eyes were red, and without advising him of his *Miranda* rights asked, "How much have you had to drink tonight?" While defendant argued this question was a violation of *Miranda*, the appellate court held that "neither *Miranda* nor its progeny requires admonition in the present circumstances." The officer simply asked preliminary questions during the course of a detention and did not "interrogate" within the meaning of *Miranda*. (*Carter*, *supra*.) Similarly, in *Berkemer*, *supra*, 468 U.S. 420, the United States Supreme Court held that incriminating statements elicited from a motorist detained as a suspected drunk driver required no *Miranda* warning prior to the arrest.

> The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not "in custody" for the purposes of *Miranda*.

(*Id*. at p. 440; see also *People v. Forster* (1994) 29 Cal.App.4th 1746, 1752-1754.) And, in *People v. Bellomo* (1992) 10 Cal.App.4th 195, the appellate court held no *Miranda* warning was necessary when officers responding to an accident scene asked the suspect if he was the driver. (*Id*. at pp. 199-200; see also *People v. Milham* (1984) 159 Cal.App.3d 487, 500-501; distinguish *People v. Bejara* (2012) 205 Cal.App.4th. 26, 40 [suspect in custody at time of questioning regarding accident].)

Similar analysis applies to field sobriety tests (FSTs). When done as part of the officer's evaluating whether to arrest a person for driving under the influence they are non-custodial with the meaning of *Miranda*. (Distinguish *People v. Bejasa* (2012) 205 Cal.App.4th 26 [suspect had already been arrested and handcuffed for parole violation].) In addition, most FSTs are non-testimonial consisting of display of physical abilities. Such tests are non-testimonial and, therefore, not subject to the Fifth Amendment or the *Miranda* rule. (*Pennsylvania v. Munoz* (1990) 496 U.S. 582, 602-604 (*Munoz*); *People v. Cooper* (2019) 37 Cal.App.5th 642, 650-652 (*Cooper*).) Nor is a person's refusal to perform FSTs covered by the *Miranda* rule. (*South Dakota v. Neville* (1983) 459 U.S. 553, 564; *Cooper*, *supra*, 37 Cal.App.5th at p. 652.) Distinguish questioning requiring suspect "to communicate and implied assertion of fact or belief." (*Munoz*, *supra*, 496 U.S. at pp. 592, 697 [request to calculate date of 60th birthday]; *People v. Bejasa*, *supra*, 205 Cal.App.4th at p. 43 [Romberg test].)

1520.7-*Miranda* does not apply to innocuous conversations 8/21

Not all communication between police and an arrested suspect require a *Miranda* waiver. " '[I]nterrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police … that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon

the perceptions of the suspect, rather than the intent of the police." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301, fns. omitted [declining to conclude officers should have known that their brief conversation with one another in the suspect's presence expressing concern that children in the area might discover a missing shotgun and hurt themselves was reasonably likely to elicit an incriminating response].)

"Clearly, not all conversation between an officer and a suspect constitutes interrogation." (*People v. Clark* (1993) 5 Cal.4th 950, 985 [there was no reason for the officer to "have known that his casual estimate of possible penalties would produce an incriminating response from this defendant"]; see also *People v. Tousant* (2021) 64 Cal.App.5th 804, 822-826 [officer had no reason to know his questioning of defendant hoping to obtain information that would help solve the murder of defendant's son would likely elicit incriminating statements about crimes in which defendant was in custody].)

For example, "small talk is permitted." (*People v. Gamache* (2010) 48 Cal.4th 347, 388.)

> When evaluating whether the *Miranda* requirements should apply during noninvestigative, routine or casual exchanges, relevant factors to consider include the nature of the questions, the context of the questioning, the knowledge and intent of the officer asking the questions, the relationship between the questions and the crime, the administrative need for the questions, and any other indications that the questions were designed to elicit incriminating evidence.

(*People v. Andreasen* (2013) 214 Cal.App.4th 70, 88; see also *People v. Gomez* (2011) 192 Cal.App.4th 609, 630-631.) "The fact that information gathered from these routine questions or casual conversations turns out to be incriminating does not alone render the statements inadmissible." (*People v. Andreasen*, *supra*, 214 Cal.App.4th at p. 87.)

> The California Supreme Court has rejected claims that *Miranda* is violated where a defendant volunteers incriminating statements as part of a "casual conversation" (*People v. Lewis* (1990) 50 Cal.3d 262, 274) or in response to " 'neutral inquir[ies]' made for 'the purpose of clarifying [statements] or points that [the officer to whom a confession is volunteered] did not understand' " (*People v. Ray* (1996) 13 Cal.4th 313, 338 (*Ray*), quoting *People v. Claxton* (1982) 129 Cal.App.3d 638, 647.)

(*People v. Franzen* (2012) 210 Cal.App.4th 1193, 1201 [officer's question "What guy?" in response to defendant's statement when cell phone rang "It's probably the guy looking for his money," was not interrogation under *Miranda*].) The same principles apply after a defendant has invoked his or her *Miranda* rights. (*People v. Jackson* (2016) 1 Cal.5th 269, 340 ["[E]ven if the detectives reinitiated the conversation after Jackson invoked his right to counsel in violation of *Edwards* [*v. Arizona* (1981) 451 U.S. 477], Jackson's statements after reinitiating the conversation were voluntary statements to an innocuous question"].)

Case examples abound. (See, e.g., *People v. McCurdy* (2014) 59 Cal.4th 1063, 1087 ["The initial questions here appear to have been an attempt by the officers to establish a rapport with defendant"]; *People v. Dement* (2011) 53 Cal.4th 1, 27 ["merely telling defendant the victim' s name—was also not the type of statement [Detective] Christian should have known was likely to elicit an incriminating response"]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1034-1035 [officer said defendant looked "like a traffic ticket" and asked, "Is it just a warrant?"]; distinguish *People v. Andrews* (2019) 32 Cal.App.5th 1102, 1123-1126 [officers had reason to know questions about certain events might relate to prior shooting investigation]; *People v. Morris* (1987) 192 Cal.App.3d 380, 387-390 [after booking officer asked defendant "who are you accused of killing?"].)

1520.8-*Miranda* does not apply to routine booking questions 1/21

"It is well established that, upon arrival at jail, the police could question [an arrestee] about his identity in a routine booking interview without implicating the Fifth Amendment. [Citations.]" (*People v. Quiroga* (1993) 16 Cal.App.4th 961, 967; see also *People v. Andreasen* (2013) 214 Cal.App.4th 70, 87.) "The routine booking questions exception applies 'even when a defendant has already received *Miranda* warnings and invoked his or her rights.' [Citation.]" (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 22.)

In *Pennsylvania v. Muniz* (1990) 496 U.S. 582 (*Muniz*) a plurality of the United States Supreme Court recognized a " 'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.' " (*Id*. at p. 601, plur. opn. of Brennan, J.) Thus, typical questions calling for biographical information and other booking information, not intended to elicit information for investigatory purposes, are outside of the ambit of *Miranda*, and may not be suppressed on that basis. (*Ibid*.; *People v. Elizalde* (2015) 61 Cal.4th 523, 532-533 (*Elizalde*); see also *People v. Hall* (1988) 199 Cal.App.3d 914, 919-921.) The booking question exception turns on whether or not the questions were "designed to elicit incriminatory admissions" (*Pennsylvania v. Munoz*, *supra*, 496 U.S. at p. 602, fn. 14, plur. opn. of Brennan, J.) or which the booking authority should know are reasonably likely to elicit an incriminating response from the arrestee (*Elizalde*, *supra*, 61 Cal.4th at pp. 535-537).

Thus, the California Supreme Court has held, that un-*Mirandized* questions to someone arrested for murder (a crime frequently committed for the benefit of street gangs) about the arrestee's gang affiliation, even if deemed relevant to the classification and safety of the inmate by the institution, are not admissible in the prosecution's case-in-chief. (*Elizalde*, *supra*, 61 Cal.4th at pp. 538-541; see also *People v. Roberts* (2017) 13 Cal.App.5th 565, 573-576 [un-*Mirandized* gang related booking answers from arrests occurring years before current charged crime still subject to holding in *Elizalde*]; *People v. Lara* (2017) 9 Cal.App.5th 296, 335-336; *People v. Leon* (2016) 243 Cal.App.4th 1003, 1015-1016; distinguish *People v. Williams* (2013) 56 Cal.4th 165, 186-188 [prisoner gave incriminating response when asked why he wanted protective custody]; *People v. Villa-Gomez* (2017) 9 Cal.App.5th 527, 537-538 [intake officer booking defendant on immigration hold could not reasonably anticipate gang affiliation questions would elicit incriminating response as to crime defendant had not yet committed]; *People v. Leon*, *supra*, 243 Cal.App.4th at p. 1016 [inmate approached correctional officers and volunteered his gang status to obtain secure housing]; *People v. Shamblin*, *supra*, 236 Cal.App.4th at pp. 21-23 [booking officer asked arrestee the last time he had been booked as well as neutral follow-up question to inmate's response].)

Nevertheless, "[c]onsistent with our Supreme Court's recent decision in [*Elizalde*], we hold that the routine booking question exception categorically applies to all of the core 'booking questions' enumerated in *Muniz* and authorizes the admission of the defendant's answers to those specific questions into evidence 'without [the need to] assess[ ] th[ose questions'] incriminatory nature on a case-by-case basis.' [Citation.]" (*In re K.W.* (2020) 56 Cal.App.5th 355, 357-358 ["core" booking questions listed as "name, address, height, weight, eye color, date of birth, and current age"].) This holding applies even if an answer to one of these questions supplies an element of the suspected or charged crime. (*Id*. at pp. 361-363.)

1520.9-Prisoners are not necessarily in custody for *Miranda* purposes 4/20

A jailor or prison inmate is not automatically considered in "custody" for *Miranda* purposes. (*People v. Krebs* (2019) 8 Cal.5th 265, 300.) The test is whether there is a sufficient degree of restraint over and above the inmate's ordinary custodial status to trigger the need for *Miranda* warnings. In other words, whether, under the totality of the circumstances, the inmate is exposed to the coercive pressures identified in *Miranda*. (*Ibid*.)

In *Howes v. Fields* (2012) 565 U.S. 499, the United States Supreme Court found "that imprisonment alone is not enough to create a custodial situation with the meaning of *Miranda*." (*Id*. at p. 511.) "In short, standard conditions of confinement and associated restrictions on freedom will not necessarily implicate the same interests that the Court sought to protect when it afforded special safeguards to persons subjected to custodial interrogation. Thus, service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody." (*Id*. at p. 512.) Instead: "When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." (*Id*. at p. 514.) The Court then applied this test to the facts of the case. "Taking into account all of the circumstances of the questioning—including especially the undisputed fact that respondent was told that he was free to end the questioning and to return to his cell—we hold that respondent was not in custody within the meaning of *Miranda*." (*Id*. at p. 517.)

In *Maryland v. Shatzer* (2010) 559 U.S. 98 the High Court was faced with the issue whether returning a sentenced prisoner to the general population after invoking his *Miranda* rights was a break in custody permitting the officers to later recontact him and seek a *Miranda* waiver. The Court held that for *Miranda* purposes there was break in "custody" under these circumstances.

> Here, we are addressing the interim period during which a suspect was not interrogated, but was subject to a baseline set of restraints imposed pursuant to a prior conviction. Without minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.

(*Id*. at p. 113.) In other words, "[t]he 'inherently compelling pressures' of custodial interrogation ended when [Shatzer] returned to his normal life." (*Id*. at p. 114.)

Applying the totality of the circumstances test for whether custodial interrogation has occurred, the California Supreme Court in *Kreps* found that a suspect incarcerated on a pending parole hold that arose from a murder investigation was in custody for *Miranda* purposed when questioned about the murders. (*People v. Krebs*, *supra*, 8 Cal.5th at pp. 300-301.) In contrast, the appellate court in *People v. Fradiue* (2000) 80 Cal.App.4th 15 found no *Miranda* warnings were required, because "no restraints were placed upon defendant to coerce him into participating in the interrogation over and above those normally associated with his inmate status." (*Id*. at p. 21.)

In *People v. Macklem* (2007) 149 Cal.App.4th 674, the defendant was in a jail detention facility awaiting trial for murder when he assaulted another inmate. A jail investigator asked if the defendant was willing to talk to her about the assault. The defendant was brought to the interview room and unhandcuffed. The investigator did not administer *Miranda* right, instead simply telling the defendant he did not have to speak to her and could leave at any time. After an extensive analysis of the applicable case authority:

> We therefore conclude the trial court correctly applied the authorities to determine that a reasonable person in Macklem's position would have realized that he could end the questioning and leave before the end of the interview. It is not dispositive that the conversation here took place at the detention facility, since Macklem was told he could leave the interview room itself at any time and did not have to discuss the issues. [Citation.] Under the totality of the circumstances, he was not in custody for purposes of *Miranda*, the protections of *Miranda* did not apply, and the failure of the detective to give a *Miranda* warning did not make his statements inadmissible.

(*Id*. at p. 696.)

1520.10-*Miranda* inapplicable if custody ends before interrogation begins 12/19

Miranda advisements are required only when a person is subjected to "custodial interrogation." (*Miranda v. Arizona* (1966) 384 U.S. 436, 444; *People v. Davidson* (2013) 221 Cal.App.4th 966, 970.) But if the custodial aspect of the police encounter ends before the interrogation begins no *Miranda* waivers are required.

For example, in *People v. Holloway* (2004) 33 Cal.4th 96, the defendant was handcuffed at his parole office until police detectives officers arrived to talk to him. The detectives explained there had been a mistake. They said they did not intend he be arrested by the parole agent because they only wanted to talk to him. The defendant's handcuffs were removed. The detectives asked the defendant if he would come to the station and he agreed. He was unrestrained in the back of the detective's unmarked car during the drive. The California Supreme Court held, despite his previous handcuffing, that the defendant was not in custody during the ensuing questioning. (*Id*. at pp. 120-121.)

Distinguish *People v. Delgado* (2018) 27 Cal.App.5th 1092 where the defendant, a juvenile, was arrested and brought to the police station because he said he had an outstanding arrest warrant. When it was determined no such warrant existed a detective told the defendant he was free to leave. But one detective took defendant's cell phone and indicated that, although he was free to go, he could not leave until the contents of his cell phone had been downloaded. The appellate court ruled that although the defendant was arrested, then freed, he was again not free to leave when the detective told him the cell phone data extraction had to occur before he could go. (*Id.* at p. 1105.)

1520.11-*Miranda* applies only to interrogation by law enforcement officers 7/20

Miranda applies only to questioning by persons known by the in custody suspect to be law enforcement officials. "*Miranda* protects the Fifth Amendment rights of a suspect faced with the coercive *combination* of custodial status *and* an interrogation *the suspect understands as official*." (*People v. Tate* (2010) 49 Cal.4th 635, 685, italics in original.) Thus, for example, "[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*." (*Illinois v. Perkins* (1990) 496 U.S. 292, 296 (*Perkins*); accord, *People v. Mayfield* (1997) 14 Cal.4th 668, 758 (*Mayfield*).) "Because the dual elements of a police-dominated atmosphere and compulsion are absent when the defendant is unaware that he is speaking to a law enforcement officer, … *Miranda* is inapplicable when the defendant does not know that the person he is talking to is an agent of the police." (*People v. Davis* (2005) 36 Cal.4th 510, 554; see also *People v. Orozco* (2019) 32 Cal.App.5th 802, 814.)

These principles also apply if the undercover agent is a private party, such as a fellow inmate.

> The essential ingredients of a "police-dominated atmosphere" and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. [Citations.] When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking. [Citation.] There is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should be confess.

(*Perkins*, *supra*, 496 U.S. at pp. 296-297; see also *People v. Rodriguez* (2019) 40 Cal.App.5th 194, 198; *People v. Jefferson* (2008) 158 Cal.App.4th 830, 840-841; accord *People v. Orozco*, *supra*, 32 Cal.App.5th 802 [girlfriend and mother of victim]; distinguish *Massiah v. United States* (1964) 377 U.S. 201.) "The fact the person conducting the questioning is a government employee is not a sufficient basis to require *Miranda* warnings. (*People v. Keo* (2019) 40 Cal.App.5th 169, 182 [social worker conducting dependency evaluation of defendant accused of killing the mother of his two children not law enforcement officer or acting as agent of law enforcement].)

> Finally, this rule applies even if the suspect has previously invoked his or her *Miranda* rights. We held in *Mayfield* that the police did not violate *Miranda* when, after the defendant in custody had invoked his right to silence, and thus could not be further interrogated, they allowed his father to discuss the case privately with him, then extracted a report of what was said. We so concluded because " 'defendant's conversations with his own visitors are not the constitutional equivalent of [forbidden] police interrogation.' [Citations.]" (*Mayfield*, *supra*, 14 Cal.4th 668, 758; see also *Arizona v. Mauro* (1987) 481 U.S. 520, 528 [police did not engage in forbidden interrogation, for purposes of *Miranda*, by mere placement of officer in room to observe and tape-record conversation between suspect in custody, who had invoked right to silence, and suspect's wife].)

(*People v Tate*, *supra*, 49 Cal.4th at pp. 685-686; see also *People v. Fayed* (2020) 9 Cal.5th 147, 164-165; *People v. Orozco*, *supra*, 32 Cal.App.5th at pp. 812-817.)

1521.1-Warning need not be in exact form laid out in *Miranda* decision 10/20

" ' "As a prophylactic safeguard to protect a suspect's Fifth Amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda*, required law enforcement agencies to advise a suspect, before any custodial law enforcement questioning, that 'he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." ' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1085-1086.) The High Court has "never insisted that *Miranda* warnings be given in the exact form described in that decision." (*Duckworth v. Eagan* (1989) 492 U.S. 195, 202.) Rather, "[t]he inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.' " (*Id*. at p. 205.) In *Duckworth*, the High Court concluded that the warnings at issue "touched all of the bases required by *Miranda*. The police told respondent that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had 'this right to the advice and presence of a

lawyer even if [he could] not afford to hire one,' and that he had the 'right to stop answering at any time until [he] talked to a lawyer.' " (*Ibid*.; similarly see *People v. Suarez* (2020) 10 Cal.5th 116, 159-160.)

1521.2-*Miranda* does not require informing suspect of crime suspected 10/19

Police officers do not have to inform a suspect of the crimes they intend to talk about in order to obtain a valid *Miranda* waiver. In *Colorado v. Spring* (1987) 479 U.S. 564, the defendant was arrested for a firearms offense and waived his *Miranda* protection, apparently expecting to be questioned about the firearms. But officers asked him about an unrelated murder and the defendant made an admission. The United States Supreme Court held:

> We have held that a valid [*Miranda*] waiver does not require that an individual be informed of all information "useful" in making his decision or all information that "might … [affect] his decision to confess." [Citation.] [We] have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." [Citation.] Here, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature. Accordingly, the failure of the law enforcement officials to inform Spring of the subject matter of the interrogation could not affect Spring's decision to waive his Fifth Amendment privilege in a constitutionally significant manner.

(*Id.* at p. 577, fn. omitted.)

The California Supreme Court has followed *Colorado v. Spring*. (See *People v. Tate* (2010) 49 Cal.4th 635, 683-684; *People v. Wash* (1993) 6 Cal.4th 215, 239; see also *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280-1282 [non-custodial admission voluntary despite failure to tell suspect a criminal investigation was underway].) "There is no requirement that, before a person may validly waive his privilege against self-incrimination, he must be apprised of the evidence against him, the 'severity of his predicament,' or the chances he will be charged. (*People v. Sanders* (1990) 51 Cal.3d 471, 513.)" (*People v. Suff* (2014) 58 Cal.4th 1013, 1070.) The rule is the same even if the police officer deceives the suspect as to the subject matter of the interrogation. (*People v. Molano* (2019) 7 Cal.5th 620, 652-653.)

1522.1-Interrogation must cease if defendant invokes *Miranda* rights at outset 5/20

Custodial interrogation must cease if the suspect indicates before or during questioning that he or she wishes to remain silent or wants an attorney. (*Miranda v. Arizona* (1966) 384 U.S. 436, 473-474; *Davis v. United States* (1994) 512 U.S. 452, 458 (*Davis*).) This is a totality-of-the-circumstances analysis. (*Fare v. Michael C.* (1979) 442 U.S. 707, 724-725.) Whether a suspect has invoked his or her *Miranda* rights at the beginning of the questioning is a subjective test turning on the suspect's state of mind. (*People v. Williams* (2010) 49 Cal.4th 405, 427 (*Williams*).) As to the *Miranda* right to remain silent, for example, "[w]e have observed previously that no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent [citation], and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely. [Citation.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 129.) "But invocations cannot be equivocal or ambiguous." (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1211.)

1522.2-After initial *Miranda* waiver, invocation of rights must be unambiguous 9/20

Unlike the test applicable to determining whether a suspect invoked his or her *Miranda* rights at the beginning of questioning, which focuses on the subjective state of mind of the suspect, the test for determining whether the suspect invoked such rights mid-interrogation is an objective test focusing on how a reasonable officer would have understood the suspect's statement under the circumstances. (*Berghuis v. Thompkins* (2010) 560 U.S 370, 380-382; see also *People v. Nelson* (2012) 53 Cal.4th 367, 376-380 [same rules apply to juveniles].)

> In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect "must unambiguously" assert his right to silence or counsel. [Citation.] It is not enough for a reasonable police officer to understand that the suspect might be invoking his rights. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required under *Miranda* … either to ask clarifying questions or to cease questioning altogether.

(*People v. Stitely* (2005) 35 Cal.4th 514, 535; see also *People v. Henderson* (2020) 9 Cal.5th 1013, 1022; *People v. Case* (2018) 5 Cal.5th 1, 20.) "The focus of the test … is the clarity of the defendant's request, not the particular officer's belief, and there is no requirement that an officer ask clarifying questions." (*People v. Suff* (2014) 58 Cal.4th 1013, 1069.)

1522.3-After initial *Miranda* waiver defendant did not invoke right to remain silent 5/20

"In order to invoke the Fifth Amendment privilege after it has been waived, and in order to halt police questioning after it has begun, the suspect 'must *unambiguously*' assert his right to silence. … [Citation.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 535; see also *People v. Martinez* (2010) 47 Cal.4th 911, 948; *People v. Rundle* (2008) 43 Cal.4th 76, 114; but see *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1420 ["I don't want to answer anymore [sic] questions" was clear invocation of right to silence].) Thus, in the mid-interrogation context:

> "A defendant has not invoked his or her right to silence when the defendant's statements were merely expressions of passing frustration or animosity toward the officers, or amounted only to a refusal to discuss a particular subject covered by the questioning." [Citations.] In our view, the statement italicized above—"I don't want to talk about it"—was an expression of defendant's frustration with [the officer's] failure to accept defendant's repeated insistence that he was not acquainted with the victim as proof that he had not encountered her on the night of the crime, rather than an unambiguous invocation of the right to remain silent. [Citations.] A reasonable officer could interpret defendant's statement as comprising part of his denial of any knowledge concerning the crime or the victim, rather than an effort to terminate the interrogation.

(*People v. Williams* (2010) 49 Cal.4th 405, 433-434; see also *People v. Thomas* (2012) 211 Cal.App.4th 987, 1005-1007 [in context of post-*Miranda* waiver, defendant's statement "I ain't talking no more and we can leave it at that," was ambiguous and equivocal and, thus, not invocation of right to silence]; but see *People v. Villasenor* (2015) 242 Cal.App.4th 42, 62-68 [juvenile's 13 requests to go home in span of 14 minutes should have been treated as post-*Miranda* waiver invocation of the right to silence].)

1522.4-After initial *Miranda* waiver defendant did not invoke right to counsel 9/20

Whether a suspect who has already waived his or her *Miranda* rights has made a valid mid-interrogation request for counsel is an objective test focusing on how a reasonable officer would have understood the suspect's statement under the circumstances. (*Davis v. United States* (1994) 512 U.S. 452, 459 (*Davis*); *People v. Williams* (2010) 49 Cal.4th 405, 427 (*Williams*).)

> The question whether a suspect has waived the right to counsel with sufficient clarity prior to the commencement of interrogation is a separate inquiry from the question whether, *subsequent* to a valid waiver, he or she effectively has invoked the right to counsel. (*Smith v. Illinois* (1984) 469 U.S. 91, 98 [analyzing a defendant's responses to an initial *Miranda* advisement]; *People v. Martinez* (2010) 47 Cal.4th 911, 951.) It is settled that in the latter circumstance, after a knowing and voluntary waiver, interrogation may proceed "until and unless the suspect *clearly* requests an attorney." (*Davis* [*supra*] 512 U.S. 452, 461, italics added.) Indeed, officers may, but are *not required* to, seek clarification of ambiguous responses before continuing substantive interrogation. (*Id*. at p. 459.)

(*Williams*, *supra*, 49 Cal. 4th at p. 427, italics in original.) In short: "It is settled that … after a knowing and voluntary waiver, interrogation may proceed 'until and unless the suspect *clearly* requests an attorney.' [Citation.]" (*People v. Sanchez* (2019) 7 Cal.5th 14, 49.)

In *Davis*, in determining that a suspect's remark to Naval Investigative Service agents—"Maybe I should talk to a lawyer"—was not a request for counsel, the United States Supreme Court has held that a suspect must unambiguously request counsel. "If the suspect's statement is not an unambiguous or unequivocal request for counsel the officers have no obligation to stop questioning him." (*Davis*, *supra*, 512 U.S. at pp. 461-462.) The High Court explained:

> As we have observed, "a statement either is such an assertion of the right to counsel or it is not." [Citation.] Although a suspect need not "speak with the discrimination of an Oxford don [ ]"…, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* [*v. Arizona* (1981) 451 U.S. 477] does not require that the officers stop questioning the suspect. [Citation.] … [¶] We decline petitioner's invitation to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. [Citation.]

(*Davis*, *supra*, at p. 459.) "[W]e are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue." (*Id*. at p. 462.)

Accordingly, "[o]nce the defendant has waived his or her right to counsel, … if the defendant has a change of heart, he or she must invoke the right to counsel unambiguously before the authorities are required to cease the questioning." (*Williams*, *supra*, 49 Cal.4th at p. 432, italics in original; see also *People v. Molano* (2019) 7 Cal.5th 620, 658- 660 ["I would feel more comfortable taking to a lawyer" not clear assertion of right to counsel]; *People v. Cunningham* (2015) 61 Cal.4th 609, 647 ["Should I have somebody here talking to me" not invocation]; *People v. McCurdy* (2014) 59 Cal.4th 1063, 1087 ["A reasonable officer in these circumstances could have concluded that defendant was expressing the abstract idea an attorney might be in his best interest, but he did not actually request one."]; *People v. Bacon* (2010) 50 Cal.4th 1082, 1104-1107 ["I think it'd probably be a good idea for me to get an attorney" was not invocation]; *People v. Johnson* (2019) 32

Cal.App.5th 26, 57 ["Because [defendant's] speech patterns, specifically his habit of stating "yeah, yeah" in response to most of the questions [the officers] asked, it was reasonable for the officers to understand only that [defendant] might be invoking his right to assistance of counsel and to seek further clarification."]; *People v. Shamblin* (2015) 236 Cal.app.4th 1, 19-20 ["I think I probably should change my mind about the lawyer now. … I think I need some advice here" is conditional and equivocal]; but see *People v. Henderson* (2020) 9 Cal.5th 1013, 1023 ["[I] want to, speak to an attorney first" was clear invocation of right to counsel].)

Similarly, "a defendant does not unambiguously invoke his right to counsel when he makes that request contingent on an event that has not occurred. (See *People v. Gonzalez* (2005) 34 Cal.4th 1111 [defendant's request for counsel was conditioned on whether he was going to be charged with any crimes].)" (*People v. Martinez* (2010) 47 Cal.4th 911, 952.)

Finally, sometimes a suspect will ask how long he or she would have to wait for an attorney before being questioned. This is not considered an invocation of the right to counsel. Keeping in mind that law enforcement is not required to have an attorney on call for purpose of custodial interrogations (*People v. Smith* (2007) 40 Cal.4th 483, 503; *People v. Bradford* (1997) 14 Cal.4th 1005, 1045-1046), the officer can appropriately respond with an accurate estimate as the length of the delay, and the suspect's subsequent decision to forgo the wait and answer questions without an attorney constitutes a knowing, intelligent and voluntary *Miranda* waiver. (*Williams*, *supra*, 49 Cal.4th at p. 429.)

1522.5-Defendant's youth is a factor in determining if *Miranda* rights invoked 5/20

One of the circumstances that is factored into the *Miranda* waiver analysis is the suspect's youth. (*People v. Nelson* (2012) 53 Cal.4th 367, 376-380.) And in the post-*Miranda* waiver context, "once a juvenile suspect has made a valid waiver of the *Miranda* rights, any subsequent assertion of the right to counsel or right to silence during questioning must be articulated sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be an invocation of such rights. (*Id*. at pp. 379-380.) For example, "this analysis requires consideration of whether a reasonable officer in light of the circumstances known to the officer, or that would have been objectively apparent to a reasonable officer, including the juvenile's age, would understand the statement by the juvenile to be a request for an attorney." (*In re Art T.* (2015) 234 Cal.App.4th 335, 355 ["Could I have an attorney?" was post-waiver invocation of right to counsel by 13-year-old].) And a juvenile's request to speak to a parent should not automatically be treated as an invocation of his or her *Miranda* rights (*People v. Nelson*, *supra*, 53 Cal.4th at p. 381; *People v. Lessie* (2010) 47 Cal.4th 1152, 1168.)

1522.6-Defendant cannot invoke *Miranda* rights before custodial interrogation 5/20

"[T]he special procedural safeguards outlined in *Miranda* [*Miranda v. Arizona* (1966) 384 U.S. 436] are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300.) "We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation' … ." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 182, fn. 3; see also *Bobby v. Dixon* (2011) 565 U.S. 23, 28; *Montejo v. Louisiana* (2009) 556 U.S. 778, 797.) A suspect's attempt to invoke his or her *Miranda* rights must be done while the suspect is in custody and interrogation is pending or imminent. (*People v. Buskirk* (2009) 175 Cal.App.4th 1436, 1448.)

"Although a defendant is not required to wait until a formal *Miranda* admonition before invoking the right to counsel, the circumstances must be such that the custodial defendant could reasonably conclude that interrogation is pending or imminent [citation] and that a reasonable officer would know that the defendant's request for counsel was unequivocal for purposes of the interrogation [citation]." (*Id*. at pp. 1448-1449.)

Thus, an anticipatory request for counsel outside the context of custodial interrogation is ineffective to foreclose subsequent custodial interrogation. (*People v. Buskirk*, *supra*, 175 Cal.App.4th at pp. 1448-1550; *People v. Nguyen* (2005) 132 Cal.App.4th 350, 356-357; see also *People v. Beltran* (1999) 75 Cal.App.4th 425, 432; *People v. Calderon* (1997) 54 Cal.App.4th 766, 770-771.) "Simply stated, the *Miranda* rights cannot be invoked except during the custodial interrogation against which they are being asserted. (*People v. Avila* (1999) 75 Cal.App.4th 416, 422.)

Similarly, a suspect's request for representation at an arraignment or a lineup, rather than during interrogation, is inadequate to invoke the right to counsel for purposes of the *Edwards* rule. (*People v. Morris* (1991) 53 Cal.3d 152, 201-202; *People v. Lispier* (1992) 4 Cal.App.4th 1317, 1324-1326; see also *Montejo v. Louisiana*, *supra*, 556 U.S. 778.

1523.1-General rules for valid *Miranda* waiver 4/20

The basic rules regarding the waiver of a suspect's *Miranda* rights are established.

> … *Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. [Citation.] After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. [Citation.] Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. [Citation.] Critically, however, a suspect can waive these rights. [Citation.] To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the "high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst* [(1938)] 304 U.S. 458." [Citation.]

(*Maryland v. Shatzer* (2010) 559 U.S. 98, 103-104; see also *People v. Williams* (2010) 49 Cal.4th 405, 425.) "To be valid, a *Miranda* 'waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" [citation], and knowing in the sense that it was "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." [Citation.]' (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 219.)" (*People v. Jones* (2017) 7 Cal.App.5th 787, 809.)

> "The prosecution bears the burden of demonstrating the validity of the defendant's waiver by a preponderance of the evidence." (*People v. Dykes* (2009) 46 Cal.4th 731, 751; see *Berghuis v. Thompkins* (2010) 560 U.S. 370.) In addition, "[a]lthough there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the *Miranda* waiver was [voluntary,] knowing[,] and intelligent under the totality of the circumstances surrounding the interrogation." (*People v. Cruz* (2008) 44 Cal.4th 636, 668.) On appeal, we conduct an independent review of the trial court's legal determination and rely upon the trial court's findings on disputed facts if supported by substantial evidence. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 751.)

(*People v. Williams*, *supra*, 49 Cal.4th at p. 425; see also *People v. Leon* (2020) 8 Cal.5th 831, 843.)

1523.2-*Miranda* waiver may be express or implied 8/17

Custodial interrogation must cease if the suspect indicates before or during questioning that he or she wishes to remain silent or wants an attorney. (*Miranda v. Arizona* (1966) 384 U.S. 436, 473-474; *Davis v. United States* (1994) 512 U.S. 452, 458.) This duty to cease interrogation, however, commences only upon the initial indication that the suspect wishes to exercise one's Fifth or Sixth Amendment rights. If the suspect is willing to discuss the case fully with the police officer after having been taken into custody and advised of *Miranda* rights, there is no constitutional inhibition to continued questioning. (*Davis v. United States*, *supra*.)

Thus, a finding of waiver of rights is justified when a suspect, after being admonished and affirming an understanding of the admonition, proceeds to answer questions even without an express waiver of rights. (*North Carolina v. Butler* (1979) 441 U.S. 369, 375-376 & fn. 6; *People v. Sully* (1991) 53 Cal.3d 1195, 1233 ["Asked if he understood his rights, defendant, a former police officer, responded, 'Yes, I do'."]; see also *People v. Whitson* (1998) 17 Cal.4th 229, 245-248.) "[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police." (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 388-389.) "Once the defendant has been informed of his rights, and indicates that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them." (*People v. Sully*, *supra*, at p. 1233.)

> *Miranda* makes clear that in order for defendant's statements to be admissible against him, he must have knowingly and intelligently waived his rights to remain silent, and to the presence and assistance of counsel. [Citation.] [¶] It is further settled, however, that a suspect who desires to waive his *Miranda* rights and submit to interrogation by law enforcement authorities need not do so with any particular words or phrases. A valid waiver need not be of predetermined form, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision. [Citation.] We have recognized that a valid waiver of *Miranda* rights may be express or implied. [Citations.] A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citations.] In contrast, an unambiguous request for counsel or refusal to talk bars further questioning. [Citation.] [¶] Although there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the *Miranda* waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation. [Citations.]

(*People v. Cruz* (2008) 44 Cal.4th 636, 667; see also *People v. Parker* (2017) 2 Cal.5th 1184, 1216; *People v. Johnson* (2010) 183 Cal.App.4th 253, 293.) "[T]he United States Supreme Court has repeatedly explained that if a suspect makes a noncoerced decision to speak with the authorities with knowledge of the rights to remain mute and counsel, the ensuing statement is admissible as a matter of law." (*People v. Rios* (2009) 179 Cal.App.4th 491, 505.)

1523.3-Clarifying ambiguous *Miranda* invocation proper 7/20

In deciding whether a suspect has invoked the *Miranda* protections, the courts hold that the attitude of the individual must be such as to show a *present* lack of willingness to discuss the case with the police, or the unambiguous desire for the assistance of counsel. (*Davis v. United States* (1994) 512 U.S. 452, 458-461 (*Davis*); *People v. Burton* (1971) 6 Cal.3d 375, 382.) Nothing in *Miranda* precludes the police from clarifying with suspects whether they understand the constitutional rights within the *Miranda* warning and whether by their answers they intend to either waive or invoke them. (*People v. Wash* (1993) 6 Cal.4th 215, 238-239; *In re Brian W.* (1981) 125 Cal.App.3d 590, 599-600.) Indeed, in *Davis*, *supra*, 512 U.S. 452, the United States Supreme Court expressly approved officers clarifying whether or not suspects are invoking their *Miranda* rights. Clarifying questions both protects a suspect's rights and minimizes the chance of a confession being suppressed by a court second-guessing the meaning of a suspect's equivocal statements. (*Id.* at p. 461.)

"It is just as important for police to make certain a suspect means what he says in his answer which asserts his rights as it is to ascertain if he understands the questions sufficiently to knowingly and intelligently waive those rights." (*In re Brian W.*, *supra*, 125 Cal.App.3d at p. 600.) Unambiguous assertion of rights, however, eliminates any justification for clarifying questions and questioning must cease. (*Davis*, *supra*, 512 U.S. at p. 459; *People v. Smith* (1995) 31 Cal.App.4th 1185, 1190-1191.) Statements such as "Maybe I ought to talk to my lawyer," "[I] might want to talk to a lawyer," "maybe I should talk to an attorney before making a further statement," and "[t]here wouldn't be [an attorney] running around here, would there?," however, are not considered clear invocations of the *Miranda* right to counsel requiring the officers to immediately cease questioning. Instead they are considered ambiguous or equivocal, thus permitting officers to ask the suspect for clarification of his or her intention to assert the right to counsel. (*Davis*, *supra*, 512 U.S. at p. 455; *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 206-207; *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 153-155.)

There are different rules, however, for clarifying ambiguous statements by suspects made during the initial *Miranda* inquiry versus mid-interrogation after a valid *Miranda* waiver. (*People v. Duff* (2014) 58 Cal.4th 527, 553; *People v. Williams* (2010) 49 Cal.4th 405, 427.) In the post-waiver context, although they may do so, officers are not required to ask clarifying questions. (*People v. Flores* (2020) 9 Cal.5th 371, 417; *People v. Williams*, *supra*, 49 Cal.4th at p. 427; *People v. Crittenden* (1994) 9 Cal.4th 83, 130, fn. 7.) In this context, when a suspect ambiguously or equivocally attempts to invokes a *Miranda* right, officers may continue questioning—they need not cease questioning immediately. "If the suspect's statement is not an unambiguous or unequivocal request for counsel the officers have no obligation to stop questioning him." (*Davis*, *supra*, 512 U.S. at pp. 461-462.) In contrast, in a pre-*Miranda* waiver context, the California Supreme Court has never held, but only "occasionally implied," that that an officer not only may, but must, clarify the suspect's expressed uncertainty before initiating substantive questioning. (*People v. Duff*, *supra*, 58 Cal.4th at pp. 553-554 [dicta because court held detective indeed made adequate inquiries to clarify defendant's remark, "Sometimes they say—it's better if I have a—a lawyer"].)

1523.4-Present willingness to talk is waiver despite request for attorney in future 1/10

In deciding whether a suspect has invoked *Miranda* protection, the appellate courts hold that the attitude of the individual must be such as to show a *present* lack of willingness to discuss the case with the police. (*People v. Burton* (1971) 6 Cal.3d 375, 382.) Hence, a defendant who expresses a willingness to be interviewed has waived *Miranda* protection even while stating a desire for counsel at some later time. "A desire to have an attorney in the future, coupled with an unambiguous willingness to talk in the meantime, is not an invocation of the right to counsel requiring a cessation of the interview." (*People v. Clark* (1992) 3 Cal.4th 41, 121; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 994; *People v. Turnage* (1975) 45 Cal.App.3d 201, 211 and fn. 5.) Similarly, a suspect who waived his rights but asked if he could talk to the officer later was not undecided about whether to talk to the officer, only when to do so. Questioning 30 minutes later was held proper. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 712-713.) Cases also hold that a suspect has not invoked *Miranda* by selectively refusing to talk about certain subjects, to demonstrate how an event occurred, to take a polygraph test, to allow an interview to be tape-recorded. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238-1240; *People v. Samayoa* (1997) 15 Cal.4th 795, 828-830; *People v. Hurd* (1998) 62 Cal.App.4th 1084, 1090-1091.)

1524.1-*Miranda* waiver valid despite mental impairment from drugs or alcohol 1/10

In the context of interrogation, the Fifth Amendment privilege against self-incrimination and the admonition required by *Miranda v. Arizona* (1966) 384 U.S. 436 protects a suspect only from overreaching by police. "Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 (*Connelly*); see also *People v. Haskett* (1990) 52 Cal.3d 210, 244.) "[T]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.' " (*Colorado*, *supra*, at p. 170.) Thus, where officers give appropriate *Miranda* warnings and obtain a waiver, the suspect's mental condition is insufficient to render any statement made involuntary. The admission of statements from a suspect who is disoriented from the ingestion of drugs or alcohol does not violate the Fifth Amendment in the absence of police coercion. In short, a suspect does not have a right to confess only when totally rational and properly motivated. (*Id.* at pp. 165-167.) "The law is clear that to have suppressed the statements, petitioner would have had to show that his reasoning was in fact so impaired that he was incapable of free or rational choice." (*People v. Mayfield* (1993) 5 Cal.4th 142, 204.)

In *People v. Cox* (1990) 221 Cal.App.3d 980, the appellate court rejected earlier California decisions holding statements inadmissible solely because of the defendant's defective mental state, in favor of *Connelly* as required by the truth-in-evidence provisions of Proposition 8. (Cal. Const., art. I, § 28, subd. (f)(2).) The older cases set a higher standard of constitutional admissibility than required by federal law and, thus, were no longer valid authority. (*People v. Cox*, *supra*, at pp. 986-987; see also *People v. Markham* (1989) 49 Cal.3d 63, 68.)

1524.2-*Miranda* waiver valid despite youth or mental impairment 4/20

In the context of interrogation, the Fifth Amendment privilege against self-incrimination and the admonition required by *Miranda v. Arizona* (1966) 384 U.S. 436 protects a suspect only from overreaching by police. "Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 (*Connelly*); see also *People v. Haskett* (1990) 52 Cal.3d 210, 244.) "[T]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.' " (*Connelly*, *supra*, at p. 170.) Thus, where officers give appropriate *Miranda* warnings and obtain a waiver, the suspect's mental condition is insufficient to render any statement made involuntary. In short, a suspect does not have a right to confess only when totally rational and properly motivated. (*Id.* at pp. 165-167.) "The law is clear that to have suppressed the statements, petitioner would have had to show that his reasoning was in fact so impaired that he was incapable of free or rational choice." (*People v. Mayfield* (1993) 5 Cal.4th 142, 204.)

Thus, merely because a suspect is young or has a borderline I.Q. does not compel the conclusion that the person is incapable of intelligently making a *Miranda* waiver. (*In re Brian W.* (1981) 125 Cal.App.3d 590.) Similarly, the presence of a mental defect does not automatically render a defendant incapable of understanding and waiving constitutional rights. (*People v. Watson* (1977) 75 Cal.App.3d 384, 397.) The totality of the circumstances must be considered. (*Id.* at p. 396.)

"When a juvenile's waiver is at issue, consideration must be given to factors such as 'the juvenile's age, experience, education, background, and intelligence, and ... whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.' [Citations.]" (*People v. Nelson* (2012) 53 Cal.4th 367, 375; see also *In re M.S.* (2019) 32 Cal.App.5th 1177, 1189; *People v. Jones* (2017) 7 Cal.App.5th 787, 809.) Similarly:

> To determine whether a minor's confession is voluntary, a court must look at the totality of circumstances, including the minor's age, intelligence, education, experience, and capacity to understand the meaning and consequences of the given statement. [Citations.] 'The decision to confess cannot be of itself an indicium of involuntariness in the complete absence of coercive circumstances.' [Citation.] A court should look at whether the minor 'was exposed to any form of coercion, threats, or promises of any kind, trickery or intimidation, or that he was questioned or prompted by … anyone else to change his mind.' [Citation.]

(*People v. Lewis* (2001) 26 Cal.4th 334, 383; see also *Fare v. Michael C.* (1979) 442 U.S. 707, 724-725, *People v. Jones*, *supra*,7 Cal.App.5th at p. 810.) Another factor is whether the officer complied with Welfare and Institutions Code section 625.6, subdivision (a), regarding the youth's right to consult with an attorney prior to waiving his or her *Miranda* rights. (*In re Anthony L.* (2019) 43 Cal.App.5th 438, 448-450.)

In *In re Norman H.* (1976) 64 Cal.App.3d 997, for example, the appellate court upheld the determination that a 15-year-old boy with an I.Q. of 47 had voluntarily waived his *Miranda* rights. The court held:

> *Neither a low I.Q. nor any particular age of minority is a proper basis to assume lack of understanding, incompetency, or other inability to voluntarily waive the right to remain silent under some presumption that the Miranda explanation was not understood*. The 'knowing' element of the waiver of the *Miranda* rights can be so misconstrued and extended to such a degree that it would prevent the use of voluntary statements made to the police without any violation of their duty to advise a defendant.

(*Id.* at p. 1003, italics added; see also *In re Joseph H* (2015) 237 Cal.App.4th 517, 533-535 [10-year-old boy]; distinguish *In re T.F.* (2017) 16 Cal.App.4th 202 [police interrogation was coercive]; *In re Elias V.*(2015) 237 Cal.App.4th 568 [same].)

1525.1-Invoking *Miranda* right to silence may not bar later interrogation 11/18

Generally a police officer must end custodial interrogation when the suspect invokes a *Miranda* right. But when the suspect invokes the *Miranda* right to remain silent, rather than the *Miranda* right to counsel, another officer can approach the suspect after passage of a "significant" period of time of scrupulously honoring the suspect's right of silence, give a fresh set of *Miranda* warnings, obtain a waiver, and interrogate the suspect about a *different* crime. (*McNeil v. Wisconsin* (1991) 501 U.S. 171; *Michigan v. Mosley* (1975) 423 U.S. 96; *People v. Lispier* (1992) 4 Cal.App.4th 1317.) As little as two hours between interrogations may be a "significant" period of time. (*Michigan v. Mosley*, *supra*.)

1525.2-Invoking *Miranda* right to counsel may not bar later interrogation 1/16

Generally a police officer must end custodial interrogation when the suspect invokes a *Miranda* right. Under *Edwards v. Arizona* (1981) 451 U.S. 477 (*Edwards*), when the suspect specifically invokes the *Miranda* right to an attorney, the officer can no longer question the suspect about *any* crime while the suspect remains in custody until counsel is present or the suspect initiates further communication. (See also *Arizona v. Roberson* (1988) 486 U.S. 675.) By invoking the right to an attorney, the suspect has expressed the desire to deal with the police only through counsel. (*Edwards*, *supra*, at pp. 484-485; *Minnick v. Mississippi* (1990) 498 U.S. 146, 154.)

Nevertheless, invoking the *Miranda* right to counsel does not immunize the suspect from all future police questioning even about the same crime. The *Edwards* rule does not prevent the police from recontacting the suspect "after a break in custody which gives the suspect reasonable time and opportunity, while free from coercive custodial pressure, to consult counsel if he or she wishes to do so." (*People v. Storm* (2002) 28 Cal.4th 1007, 1024-1025, italics in original deleted.)

The United States Supreme Court affirmed this principle in *Maryland v. Shatzer* (2010) 559 U.S. 98 but created a bright-line 14 day time frame for when police may recontact a suspect after a break in custody. "The only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects." (*Id*. at p. 108.)

> We think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption "will not reach the correct result most of the time." [Citation.] It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.

(*Id*. at p. 110.) The High Court explained the rationale for this rule:

> When … a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely. In these circumstances, it is far fetched to think that a police officer's asking the suspect whether he would like to waive his *Miranda* rights will any more "wear down the accused,"[citation] than did the first such request at the original attempted interrogation-which is of course not deemed coercive. His change of heart is less likely attributable to "badgering" than it is to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest. Uncritical extension of *Edwards* to this situation would not significantly increase the number of genuinely coerced confessions excluded.

(*Id*. at pp. 107-108, fns. omitted; see also *People v. Bridgeford* (2015) 241 Cal.App.4th 887, 900-903.)

1525.3-Break in interrogation does not require new *Miranda* warning 10/20

It is well-established that an officer need not fully advise a suspect of his or her *Miranda* rights at each interview if there has been a complete advisement and waiver previously. (*People v. Johnson* (1973) 32 Cal.App.3d 988, 997.) The basic test is whether the interrogation is "reasonably contemporaneous" with the previous admonition and waiver. (*People v. Jackson* (2016) 1 Cal.5th 269, 341; *People v. Duff* (2014) 58 Cal.4th 527, 555; *People v. Smith* (2007) 40 Cal.4th 483, 504.)

"The courts examine the totality of the circumstances, including the amount of time that has passed since the waiver, any change in identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights." (*People v. Mickle* (1991) 54 Cal.3d 140, 170; see also *People v. Smith*, *supra*, 40 Cal.4th at p. 504.)

The appellate courts have held that it is unnecessary to readvise the suspect of the *Miranda* warnings when the gap between the original waiver and the subsequent interview is short. (*People v. Suarez* (2020) 10 Cal.5th 116, 162 [13-14 hour gap]; *People v. Spencer* (2018) 5 Cal.5th 642, 668-670 [4 hours] *People v. Pearson* (2012) 53 Cal.4th 306, 317 [27 hours]; *People v. Williams* (2010) 49 Cal.4th 405, 434-435 [40 hours]; *People v. Smith*, *supra*, 40 Cal.4th at pp. 504-505 [12 hours]; *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1972 [9 hours]; *People v. Inman* (1969) 274 Cal.App.2d 704, 707-708 [10 hours]; *People v. Sievers* (1967) 255 Cal.App.2d 34, 37-38 [next day].)

When there is a longer lapse of time since the full advisement and waiver it is certainly preferable for the subsequent interview to be prefaced with a general reminder or partial admonition. (*People v. McGowan* (1980) 105 Cal.App.3d 997, 1004 [2-day gap and defendant said further *Miranda* warnings unnecessary]; *People v. Booker* (1977) 69 Cal.App.3d 654, 665 [3-day gap]; *People v. McFadden* (1970) 4 Cal.App.3d 672, 687 [1-day gap]; *People v. Brockman* (1969) 2 Cal.App.3d 1002, 1006 [2-day gap].)

In contrast, a different police officer or agent contacting a suspect without a fresh *Miranda* advisement or a reminder of the rights after a significant period of time has passed is generally unacceptable. (*People v. Quirk* (1982) 129 Cal.App.3d 618, 632 [police psychiatrist contacted suspect after 3 days]; *People v. Bennett* (1976) 58 Cal.App.3d 230, 238 [police psychiatrist contacted suspect after 6 weeks].)

1525.4-Prior *Miranda* violation does not taint later warned confession 5/20

In *Oregon v. Elstad* (1985) 470 U.S. 298 (*Elstad*) the United States Supreme Court held that voluntary admissions made after the defendant was fully advised of and waived his *Miranda* rights were not the poisoned fruit of an earlier, brief, unwarned, but otherwise voluntary, statement. The High Court reiterated that statements taken in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 are presumed to have been compelled, and thus are inadmissible in the prosecution's case-in-chief. But they are not necessarily involuntary under the Constitution. The only "taint" that attaches to an unwarned, but otherwise voluntary, statement is the failure to comply with judicially created *Miranda* procedure. A subsequent statement that has been preceded by a proper and effective *Miranda* admonition and waiver can dispel any presumptive taint from the prior unwarned statement.

> If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free fill, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

(*Elstad*, *supra*, at p. 309; see also *Dickerson v. United States* (2000) 530 U.S. 428, 441.)

The court also refused to bestow any constitutional significance to the psychological impact of the prior unwarned, but voluntary, statement. "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." (*Oregon v. Elstad*, *supra*, 470 U.S. at p. 312; similarly, see *People v. Lewis* (1990) 50 Cal.3d 262, 275-276.)

California courts follow *Elstad*. (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1368.)

> Even when a first statement is taken in the absence of proper advisements and is incriminating, so long as the first statement was voluntary a subsequent voluntary confession ordinarily is not tainted simply because it was procured after a *Miranda* violation. Absent "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," a *Miranda* violation—even one resulting in the defendant's letting "the cat out of the bag"—does not "so taint[] the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." (*Oregon v. Elstad* (1985) 470 U.S. 298, 309, 311; see also *People v. Storm* (2002) 28 Cal.4th 1007, 1033.) Rather "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also

voluntarily made." (*Oregon v. Elstad*, *supra*, 470 U.S. at p. 318, fn. omitted; see also *People v. San Nicolas* (2004) 34 Cal.4th 614, 639 [" 'A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.' "].) This is not a case in which it is alleged that the officers were following a policy of disregarding the teaching of *Miranda*. [Citation.]

(*People v. Williams* (2010) 49 Cal.4th 405, 448; see also *People v. Young* (2019) 7 Cal.5th 905, 924; *People v. Scott* (2011) 52 Cal.4th 452, 477.)

The *Elstad* rule applies whether the earlier *Miranda* violation involved the privilege against self-incrimination or the right to counsel. (*People v. Storm*, *supra*, 28 Cal.4th at pp. 1031-1034; *People v. Bradford* (1997) 14 Cal.4th 1005, 1039-1040.) And the subsequent voluntary statement need not be preceded by a *Miranda* warning and waiver if it is taken in a non-custodial or non-interrogation settings. (*People v. Storm, supra,* 28 Cal.4th at pp. 1037-1038 [non-custodial]; *People v. Orozco* (2019) 32 Cal.App.5th 802, 817-818 [non-interrogation].)

1525.5-Taint may extend to second statement if officers deliberately violate *Miranda* 5/20

The *Elstad* rule (*Oregon v. Elstad* (1985) 470 U.S. 298) does not countenance officers employing a two-stage interrogation technique—withholding *Miranda* warnings until after questioning has elicited a confession, then reiterating the confession after giving *Miranda* warnings and securing a waiver. (*Missouri v. Seibert* (2004) 542 U.S. 600.) With consecutive confessions the threshold question is "whether in the circumstances the *Miranda* warnings given could be found effective." (*Id.* at p. 655, fn. 4.) If so, admissibility depends simply on whether there was a voluntary waiver of the *Miranda* rights and a voluntary statement. (*Ibid*.; see also *Bobby v. Dixon* (2011) 565 U.S. 23, 28-33.) If not, "the subsequent statement is inadmissible for want of adequate *Miranda* warnings, because the earlier and later statements are realistically seen as parts of a single, unwarned sequence of questioning." (*Missouri v. Seibert*, *supra*, 542 U.S. at p. 655, fn. 4; see *People v. Young* (2019) 7 Cal.5th 905, 925-925 [explaining different rationales used by plurality and concurring justices].) The court first must make a factual finding whether or not the officer deliberately used such a two-step interrogation technique. (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1370-1371.) If so, additional curative steps need to occur to make the subsequent *Miranda* waiver statements admissible, such as a longer waiting period before the reinterview or informing the suspect that the previous incriminating statements are likely not going to be admissible against them. (*Id*. at pp. 1369-1370.)

1526.1-*Miranda* not applicable to volunteered statements 10/09

Any statements made by the defendant spontaneously and not in response to questioning are admissible despite the lack of prior *Miranda* advisement or a previous invocation of the *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436, 478; *People v. Hayes* (1985) 169 Cal.App.3d 898.) This rule applies even if the spontaneous statements are made while being advised of the *Miranda* rights. (*People v. Villarreal* (1985) 167 Cal.App.3d 450.)

Even when a defendant has given a previous voluntary statement without a *Miranda* advisement, or despite an invocation of *Miranda* rights, a subsequent volunteered statement will be admissible. (*People v. Torres* (1989) 213 Cal.App.3d 1248.)

Application of these principles is illustrated by *People v. Davis* (2005) 36 Cal.4th 510. The defendant in *Davis* had previously invoked his *Miranda* rights when the detective made a false statement implying the police had evidence linking him to the crime. The detective then left the defendant alone his accomplice cellmates. The defendant made incriminating statements which were surreptitiously recorded. The California Supreme Court held the statements admissible despite the detective's prior illegal action (characterized as the functional equivalent of interrogation), because they were made voluntarily to a third party. (*Id*. at p. 555.) "Viewing the situation from defendant's perspective [citations], when he made these statements to his cellmates there was no longer a coercive, police-dominated atmosphere, and no official compulsion for him to speak. Thus, the admission of defendant's incriminating statements made after [the detective] left the cell did not violate his rights under *Miranda*." (*Ibid*.; see also *People v. Jefferson* (2005) 158 Cal.App.4th 830, 840-841.)

1526.2-Suspects may be questioned after invocation when they initiate contact 10/19

There is no question that a suspect's invocation of the right to silence or to an attorney must be honored and that all interrogation must cease. (*Miranda v. Arizona* (1966) 384 U.S. 436, 474 (*Miranda*); *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 (*Edwards*).) But *Miranda* and its progeny do not forbid renewed questioning about a crime after a suspect invokes these rights where the initiative for the conversation comes from the suspect rather than from an officer's renewed attempt to interrogate.

> In *Edwards v. Arizona*, *supra*, 451 U.S. 477, the United States Supreme Court laid down a "prophylactic rule" (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 (plur. opn.)) to implement *Miranda*: "an accused, … having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (451 U.S. at pp. 484-485.) An accused "initiates" such dialogue when he speaks words or engages in conduct that can be "fairly said to represent a desire" on his part "to open up a more generalized discussion relating directly or indirectly to the investigation." (*Oregon v. Bradshaw*, *supra*, 462 U.S. at p. 1045 (plur. opn.).) In the event he does in fact "initiate" dialogue, the police may commence interrogation if he validly waives his rights. (*Id*. at p. 1046 (plur. opn.); *Edwards v. Arizona*, *supra*, 451 U.S. at p. 486, fn. 9.)

(*People v. Mickey* (1991) 54 Cal.3d 612, 648 -649 (*Mickey*); see also *People v. Waidla* (2000) 22 Cal.4th 690, 727.) The scope of the renewed interrogation encompasses all offenses, not just the particular offense that is the subject of the reinitiated contact, unless the suspect so limits it. (*People v. Turner* (2012) 54 Cal.4th 908, 926-928.)

The suspect does not also have to initiate the encounter leading to renewed dialogue. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 732.) Instead, the test is "whether, under the totality of the circumstances, there was 'the requisite coercive activity by the state or its agents and the necessary causal connection between any such activity and the statements in question.' (*Mickey*, *supra*, 54 Cal.3d at p. 651.)" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 643.) The burden is on the prosecution to show by a preponderance of evidence both that the defendant reinitiated the discussion and that he or she knowingly and intelligently waived the right he or she had invoked. (*People v. Molano* (2019) 7 Cal.5th 620, 654, 661; *People v. Gamache* (2010) 48 Cal.4th 347, 385.)

How minimal the action by a defendant may be to initiate an interview was demonstrated in *Oregon v. Bradshaw*, *supra*, 462 U.S. 1039. There, a suspect in the death of a minor was asked to come to the station and was advised of his *Miranda* rights. After denying involvement in the crime, he was placed under arrest. As the questioning continued, he asserted his right to counsel. The interview was stopped, and he was transported to jail. Along the way, the suspect asked, "Well, what is going to happen to me now?" The officer reminded the suspect of his right to silence, reminded him of his demand for counsel, and that any discussion must be of his own free will. The suspect said he understood and there followed a discussion of the offense. The officer suggested a polygraph examination and the suspect agreed. During the examination, which was done on the following day, the suspect changed his story and admitted responsibility for the death. The United States Supreme Court emphasized the rule announced in *Edwards*, that further questioning could not take place once an accused asserted the right to counsel, " '*unless the accused himself initiates further communication, exchanges, or conversations with the police*.' " (*Id.* at p. 1043, italics added; citing *Edwards, supra,* 451 U.S. at p. 485.) The High Court explained that analysis of the issue requires a two-step process, "and clarity of application is not gained by melding them together." (*Oregon v. Bradshaw*, *supra*, 462 U.S. at p. 1045.) The first inquiry is whether the defendant initiated further conversation. The court held the suspect's question about what would happen to him was sufficient to initiate further conversation. The second inquiry is whether there was thereafter a valid waiver of *Miranda* rights, and whether the waiver was knowingly and voluntarily made under the totality of the circumstances. The court upheld the lower court ruling that there had, in fact, been a waiver. (*Id*. at pp. 1043-1046; similarly, see *People v. Gamache*, *supra*, 48 Cal.4th at pp. 384-387; see also *People v. Hensley* (2014) 59 Cal.4th 788, 810-811; *People v. Enraca* (2012) 53 Cal.4th 735, 752-754.)

1527.1-*Miranda* does not apply in emergency circumstances 11/09

"Under some narrow circumstances, sometimes called the 'public safety' or 'rescue' exceptions, compliance with *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436) is excused where the purpose of police questioning is to protect life or avoid serious injury and the statement is otherwise voluntary." (*People v. Panah* (2005) 35 Cal.4th 395, 471.)

The United States Supreme Court in *New York v. Quarles* (1984) 467 U.S. 649 (*Quarles*), recognized the "public safety" exception to the *Miranda* rule. "We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." (*Quarles*, *supra*, 467 U.S. at p. 657.)

In *Quarles*, police arrested a rape suspect reported to be carrying a firearm. On finding an empty shoulder holster, the officer asked where the gun was. Defendant's answer was held admissible despite the lack of warning. The High Court held that there are times where a concern for public safety must be paramount to adherence to the *Miranda* rules; that in such a kaleidoscopic situation "spontaneity rather than adherence to a police manual is necessarily the order of the day … ." (*Quarles*, *supra*, 467 U.S. at p. 656.)

Several California cases have applied the *Quarles* rationale. In *People v. Sims* (1993) 5 Cal.4th 405 officers arrested a dangerous suspect, believed to be armed, in a motel room. The defendant's answer to their request for the whereabouts of the firearm, prior to any *Miranda* waiver, was held admissible. (*Id*. at pp. 450-451.) Similarly, the *Quarles* public safety rule has validated

questions about the location of a gun discarded in a public area by a suspect leaving the scene of a shooting. (*People v. Gilliard* (1987) 189 Cal.App.3d 285, 291-292.)

The public safety exception was applied again in *People v. Cressy* (1996) 47 Cal.App.4th 981 to asking a person arrested for possession of a syringe whether he had any other needles or paraphernalia on his person before a search incident to arrest. (*Id*. at pp. 986-989.) The *Quarles* rule permitted an officer serving a search warrant for drugs on premises occupied by a known drug trafficker to ask the occupant of the premises whether there were any guns or weapons on the property in *People v. Simpson* (1998) 65 Cal.App.4th 854.

The "rescue doctrine" is a related *Miranda* exception recognized by the California appellate courts. (See *People v. Davis* (2009) 46 Cal.4th 539, 591-593.) The California Supreme Court has described the rescue doctrine as "analogous" to, not subsumed within, the public safety exception. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 56.) "In the handful of post-*Quarles* cases involving the rescue of missing persons, California decisions have continued to apply the rescue doctrine independently of the public safety exception articulated by the high court. [Citations.]" (*People v. Davis*, *supra*, 46 Cal.4th at p. 593.) The applicability of the rescue doctrine is grounded on objective facts known to law enforcement. (*Ibid*.) "[U]nder circumstances of extreme emergency where the possibility of saving the life of a missing victim exists, noncoercive questions may be asked of a material witness in custody even though answers to the questions may incriminate the witness. Any other policy would reflect indifference to human life." (*Id*. at pp. 593-594, internal quote marks omitted [although kidnap suspect had invoked *Miranda*, proper to approach him four days after arrest and question him whether young victim, who had been missing over nine weeks, was still alive].)

1528.1-Statements taken in violation of *Miranda* can be used to impeach 8/17

Statements taken in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) cannot be used in the prosecution's case-in-chief as substantive evidence against the defendant. But, so long as they are not coerced or involuntary, *Miranda* violation statements can be used for impeachment should the defendant take the stand and testify contrary to such statements. (*Harris v. New York* (1971) 401 U.S. 222 (*Harris*).) "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (*Id*. at p. 226.)

California follows the *Harris* rule. (*People v. May* (1988) 44 Cal.3d 309; see e.g., *People v. Debouver* (2016) 1 Cal.App.5th 972, 980.) The *Harris* rule applies even if the police deliberately elicited the defendant's statements in knowing violation of *Miranda*. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1074-1077; see also *People v. DePriest* (2007) 42 Cal.4th 1, 32-33; *People v. Demetrulias* (2006) 39 Cal.4th 1, 29-30.) Finally, the same rule applies whether the statements were taken in violation of the *Miranda* right to remain silent or the *Miranda* right to counsel. (*People v. Brown* (1996) 42 Cal.App.4th 461, 471-474; see also *Kansas v. Ventris* (2009) 556 U.S. 586 [statements taken in violation of *Massiah v. United States* (1964) 377 U.S. 201 can be used to impeach].)

The *Harris* rule, however, does not permit third party witnesses called by the defense to be impeached with defendant's statements taken in violation of the *Miranda* rule. (*James v. Illinois* (1990) 493 U.S. 307, 309, 320.) But such statements can be used at the sanity phase of a trial to

impeach a defense expert witness who relied on contrary statements by the defendant as a basis for his or her opinion. (*People v. Edwards* (2017) 11 Cal.App.5th 759, 769.)

Upon request, the defendant is entitled to an instruction advising the jury of the limited purpose for which the *Miranda* violation statement has been admitted. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 63; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1401-1402.)

1528.2-*Miranda* violation statements can be used to revoke parole or probation 8/11

Statements taken in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) cannot be used in the prosecution's case-in-chief as substantive evidence against the defendant. But, so long as they are not coerced or involuntary, *Miranda* violation statements can be used in parole and probation revocation proceedings. (*In re Martinez* (1970) 1 Cal.3d 641, 648-651 [parole revocation hearing]; *People v. Racklin* (2011) 195 Cal.App.4th 872, 878-881 [probation revocation hearing].)

1528.3-Use of post-*Miranda* waiver statements or selective silence not *Doyle* error 11/14

In *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), the United States Supreme Court held the prosecution may not use a defendant's postarrest, post-*Miranda* silence to impeach the defendant's trial testimony. (*Id*. at p. 619.) *Doyle* involved two defendants who, after being arrested and advised of their *Miranda* rights, made no statements, but subsequently testified at trial they had been framed. On cross-examination, the prosecutor asked the defendants why, if they were innocent, they did not offer this explanation at the time of their arrest. (*Id*. at pp. 612-614.) The High Court concluded such impeachment was fundamentally unfair and a deprivation of due process because *Miranda* warnings carry an implied assurance that silence will carry no penalty. (*Id*. at p. 618.) The California Supreme Court has extended the *Doyle* rule to prohibit the prosecution's use of a defendant's post-*Miranda* silence as evidence of guilt during the prosecution's case-in-chief. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.)

"The *Doyle* rule, however, is not absolute." (*People v. Bowman* (2011) 202 Cal.App.4th 353, 363 (*Bowman*).) "It does not prohibit the prosecution's use of a defendant's prearrest silence." (*Ibid*., citing *Brecht v. Abrahamson* (1993) 507 U.S. 619, 628.) "It also does not prohibit the prosecution's use of a defendant's postarrest silence if the defendant did not receive *Miranda* warnings. (*Brecht v. Abrahamson*, *supra*, at p. 628.)" (*Bowman*, *supra*; see also *People v. Tom* (2014) 59 Cal.4th 1210, 1215 ["We …conclude that defendant, after his arrest but before he had received his *Miranda* warnings, needed to make a timely and unambiguous assertion of the privilege [against self-incrimination] in order to benefit from it."]) "Additionally, the *Doyle* rule does not prohibit the prosecution from cross-examining a defendant who received *Miranda* warnings and then voluntarily spoke with a police detective about discrepancies between the defendant's statements to the detective and the defendant's trial testimony. (*Anderson v. Charles* (1980) 447 U.S. 404, 406, 409 (*Anderson*).)" (*Bowman*, *supra*.) As the United States Supreme Court explained:

> *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

(*Anderson*, *supra*, 447 U.S. at p. 408.)

There is a split of authority whether the *Doyle* rule applies to "selective silence" or "partial silence" cases where a defendant was advised of his or her *Miranda* rights, elected to speak with a police detective, and then responded to some of the officer's questions, but not others. (See *Bowman*, *supra*, 202 Cal.App.4th at p. 364 [setting forth authorities on each side].) Division One of the Fourth Appellate District Court of Appeal in *Bowman* found no *Doyle* error in this scenario.

> We are persuaded in this case that the *Doyle* rule did not prohibit the prosecution's use of Bowman's selective silence as adoptive admissions. Like the defendant in *Anderson*, Bowman voluntarily spoke with a police detective after receiving *Miranda* warnings. Although Bowman did not respond to certain questions during the interview, there is no evidence he told the detective he wanted to cease all further questioning, asked for an attorney, or otherwise unambiguously indicated he wanted to invoke his right of silence. [Citations.] [¶] Consequently, like the court in *Anderson*, we cannot conclude Bowman's decision not to respond to some of the detective's questions was induced by the *Miranda* warnings he received. Absent such inducement, the harm the *Doyle* rule seeks to prevent is not present and the *Doyle* rule does not apply. [Citations.]

(*Bowman*, *supra*, at pp. 364-365.)

1528.4-Fruit of poisonous tree doctrine does not apply to *Miranda* violations 11/18

"As a general rule, courts have held that a *Miranda* [*Miranda v. Arizona* (1966) 384 U.S. 436] violation, unlike a Fourth Amendment violation, does not require 'full application' of the ' "fruit of the poisonous tree" ' doctrine developed for Fourth Amendment violations.' (*People v. Storm* (2002) 28 Cal.4th 1007, 1028.)" (*People v. Case* (2018) 5 Cal.5th 1, 23.)

> "[T]he exclusionary rule serves different purposes under the Fourth and Fifth Amendments. Exclusion of statements or evidence obtained as the fruits of an unreasonable search or seizure prohibited by the Fourth Amendment is necessary to deter direct violations of that constitutional guarantee." [Citation.] "On the other hand, the Fifth Amendment, at bottom, protects against compelled testimonial self-incrimination. *Miranda* and its progeny are designed to allow full understanding and exercise of this constitutional right in the inherently custodial atmosphere of police custody. However, '[t]he failure of police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. [Citations.]' [Citation.] Thus, such statements must be excluded even if they were 'otherwise voluntary within the meaning of the Fifth Amendment.' [Citation.] [¶] But it does not follow that the fruits of such an 'otherwise voluntary' statement are invariably tainted and inadmissible. … '[N]either the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence' would be served by suppressing the testimony of a witness whose identity was discovered as the result of a suspect's statement in custody which, though elicited without *Miranda* warnings, was otherwise uncoerced." (*Ibid*.; cf. *Michigan v. Tucker* (1974) 417 U.S. 433, 445-446 [declining to suppress testimony of witness whose identity was discovered through a suspect's statement given before the decision in *Miranda*, and thus without the benefit of *Miranda* warnings].)

(*People v. Case*, *supra*, 5 Cal.5th at p. 24.)

Thus, since fruit of the poisonous tree analysis under the Fourth Amendment does not apply to a noncoercive *Miranda* violation, physical evidence seized as the result of a simple *Miranda* violation should not be suppressed as tainted derivative evidence. (*United States v. Patane* (2004) 542 U.S. 630, 636-640; *People v. Davis* (2009) 46 Cal.4th 539, 598; see also *People v. Brewer* (2000) 81 Cal.App.4th 442, 453-455; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 953-957.)

1550.1-Voluntariness of confession determined by totality of circumstances 9/21

"Voluntary confessions are not merely 'a proper element in law enforcement' [citation], they are an 'unmitigated good' [citation], ' "essential to society's compelling interest in finding, convicting, and punishing those who violate the law' " [citations]." (*Maryland v. Shatzer* (2010) 559 U.S. 98, 108.) "Both the federal and state Constitutions bar prosecutors from introducing into evidence a defendant's involuntary statement to government officials." (*People v. Battle* (2021) 11 Cal.5th 749, 790.) A confession or admission must be the product of a rational intellect and a free will—it must be self-motivated. (*Blackburn v. Alabama* (1960) 361 U.S. 199, 208; *People v. McWhorter* (2009) 47 Cal.4th 318, 346-347; *People v. Spears* (1991) 228 Cal.App.3d 1, 27.) "In general, a confession is considered voluntary 'if the accused's decision to speak is entirely "self-motivated" [citation], i.e., if he [or she] freely and voluntarily chooses to speak without "any form of compulsion or promise of reward. …" [Citation.]' [Citation.]" (*People v. Boyde* (1988) 46 Cal.3d 212, 238; see also *People v. Gonzalez* (2012) 210 Cal.App.4th 875, 882.) "Coercive police conduct includes physical violence, threats, direct or implied promises, or any other exertion of improper influence by officers to extract a statement." (*People v. Battle*, *supra*, 11 Cal.5th at p. 790.) For example, "[w]e have found a confession not 'essentially free' when a suspect's confinement was physically oppressive, invocations of his or her *Miranda* rights were flagrantly ignored, or the suspect's mental state was visibly compromised." (*People v. Spencer* (2018) 5 Cal.5th 642, 672.)

"A confession's voluntariness depends upon the totality of the circumstances." (*People v. Winbush* (2017) 2 Cal.5th 402, 453.)

> To determine the voluntariness of a confession, courts examine " 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." (*Dickerson v. United States* (2000) 530 U.S. 428, 434.) In making this determination, courts apply a "totality of the circumstances" test, looking at the nature of the interrogation and the circumstances relating to the particular defendant. (*People v. Haley* (2004) 34 Cal.4th 283, 298; *People v. Massie* (1999) 19 Cal.4th 550, 576.) With respect to the interrogation, among the factors to be considered are " ' "the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity … ." ' " (*People v. Massie*, *supra*, 19 Cal.4th at p. 576.) With respect to the defendant, the relevant factors are "' "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health." ' " (*Ibid*.) "A statement is involuntary [citation] when, among other circumstances, it 'was " 'extracted by any sort of threats …, [or] obtained by any direct or implied promises … .' " ' " (*People v. Neal* [(2003)] 31 Cal.4th [63] at p. 79.)

(*People v. Dykes* (2009) 46 Cal.4th 731, 752; also see *People v. Sanchez* (2019) 7 Cal.5th 14, 50; *People v. Thomas* (2012) 211 Cal.App.4th 987, 1008.) Additional factors may be relevant when police interview a juvenile. (*In re Anthony L.* (2019) 43 Cal.App.5th 438, 452-455; *In re Elias V.* (2015) 237 Cal.App.4th 568, 576.)

1550.2-Causal link required between police activity and claim of involuntariness 9/21

Coercive police activity is prerequisite to finding a defendant's statement involuntary under the federal and state due process clauses. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167; see also *People v. McWhorter* (2009) 47 Cal.4th 318, 347].) "The presence of coercion is a necessary, but not always sufficient, predicate to finding a confession was involuntary." (*People v. Battle* (2021) 11 Cal.5th 749, 790.)

> A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." [Citation.] The statement and the inducement must be causally linked. [Citation.]

(*People v. Maury* (2003) 30 Cal.4th 342, 404-405; see also *People v. Williams* (2010) 49 Cal.4th 405, 437.) For example, a confession motivated by misconduct committed by government officials unrelated to the investigation of criminal activity and not part of the process of interrogation should not be excluded as involuntary. (*People v. Hall* (2000) 78 Cal.App.4th 232, 240-241 [defense claimed prison conditions prompted confession to old unsolved murder].) In addition, "[i]nsofar as a defendant's claims of involuntariness emphasize that defendant's particular psychological state rendered him open to coercion, this court has noted that ' " '[t]he Fifth Amendment is not 'concerned with moral and psychological pressures to confess emanating from sources *other than official coercion*.' " ' (*People v. Smith* (2007) 40 Cal.4th 483, 502, italics added.)" (*People v. Dykes* (2009) 46 Cal.4th 731, 753.)

1550.3-Private party coercion not of constitutional dimension 5/20

State action is required to find a defendant's statement involuntary. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 (*Connelly*); see also *People v. McWhorter* (2009) 47 Cal.4th 318, 347; distinguish *People v. Williams* (2013) 56 Cal.4th 165, 184-186 [relative of victim working at prison making threats to defendant not state actor].)

> Our "involuntary confession" jurisprudence is entirely consistent with the settled law requiring some sort of "state action" to support a claim of violation of the Due Process Clause of the Fourteenth Amendment. The Colorado trial court, of course, found that the police committed no wrongful acts, and that finding has been neither challenged by respondent nor disturbed by the Supreme Court of Colorado. The latter court, however, concluded that sufficient state action was present by virtue of the admission of the confession into evidence in a court of the State. [Citation.]
>
> The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other. The flaw in respondent's constitutional argument is that it would expand our previous line of "voluntariness" cases into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision.
>
> *The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.* See *Walter v. United States*, 447 U.S. 649, 656 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 487-488 (1971); *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921).

(*Connelly*, *supra*, 479 U.S. at pp. 165-166, italics added.) Prior California appellate decisions (i.e., *People v. Haydel* (1974) 12 Cal.3d 190, 196-197; *People v. Berve* (1958) 51 Cal.2d 286, 293; *People v. Brown* (1981) 119 Cal.App.3d 116, 129) holdings that third party coercion is of constitutional concern are likely rendered obsolete in light *Connolly* and the truth-in-evidence provision of Proposition 8. (Cal. Const., art. I, § 28, subd. (f)(2) [formerly subd. (d)].)

1550.4-Exhortations to tell truth do not make confession involuntary 5/20

A confession or admission motivated by police threats, or by promises of leniency or reward, express or clearly implied, is involuntary as a matter of law. (*People v. Tully* (2012) 54 Cal.4th 952, 985; see also *People v. Perez* (2016) 243 Cal.App.4th 863, 871; *People v. Vasila* (1995) 38 Cal.App.4th 865, 873.) But a distinction is drawn between such coercion and interrogation techniques that merely points out to a suspect the benefits flowing naturally from a truthful statement. (*People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1250-1251; *People v. Spears* (1991) 228 Cal.App.3d 1, 27.) The latter will not make any statement which follows involuntary. (*People v. Holloway* (2004) 33 Cal.4th 96, 115.)

> " 'Once a suspect has been properly advised of his [or her] rights, he [or she] may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits. Questioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect. … Yet in carrying out their interrogations the police must avoid threats of punishment for the suspect's failure to admit or confess particular facts and must avoid false promises of leniency as a reward for admission or confession. …' [Citation.]"

(*Ibid*.; see also *People v. Williams* (2010) 49 Cal.4th 405, 444; *People v. Carrington* (2009) 47 Cal.4th 145, 170.)

> The distinction that is to be drawn between permissible police conduct on the one hand and conduct deemed to have induced an involuntary statement on the other "does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth as represented by the police." [Citation.] Thus, "[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, "if … the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. …" [Citations.]

(*People v. Jimenez* (1978) 21 Cal.3d 595, 611-612; see also *People v. Gonzalez* (2012) 210 Cal.App.4th 875, 883.) " '[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary.' [Citation.]" (*People v. Howard* (1998) 44 Cal.3d 375, 398.)

Thus, case authorities have found that searching questions and exhortations to "tell the truth," statements that one would "feel better" after a confession, or urging a suspect to "help himself" by cooperating with officers, are not improper inducements for a statement. (See, e.g., *People v. Ditson* (1962) 57 Cal.2d 415, 433; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1212; *People v. Spears* (1991) 228 Cal.App.3d 1, 27; *People v. Flores* (1983) 144 Cal.App.3d 459, 469.)

"We recognize, of course, that coercion can be psychological as well as physical. But in this we must exercise great care not to become confused; intellectual persuasion is not the equivalent of coercion." (*People v. Ditson*, *supra*, at p. 433.)

> Defendant also contends that Detective Lindsay's assurances that the police merely were attempting to understand defendant's motivation in committing the crimes impermissibly coerced her to confess. To the contrary, Detective Lindsay's suggestions that the Gleason homicide might have been an accident, a self-defensive reaction, or the product of fear, were not coercive; they merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime. This tactic is permissible.

(*People v. Carrington*, *supra*, 47 Cal.4th at p. 171.) "Moreover, when law enforcement officers describe the moral or psychological advantages to the accused of telling the truth, no implication of leniency or favorable treatment at the hands of the authorities arises." (*Id*. at p. 172.)

1550.5-Promises of leniency must motivate the suspect's statements 5/20

Any alleged improper police actions, such as promises of leniency, do not render a defendant's subsequent statements involuntary unless these statements were "causally related" to such improper police actions. (*People v. Scott* (2011) 52 Cal.4th 452, 480; see also *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1404.) "A confession is not involuntary unless the coercive police conduct and the defendant's statement are causally related." (*People v. Williams* (2010) 49 Cal.4th 405, 437.) In other words, the improper police conduct must be the "motivating cause of the decision to confess." (*People v. Boyde* (1988) 46 Cal.3d 212, 238; see also *People v. Wall* (2017) 3 Cal.5th 1048, 1066-1067 [alleged promise of leniency was not the cause of Wall's confession].) Thus, only "where a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law.' " (*People v. Tully* (2012) 54 Cal.4th 952, 985; see also *People v. Perez* (2016) 243 Cal.App.4th 863, 871.)

1550.6-Confession voluntary despite police lies to suspect during interrogation 5/20

"The use of deceptive statements during an interrogation does not invalidate a confession as involuntary unless the deception is of a type reasonably likely to produce an untrue statement." (*People v. Scott* (2011) 52 Cal.4th 452, 481.) Thus, officers may legitimately use deception to induce a suspect, who has already waived *Miranda* rights, to confess or make an admission. " 'Lies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary.' " (*People v. Farnam* (2002) 28 Cal.4th 107, 182 [suspect falsely told his fingerprints found on victim's wallet]; see also *People v. Richardson* (2008) 43 Cal.4th 959, 993 [defendant falsely told two people identified him at scene]; *People v. Smith* (2007) 40 Cal.4th 483, 505-506 [falsely told fake test showed gunshot residue on defendant].) "[T]he use of subterfuge by police investigators is not necessarily impermissible because 'subterfuge per se is not the same as coercive conduct.' " (*People v. Dominick* (1986) 182 Cal.App.3d 1174, 1192.) But the deception may not be of a type reasonably likely to produce an untrue statement. (*People v. Williams* (2010) 49 Cal.4th 405, 443; *In re Walker* (1974) 10 Cal.3d 764, 777.)

In *People v. Thompson* (1990) 50 Cal.3d 134 officers repeatedly lied to a suspect during interrogation to convince him that he should confess. The officers said his vehicle had been connected to the crime by tire tracks and trace evidence, and that other trace evidence was found in his bedroom. The California Supreme Court rejected defendant's argument that the resulting confession was involuntary:

> Numerous California decisions confirm that deception does not necessarily invalidate a confession. We note in particular *In re Walker* (1974) 10 Cal.3d 764, in which a wounded defendant was told, perhaps deceptively, that he might die before he reached the hospital and should talk to close the record, and *People v. Watkins* (1970) 6 Cal.App.3d 119, in which a defendant was falsely told that his fingerprints had been found on the getaway car. In both cases the confession was admitted on the ground that "the deception was not of a type reasonably likely to procure an untrue statement."

(*Id.* at p. 167; see also *People v. Spencer* (2018) 5 Cal.5th 642, 675 [detective falsely told suspect his fingerprints were found at crime scene].)

1550.7-Length of interview is factor in voluntariness 5/20

The length of the interrogation is a factor in determining voluntariness. (*People v. Carrington* (2009) 47 Cal.4th 145, 175.)

> In the present case, although the questioning continued over the course of eight hours, it does not appear that defendant's will to resist was overborne. The questioning was not aggressive or accusatory. Instead, the interviewing officers chose to build rapport with defendant and gain her trust in order to persuade her to tell the truth. There is no indication that defendant was induced by fear to make a statement. She appeared lucid and aware throughout the entire interrogation session and never asked the police officers to terminate the interview. Defendant spoke with confidence, and her answers were coherent. Moreover, the police repeatedly offered defendant food and beverages, provided her with four separate breaks, and allowed her to meet privately with her partner, Jackie. We conclude that under the totality of the circumstances, the length of the interrogation did not render defendant's confessions involuntary.

(*Ibid*.; distinguish *Mincey v. Arizona* (1978) 437 U.S. 385, 398-399 [defendant's statements to the police were not the product of a free and rational choice under the circumstances, where he was questioned for more than three hours, had been seriously wounded several hours earlier, was confused and unable to think clearly, and stated repeatedly that he did not wish to speak without having a lawyer present].)

1550.8-Intoxication does not necessarily make suspect's statements involuntary 5/20

"Intoxication alone does not render a confession involuntary." (*People v. Debouver* (2016) 1 Cal.App.5th 972, 978.) "Moreover, absent state coercion, defendant cannot complain that any self-induced intoxication rendered his statements involuntary. (See *Colorado v. Connelly* [(1986)] 479 U.S. [157] at p. 163.)" (*People v. Maury* (2003) 30 Cal.4th 342, 411.) Similarly, the California Supreme Court "has repeatedly rejected claims of incapacity or incompetence to waive *Miranda* rights premised upon voluntary intoxication or ingestion of drugs, where … there is nothing in the record to indicate that the defendant did not understand his rights and the questions posed to him. [Citation.]" (*People v. Clark* (1993) 5 Cal.4th 950, 988.

1550.9-Statement not product of prior involuntary statement 5/20

When, as a result of improper police conduct, an accused confesses, and subsequently makes another confession, it is presumed the subsequent confession is the product of the first because of the psychological or practical disadvantages of having "let the cat out of the bag" by confessing. (*People v. McWhorter* (2009) 47 Cal.4th 318, 359; *People v. Sims* (1993) 5 Cal.4th 405, 444-445 (*Sims*).)

> Notwithstanding this presumption, "no court has ever 'gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.' " [Citations.] Thus, the foregoing presumption is rebuttable, with the prosecution bearing the burden of establishing a break in the causative chain between the first confession and the subsequent confession. [Citation.]

(*Sims*, *supra*, 5 Cal.4th at p. 445.) The question whether a subsequent, otherwise voluntary post-*Miranda* statement is the tainted product of a prior involuntary statement mirrors the "fruit of the poisonous tree" analysis under the Fourth Amendment.

> "A subsequent confession is not the tainted product of the first merely because, 'but for' the improper police conduct, the subsequent confession would not have been obtained. [Citation.] As the United States Supreme Court has explained: '[N]o … all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ' (*Wong Sun v. United States* (1963) 371 U.S. 471, 487-488 … .)"

(*People v. McWhorter*, *supra*, 47 Cal.4th at p. 360, quoting *Sims*, *supra*, 5 Cal.4th at p. 445.) Thus, "[t]he degree of attenuation that suffices to dissipate the taint 'requires at least an intervening independent act by the defendant or a third party' to break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the illegality. [Citations]." (*Sims*, *supra*, 5 Cal.4th at p. 445.)

1560.1-Confession after illegal police act may be attenuated 12/19

Where there are factors intervening between the initial unlawful police act and the later confession or admission, the prosecution is free to argue that the defendant's statements have "become so attenuated as to dissipate the taint. [Citation.]" (*Wong Sun v. United States* (1963) 371 U.S. 471, 491.)

A subsequent *Miranda* admonition is one factor the court should strongly consider in determining that the taint is purged. Other factors for consideration are the amount of time between the illegal police act and the statement, the "purpose and flagrancy of the official misconduct," and any other intervening factors. (*Brown v. Illinois* (1975) 422 U.S. 590, 604-605; *People v. DeVaughn* (1977) 18 Cal.3d 889, 898-899.)

Statements that are not a direct product of unlawful police acts should not be suppressed. In *New York v. Harris* (1990) 495 U.S. 14, the United States Supreme Court held the officers' failure to obtain an arrest warrant before arresting a suspect in his home was not a basis for suppression of statements made outside the home following the arrest. Because the arrest was otherwise lawful, the

values sought to be protected by the requirement of an arrest warrant applied only to evidence obtained within the suspect's home. (*Id.* at pp. 18-21; similarly, see *People v. Marquez* (1992) 1 Cal.4th 553, 568-569; see, generally, *In re Frank S.* (2006) 142 Cal.App.4th 145; but see *Brown v. Illinois*, *supra*, 422 U.S. at pp. 602-605 [illegal arrest tainted subsequent Mirandized statement]; *People v. Flores* (2019) 38 Cal.App.5th 617, 633-636 [illegal detention tainted subsequent Mirandized statement].) Similarly, failure to comply with knock-notice requirements in making an otherwise lawful arrest does not taint the suspect's post-arrest statement. (*People v. Watkins* (1994) 26 Cal.App.4th 19, 29-33.)

> In *People v. Gonzalez* (1998) 64 Cal.App.4th 432 the appellate court reiterated that:
> [T]he Supreme Court in *Brown v. Illinois* identified four factors a court should consider in determining whether a defendant's confession was the product of free will or the result of exploiting an illegal arrest. Those factors are: the giving of a *Miranda* warning, the temporal proximity of the arrest and confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct. (422 U.S. at pp. 603-604.)

(*People v. Gonzalez*, *supra*, 64 Cal.App.4th at p. 442.) Examining these factors, the court held that the defendant's confession to a crime other than the one for which the defendant was unlawfully arrested, to officers from a different police agency who played no part in and were unaware of the circumstances surrounding the arrest, was sufficiently attenuated from the arrest to dissipate any taint. (*Id*. at pp. 448-450; see also *People v. Ford* (2001) 91 Cal.App.4th 112, 123-128.)

1580.1-*Massiah* does not bar interrogation about uncharged offenses 7/20

Under *Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*), once formal charges have been filed and counsel has been appointed or retained, government officials may not question the defendant about the charged offense out of counsel's presence. (*Id*. at pp. 206-207.) To do so violates the right to counsel secured by the Sixth and Fourteenth Amendments. (*Ibid*.; see also *People v. Almeda* (2018) 19 Cal.App.5th 346, 358.) In California, the filing of a criminal complaint normally commences criminal proceedings, thus triggering the right to counsel under *Massiah*. (*People v. Viray* (2005) 134 Cal.App.4th 1186, 1194-1199 [prosecutor violated *Massiah* by talking to defendant outside courtroom before arraignment].) *Massiah* does not apply to the investigatory stage, not matter how certain it is that charges will be filed. (*People v. Woods* (2004) 120 Cal.App.4th 929, 939-941 [police surrounded area waiting to arrest defendant after he met with undercover informant, while search warrants were being served at his residence and elsewhere]; see also *People v. Riskin* (2006) 143 Cal.App.4th 234, 143.) Nor does *Massiah* apply when a suspect has been arrested and incarcerated awaiting the filing of charges. (*Illinois v. Perkins* (1990) 496 U.S. 292, 299.)

In addition, the *Massiah* rule does *not* apply to questioning about a crime when no formal charge is pending concerning *that* crime. In other words, "[t]he Sixth Amendment right [to counsel] … is offense specific. It cannot be invoked once for all future prosecutions for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings … ." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 175 [internal quotation marks omitted]; see also *People v. Avila* (1999) 75 Cal.App.4th 416, 421-422.) Thus, in *People v. Duck Wong* (1976) 18 Cal.3d 178, the California Supreme Court held defendant's presumably in-custody admissions to police concerning vehicular manslaughter were admissible, even though he had retained counsel in that case, because *no formal charge* had been filed. The court reasoned that to

require counsel's consent to interrogation in the pre-complaint stage would unduly hamper police investigation in which society has a significant interest. (*Id.* at pp. 186-187, called into doubt on other grounds in *People v. Harris* (1989) 47 Cal.3d 1047, 1094; see also *People v. DePriest* (2007) 42 Cal.4th 1, 33.)

Similarly, *Massiah* does not bar questioning a formally charged defendant about other unrelated and uncharged crimes. This is so even when the uncharged crimes are factually related to a charged offense, so long as they are not necessarily included offenses. The uncharged crimes must require proof of a fact that the charged offense does not. (*Texas v. Cobb* (2001) 532 U.S. 162; *McNeil v. Wisconsin*, *supra*, 501 U.S. at p. 176; see *People v. Webb* (1993) 6 Cal.4th 494, 526-528; *People v. Wader* (1993) 5 Cal.4th 610, 636; see also *In re Michael B.* (1981) 125 Cal.App.3d 790, 795-798; *People v. Booker* (1977) 69 Cal.App.3d 654, 663-664.) Further, even if state authorities deliberately delay arresting defendant for a particular offense, purportedly to give them more time in which to elicit defendant's incriminatory statements while in custody on pending federal charges, this "conscious delay" does not violate his Sixth Amendment right to counsel. (*People v. Fayed* (2020) 9 Cal.5th 147, 163 [federal prosecution not a "sham and a cover" for the state charges].)

Finally, while statements taken in violation of a defendant's right to counsel under *Massiah* cannot be used in the prosecution's case-in-chief, they can be used to impeach should the defendant elect to take the stand and testify contrary to such statements. (*Kansas v. Ventris* (2009) 556 U.S. 586.)

1580.2-*Massiah* does not bar use of jail cell listeners 12/19

Under *Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*), once formal charges have been filed and counsel has been appointed or retained, law enforcement may not question the defendant about the charged offense out of counsel's presence. (*Id*. at pp. 206-207) *Massiah* also can be implicated if law enforcement place an agent in the defendant's cell to obtain incriminating statements. "Under *Massiah* when, after adversarial judicial criminal proceedings have been initiated and in the unwaived absence of counsel, a government agent deliberately elicits from a defendant incriminating statements, those statements are inadmissible at a trial on the charges to which the statements pertain. [Citations.]" (*People v. Dement* (2011) 53 Cal.4th 1, 33.) "Such a Sixth Amendment violation occurs when the government intentionally creates or knowingly exploits a situation likely to induce the defendant to make incriminating statements without the assistance of counsel, but *not* when the government obtains such statements through happenstance or luck." (*Ibid*., italics added.)

> To prevail on a *Massiah* claim, a defendant must show that the police and the informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. [Citations.] "Specifically, the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements." [Citation.] The requirement of agency is not satisfied when law enforcement officials "merely accept information elicited by the informant-inmate on his or her own initiative, with no official promises, encouragement, or guidance." [Citation.] A preexisting arrangement, however, need not be explicit or formal, but may be inferred from evidence of the parties' behavior

indicative of such an agreement. [Citation.] A trial court's ruling on a motion to suppress informant testimony is essentially a factual determination, entitled to deferential review on appeal. [Citation.]

(*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 67; see also *People v. Hartsch* (2010) 49 Cal.4th 472, 490-491; *People v. Almeda* (2018) 19 Cal.App.5th 346, 358-359.) "[W]e have held a 'general policy of encouraging inmates to provide useful information does not transform them into government agents.' (*People v. Williams* (1988) 44 Cal.3d 1127, 1141 [that the 'sheriff's department followed the practice of accepting information provided by inmates, and, when feasible, of rewarding inmates for providing that information,' and inmates were 'probably aware of that policy,' was insufficient to demonstrate the informant was a government agent].)" (*People v. Dement*, *supra*, 53 Cal.4th at p. 34 [that informant inmate in debriefing process with prison authorities to end his gang affiliation did not transform him into government agent under *Massiah*]; similarly, see People v. *Keo* (2019) 40 Cal.App.5th 169, 182 [social worker conducting dependency evaluation of defendant accused of killing the mother of his two children not law enforcement officer or acting as agent of law enforcement].)

1630.1-The scope of a consent search is measured objectively 12/17

A consensual search may not legally exceed the scope of the consent supporting it. (*People v. Valencia* (2011) 201 Cal.App.4th 922, 928; *People v. Cantor* (2007) 149 Cal.App.4th 961, 965.) "[I]t is the government's burden to prove that a warrantless search was within the scope of the consent given." (*People v. Harwood* (1977) 74 Cal.App.3d 460, 466.) The scope of a consent search is measured against objective reasonableness—"what would the typical reasonable person have understood by the exchange between the officer and the suspect? [Citations.]" (*Florida v. Jimeno* (1991) 500 U.S. 248, 251.) The limitations of a consent search depend upon the mutual understanding and reasonable expectations of the parties. (*People v. Harwood*, *supra*, 74 Cal.App.3d at pp. 466-467.) " 'Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of the circumstances.' [Citation.]" (*People v. Crenshaw* (1992) 9 Cal.App.4th 1403, 1408.) For example, "[t]he scope of a consensual search [of a home] for narcotics is very broad and includes closets, drawers, and containers. (*People v. Miller* (1999) 69 Cal.App.4th 190, 203; see also *People v. Shandloff* (1985) 170 Cal.App.3d 372, 384 ["Once the voluntary consent to search the suitcases was given, without any limitation or attempts to revoke the consent, the officers were authorized to search all of the compartments and containers within the suitcases."]; but, see *People v. Picard* (2017) 15 Cal.App.5th Supp. 12 [consent to blood test only for presence of alcohol did not permit second warrantless test for presence of drugs].)

1630.2-Consent to search vehicle includes all closed containers 2/12

A general consent to search a vehicle inherently encompasses the entire vehicle and its contents, including closed containers. (*Florida v. Jimeno* (1991) 500 U.S. 248, 251-252; *People v. Williams* (1980) 114 Cal.App.3d 67, 74.) It allows the use of a drug-sniffing dog. (*People v. Bell* (1996) 43 Cal.App.4th 754, 769-772.) An unlimited consent may even permit partially dismantling the vehicle to search for items that reasonably might be concealed in its structure; for example, within a door panel or air vent. (*People v. Crenshaw* (1992) 9 Cal.App.4th 1403.)

> Had the defendant wished to limit the scope of the search, he should have done so. We believe that the defendant intended, and the officer understood, that the consent encompassed the vehicle in its entirety including its contents. To hold otherwise would require an extended and potentially confusing colloquy between the officer and the subject in an effort to isolate the precise areas of the automobile to which the consent to search extended. We do not believe that the Fourth Amendment requires anything more than the defendant's voluntary consent to the search of the property under his control.

(*People v. Williams*, *supra*, at pp. 73-74; but see *People v. Cantor* (2007) 149 Cal.App.4th. 961 [consent to "real quick" search of car did not encompass officer unscrewing the back panel of a wooden box in the truck].)

1630.3-Consent may permit multiple searches 5/20

A consensual search may not legally exceed the scope of the consent supporting it. (*People v. Valencia* (2011) 201 Cal.App.4th 922, 928 (*Valencia*); *People v. Cantor* (2007) 149 Cal.App.4th 961, 965.) "[A]s a general matter, a consent to search usually involves an 'understanding that the search will be conducted forthwith and that only a single search will be made.' [Citation.]" (*Valencia*, *supra*, 201 Cal.App.4th at p. 937.) But:

> [W]e conclude that, at least in some circumstances, a defendant's consent to a search may justify law enforcement in conducting more than one search. In determining whether a particular grant of consent permitted officers to conduct more than one search, courts must evaluate whether, under the totality of the circumstances, it was objectively reasonable for law enforcement to conclude that the subsequent search fell within the scope of the initial consent.

(*Id*. at pp. 931-932.)

There are several factors that may "help courts identify those limited instances in which it might be reasonable to conduct more than one search." (*Valencia*, *supra*, 201 Cal.App.4th at p. 937.)

> [C]ourts have considered a variety of factors in assessing the reasonableness of conducting more than one search based on a single grant of consent. Those factors have included (1) whether the defendant placed any limitations on the scope of the initial consent; (2) the amount of time that passed between the grant of consent and the contested search; (3) whether police remained in control of the area being searched prior to conducting the second search; (4) whether officers were searching a residence or other area that is entitled to a heightened expectation of privacy; (5) whether the suspect was arrested between the initial search and the subsequent search; (6) whether the searches were part of a continuous criminal investigation having a single objective; and (7) whether the defendant had advance knowledge of, and an opportunity to object to, a subsequent search.
>
> This list is not exhaustive; because the reasonableness of a search must be based on the totality of circumstances, any number of other factors might be relevant depending on the individual facts of the case under review. Moreover, the presence or absence of any one factor should not be treated as dispositive. Like other multifactor reasonableness tests, the list must be tailored to the unique circumstances of each case.

(*Ibid*.) Examining each of these factors in light of the facts of the case, the appellate court in *Valencia* concluded that the second search of the defendant's vehicle at the police station was within

the scope of the defendant's original consent in the field. (*Id*. at pp. 937-940.)

The appellate court in *People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, for example, held "inviting police to respond to an emergency may, depending upon the circumstances, be regarded as implied consent to enter and search for suspects and victims." (*Id*. at p. 1012 (*Chapman*).)

> … Chapman invited the first wave responders into his residence and he therefore lost any expectation of privacy as to items observed in plain view during the search, which was within the scope of his consent, including the bullet holes in the walls, shell casings, bullets fragments, the gun, the sledge hammer, Brian's body, and the surrounding blood. The entry of the second wave responders to further observe, photograph, and collect this plain-view evidence began within minutes and was reasonable under the circumstances. As in [*People v. Justin* (1983) 140 Cal.App.3d 729], we believe Chapman's "contention that the waiver of his right to privacy does not extend beyond the initial entry of [the first wave responders] lacks rational foundation in Fourth Amendment jurisprudence." (*Justin*, *supra*, 140 Cal.App.3d at p. 740.) The search and seizure of plain-view evidence by the second wave responders did not significantly add to the invasion of privacy caused by the initial, authorized search. Once Chapman's privacy was lawfully invaded by his consent and with the exigent circumstances, he lost privacy interests in items observed in plain view. A close-in-time successive search of the areas already searched in order to begin processing and collecting this evidence does not constitute an unreasonable and additional invasion of privacy, and therefore does not violate the Fourth Amendment.

(*Id*. at pp.1016-1017.)

1640.1-Consent from third party valid 4/17

Valid consent may be obtained from the sole owner of property or from a third party who possesses common authority over such property. (*In re Scott K.* (1979) 24 Cal.3d 395, 404; see *People v. Schmeck* (2005) 37 Cal.4th 240, 281 [consent by tenant who had access to defendant's clothing bags]; see also *People v. Bishop* (1996) 44 Cal.App.4th 220, 236-239 [consent effective from wife who moved to a battered women's shelter three weeks earlier].) When officers reasonably and in good faith believe that a third party has authority to consent to a search and seizure, such search and seizure is reasonable and lawful even if that party does not have actual authority. (*Illinois v. Rodriquez* (1990) 497 U.S. 177, 179; *People v. Hill* (1978) 69 Cal.2d 550, 554-555; see *People v. Jenkins* (2000) 22 Cal.4th 900, 976-980 [sister had apparent authority to consent to search of defendant's briefcase she had removed from his house]; see also *People v. Oldham* (2000) 81 Cal.App.4th 1 [father had apparent, if not actual, authority to permit search of adult son's bedroom]; *People v. Hoxter* (1999) 75 Cal.App.4th 406 [16-year-old daughter had apparent authority to consent to police entry].)

> Cases from a number of jurisdictions have recognized that a guest who has the run of the house in the occupant's absence has the apparent authority to give consent to enter an area where a visitor normally would be received. [Citations.] Furthermore, the police may assume, without further inquiry, that a person who answers the door in response to their knock has the authority to let them enter.

(*People v. Ledesma* (2006) 39 Cal.4th 641, 703.)

Similarly, civilian law enforcement may reasonably rely on a military bases commander's professed authority to permit a search of the defendant's quarters. (*People v. Jasmin* (2008) 167 Cal.App.4th 198, 110-114; distinguish *People v. Miller* (1987) 196 Cal.App.3d 307 [off-base housing].)

It is only if an adult defendant with equal authority over the area to be searched is physically present and objects to a search then the validity of a third party's consent is negated. (*Georgia v. Randolph* (2006) 547 U.S. 103 (*Randolph*); *People v. Ledesma*, *supra*, at p. 704, fn. 16.)

> [A] warrantless entry into a dwelling is reasonable under the Fourth Amendment if a person possessing authority voluntarily consents to the search of the property. (*Randolph*, *supra*, 547 U.S. at p. 109.) The consenting person might be the occupant against whom evidence is sought. (*Ibid*.) Or, if the suspect is absent, the consent-giver might be a co-occupant who shares common authority over the property. (*Ibid*.) However, when an occupant consents to a search, but a co-occupant who "is present at the scene … expressly refuses to consent," the co-occupant's refusal "prevails, rendering the warrantless search unreasonable and invalid as to" him. (*Id*. at p. 106.) This is because one occupant's consent is not "good against another [occupant], standing at the door and expressly refusing consent." (*Id*. at p. 119.)

(*People v. Byers* (2016) 6 Cal.App.5th 856, 862.) But, depending on the facts available to the officer, when the suspect is a minor the officer generally can rely on the consent given by a the parent over the objection of the minor. (*In re D.C.* (2010) 188 Cal.App.4th 978 [minor's bedroom].) Finally, once the previously present and objecting person is removed from the premises, such as by an arrest, the police can rely on consent given by the remaining authorized co-occupant. (*Fernandez v. California* (2014) 571 U.S. 292.)

1650.1-General standard for consent search 6/20

"One exception to the requirement of a warrant is a search conducted pursuant to consent." (*People v. Byers* (2016) 6 Cal.App.5th 856, 862.) Voluntary consent to search permits an officer to search without a warrant and establishes the reasonable nature of the search. (*People v. Michael* (1955) 45 Cal.2d 751, 753; *People v. Tremayne* (1971) 20 Cal.App.3d 1006, 1015.) Consent to search must be voluntary and freely given and not mere submission to an assertion of authority by law enforcement. (*People v. James* (1977) 19 Cal.3d 99, 106.) Voluntariness is a question of fact to be resolved by considering all the surrounding circumstances. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 248-249; *People v. James*, *supra* 19 Cal.3d at p. 106; *People v. Lopez* (2020) 46 Cal.App.5th 317, 327.) The prosecution has the burden of showing the voluntariness of the consent by a preponderance of the evidence. (*People v. James*, *supra*, 19 Cal.3d at p. 106, fn. 4; *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1650.)

In determining the voluntariness of a person's consent, the Fourth Amendment does not require that a defendant be advised of *Miranda* rights, or of the right to refuse permission. "The [United States Supreme] Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." (*United States v. Drayton* (2002) 536 U.S. 194, 206.) While the absence of such warnings, or that a defendant is in custody, may be taken into consideration, they do not establish that a consent was involuntary. (*Schneckloth v. Bustamonte*, *supra*, 412 U.S at p. 249; see also *People v. Monterrosa* (2004) 34 Cal.4th 743, 758; *People v. James*, *supra*, 19 Cal.3d at pp. 114-115;

People v. Lopez, *supra*, 46 Cal.App.54th at p. 331.) Similarly, the defendant need not be told that a detention has ended and he or she is free to go before a post-detention consent may be deemed voluntary. (*Ohio v. Robinette* (1996) 519 U.S. 33, 35, 39-40.) Finally, police deception as to the purpose for seeking consent does not automatically make the resulting consent involuntary. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1578-1579.)

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

(*U.S. v. Drayton*, *supra*, 536 U.S. at p. 207.)

1650.2-Advising of rights shows voluntariness of consent 12/09

Although not required, the fact the officer made clear the defendant was free to decline to consent substantially decreased the probability that police conduct was perceived as coercive. (*United States v. Mendenhall* (1980) 446 U.S. 544, 558-559; *People v. Wilks* (1978) 21 Cal.3d 460, 467.) Similarly, the fact that *Miranda* warnings were given and waived is an additional factor tending to show the consent was voluntary. (*People v. McClure* (1974) 39 Cal.App.3d 64, 70; *People v. Sloss* (1973) 34 Cal.App.3d 74, 84.)

1650.3-Consent voluntary despite threat of search warrant 12/09

It has often been held that otherwise voluntary consent to search is not made involuntary merely because officers state they will seek a search warrant, or believe they can obtain a search warrant, if a defendant declines to consent. (*People v. Ratliff* (1986) 41 Cal.3d 675, 687; *People v. Mayberry* (1982) 31 Cal.3d 335, 343; see also *People v. Goldberg* (1984) 161 Cal.App.3d 170, 188; *People v. Escobedo* (1973) 35 Cal.App.3d 32, 42.) Indeed, even relating the suspect's vehicle will be impounded or home secured until a search warrant can be obtained does not negate a voluntary consent. (*People v. Gee* (1982) 130 Cal.App.3d 174, 182; *People v. Escobedo*, *supra*.) Nor does telling a suspect that he or she could consent or a warrant would be sought make the subsequent consent involuntary. (*People v. Gurtenstein* (1997) 69 Cal.App.3d 441, 451.)

1650.4-Consent by arrestee proper even without *Miranda* waiver 12/09

Following a custodial arrest, notwithstanding that the suspect had not been advised pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, police officers may still ask for and receive the suspect's permission to search. (*People v. James* (1977) 19 Cal.3d 99, 114-115.) Similarly, that a suspect has invoked his or her *Miranda* rights, does not preclude officers from asking for consent to search. (*People v. Brewer* (2000) 81 Cal.App.4th 442, 457-459; *People v. Shegog* (1986) 184 Cal.App.3d 899, 905.) Asking for permission to search is not interrogation intended to elicit an incriminatory response, and thus does not violate the suspect's privilege against self-incrimination. (*People v. James*, *supra*, 19 Cal.3d at p. 114) The words of consent are not testimonial in a Fifth Amendment sense even if the search leads to incriminating evidence. (*Ibid*.; *People v. Brewer*, *supra*, at pp. 457-458.) "[I]t is established that advice as to *Miranda* rights is not a prerequisite to a voluntary consent to search." (*People v. Ibarra* (1980) 114 Cal.App.3d 60, 65.)

1650.5-Consent or waiver valid despite use of drugs or alcohol 12/09

It is well established that the mere ingestion of drugs or alcohol does not compel the conclusion that a defendant is incapable of intelligently waiving constitutional rights. (*People v. Watson* (1977) 75 Cal.App.3d 384, 397.) Intoxication does not negate a waiver of rights from a defendant who is otherwise coherent, rational, and responsive. (*People v. Gurley* (1972) 23 Cal.App.3d 536 (*Gurley*); compare, *People v. Frye* (1998) 18 Cal.4th 894, 988 [consumption of alcohol insufficient to establish impaired capacity to waive *Miranda* rights].)

In *Gurley*, the defendant consented to a search of his vehicle shortly after (1) his wife died from an overdose of heroin, causing him to become hysterical; (2) he had consumed a number of glasses of wine earlier in the evening; and (3) he had injected himself with a substantial dose of heroin. Despite conflicting medical testimony about the defendant's ability to even perceive reality at the time of the purported consent, the appellate court held that his consent was valid. Recognizing the reasons supporting the Fourth Amendment exclusionary rule, the appellate court stated:

> In the situation where the officers act reasonably on the evidence before them (here the ostensibly rational statements of the defendant, although he may subsequently be found to have been irrational), the exclusion of the evidence seized with his apparent consent will not prevent similar conduct in the future under similar conditions. No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and will, so act again in the future.

(*Gurley*, *supra*, 23 Cal.App.3d at p. 553.) "[T]he subsequent establishment that the defendant's statements were not knowingly, intelligently and voluntarily made because of the combination of the defendant's condition and his taking of alcohol and drugs should not affect the validity of the search and seizure made on the basis of the apparent consent, unless, as does not appear, the officers should have realized his condition." (*Id*. at p. 555.)

1650.6-Consent voluntary despite handcuffs, guns and officers 4/7

"Circumstances which give rise to an illegal search based upon purported consent center around coercive, intimidating conduct by the police." (*People v. Schoennauer* (1980) 103 Cal.App.3d 398, 409.) The mere fact a suspect is under arrest and handcuffed does not show any consent given was involuntary. (*People v. Monterroso* (2004) 34 Cal.4th 743, 758-759 *People v. Ratliff* (1986) 41 Cal.3d 675, 686-687; *People v. James* (1977) 19 Cal.3d 99, 107-110.) "A 'person's in-custody status, even when he is handcuffed, does not automatically vitiate his consent … ." (*People v. Byers* (2016) 6 Cal.App.5th 856, 864.) The fact a suspect is surrounded by police vehicles or police officers when his or her consent was requested does not demonstrate coercion. (*People v. Ibarra* (1980) 114 Cal.App.3d 60, 65.) It has also been held that taking the defendant into custody at gunpoint is not conduct so overbearing as to invalidate the subsequent consent. (*People v. Ratliff*, *supra*, 41 Cal.3d at p. 686.)

1650.7-Consent valid despite deception 8/09

It does not necessarily violate a person's Fourth Amendment rights when law enforcement officers use deception to obtain consent. The officer's actions must always be tested against what is reasonable in light of the totality of the circumstances, weighing the invasion of a privacy interest recognized by society against the governmental interest involved. (*Samson v. California* (2006) 547 U.S. 843, 848.) Police use of false identities and false statement of purpose to obtain entry into a

person's home may vitiate consent. (*People v. Lathrop* (1979) 99 Cal.App.3d 967 [undercover officer said he was a new neighbor and asked to use the suspect's telephone]; *People v. Mesaris* (1970) 14 Cal.App.3d 71, 75 [plainclothes officers came to the door and sought permission to enter for the alleged purpose of visiting an appliance repairman on the premises].) But police deception as to their purpose for seeking consent, by itself, does not automatically make the resulting consent involuntary. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1578-1579 [officers gave on one false reason and one vague, but true, reason].)

In addition, the detection of many types of crimes requires the use of decoys and the concealing of an officer's true identity and purpose. (*Lewis v. United States* (1966) 385 U.S. 206, 210 (*Lewis*); see also *Jacobson v. United States* (1992) 503 U.S. 540, 548, 112 S.Ct. 1535.) The High Court in *Lewis* reiterated the rule that "[a] government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." (*Lewis, supra,* 385 U.S. at p. 211.)

In *Lewis*, a federal narcotics agent, by misrepresenting his identity as a potential buyer of narcotics, was invited into the defendant's home. The High Court acknowledged that the invitation to enter would not have been extended had the defendant been told the potential buyer was in fact an undercover officer. But the court rejected as a general rule that law enforcement must never constitutionally use ruse or trick during the investigation of criminal offenses. Instead, the court repeated the general rule governing Fourth Amendment challenges: "[T]he particular circumstances of each case govern the admissibility of evidence obtained by stratagem or deception." (*Lewis, supra,* 385 U.S. at p. 208.)

In *People v. Lucatero* (2008) 166 Cal.App.4th 1110, an officer contacted a real estate agent to view the suspect's house which was up for sale. The officer either misrepresented his true identity or simply did not reveal it. Once inside he acted like a bona fide buyer and was shown around by the unsuspecting agent. The appellate court found no violation of the homeowner's reasonable expectation of privacy. "Listing a home with a realtor is an invitation to do business with the public." (*Id*. at p. 118.) "[T]he authority of a realtor to permit entry is not limited to actual bona fide potential purchasers; the agent's authority is not vitiated by some secret, deceptive intent harbored in the mind of the person posing as a potential buyer." (*Id*. at p. 1117; see also *People v. Jaquez* (1985) 163 Cal.App.3d 918, 929; distinguish dicta in *People v. DeCaro* (1981) 123 Cal.App.3d 454.) "What is observable by the public is observable, without a warrant, by the Government … as well." (*Marshall v. Barlow's, Inc.* (1978) 436 U.S. 307, 315.)

1660.1-Consent tested by objective rather than subjective standard 8/09

Whether a defendant has consented to a search is measured by an objective standard—how a reasonable person would have understood the exchange between the officer and the defendant. Thus, the defendant's subjective state of mind or intent is not determinative of the question. (*People v. Wheeler* (1974) 43 Cal.App.3d 898, 903; see also *Florida v. Jimeno* (1991) 500 U.S. 248, 251.) The appellate court in *Wheeler* held, for example that "[t]he officer had a reasonable right to conclude that defendant gave his consent when he stated he had no objection to the officer's trying the key in the trunk lock." (*Wheeler*, *supra*, 43 Cal.App.3d at p. 903.) The reason for the rule was stated in *People v. Gurley* (1972) 23 Cal.App.3d 536:

> [A]n objective standard should be used in determining whether there has been a valid consent to search, even when that consent emanates from an accused who later establishes, upon facts not readily apparent to the officers, that he was not in full possession of his faculties at the time. This conclusion is supported by the fact that if the validity of the consent can only be established later, it is then generally too late to secure a search warrant or take such other steps as might have been taken to secure and seize the contraband, loot or evidence, had consent been refused.

(*Id*. at p. 555.)

1660.2-Consent may be implied from person's conduct 6/20

Consent to search or enter may be implied from a person's conduct. (*People v. Lopez* (2020) 46 Cal.App.5th 317, 327; *People v. Superior Court (Fall)* (1973) 31 Cal.App.3d 788, 801.) For example, consent was implied from a person responding to an officer's request to "open the vehicle" by silently unlocking the truck and revealing a weapon. (*In re D.M.G.* (1981) 120 Cal.App.3d 218, 224-227.) Similarly, opening a door and stepping back or gesturing in response to an officer's request to enter a premises implies consent to enter. (*People v. Panah* (2005) 35 Cal.4th 395, 467; *People v. Frye* (1998) 18 Cal.4th 894, 990; *People v. Martino* (1985) 166 Cal.App.3d 777, 791; *People v. Sproul* (1969) 3 Cal.App.3d 154, 162.) As another example, voluntary implied consent found when person arrested for driving under the influence of drugs is simply told by the officer that they must submit to a blood test and the arrestee silently and without objection or resistance cooperate with the blood draw. (*People v. Lopez* (2020) 46 Cal.App.5th 317, 327-328.)

In *United States v. Drayton* (2002) 536 U.S. 194 officers performing routine drug and weapons interdiction boarded a bus to talk to the passengers. An officer contacted two men sitting together, explained their purpose, and asked if they had any bags. When the men pointed to a bag overhead, the officer asked "Do you mind if I check it?" One of the men said to go ahead. The officer then asked if the men had any weapons or drugs in their possession. The officer asked the one man, "Do you mind if I check your person?" The man said "Sure," was searched, and then was arrested when packages of drugs were found. The officer then asked Mr. Drayton, "Mind if I Check you?" Drayton responded by lifting his hands about eight inches from his legs so that he could be frisked. More packages of drugs were found. While more concerned with whether this bus encounter was a detention or a consensual contact, the United States Supreme Court also concluded that both Drayton and his companion voluntarily consented to the police search. (*Id*. at pp. 206-207.)

1660.3-Statement of consent is not hearsay 8/09

Just as a statement of consent is not incriminatory and does not require a *Miranda* warning, it is not hearsay. The statement is not offered to prove the truth of the matter asserted. Instead it is a statement of authorization. The statement is offered to prove that things were said or done, not whether these things were true or false. The consenting person's internal state of mind is irrelevant—it is the saying of the words or display of conduct that is important, not whether they were true or false. It is the fact that the statement was made that is in issue, not its truth. (*People v. Nelson* (1985) 166 Cal.App.3d 1209, 1214-1215.)

1730.1-Conspiracy is an agreement to commit a crime 6/20

The crime of conspiracy is an agreement by two or more persons to commit any crime. (Pen. Code § 182, subd. (a)(1); *People v. Johnson* (2013) 57 Cal.4th 250, 257; *People v. Morante* (1999) 20 Cal.4th 403, 416.) Recognizing that criminal agency poses a greater threat to society than that posed by an independent criminal actor, the crime of conspiracy "seeks to deter criminal combination by recognizing the act of one as the act of all." (*People v. Luparello* (1986) 187 Cal.App.3d 410, 437.)

"Conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act, by at least one of these parties, in furtherance of the conspiracy. (*People v. Swain* (1996) 12 Cal.4th 593, 600 … .)" (*People v. Homick* (2012) 55 Cal.4th 816, 870; see also *People v. Dalton* (2019) 7 Cal.5th 166, 244.)

> A conviction for conspiracy requires proof of four elements: (1) an agreement between two or more people, (2) who have the specific intent to commit a public offense, (3) the specific intent to commit that offense, and (4) an overt act committed by one or more of the parties to the agreement for the purpose of carrying out the object of the conspiracy. ([Pen. Code] §§ 182, subd. (b), 184; *People v. Morante*, *supra*, 20 Cal.4th at p. 416 … .)

(*People v. Cook* (2001) 91 Cal.App.4th 910, 918; see also *People v. Johnson*, *supra*, 57 Cal.4th at p. 257; *People v. Garcia* (2018) 29 Cal.App.5th 864, 872; *People v. Mullins* (2018) 19 Cal.App.5th 594, 607.)

"It is true a conspirator is not responsible for the acts of a non-conspirator even if the acts helped further the conspiracy. [Citation.]" (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1001.) But, "[t]he prosecution need not prove that each conspirator knew the identity of all the other members of the conspiracy, or their exact functions. ([Citations.] If the defendant conspired with only one person instead of many, as charged, he is still guilty of conspiracy." (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 420.) " 'It is, of course, unnecessary that each conspirator see the others or know who all the members of the conspiracy are.' [Citation.]" (*Ibid*.) "Disagreement as to who the coconspirators were or who did an overt act, or exactly what that act was, does not invalidate a conspiracy conviction, as long as a unanimous jury is convinced beyond a reasonable doubt that a conspirator did commit some overt act in furtherance of the conspiracy." (*People v. Russo* (2001) 25 Cal.4th 1124, 1135; see also *People v. Jurado* (2006) 38 Cal.4th 72, 120-121.)

1730.2-Conspiracy requires an overt act 6/20

Conspiracy requires an overt act. Certainly, the "[c]ommission of the target offense in furtherance of the conspiracy satisfies the overt act requirement. (*People v. Padilla* (1995) 11 Cal.4th 891, 966.)" (*People v. Jurado* (2006) 38 Cal.4th 72, 121.) But the overt act need not "constitute the crime or even an attempt to commit the crime which is the conspiracy's ultimate object. Nor is it required that such a step or act, in and of itself, be a criminal or unlawful act." (*People v. Profit* (1986) 183 Cal.App.3d 849, 882; see also *People v. Johnson* (2013) 57 Cal.4th 250, 259; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 244.) Even internal discussions and arrangements between co-conspirators after the agreement may constitute overt acts. (*People v. Von Villas*, *supra*, 11 Cal.App.4th at p. 244; *People v. Sconce* (1991) 228 Cal.App.3d 693, 700.)

> Conspiracy law attaches culpability at an earlier point along the continuum than attempt. … Conspiracy separately punishes not the completed crime, or even its attempt. The crime of conspiracy punishes the agreement itself and "does not require the commission of the substantive offense that is the object of the conspiracy." [Citation.] "Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes." [Citation.]

(*People v. Johnson*, *supra*, 57 Cal.4th at pp. 258-259.) Thus, once conspirators agree to commit a crime, and one of the conspirators commits any overt act in furtherance of that end, the crime of conspiracy is complete even if they later agree to abandon the object of the conspiracy. (*People v. Sconce*, *supra*, 228 Cal.App.3d at p. 702.)

1740.1-Defendant liable for criminal acts of co-conspirators in furtherance 8/14

In addition to being a substantive criminal offense, "proof of a conspiracy serves to impose criminal liability on all conspirators for crimes committed in furtherance of the conspiracy." (*People v. Salcedo* (1994) 30 Cal.App.4th 209, 215.) Uncharged conspiracy is an alternative theory of liability for the underlying substantive offense. (*People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1202.)

In the often cited case of *People v. Kauffman* (1907) 152 Cal. 331, the California Supreme Court adopted the following language from another source:

> "The general rule is well settled that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance of any prosecution of the common design for which they combine. In contemplation of law the act of one is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan."

(*Id.* at p. 334; similarly, see *People v. Harper* (1945) 25 Cal.2d 862, 870; *People v. Flores* (2005) 129 Cal.App.4th 174, 182.) Thus, "a conspirator is criminally liable for the act of a coconspirator which follows as a probable and natural consequence of the common design, even though it [is] not intended as a part of the original design or common plan. [Citations.]" (*People v. Luparello* (1986) 187 Cal.App.3d 410, 442; see also *People v. Zielesch* (2009) 179 Cal.App.4th 731, 739; *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 843.)

> The question whether an unplanned crime is a natural and probable consequence of a conspiracy to commit the intended crime "is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, [the unplanned crime] was reasonably foreseeable." (*People v. Medina* [(2009)] 46 Cal.4th [913,] 920.) To be reasonably foreseeable " ' "[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. …" [Citation.]' " (*Ibid*.) Whether the unplanned act was a "reasonably foreseeable consequence" of the conspiracy must be "evaluated under all the factual circumstances of the individual case" and "is a factual issue to be resolved by the jury" (*ibid*.), whose determination is conclusive if supported by substantial evidence.

(*People v. Zielesch*, *supra*, 179 Cal.App.4th at pp. 739-740.)

1750.1-Conspiracy is proven by circumstantial evidence 4/17

The essence of conspiracy is the evil or corrupt agreement to do an unlawful act. (*People v. Marsh* (1962) 58 Cal.2d 732, 743; *People v. Lipinski* (1976) 65 Cal.App.3d 566, 575.) Conspiracy is a specific intent crime, requiring proof of both the intent to agree or conspire and the intent to commit the offense that is the object of the conspiracy. (*People v. Backus* (1979) 23 Cal.3d 360, 390.) "Circumstantial evidence often is the only means to prove conspiracy." (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999; see also *People v. Maciel* (2013) 57 Cal.4th 482, 515-516.)

> "As a general rule, a conspiracy can only be established by circumstantial evidence 'for, as the courts have said, it is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design [citation]; and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts (citing authority), nor that they had previously arranged a detailed plan ... for the execution of the conspiracy (citing authority).' [Citation.]" [Citation.] The trier of fact "may consider the events that occurred 'at or before' or 'subsequent' to the formation of the agreement. From the proof of the occurrences beforehand and at the time of the agreement linked with evidence of the overt acts." [Citation.] [¶] And "[w]hile it is true that mere association with the perpetrator of a crime does not prove criminal conspiracy, it is a starting place for examination." [Citation.] "[T]he entire conduct of the parties, their relationship, acts, and conduct … may be taken into consideration by the jury in determining the nature of the conspiracy." [Citation.]

(*People v. Starski* (2017) 7 Cal.App.5th 215, 224; see also *People v. Backus*, *supra*, 23 Cal.3d at p. 390.)

> There is no need to show that the parties met and expressly agreed to commit a crime in order to prove a conspiracy. The evidence is sufficient if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. … The inference can arise from the actions of the parties, as they bear on the common design, before, during, and after the alleged conspiracy.

(*In re Nathaniel C.*, *supra*, 228 Cal.App.3d at p. 999; see also *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1399; *People v. Cooks* (1983) 141 Cal.App.3d 224, 311.)

Although mere association with the perpetrator of a crime does not prove criminal conspiracy, it is a starting place for examination. (*In re Nathaniel C.*, *supra*, 228 Cal.App.3d at p. 999; *People v. Manson* (1976) 61 Cal.App.3d 102, 126.) "Where there is some evidence of participation or interest in the commission of the offense, it, when taken with evidence of association, may support an inference of a conspiracy to commit the offense." (*People v. Hardeman* (1966) 244 Cal.App.2d 1, 41.)

> If the agreement between the conspirators is the crux of criminal conspiracy, then the existence and nature of the relationship among the conspirators is undoubtedly relevant to whether such agreement was formed, particularly since such agreement must often be proved circumstantially. " 'The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy.' " [Citation.]

(*People v. Homick* (2012) 55 Cal.4th 816, 870-871, italics deleted.)

That there was the requisite agreement of the parties to constitute a conspiracy may be inferred from their conduct in mutually carrying out a common purpose in violation of a penal statute. (*In re Nathaniel C.*, *supra*, 228 Cal.App.3d at p. 999; *People v. Lipinski*, *supra*, 65 Cal.App.3d at p. 575.)

> "The major portion of the evidence might consist of the conversations and writings of the conspirators or it may consist of the overt acts done pursuant to the conspiracy. Such acts may establish the purpose and intent of the conspiracy and relate back to the agreement whose purpose may be otherwise enshrouded in the hush-hush admonitions of the conspirators." [Citation.]

(*People v. Manson*, *supra*, 61 Cal.App.3d at p. 126.)

1750.2-Overt acts not subject to challenge by PC995 motion 7/07

There is no authority for the defense attempt to challenge under Penal Code section 995 the sufficiency of the evidence presented at the preliminary hearing to support the overt acts alleged. Although an overt act is necessary to show that the unlawful agreement has been put into effect by the conspirators, the overt act need not be criminal or an unlawful act. (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 243-244.) The overt act is said to be merely the "theory" of the case rather than an actual element of the crime of conspiracy. (*Id.* at pp. 234-235; *People v. Jones* (1986) 180 Cal.App.3d 509, 516-517.) " '[T]he overt act merely establishes the legal existence of a criminal conspiracy,' and thus it is ' "the agreement, not the overt act that is punishable." ' " (*People v. Von Villas*, *supra*, at p. 235.) Indeed, there is no requirement that a jury must agree unanimously that any particular overt act was committed. It is sufficient that all jurors agree that some overt act was committed even though they may differ on which overt act was proven. (*People v. Russo* (2001) 25 Cal.4th 1124.) If a *conviction* only requires the trier to conclude that *some* overt act was proven without agreement on which overt act, it would be ludicrous to require that *all* overt acts, or any *specific* overt act, be proven to the magistrate.

The assertion that overt acts are subject to challenge under section 995 would also lead to the conclusion that only those overt acts proven at the preliminary hearing may be alleged and proven to the jury. That conclusion is at odds with Penal Code section 182, which specifically permits overt acts which have not been alleged to be presented in evidence. Combined with Penal Code section 1009, which permits amendment of the information at any stage to conform with proof, it follows that there is no requirement that evidence supporting the allegation of an overt act be presented at the preliminary hearing. In *People v. Witt* (1975) 53 Cal.App.3d 154, the court permitted the prosecutor to allege a new overt act at the close of his evidence. The court held: "The instant case meets the requirements of Penal Code section 1009. An information charging conspiracy may be amended to allege an additional overt act without alleging a different offense." (*Id.* at p. 165.)

Thus, if overt acts were subject to a motion under section 995, the People would lose any ability to add newly proven overt acts at trial, and the People would face a higher burden of proof at the preliminary hearing than exists at trial.

1770.1-People entitled to continuance of trial or PE for good cause 11/16

California statutes permit continuance of preliminary hearing or trial at the request of either the defense or the prosecution upon a showing of "good cause." (Pen. Code, §§ 859b, 1050, subd. (e), 1382.)

> Section 1382 does not define "good cause" as that term is used in the provision, but numerous California appellate decisions that have reviewed good-cause determinations under this statute demonstrate that, in general, a number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for the delay, (2) the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay. (See, e.g., *Stroud v. Superior Court* (2000) 23 Cal.4th 952, 969-970; *People v. Szeto* (1981) 29 Cal.3d 20, 29-30 ; *Jensen v. Superior Court* (2008) 160 Cal.App.4th 266, 271-275.) Past decisions further establish that in making its good-cause determination, a trial court must consider all of the relevant circumstances of the particular case, "applying principles of common sense to the totality of circumstances … ." (*Stroud*, *supra*, 23 Cal.4th 952, 969; see, e.g., *Jensen v. Superior Court*, *supra*, 160 Cal.App.4th 266, 270-275.)

(*People v. Sutton* (2010) 48 Cal.4th 533, 546.) "Past California decisions have examined a wide variety of circumstances that have been proffered or relied upon as a basis under [Pen. Code] section 1382 for finding good cause to delay a trial, including (1) the unavailability of a witness, (2) the unavailability of a judge, (3) the unavailability of a courtroom, (4) counsel's need for additional time to prepare for trial, (5) the unavailability of counsel, and (6) the interest in trying jointly charged defendants in a single trial." (*Id*. at p. 547.)

> The courts agree, for example, that delay caused by the conduct of the defendant constitutes good cause to deny his motion to dismiss. Delay for defendant's benefit also constitutes good cause. Finally, delay arising from unforeseen circumstances, such as the unexpected illness or unavailability of counsel or witnesses constitutes good cause to avoid dismissal. Delay attributable to the fault of the prosecution, on the other hand, does not constitute good cause. Neither does delay caused by improper court administration.

(*People v. Johnson* (1980) 26 Cal.3d 557, 570, fns. omitted.)

"What constitutes good cause for the delay of a criminal trial is a matter that lies within the discretion of the trial court." (*People v. Johnson* (1980) 26 Cal.3d 557, 570; see also *People v. Strozier* (1993) 20 Cal.App.4th 55, 60.) A trial court's ruling on a motion for a continuance is ordinarily reviewed for an abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

Even when good cause is not shown, however, a court should not deny the prosecution a continuance "when to do so would foreseeably result in dismissal." (*People v. Johnson* (2013) 218 Cal.App.4th 938, 943; see also *People v. Ferrer* (2010) 184 Cal.App.4th 873, 884-885; *People v. Henderson* (2004) 115 Cal.App.4th 922, 935.) This principle derives from Penal Code section 1050, subdivision (*l*), which states that section 1050 "is directory only and does not mandate dismissal of an action by its terms." (*People v. Johnson* , *supra*, 218 Cal.App.4th at pp. 942-943.)

Finally, Penal Code section 1050 "does not apply to a request to continue a preliminary hearing if the continuance request and the requested future date fall within the statutory 10-day time limit." (*People v. Smith* (2016) 245 Cal.App.4th 869, 875.) "As we read [Pen. Code] section 1050, subdivision (k) in light of section 859b, either party is *presumptively* entitled to a continuance,

without having to provide notice or make a good cause showing under section 1050, so long as the request and the requested date fall within the 10-day statutory deadline set by section 859b." (*Ibid*.)

1770.2-Good cause shown because of unavailable necessary witness 3/11

In *Owens v. Superior Court* (1980) 28 Cal.3d 238, the California Supreme Court set forth the legal criteria of good cause when a continuance is sought to secure the attendance of a witness: " '(1) That the movant has exercised due diligence in an attempt to secure the attendance of the witness at the trial by legal means; (2) that the expected testimony is material; (3) that it is not merely cumulative; (4) that it can be obtained within a reasonable time; and (5) that the facts to which the witness will testify cannot otherwise be proven.' " (*Id.* at p. 251; see also *People v. Howard* (1992) 1 Cal.4th 1132, 1171.)

Good cause for a continuance has been found to exist when a prosecution witness was unavailable through no lack of prosecutorial diligence. (*Gaines v. Municipal Court* (1980) 101 Cal.App.3d 556, 558-562; *Pickett v. Municipal Court* (1970) 12 Cal.App.3d 1158, 1162-1163.) And in *People v. Bronaugh* (1950) 100 Cal.App.2d 220, the court found good cause for a continuance where prosecution witnesses were hospitalized and unable to appear for trial. (See also *People v. Bracamonte* (1967) 253 Cal.App.2d 980, 984.)

A properly served subpoena may, by itself, show sufficient due diligence. In *Gaines v. Municipal Court*, *supra*, 101 Cal.App.3d 556, for example, the prosecution requested a continuance beyond the statutory time for trial until a subpoenaed police officer who was a material witness returned from vacation. The trial court found good cause for a continuance. The Court of Appeal rejected defense arguments that the prosecution should have made additional efforts to contact the police officer. The subpoena alone showed the exercise of due diligence. (Similarly see *People v. Alvarez* (1989) 208 Cal.App.3d 567, 578.)

1770.3-Good cause to maintain joinder of defendants under PC1050.1 6/20

Good cause to continue one defendant's case under Penal Code section 1050 is good cause to continue a jointly charged codefendant. Penal Code section 1050.1 (§ 1050.1) states:

> In any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the arraignment, preliminary hearing, or trial of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time.

In short, "[s]ection 1054.1 is the equivalent of 'good cause' " (*In re Samano* (1995) 31 Cal.App.4th 984, 989.)

Section 1050.1 applies only if the codefendant is jointly charged with the defendant whose case is being continued. Section 1050.1 is a continuance statute, not a joinder statute. (*A.A. v. Superior Court* (2003) 115 Cal.App.4th 1, 6.) Thus, section 1050.1 does not permit continuing a case over a defendant's objection beyond a statutory deadline to allow another defendant's case to

catch up and then be joined. (*Arroyo v. Superior Court* (2004) 119 Cal.App.4th 460, 464 [codefendant scheduled to be arraigned the day before the defendant's trial].)

Section 1050.1 applies if the hearing to be continued is an arraignment, preliminary hearing or trial. Thus, in the context of the statutory right to speedy trial within 60 days after the filing of the information under Penal Code section 1382, "… if the precipitating cause for trial delay is justifiable, such as codefendants' need to adequately prepare for trial, then the [Pen. Code] section 1098 joint trial mandate constitutes good cause to delay the trial of an objecting [in custody] codefendant." (*Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 501, fn. omitted (*Greenberger*).) If the hearing to be continued is a preliminary examination, the non-moving codefendant is not entitled to be released from custody under Penal Code section 859b. (*In re Samano*, *supra*, 31 Cal.App.4th 984.) "The request of one properly joined defendant for a continuance of the preliminary examination with good cause shall be deemed a request of all jointly charged defendants." (*Id*. at p. 993.) But this rule does not apply to permit a continuance of a preliminary hearing beyond the 60 day period of Penal Code section 859b without a personal waiver by all defendants. (*Ramos v. Superior Court* (2007) 146 Cal.App.4th 719.)

By its own terms, section 1050.1 does not apply if the finding of good cause to continue one defendant's case is based upon the unavailability or unpreparedness of that defendant (or, presumably, his or her counsel), but it will be impossible for all defendants (or their counsel) to be available or prepared "within a reasonable amount of time." The phrase "reasonable amount of time" is derived from case law predating the enactment of section 1050.1. Shortly before section 1050.1 was enacted, the appellate court in *Greenberger* examined a number of factors to determine if it was appropriate to delay the trial of a codefendant, over objection, to maintain joinder. These factors included (1) the length of the delay, (2) the seriousness of the charges, (3) the complexity of the case, (4) prejudice to the defendant, (5) the reason for the delay, (6) witness hardship, and (7) burden on the courts. (*Greenberger*, *supra*, 219 Cal.App.3d at pp. 504-506 [six month delay of multiple murder case upheld as reasonable].)

> And although past California decisions have held that a lengthy continuance of an objecting codefendant's trial to facilitate a joint trial is permissible only in instances in which the state interest in avoiding multiple trials is especially compelling—as when the trials are likely to be long and complex and impose considerable burdens on numerous witnesses [citation]—when the proposed delay to permit a single joint trial is relatively brief, the substantial state interests that are served in every instance by proceeding in a single joint trial generally will support a finding of good cause to continue the codefendant's trial under section 1382, even when there is no indication that, were the defendants' trials to be severed, the separate trials would be unusually long or complex.

(*People v. Sutton* (2010) 48 Cal.4th 533, 560 (*Sutton*), italics omitted.) In *Sutton*, for example, trailing a joint trial day-to-day for six days waiting for one defendant's attorney to complete another trial was found to be reasonable. (*Id*. at p. 562; see also *Hollis v. Superior Court* (1985) 165 Cal.App.3d 642 [40 day continuance requested by three of four defendants in complex murder case upheld over fourth defendant's objection].)

Finally, after one defendant's case is continued, section 1050.1 requires the prosecution to make the motion to continue the codefendant's case to the same date to maintain joinder. But "the language of section 1050.1 in question was not intended, and reasonably cannot be interpreted, to require an explicit motion by the prosecutor seeking such a continuance as a necessary prerequisite

to a trial court's finding of good cause to continue a codefendant's trial in order to permit a joint trial." (*Sutton*, *supra*, 48 Cal.4th at p. 559.)

1780.1-Defendant must show good cause to obtain continuance 11/18

In criminal cases the prosecution has a right to speedy trial. (Cal. Const. Art. I, § 29; *People v. Avila* (2009) 46 Cal.4th 680, 711.) Similarly, under Penal Code section 1050, the People, the defendant, the victim, and the witnesses all have a right to the expeditious disposition of a criminal case. (*People v. Avila*, *supra*; *People v. Santamaria* (1991) 229 Cal.App.3d 269, 277.) Penal Code section 1050 states in pertinent part:

> (a) The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. Excessive continuances contribute substantially to this congestion and cause substantial hardship to victims and other witnesses. …[¶] (e) Continuances shall be granted only upon a showing of good cause. …

What constitutes good cause under section 1050 for a continuance of a criminal trial is a matter that lies within the sound discretion of the trial court. (*People v. Cunningham* (2015) 61 Cal.4th 609, 666; *People v. Johnson* (1980) 26 Cal.3d 557, 570; *People v. Strozier* (1993) 20 Cal.App.3d 55, 60.) "Trial courts have wide discretion to determine whether such cause exists." (*People v. Reed* (2018) 4 Cal.5th 989, 1004.) "While a showing of good cause requires that both counsel and the defendant demonstrate they have prepared for trial with due diligence …, the trial court may not exercise its discretion 'so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.' [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 450; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 650; *People v. Leavel* (2012) 203 Cal.App.4th 823, 830.)

A continuance on the ground of lack of preparation must be supported by a showing that defendant and counsel used due diligence and all reasonable effort to prepare for the trial. (*People v. Grant* (1988) 45 Cal.3d 829, 844; *People v. Johnson* (1970) 5 Cal.App.3d 851, 859.) Even a continuance to obtain counsel of defendant's choice may properly be denied " 'if the accused is "unjustifiably dilatory" in obtaining counsel, or "if he arbitrarily chooses to substitute counsel at the time of trial." ' " (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850; see also *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1368.) " '[I]t is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel.' " (*People v. Howard* (1992) 1 Cal.4th 1132, 1171-1172.)

A trial court's ruling on a motion for a continuance is ordinarily reviewed for an abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

> A continuance in a criminal trial may only be granted for good cause. (§ 1050, subd. (e).) "The trial court's denial of a motion for continuance is reviewed for abuse of discretion." [Citation.] "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." [Citations.]

(*People v. Murgia* (2008) 44 Cal.4th 1101, 1118; see also *People v. D'Arcy* (2010) 48 Cal.4th 257,

287-288.) Denial of a motion to continue is "seldom successfully attacked." (*People v. Beames* (2007) 40 Cal.4th 907, 920; see also *People v. Anderson* (2018) 5 Cal.5th 372, 397.)

1780.2-Defendant must show good cause to continue PE 3/11

Penal Code section 859b states: "Both the defendant *and the people* have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided in Section 1050, the preliminary examination shall be held within 10 court days … ." (Italics added; see also *Galindo v. Superior Court* (2010.) 50 Cal.4th 1, 8, 12-13 [magistrate need not hear *Pitchess* discovery motion before preliminary hearing because it would entail continuance and was not likely to yield evidence that would defeat probable cause].) "Good cause" to continue a preliminary hearing on behalf of the defendant, over objection of the People, is circumscribed by various considerations not applicable to trial continuances.

First, a defendant's right to discovery, both statutory and constitutional, is a trial right, not a preliminary hearing right. "It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony. *The examination shall not be used for purposes of discovery.*" (Pen. Code, § 866, subd. (b), italics added.) The criminal discovery statutes clearly focus on the trial date as the triggering event for the prosecution to provide the defense with discovery. (See, e.g., Pen. Code §§ 1054, subds. (a) & (c); 1054.7.) If the preliminary hearing is not intended as a vehicle for discovery, certainly there is no basis to continue a preliminary hearing while waiting for additional discovery to be provided the defense.

Second, the defense is restricted in their ability to call witnesses whose testimony is not reasonably likely to affect the magistrate's decision. (Pen. Code, § 866, subd. (a); *People v. Eid* (1994) 31 Cal.App.4th 114, 127-128.) Therefore, a preliminary hearing should not be continued to allow the defense to subpoena witnesses whose testimony is unlikely to be either admissible or relevant on the limited question whether there is probable cause to believe the defendant has committed a felony.

Third, a defendant's right to confront and cross-examine witnesses at a preliminary hearing is extremely limited. (Pen. Code, § 872, subd. (b); *Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1070.) Thus, a preliminary hearing should not be continued simply because the prosecution may seek to present hearsay testimony of an unavailable witness.

Finally, the denial of a defense motion to continue a preliminary hearing generally does not impact a substantial right of the defendant (Pen. Code, § 995) or deprive the defendant of the right to a fair trial. The denial of a defendant's request to continue a preliminary examination prevails on appeal only if the defendant "can demonstrate that the denial of a continuance before the preliminary hearing resulted in the denial of a fair trial or otherwise affected the ultimate judgment." (*People v. Jenkins* (2000) 22 Cal.4th 900, 958, citing *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-530.)

1780.3-Defense must show due diligence for continuance to obtain witness 9/19

"The decision to continue a hearing so a party can secure the presence of a witness is one within the trial court's discretion." (*People v. Caro* (2019) 7 Cal.5th 463, 499.) "A trial court does not abuse its discretion in denying a continuance unless the defendant establishes good cause for a continuance." (*Ibid*.) When the defendant's purpose of the requested continuance is to secure the attendance of a witness, the defense must show (1) that they exercised due diligence to secure the

attendance of the witness, (2) that the expected testimony is material and not cumulative, (3) that the testimony can be secured in a reasonable time, and (4) that the facts sought to be proven could not be proven by other means. (*People v. Mora & Rangel* (2018) 5 Cal.5th 442, 509; *People v. Howard* (1992) 1 Cal.4th 1132, 1171; similarly, see *People v. Strozier* (1993) 20 Cal.App.4th 55, 60-61.) "The failure to attempt to secure the attendance of a witness for whom a continuance is sought indicates a lack of due diligence." (*Pickett v. Municipal Court* (1970) 12 Cal.App.3d 1158, 1162-1163.) An attempt to serve the witness before they leave the jurisdiction should be made even if the witness is believed to be going on vacation. (*Perryman v. Superior Court* (2006) 141 Cal.App.4th 767, 778; *Baustert v. Superior Court* (2005) 129 Cal.App.4th 1269, 1277-1278.)

1800.1-Corpus delicti requires only slight evidence 2/21

"The corpus delicti rule precludes conviction where the corpus of the offense has been established on the basis of a defendant's uncorroborated statements." (*People v. Miranda* (2008) 161 Cal.App.4th 98, 101; see also *People v. Dalton* (2019) 7 Cal.5th 166, 218.) "The purpose of the corpus delicti rule is to assure that 'the accused is not admitting to a crime that never occurred.'[Citation.] " (*People v. Jones* (1998) 17 Cal.4th 279, 301; see also *People v. Sanchez* (2016) 246 Cal.App.4th 167, 173.) Thus, a finding of guilt still must be supported by some independent proof of the corpus delicti of the crime. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1180 (*Alvarez*).) But such independent proof of corpus delicti is no longer prerequisite to the court admitting evidence of a defendant's extrajudicial admission or confession. (*Ibid*.) Instead, it is for the trier of fact to determine whether the evidence presented satisfies the corpus delicti rule. (*People v. Capers* (2019) 7 Cal.5th 989, 1002-1004 [also noting that California does not follow the federal common law corroboration rule].)

The corpus delicti rule is satisfied by independent proof "that a crime has been committed by someone." (*People v. Cobb* (1955) 45 Cal.2d 158, 161.) This consists of two elements: (1) "the fact of injury, loss, or harm," and (2) "the existence of a criminal agency as its cause." (*Alvarez*, *supra*, 27 Cal.4th at p. 1168; *People v. Adams* (1993) 19 Cal.App.4th 412, 428.) But, the "prosecution need not adduce 'independent evidence of every physical act constituting an element of the offense.' " (*People v. Krebs* (2019) 8 Cal.5th 265, 317, citing *People v. Jones*, *supra*, 17 Cal.4th at p. 303; see also *People v. Ruiz* (2020) 56 Cal.App.5th 809, 831.)

Independent proof of corpus delicti requires only a slight or prima facie showing of the offense, not proof beyond a reasonable doubt. (*Alvarez, supra,* 27 Cal.4th at p. 1171; *People v. Webb* (1993) 6 Cal.4th 494, 529.) "[T]he amount of independent proof required is 'quite small,' 'slight,' or 'minimal,' amounting only to a prima facie showing permitting a reasonable inference a crime was committed. (*People v. Jones* (1998) 17 Cal.4th 279, 301.)" (*People v. Tompkins* (2010) 185 Cal.App.4th 1253, 1259.) "This minimal standard is better understood when we consider that the purpose of the corpus delicti rule is 'to protect the defendant against the possibility of fabricated testimony which might wrongfully establish the crime and the perpetrator.' [Citation.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 368.)

Corpus delicti may be established entirely by circumstantial evidence and the reasonable inferences to be drawn therefrom. (*People v. Jennings*, *supra*, at p. 364; *People v. Wright* (1990) 52 Cal.3d 367, 404.) The prosecution need not eliminate all inferences tending to show that no crime was committed. And an inference of criminal conduct is proper even in the face of a plausible noncriminal explanation. (*Alvarez*, *supra*, 27 Cal.4th at p. 1171; *People v. Jacobson* (1965) 63

Cal.2d 319, 327; see also *People v. Stacy* (2010) 183 Cal.App.4th 1229, 1236; *People v. Martinez* (1994) 26 Cal.App.4th 1098, 1104; *People v. Ramirez* (1979) 91 Cal.App.3d 132, 137.)

Once corpus delicti is proved, a defendant's admissible extrajudicial statements can be considered by the fact finder for all purposes, including establishing the elements and degree of the crime and the identity of the perpetrator. (*Alvarez, supra,* 27 Cal.4th at p. 1171; *Matthews v. Superior Court* (1988) 201 Cal.App.3d 385, 397; *People v. Manson* (1977) 71 Cal.App.3d 1, 41-42.)

1800.2-Corpus of murder is death by criminal agency 8/19

" 'The elements of the corpus delicti are (1) the injury, loss or harm, and (2) the criminal agency that has caused the injury, loss or harm.' [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1057.) "In a prosecution for murder, as in any other criminal case, the corpus delicti—i.e., death caused by a criminal agency—must be established independently of the extrajudicial statements, confessions or admissions of the defendant." (*People v. Towler* (1982) 31 Cal.3d 105, 115.) "The corpus delicti of murder consists of the death of the victim and a *criminal agency* as the cause of that death. [Citation.]" (*People v. Huynh* (2012) 212 Cal.App.4th 285, 300-301 (*Huynh*), italics added.) "There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. [Citation.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1171; see also *People v. Dalton* (2019) 7 Cal.5th 166, 218.)

> The standard of proof required to show criminal agency is only a reasonable probability; in other words, only a slight or prima facie showing that the criminal act of another caused the death is necessary. [Citation.] "To meet the foundational test the prosecution need not eliminate all inferences tending to show a noncriminal cause of death. Rather, the foundation may be laid by the introduction of evidence which creates a reasonable inference that the death could have been caused by a criminal agency [citation], even in the presence of an equally plausible noncriminal explanation of the event." (*People v. Jacobson* (1965) 63 Cal.2d 319, 327.)

(*Huynh*, *supra*, 212 Cal.App.4th at p. 301.) Thus, for example, other circumstantial evidence may be sufficient to prove criminal agency, even if there the autopsy results are inconclusive. (*Id*. at pp. 302-303; see also *People v. Towler*, *supra*, 31 Cal.3d at pp. 112-117; *People v. Jacobson*, *supra*, 63 Cal.2d at p. 327.)

1810.1-Corpus delicti rule applies at preliminary hearing and trial 6/20

"In every criminal *trial*, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168, italics added.)

The corpus delicti rule also applies at a preliminary hearing. (*Munoz v. Superior Court* (2020) 45 Cal.App.5th 774, 780; *People v. Powers-Monachello* (2010) 189 Cal.App.4th 400, 406-409; see also *People v. Herrera* (2006) 136 Cal.App.4th 1191, 1201-1202; *Rayyis v. Superior Court* (2005) 133 Cal.App.4th 138, 149.)

The corpus delicti rule does not apply, however, to penalty enhancement allegations. (*People v. Miranda* (2008) 161 Cal.App.4th 98. 102, 108; *People v. Shoemake* (1993) 16 Cal.App.4th 243, 252, 256.)

The corpus delicti rule generally also does not apply to uncharged criminal acts admitted under Evidence Code section 1101, subdivision (b). (*People v. Davis* (2008) 168 Cal.App.4th 617, 633-638.) There is an exception for uncharged acts admitted at the penalty phase of a capital case, which must comply with the corpus delicti rule. (*People v. Valencia* (2008) 43 Cal.4th 268, 296.)

1810.2-Corpus delicti rule does not apply to degree of crime or identity 5/14

Neither the identify of the person who committed the crime, nor the degree of the crime, are part of the corpus delicti rule. (*People v. Cullen* (1951) 37 Cal.2d 614, 624; *People v. Rosales* (2014) 222 Cal.App.4th 1254, 1260; *People v. Martinez* (1994) 26 Cal.App.4th 1098, 1104; *People v. Ramirez* (1979) 91 Cal.App.3d 132, 137.) "It is also well-established that a defendant's inculpatory out-of-court statements may, however, be relied upon to establish his or her identify as the perpetrator of a crime. (*People v. Howard* (2010) 51 Cal.4th 15, 36-37; *People v. Ledesma* [(2006)] 39 Cal.4th [641] at p. 721.)" (*People v. Rosales*, *supra*, 222 Cal.App.4th at p. 1260.) "This is because the perpetrator's identity is not part of the corpus delicti." (*Ibid*.)

1810.3-Corpus delicti rule does not apply to statement that are part of the crime 6/20

The corpus delicti rule does not apply to statements by the defendant that are part of the crime itself. (*People v. Carpenter* (1997) 15 Cal.3d 312, 394 [defendant statement to victim that he intended to rape her admissible to prove attempted rape and murder]; *Munoz v. Superior Court* (2020) 45 Cal.App.5th 774, 776, 781, 783-784 [wiretap recordings of defendant and others planning to kill someone admissible in conspiracy to commit murder prosecution]; distinguish *People v. Herrera* (2006) 136 Cal.App.4th 1191, 1206 [only evidence of conspiracy was defendant's confession to detective after the fact].) "Statements that, although extrajudicial, are themselves a part of the conduct of the crime, are not subject to the corpus delicti rule. [Citation.]" (*In re I.M.* (2005) 125 Cal.App.4th 1195, 1204 [defendant's misleading statement intended to protect perpetrator of crime admissible to prove accessory after the fact charge]; see also *People v. Chan* (2005) 128 Cal.App.4th 408, 420-421 [defendant provided false address on sex registration form admissible to prove violation of Pen. Code § 290].)

1870.1-Two-part test for proof of incompetence of counsel 4/20

The burden of proving a claim of ineffective assistance of counsel is on the defendant. There are two components to such a claim whether analyzed under federal or state law. (*Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*); *People v. Williams* (1988) 44 Cal.3d 883, 937.) "*Strickland* requires a defendant to establish deficient performance and prejudice." (*Knowles v. Mirzayance* (2009) 556 U.S. 111, 124 (*Knowles*); see also *People v. Mickel* (2016) 2 Cal.5th 181, 198.) The defendant must first show that counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. (*Strickland*, *supra*, 466 at pp. 687-688; see also *People v. Jennings* (1991) 53 Cal.3d 334, 357.) Second, the defendant must demonstrate that it is reasonably probable a more favorable result would have been obtained in the absence of counsel's failings. (*Strickland*, *supra*, 466 U.S. at pp. 691-694; see also *People v. Duncan* (1991) 53 Cal.3d 955, 966.)

1870.1a-Part 1: The performance standard 4/20

Regarding the first component of an ineffective assistance of counsel claim, the performance standard, the defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland v. Washington* (1984) 466 U.S. 668, 689 (*Strickland*).) "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." (*Id*. at p. 688; see also *Knowles v. Mirzayance* (2009) 556 U.S. 111, 124 (*Knowles*).) The prevailing professional norms require a "contemporary assessment of counsel's conduct," "viewed as of the time of counsel conduct." (*Maryland v. Kulbicki* (2015) 577 U.S. 1, 4, internal citations omitted; see also *In re Gay* (2020) 8 Cal.5th 1059, 1073.)

The performance standard does not require that a defense attorney take any action simply because there is "nothing to lose." (*Knowles*, *supra*, 556 U.S. at p. 122.) Similarly, "[t]he law does not require counsel to raise every available nonfrivolous defense." (*Id*. 556 U.S. at p. 127.) "We have said that counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' *Strickland*, [*supra*] 466 U.S. at [p.] 690, and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant, *id*., at [p.] 687." (*Burt v. Titlow* (2013) 571 U.S. 10, 22.)

> "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." [Citation.] " '[S]econd-guessing' is to be avoided." [Citation.] Stated differently, the question is not what the "best lawyers would have done," nor "even what most good lawyers would have done," but simply whether "some reasonable lawyer" could have acted, in the circumstances, as defense counsel acted in the case at bar. [Citation.] A defendant must show that [her] attorney's performance fell below this objective standard of reasonableness by a preponderance of the evidence.

(*People v. Jones* (2010) 186 Cal.App.4th 216, 235; see also *People v. Angel* (2017) 9 Cal.App.5th 1107, 1112.)

The defendant has the affirmative duty to demonstrate the alleged acts or omissions by defense counsel cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Blomdahl* (1993) 16 Cal.App.4th 1242, 1248.) "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." (*Strickland*, *supra,* 466 U.S. at p. 690; see also *Knowles*, *supra*, 556 U.S. at p. 124.) But, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." (*Hinton v. Alabama* (2014) 571 U.S. 263, 274.)

"In evaluating defendant's showing we accord great deference to the tactical decisions of trial counsel in order to avoid 'second-guessing counsel's tactics and chilling vigorous advocacy by tempting counsel "to defend himself against a claim of ineffective assistance after trial rather than to defend his client against criminal charges at trial." ' " (*In re Fields* (1990) 51 Cal.3d 1063, 1069-1070, internal citations omitted.) "Even the most competent counsel may from time-to-time make decisions or conduct himself in a manner which might be criticized by other equally competent counsel but that is not the measure of competency of counsel on review by an appellate court." (*People v. Wallin* (1981) 124 Cal.App.3d 479, 485.) Thus, even when counsel's tactical choice

appears unreasonable on its face, a reviewing court's inability to understand why counsel acted that way cannot be the basis for inferring that counsel was wrong. (*People v. Bess* (1984) 153 Cal.App.3d 1053, 1059.)

1870.1b-Part 2: The prejudice requirement 2/21

The second required element of any ineffective assistance of counsel claim is proof of prejudice. (*Knowles v. Mirzayance* (2009) 556 U.S. 111, 124 (*Knowles*); *Strickland v. Washington* (1984) 466 U.S. 668, 691-694 (*Strickland*); "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." (*Strickland*, *supra*, 466 U.S. at p. 691.) To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*., at p. 694; see also *Knowles*, *supra*, 556 U.S. at p. 127.) A reasonable probability means a substantial, not just conceivable, likelihood of a different result. (*Shinn v. Kayer* (2020) 592 U.S. ___, ___ [141 S.Ct. 517, 523, 208 L.Ed.2d 353, ___].) In other words, "[p]rejudice is established if there is a reasonable probability that a more favorable outcome would have resulted had the evidence been presented, i.e., a probability sufficient to undermine confidence in the outcome. [Citations.] The incompetence must have resulted in a fundamentally unfair proceeding or an unreliable verdict. [Citation.]" (*In re Clark* (1993) 5 Cal.4th 750, 766.) "[T]o be entitled to reversal of a judgment on grounds that counsel did not provide constitutionally adequate assistance, the petitioner must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

The *Strickland* inquiry requires "probing and fact-specific analysis." (*Sears v. Upton* (2010) 561 U.S. 945, 955.) "How readily deficient performance undermines confidence in the trial's outcome will in part depend on the strength of the trial evidence on any decisive points. A 'verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.' (*Strickland*, at p. 696.)" (*In re Gay*, *supra*, 8 Cal.5th 1059, 1087.)

A court can deny a claim of ineffective assistance of counsel solely on the basis of lack of demonstrable prejudice without ever reaching the issue of counsel's performance. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies … . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice … that course should be followed." (*Strickland*, *supra*, 466 U.S. at p. 697; see also *In re Champion* (2014) 58 Cal.4th 965, 1007; *People v. Henderson* (2020) 46 Cal.App.5th 533, 549; *People v. Jacobs* (2013) 220 Cal.App.4th 67, 75-76.)

1870.2-Direct appeal is not best forum to litigate competency of counsel 12/20

"[C]ertain practical constraints make it more difficult to address ineffective assistance of counsel claims on direct appeal rather than in the context of habeas corpus proceedings." (*People v. Mickel* (2016) 2 Cal.5th 181, 198.) "Generally, claims for ineffective assistance of counsel are more appropriately litigated on habeas corpus because the reasons for defense counsel's actions or omissions can be explored." (*People v. Thomas* (2017) 15 Cal.App.5th 1063, 1075.) If the record on

appeal " ' "sheds no light on why counsel acted or failed to act in the manner challenged[,] … unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected,' " and the "claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; see also *People v. Vines* (2011) 51 Cal.4th 830, 876; *People v. Kendrick* (2014) 226 Cal.App.4th 769, 778.)

> On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding.

(*People v. Mai* (2013) 57 Cal.4th 986, 1009; see also *People v. Torres* (2018) 25 Cal.App.5th 162, 171; but see *People v. Zaheer* (2020) 54 Cal.App.5th 326, 336 ["Here we are presented with such an exceptional case. It is clear from defense counsel's own statements in conjunction with his mistrial and new trial motions that there was no tactical basis for his failure … . It was merely an oversight."]

> Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] Defendant's burden is difficult to carry on direct appeal, as we have observed: " 'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.' " [Citation.]

(*People v. Lucas* (1995) 12 Cal.4th 415, 436-437; see also *People v. Mickel*, *supra*, 2 Cal.5th at p. 198.)

1870.3-Attack on counsel waives atty-client and work product privileges 7/07

Many matters raised in an allegation of incompetence of counsel involve work product and communications otherwise subject to the attorney-client privilege. But, "[t]here is no [attorney-client] privilege … as to communications relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." (Evid. Code § 958.) Nor does the work product privilege protect material relevant to the issues raised. (Code Civ. Proc., § 2018.080.) Thus, when a defendant challenges the competency of counsel, whether by petition for habeas corpus, motion for new trial, or otherwise, the attorney-client and work product privileges are waived as to all matters put in issue by the challenge. (*In re Ledesma* (2006) 39 Cal.4th 641, 690-691; *In re Scott* (2003) 29 Cal.4th 783, 814; see *In re Gray* (1981) 123 Cal.App.3d 614, 616; see also *People v. Dennis* (1986) 177 Cal.App.3d 863, 873.)

1870.4-Defense counsel only required to make reasonable investigation 4/21

"Counsel is only required to make a reasonable investigation; reasonableness depends upon the totality of the circumstances, and great deference is given to counsel's judgment. (*In re Cudjo* (1999) 20 Cal.4th 673, 692.)" (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1093.)

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

> In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

(*Strickland v. Washington* (1984) 466 U.S. 668, 691.) But "a defense attorney who fails to investigate potentially exculpatory evidence, including evidence that might be used to impeach key prosecution witnesses, renders deficient representation. [Citations.]" (*In re Edward S.* (2009) 173 Cal.App.4th 387, 407,) "California case law makes clear that counsel has an obligation to investigate all possible defenses and should not select a defense strategy without first carrying out an adequate investigation. (*Ibid*.; see also *People v. Hill* (2011) 198 Cal.App.4th 1008, 1017.) Whether counsel exercised reasonable professional judgment can also turn on whether the investigation supporting counsel's decision not to consult an expert was itself reasonable. (*In re Long* (2020) 10 Cal.5th 764, 776.) Any required investigation should be conducted in a timely fashion. (*In re Gay* (2020) 8 Cal.5th 1059, 1078-1079.) An attorney should not advise a defendant to enter a guilty plea without exploring potential defenses. (*People v. O'Hearn* (2020) 57 Cal.App.5th 280, 294-299.)

"In order to render reasonably competent assistance, a criminal defense attorney should investigate carefully the possible grounds for seeking the suppression of incriminating evidence, explore the factual bases for defenses that may be available to the defendant, and otherwise pursue diligently those leads indicating the existence of evidence favorable to the defense. [Citations.]" (*In re Neely* (1993) 6 Cal.4th 901, 919.) But the standards for competent representation do not require counsel to investigate or interview all potential witnesses before trial. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1111; *People v. Knight* (1987) 194 Cal.App.3d 337, 345.) "Defense counsel was not required to conduct a limitless investigation to be adjudged to have performed effectively." (*In re Alcox* (2006) 137 Cal.App.4th 657, 670.)

A defense attorney's failure to investigate may be excused when the defendant withholds relevant information from the attorney.

> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." (*Strickland v. Washington* (1984) 466 U.S. 668, 691.) Thus, a defendant can hinder counsel's investigation not only through affirmative statements, but also by remaining silent or failing to disclose pertinent information to counsel. (*In re Andrews* (2002) 28 Cal.4th 1234, 1255.) Whether a defendant's statements or nondisclosures have hindered trial counsel's investigation depends upon the circumstances of each case. See *In re Lucas* (2004) 33 Cal.4th 682, 729.)

(*In re Crew* (2011) 52 Cal.4th 126, 148.)

1870.5-Failure to make objections does not show incompetence 4/20

Generally, the failure to make objections is a matter of trial tactics which should not be subject to "judicial hindsight." (*People v. Frierson* (1979) 25 Cal.3d 142.) " 'Failure to object rarely constitutes constitutionally ineffective legal representation.' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 207; see also *People v. Bernal* (2019) 42 Cal.App.5th 1160, 1169.) "Because the decision whether to object is inherently tactical, the failure to object to evidence will seldom establish incompetence." (*People v. Freeman* (1994) 8 Cal.4th 450, 490-491; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1185-1188 [tactical reasons to not object]; distinguish *People v. Valencia* (2006) 146 Cal.App.4th 92 [counsel incompetent to fail to make objection to inadmissible testimony]; *People v. Lopez* (2005) 129 Cal.App.4th 1508 [accord].) "The decision whether to object to evidence at trial is a matter of tactics and, because of the deference accorded such decisions on appeal, will seldom establish that counsel was incompetent. [Citations.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 444 [plausible tactical reason to not object to holes in chain of custody of prosecution evidence].)

The failure to make a motion to suppress involves similar analysis. "Where a claim of ineffective assistance is premised on a failure to seek suppression of evidence obtained in violation of the Constitution, the defendant must demonstrate the suppression motion was meritorious and there is a reasonable probability the verdict would have been different had defendant prevailed on the motion." (*People v. Torres* (2018) 25 Cal.App.5th 162, 171.)

1870.6-Limited cross-examination does not show incompetence 1/10

" 'As to whether certain witnesses should have been more rigorously cross-examined, such matters are normally left to counsel's discretion and rarely implicate inadequacy of representation.' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 217.) "Cross-examination is always a risky process-even experienced counsel conducting a brilliant cross-examination might inadvertently elicit damaging disclosures, a risk inherent in the tactical decision to conduct cross-examination." (*People v. Ervin* (2000) 22 Cal.4th 48, 94.) In addition, counsel should not be faulted for failing to anticipate a nonresponsive answer that includes information unhelpful to the defense. (*People v. Mayfield* (1997) 14 Cal.4th 668, 787.)

1870.7-Unless defendant objects, defense counsel can concede some facts 1/21

As a general rule, defense counsel is responsible for trial strategy.

> 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.' " (*In re Horton* (1991) 54 Cal.3d 82, 95 (*Horton*).) "The reason is that when … the accused exercises his or her constitutional right to representation by professional counsel, ' "it is counsel, not defendant, who is in charge of the case." ' " (*People v. Hinton* (2006) 37 Cal.4th 839, 873-874, quoting *Horton*, *supra*, at p. 95.)

(*People v. Johnson* (2020) 45 Cal.App.5th 123, 129-130.) " ' "[T]here is no constitutional right to an attorney who will conduct the defense of the case in accordance with an indigent defendant's whims." ' " (*People v. Jones* (1971) 16 Cal.App.3d 837, 844, internal citations omitted.) But some crucial trial decisions do belong to the defendant. (*McCoy v. Louisiana* (2018) 584 U.S. ___ [138 S.Ct. 1500, 200 L.Ed.2d 821] (*McCoy*) [attorney cannot admit defendant's guilt to spare him from

death sentence if defendant insists on pursuing claim of actual innocence].) "The United States Supreme Court decided in *McCoy* that an attorney may not concede guilt on a charge—even if that is a reasonable strategy given overwhelming prosecution evidence—when the defendant expresses that the objective of the defense is to maintain his or her complete innocence (*McCoy*, *supra*, at p. ___ [138 S.Ct. at pp. 1508-1509; 200 L.Ed.2d at pp. __-__].)" *People v. Bernal* (2019) 42 Cal.App.5th 1160, 1165-1166; see also *People v. Flores* (2019) 34 Cal.App.5th 270, 276-283 [attorney's concession on elements of charged crimes despite defendant's insistence he was totally innocent violated *McCoy*]; *People v. Eddy* (2019) 33 Cal.App.5th 472, 479-483 [attorney's concession of guilt on lesser charge over defendant's insistence he was innocent violated *McCoy*].)

"California courts following *McCoy* repeatedly have held that case applies only where defendant actively opposes counsel's concession." (*People v. Villa* (2020) 55 Cal.App.5th 1042, 1056.) Thus, absent contrary direction or timely objection from the defendant, otherwise competent counsel can admit some incriminating facts, not contest certain elements of the charged crime, or concede guilt in an effort to obtain a better overall outcome for the defendant without violating *McCoy*. (*In re Smith* (2020) 49 Cal.App.5th 377, 390 [*McCoy* inapplicable because defendant did not object until after counsel's concession in closing argument]; *People v. Palmer* (2020) 49 Cal.App.5th 268, 280-283 [attorney conceded defendant guilty of voluntary manslaughter instead of charged murder]; *People v. Bernal*, *supra*, 42 Cal.App.5th at p. 1167 [no indication on record that defendant objected to counsel's concession of guilt during closing argument]; *People v. Franks* (2019) 35 Cal.App.5th 883, 889-891 [*McCoy* not violated when uncooperative defendant refused to consent or object to attorney's decision to admit he was killer]; *People v. Lopez* (2019) 31 Cal.App.5th 55, 63-67 [attorney's concession of guilt on lesser charge without objection by defendant did not violate *McCoy*]; accord *People v. Marsh* (2019) 37 Cal.App.5th 474, 490-492 [counsel's admission of guilt during closing argument not equivalent to guilty plea requiring defendant's consent].)

1880.1-General test for when defense counsel has conflict of interest 6/18

" 'The right to effective assistance of counsel, secured by the Sixth Amendment to the federal Constitution, and article I, section 15 of the California Constitution, includes the right to representation that is free from conflicts of interest.' " (*People v. Roldan* (2005) 35 Cal.4th 646, 673 (*Roldan*), quoting *People v. Cox* (2003) 30 Cal.4th 916, 948.) "While the classic example of a conflict in criminal litigation is a lawyer's dual representation of codefendants, the constitutional principle is not narrowly confined to instances of this type. (*People v. Hardy* (1992) 2 Cal.4th 86, 135.)" (*People v. Gonzales & Soliz* (2011) 52 Cal.4th 254, 309 (*Gonzales*).) "A conflict may also arise when an attorney's loyalty to, or efforts on behalf of, a client are threatened by the attorney's own interests. (*Ibid*., see also *Roldan*, *supra*, at p. 673; *Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1138.) "The federal and state constitutional right to counsel in a criminal case also includes the right to representation free of conflicts of interest that may compromise the attorney's loyalty to the client and impair counsel's efforts on the client's behalf." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

"Under the federal Constitution, prejudice is presumed when counsel suffers from an actual conflict of interest. (*Cuyler v. Sullivan* (1980) 446 U.S. 335.)" (*Gonzales*, *supra*, 52 Cal.4th at p. 309.) This presumption arises, however, "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his

lawyer's performance.' " (*Strickland v. Washington* (1984) 466 U.S. 668, 692, quoting *Cuyler*, *supra*, at p. 348; distinguish *Harris v. Superior Court*, *supra*, 225 Cal.App.4th at pp. 1145-1148 [no showing of prejudice necessary to obtain dismissal of information based upon denial of conflict-free attorney during preliminary hearing].) California follows federal law in this regard. Prejudice will be presumed only when counsel is representing multiple defendants concurrently and a conflict of interest arises from that circumstance. (*People v. Doolin* (2009) 45 Cal.4th 390, 429; *People v. Almanza* (2015) 233 Cal.App.4th 990, 1006.)

An actual conflict of interest means "a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties." (*Mickens v. Taylor* (2002) 535 U.S. 162, 171, italics omitted.) "Under the federal precedents, which we have also applied to claims of conflict of interest under the California Constitution, a defendant is required to show that counsel performed deficiently and a reasonable probability exists that, but for counsel's deficiencies, the result of the proceeding would have been different. (*People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22 [disapproving former state law "informed speculation" standard of prejudice].)" (*Gonzales*, *supra*, 52 Cal.4th at pp. 309-310.) To determine if a conflict adversely affected counsel's performance the court should examine whether counsel "pulled his punches," and "failed to represent [the] defendant as vigorously as he might have, had there been no conflict." (*Id*. at p. 310; see also *People v. Perez* (2018) 4 Cal.5th 421, 435; *People v. O'Malley* (2016) 62 Cal.4th 944, 1001; *Roldan*, *supra*, 35 Cal.4th at p. 674.) But "no actual or potential conflict of interest arises when the attorney does not possess such confidential information." (*People v. Williams* (2015) 61 Cal.4th 1244, 1283.)

On appeal, absent a dual-representation situation calling for a presumption of prejudice, "to obtain reversal of a criminal verdict, the defendant must demonstrate that (1) counsel labored under an actual conflict of interest that adversely affected counsel's performance, and (2) absent counsel's deficiencies arising from the conflict, it is reasonably probable the result of the proceeding would have been different." (*People v. Mai*, *supra*, 57 Cal.4th at p. 1010; see also *People v. Rices* (2017) 4 Cal.5th 49, 65.)

1880.2-Court has duty of inquiry into potential conflict of interest 4/18

Although defense counsel "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop" (*Holloway v. Arkansas* (1978) 435 U.S. 475, 485; see also *People v. Belmontes* (1988) 45 Cal.3d 744, 776; *Leversen v. Superior Court* (1983) 34 Cal.3d 530, 537), the court has a duty of inquiry when it becomes aware of a potential conflict of interest by defense counsel. "We agree that an attorney's declaration of a conflict of interest is to be accorded great deference. But it does not follow that an attorney's failure to declare a conflict deserves the same deference, absent inquiry by the court. An attorney's silence may reflect unawareness of his or her legal obligation to declare a conflict." (*Reid v. Superior Court* (1983) 140 Cal.App.3d 624, 648.)

It is not improper for the prosecution to bring such matters to the court's attention. The prosecution had the right to protect itself. Whether a conflict of interest exists such that a defendant should have a different attorney is a very sensitive matter. The prosecution could legitimately be concerned that if the court had not examined the question, any conviction it received might have been doomed to reversal on appeal even before the trial began. (See, e.g., *People v. Mroczko* (1983) 35 Cal.3d 86.) We see no impropriety in the prosecution's cautiously seeking a determination before trial whether a conflict existed

rather than waiting for a defense challenge to a conviction after trial.
(*People v. Harris* (2005) 37 Cal.4th 310, 342.)

The court's "duty of inquiry" is triggered "when the trial court knows or reasonably should know that a particular conflict exists." (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 347; see also *Mickens v. Taylor* (2002) 535 U.S. 162, 168.) "[A] court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." (*Wheat v. United States* (1988) 486 U.S. 153, 159.)

> When a trial court is aware, or should be aware, of a possible conflict of interest between a criminal defendant and defense counsel, the court is required to inquire into the circumstances of the possible conflict and take whatever action may be appropriate. [Citation.] A trial court's failure to carry out its duty to conduct such an inquiry, or to take action based on the results of its inquiry, denies the defendant the right to due process.

(*People v. Frye* (1988) 18 Cal.4th 894, 999; disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; but see *People v. Zambrano* (2007) 41 Cal.4th 1082, 1191, ["We do not interpret these principles to mean that the court must inquire into every claim of conflict, however suspect and unfounded."] also disapproved in part by *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

The court's duty of inquiry may be supplemented by appointing independent counsel for the purpose of discussing the potential conflict with the defendant and ascertaining whether the defendant would waive the right to conflict-free counsel. (See e.g., *People v. McDermott* (2002) 28 Cal.4th 946, 991.)

Upon appellate review, " '[w]hen a defendant claims that a trial court's inquiry into a potential conflict of interest was inadequate, the defendant still must demonstrate the impact of the conflict on counsel's performance.' [Citation.]" (*People v. Rices* (2017) 4 Cal.5th 49, 64.)

1880.3-A defendant can waive a potential conflict of interest 11/13

A potential conflict of interest between a criminal defendant and their attorney can be waived under the proper circumstances.

> The defendant may voluntarily, knowingly, and intelligently waive a conflict of interest. But the court must take steps to ensure that any waiver of a possible conflict meets those standards. If, after inquiry, the court determines that a waiver is necessary, it must satisfy itself that the defendant (1) has discussed with his or her own counsel, or with an outside attorney if he or she wishes, the potential drawbacks of representation by counsel who may have a conflict of interest; (2) has been advised of the dangers of conflicted representation in his case; and (3) voluntarily wishes to waive that right.

(*People v. Mai* (2013) 57 Cal.4th 986, 1010.)

> [W]aiver of a possible attorney conflict of interest is not invalid simply because all conceivable ramifications of the potential conflict were not explored or explained, and the waiver does not extend only to those matters discussed on the record. [Citations.] Indeed, where no actual conflict has materialized at the time the waiver is taken, it may simply be impossible to foresee future developments that could have a genuine effect on counsel's loyalty and zeal; on the other hand, sources of conflict that are merely speculative and conjectural need not be addressed.

(*Id*. at p. 1011.)

1880.4-Court has inherent authority to remove attorney with conflict of interest 11/18

A trial court has inherent authority to "[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." (Code Civ. Proc., § 128, subd. (a)(5); see *Costello v. Buckley* (2016) 245 Cal.App.4th 753.) " 'A trial court may remove defense counsel, even over defendant's objections, "in order to eliminate potential conflicts, ensure adequate representation, or prevent substantial impairment of court proceedings … ." [Citation.].' (*People v. Richardson* (2008) 43 Cal.4th 959, 995.)" (*Magana v. Superior Ct.* (2018) 22 Cal.App.5th 840, 858.)

The above-cited power "authorizes a trial court … to discharge an attorney who has a conflict of interest." (*People v. Noriega* (2010) 48 Cal.4th 517, 524 (*Noriega*).) "With respect to defendant's state constitutional right to counsel (Cal. Const., art. I, § 15), 'a trial court does not violate a defendant's right to counsel under the state Constitution when it "removes a defense attorney because of a potential conflict of interest." ' (*Noriega*, *supra*, 48 Cal.4th at p. 524.)" (*People v. Suff* (2014) 58 Cal.4th 1013, 1039.) "[A] trial court's decision to disqualify an attorney is subject to review for an abuse of discretion." (*Id*., at p. 1038.)

Similarly, the trial court has "several measures available 'when it appears to him that a defense counsel is making serious mistakes to his client's prejudice.' [Citation.]" (*People v. Woodruff* (2018) 5 Cal.5th 697, 729.) " 'While we recognize that courts should exercise their power to remove defense counsel with great circumspection,' a trial court has a duty to remove counsel even over the defendant's objection where other measures have failed, in cases of ' "obviously deficient performance" ' such as when counsel refuses to participate in the trial. [Citation.]" (*Ibid*.) "If 'an adequate waiver of defendant's effective-assistance rights cannot be obtained on the record, the court must presume that he has not knowingly and intelligently chosen to proceed with retained counsel. [Citation.] The court may then protect the record and defendant's right to effective assistance by requiring counsel's withdrawal.' [Citation.]" (*Id*. at p. 732.)

1910.1-A defendant has no right to be named cocounsel 9/11

"It is settled that a criminal defendant does not have a right both to be represented by counsel and to participate in the presentation of his own case. Indeed, such an arrangement is generally undesirable." (*People v. Clark* (1992) 3 Cal.4th 41, 97; see also *People v. D'Arcy* (2010) 48 Cal.4th 257, 281-282; *People v. Bradford* (1997) 15 Cal.4th 1229, 1368.) "[N]one of the 'hybrid' forms of representation, whether labeled 'cocounsel,' 'advisory counsel,' or 'standby counsel,' is in any sense constitutionally guaranteed." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1218.)

> As long as a defendant is represented by counsel at trial, he has no absolute right to participate personally in his own defense. [Citation.] While the Sixth Amendment guarantees both the right to self-representation and the right to counsel, a defendant who elects representation by counsel does not have a constitutionally protected right to appear as cocounsel. [Citations.] The court may exercise its discretion and permit a defendant to actively participate in the presentation of his case. But it grants that request on a substantial showing the cause of justice would be served and the "orderly and expeditious conduct of the court's business" would not be substantially hindered. [Citation]

(*People v. Pena* (1992) 7 Cal.App.3d 1294, 1301; see also *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1310-1311.) "The burden is on the defendant to make the requisite showing. A trial court is not required to inquire further into the matter where the defendant has not first offered

the 'substantial showing.' [Citations.]" (*People v. Pena*, *supra*, 7 Cal.App.3d at p. 1302.) "Where … a defendant fails to show cocounsel status would serve the interests of justice and would not result in substantial disruption, there is no basis for the exercise of the court's discretion, and the motion is properly denied. [Citation.]" (*Ibid*.)

> If [a criminal defendant] chooses professional representation, he waives tactical control; counsel is at all times in charge of the case and bears the responsibility for providing constitutionally effective assistance. Upon a 'substantial' showing [citation], and entirely subject to counsel's consent …, the court may nonetheless permit the accused a limited role as cocounsel. *Even so, professional counsel retains complete control over the extent and nature of the defendant's participation, and of all tactical and procedural decisions.*

(*People v. Hamilton* (1989) 48 Cal.3d 1142, 1164, fn. 14, original italics.) The denial of a motion for cocounsel is reviewed for abuse of discretion. (*People v. Moore* (2011) 51 Cal.4th 1104, 1120.)

1910.2-A pro per defendant has no right to advisory counsel 5/21

"It is settled that a defendant who elects to represent himself has no constitutional right to advisory counsel or any other form of hybrid representation. (*People v. Moore* (2011) 51 Cal.4th 1104, 1120; *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1430.)" (*People v. Debouver* (2016) 1 Cal.App.5th 972, 976.) "[N]one of the 'hybrid' forms of representation, whether labeled 'cocounsel,' 'advisory counsel,' or 'standby counsel,' is in any sense constitutionally guaranteed." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1218.) "[T]he right to the assistance of counsel, guaranteed by the state and federal Constitutions, has never been held to include a right to the appointment of advisory counsel to assist a defendant who voluntarily and knowingly elects self-representation. [Citation.]" (*People v. Crandell* (1988) 46 Cal.3d 833, 864.) And when a defendant in a noncapital case has not requested advisory counsel, the trial court is under no obligation to appoint one sua sponte or advise the defendant of the right to request one. (*People v. Harrison* (2013) 215 Cal.App.4th 647, 656-657; *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1429.)

Instead, the trial court's decision to grant or deny a defendant's request for appointment of advisory counsel is discretionary. (*People v. Debouver*, *supra*, 1 Cal.App.5th at p. 976.) In ruling on a request for advisory counsel, the trial court may consider defendant's demonstrated legal abilities and reasons for seeking the appointment of advisory counsel, including evidence of any manipulative purpose. (*People v. Crandell*, *supra*, 46 Cal.3d at pp. 863-864.) Other factors include the seriousness of the charges, the complexity of the issues, and defendant's education and familiarity with the justice system. (*Ibid*.; *People v. Bigelow* (1984) 37 Cal.3d 731, 743-744.) The decision to grant or deny a request for advisory counsel will not be set aside absent a showing the ruling is arbitrary, capricious, or whimsical. (*People v. Crandell*, *supra*, 46 Cal.3d at p. 863; *People v. Debouver*, *supra*, 1 Cal.App.5th at p. 976.) But when a defendant requests appointment of advisory counsel, a court's failure to exercise its discretion is serious error and its denial of a request may constitute an abuse of discretion. (*People v. Walton* (1996) 42 Cal.App.4th 1004, 1017-1018; distinguish *People v. Choi* (2021) 59 Cal.App.5th 753, 766-769 [although stating "that's not the way it's done in this courthouse," judge also acknowledged her discretion to deny request for advisory counsel].) Absent such a request, however, a trial court has no duty "to make a record" explaining why it has not appointed advisory counsel. (*People v. Robinson* (1997) 53 Cal.App.4th 270, 278.)

"Advisory counsel," is appointed to assist the self-represented defendant if and when the defendant requests help. (*People v. Blair* (2005) 36 Cal.4th 686, 725.) "When 'advisory counsel' is

appointed, 'the attorney actively assists the defendant in preparing the defense case by performing tasks and providing advice pursuant to the defendant's requests, but does not participate on behalf of the defense in court proceedings.' " (*People v. Harrison*, *supra*, 215 Cal.App.4th at p. 656.) Although the trial court may "permit the sharing of responsibilities between a defendant and a defense attorney when the interests of justice support such an arrangement," it is within the court's discretion to do so. (*People v. Moore*, *supra*, 51 Cal.4th at p. 1120.) In addition, the court retains authority to exercise its judgment regarding the extent to which the advisory counsel may participate in the proceedings. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1368.)

Finally, "[w]hile a pro se defendant has no right to advisory counsel, once that privilege is granted it may not be restricted or terminated without due process of law, including adequate notice and the opportunity to be heard. (*People v. Ebert* (1988) 199 Cal.App.3d 40, 44.)

1930.1-*Marsden* motion procedure to substitute appointed counsel 6/20

"When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation—i.e., makes what is commonly called a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118)—the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance." (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

> [A] judge who denies a motion for substitution of attorneys solely on the basis of his courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of his discretion to determine the competency of the attorney. A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention "is lacking in all the attributes of a judicial determination." [Citation.]

(*Marsden, supra*, 2 Cal.3d at p. 124.) "In a *Marsden* hearing, defendant's attorney has an obligation to respond when a defendant states seemingly meritorious grounds for a substitution of counsel." (*People v. Henning* (2009) 178 Cal.App.4th 388, 404.) Nevertheless, "a *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement." (*People v. Hines* (1997) 15 Cal.4th 997, 1025.)

The court need not appoint counsel just for the *Marsden* hearing.

> Appointment of independent counsel to assist a defendant in making a *Marsden* motion is likely to cause unnecessary delay, and may damage the attorney-client relationship in those cases in which the trial court ultimately concludes that the motion should be denied. We see no need for trial courts to appoint independent counsel to assist defendants making such motions.

(*People v. Hines*, *supra*, 15 Cal.4th at p. 1025; see also *People v. Sanchez*, *supra*, 53 Cal.4th at p. 84 ["we specifically disapprove of the procedure of appointing substitute or 'conflict' counsel solely to evaluate a defendant's complaint that his attorney acted incompetently with respect to advice regarding the entry of a guilty or no contest plea"].)

If the *Marsden* motion is granted, the original attorney must be discharged and new counsel must be appointed. "[I]f a defendant requests substitute counsel and makes a showing during a

Marsden hearing that the right to counsel has been substantially impaired, substitute counsel must be appointed as attorney of record for all purposes." (*People v. Sanchez*, *supra*, 53 Cal.4th at p. 84.)

A *Marsden* motion can be made at any stage of the criminal proceedings, including both before or after the defendant is convicted. (*People v. Armijo* (2017) 10 Cal.App.5th 1171, 1179.) But the court has the discretion to deny a motion for substitution of counsel if it is untimely. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 497; *People v. Molina* (1977) 74 Cal.App.3d 544, 548.) Untimeliness can include renewing a previously denied *Marsden* motion unless there are new developments. (*People v. Lopez* (2008) 168 Cal.App.4th 801, 814.) In addition, "[t]he court had to weigh appellant's request against the state's interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of assembling the witnesses, lawyers, and jurors." (*People v. Shoal*, *supra*, 8 Cal.App.4th at p. 497.) But if an untimely substitution is permitted, the court is generally obligated to allow a continuance for newly appointed counsel to prepare. (*People v. McKenzie* (1984) 34 Cal.3d 616, 629.)

1930.2-*Marsden* requires clear indication that defendant seeks substitute counsel 6/20

"Although no formal [*Marsden*] motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 157; see also *People v. Armijo* (2017) 10 Cal.App.5th 1171, 1178; *People v. Gonzalez* (2012) 210 Cal.App.4th 724, 741.) "[W]hen a defendant asks for new counsel, a trial court's duty to undertake the *Marsden* inquiry 'arises "only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel." ' (*People v. Leonard* (2000) 78 Cal.App.4th 776, 787.)" (*People v. Johnson* (2018) 6 Cal.5th 541, 573.) "We conclude a trial court must conduct such a *Marsden* hearing only when there is at least some clear indication by the defendant, either personally or through counsel, that the defendant wants a substitute attorney." (*People v. Sanchez* (2011) 53 Cal.4th 80, 84 [defendant wanted to withdraw his guilty plea because induced by incompetent representation of counsel]; distinguish *People v. Lucero* (2017) 18 Cal.App.5th 532, 539 [appointment of new counsel not required sua sponte after appellate court found trial counsel ineffective because, despite being informed of decision, defendant failed to appear and make a *Marsden* motion].) There is no duty to conduct a *Marsden* hearing when the complaints about appointed counsel are generated by a third party, such as a family member, and not the defendant. (*People v. Martinez* (2009) 47 Cal.4th 399, 418-419.)

1930.3-Standard for granting *Marsden* motion 6/20

"Under the Sixth Amendment right to assistance of counsel ' " '[a] defendant is entitled to [substitute another appointed attorney] if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' " ' (*People v. Memro* (1995) 11 Cal. 4th 786, 857.)" (*People v. Welch* (1999) 20 Cal.4th 701, 728 (*Welsh*); see also *People v. Valdez* (2004) 32 Cal.4th 73, 95.) "Substitution of counsel lies within the court's discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel. [Citation.]" (*People v. Smith* (2003) 30 Cal.4th 581, 604; see also *People v. Streeter* (2012) 54 Cal.4th 205, 230; *People v. Clark* (2011) 52 Cal.4th 856, 912.)

In *People v. Smith* (1993) 6 Cal.4th 684, the California Supreme Court held that when a defendant requests substitute counsel, "the standard expressed in *Marsden* [*People v. Marsden* (1970) 2 Cal.3d 118,] and its progeny applies equally preconviction and postconviction. … A defendant has no greater right to substitute counsel at the later stage than the earlier." (*People v. Smith*, *supra*, 6 Cal.4th at p. 694.)

> It is the very nature of a *Marsden* motion, at whatever stage it is made, that the trial court must determine whether counsel has been providing competent representation. Whenever the motion is made, the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the future. But the decision must always be based on what has happened in the past. The further one is in the process, the more counsel has done in the past that can be challenged, but that is a difference of degree, not kind.

(*Id*. at pp. 694-695; see also *People v. Sanchez* (2011) 53 Cal.4th 83, 88; *People v. Winn* (2020) 44 Cal.App.5th 859, 870.)

A *Marsden* motion should not be granted simply because the defendant disagrees with his or her attorney's handling of the case. While some fundamental decisions about the handling of a criminal case belong to the defendant, most other decisions belong to the attorney. (*People v. Frierson* (1985) 39 Cal.3d 803, 813.) Thus, disagreement on trial strategy alone is not grounds to remove appointed counsel. (*People v. Cole* (2004) 33 Cal.4th 1158, 1192; *People v. Smith*, *supra*, 30 Cal.4th at p. 606.) "Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.' " (*Welch*, *supra*, 20 Cal.4th at pp. 728-729; see also *People v. Myles* (2012) 53 Cal.4th 1181, 1207; *People v. Dickey* (2005) 35 Cal.4th 884, 922.) " 'When a defendant chooses to be represented by professional counsel, that counsel is 'captain of the ship' and can make all but a few fundamental decisions for the defendant.' [Citation.]" (*Welsh*, *supra*, 20 Cal.4th at p. 729.)

A defendant may not force a substitution of counsel by manufacturing a conflict through defendant's own conduct and refusal to cooperate with counsel. (*People v. Clark*, *supra*, 52 Cal.4th at p. 913; *People v. Smith*, *supra*, 6 Cal.4th at p. 697.) Counsel cannot be faulted for declining to engage in purely dilatory tactics. (*People v. Beagle* (1972) 6 Cal.3d 441, 458.) Nor is it relevant to an attorney's competency that counsel believe or disbelieve the defendant. (*People v. Pangelino* (1984) 153 Cal.App.3d 1, 5-6.) Similarly, it is not enough for a defendant to claim they do not like or do not think highly of their appointed lawyer (*People v. Memro* (1995) 11 Cal.4th 786, 857) or that they do not trust and cannot get along with their attorney (*People v. Abilez* (2007) 41 Cal.4th 472, 489).

Finally, lack of jail visits is not incompetency. (*People v. Myles*, *supra*, 53 Cal.4th at p. 1208; *People v. Williamson* (1985) 172 Cal.App.3d 737, 745-746.) "[T]he number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence." (*People v. Silva* (1988) 45 Cal.3d 604, 622.)

1930.4-DA entitled to limited participation in *Marsden* motion 7/11

While *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) ensures defendant's right to be heard on a request for substitution of counsel, it makes no reference to the hearing being held out of the prosecutor's presence. But "[t]ypically, when conducting a *Marsden* hearing, trial courts exclude the district attorney upon defendant's request and 'whenever information would be presented during

the hearing to which the district attorney is not entitled, or which could conceivably lighten the prosecution's burden of proving its case.' (*People v. Madrid* (1985) 168 Cal.App.3d 14, 19.)" (*People v. Knight* (2015) 239 Cal.App.4th 1, 6.) This does not mean, however, that the prosecutor should be totally excluded from the *Marsden* process. The trial court is in the best position to assess whether defendant's motion can be most expeditiously handled in open court. (*People v. Madrid*, *supra*, 168 Cal.App.3d at p. 19.) The court should keep in mind that some or all of the information needed to assess defendant's complaints may be within the prosecutor's knowledge, so automatic and complete exclusion would be improper. (*Id.* at pp. 18-19.) "An in camera *Marsden* hearing is 'the better practice,' but a *Marsden* hearing in open court is permissible where, as here, neither the defendant nor defense counsel asks for an in camera hearing and the defendant's complaints neither disclose information that conceivably could lighten the prosecutor's burden of proof nor involve evidence or strategy to which the prosecutor is not privy. [Citations.]" (*People v. Lopez* (2008) 168 Cal.App.4th 801, 815.) The defendant is also protected because "statements made in a *Marsden* hearing are subject to use immunity; that is, statements made by the defendant may not be used in further related proceedings, save for the purposes of impeachment and rebuttal in such proceedings." (*People v. Knight*, *supra*, 239 Cal.App.4th at p. 8.)

1930.5-Test for permitting late request to substitute retained for appointed counsel 7/21

"The right to retained counsel of choice is—subject to certain limitations—guaranteed under the Sixth Amendment to the federal Constitution. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144, 151-152; *People v. Ramirez* (2006) 39 Cal.4th 398, 422.) "[W]hile a criminal defendant's right to counsel of choice is not absolute, that right may be overridden only under narrow, compelling, and specifically delineated circumstances." (*People v. Williams* (2021) 61 Cal.App.5th 627, 631 (*Williams*).) "A trial court must make *all* reasonable efforts to vindicate a defendant's constitutional right to counsel of choice and has 'limit[ed] ... discretion' to intrude upon that right. (*Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 613.)" *(Williams*, *supra*, 61 Cal.App.5th at p. 631, italics in original.) A defendant's request to substitute retained for appointed counsel "can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." (*People v. Crovedi* (1966) 65 Cal.2d 199, 208.) Thus, the California Supreme Court held in *People v. Counts* (1985) 37 Cal.3d 784, that the trial court abused its discretion when it refused to grant the accused a continuance to permit him to be represented by an attorney he retained approximately one week before trial. (*Id*. at pp. 787-790.) The court "emphasized that trial courts have the responsibility to protect a financially able individual's right to appear and defend with counsel of his own choosing." (Id. at p. 790.) In addition, the court noted that, " 'once retained, [counsel must be] given a reasonable time in which to prepare the defense.' " (*Ibid*; see also *Williams*, *supra*, 61 Cal.App.5th at pp. 650-657 [reversible error to deny request on day of special circumstance murder trial to substitute an attorney retained six days previously for appointed counsel despite necessitating at least a four month continuance]; distinguish *People v. Jeffers* (1987) 188 Cal.App.3d 840, 850 [denial of continuance in order to obtain retained counsel affirmed where "[n]othing in the record suggest[ed] [defendant] made a good faith, diligent effort to obtain retained counsel before the scheduled trial date"].)

1930.6-Court can deny untimely request to discharge retained counsel 8/18

"The right to retained counsel of choice is—subject to certain limitations—guaranteed under the Sixth Amendment to the federal Constitution. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144, 151-152; *People v. Ramirez* (2006) 39 Cal.4th 398, 422.) In California, this right 'reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain.' (*People v. Ortiz* (1990) 51 Cal.3d 975, 983 … ; see Code Civ. Proc., § 284.)" (*People v. Verdugo* (2010) 50 Cal.4th 263, 310-311 (*Verdugo*).) "Few restrictions apply when a defendant wants to discharge his or her retained counsel." (*People v. Lopez* (2018) 22 Cal.App.5th 40, 46.) "In general, a criminal defendant has the right to discharge her retained attorney. [Citation.]" (*People v. Rodriguez* (2014) 58 Cal.4th 587, 622.) But this right is not triggered absent a clear indication the defendant wants to discharge the retained attorney. (*People v. O'Malley* (2016) 62 Cal.4th 944, 1006.)

When a defendant makes a "timely motion to discharge his retained attorney and obtain appointed counsel," unlike when a defendant seeks to substitute one appointed counsel for another, he is not required to demonstrate "inadequate representation by his retained attorney, or to identify an irreconcilable conflict between them." (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 984 (*Ortiz*); see *People v. Sanchez* (2011) 53 Cal.4th 80, 89.) "The right to discharge a retained attorney is, however, not absolute. (*Ortiz*, at p. 983.) The trial court has discretion to 'deny such a motion if discharge will result in "significant prejudice" to the defendant [citation], or if it is not timely, i.e., if it will result in "disruption of the orderly processes of justice … ." ' " (*Verdugo*, *supra*, 50 Cal.4th at p. 311; see *Morris v. Slappy* (1983) 461 U.S. 1, 11 ["Trial judges necessarily require a great deal of latitude in scheduling trials."].) "In evaluating whether a motion to discharge retained counsel is 'timely, i.e., if it will result in "disruption of the orderly processes of justice" ' (*Ortiz*, *supra*, 51 Cal.3d at p. 983), the trial court considers the totality of the circumstances (see *United States v. Gonzalez-Lopez*, *supra*, 548 U.S. at p. 152; *Verdugo*, *supra*, 50 Cal.4th at p. 311)." (*People v. Maciel* (2013) 57 Cal.4th 482, 513 (*Maciel*); see also *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1411.)

The California Supreme Court in *Maciel* upheld the trial court's denial of a death penalty defendant's request to discharge retained counsel six weeks before trial.

> We conclude that the trial court acted within its discretion in denying defendant's motion to discharge counsel. At the time the motion was made, the case had been pending for two years. Trial was imminent and, in fact, began about six weeks later. Defendant had no substitute counsel in mind; rather, he requested that the court appoint counsel. New counsel would have had to study the records in each former codefendant's trial as well as in this case, resulting in significant delays. In evaluating timeliness, the trial court properly considered the long delay that would have resulted from changing counsel in this case. The trial court, which had been through at least one trial of the former codefendants, expressed concern that further delay would exacerbate the witnesses' reluctance to testify. The trial court also noted the absence of abandonment or inadequate representation by counsel or an actual conflict of interest. We conclude the trial court reasonably denied defendant's motion because relieving counsel under these circumstances would have resulted in the " 'disruption of the orderly processes of justice.' " (*Ortiz*, *supra*, 51 Cal.3d at p. 983.)

(*Maciel*, *supra*, 57 Cal.4th at pp. 512-513; distinguish *People v. Lopez*, *supra*, 22 Cal.App.5th at pp. 48-51 [although case two years old, request to discharge retained counsel was timely and should

have been granted because there was no evidence "justice would be unjustifiably delayed by granting the motion" or request was made with "improper motives"].)

Finally, "[a] trial court is not obligated to discharge retained counsel the instant a defendant states the intent to remove that attorney and even before the defendant decides on a replacement." (*People v. Rodriguez*, *supra*, 58 Cal.4th at pp. 622-623.)

1950.1-Right to waive counsel under *Faretta* is not absolute 4/17

Criminal defendants have a constitutional right to represent themselves, subject to some limitations. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*); *People v. Bush* (2017) 7 Cal.App.5th 457, 468.) "A trial court must grant a defendant's request for self-representation if the defendant unequivocally asserts that right within a reasonable time prior to the commencement of trial, and makes his request voluntarily, knowingly, and intelligently." (*People v. Lynch* (2010) 50 Cal.4th 693, 721 (*Lynch*).) "If a defendant has validly waived the right to counsel, a trial court must grant a defendant's request for self-representation." (*People v. Mickel* (2016) 2 Cal.5th 181, 205.) As courts indulge every reasonable inference against the waiver of counsel, however, a defendant must make an "unequivocal" demand for self-representation or the request is properly denied. (*People v. Boyce* (2014) 59 Cal.4th 672, 703.)

> We have … rejected claims that the fact or likelihood that an unskilled, self-represented defendant will perform poorly in conducting his or her own defense must defeat the *Faretta* right. [¶] Accordingly, the critical question is not whether a self-represented defendant meets the standards of an attorney, or even whether a defendant is capable of conducting an effective defense. Instead, we have accepted that the cost of recognizing a criminal defendant's right to self-representation may result " 'in detriment to the defendant, if not outright unfairness.' " [Citations.] But that is a cost that we allow defendants the choice of paying, if they can do so knowingly and voluntarily.

(*People v. Mickel*, *supra*, 2 Cal.5th at p. 206.) But, "[t]he autonomy and dignity interests underlying our willingness to recognize the right of self-representation may be outweighed, on occasion, by countervailing considerations of justice and the state's interest in efficiency. (*Ibid*.)

> "*Faretta* itself and later cases have made clear that the right of self-representation is not absolute." (*Indiana v. Edwards* (2008) 554 U.S. 164, 171; see *Jones v. Barnes* (1983) 463 U.S. 745, 751, citing *Faretta*, *supra*, 422 U.S. 806 ["we have held that, with some limitations, a defendant may elect to act as his or her own advocate …"].) Thus, a *Faretta* motion may be denied if the defendant is not competent to represent himself (*Indiana v. Edwards*, at pp. 177-178), is disruptive in the courtroom or engages in misconduct outside the courtroom that "seriously threatens the core integrity of the trial" (*People v. Carson* (2005) 35 Cal.4th 1, 6; see *id*. at p. 8; *Faretta*, at p. 834, fn. 46), or the motion is made for purpose of delay (*People v. Marshall* (1997) 15 Cal.4th 1, 23 …).

(*Lynch*, *supra*, 50 Cal.4th at pp. 721-722.)

1950.2-Requirements for valid *Faretta* admonishment and waiver 4/20

Before allowing a defendant to represent themselves under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), the trial court must also ensure that the defendant realizes " 'the probable risks and consequences of self-representation.' " (*People v. Nauton* (1994) 29 Cal.App.4th 976, 979.) "A defendant seeking to represent himself 'should be made aware of the dangers and disadvantages of self representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." [Citation.]' (*Faretta*, *supra*, 422 U.S. at p. 835.)" ' (*People v. Burgener* (2009) 46 Cal.4th 231, 240-241.)" (*People v. Bush* (2017) 7 Cal.App.5th 457, 468.)

> Generally, a defendant should be told that "self-representation is almost always unwise and that the defense he conducts might be to his detriment; he will have to follow the same rules that govern attorneys; the prosecution will be represented by experienced, professional counsel who will have a significant advantage over him in terms of skill, training, education, experience, and ability; the court may terminate his right to represent himself if he engages in disruptive conduct; and he will lose the right to appeal his case on the grounds of ineffective assistance of counsel. [Citation.] In addition, he should also be told he will receive no help or special treatment from the court and that he does not have a right to standby, advisory, or cocounsel." (*People v. Phillips* (2006) 135 Cal.App.4th 422, 428.)

(*People v. Weber* (2013) 217 Cal.App.4th 1041, 1057-1058 (*Weber*).)

> However, although there are standard scripts and although courts have emphasized the importance of thoroughly admonishing a defendant before accepting a *Faretta* waiver, there is no required form of waiver: "The requirements for a valid waiver of the right to counsel are (1) a determination that the accused is competent to waive the right, i.e., he or she has the mental capacity to understand the nature and object of the proceedings against him or her; and (2) a finding that the waiver is knowing and voluntary, i.e., the accused understands the significance and consequences of the decision and makes it without coercion." (*People v. Lawley* (2002) 27 Cal.4th 102, 139.) "No particular form of words, however, is required in admonishing a defendant who seeks to forgo the right to counsel and engage in self-representation. ' "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." ' " (*Id*. at p. 140.) [¶] "Thus, '[a]s long as the record as a whole shows that the defendant understood the dangers of self-representation, no particular form of warning is required.' [Citations.] … ." (*People v. Burgener* (2009) 46 Cal.4th 231, 241; see *People v. Doolin* (2009) 45 Cal.4th 390, 453; *People v. Bloom* (1989) 48 Cal.3d 1194, 1224-1225.)

(*Weber*, *supra*, 217 Cal.App.4th at p. 1058; see also *People v. Mickel* (2016) 2 Cal.5th 181, 211-212; *People v. Jackio* (2015) 236 Cal.App.4th 445, 451-452.)

The trial court need not inform the defendant of every possible disadvantage that might flow from the waiver of counsel. (*People v. Frederickson* (2020) 8 Cal.5th 963, 1002-1003.)

> Our review of the relevant cases does not persuade us that a pretrial waiver of counsel cannot be valid if the court did not specifically advise the defendant of all possible penal consequences of the charged offenses, including all monetary fines. While the better practice would be to inform the accused, on the record, of the maximum sentence, including

> any maximum monetary fine that could be imposed on a conviction, defendant does not cite, and we have not found, any case specifically concluding that an advisement on this point is a constitutional minimum in every case.

(*People v. Bush*, *supra*, 7 Cal.App.5th at p. 473 [court's failure to warn of potential $250,000 fine did not render otherwise knowing and intelligent waiver of counsel invalid]; contra *People v. Jackio*, *supra*, 236 Cal.App.4th at pp. 454-455 [holding that court must advise the defendant of the maximum punishment if convicted, including enhancements]; see also *People v. Ruffin* (2017) 12 Cal.App.5th 536, 543-550 [simply inquiring if defendant read and had any questions about *Faretta* form without clarifying defendant's ambiguous responses about his knowledge of nature of charges and without explaining that he faced potential sentence of 27 years to life, did not demonstrate adequate waiver]; but see *People v. Fox* (2014) 224 Cal.App.4th 424, 436-438 [court's misstatements regarding collateral consequences if convicted did not render otherwise knowing and intelligent waiver of counsel invalid].)

" 'On appeal, we review the entire record, including proceedings after the invocation of the right to self-representation, and determine de novo whether the defendant's waiver of the right to counsel was knowing and voluntary.' [Citations.]" (*People v. Bush*, *supra*, 7 Cal.App.5th at p. 469; see also *People v. Frederickson*, *supra*, 8 Cal.5th at p. 1002.)

1950.3-Timely request to go pro per under *Faretta* must be granted 4/20

"A trial court must grant a defendant's request for self-representation if the defendant unequivocally asserts that right within a reasonable time prior to the commencement of trial … . [Citations.]" (*People v. Lynch* (2010) 50 Cal.4th 693, 722 (*Lynch*).The California Supreme Court has also "long held that a self-representation motion may be denied if untimely." (*Ibid*.) A *Faretta* [*Faretta v. California* (1975) 422 U.S. 806] motion is timely if made "a reasonable time prior to the commencement of trial." (*People v. Windham* (1977) 19 Cal.3d 121, 128, fn. omitted.) The imposition of a timeliness "requirement should not be and, indeed, must not be used as a means of limiting a defendant's constitutional right of self-representation." (*Id*. at p. 128, fn. 5.) Rather, the purpose of the requirement is "to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice." (*People v. Burton* (1989) 48 Cal.3d 843, 852 (*Burton*).)

"Along these lines, we have held on numerous occasions that *Faretta* motions made on the eve of trial are untimely." (*Lynch*, *supra*, 50 Cal.4th at p. 722; see also *People v. Stringer* (2019) 41 Cal.App.5th 974, 991.) "A motion made that close to the day set for trial is 'extreme' (*id*. at p. 723) and now is disfavored (see *id*. at pp. 722-723 [collecting cases] … ." (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1277-1278.) "Likewise, we have concluded that motions for self-representation made long before trial were timely." (*Lynch*, *supra*, 50 Cal.4th at p. 723.) "[O]ur refusal to identify a single point in time at which a self-representation motion filed before trial is untimely indicates that outside these two extreme time periods, pertinent considerations may extend beyond a mere counting of the days between the motion and the scheduled trial date." (*Ibid*.)

> [T]imeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made. An analysis based on these considerations is in accord with the purpose of the timeliness requirement, which is "to prevent the defendant

from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice." (*Burton*, *supra*, 48 Cal.3d at p. 852.)

(*Lynch*, *supra*, 50 Cal.4th at p. 724.)

> [A] trial court may consider the totality of the circumstances in determining whether a defendant's pretrial motion for self-representation is timely. Thus, a trial court properly considers not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation.

(*Id*. at p. 726; see also *People v. Johnson* (2019) 8 Cal.5th 475, 500.)

1950.4-Court has discretion to grant or deny untimely *Faretta* request 4/19

An untimely *Faretta* [*Faretta v. California* (1975) 422 U.S. 806] motion should not be summarily denied. "When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365; see also *People v. Percelle* (2005) 126 Cal.App.4th 164, 175.)

> [Untimely] requests for self-representation are addressed to the trial court's sound discretion. (*People v. Windham* (1977) 19 Cal.3d 121, 127-129 (*Windham*).) Among the factors to be considered when ruling upon a defendant's midtrial request for self-representation are the defendant's reasons for the motion, the quality of defense counsel's representation, the defendant's proclivity to substitute counsel, the length and stage of the proceedings, and the disruption or delay that might reasonably be expected to follow if the motion were granted. (*Ibid*.; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1104-1105.) "[A] reviewing court must give 'considerable weight' to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made." [Citation.]

(*People v. Bradford* (2010) 187 Cal.App.4th 1345, 1353-1354 (*Bradford*); see also *People v. Buenrostro* (2018) 6 Cal.5th 367, 426; *People v. Williams* (2013) 56 Cal.4th 165, 193-194; *People v. Lynch* (2010) 50 Cal.4th 693, 722, fn. 10 (*Lynch*).)

> Among the factors a court may consider in exercising its discretion when ruling on a motion made in close proximity to trial or after commencement of trial is whether defendant's prior conduct has demonstrated a likelihood that proceedings would be disrupted in the event the motion for self-representation was granted. (*People v. Jenkins* [(2000)] 22 Cal.4th [900] at pp. 962-963.) This includes a consideration of defendant's manner and demeanor, any previous disruptive behavior, any refusals to come to court whereby he absented himself from the proceedings, and any lack of control over his emotions that would demonstrate a risk of disruption of future court proceedings. (*Ibid*.) In exercising its discretion a court may rely on a defendant's previous conduct whereby he absented himself from the proceedings, and the court need not credit any assurances made by defendant at the time of the motion that he would appear in court each day and not cause any further disruption of the proceedings. (*Id*. at p. 962.) The trial court can also consider

> the risk that a particular defendant might tell jurors of matters that the court had withheld from them. (*Ibid*.)

(*People v. Howze* (2001) 85 Cal.App.4th 1380,1398.) In other words, a trial court may deny an untimely self-representation motion if it finds it is made for the purpose of frustrating the orderly administration of justice. (*People v. Marshall* (1997) 15 Cal.4th 1, 23.) Finally, the court does not abuse its discretion when denying an untimely *Faretta* motion made on the day of trial. (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1278 ["Such discretion, it would seem in light of *People v. Lynch*, *supra*, 50 Cal.4th at pages 722-723, should seldom be exercised in favor of granting the motion, notwithstanding any contrary suggestion in the earlier *Windham* case."].)

1950.5-Mentally ill defendant may be denied right to self-representation 58/20

Criminal defendants have a constitutional right to represent themselves, subject to some limitations. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).) On such limitation is for defendants with mental illnesses.

> [T]he same standard of competency used at the competency hearing applied to the competency to waive counsel. The competency defendant needed was the competency to *waive the right* to counsel, and to determine this, a trial court applies the same standard that it uses to determine if a defendant is competent to stand trial. [Citation.] The question is whether the defendant "has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.' " [Citations.]

(*People v. Weber* (2013) 217 Cal.App.4th 1041, 1051-1052, italics in original [defendant properly allowed to waive right to counsel although he also feigned mental illness to inject error in court's attempt to give full *Faretta* admonishment].) " '... [T]he federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent.' " [Citations.] (*People v. Miranda* (2015) 236 Cal.App.4th 978, 988.)

In *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*), the United States Supreme Court held that states may, but need not, deny self-representation to defendants who, although competent to stand trial, lack the mental health or capacity to represent themselves at trial—persons the court referred to as "gray-area defendants." (*Id*. at p. 174; see also *People v. Taylor* (2009) 47 Cal.4th 850, 877-878; *People v. Weber*, *supra*, 217 Cal.App.4th at pp. 1052-1053.)

California is one such state. "Consistent with long-established California law, we hold that trial courts may deny self-representation in those cases where *Edwards* permits such denial." (*People v. Johnson* (2012) 53 Cal.4th 519, 528.) "[P]ending further guidance from the high court, we believe the standard that trial courts considering exercising their discretion to deny self-representation should apply is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*Id*. at p. 530; see also *People v. Mickel* (2016) 2 Cal.5th 181, 207-208.) The California Supreme Court cautioned:

> A trial court need not routinely inquire into the mental competence of a defendant seeking self-representation. It needs to do so only if it is considering denying self-representation due to doubts about the defendant's mental competence. When a court

> doubts a defendant's competence to stand trial, it "shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant." (Pen. Code, § 1369, subd. (a).) Similarly, when it doubts the defendant's mental competence for self-representation, it may order a psychological or psychiatric examination to inquire into that question. To minimize the risk of improperly denying self-representation to a competent defendant, "trial courts should be cautious about making an incompetence finding without benefit of an expert evaluation, though the judge's own observations of the defendant's in-court behavior will also provide key support for an incompetence finding and should be expressly placed on the record." [Citation.]

(*People v. Johnson*, *supra*, 53 Cal.4th at pp. 530-531; see also *People v. Gardner* (2014) 231 Cal.App.4th 945, 957-960 [appellate court held trial court did not abuse its discretion when, after obtaining psychological report finding defendant suffered from "Expressive Language Disorder," it denied his request for self-representation]; but see *People v. Best* (2020) 49 Cal.App.5th 747, 758-761 [with no finding of severe mental illness it was error to deny *Faretta* motion simply because odd-behaving defendant lacked knowledge of criminal law and courtroom]; *People v. Shiga* (2016) 6 Cal.App.5th 22, 40-42 [court erred by granting *Faretta* motion without recognizing it had discretion to conduct inquiry, including ordering expert evaluation, into whether this "gray-area" defendant was mentally competent to represent himself].)

1950.6-Abusive or disruptive defendant may be denied *Faretta* rights 5/20

Criminal defendants have a constitutional right to represent themselves, subject to some limitations. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).)

> A defendant's *in-court* misconduct can warrant the denial or revocation of a defendant's right to represent himself. [Citations.] So can a defendant's *out-of-court* misconduct, as long as there is a nexus between that misconduct and the trial process. [Citation.] What matters is "the effect, not the location, of the misconduct and its impact on the core integrity of the trial." [Citation.] A defendant's out-of-court efforts to intimidate witnesses may consequently justify the denial of self-representation [citation], but abuse of the privileges accorded to self-represented litigants or misconduct while incarcerated ordinarily do not.

(*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1515-1516, italics in original [defendant's repeated willful refusals to leave his cell and come to court, couple with evidence he attempted to dissuade the victim from testifying, sufficient grounds to deny *Faretta* motion]; see also *People v. Torres* (2020) 47 Cal.App.5th 984, 989-990 [defendant attempted to dissuade domestic violence from testifying].)

1950.7-Court has discretion to allow defendant to withdraw from self-representation 4/20

The right of a criminal defendant to self-representation under *Faretta* "once asserted, may be waived or abandoned." (*People v. Dunkle* (2005) 36 Cal.4th 861, 909; see *Indiana v. Edwards* (2008) 554 U.S. 164, 171 [self-representation right is not absolute].) "A defendant's waiver or abandonment of this constitutional right should be voluntary, knowing, and intelligent … such waiver or abandonment may be inferred from a defendant's conduct." (*People v. Trujeque* (2015) 61 Cal.4th 227, 262-263; *People v. D'Arcy* (2010) 48 Cal.4th 257, 284-285.) A defendant's request to withdraw his or her waiver of the right to counsel and reappoint counsel should be unequivocal.

(*People v. Frederickson* (2020) 8 Cal.5th 963, 1005; *People v. Lawrence* (2009) 46 Cal.4th 186, 193; *People v. Weber* (2013) 217 Cal.App.4th 1041, 1061.)

"A request to revoke in propria persona status and have an attorney appointed is committed to the sound discretion of the trial court." (*People v. Weber*, *supra*, 217 Cal.App.4th at p. 1061.) "In considering whether to grant a defendant's request to withdraw from self-representation and have counsel appointed, we consider the ' "totality of the facts and circumstances," ' including defendant's prior history in substitution of counsel, the reasons for the request, the stage of the trial proceedings, the disruption that might ensue, and the likelihood of defendant's ability to defend against the charges if he proceeds in pro per. (*People v. Gallego* (1990) 52 Cal.3d 115, 164.)" (*People v. Gonzalez* (2012) 210 Cal.App.4th 724, 743.) The trial court need not review on the record each factor: "The standard is whether the court's decision was an abuse of its discretion under the totality of the circumstances … ." (*People v. Lawrence*, *supra*, 46 Cal.4th at p. 196.)

1950.8-Court can terminate pro per status for abuse 5/20

A criminal defendant has a right to represent himself or herself at trial under the Sixth Amendment to the United States Constitution. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*); *People v. Marshall* (1997) 15 Cal.4th 1, 20.) "However, the right of self-representation is not absolute." (*People v. Williams* (2013) 58 Cal.4th 197, 253.) "A prerequisite of self-representation, however, is that the defendant be willing and able 'to abide by rules of procedure and courtroom protocol.' (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 173.)" (*People v. Doss* (2014) 230 Cal.App.4th 46, 55.) "Revoking a defendant's propria persona status is justified when the defendant has ' "deliberately engage[d] in serious and obstructionist misconduct," ' occurring either inside or outside the courtroom [citations], that "seriously threatens the core integrity of the trial.' [Citation.]" (*People v. Doss*, *supra*, 230 Cal.App.4th at p. 55 [revocation of pro per status reversed and remanded because trial court did not use proper standard].)

> "[The] government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." (*Martinez v. Court of Appeal* (2000) 528 U.S. 152, 161.) "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." (*Faretta*, *supra*, 422 U.S. at pp. 834-835, fn. 46; see also *People v. Butler* (2009) 47 Cal.4th 814 ["The court may deny a request for self-representation that … is intended to delay or disrupt the proceedings."].) "Thus, a trial court must undertake the task of deciding whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation. The trial court possesses much discretion when it comes to terminating a defendant's right to self-representation and the exercise of that discretion 'will not be disturbed in the absence of a strong showing of clear abuse.' " (*People v. Welch* (1999) 20 Cal.4th 701, 735.)

(*People v. Williams*, *supra*, 58 Cal.4th at p. 253.)

> By the time defendant's *Faretta* status was revoked, defendant had been proceeding in propria persona for over 10 months and had missed the ready-for-trial deadline by five months. During this period, defendant did not conduct any meaningful investigation or engage in any discovery. Defendant conceded, and the trial court found, that he was "in over his head." The trial court did not abuse its discretion in finding that defendant had

engaged in "delay tactics" in the course of his self-representation. Accordingly, we find no violation of defendant's Sixth Amendment right to self-representation.

(*People v. Williams*, *supra*, at pp. 254-255.)

To be sure, self-representation cannot be terminated for forceful advocacy. It can be terminated for repetitious personal attacks on the integrity of the trial court and other personnel. [¶] … It seems obvious that appellant was not interested in having a speedy resolution of his case and that he used the right of self-representation to actually prevent the orderly administration of justice. The record can only be read as an attempt to abuse the dignity of the courtroom and impugn the integrity of just about everyone involved in the case. This should not be tolerated.

(*People v. Peyton* (2014) 229 Cal.App.4th 1063, 1081.)

Termination of pro per status is not necessarily the only remedy when a pro per defendant attempts to abuse the right or manipulate the court. In *People v. Espinoza* (2016) 1 Cal.5th 61 the judge granted the defendant's *Faretta* request made during jury selection on condition he be prepared to continue with the trial. The defendant, who was out-of-custody, failed to return to the courthouse the next day. Finding that the defendant voluntarily absented himself, the judge continued with the trial in the defendant's absence under Penal Code section 1043(b)(2). The California Supreme Court found the judge did not violate the defendant's constitutional rights or abuse his statutory discretion. (*Id*. at pp. 75-79.) "A defendant cannot choose to represent himself, decide upon an ill-advised strategy that results in his inability to present a defense or to cross-examine witnesses, and then plead ignorance of the law or the consequences of his actions as a ground for reversal of his conviction." (*Id*. at p. 75.) "Moreover, the trial court reasonably found that defendant's failure to appear was a continuation of his efforts to manipulate the court and delay his criminal trial." (*Id*. at p. 77; distinguish *People v. Ramos* (2016) 5 Cal.App.5th 897 [error to involuntarily remove disruptive pro per defendant from key stages of trial].)

2000.1-Expert medical opinion necessary to justify mental defense jury instructions 11/16

The trial court has an obligation to instruct on a mental defense, and on the relationship of such defense to the elements of the charged offense when it appears that the defendant is relying on such a defense and if there is substantial evidence supportive of such a defense. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 823 (*Larsen*).) For example, a pinpoint instruction on the relationship between mental impairment and specific intent "must be given [but] only if requested by the defendant, and only if substantial evidence supports the defense theory that defendant's mental disease or disorder affected the formation of the relevant intent or mental state. (*People v. Ervin* (2000) 22 Cal.4th 48, 91.)" (*Larsen*, *supra*, 205 Cal.App.4th at p. 824.)

"Also, expert medical opinion testimony is necessary to establish that a defendant suffered from a mental disease, mental defect, or mental disorder within the meaning of [such a jury instruction], because jurors cannot make such a determination from common experience. [Citations.]" (*Larsen*, *supra*, 205 Cal.App.4th at p. 824.) But such evidence is limited:

[Penal Code] Sections 28 and 29 prohibit "an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time he acted." [Citation.] "Expert opinion on whether a defendant had the capacity to form a mental state that is an element of a charged offense or actually did form such intent is not admissible at the guilt phase of a trial. [Citation.] Sections 28 and 29 permit

> introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state." [Citations.]

(*Id*. at p. 826; see also *People v. Pearson* (2013) 56 Cal.4th 393, 443.)

> Taken together, these sections "do not preclude offering as a defense the absence of a mental state that is an element of a charged offense or presenting evidence in support of that defense. They preclude only expert opinion that the element was not present." (*People v. Coddington* (2000) 23 Cal.4th 529, 583.) "Put differently, sections 28 and 29 do not prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, or how that diagnosis or condition affected him at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent, or malice aforethought, or any other legal mental state required for conviction of the specific intent crime with which he is charged." ([*People v.*] *Cortes* [(2011)] 192 Cal.App.4th [873] at p. 908.)

(*People v. Herrera* (2016) 247 Cal.App.4th 467, 476.)

2000.2-Mental impairment not a defense to general intent crime or enhancement 3/17

Penal Code section 28, subdivision (a), provides in pertinent part that "[e]vidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged" "Accordingly, the rule has developed that evidence of mental illness may be offered to show the absence of specific intent but not to prove the absence of general intent. [Citations]" (*People v. Gutierrez* (1986) 180 Cal.app.3d 1076, 1082.) "Evidence of defendant's mental condition is not admissible to prove the absence of general intent." (*People v. Jefferson* (2004) 119 Cal.App.4th 508, 519; see also *People v. Bejarano* (2009) 180 Cal.App.4th 583, 588.)

> When the definition of a crime [or an enhancement] consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.

(*People v. Hood* (1969) 1 Cal.3d 444, 456-457; see, e.g., *People v. Thiel* (2016) 5 Cal.App.5th 1201, 1209 [mental impairment admissible on issue whether defendant knew or should have known age of victim, but not on issue whether defendant inflicted willfully inflicted great bodily harm under circumstances likely to do so under Pen. Code, § 368, subd. (b)(1)].)

2000.3-Hallucinations and delusions 10/19

Crimes allegedly committed as a result of hallucinations or delusions, defined as perceptions by the defendant not based on any objective reality (*People v. McCarrick* (2016) 6 Cal.5th 227, 242; *People v. Padilla* (2002) 103 Cal.App.4th 675, 677 (*Padilla*)), are a special form of mental illness. Note that not all delusions are in the form of visual or auditory hallucinations. (*People v. McCarrick*, *supra*, 6 Cal.App.5th at p. 245 & fn. 7.)

Generally, a defendant operating purely based on delusions or hallucinations has a form of insanity. "Thus, while [Pen. Code] section 28, subdivision (a), 'allows defendants to introduce evidence of mental disorder to show they did not actually form a mental state required for guilt of the charged crime,' this provision "is necessarily limited by the presumption of sanity, which operates at a trial on the question of guilt to bar the defendant from claiming he [or she] is not guilty because he [or she] is legally insane." (*People v. Elmore* (2014) 59 Cal.4th 121, 141.) Thus, the California Supreme Court concluded the defendant in *Elmore* was properly precluded from claiming imperfect self-defense based solely on delusion during the guilt phase of his trial.

> A claim of self-defense based solely on delusion is more than a claim of unreasonable self-defense; as we have shown, it is a claim of legal insanity. If section 28(a) were applied to allow the defendant to make that claim at the guilt phase, the burden would shift to the prosecution to prove beyond a reasonable doubt that the defendant was not insane. The statutory scheme would be turned on its head.

(*Id*. at p. 145.) Instead, only "relevant evidence of mental states short of insanity is admissible at the guilt phase under section 28(a)" to negate malice under an imperfect self-defense theory, e.g., where a defendant "mistakenly believed that actual circumstances required [his or her] defensive act … even if [the] reaction was distorted by mental illness." (*Id*. at p. 146.) Evidence that "purely delusional perceptions caused the defendant to believe in the necessity of self-defense" may be presented only during the sanity phase of the trial. (*Ibid*.; see also *People v. McGehee* (2016) 246 Cal.App.4th 1190, 1207-1211; *People v. Mejia-Lenares* (2006)135 Cal.App.4th 1437, 1461.)

There is an exception to the general rule. As noted, evidence of a hallucination is inadmissible to negate malice and, thus, cannot mitigate murder to voluntary manslaughter. (*Padilla*, *supra*, 103 Cal.App.4th 675, 677.) But such evidence may be admissible to negate deliberation and premeditation or lying-in-wait so as to potentially reduce first degree murder to second degree murder. (*People v. Gana* (2015) 236 Cal.App.5th 598, 605, 610; *Padilla*, *supra*.) The trial court has an obligation to instruct on this hallucination defense when it appears that the defendant is relying on such a defense and if there is substantial evidence supportive of it. (*People v. Mitchell* (2019) 7 Cal.5th 561, 583.) But a mere possibility the defendant was hallucinating at the time of the crime, however, is not enough, particularly in the absence of supporting medical evidence. (*Id*., at pp. 583-584 [the defendant calling the victim the "devil" did not alone provide sufficient evidence that the defendant was hallucinating].)

2010.1-Voluntary intoxication not a defense to general intent crime or enhancement 11/18

"Evidence of voluntary intoxication is inadmissible to negate the existence of general criminal intent." (*People v. Atkins* (2001) 25 Cal.4th 76, 81; see Pen. Code, § 29.4, subd. (b) ["Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent … ."]; see also *People v. Olivas* (2016) 248 Cal.App.4th 758, 770.)

> Voluntary intoxication includes the voluntary ingestion of any intoxicating drug. (Pen. Code, § 22, subd. (c).) While evidence of voluntary intoxication is admissible on the issue of whether or not a defendant actually formed a required specific intent or mental state (Pen. Code, § 22, subd. (b); *People v. Velez* (1985) 175 Cal.App.3d 785, 791 (*Velez*), voluntary intoxication "is not a defense to a general intent crime." (*Velez*, *supra*¸ 175 Cal.App.3d at p. 791.)

(*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1312.)

" 'The distinction between specific and general intent crimes evolved as a judicial response to the problem of the intoxicated offender' and the availability of voluntary intoxication as a defense." (*People v. Hering* (1999) 20 Cal.4th 440, 445.)

> When the definition of a crime [or an enhancement] consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.

(*People v. Hood* (1969) 1 Cal.3d 444, 456-457.)

> In addition, evidence of voluntary intoxication may be admissible to negate the specific knowledge or mental state requirement included in a narrow set of crimes nevertheless classified as general intent crimes. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 983-984; *People v. Lopez* (1986) 188 Cal.App.3d 592, 598-599.) For example, the crime of resisting arrest requires the perpetrator to know the person they are resisting is an officer, and thus evidence of voluntary intoxication is admissible to show the defendant did not know. (*Reyes*, at pp. 985-986.) Similarly, the crime of possession of stolen goods requires the perpetrator to know that the goods at issue were stolen, and evidence of voluntary intoxication is admissible to show the defendant did not. (*Lopez*, at pp. 599-600.)

(*People v. Moore* (2018) 19 Cal.App.5th 889, 894 [voluntary intoxication not admissible as a defense to "maliciously" element of crime of vandalism charge]; accord *People v. Quarles* (2018) 25 Cal.App.5th 631, 636-637 [voluntary intoxication not admissible as a defense to "maliciously" destroying telephone line]; see also *People v. Berg* (2018) 23 Cal.App.5th 959, 968-970 [rejecting analysis in *People v. Reyes*, *supra*, 52 Cal.App.4th 975, and holding voluntary intoxication is not defense to knowledge elements of the general intent crime of unlawful possession of narcotics].)

The same principles apply to sentencing enhancements. "[W]hen the Legislature intends to require proof of a specific intent in connection with a sentence enhancement provision, it has done so explicitly by referring to the required intent in the statute." (*In re Tameka C.* (2000) 22 Cal.4th 190, 198-199; see also *People v. Lucero* (2016) 246 Cal.App.4th 750, 760 ["we conclude that the trial court properly instructed the jury that it was not to consider evidence of Lucero's voluntary

intoxication in determining the truth of the [Pen. Code] section 12022.53, subdivisions (c) and (d) firearm enhancement allegations"].)

2010.2-Voluntary intoxication not admissible on self-defense claim 9/18

Penal Code section 29, subdivision (a) states:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

The California Supreme Court has held evidence of voluntary intoxication is not admissible to support a claim of actual self-defense or unreasonable self-defense in a murder case. (*People v. Soto* (2018) 4 Cal.5th 968.)

> We must decide whether section 29.4 permits evidence of voluntary intoxication on the question of whether a defendant believed it necessary to act in self-defense. Reading the statutory language in context and in light of the apparent legislative intent in enacting it, we conclude such evidence is not admissible on this question. Accordingly, [the standard jury instruction given by the trial court] correctly permits the jury to consider evidence of voluntary intoxication on the question of whether defendant intended to kill but not on the question of whether he believed he needed to act in self-defense.

(*Id*. at p. 970.) This holding applies whether liability for the charged murder is based on express or implied malice aforethought. (*Id*. at pp. 977-978.)

2100.1-Self-defense requires honest and reasonable fear of imminent harm 8/21

" To justify an act of self-defense … the defendant must have an honest and reasonable belief that bodily injury is about to be inflicted on him.' " (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064 (*Minifie*).) "In other words, the defendant's belief must both subjectively exist and be objectively reasonable. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 (*Humphrey*).)" (*People v. Brady* (2018) 22 Cal.App.5th 1008, 1014 (*Brady*).) Additionally, "[t]he threat of bodily injury must be imminent" and the force used in response " 'reasonable under the circumstances.' " (*Minifie*, *supra*, 13 Cal.4th at pp. 1064-1065.)

To assess whether a belief was objectively reasonable, "a jury must consider what 'would appear to be necessary to a reasonable person in a similar situation and with similar knowledge.' " (*Humphrey*, *supra*, 13 Cal.4th at pp. 1082-1083.) It must assume " 'the point of view of a reasonable person in the position of the defendant,' " taking into account " 'all the elements in the case which might be expected to operate on his mind.' " (*Id*. at p. 1083.) "[T]he reasonable person standard takes into account a defendant's knowledge that may increase his or her ability to *accurately* predict impending violence." (*Brady*, *supra*, 22 Cal.App.5th at p. 1017, italics in original.) But, "this does not mean that the objective inquiry adopts the standpoint of a reasonable person 'with [the defendant's] background of trauma, abuse, mental illness, and physical limitations.' " (*Id*., at pp. 1014-1015.) The reasonable person standard does not take into account "personal attributes that purportedly increased [a defendant's] propensity to *misperceive* threats of violence." (*Id*. at p. 1017, italics in original.) "The issue is not whether defendant, or a person like him, had reasonable grounds for believing he was in danger." (*People v. Jefferson* (2004) 119 Cal.App.4th 508, 519.) It

is instead "whether a person of ordinary and normal mental and physical capacity would have believed he was in imminent danger of bodily injury under the known circumstances." (*Id*. at p. 520.) Disagreeing with what it described as unnecessary dicta in the *Brady* and *Jefferson* opinions, the appellate court in *People v. Horn* (2021) 63 Cal.App.5th 672 held a defendant's knowledge of his or her own physical disabilities (but not mental limitations) can be relevant to determine the reasonableness of their claimed need to act in self-defense. (*Id*., at pp. 675, 682-686.)

"To be exculpated on a theory of self-defense one must have an honest and reasonable belief in the need to defend. [Citations.] A bare fear is not enough; 'the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.' [Citation.]" (*People v. Flannel* (1979) 25 Cal.3d 668, 674-675.) Thus, for example, "[a] killing committed in so-called perfect self-defense is neither murder nor manslaughter, but instead is justifiable homicide. [Citations.]" (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1305.) " 'For perfect self-defense [in a murder case], one must actually and reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury. [Citation.]' [Citation.]" (*Ibid*.) "The danger must be imminent; mere fear that it will become imminent is not enough. [Citation.]" (*Ibid*.) "Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of imminent danger to life or great bodily injury." (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) A non-violent trespass or other such threat to property is never justification for use of deadly force. (*People v. Chen* (2020) 50 Cal.App.5th 952, 958-960 [defendant brandished firearm at neighbor replacing fence between properties not entitled tro self-defense instruction].)

Finally, there is no right of self-defense when the defendant, through his or her own wrongful conduct, creates the circumstances under which the victim is legally justified in attacking or pursuing the defendant. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1226; *People v. Enraca* (2012) 53 Cal.4th 735, 761; but see *People v. Ramirez* (2015) 233 Cal.App.4th 940, 945-953 [defendant's right to self-defense may return if victim illegally escalates violence].)

2100.2-Imperfect self-defense or defense of others theory of voluntary manslaughter 4/20

Imperfect self-defense is not a "true" defense, but a "shorthand description of one form of voluntary manslaughter." (*People v. Simon* (2016) 1 Cal.5th 98, 132; *People v. Barton* (1995) 12 Cal.4th 186, 200 (*Barton*).) "Imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury. [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 182.) "The element of malice is negated, and a killing reduced from murder to voluntary manslaughter, when a defendant kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury." (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1305.) "We caution, however, that the doctrine is narrow. It requires without exception that the defendant must have had an actual belief in the need for self-defense." (*In re Christian S.* (1994) 7 Cal.4th 768, 783; see also *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 744.) Finally, imperfect self-defense requires an unreasonable belief that that harm is imminent and must be instantly dealt with. (*People v. Beck & Cruz* (2019) 8 Cal.5th 548, 648; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1066.)

The trial court's duty to instruct on voluntary manslaughter under an imperfect self-defense theory arises " 'whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-

defense.' " (*People v. Rogers* (2006) 39 Cal.4th 826, 883.) "In a murder case, trial courts are obligated to instruct the jury on defenses supported by substantial evidence that could lead to conviction of the lesser included offense of voluntary manslaughter, even where the defendant objects, or is not, as a matter of trial strategy, relying on such a defense." (*People v. Moye* (2009) 47 Cal.4th 537, 541.) Substantial evidence is not evidence that is " 'minimal and insubstantial' [Citation.]" (*Barton*, *supra*, 12 Cal.4th at p. 201, fn. omitted) and not " ' "any evidence, no matter how weak," ' " but evidence from which a reasonable jury could conclude that the defendant was guilty only of manslaughter. (*People v. Moye*, *supra*, 47 Cal.4th at p. 553). "Accordingly, when a defendant is charged with murder the trial court's duty to instruct sua sponte, or on its own initiative, on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense … ." (*Barton*, *supra*, 12 Cal.4th at p. 201.) "[W]e have never intimated that the rule is satisfied once the jury has some lesser offense option, so that the court may limit its sua sponte instructions to those offenses or theories that seem strongest on the evidence, or on which the parties have openly relied. On the contrary, … [t]he inference is that every lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury." (*People v. Breverman* (1998) 19 Cal.4th 142, 155.)

These principles apply equally to the "imperfect defense of others" theory of voluntary manslaughter. (*People v. Trujeque* (2015) 61 Cal.4th 227, 270-271; *People v. Randle* (2005) 35 Cal.4th 987, 997.) They also apply to potentially reduce a charge of attempted murder to attempted voluntary manslaughter. (*People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1407-1408.)

"Where … the defendant's version of events, if believed, establishes actual self-defense, while the prosecution's version, if believed, negates both actual and imperfect self-defense, the court is not required to give the instruction. [Citation.]" (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 834; see also *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1232.)

Finally, the imperfect self-defense theory does not apply when, as with "perfect" self-defense, the defendant through his or her own wrongful conduct creates the circumstances under which the victim is legally justified in attacking or pursuing the defendant. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1226; *People v. Enraca* (2012) 53 Cal.4th 735, 761; but see *People v. Ramirez* (2015) 233 Cal.App.4th 940, 945-953 [defendant's right to imperfect self-defense may return if victim illegally escalates violence].) Nor does it apply when the defendant's unreasonable belief in the need to act in self-defense is purely a produce of a psychological delusion. (*People v. Elmore* (2014) 59 Cal.4th 121, 136-139; distinguish *People v. Ocegueda*, *supra*, 247 Cal.App.4th at p. 1409 [other mental disabilities may be admissible in support of this defense].)

2100.3-Victim's violent history only relevant to self-defense if known to defendant 8/19

"Evidence that a victim had previously threatened or harmed others is relevant to a defendant's claim of self-defense *only* if the defendant knew of the victim's prior threatening conduct." (*People v. Bates* (2019) 35 Cal.App.5th 1, 9-10, original italics.) "[A]n instruction on the effect of antecedent threats known by a defendant is required where evidence establishes … threats … made by the deceased against the defendant and the defendant's belief and reliance thereon as influencing or justifying his actions" (*People v. Pena* (1984) 151 Cal.App.3d 462, 475.) This is because " '[a] person claiming self-defense is required to "prove his own frame of mind." ' " (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.) But if the "defendant was unaware of the victim's prior threatening conduct, such conduct was not relevant to show defendant's state of mind for

purposes of self-defense." (*People v. Bates*, *supra*, 35 Cal.App.5th at p. 10.) "Indeed, … the *reasonableness* of a defendant's beliefs is necessarily determined by what he is aware of, *not* from circumstances entirely unknown to him. (*Ibid*. original italics; see also *People v. Tafoya* (2007) 42 Cal.4th 147, 165-166.)

2120.1-Victim's capacity to give "legal consent" is fact question 2/12

"Legal consent" consists of the intelligence to understand (1) the act, (2) its nature, and (3) its probable consequences. (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1420 (*Miranda*).) In other words, actual consent requires that the victim act with positive cooperation and knowledge of the nature of the act involved. (*Ibid*.)

"The existence of capacity to consent is a question of fact." (*Miranda*, *supra*, 199 Cal.App.4th at p. 1413.) "A lay juror is able to assess the extent of a victim's mental disability." (*Ibid*.)

> " 'The question whether a person possesses sufficient resources—intellectual, emotional, social, psychological—to determine whether to participate in sexual contact with another is an assessment within the ken of the average juror, who likely has made the same determination at some point.' … [Citation.]" "There is a nationwide consensus that expert testimony on this issue is not required. …" [Citations.].)

(*Id*. at pp. 1413-1414.) Instead, the jury's determination of the sexual assault victim's capacity to consent necessarily depended upon the jurors' subjective assessment of her demeanor, as her demeanor as a witness can be highly probative of her mental condition. (*Id*. at p. 1414.) The jury can reasonably infer, for example, that an inability to articulate what happened demonstrates that the victim was not capable of appreciating what took place or freely and voluntarily participating in the acts. (*Id*. at p. 1415.)

2120.2-Honest and reasonable belief in victim's consent (*Mayberry*) defense 12/17

The California Supreme Court in *People v. Mayberry* (1975) 15 Cal.3d 143 (*Mayberry*) held that a defendant's reasonable and good faith mistake of fact regarding a woman's consent to sexual intercourse is a defense to rape. (*Id*. at p. 155.) In *People v. Williams* (1992) 4 Cal.4th 354 (*Williams*), the court explained the circumstances in which a court is required to give a *Mayberry* instruction in a case in which the defendant is charged with rape:

> *Mayberry* is predicated on the notion that under [Pen. Code] section 26, reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent. [Citations.] [¶] The *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent.

(*Id*. at pp. 360-361, fn. omitted.) To satisfy the subjective component, there must be evidence, either direct or circumstantial, of the defendant's state of mind when he committed the offense. (*People v. Maury* (2003) 30 Cal.4th 342, 425 (*Maury*).) Secondly:

> [T]he defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse,

that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction. [Citations.]

(*Williams*, *supra*, 4 Cal.4th at p. 361.)

The California Supreme Court further instructed: "[I]n determining whether the *Mayberry* instruction should be given, the trial court must examine whether there is substantial evidence that the defendant honestly and reasonably, but mistakenly, believed that the victim consented to sexual intercourse." (*Williams*, *supra*, 4 Cal.4th at p. 361; see also *Mayberry*, *supra*, 15 Cal.3d at p. 157 [instruction must be given "when 'some evidence "deserving of … consideration" ' existed to support that contention"].) And, as with other defenses, "[a] trial court's duty to instruct, sua sponte, … arises ' "only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." ' [Citations.]" (*Maury*, *supra*, 30 Cal.4th at p. 424; see also *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1300.)

The *Mayberry* defense has been applied to many crimes. (*People v. Lee* (2011) 51 Cal.4th 620, 641-642 [forcible rape under Pen. Code, § 261, subd. (a)(2)]; *Mayberry*, *supra*, 15 Cal.3d at pp. 153-157 [rape, kidnapping]; *People v. Andrews* (2015) 234 Cal.App.4th 590, 603 [sexual battery]; *People v. Sojka* (2011) 196 Cal.App.4th 733, 737-739 [attempted rape]; *People v. King* (2010) 183 Cal.App.4th 1281, 1317-1318 [forcible sexual penetration with foreign object under Pen. Code, § 289, subd. (a)]; *People v. Leal* (2009) 180 Cal.App.4th 782, 790-791 [assault with intent to commit rape under § 220]; *People v. Dillon* (2009) 174 Cal.App.4th 1367, 1383-1384 [forcible sexual penetration with a foreign object, and assault with intent to commit sexual penetration with a foreign object]; *People v. Rivera* (1984) 157 Cal.App.3d 736, 741-743 [assault with intent to commit rape]; *People v. Harris* (1979) 93 Cal.App.3d 103, 114 [kidnapping under Pen. Code, § 207].) But it does not apply when the charged crime is involves the use of means to incapacitate the victim to overcome their ability to resist. (*People v. Lujano* (2017) 15 Cal.App.5th 187, 194-195 [sodomy of intoxicated person]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 471 [rape and oral copulation by intoxication].)

The appellate court in *People v. Duarte-Lara* (2020) 49 Cal.App.5th 332, upheld the denial of a *Mayberry* instruction in a trial for sexual penetration with a foreign object of a minor under Penal Code section 289, subdivision (a)(1)(C) for failure to establish either the subjective or objective component of this defense. (*Id*. at pp. 339-341.)

2130.1-No sua sponte duty to instruct on accident defense 7/13

Penal Code section 26 recognizes the defense of accident or misfortune: "All persons are capable of committing crimes except those belonging to the following classes: [¶] … [¶] Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." "The accident defense amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime." (*People v. Lara* (1996) 44 Cal.App.4th 102, 110; see also *People v. Jennings* (2010) 50 Cal.4th 616, 674.)

"[A] trial court has no obligation to provide a sua sponte instruction on accident where … the defendant's theory of accident is an attempt to negate the intent element of the charged crime." (*People v. Anderson* (2011) 51 Cal.4th 989, 992) "A trial court's responsibility to instruct on

accident therefore generally extends no further than the obligation to provide, *upon request*, a pinpoint instruction relating the evidence to the mental element required for the charged crime." (*Id*. at p. 997, original italics.)

2140.1-Mistake of fact defense has limited applicability 6/20

Penal Code section 26 recognizes the defense of mistake of fact: "All persons are capable of committing crimes except those belonging to the following classes: [¶] … [¶] Three—Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." "If the defendant had an honest and reasonable belief in the existence of circumstances, which, if true, would make the act an innocent act, the mistake of fact defense applies." (*People v. Orlosky* (2015) 233 Cal.App.4th 257, 275; see also *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425 (*Russell*); *People v. Young* (2001) 92 Cal.App.4th 229, 233-234.) "The defendant's mistaken belief must relate to a set of circumstances which, if existent or true, would make the act charged an innocent act." (*People v. Lawson* (2013) 215 Cal.App.4th 108, 115 (*Lawson*); see also *People v. Zinda* (2015) 233 Cal.App.4th 871, 880.) In other words, "[w]hen a person commits an act based on a mistake of fact, his guilt or innocence is determined as if the facts were as he perceived them." (*People v. Beardslee* (1991) 53 Cal.3d 68, 87-88; see, e.g., *People v. Robbins* (2018) 19 Cal.App.5th 660, 668 [mistake of fact defense does not apply to attempted murder charge when defendant shots a stranger thinking it is another person he actually intended to kill].) Finally, "[a] mistake of fact must be in good faith. [Citations.])" (*People v. Watt* (2014) 229 Cal.App.4th 1215, 1218.)

For general intent crimes, the defendant's mistaken belief must be both actual and reasonable, but if the mental state of the crime is a specific intent or knowledge, then the mistaken belief must only be actual. (*Lawson*, *supra*, 215 Cal.App.4th at p. 115; *People v. Reyes* (1997) 52 Cal.App.4th 975, 984 & fn. 6; *Russell*, *supra*, at 144 Cal.App.4th at pp. 1425-1426.) But, "[i]n determining if a mistake of fact has negated a specific mental state, the jury may consider reasonableness in deciding if the belief was in good faith—a highly unreasonable belief can support an inference of bad faith, so while objective reasonableness is not a requirement of the defense of mistake, subjective reasonableness can be a relevant consideration on the subject of good faith. [Citations.]" (*People v. Watt*, *supra*, 229 Cal.App.4th at p. 1218.)

In *Russell*, a person's motorcycle broke down while he was riding it, and he pushed it to a nearby repair shop. Because the shop was closed, he left the motorcycle next to a fenced area near the shop. Several trash bins were inside the fenced area. The police later found the motorcycle near a tent in a nearby homeless encampment. The defendant lived in the tent and, when questioned, told the police found the motorcycle in a commercial parking lot. At trial, the defendant testified that he saw the motorcycle sitting next to the large trash receptacles and thought it was abandoned. The defendant was convicted of receiving stolen property, and on appeal claimed the trial court had a duty to instruct the jury sua sponte on mistake of fact. The appellate court agreed reasoning that the evidence there showed that the defendant had an actual and reasonable belief in a set of circumstances—that the motorcycle had been abandoned—which, if true, would have shown he did not knowingly possess a stolen motorcycle. (*Russell*, *supra*, 144 Cal.App.4th at p. 1431.)

In contrast, the defendant in *Lawson* was charged with petty theft for walking out of Walmart without paying for a hoodie sweatshirt draped over his shoulder. He testified he simply forgot it was around his neck when he left the store. His claim of error based on the trial court's failure to instruct

sua sponte on the mistake of fact defense was rejected by the appellate court. (*Lawson*, *supra*, 215 Cal.App.4th at pp. 115-117.) "The act of forgetting about the hoodie does not amount to a mistaken belief in a set of circumstances which, if true, would have made defendant's act of walking out of the store with the hoodie lawful." (*Id*. at p. 116; see also *People v. Osborne* (1978) 77 Cal.App.3d 472, 479.)

The appellate court in *Lawson* further held, based upon *People v. Anderson* (2011) 51 Cal.4th 989 (*Anderson*) rejecting a sua sponte duty to instruct on the defense of accident, that *Russell* was no longer good law on the issue of a trial court's duty to instruct on the mistake of law defense sua sponte. (*Lawson*, *supra*, 215 Cal.App.4th at pp. 118-119.)

> Like the defense of accident [*Anderson*], an instruction on the defense of mistake of fact would have served only to negate the mental state element of the crime. Thus, at least as asserted here, the defense of mistake of fact was not a true affirmative defense. … Thus, even if substantial evidence supported an instruction on mistake of fact, the trial court had no duty to instruct on the defense sua sponte.

(*Id*. at p. 118.) Thus, the trial court should only instruct on the defense of mistake of fact if it is supported by the evidence and requested by the defendant. (*Ibid*.)

2160.1-Entrapment is an objective test 12/16

Entrapment is a non-statutory defense.

> In California, the test for entrapment focuses on the police conduct and is objective. Entrapment is established if the law enforcement conduct is likely to induce a normally law-abiding person to commit the offense. [Citation.] "[S]uch a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect—for example, a decoy program—is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." [Citation.]

(*People v. Watson* (2000) 22 Cal.4th 220, 223, quoting *People v. Barraza* (1979) 23 Cal.3d 675, 689-690 (*Barraza*); see also *People v. Federico* (2011) 191 Cal.App.4th 1418, 1422.)

"The *Barraza* court described two guiding principles. 'First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established.' [Citation.]" (*People v. Watson*, *supra*, 22 Cal.4th at p. 223.) " 'Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute entrapment. Such conduct would include, for example, a guarantee that the act is not illegal or the offense will go undetected, an offer of exorbitant consideration, or any similar enticement.' [Citation.]" (*Id*. at p. 223.) If the defendant does not present substantial evidence to support it, the trial court is not required to give the jury instructions on the defense of entrapment. (*People v. Fromuth* (2016) 2 Cal.App.5th 91, 110; *People v. Federico*, *supra*, 191 Cal.App.4th at p. 1422.)

2210.1-Defense of necessity rejected in most cases 7/20

The common-law defense of necessity, often referred to as the "choice of evils" defense, traditionally covered situations where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. (*United States v. Bailey* (1980) 444 U.S. 394, 410 (*Bailey*).) This defense is not recognized by statute in California. (*People v. McKinney* (1986) 187 Cal.App.3d 583, 586.) It was judicially sanctioned, however, as a defense to a charge of nonviolent prison escape in *People v. Lovercamp* (1974) 43 Cal.App.3d 823 (*Lovercamp*). But, in California, "the exact confines of the necessity defense remain clouded … ." (*People v. Patrick* (1981) 126 Cal.App.3d 952, 960 (*Patrick*).) The defenses of duress and necessity are not the same. (See, generally, *People v. Heath* (1989) 207 Cal.App.3d 892.)

In general, to establish a necessity defense, "[t]he defendant must prove that he or she received a specific threat of death, forcible sexual attack, or substantial bodily injury in the immediate future and that he or she immediately reported this threat to the proper authorities when he had attained a position of safety from the immediate threat." (*People v. Kunes* (2014) 231 Cal.App.4th 1438, 1443.) The defendant has the burden of establishing the defense of necessity by a preponderance of the evidence. (*People v. Waters* (1985) 163 Cal.App.3d 935, 923-938.)

> "To justify an instruction on the defense of necessity, there must be evidence sufficient to establish that defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency." (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1035 [deciding factual predicate of defendant's necessity defense "insufficient as a matter of law"]; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1164 [necessity defense is " 'very limited' " and " 'represents a policy decision not to punish an individual despite proof of the crime' "].)

(*People v. Trujeque* (2015) 61 Cal.4th 227, 273; see also *People v. Buena Vista Mines, Inc.* (1998) 60 Cal.App.4th 1198, 1202; *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135; *People v. Slack* (1989) 210 Cal.App.3d 937, 940 (*Slack*).)

"[T]he defense of necessity more properly applies to situations when the person asserting the defense is faced with an extraordinary, or at least unusual, situation." (*People v. Lee* (2005) 131 Cal.App.4th 1413, 1429.) "[A] well-established central element involves the emergency nature of the situation, i.e., the imminence of the greater harm which the illegal act seeks to prevent." (*Patrick*, *supra*, 126 Cal.App.3d at p. 960.) As noted, however, the defense is unavailable if the defendant's own conduct substantially contributed to the emergency. (*People v. Bell* (2020) 48 Cal.App.5th 1, 21.)

Also basic to the defense of necessity is the actor's confrontation with a choice between two evils. If yet another alternative existed to violating the law, which alternative was reasonable or likely to cause less harm, the necessity defense is unavailable at trial. (*Bailey*, *supra*, 444 U.S. at p. 410; *Slack*, *supra*, 210 Cal.App.3d at p. 940; *People v. Heath*, *supra*, 207 Cal.App.3d at p. 901.) The defendant must demonstrate that violation of the law was the only reasonable alternative. (*Bailey*, *supra*, 444 U.S. at p. 410.) This requirement also applies to a person who is delusional due to involuntary intoxication. "[T]he law makes clear that the defense is unavailable where the means chosen by the defendant to resolve the delusional difficulties were not reasonably necessary. …

Thus, even a delusional defendant is 'obligated to utilize the least costly alternative.' [Citation.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1148.)

California courts have consistently rejected defendants' attempts to apply the necessity defense to justify various criminal acts, including trespassing and destruction of property by nuclear protesters. (*In re Weller* (1985) 164 Cal.App.3d 44, 48; *People v. Weber* (1984) 162 Cal.App.3d Supp. 1.) Necessity has been rejected as a defense to trespassing during abortion demonstrations. (*People v. Garziano* (1991) 230 Cal.App.3d 241.) It is not a defense to animal cruelty. (*People v. Youngblood* (2001) 91 Cal.App.4th 66 [hoarding cats alleged to prevent their euthanasia].) Necessity does not apply to discharging hazardous waste when the company's actions contributed to the emergency. (*People v. Buena Vista Mines, Inc.*, *supra*, 60 Cal.App.4th 1198.) Necessity is also not a viable defense to kidnapping and false imprisonment to "deprogram" the victim. (*Patrick*, *supra*, 126 Cal.App.3d 952.) And, necessity has been rejected as a defense to driving under the influence. (*Slack*, *supra*, 210 Cal.App.3d 937.)

The defense of necessity can never be used to justify the crime of murder of an innocent person. (*People v. Coffman* (2004) 34 Cal.4th 1, 100; *In re Weller*, *supra*, 164 Cal.App.3d at p. 48.) Nor can it be used to justify assaulting a neighborhood drug pusher. (*People v. Micelil* (2002) 104 Cal.App.4th 256, 267-268.) It is not generally available to a charge of robbery. (See *People v. Kearns*, *supra*, 55 Cal.App.4th 1128.)

Even though California recognizes necessity as a defense to escape (*Lovercamp*, *supra*, 43 Cal.App.3d 823), necessity is not a defense to assaulting another while in custody. (*People v. McKinney* (1986) 187 Cal.App.3d 583, 586-587.) "[T]he defense of necessity is inappropriate where it would encourage rather than deter violence." (*Id*. at p. 587.) Thus, no appellate court sanctions the possession of deadly weapons by prisoners as necessary for the prisoner's self-defense against future harm. (See *People v. Velasquez* (1984) 158 Cal.App.3d 418, 422.)

2210.2-Evidence of necessity should be excluded unless all elements proven 7/07

The courts often require an offer of proof by the defendant before any evidence of necessity is allowed before the jury. If the defense's proffered evidence is insufficient to establish each and every element of the defense of necessity, the defense and its related evidence should be rejected. (See, e.g., *People v. Geddes* (1991) 1 Cal.App.4th 448, 456; *People v. Slack* (1989) 210 Cal.App.3d 937, 943-944; *People v. Patrick* (1981) 126 Cal.App.3d 952, 959-962; and see *People v. Richards* (1969) 269 Cal.App.2d 768, 770-771; but, see *In re Eichorn* 1998) 69 Cal.App.4th 382 [defense available to homeless person sleeping in public area].)

In *United States v. Bailey* (1980) 444 U.S. 394, the United States Supreme Court endorsed this procedure:

> The requirement of a threshold showing on the part of those who assert an affirmative defense to a crime is by no means a derogation of the importance of the jury as a judge of credibility. Nor is it based on any distrust of the jury's ability to separate fact from fiction. On the contrary, it is a testament to the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses. If, as we here hold, an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.

(*Id*. at p. 416.)

In *Bailey* the trial court had permitted the defendant to present his incomplete evidence of necessity for escape from prison to the jury. The Supreme Court noted the result:

> This case presents a good example of the potential for wasting valuable trial resources. … Here, however, the jury heard five days of testimony. It was presented with evidence of every unpleasant aspect of prison life from the amount of garbage on the cell-block to the meal schedule to the number of times the inmates were allowed to shower Unfortunately, all this evidence was presented in a case where the defense's reach hopelessly exceeded its grasp. Were we to hold, as respondents suggest, that the jury should be subjected to this pot-pourri even though a critical element of the proffered defenses was concededly absent, we undoubtedly would convert every trial [for escape] into a hearing on the current state of the federal penal system.

(*Id*. at p. 417.)

Rejection of the defendant's proffered evidence is not the only limitation that should be applied when the proof is lacking. Clearly, jury instructions supporting such a defense should be refused. (See, e.g., *United States v. Bailey*, *supra*, 444 U.S. at p. 417; *People v. Pepper* (1996) 41 Cal.App.4th 1029, 1036; *People v. Geddes*, *supra*, 1 Cal.App.4th at p. 456; see also *People v. Slack*, *supra*, 210 Cal.App.3d at pp. 943-944; *People v. Patrick*, *supra*, 126 Cal.App.3d at p. 959-962; *People v. McKinney* (1986) 187 Cal.App.3d 583.) And, obviously, voir dire, opening statements and closing argument regarding the "necessity" or motivation for the defendant to act should also be precluded.

2220.1-Elements of duress defense must be supported by substantial evidence 7/20

Duress is available as a defense to defendants who commit a crime "under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." (Pen. Code, § 26, subd. 6*; People v. Casares* (2016) 62 Cal.4th 808, 844; *People v. Otis* (1959) 174 Cal.App.2d 119, 124-125) "An essential component of this defense is that the defendant be faced with a direct or implied demand that he or she commit the charged crime." (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 567]; see also *People v. Bell* (2020) 48 Cal.App.5th 1, 21.) "The defense of duress, unlike the necessity justification, requires that the threat or menace be accompanied by a direct or implied demand that the defendant commit the criminal act charged." (*People v. Steele* (1988) 206 Cal.App.3d 703, 706 [duress not available as a defense when inmate escaped in response to threats of bodily injury because persons making threats did not demand that defendant escape.) "The common characteristic of all the decisions upholding [a duress defense] lies in the immediacy and imminency of the threatened action: each represents the situation of a present and active aggressor threatening immediate danger; none depict a phantasmagoria of future harm." (*People v. Otis*, *supra*, 174 Cal.App.2d at p. 125; see also *People v. Vieira* (2005) 35 Cal.4th 264, 290; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 125.) Thus, threats of future danger are inadequate to support a proffered duress defense. (*People v. Casares*, *supra*, 62 Cal.4th at p. 844.) "A trial court is required to instruct sua sponte on a duress defense if there is substantial evidence of the defense and if it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 157.)" (*People v. Wilson* (2005) 36 Cal.4th 309, 331; see also *People v. Powell* (2018) 6 Cal.5th 136, 164.)

2220.2-Duress is not a defense to murder 12/18

The duress defense is generally not applicable to the crime of murder.

> "[D]uress is not a defense to any murder" (*People v. Maury* (2003) 30 Cal.4th 342, 421) and, in particular, does not negate malice. (*People v. Anderson* (2002) 28 Cal.4th 767, 783-784.) Duress likewise does not categorically negate premeditation and deliberation, although "[i]f a person obeys an order to kill without reflection, the jury might find no premeditation and thus convict of second degree murder." (*Id*. at p. 784.) Finally, "duress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony." (*Ibid*.)

(*People v. Hinton* (2006) 37 Cal.4th 839, 882-883; see also *People v. Landry* (2016) 2 Cal.5th 52, 91.) "Moreover, because duress cannot, as a matter of law, negate the intent, malice or premeditation elements of a first degree murder, we further reject defendant's argument that duress could negate the requisite intent for one charged with aiding and abetting a first degree murder. (See *Anderson*, *supra*, 28 Cal.4th at p. 784.)" (*People v. Vieira* (2005) 35 Cal.4th 264, 290.) Similarly, "this court has long held that duress cannot reduce murder to manslaughter, and defendant does not convince us otherwise. (*People v. Hinton* (2006) 37 Cal.4th 839, 882-883; *People v. Anderson* (2002) 28 Cal.4th 767, 781.)" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 477-478.)

But, as noted, a duress defense may come into play in a felony-murder situation.

> Although 'duress is not a defense to any form of murder,' (*People v. Anderson*, *supra*, 28 Cal.4th at p. 780) 'duress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony. [Citations.] If one is not guilty of the underlying felony due to duress, one cannot be guilty of felony murder based on that felony.' (*Id*. at p. 784.)

(*People v. Powell* (2018) 6 Cal.5th 136, 164.)

2240.1-Third party culpability evidence barred unless linked to crime 2/21

In *People v. Hall* (1986) 41 Cal.3d 826 (*Hall*), the California Supreme Court held that to be admissible, defense evidence that some third party, rather than the defendant, committed the charged crime must be capable of raising a reasonable doubt. The court went on to define and limit such evidence.

> [W]e do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. … [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: *there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime*.

(*Id.* at p. 833, italics added; see also *People v. Turner* (2020) 10 Cal.5th 786, 817; *People v. Vines* (2011) 51 Cal.4th 830, 860.)

> [C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code] § 352). We recognize that an inquiry into the admissibility of such evidence and the balancing required under section 352 will always turn on the facts of the case.

(*Hall*, *supra*, at p. 834; see also *People v. Hartsch* (2010) 49 Cal.4th 472, 498.)

Applying the *Hall* standard, courts have frequently concluded that evidence providing only a possible motive or opportunity to some third party is insufficient to raise a reasonable doubt of guilt and, thus, properly excluded under Evidence Code section 352. (See, e.g., *People v. Casares* (2016) 62 Cal.4th 808, 830; *People v. Linton* (2013) 56 Cal.4th 1146, 1201-1202.) Similarly, marginal or speculative evidence linking a third party to the crime is insufficient to trigger admissibility under *Hall*. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 624-626; *People v. Lewis* (2001) 26 Cal.4th 334, 373; *People v. Kerley* (2018) 23 Cal.App.5th 513, 572-574.) Finally, "[t]hird party culpability evidence that does not identify a possible suspect is properly excluded." (*People v. Brady* (2010) 50 Cal.4th 547, 559.)

Even evidence which tends to connect a third party to a crime should be barred by the trial court when other evidence excludes that person as the perpetrator. In *People v. Johnson* (1988) 200 Cal.App.3d 1553, the defense offered evidence of a person detained in the vicinity of a burglary who was of the height described, had cash in the amount and denominations missing, and was walking away from the burglarized house. The trial court barred the evidence because that person's fingerprints did not match latent prints left at the point of entry. Upholding that ruling, the appellate court held, "even the strongest circumstantial evidence case of third party culpability does not raise a reasonable doubt about a defendant's guilt when fingerprints found at the scene of the crime could not have been those of the third party." (*Id.* at p. 1564.)

Otherwise inadmissible evidence does not become admissible under this rule merely because it might establish a third party's culpability. Rejecting evidence of a third party's alleged admission, the appellate court in *People v. Huggins* (1986) 182 Cal.App.3d 828 ruled: "… *Hall* did not undertake to repeal the Evidence Code. Incompetent hearsay is as inadmissible as it always was." (*Id*. at p. 833,) Thus, for example, mere evidence of a third party's propensity for violence is insufficient to justify admission under Evidence Code section 1101 as proof of that person's identity as the perpetrator of a murder. "Such evidence does not amount to direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Davis* (1995) 10 Cal.4th 463, 501; see also *People v. McWhorter* (2009) 47 Cal.4th 318, 372-373.) Similarly, prior similar crimes that are not sufficiently distinctive for admission to prove identity under Evidence Code section 1101, are not admissible to establish third party culpability. (*People v. Elliott* (2012) 53 Cal.4th 535, 580-581.)

The limitations on defense evidence of third-party culpability apply equally to direct examination of defense witnesses and cross-examination of prosecution witnesses. In *People v. Shilling* (1987) 188 Cal.App.3d 1021, the trial court foreclosed cross-examination of a prosecution witness based upon a defense theory of the witness' culpability which was unsupported by any evidence. The court of appeal held, "[t]he constitutional right to confront and cross-examine adverse witnesses does not include the right to ask wholly speculative questions ungrounded in factual predicate even when posed in the quest to discredit a witness." (*Id.* at p. 1033.)

A ruling excluding a proffered third party culpability defense will not be disturbed on appeal absent a finding that the trial court abused its discretion. (*People v. Young* (2019) 7 Cal.5th 905, 937; *People v. Elliott*, *supra*, 53 Cal.4th at p. 581.)

2280.1-Unconsciousness defense requirements and limits 7/20

An unconscious person is generally incapable of committing a crime. (Pen. Code, § 26(4); *People v. Gana* (2015) 236 Cal.App.4th 598, 609 (*Gana*).) "[U]nconsciousness is a defense; consciousness is not an element of a crime." (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1325, citing *People v. Babbitt* (1988) 45 Cal.3d 660, 693.) There is a rebuttable presumption of consciousness and, therefore, it is proper to require the defense to present evidence sufficient to raise a reasonable doubt of unconsciousness before shifting the burden to the prosecution to prove consciousness beyond a reasonable doubt. (*People v. Babbitt*, *supra*, 45 Cal.3d at pp. 693-694; *People v. James* (2015) 238 Cal.App.4th 794, 804.)

> Consistent with this presumption and the burden of proof, if a defendant presents substantial evidence of unconsciousness, the trial court must provide an instruction to the jury. [Citation.] Substantial evidence is "evidence sufficient for a reasonable jury to find in favor of the defendant." [Citations.] Where a defendant provides evidence of involuntary unconsciousness, "the refusal of a requested instruction on the subject, and its effect as a complete defense if found to have existed, is prejudicial error. [Citations.]" [Citation.] "The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. … However incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true. [Citations.]" [Citation.]

(*People v. James*, *supra*, 238 Cal.App.4th at p. 804; bur see *People v. Bel*l (2020) 48 Cal.App.5th 1, 19-20 [no evidence defendant unconscious at time of crime].)

"An unconscious act, as defined 'within the contemplation of the Penal Code is one committed by a person who because of somnambulism, a blow on the head, or similar cause is not conscious of acting and whose act therefore cannot be deemed volitional.' [Citation.]" (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1083.) "Unconsciousness for this purpose need not mean that the actor lies still and unresponsive … ." (*People v. Ochoa* (1998) 19 Cal.4th 353, 423.) " 'To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist "where the subject physically acts but is not, at the time, conscious of acting." [Citation.]' [Citations.]" (*People v. Carlson* (2011) 200 Cal.App.4th 695, 704; see also *Gana*, *supra*, 236 Cal.App.4th at p. 609.) Unconsciousness can arise from a mental illness or "unsound mind" that also could support finding the defendant not guilty by reason of insanity. (*People v. James*, *supra*, 238 Cal.App.4th at p. 809 [court rejected "the continued dichotomy between unconscious states resulting from physical or organic conditions and those resulting from severe mental illnesses"].)

The complicated and purposive nature of a defendant's conduct can demonstrate sufficient awareness to deny giving an unconsciousness defense jury instruction. (*Ibid*.) "A '[d]efendant's professed inability to recall the event, without more, [i]s insufficient to warrant an unconsciousness instruction. [Citations.]' [Citations.]" (*Carlson*, *supra*, 200 Cal.App.4th at p. 704; see also *People v. Halvorsen* (2007) 42 Cal.4th 379, 418; *People v. Rogers* (2006) 39 Cal.4th 826, 887-888.) Medical testimony, however, as to why the defendant was unconscious can support an instruction on this defense. (*Gana*, *supra*, 236 Cal.App.4th at p. 609.)

2280.2-Voluntary intoxication causing unconsciousness is not a defense 8/17

"Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge. [Citations.]" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 417; see also *People v. Parker* (2017) 2 Cal.5th 1184, 1223; *People v. Gana* (2015) 236 Cal.App.4th 598, 609.) "Voluntary intoxication includes the voluntary ingestion of any intoxicating drug. (Pen. Code, § 22, subd. (c).)" (*People v. Mathson* (2012) 210 Cal.App.4th 1297, 1312 (*Mathson*).) "In contrast, involuntary intoxication that results in unconsciousness is a complete defense to a crime." (*Id*. at p. 1313; see also *People v. Velez* (1985) 175 Cal.App.3d 785, 793 (*Velez*).) "Involuntary intoxication can be caused by the voluntary ingestion of prescription medication if the person did not know or have reason to anticipate the drug's intoxicating effects." (*Mathson*, *supra*, at p. 1313; *People v. Chaffey* (1994) 25 Cal.App.4th at pp. 856-858 (*Chaffey*).)

> The question of whether intoxication is voluntary or involuntary focuses on whether the intoxication is induced through the defendant's fault or the fault of another or whether the defendant knows or has reason to anticipate the intoxicating effects of the substance he or she ingests. If intoxication is the result of the defendant's own fault or the defendant knows or has reason to anticipate the intoxicating effects, the intoxication is voluntary. (*Velez*, *supra*, 175 Cal.App.3d at p. 796; *Chaffey*, *supra*, 25 Cal.App.4th at pp. 856-858.)

(*Mathson*, *supra*, 210 Cal.App.4th at p. 1313.) Thus, for example, there is a "distinction between voluntary intoxication resulting in sleep driving, which is not excusable, and involuntary intoxication resulting in sleep driving, which is excusable." (*Id* . at p. 1316.)

The admissibility and relevancy of a defendant's voluntary intoxication as a defense depends whether the crime involves a general or specific intent. "While evidence of voluntary intoxication is admissible on the issue of whether or not a defendant actually formed a required specific intent or mental state [citations], voluntary intoxication 'is not a defense to a general intent crime." (*Velez*, *supra*, 175 Cal.App.3d at p. 791; see also *People v. James* (2015) 238 Cal.App.4th 794, 805, 812.) Thus, for example, since driving under the influence is a general intent crime, voluntary intoxication is not a defense. (*Mathson*, *supra*, 210 Cal.App.4th at pp. 1312-1312; *Chaffey*, *supra*, 25 Cal.App.4th at p. 855.)

Similar rules apply regarding killing while unconscious due to voluntary intoxication. "[I]f the intoxication is voluntarily induced, it can never excuse homicide. [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 423; see also *People v. Carlson* (2011) 200 Cal.App.4th 695, 703.) " 'To the extent that a defendant who is voluntarily intoxicated unlawfully kills with implied malice, the defendant would be guilty of second degree murder.' [Citation.] No reason exists to carve out an exception where a person drinks so much as to render him or her unconscious." (*People* v. *Carlson*, *supra*, at p. 707; see also *People v. Turk* (2008) 164 Cal.App.4th 1361, 1376-1377.)

2290.1-Return of property not defense to theft 11/12

"In general, '[r]estoration of property feloniously taken or appropriated is no defense to a charge of theft.' (*People v. Pond* (1955) 44 Cal.2d 665, 674.) '[O]ffers of restoration, in whole or in part, [are] only matters which the court might consider in mitigation of punishment.' (*People v. Costello* (1951) 107 Cal.App.2d 514, 518.)" (*People v. Bradley* (2012) 208 Cal.App.4th 64, 81-82.) Such actions may, depending on the facts, be relevant, to prove a lack of intent to steal in the first instance. (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099-1101.) But such evidence is

admissible "only when [a] defendant shows a relevant and probative link in his subsequent actions from which it might be inferred his original intent was innocent." (*Id*. at pp. 1100-1101.)

This exception generally does not apply in an embezzlement case. Evidence of a defendant's intent to restore embezzled property is irrelevant because the fraudulent intent required for embezzlement is the intent to use the property for a purpose other than that for which the dealership intended, even if temporarily. (*People v. Sisuphan* (2010) 181 Cal.App.4th 800, 813.) "Even if defendant had intended to eventually return both the trade-in vehicle and the money, his appropriation of both, for his own personal use, was significant in duration and incompatible with the owner's enjoyment or use of the property" (*People v. Casas* (2010) 184 Cal.App.4th 1242, 1247.)

2290.2-Claim-of-right defense to theft is limited 5/20

"The claim-of-right defense provides that a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." (*People v. Tufunga* (1999) 21 Cal.4th 935, 938 (*Tufunga*); see also *People v. Kaufman* (2017) 17 Cal.App.5th 370, 388.) "[T]he defense is not available where the claimed debt is uncertain and subject to dispute." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1146.) "The claim-of-right defense also is inapplicable where a defendant attempts to conceal the taking [citation], where the claim of right to the property arises from "notoriously illegal" activity [citation], or 'where an employee unilaterally determines that he or she is entitled to certain wages and thereafter, without authorization, appropriates the property of the employer in purported payment of such wages' (*People v. Creath* (1995) 31 Cal.App.4th 312, 318.)" (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 768.)

"In furtherance of the public policy discouraging the use of forcible self-help" (*Tufunga*, *supra*, 21 Cal.4th at p. 950), the claim-of-right defense does not extend to "robberies perpetrated to satisfy, settle or otherwise collect on a debt, liquidated or unliquidated—as opposed to forcible takings intended to recover specific personal property in which the defendant in good faith believes he has a bona fide claim of ownership or title … ." (*Id*. at p. 956.) " ' "It is a general principle that one who is or believes he is injured or deprived of what he is lawfully entitled to must apply to the state for help. Self-help is in conflict with the very idea of social order. It subjects the weaker to risk of the arbitrary will or mistaken belief of the stronger. Hence the law in general forbids it.' " [Citation.]" (*Id*. at pp. 952-953.)

"The claim-of-right defense is generally limited 'to the perpetrator who merely seeks to effect what he believes in good faith to be the recovery of specific items of *his own* personal property.' (*People v. Waidla* (2000) 22 Cal.4th 690, 734, fn. 12, italics added.)" (*People v. Anderson* (2015) 235 Cal.App.4th 93, 100; see also *People v. Starski* (2017) 7 Cal.App.5th 215, 232.)

> [T]he same public policy similarly precludes extension of the claim-of-right defense to a defendant who has no right or claim of ownership to the property that he is accused of stealing, and who maintains that he acted as an agent of a third party who was the rightful owner of the property but was not a coprincipal in the commission of the charged offenses. To allow defendants who claim to have committed theft or robbery as agents for third parties to assert a claim-of-right defense based on the belief that the third party has a right or claim to the property taken would be contrary to the strong public policy against forcible self-help, because it would condone the type of self-help that subjects the weaker to the risk

of being victimized as the result of mistaken belief or arbitrary will of the perpetrator or the third-party "principal."

(*People v. Anderson*, *supra*, 235 Cal.App.4th at p. 102.)

In contrast, the appellate court in *People v. Williams* (2009) 176 Cal.App.4th 1521 extended the claim-of-right defense to a defendant who was tried as an aider and abettor to a charged principal who acted to recover property under an alleged good faith belief that the principle had a right or claim to the property. (*Id*. at pp. 1528-1529.) The court held that "a good faith belief by a defendant, tried as an accomplice, that he was assisting his coprincipal retake the principal's property negates the 'felonious intent' element of both larceny and robbery, and that an instruction on the claim-of-right defense must be given where substantial evidence supports such a belief." (*Id*. at pp. 1528-1529.)

While the claim-of-right defense may negate the intent to steal element or robbery, it is not a defense to the accompanying use of force, including assault and battery. Nor is claim-of-right ever a defense to carjacking (*People v. Cabrera* (2007) 152 Cal.App.4th 695, 701-703), extortion (*People v. Lancaster* (2007) 41 Cal.4th 50, 88) or kidnapping for ransom or extortion (*Lancaster*, *supra*; *People v. Serrano* (1992) 11 Cal.App.4th 1672, 1677-1678).

Finally, because the claim-of-right defense is not a " special defense," but seeks only to negate the mental state element of the charged crime, the jury need not be instructed on this theory sua sponte and, if requested, only if there is substantial evidence to support it. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 873-875; *People v. Perkins*, *supra*, 5 Cal.App.5th at p. 768.)

2300.1-Demurrer tests only issues of law on face of accusatory pleading 3/18

A demurrer is a pleading entered at or before the time of arraignment, raising an issue of law as to the sufficiency of the accusatory pleading. (Pen. Code, §§ 1002-1004.) A demurrer tests only defects appearing on the face of the accusatory pleading. (*Hoffman v. Superior Ct.* (2017) 16 Cal.App.5th 1086, 1090; *Shortridge v. Municipal Court* (1984) 151 Cal.App.3d 611, 616.) Such a defect would encompass a constitutionally invalid statute. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1090; *Guevara v. Superior Court* (1998) 62 Cal.App.4th 864, 870-871.)

But, for example, a demurrer cannot be used to force the prosecution to make a pretrial election of which act, of many properly chargeable under Penal Code section 954, supports each charged offense. (*Huffman v. Superior Ct.*, *supra*, 16 Cal.App.5th at p. 1095-1098; rejecting contrary language in *People v. Salvato* (1991) 234 Cal.App.4th 872.)

Similarly:

> A demurrer is not a proper means of testing the sufficiency of the *evidence* supporting an accusatory pleading. [Citation.] Rather, a demurrer lies only to challenge the sufficiency of the *pleading*. It is limited to those defects appearing on the face of the accusatory pleading, and raises only issues of law. [Citations.] " 'The [accusatory pleading] must be given a reasonable interpretation and read as a whole with its parts considered in their context.' " [Citation.]

(*People v. Biane* (2013) 58 Cal.4th 381, 388, italics in original.)

"On appeal, we review the order overruling the defendant's demurrer de novo." (*People v. Osorio* (2015) 235 Cal.App.4th 1408, 1412.) Nevertheless, "[o]n appeal from a judgment entered on demurrer, the allegations of the accusatory pleading must be liberally construed and assumed to be true." (*People v. Biane*, *supra*, 58 Cal.4th at p. 388.)

2310.1-The statutory grounds for bringing a demurrer are limited 3/14

Penal Code section 1004 sets out five grounds upon which a demurrer may be brought. It has long been held that the enumerated grounds are exclusive, and that a demurrer may not be brought on any other ground. (*People v. McConnell* (1895) 82 Cal. 620; *People v. McAllister* (1929) 99 Cal.App. 37, 40, 44.)

> The legal grounds for demurrer to an accusatory pleading are limited to those specifically enumerated in Penal Code section 1004. [Citations.] Failure to assert one of the enumerated grounds, other than an objection to the jurisdiction of the court or that the facts stated do not constitute a public offense, "shall be deemed a waiver thereof." (Pen. Code, § 1012.)

(*People v. Biane* (2013) 58 Cal.4th 381, 388.)

2320.1-Demurrer must be filed before entry of plea 6/17

A demurrer is a pleading that must be filed before a defendant enters a plea. (Pen. Code, §§ 1002-1004.) Failure to do so constitutes a waiver of all objections appearing on the face of the indictment or information, except want of jurisdiction or failure to state facts constituting a public offense. (Pen. Code, § 1012; *In re Geer* (1980) 108 Cal.App.3d 1002; *People v. Schoeller* (1950) 96 Cal.App.2d 61, 62.) The court may, however, permit a demurrer to be made another stage of the proceedings. (Pen. Code, § 1003; *Hudson v. Superior Ct.* (2017) 7 Cal.App.5th 999, 1017.)

2400.1-No duty on police to gather all evidence 6/14

Under certain circumstances law enforcement has a duty to *preserve* physical evidence. (See *Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58; *California v. Trombetta* (1984) 467 U.S. 479, 488-489.) But there is no corresponding duty on law enforcement to *gather* physical evidence that might prove useful to the defendant. (*People v. Hogan* (1982) 31 Cal.3d 815, 851.) "Generally, due process does not require the police to collect particular items of evidence. [Citation.]" (*People v. Montes* (2014) 58 Cal.4th 809, 837.) "The police cannot be expected to 'gather up everything which might eventually prove useful to the defense.' " (*People v. Hogan*, *supra*, 31 Cal.3d at p. 851.) "Although this court has suggested that there might be cases in which the failure to collect or obtain evidence would justify sanctions against the prosecution at trial, we have continued to recognize that, as a general matter, due process does not require the police to collect particular items of evidence. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 943.) There is certainly no due process violation when the defendant is allowed to retain the evidence. (*People v. Velasco* (2011) 194 Cal.App.4th 1258, 1263 ["A contrary rule would make the state a caretaker for defendants' exculpatory evidence even though the state did not control or possess the evidence. Such a rule would make no sense."].)

In cases concerning many different forms of evidence, the California appellate courts have uniformly rejected the assertion that police have to gather such evidence. (See *People v. Montes*, *supra*, 58 Cal.4th at pp. 837-838 [sample of defendant's blood at time of arrest]; *In re Michael L.* (1985) 39 Cal.3d 81, 86-87 [video tape]; *People v. Hogan*, *supra*, at p. 851 [fingernail scrapings]; *People v. Perez* (1979) 24 Cal.3d 133, 145 [glass particles]; *People v. Velasco*, *supra*, 194 Cal.App.4th at pp. 1263-1267 [boxer shorts where prisoner concealed shank]; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 791 [tape recording of interrogation]; *People v. Callen* (1987) 194

Cal.App.3d 558, 561-563 [name of crime tipster]; *People v. Harris* (1985) 165 Cal.App.3d 324, 327-329 [tape recordings]; *People v. McNeill* (1980) 112 Cal.App.3d 330, 338 [fingernail scrapings]; *People v. Maese* (1980) 105 Cal.App.3d 710, 721 [fingerprints]; *People v. Cooper* (1979) 95 Cal.App.3d 844, 850-851 [fingerprints]; *People v. Watson* (1977) 75 Cal.App.3d 384, 399 [blood sample].)

As one appellate court reasoned: "The instant case is thus less one of failure to preserve evidence than failure to gather and collect everything which, with fortuitous foresight, might prove useful to the defense. [Citations.] As aptly put by the trial judge, 'the people were not required to foresee everything the fertile mind of the defense counsel might wish to examine.' " (*People v. McNeill*, *supra*, 112 Cal.App.3d at p. 338.)

2410.1-*Trombetta/Youngblood* motion should be reserved to trial court 7/11

A defense motion for sanctions against the prosecution for the loss or destruction of evidence under *California v. Trombetta* (1984) 467 U.S. 479 or *Arizona v. Youngblood* (1988) 488 U.S. 51, is clearly a nonstatutory, common-law motion. (Cf. *People v. Huffman* (1977) 71 Cal.App.3d 63, 78-79; *People v. Vera* (1976) 62 Cal.App.3d 293, 296.) A common-law motion is generally heard in the trial court out of the presence of the jury. While such a motion may be heard pretrial, any ruling on the admissibility of related evidence is not binding on the court if the People again offer the evidence at trial, or if the defense again objects. Unlike a statutory motion to suppress evidence pursuant to Penal Code section 1538.5, any ruling made before the date of trial is basically an advisory opinion. (*People v. Superior Court (Zolnay)* (1975) 15 Cal.3d 729, 734.) Thus, the resolution of a common-law motion such as this is not reviewable pretrial. (*Ibid.*; *People v. Municipal Court (Ahnemann)* (1974) 12 Cal.3d 658, 661.)

The court rarely should exercise its discretion in favor of a pretrial resolution of a motion such as this. (See *People v. Superior Court (Zolnay)*, *supra*, 15 Cal.3d at p. 734; *Saidi-Tabatabai v. Superior Court* (1967) 253 Cal.App.2d 257, 266.) The present motion is particularly well suited to trial court, rather than pretrial, consideration. Not only will resolution at trial preclude the necessity of having to relitigate the motion, but the issue can be determined much more logically by the trial judge. The trial judge will have a broader understanding of all the evidence and will be in a better position to evaluate the purported exculpatory value of the lost evidence and whether comparable evidence exists. Also, fashioning the proper sanction, if any is required, must take into consideration all facts surrounding the case so that the value of any piece of destroyed evidence can be weighed. Here again, a proper resolution can only be made by the trial judge hearing the presentation of the case. In San Diego County this procedure is mandated by the local rules of court. (See San Diego County Superior Court Rules, Division III, "Criminal," rule 3.2.1.F.)

2410.2-Federal precedent, not *Hitch*, controls relief for loss or destruction of evidence 12/14

> The state has a duty to preserve evidence that both possesses "a" exculpatory value that was apparent before the evidence was destroyed,' and is of "such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta* (1984) 467 U.S. 479, 489 (*Trombetta* .) Moreover, a constitutional violation is not established unless the authorities acted in bad faith in failing to preserve potentially useful evidence. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58 (*Youngblood*).)

(*People v. Schmeck* (2005) 37 Cal.4th 240, 283; see also *People v. Carrasco* (2014) 59 Cal.4th 924, 961.)

In *People v. Hitch* (1974) 12 Cal.3d 641(*Hitch*), the California Supreme Court had previously held that a defendant, under certain circumstances, may be entitled to the remedy of suppression when material physical evidence is lost or destroyed. In reaching this conclusion, the *Hitch* court adopted and relied *solely* on federal due process. (*In re Michael L.* (1985) 39 Cal.3d 81, 85-86; *Hitch*, *supra*, at pp. 651-652.) In *Trombetta*, however, the United States Supreme Court unanimously adopted a substantially different rule, cited above.

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality … evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

(*Trombetta*, *supra*, 467 U.S. at pp. 488-489, internal citation and footnote omitted.)

As also noted above, the United States Supreme Court further restricted relief in the case of lost or destroyed evidence. "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Youngblood*, *supra*, 488 U.S. at p. 58; see also *People v. Cook* (2006) 39 Cal.4th 566, 591; *People v. Cooper* (1991) 53 Cal.3d 771, 810.) Hence, under current federal law, no sanctions are appropriate for the negligent loss or destruction of evidence. (*People v. Webb* (1993) 6 Cal.4th 494, 519-520.)

It is clear the *Trombetta* preservation test differs substantially from the older *Hitch* rule. (*In re Michael L.*, *supra*, 39 Cal.3d at p. 86.) It is equally clear that the *Trombetta* and *Youngblood* legal standards have supplanted *Hitch*. (*People v. Frye* (1998) 18 Cal.4th 894, 942; *People v. Hardy* (1992) 2 Cal.4th 86, 165; *People v. Johnson* (1989) 47 Cal.3d 1194, 1233-1234.)

2410.3-No sanction unless evidence lost or destroyed obviously exculpatory 7/20

"[T]here is a distinction between *Trombetta*'s [*California v. Trombetta* (1984) 467 U.S. 479] 'exculpatory value that was apparent' criteria and the standard set forth in *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*)] for 'potentially useful' evidence." (*People v. Alvarez* (2014) 229 Cal.App.4th 761, 773 (*Alvarez*).)

> If the higher standard of apparent exculpatory value is met, the motion is granted in the defendant's favor. But if the best that can be said of the evidence is that it was "potentially useful," the defendant must also establish bad faith on the part of the police or prosecution. (See *Youngblood*, *supra*, 488 U.S. at p. 58; *Trombetta*, *supra*, 467 U.S. at pp. 488-489.)

(*Alvarez*, *supra*, 229 Cal.App.4th at p. 773.)

Under *Trombetta*, a defendant seeking sanctions for destruction of evidence collected by the state must show that the destroyed physical evidence was of *significant materiality*.

> Due process requires the state preserve evidence in its possession where it is reasonable to expect the evidence would play a significant role in the defense. (*People v. Beeler* (1995) 9 Cal.4th 953, 976.) The evidence must "possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant

would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta*, *supra*, 467 U.S. at p. 489.)

(*People v. Alexander* (2010) 49 Cal.4th 846, 878.)

If the evidence's exculpatory value is apparent and no comparable evidence is reasonably available, due process precludes the state from destroying it. (*Trombetta*, at p. 489; [*People v.*] *Alexander* [(2010) 49 Cal.4th 846] at p. 878.) If, however, "no more can be said [of the evidence] than that it *could have* been subjected to tests, the results of which *might have* exonerated the defendant" (*Youngblood*, at p. 57, italics added), the proscriptions of the federal Constitution are narrower; "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law" (*id*. at p. 58; accord, *People v. Tafoya* (2007) 42 Cal.4th 147, 187; *People v. DePriest* (2007) 42 Cal.4th 1, 42.)

(*People v. Duff* (2014) 58 Cal.4th 527, 549; see also *People v. Flores* (2020) 9 Cal.5th 371, 394-395; see, e.g., *People v. Lucas* (2014) 60 Cal.4th 153, 221-222 [destruction of partial fingerprint not *Trombetta* or *Youngblood* violation]; but see *Alvarez*, *supra*, 229 Cal.App.4th at pp. 774-779 [dismissal of robbery charges against two of three suspects upheld because of the bad faith destruction of videos of crime scene taken by police-controlled camera].)

"[T]he constable must have *subjectively* anticipated the exculpatory nature of the evidence in order to expose the prosecution to sanction for its loss." (*People v. Gonzales* (1986) 179 Cal.App.3d 566, 574, italics in original.) For example, in *People v. Lewis* (2006) 39 Cal.4th 970 the police destroyed shotgun shells, but only after experts linked them to defendant Lewis's shotgun. The California Supreme Court found no *Trombetta* violation reasoning the expert's "information negates any inference that the shells possessed exculpatory value manifest to the authorities when discarded before trial." (*Id*. at p. 1000.) But "[i]f 'the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant' (*Youngblood*, *supra*, 488 U.S. at p. 58) and fail to preserve it, that shows bad faith." (*Alvarez*, *supra*, 229 Cal.App.4th at p. 777.)

Assuming the initial showing is made, a defendant must demonstrate the unavailability of comparable forms of evidence. Only when the defendant can establish the materiality of the physical evidence under *both prongs* of either the *Trombetta* or the *Youngblood* tests does due process require the preservation of physical evidence for later use by the defense. (*People v. Sixto* (1993) 17 Cal.App.4th 374, 397-398; see also *People v. Carter* (2005) 36 Cal.4th 1215, 1246.)

2410.4-No sanction for good faith loss or destruction of rough police notes 7/11

Applying the controlling standards for destruction of evidence set forth in *California v. Trombetta* (1984) 467 U.S. 479 and *Arizona v. Youngblood* (1988) 488 U.S. 51, the appellate courts have held there can be no sanction for the good faith destruction of rough police notes used in preparation of a formal report where the destruction did not violate police procedures. (*Killian v. United States* (1961) 368 U.S. 231; *People v. Coles* (2005) 134 Cal.App.4th 1049, 1054-1056; see also *People v. Tierce* (1985) 165 Cal.App.3d 256, 262-265; *People v. Savage* (1982) 129 Cal.App.3d 1, 3.) As one appellate court explained:

The negligent loss of the notes comports with the requirement of good faith. Good faith, in this context, is the absence of malice and absence of design to seek an unconscionable advantage over the defendant. There is no evidence of official animus toward defendant on the part of [Officer] Castillo or any conscious effort on his part to

> suppress exculpatory evidence. The record shows only that the original notes were lost, not purposefully destroyed or secreted so as to prejudice defendant with respect to their possible content.

(*People v. Angeles* (1985) 172 Cal.App.3d 1203, 1214; see also *People v. Garcia* (1986) 183 Cal.App.3d 335, 349.)

2410.5-*Trombetta* does not require saving portion of DUI breath sample 6/20

The United States Supreme Court in *California v. Trombetta* (1984) 467 U.S. 479 held it was not a violation of Fourteenth Amendment due process for law enforcement to fail to retain breath samples in driving under the influence cases. The High Court reasoned that modern testing equipment is accurate enough that the possibility of defendant's own test producing a different and exculpatory result was "extremely low." (*Id*. at p. 489.) In addition, the test results are available and their accuracy can be tested by defendant through cross-examination of the person who conducted the test about personal qualifications, the procedures used, and the validity of the results. (*Id.* at p. 490.) California appellate courts apply this holding. (*People v. Trombetta* (1985) 173 Cal.App.3d 1093.)

2410.6-Remedies for *Trombetta/Youngblood* violations are discretionary 12/14

Trial courts have a large measure of discretion in determining the appropriate sanction for failure to preserve material evidence under *California v. Trombetta* (1984) 467 U.S. 479 and *Arizona v. Youngblood* (1988) 488 U.S. 51. (*People v. Memro* (1995) 11 Cal.4th 786, 831; *People v. Alvarez* (2014) 229 Cal.App.4th 761, 778 (*Alvarez*).) "A dismissal on due process grounds may be improper if a less drastic alternative is available that still protects the defendant's right to due process." (*Alvarez*, *supra*, 229 Cal.App.4th at p. 778.) For example, a trial court can administer ameliorative jury instructions. (See *Arizona v. Youngblood*, *supra*, 488 U.S. at p. 60, (conc. opn. of Stevens, J.); *People v. Montes* (2014) 58 Cal.4th 809, 837; *People v. Gonzales* (1989) 209 Cal.App.3d 1228, 1233-1234.) However, where there is bad faith destruction of material exculpatory evidence under the *Youngblood* standard dismissal may be proper if less drastic alternatives are unavailable. (*Alvarez*, *supra*, 229 Cal.App.4th at p. 779.)

2420.1-No sanction for evidence lost or destroyed by third party or court 7/11

The courts have consistently held that no sanctions are applicable for the destruction of evidence at the hands of third parties. Where otherwise appropriate, sanctions may only be imposed for improper destruction by police or the prosecution. (*People v. Lovett* (1978) 82 Cal.App.3d 527, 532-534.) Hence, no sanction may be applied for loss or destruction of evidence by private parties or even court personnel. (*Ibid.*; similarly see *In re Michael L.* (1985) 39 Cal.3d 81, 86-87; *People v. Gopal* (1985) 171 Cal.App.3d 524, 542; *People v. Kane* (1985) 165 Cal.App.3d 480, 485.)

2480.1-Mere contact is not a detention 5/20

"Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.) "Consensual encounters do not trigger Fourth Amendment scrutiny." (*Ibid*.) Thus, "[c]onsensual encounters require no articulable suspicion of criminal activity." (*People v. Rivera* (2007) 41 Cal.4th 304, 309.)

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. [Citation.] Nor would the fact that the officer identified himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. [Citation.] The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his own way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. [Citation.] If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

(*Florida v. Royer* (1983) 460 U.S. 491, 497-498.)

"If a reasonable person would feel free to terminate the encounter, then he or she has not been seized." (*United States v. Drayton* (2002) 536 U.S. 194, 201.) A "seizure" occurs only "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen … ." (*Terry v. Ohio* (1968) 392 U.S. 1, 19, fn. 16.) "[T]o determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." (*Florida v. Bostick* (1991) 501 U.S. 429, 439; see also *United States v. Mendenhall* (1980) 446 U.S. 544, 554 (*Mendenhall*); *People v. Parrott* (2017) 10 Cal.App.5th 485, 492.) And a detention occurs only "if the person actually submits to the show of authority [citation]." (*People v. Brown* (2015) 61 Cal.4th 968, 974.) The same test applies when the person contacted passively acquiesces to the officer's show of authority. (*Id*. at p. 977.)

An officer's uncommunicated subjective intent to detain had the person tried to leave is irrelevant except insofar as it may have been conveyed to the person. So, too, is the person's subjective belief. (*Mendenhall, supra,* 446 U.S. at p. 554, fn. 6; accord, *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1253-1254; *People v. Bennett* (1998) 68 Cal.App.4th 396, 402, fn. 5.) "[A]n officer's 'beliefs concerning the potential culpability of the individual being questioned' are relevant to determining whether a seizure occurred 'only if' those beliefs 'were somehow manifested to the individual' being interviewed—'by word or deed'—and 'would have affected how a reasonable person in that position would perceive his or her freedom to leave.' (*Stansbury v. California* (1994) 511 U.S. 318, 325.)" (*People v. Zamudio* (2008) 43 Cal.4th 327, 345.)

The reasonable person test is judged from the viewpoint of an innocent person. (*Florida v. Bostick*, *supra*, 501 U.S. at p. 438; *People v. Chamagua* (2019) 33 Cal.App.5th 925, 928-930.) The person must have an objective reason to believe that he or she was not free to end the conversation and proceed on one's way. (*Mendenhall, supra,* 446 U.S. at p. 555.) "In determining whether a reasonable person would have believed he or she was free to ignore the police presence and go about his business, a court ' "must consider all the circumstances surrounding the encounter" … [and] assess[ ] the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation.' (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)" (*In re J.G.* (2014) 228 Cal.App.4th 402, 409.) Among the circumstances that might indicate a detention, even where the person did not attempt to leave, are the threatening presence of several officers, an officer's display of a weapon, some physical touching of the citizen's person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. (*Mendenhall, supra,* at p. 554.)

As part of a consensual encounter, a police officer may approach and talk to anyone in a public place for any reason or no reason at all. (*Florida v. Bostick*, *supra*, 501 U.S. at p. 434; see also *People v. Divito* (1984) 152 Cal.App.3d 11, 14; *People v. King* (1977) 72 Cal.App.3d 346.) The same rule applies when officers contact someone at a residence (a "knock and talk"). (*People v. Rivera*, *supra*, 41 Cal.4th at pp. 309-310; see also *People v. Jenkins* (2004) 119 Cal.App.4th 368, 371-374; *People v. Colt* (2004) 118 Cal.App.4th 1404, 1410.) A consensual encounter can include a suspect's agreement to be driven to a police station for an interview. (*People v. Zamudio*, *supra*, 43 Cal.4th at pp. 344-346.)

2480.2-Mere contact is not a detention (short) 8/19

Not every contact between a police officer and a citizen is considered a detention. A person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable and innocent person would have believed that he or she was not free to leave. (*United States v. Mendenhall* (1980) 446 U.S. 544, 554; *People v. Brown* (2015) 61 Cal.4th 968, 974, 977; *People v. Chamagua* (2019) 33 Cal.App.5th 925, 928-930.) Thus, a detention does not occur merely because an officer approaches a citizen and poses a few questions without restraining the citizen's liberty. (*Florida v. Bostick* (1991) 501 U.S. 429, 439; see also *United States v. Mendenhall* (1980) 446 U.S. 544, 554; *Wilson v. Superior Court* (1983) 34 Cal.3d 777, 790.)

2480.3-Merely approaching subject to talk not a detention 2/21

A person is not "seized" within the meaning of the Fourth Amendment simply because an officer approaches, asks a few questions, or even asks for identification. (*United States v. Mendenhall* (1980) 446 U.S. 544, 555; *People v. Gonzalez* (1985) 164 Cal.App.3d 1194.) "[I]t is well-settled that 'mere police questioning does not constitute a seizure.' (*Florida v. Bostick* (1991) 501 U.S. 429, 434.)" (*People v. Arebalos-Cabrera* (2018) 27 Cal.App.5th 179, 187.) "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." (*Florida v. Royer* (1983) 460 U.S. 491, 497.) "An officer may approach a person in a public place and ask if the person is willing to answer

questions. If the person voluntarily answers, those responses, and the officer's observations, are admissible in a criminal prosecution." (*People v. Brown* (2015) 61 Cal.4th 968, 974.) In short, "[a]sking questions, including incriminating questions, does not turn an encounter into a detention." (*People v. Chamagua* (2019) 33 Cal.App.5th 925, 929.)

A person is not detained because a patrol car stops behind a parked vehicle and an officer approaches to talk to the occupants. (*People v. Banks* (1990) 217 Cal.App.3d 1358, 1362; *People v. Divito* (1984) 152 Cal.App.3d 11, 14.) Nor is one detained when an officer stops near a suspect vehicle, backs up to observe its license plate, and then follows the vehicle when it drives away. (*People v. Turner* (1994) 8 Cal.4th 137, 180-181.) The use of emergency lights or spotlight in close proximity to someone in parked car may, but not always does, constitute a detention. (*People v. Brown* (2015) 61 Cal.4th 968, 980 [deputy stopping behind defendant's legally parked car and turned on his emergency lights was detention]; see also *In re Edgerrin J.* (2020) 57 Cal.App.5th 752, 759-761 [four officers stepped out of their vehicles, one with emergency lights on, walked to each door of the sedan for the admitted purpose of preventing its occupants from leaving, and then directed the occupants to roll down their windows, hand over proof of identification, and provide their names, addresses, and birthdays]; *People v. Kidd* (2019) 36 Cal.App.5th 12, 20-22 [detention occurred when office made U-turn, parked behind defendant's car and turned on spotlight]; *People v. Steele* (2016) 246 Cal.App.4th 1110, 1115-1116 [although use of emergency lights constituted detention, court found reasonable cause]; *People v. Garry* (2007) 156 Cal.App.4th 1100 [officer's shining spotlight on and rushing at defendant on street while asking about his legal status constituted a detention].)

"Consensual encounters may also take place at the doorway of a home." (*People v. Rivera* (2007) 41 Cal.4th 304, 309.) " '[T]here is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly or peaceable, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant therefore—whether the questioner be a pollster, a salesman, or an officer of the law.' [Citation.]" (*Ibid*.) Nor does this so-called "knock and talk" procedure require that officers have any reasonable suspicion of criminal activity. (*Ibid*.; see also *People v. Jenkins* (2004) 119 Cal.App.4th 368, 371-374; *People v. Colt* (2004) 118 Cal.App.4th 1404, 1410.)

2480.4-Merely calling to subject to talk not a detention 7/07

Certainly, no detention occurs merely because an officer calls out loud to get a citizen's attention. For example, the appellate court in *People v. King* (1977) 72 Cal.App.3d 346, held that merely calling out to a person walking away, "Danny, stop, I want to talk to you," did not constitute a detention. The statement was merely an appropriate means of communicating the officer's desire to talk rather than initiation of a restraint. (*Ibid*. Compare *People v. Jones* (1991) 228 Cal.App.3d 519, 523 [an officer's actions and speech "Stop. Would you please stop," would lead a reasonable person to believe he was not free to leave]; *People v. Verin* (1990) 220 Cal.App.3d 551, 556-557 [officer's command to "Hold it, Police" or "Hold on, Police" constituted a detention].)

2480.5-Request for ID, consent, or station house interview not a detention 8/19

"People targeted for police questioning rightly might believe themselves the object of official scrutiny. Such directed scrutiny, however, is not a detention." (*People v. Chamagua* (2019) 33 Cal.App.5th 925, 929.) "Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment." (*Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.* (2004) 542 U.S. 177, 185.) In *INS v. Delgado* (1984) 466 U.S. 210 the United States Supreme Court held the mere inquiry regarding identification, or a request for identification by police, without more, does not constitute a detention. "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." (*Id*. at p. 216.) The High Court has also upheld the right of officers to request and receive permission to search bus passengers' persons and property, even without cause to detain, so long as they do not convey that cooperation and compliance with their request is required. (*United States v. Drayton* (2002) 536 U.S. 194, 200-206; *Florida v. Bostick* (1991) 501 U.S. 429, 433-439.)

California cases agree. (See, e.g., *People v. Vibanco* (2007) 151 Cal.App.4th 1, 13-14; *People v. Lopez* (1989) 212 Cal.App.3d 289; *People v. Gonzalez* (1985) 164 Cal.App.3d 1194.) In *Gonzalez*, for example, a police officer approached a parked car and, in sequence, asked the driver for his driver's license, other identification, and to verbally identify himself. The appellate court held such conduct did not constitute a detention. (Similarly see *People v. Sanchez* (1987) 195 Cal.App.3d 42, 46-47.) Nor does a consensual encounter turn into a detention once a person voluntarily relinquishes there identification to the officer's control. (*People v. Leath* (2013) 217 Cal.App.4th 344, 353; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1254; *People v. Lopez* (1989) 212 Cal.App.3d 289, 292-293; contra *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1227.) "[A]n officer's taking of a voluntarily offered identification card, while it may be considered as a factor in evaluating whether a detention has occurred pursuant to a review of all the circumstances involved in an encounter, is not alone definitive in resolving that question." (*People v. Linn* (2015) 241 Cal.App.4th 46, 63.) And in *People v. Bouser* (1994) 26 Cal.App.4th 1280, the appellate court held that running a warrant check after receiving identifying information from a person does not convert an otherwise consensual encounter into a detention. (*Id*. at pp. 1283-1288.)

One is not detained or seized simply because the officer requests a citizen remove hands from pockets. (*People v. Parrott* (2017) 10 Cal.App.5th 485, 494; *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1237-1239; *People v. Ross* (1990) 217 Cal.App.3d 879, 884-885.) A request for consent to search does not transform a consensual encounter into a detention. (*People v. Galindo* (1991) 229 Cal.App.3d 1529, 1535-1536.) Nor does a contact become a detention simply because a person agrees to remain at the scene while police run a warrant check. (*People v. Bennett* (1998) 68 Cal.App.4th 396, 402-403.) "[A]n officer's asking a person to sit on the curb, without more, generally does not constitute a detention." (*In re J.G.* (2014) 228 Cal.App.4th 402, 412 [addition circumstances in this case did transform consensual encounter into detention].)

A consensual encounter may include a person's agreement to accompany the police to the station for questioning or for some other purpose. (*People v. Kopatz* (2015) 61 Cal.4th 62, 79-82; *People v. Zamudio* (2008) 43 Cal.4th 327, 344-346; see also *Ford v. Superior Court* (2001) 91 Cal.App.4th 112, 123-128; *In re Gilbert R.* (1994) 25 Cal.App.4th 1121, 1125-1126.)

In summary:

> Where a consensual encounter has been found, police may inquire into the contents of pockets [citation]; ask for identification [citation]; or request the citizen to submit to a search [citation]. It is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not.

(*People v. Franklin* (1987) 192 Cal.App.3d 935, 941.)

2480.6-Mere pursuit of fleeing suspect is not a detention 7/07

In *California v. Hodari D.* (1991) 499 U.S. 621, the United States Supreme Court held that a person has not been detained until actually submitting to an officer's show of authority. Hence, if the suspect flees an attempt to detain, there is no detention until the suspect is physically captured. In *Hodari*, as officers approached several youths huddled around a car, the youths fled. Officers pursued Hodari on foot and, as an officer was nearly upon him, Hodari threw a rock of cocaine. He was arrested and searched. The High Court held that a show of authority does *not* constitute a "seizure," even if the officer's intention to affect a detention or arrest is manifest. Until there is an actual submission to the authority of the officer, or the suspect is physically restrained, any abandonment of evidence by the suspect cannot be a fruit of the seizure. Hence, the legality of any *threatened* detention or arrest is outside of the Fourth Amendment's prohibition against "unreasonable … *seizures*," and the abandonment of contraband prior to actual physical restraint or submission to the officer's authority cannot be its product. (*Id.* at pp. 624-629.)

> In sum, assuming that [the officer's] pursuit in the present case constituted a ''show of authority" enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied.

(*Id.* at p. 629; similarly, see *People v. Arangure* (1991) 230 Cal.App.3d 1302, 1307-1308.)

2480.7-Permissible contact with passenger of stopped vehicle 11/09

Passengers in a vehicle pulled over by law enforcement officers during a traffic stop are seized within the meaning of the Fourth Amendment and, therefore, are entitled to challenge the constitutionality of the traffic stop. (*Brendlin v. California* (2007) 551 U.S. 249.)

> For the duration of a traffic stop, we recently confirmed, a police officer effectively seizes "everyone in the vehicle," the driver and all passengers. (*Brendlin v. California* [*supra*] 551 U.S. 249, 255.) Accordingly, we hold that, in a traffic-stop setting, the first *Terry* [*Terry v. Ohio* (1968) 392 U.S. 1] condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity.

(*Arizona v. Johnson* (2009) 555 U.S. 323, 327.)

Thus, after a valid traffic stop officers may minimally intrude on passengers' personal liberty by ordering them to stay inside or get out of the vehicle to further officer safety. (*Maryland v. Wilson* (1997) 519 U.S. 408, 414; *People v. Vibanco* (2007) 151 Cal.App.4th 1, 9-13.) In addition, officers may request identification from passengers, ask questions, address officer-safety concerns,

and even request permission to search, within legitimate law enforcement purposes incidental to the traffic stop, without any separate justification.

For example, in *People v. Grant* (1990) 217 Cal.App.3d 1451 an officer stopped a car for speeding. A question arose about the driver's true identity. The officer asked the passenger—the defendant—to exit the car and identify himself. The officer learned the car belonged to a relative of the passenger, and then asked for and obtained the passenger's permission to search the car. The appellate court held that all occupants of a vehicle are detained when the vehicle is stopped for a traffic violation. But their detention is merely incidental to the traffic stop and requires no separate justification.

> We find … that the stop and detention of defendant was merely incident to his being a passenger in a lawfully stopped vehicle. [Citation.] Therefore, if the stop of the vehicle and its operator was lawful, … there was a lawful basis to stop and detain [the passenger]. …[W]e see no need to characterize the nature of the officer/passenger contact where it does not go beyond the legitimate law enforcement practices incidental to the traffic stop. If we assess the nature of [the passenger's] encounter with [the officer], independent of the stop, … we conclude that no separate "detention" of defendant occurred. At most, we find the encounter a consensual one.

(*Id.* at pp. 1460-1461.) Thus, questioning the passenger did not amount to a separate "detention" requiring separate justification. (*Id.* at p. 1462; accord, *People v. Vibanco*, *supra*, 151 Cal.App.4th at pp. 13-14.)

Of course, when independently justified by some objective manifestation of their involvement in criminal activity, the passengers, too, may be detained for investigation. (See, e.g., *People v. Fisher* (1995) 38 Cal.App.4th 338, 345 [presence of drugs in car justified passenger's detention].)

Last, but certainly not least, an important officer-safety concern is whether a passenger of a stopped vehicle is potentially armed. The United States Supreme Court has indicated the basic principles governing patdown searches apply. "To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." (*Arizona v. Johnson*, *supra*, 555 U.S. at p. 327.)

2480.8-Detention can revert to a contact 12/18

A mere contact becomes a detention, and must be justified by reasonable cause, when the person contacted is not free to leave at will. The opposite is equally true. A detention reverts to a mere contact when the detained person is free to leave. No bright-line separates the two states—the totality of the circumstances controls.

For example, "[i]n general, a driver's detention at a traffic stop ends when he is told that he is free to leave." (*People v. Arebalos-Cabrera* (2018) 27 Cal.App.5th 179, 187 (*Arebalos-Cabrera*).)

> A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.

(*Arizona v. Johnson* (2009) 555 U.S. 323, 333.) "A police officer's questioning of a defendant after

the stop has ended is consensual, and does not implicate the Fourth Amendment, unless a reasonable person would not have felt free to leave or otherwise terminate the questioning." (*Arebalos-Cabrera*, *supra*, 27 Cal.App.5th at p. 187.) " 'When the stop is over and its purpose served … , mere questioning by officers, without some indicated restraint, does not amount either to custody for *Miranda* purposes or a seizure under the Fourth Amendment.' [Citation.]" (*Ibid*., fn. omitted.) The appellate court in *Arebalos-Cabrera* held that the validity of the initial traffic stop was irrelevant because the stop had ended and the defendant was free to leave when the officer asked for consent. (*Id*. at p. 189.)

Similarly, in *Ohio v. Robinette* (1996) 519 U.S. 33, an officer verbally warned a motorist about speeding and ended the traffic detention by returning the motorist's driver's license. The officer did not tell the motorist the detention was over. Following routine procedure, the officer then asked for and received the motorist's permission to search the car, finding contraband. The Ohio appellate courts held that when an officer wants to engage in a consensual encounter with a motorist at the end of a traffic stop, the officer must first tell the motorist that he or she is free to go. The United States Supreme Court disagreed. The High Court held that the Fourth Amendment does not require that officers always inform detainees they are free to leave before any post-detention consent may be deemed voluntary. (*Id* at pp. 35, 39-40.)

Analogy can be drawn to cases analyzing when a person has been released from custody for *Miranda* purposes. For example, in *People v. Holloway* (2004) 33 Cal.4th 96, the defendant was handcuffed at his parole office until police detectives officers arrived to talk to him. The detectives explained there had been a mistake. They said they did not intend he be arrested by the parole agent because they only wanted to talk to him. The defendant's handcuffs were removed. The detectives asked the defendant if he would come to the station and he agreed. He was unrestrained in the back of the detective's unmarked car during the drive. The California Supreme Court held, despite his previous handcuffing, that the defendant was not in custody during the ensuing questioning. (*Id*. at pp. 120-121.)

Similarly, in *In re Joseph R.* (1998) 65 Cal.App.4th 954, an officer detained a minor, put him in handcuffs, and told him to sit in the back of a patrol car. The officer carried on another part of his investigation. He returned after about five minutes, released the minor from the patrol car, and removed the handcuffs. The minor then made admissions in response to the officer's questions without benefit of a *Miranda* warning. The appellate court affirmed the judgment of conviction, holding that the questioning was not custodial. The court observed that the minor would have been in custody for *Miranda* purposes while restrained in the police car. But once the minor was released from these temporary restraints he was no longer in custody and could be questioned without a *Miranda* warning. (*Id*. at pp. 958-961.)

2480.9-Decision to cooperate need not be intelligent or wise 1/10

The defendant's decision to cooperate with an officer attempting to initiate a contact must merely be consensual—it need not be intelligent or wise from a criminal's point of view. If the defendant's decision ultimately proves to be a mistake, "it is not one for which the rest of us should be penalized." (*People v. Bennett* (1998) 68 Cal.App.4th 396, 403 & fn. 7.) " 'There is no right to escape detection. … The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. … [¶] … It is consonant with good morals, and the

Constitution, to exploit a criminal's ignorance or stupidity in the detection process.' " (*Id*. at p. 403, fn. 7.)

2490.1-Field sobriety tests violate no constitutional right 1/10

The appellate courts have long upheld administering typical "field sobriety" tests to motorists suspected of driving under the influence of alcohol. In *Whelen v. Municipal Court* (1969) 274 Cal.App.2d 809, the appellate court held such testing does not violate a suspect's Fifth and Sixth Amendment protections. The appellate court in *People v. Bennett* (1983) 139 Cal.App.3d 767 agreed and went on to hold that field sobriety tests neither violate a suspect's Fourth Amendment rights nor give rise to any claim of "involuntariness." (*Id.* at pp. 770-771.)

> Suspects have no constitutional right to refuse a test designed to produce physical evidence in the form of a breath sample … whether or not counsel is present . … [¶] … In a day when excessive loss of life and property is caused by inebriated drivers, an imperative need exists for a fair, efficient, and accurate system of detection, enforcement and, hence, prevention. … [¶] … A wrongful refusal to cooperate with law enforcement officers does not qualify for such protection. A refusal that might operate to suppress evidence of intoxication, which disappears rapidly with the passage of time … should not be encouraged as a device to escape prosecution.

(*People v. Sudduth* (1966) 65 Cal.2d 543, 546, citations omitted.)

Even a tape-recorded repetition of the field sobriety tests, conducted after a defendant's arrest, does not violate a defendant's right against self-incrimination " 'because the evidence procured is of a physical nature rather than testimonial.' " (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 602-603.) Similarly, incriminating utterances made by the defendant in the course of the tests are voluntary since they are not elicited in response to custodial interrogation. (*Ibid.*)

2490.2-Driver may be ordered out to determine condition 1/10

It is proper for an officer to request a suspect to alight from a vehicle when it appears necessary to view the suspect's physical condition. (*People v. Beal* (1974) 44 Cal.App.3d 216, 220 (*Beal*).) In *Beal*, the officer in saw two people stagger to a car and the car then drive a block. The *Beal* court specifically held that it is proper for a peace officer, not only to stop the vehicle, but to ask both occupants to alight from a vehicle for purposes of ascertaining if they were intoxicated. (*Ibid*., similarly, see *People v. Manning* (1973) 33 Cal.App.3d 586, 604-605.) "Since the purpose of the stop was 'to ascertain if these people were intoxicated,' it was permissible to ask the occupants to alight in order to view their condition." (*Beal*, *supra*, 44 Cal.3d at p. 220.)

2500.1-Officer may enter house to detain fleeing suspect 7/07

A suspect may not defeat an arrest initiated outside his or her residence by retreating inside before the arrest can be effected. (*United States v. Santana* (1976) 427 U.S. 38, 42-43; see also *People v. Hampton* (1985) 164 Cal.App.3d 27, 35-36.) Probably cause to arrest can arise from the unlawful resistance or escape from a lawful detention. (*People v. Lloyd* (1989) 216 Cal.App.3d 1425, 1429; see also *People v. Abes* (1985) 174 Cal.App.3d 796, 805-806.) The officer's entry is justified in such a case even where the original offense for which the officer sought to arrest the suspect is a misdemeanor, or even an infraction. (*People v. Lloyd*, *supra*, at p. 1430.)

2510.1-Police can use force to effectuate a lawful detention 6/20

A detention is intended " '[t]o permit a speedy, focused investigation to confirm or dispel [the] individualized suspicion of criminal activity' " justifying it. (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1516.) "The right to verify or dispel suspicion is meaningless unless officers may, when necessary, *forcibly* detain a suspect." (*People v. Johnson* (1991) 231 Cal.App.3d 1, 12.) Police officers are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." (*United States v. Hensley* (1985) 469 U.S. 221, 235; *People v. Soun*, *supra*, at p. 1519.)

> Of significance too are the facts known to the officers in determining whether their actions went beyond those necessary to effectuate the purpose of the stop, that is, to quickly dispel or confirm police suspicions of criminal activity. [Citations.] Although a routine traffic stop would rarely justify a police officer in drawing a gun or using handcuffs, such actions may be appropriate when the stop is of someone suspected of committing a felony.

(*People v. Celis* (2004) 33 Cal.4th 667, 675-676.)

2510.2-Physical restraint does not change detention to arrest 6/20

The use of force by police does not automatically transform a detention into an arrest. (*People v. Turner* (2013) 219 Cal.App.4th 151, 162 (*Turner*).)

> [T]here is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests. Instead, the issue is decided on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances. [Citations.]

(*In re Carlos M.* (1990) 220 Cal.App.3d 372, 384-385; see also *Turner*, *supra*, 219 Cal.App.4th at p. 162.) "Important to this assessment, however, are the 'duration, scope and purpose' of the stop. [Citation.]" (*People v. Celis* (2004) 33 Cal.4th 667, 675 (*Celis*).) "With respect to duration, the United States Supreme Court has said that ' "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." ' (*United States v. Sharpe* [(1985)] 470 U.S. [675] at p. 685.)" (*Celis*, *supra*, 33 Cal.4th at p. 675.)

For example, when "reasonably necessary under the circumstances" an officer may handcuff a suspect for a brief period of time to conduct a patdown search without transforming the detention into an arrest. (*In re K.J.* (2018) 18 Cal.App.5th 1123, 1132 [high school student suspected of possessing handgun on campus]; *People v. Osborne* (2009) 175 Cal.App.4th 1052, 1062 [suspected auto burglar]; but see *People v. Stier* (2008) 168 Cal.App.4th 21, 28 [handcuffing driver for equipment violation and because passenger possessed narcotics was de facto arrest]; *In re Antonio B.* (2008) 166 Cal.App.4th 435, 441-442 [handcuffing juvenile suspected only of marijuana possession was de facto arrest].)

Indeed, depending on the circumstances, suspects may be stopped at gunpoint, ordered out of cars, made to lie down on the pavement, thrown to the ground, handcuffed, locked in the rear seats of patrol cars, and sometimes transported, without converting a reasonable detention to an unlawful arrest. (See, e.g., *Celis*, *supra*, 33 Cal.4th at pp. 674-676 [suspected drug dealer stopped at gunpoint, handcuffed, and made to sit on the ground]; *Turner*, *supra*, 219 Cal.App.4th at p. 163 [investigating reports defendant made threats to hurt someone and was carrying a gun, officers approached him

with their drawn service weapon, ordered him to the ground, and handcuffing him]; *People v. Johnson* (1991) 231 Cal.App.3d 1, 14 [suspected narcotics dealer attempted to flee so officers tackled him, resulting in five-minute "wrestling match" until the officers subdued, handcuffed and stood him up]; *In re Carlos M.*, *supra*, 220 Cal.App.3d at p. 385 [suspect handcuffed and transported to hospital for identification by rape victim within 30-minutes]; *People v. Gorak* (1987) 196 Cal.App.3d 1032, 1038 [20-minute detention in a patrol car awaiting officer with expertise in determining if suspect under influence of controlled substance]; *People v. Bowen* (1987) 195 Cal.App.3d 269, 272-274 [handcuffing suspect to guardrail for 25 minutes while waiting for victim to arrive did not elevate a detention into an arrest]; *People v. Brown* (1985) 169 Cal.App.3d 159, 166-167 [suspected bank robber resisting patdown search for weapons thrown face down and handcuffed]; *People v. Craig* (1978) 86 Cal.App.3d 905, 912-913 [suspected robbers placed in back seat of a secured patrol vehicle for five to ten minutes awaiting the victim's arrival]; but see *Kaupp v. Texas* (2003) 538 U.S. 626, 630 [removing a 17-year-old from his bed at 3 a.m. and transporting him in handcuffs by patrol car to the police station for questioning was de facto arrest].)

People v. Soun (1995) 34 Cal.App.4th 1499, is typical of these cases. Multiple patrol units executed a full felony stop on a car possibly tied to a homicide. Numerous officers confronted the six occupants of the car with guns drawn. The occupants were ordered out of the car and told to lie prone in the street. They were pat searched, handcuffed, and placed in separate patrol cars. The busy street was essentially closed to other traffic during this police activity. Defendant Soun was moved from the street to a parking lot about three blocks away. He was not told why he had been stopped. Over 40 minutes later the police developed additional information causing them to transport the suspects to the station. The appellate court found that all the suspects, including Soun, were merely detained—not arrested—before they were transported to the police station. (*Id.* at pp. 1515-1520.)

2520.1-Length of detention depends upon particular facts 8/09

An investigatory detention is intended " 'to permit a speedy, focused investigation to confirm or dispel [the] individualized suspicion of criminal activity' " justifying it. (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1516.) A detention exceeds constitutional bounds when it is extended beyond what is "reasonably necessary under the circumstances" that made its initiation permissible. (*People v. McGaughran* (1979) 25 Cal.3d 577, 586.) But, when additional cause to detain develops after the initial stop, additional time to investigate is allowed. (*People v. Russell* (2000) 81 Cal.App.4th 96, 101-102; *People v. Suennen* (1980) 114 Cal.App.3d 192, 200-201.) A detention similarly may be extended legitimately because of a suspect's false answers to police inquiries. (*People v. Huerta* (1990) 218 Cal.App.3d 744, 750.)

In *United States v. Sharpe* (1985) 470 U.S. 675 (*Sharpe*), the United States Supreme Court held that whether an investigative detention became prolonged could not be measured against a set time limit, or "bright line" rule. Rather, common sense must govern. The High Court also recognized the police must be allowed to "graduate their responses to the demands of any particular situation." (*Id.* at pp. 685-686; similarly, see *Pendergraft v. Superior Court* (1971) 15 Cal.App.3d 237, 242.)

Sharpe developed the following guideline to assess whether a detention was too long in duration to be justified as an investigative stop. One should focus on whether the police diligently pursued a means of investigation reasonably likely to confirm or dispel their suspicions quickly. (*Sharpe*, *supra*, 470 U.S. at p. 686; see also *People v. Soun*, *supra*, 34 Cal.App.4th at p. 1520.)

Courts reviewing police conduct should not engage in unrealistic second-guessing of police investigative techniques.

> A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, in itself, render the search unreasonable."

(*Sharpe*, *supra*, 470 U.S at pp. 686-687.)

> "[T]here is no hard and fast line to distinguish permissible investigative detentions from impermissible de facto arrests. Instead, the issue is decided on the facts of each case, with focus on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances." [Citations.] Important to this assessment, however, are the "duration, scope and purpose" of the stop. [Citation.] [¶] With respect to duration, the United States Supreme Court has said that " 'the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.' " [Citation.]

(*People v. Celis* (2004) 33 Cal.4th 667, 674-675.)

Finally, the duration of a detention is irrelevant if there is probable to cause to arrest. (*People v. Williams* (2007) 156 Cal.App.4th 949, 960; *People v. Gomez* (2004) 117 Cal.App.4th 531, 539-540.)

2520.2-Traffic detention may be continued long enough for all purposes 12/19

"Like a *Terry* stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop … and attend to related safety concerns … ." (*Rodriguez v. United States* (2015) 575 U.S. 348, 354 (*Rodriguez*);

> A lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. [Citation.] An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop. [Citation.]

(*Arizona v. Johnson* (2009) 555 U.S. 323, 333.) In short, an officer may detain a traffic offender for the period of time needed to complete the duties related to a traffic stop. (*Rodriguez*, *supra*, 575 U.S. at pp. 354-355; *People v. McGaughran* (1979) 25 Cal.3d 577, 584 (*McGaughran*).) This reasonable period may include time for all of the following:

(a) Examine the driver's license;
(b) Examine the vehicle registration;
(c) Determine proof of insurance;
(d) Inspect or test the vehicle if reasonably needed;
(e) Discuss the violation;

(f) Consider the driver's explanations;
(g) Move the vehicle to a safer location; and
(h) Determine whether there are outstanding warrants against the driver.

(*Rodriguez*, *supra*, 575 U.S. at p. 355; *People v. Tully* (2012) 54 Cal.4th 952, 981; *McGaughran*, *supra*, 25 Cal.3d at p. 584.) "There is no hard-and-fast limit as to the amount of time that is reasonable; rather, it depends on the circumstances of each case." (*People v. Gallardo* (2005) 130 Cal.App.4th 234, 238.)

Indeed, even where no citation will be issued, the "*customary steps taken as matters of good police practice*" referred to in *McGaughran* often include the time necessary to perform the above-mentioned duties, as well as to "release the motorist with a warning against committing future violations of the same kind." (*McGaughran*, *supra*, 25 Cal.3d at p. 584.) The officer is permitted to "satisfy himself that the motorist fully understands the conduct to be avoided before permitting him to go his way." (*Ibid.*; similarly, see *People v. Miranda* (1993) 17 Cal.App.4th 917, 926-927.)

Police officers may conduct investigative activities that are outside the scope of their traffic stop duties as long as they do not prolong the stop beyond the time it would otherwise take. (*Illinois v. Ceballes* (2005) 543 U.S. 405 [okay to allow drug sniffing dog to go around vehicle while traffic stop in progress]; see generally *People v. Tully*, *supra*, 54 Cal.4th at p. 981; *People v. Bell* (1996) 43 Cal.App.4th 754, 767; but see *Rodriguez*, *supra*, 575 U.S. 348 [absent additional justification, traffic stop cannot be extended waiting for drug sniffing dog to arrive]; distinguish *People v. Vera* (2018) 28 Cal.App.5th 1081, 1087-1089 [dog search took place while traffic citation was being written and no evidence presented that this was outside the time such a citation reasonably should have been issued].) Thus, during the stop officers may question traffic offenders about where they were coming from and what they had been doing. (*People v. Bell*, *supra*, 43 Cal.App.4th at pp. 767-768.) Officers may routinely run warrant checks during traffic stops, provided the checks do not unreasonably prolong the detention. (*Rodriguez*, *supra*, 575 U.S. at p. 355; *People v. Brown* (1998) 62 Cal.App.4th 493, 498.) Similarly, police officers may question traffic offenders about parole and probation status, or request permission to search, while not extending the period of detention justified by a traffic stop. (*People v. Brown*, *supra*, 62 Cal.App.4th at pp. 499-500; see also *People v. Gallardo*, *supra*, 130 Cal.App.4th at pp. 237-238.)

If other violations are detected during the traffic stop, such as the driver is unable to produce a driver's license, other proof of identity, or registration for the vehicle, then the scope of the detention may be expanded to meet these needs. (*People v. Valencia* (1993) 20 Cal.App.4th 906, 918.)

Finally, Fourth Amendment rules governing the scope and duration of a detention do not apply if the officer has probable cause to arrest (or issue a citation) for the traffic violation. (*Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 354; *People v. McKay* (2002) 27 Cal.4th 601, 607; *People v. Gomez* (2004) 117 Cal.App.4th 531, 539-540.)

2530.1-Occupants may be ordered from vehicle during detention 11/16

In *Pennsylvania v. Mimms* (1977) 434 U.S. 106, the United States Supreme Court held it proper for an officer to order a motorist out of an otherwise lawfully stopped vehicle. This added intrusion into the motorist's liberty is so minimal when compared with legitimate concerns for officer safety that the order is reasonable even when routinely made in a simple traffic stop. (*Id*. at p. 111.) Subsequently the United States Supreme Court also held that the bright line *Mimms* rule applies equally to ordering passengers out of vehicles pending completion of routine traffic stops to promote officer safety. (*Maryland v. Wilson* (1997) 519 U.S. 408, 414-415.) The High Court in *Wilson* held that a police officer for reasons of officer safety may, "as a matter of course," order the passengers of a lawfully stopped car to get out of the vehicle. (*Id*. at p. 410; see also *People v. Hoyos* (2007) 41 Cal.4th 872, 892-893.)

These ruling have been extended by California courts to permit officers to also order passengers to remain seated during the stop. (*People v. Castellon* (1999) 76 Cal.App.4th 1369, 1374-1376.) Additionally, for safety reasons officers may order a passenger who begins to exit the car to get back inside. (*People v. Vibanco* (2007) 151 Cal.App.4th 1, 9-13.) Similarly the officers may order all passengers to get out of the car and sit on the curb during the traffic stop despite the lack of reason to suspect them of wrongdoing. (*Ibid*.) The propriety of the officer's order that the occupants either alight or exit the vehicle turns only on whether the initial traffic stop was lawful. (*Maryland v. Wilson*, *supra*, 519 U.S. at p. 410; *People v. Saunders* (2006) 38 Cal.4th 1129, 1134-1135.) Finally, '[c]onsistent with the Fourth Amendment, detention following a *Mimms/Wilson* order may continue at least as long as reasonably necessary for the officer to complete the activity the *Mimms/Wilson* order contemplates." (*People v. Hoyos*, *supra*, 41 Cal.4th at p. 894 [here during the period of time the car was inventoried prior to impound].)

Finally, when reasonably warranted by the circumstances, persons in nearby cars travelling with the suspect vehicle may be detained simply for officer's safety. (*People v. Steele* (2016) 246 Cal.App.4th 1110, 1116-1120.)

> The circumstances warranted caution by the deputies. It was dark. The deputies were at the end of a driveway, not visible from the highway. The lead and second vehicles appeared to be travelling together and the deputies did not know the identities of the drivers. There was a risk defendant could come up behind the deputies while they contacted the lead vehicle. … Officer safety is a weighty public interest warranting a brief detention of defendant to assure that defendant did not present a danger to the deputies while they approached and investigated the lead vehicle and its occupants.

(*Id*. at pp. 1119-1120.)

2540.1-General standard for detention 7/20

"The Fourth Amendment permits brief investigative stops … when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' [Citations.]" (*Navarette v. California* (2014) 572 U.S. 393, 396-397; see also *People v. Brown* (2015) 61 Cal.4th 968, 981; *People v. Parrott* (2017) 10 Cal.App.5th 485, 494.) "A police officer may stop and question persons on public streets, including those in vehicles, when the circumstances indicate to a reasonable man in a like position that such a course of action is called for in the proper discharge of the officer's duties." (*People v. Flores* (1974) 12 Cal.3d 85, 91.) It is reasonable to expect diligent officers to investigate unusual and potentially criminal behavior

through the relatively nonintrusive means of a detention. (See *People v. Foranyic* (1998) 64 Cal.App.4th 186, 189.)

A person may be detained if an officer has a reasonable suspicion that criminal activity is afoot and that the person is connected with it. (*Terry v. Ohio* (1968) 392 U.S. 1, 30 (*Terry*); *People v. Barnes* (2013) 216 Cal.App.4th 1508, 1514.) "[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity." (*In re Tony C.* (1978) 21 Cal.3d 888, 893; see also *People v. Turner* (2013) 219 Cal.App.4th 151, 160.) "The reasonableness of the officer's suspicion is determined by what he or she knows before any search occurs." (*People v. Turner*, *supra*, 219 Cal.App.4th at p. 160.) The circumstances amounting to reasonable suspicion justifying a detention encompass suspects who may be involved in any criminal activity, whether past, present or future. (*United States v. Sokolow* (1989) 490 U.S. 1, 7-8 (*Sokolow*); *Terry*, *supra*, 392 U.S. at p. 22; *People v. Souza* (1994) 9 Cal.4th 224, 230.)

Reasonable cause to detain a person requires some minimum level of objective justification, but considerably less than is required for probable cause to arrest. (*Sokolow*, *supra*, 490 U.S. at p. 7; *Terry*, *supra*, 392 U.S. at p. 22.) Indeed, the reasonable suspicion standard also falls considerably short of a preponderance of the evidence. (*Kansas v. Glover* (2020) 589 U.S. ___, ___ [140 S.Ct. 1183, 1187, 206 L.Ed.2d 412, 419]; *United States v. Arvizu* (2002) 534 U.S. 266, 274.) And reasonable suspicion can be established with information that is different in quantity, content, and reliability from that required for probable cause. (*People v. Souza* (1994) 9 Cal.4th 224, 230-231.)

> An officer "who lacks the precise level of information necessary for probable cause to arrest" is not constitutionally required to "simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. [Citation.] A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." (*Adams v. Williams* (1972) 407 U.S. 143, 145-146 … .)

(*People v. Brown*, *supra*, 61 Cal.4th at p. 986.)

Finally, "[t]he reasonableness of [an] officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques." (*Sokolow*, *supra*, 490 U.S. at p. 11; *In re Raymond C.* (2008) 45 Cal.4th 303, 308.)

2540.2-Reasonable cause to detain is based on the totality of the circumstances 7/20

"The concept of reasonable cause … is not 'readily, or even usefully, reduced to a neat set of legal rules.' " (*United States v. Sokolow* (1989) 490 U.S. 1, 7 (*Sokolow*).) Whether specific articulable facts amount to reasonable cause to detain depends on the totality of the circumstances. (*Id.* at pp. 8-9; see also *Navarette v. California* (2014) 572 U.S. 393, 397; *United States v. Arvizu* (2002) 534 U.S. 266, 277-278.) Although each fact alone may be inadequate, together they can constitute reasonable cause. (*Sokolow*, *supra*, 490 U.S. at pp. 8-9; *People v. Souza* (1994) 9 Cal.4th 224, 230-231.) The court should not evaluate each factor in isolation from the rest. Indeed, the totality of the circumstances test bars judicial divide-and-conquer analysis. (*United States v. Arvizu*, *supra*, 534 U.S. at pp. 274-275.) Among the relevant circumstances, beyond the activity observed or

reported, are the characteristics and reputation of the area (i.e., high crime area), and the time of day. (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124 (*Wardlow*).)

Reasonable cause to detain must be supported by specific articulable facts, rather than inchoate suspicion or mere hunches. (*Sokolow*, *supra*, 490 U.S. at pp. 7-8; *People v. Hernandez* (2008) 45 Cal.4th 295, 299; *People v. Turner* (2013) 219 Cal.App.4th 151, 160.) The officer " 'must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' " the detention. (*People v. Glaser* (1995) 11 Cal.4th 354, 363.) And reasonable suspicion to detain "cannot be based solely on factors unrelated to the defendant, such as criminal activity in the area." (*People v. Casares* (2016) 62 Cal.4th 808, 838, citing *Wardlow*, *supra*, 528 U.S. at p. 124.)

Judges are advised to keep in mind when evaluating the specific facts and inferences in any particular case and applying the broad legal rules of temporary detention, that reasonable minds may differ. (*Flores v. Superior Court* (1971) 17 Cal.App.3d 219, 223.)

> It is at this point that the conduct of the officer is "subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in the light of the particular circumstances." [Citation.] But this detached scrutiny must be made by judges who are aware of the sometimes harsh reality of life in the streets, not life as it exists in the protected and somewhat cloistered life on the bench.

(*Ibid.*) In other words, the totality of circumstances should be seen and weighed as understood by those versed in law enforcement rather than in terms of library analysis by scholars. (*United States v. Cortez* (1981) 449 U.S. 411, 418.) "Courts 'cannot reasonably demand scientific certainty … where none exists.' [Citation.] Rather, they must permit officers to make 'commonsense judgments and inferences about human behavior.' [Citations.]" (*Kansas v. Glover* (2020) 589 U.S. ___, ___ [140 S.Ct. 1183, 1188, 206 L.Ed.2d 412, 419].)

2540.3-An officer's experience can be a key factor in justifying a detention 4/20

The facts justifying the detention must be evaluated in light of the officer's specialized training and experience. (*United States v. Mendenhall* (1980) 446 U.S. 544, 563-564 (Powell, J., concurring); *Terry v. Ohio* (1968) 392 U.S. 1, 22-23.) An experienced officer may draw inferences and make deductions from observed facts that might well elude an untrained person. (*United States v. Cortez* (1981) 449 U.S. 411, 418.) "Experienced police officers naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult task of protecting the security and safety of law-abiding citizens." (*People v. Courtney* (1970) 11 Cal.App.3d 1185, 1190.) Thus, there does not necessarily need to be a recently reported crime to justify an investigative detention. (*People v. Foranyic* (1998) 64 Cal.App.4th 186, 189.) "This is a totality of the circumstances evaluation, in light of the officer's training and experience." (*People v. Osborne* (2009) 175 Cal.App.4th 1052, 1058.)

2540.4-Evasive and nervous behavior can justify a brief investigatory detention 4/20

Evasive or nervous behavior by a person is a relevant factor in determining if the totality of the circumstances justified their detention. Indeed a person's flight from approaching officers—the consummate act of evasion—can be a key factor in establishing reasonable suspicion. (*Illinois v. Wardlow* (2000) 528 U.S. 119, 124-126 (*Wardlow*); *People v. Souza* (1994) 9 Cal.4th 224, 235, 239-241; *People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1544; *People v. Foranyic* (1998) 64 Cal.App.4th 186, 189-190.) In *Wardlow* the United States Supreme Court upheld a detention based on the suspect's presence in an area known for heavy narcotics trafficking coupled with his unprovoked, headlong flight upon seeing police on patrol. The High Court reaffirmed that one has a right to ignore the police and go about one's business when police approach to initiate an encounter, as well as that a mere refusal to cooperate does not contribute to cause to detain. "But unprovoked flight is simply not a mere refusal to cooperate. Flight by its very nature is not 'going about one's business'; in fact, it is just the opposite." (*Wardlow*, *supra*, 528 U.S. at p. 125; but see *People v. Flores* (2019) 38 Cal.App.5th 617, 629-633 [*Wardlow* distinguished because no evidence defendant involved in criminal activity when during afternoon he exited alley where gang activity and drug sales at night had been reported and walked briskly toward not away from the approaching officers].)

2540.5-An innocent explanation does not negate an otherwise proper detention 4/20

It is immaterial that there might be some innocent explanation for the potentially criminal activities witnessed by the police officer initiating an investigatory detention. (*People v. Leitner and Tobin* (2010) 50 Cal.4th 99, 146-147.) An officer is not "required to eliminate all innocent explanations that might account for the facts supporting a particularized suspicion." (*In re Raymond C.* (2008) 45 Cal.4th 303, 308, citing *People v. Glaser* (1995) 11 Cal.4th 354, 373.) Even innocent behavior will frequently provide reasonable cause to detain. The test is not whether the conduct observed is "innocent" or "guilty," rather it is " 'the degree of suspicion that attaches to particular types of noncriminal acts.' " (*United States v. Sokolow* (1989) 490 U.S. 1, 9-10; *United States v. Arvizu* (2002) 534 U.S. 266, 277-278.) Indeed, one function of a temporary detention is to resolve any ambiguity in the situation and to find out whether the activity was in fact legal or illegal. (*People v. Souza* (1994) 9 Cal.4th 224, 242; distinguish *People v. Mendoza* (2020) 44 Cal.App.5th 1044 [defendant's non-criminal behavior did not support reasonable suspicion she was involved in criminal activity].)

2540.6-Reasonable cause is objective rather than subjective standard 11/10

"An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.' [Citation.] The officer's subjective motivation is irrelevant." (*Brigham City v. Stuart* (2006) 547 U.S. 398, 404; see also *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.)

"Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, … and not on the officer's actual state of mind at the time the challenged action was taken." (*Maryland v. Macon* (1985) 472 U.S. 463, 470-471; see also *Scott v. United States* (1978) 436 U.S. 128, 138.) "We view the *Scott/Macon* line as establishing the rule that because the Fourth Amendment protects against only unreasonable searches and seizures, a search or seizure which is reasonable based on

the objective facts is not rendered unreasonable merely because the officer held an improper subjective motivation at the time of the search." (*People v. Uribe* (1993) 12 Cal.App.4th 1432, 1436.)

This general principle also applies to detentions. Thus, "[t]he reasonable suspicion necessary to justify a detention is measured solely by an objective standard." (*People v. Lloyd* (1992) 4 Cal.App.4th 724, 733.) The officer's subjective belief is immaterial. (*Ibid*.) Thus, whether an officer actually entertains a belief that reasonable cause exists is inconsequential if, viewed objectively, the officer's actions are reasonable under the Fourth Amendment. (*Ibid.*; see also *People v. Uribe*, *supra*, 12 Cal.App.4th at pp. 1436-1437.) An off-shoot of this principle is that an objectively reasonable detention is not rendered invalid simply because the officer acted in reliance on the wrong statute. (*People v. McDonald* (2006) 137 Cal.App.4th 521, 530; *In re Justin K.* (2002) 98 Cal.App.4th 695, 700.) Earlier California case authorities applying a subjective standard also are no longer applicable with the adoption of Article I, section 28, subdivision (d) of the California Constitution. (*People v. Castillo* (1992) 7 Cal.App.4th 836, 840; *People v. Lloyd*, *supra*, 4 Cal.App.4th at p. 733)

2540.7-Detention not pretext because another crime suspected 8/07

Defendants have frequently argued that their otherwise justifiable detention or arrest was merely a "pretext" for the officers to investigate another more serious crime. This argument has always conflicted with the basic rule that reasonable or probable cause is judged against an *objective* standard. (*Horton v. California* (1990) 496 U.S. 128, 138; *Scott v. United States* (1978) 436 U.S. 128, 138; *People v. Lloyd* (1992) 4 Cal.App.4th 724, 733.) "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, … and not on the officer's actual state of mind at the time the challenged action was taken." (*Maryland v. Macon* (1985) 472 U.S. 463, 470-471.) Any doubt as to the viability of the defense "pretext" argument was dispelled by the United States Supreme Court in *Whren v. United States* (1996) 517 U.S. 806. In *Whren* the High Court unanimously held a traffic stop by plainclothes narcotics officers in an area of high drug activity was reasonable despite their subjective motivation where the officers had probable cause to believe a traffic violation had occurred. (*Id.* at p. 812.) The constitutional reasonableness of conduct based on probable cause cannot be invalidated by the concurrent existence of ulterior police motives and subjective intentions. (*Ibid*.; see also *Arkansas v. Sullivan* (2001) 532 U.S. 769 [reiterated *Whren* in an arrest context].)

California appellate cases even before *Whren* rejected "pretext" as a grounds for challenging a detention. Typical is *People v. Uribe* (1993) 12 Cal.App.4th 1432. There, officers believed the occupants of a van were involved in drug dealing. They asked a patrol vehicle to follow the van and pull it over if a traffic violation was observed. After an illegal U-turn and unsafe lane change, officers stopped the van. During the detention, officers asked for and received permission to search the van and found drugs and a weapon. The appellate court reviewed numerous state and federal case authorities and rejected any assertion the detention and search should be suppressed as a "pretext." The court held, "because the Fourth Amendment protects against only unreasonable searches and seizures, a search or seizure which is reasonable based on the objective facts is not rendered unreasonable merely because the officer held an improper subjective motivation at the time

of the search." (*Id.* at p. 1436; similarly, see *People v. Valencia* (1993) 20 Cal.App.4th 906, 914-917; *People v. Miranda* (1993) 17 Cal.App.4th 917, 923-931; *People v. Parnell* (1993) 16 Cal.App.4th 862, 874-875; but see *People v. Valenzuela* (1999) 74 Cal.App.4th 1202, 1028 [suppressing evidence from a purported inventory search having a clearly investigatory purpose].)

2540.8-General suspect or auto description sufficient to detain 4/19

It is well established that a peace officer may detain a person for questioning if the person resembles a suspect in a crime. (*People v. Craig* (1978) 86 Cal.App.3d 905, 911-912.) General suspect and vehicle descriptions have justified temporary detentions in numerous cases. (See *People v. Marquez* (1992) 1 Cal.4th 553, 578; *People v. Harris* (1975) 15 Cal.3d 384, 389; *People v. Flores* (1974) 12 Cal.3d 85, 91-92; see also *People v. Leath* (2013) 217 Cal.App.4th 344, 354-356; *People v. Overton* (1994) 28 Cal.App.4th 1497, 1504-1505; *People v. Dominguez* (1987) 194 Cal.App.3d 1315.)

It is enough if there is adequate conformity between description and fact to indicate to a reasonable officer that detention and questioning are necessary to the proper discharge of police duties. (*People v. Smith* (1970) 4 Cal.App.3d 41, 49; see also *People v. Stanley* (2017) 18 Cal.App.5th 398, 405.)

> [M]inor discrepancies do not prevent development of the suspicions which justify temporary detention for questioning. Crime victims often have limited opportunity for observation; their reports may be hurried, perhaps garbled by fright or shock. More garbling may occur as the information is relayed to the police broadcaster and from the broadcaster to the field. It is enough if there is adequate conformity between description and fact to indicate to *reasonable* officers that detention and questioning are necessary to the proper discharge of their duties.

(*People v. Smith* (1970) 4 Cal.App.3d 41, 48-49, italics in original.)

Similarly, occupants of a vehicle can be detained solely based on the vehicle's resemblance to one used in a reported crime. "The description need not match the vehicle in every detail." (*People v. Jones* (1981) 126 Cal.App.3d 308, 314 [probable cause to arrest]; but see *People v. Bates* (2013) 222 Cal.App.4th 60, 66-69 [insufficient cause to believe suspect inside van stopped by police].)

Even a vague description will support a detention where other objective circumstances known to the officer justify the action. These circumstances might include the presence of the suspect at a time and place close to the crime, or companionship with another person who resembles a described suspect. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 381-382; but see *People v. Thomas* (2018) 29 Cal.App.5th 1107, 1115-1117 [two and one-half delay in responding to complaint that black male, wearing nondescript clothing who appeared to be having mental problems and "had set up camp," was "harassing" customers (no actual criminal behavior described) did not justify detention of defendant seated 80 yards away who was not displaying any of the reported behaviors or activities]; *People v. Walker* (2012) 210 Cal.App.4th 1372 [officer did not have reasonable cause to detain defendant at busy, high crime, train station one week after sexual assault based only on general match of race and age].)

At times, the officer need not have either a suspect or a vehicle description to justify a detention. Simply the report of a recent crime in a particular place may be sufficient. In *People v. Conway* (1994) 25 Cal.App.4th 385, an officer received a radio call of a burglary in progress

involving two suspects on Sawtelle Way around 3:00 a.m. The suspects were not described, nor was any vehicle mentioned. Within minutes the officer was in the area and saw a car containing two men drive from Sawtelle onto an adjacent street. The officer saw no other traffic or any pedestrians in the area. Less than two minutes after the radio call, the officer stopped the car to investigate. The appellate court held it was objectively reasonable for the officer to suspect the men in the car were involved in the burglary. (*Id*. at p. 390; see also *People v. Juarez* (1973) 35 Cal.App.3d 631, 635-636.)

2540.9-Untested information sufficient for detention 2/21

It has been said that "the tip" which triggers the investigative action, unlike that which creates grounds for arrest, need not come from a source of proven reliability. (*People v. Superior Court (McBride)* (1981)122 Cal.App.3d 156, 163.) Thus, police officers may rely on information furnished by citizens, though not of proven reliability, to justify temporary detentions for reasonable investigation. (*People v. Stanley* (2017) 18 Cal.App.5th 398, 405; *People v. Superior Court (Martin)* (1971) 20 Cal.App.3d 384, 389.) But the information provided must be sufficient to justify a detention. (See, e.g., *In re Edgerrin J.* (2020) 57 Cal.App.5th 752, 764-766 [citizen reporting "shady" behavior insufficient for officers to believe criminal activity occurring].)

A bare, uncorroborated, anonymous telephone tip, providing nothing to demonstrate the tipster's basis of knowledge or veracity, provides no indicia of reliability and cannot justify a detention. (*Florida v. J.L.* (2000) 529 U.S. 266; see also *People v. Jordan* (2004) 121 Cal.App.4th 544, 558-559; *People v. Pitts* (2004) 117 Cal.App.4th 881, 886.) "But under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.' [Citation.]" (*Navarette v. California* (2014) 572 U.S. 393, 397, citing *Alabama v. White* (1990) 496 U.S. 325, 327; see also *People v. Butler* (2003) 111 Cal.App.4th 150, 161-162.) For example, sufficient corroboration can be supplied it there are two independent tips from citizens, close in time, describing the same criminal activity, location, and perpetrator. (See *People v. Coulombe* (2000) 86 Cal.App.4th 52, 59-60.) Also the necessity showing some level of reliability from an anonymous source does not apply to special needs searches, such as reports of someone carrying a gun on a school campus. (*In re K.J.* (2018) 18 Cal.App.5th 1123, 1134-1135.)

In *People v. Silveria* (2020) 10 Cal.5th 195, the informant called 911 to report the location of suspects in a robbery series. The California Supreme Court held this provided sufficient cause for police to locate, detain and ultimately arrest the suspects.

> "[A] caller's personal knowledge," shown here by the informant's knowledge of the suspects' names, current location, and apparel, " 'lends significant support to the tip's reliability.' " [Citations.] "[T]he caller's report was contemporaneous, a factor that 'has long been treated as especially reliable.' " [Citation.] In addition, the caller identified himself and appears to have given his phone number and described what he was wearing, circumstances that enhanced his credibility. [Citation.] His "use of the 911 emergency system" is a further "indicator of veracity" because the recording and tracing features of that system "provide some safeguards against making false reports with immunity." [Citations.]

(*Id*. at p. 237.)

In *People v. Dolly* (2007) 40 Cal.4th 458 an unidentified man called 911 to report an assault with a firearm, and described the perpetrator, the car he was parked in, and his location. The caller stated he did not want to talk to police once they arrived at the scene because "if they find out I'm snitching, they're going to kill me around here." When police arrived at the scene a few minutes later, they found a man who matched the description provided to radio dispatch, and he was sitting in a car that also matched the description provided by the 911 caller. Police ordered the suspect to get out of his car, and a revolver was found under the front passenger seat. The California Supreme Court held that, in light of the totality of the circumstances, the anonymous 911 call supplied reasonable suspicion to detain defendant. (*Id*. at p. 465.) In reaching its conclusion, the court considered several factors: (1) The grave and immediate danger posed to the caller and to anyone nearby by the reported crime; (2) the lack of reason to believe that anonymous 911 calls about contemporaneous threats with a firearm are any more likely to be hoaxes than anonymous calls regarding reckless driving, which have been held to provide police with a reasonable suspicion to stop a vehicle (comparing *People v. Wells* (2006) 38 Cal.4th 1078); (3) the caller provided a firsthand, contemporaneous description of the crime and an accurate and complete description of the suspect and his location, the details of which were confirmed within minutes by the police when they arrived; and (4) the 911 caller provided a reasonable explanation for wanting to protect his anonymity. (*Dolly*, *supra*, 40 Cal.4th at pp. 465-469; accord *Navarette v. California*, *supra*, 572 U.S. at pp. 397-402 [911 caller reporting described vehicle just ran her off the road]; *People v. Brown* (2015) 61 Cal.4th 968, 981-983; similarly, see *People v. Turner* (2013) 219 Cal.App.4th 151, 164-170; *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1257-1258; *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1400.)

2540.10-Officer ordering detention need not provide facts to detaining officer 7/20

An officer may detain a suspect at the direction of another officer. The detaining officer need not be aware of the specific articulable facts supporting the detention known to the other officer. Under the "collective knowledge" or "total police activity" concept, the detention is lawful if the officer who *directs* that action be taken is aware of the supporting facts. (*People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1552-1558; *People v. Alcorn* (1993) 15 Cal.App.4th 652, 655-656; *In re Vincent B.* (1981) 125 Cal.App.3d 752, 756.) "In all the cases we have researched in which arrests were made based on the collective knowledge of police officers, no probable cause was held insufficient because the officer who ultimately executed the arrests did not have specific knowledge of the nature and extent of his fellow officers' conclusion probable cause was present." (*People v. Ramirez*, *supra*, 59 Cal.App.4th at p. 1555; see also *People v. Gomez* (2004) 117 Cal.App.4th 531, 538.) But the collective knowledge doctrine does not apply unless there is evidence the detaining or arresting officer relied upon information from the original officer. (*Lockridge v. Superior Court* (1969) 275 Cal.App.2d 612, 618-619 [arresting officer not called to testify]; *People v. Chalak* (2020) 48 Cal.App.5th Supp. 14, 18-20 [detaining officer not called to testify].)

2540.11-Detention of suspect during search warrant execution or probation search 9/18

The United States Supreme Court in *Michigan v. Summers* (1981) 452 U.S. 692 (*Summers*), firmly established that officers may detain the occupants of a premises while searching it for contraband under a warrant. "[F]or Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." (*Id.* at p. 705.) "In *Summers* and later cases the occupants detained were found within or immediately outside a residence at the moment the police officers executed the search warrant." (*Bailey v. United States* (2013) 568 U.S. 186, 193 (*Bailey*).) But the *Summers* rule is confined to those who are present when and where the search is being conduct. (*Bailey*, *supra*, 568 U.S. at p. 197.) "The categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched." (*Id*. 568 U.S. at p. 199 [defendant left the scene before the search began and the police officers waited to detain him until he was almost a mile away].) The length of such a detention is limited to the duration of the search. (*Guillory v. Hill* (2015) 233 Cal.App.4th 240, 249.)

The California Supreme Court applied the *Summers* rule permitting the detention of an unknown person on the premises when the search began, where the officers are unable to immediately determine the person's identity and connection to the premises. (*People v. Glaser* (1995) 11 Cal.4th 354 (*Glaser*).) In *Glaser*, officers were about to search a house for drugs under a warrant. They encountered the defendant, who had just arrived in a pickup truck, in an unlit spot in the driveway. He was about to open the gate to the backyard of the house. The officers detained the defendant at gunpoint. The California Supreme Court upheld the detention. (*Id*. at p. 360.)

> When, in the course of initiating a search under warrant of a private residence for illegal [activity] or related items, police officers encounter on the premises a person whose identity and connection to the premises are unknown and cannot immediately be determined without detaining the person, the officers may constitutionally detain him or her for the period of time required and in the manner necessary to make those determinations and to protect the safety of all present during the detention. If the person is determined to be an occupant of the home to be searched, he or she may be detained, pursuant to *Summers*, for the duration of the search. (*Summers*, *supra*, 452 U.S. at p. 705.) If the person is determined not to be an occupant, further detention is proper only if justified by other specific, articulable facts connecting him or her to the criminal activity suspected to be occurring on the premises or establishing a danger to the officers if the person is released.

(*Id.* at p. 374.)

The *Glaser* rules also allows officers to detain persons encountered when entering a residence to execute an arrest warrant or when conducting a probation search. (*People v. Rios* (2011) 193 Cal.App.4th 584, 592-595 [probation search]; *People v. Matelski* (2000) 82 Cal.App.4th 837, 849-853 [probation search]; *People v. Hannah* (1996) 51 Cal.App.4th 1335, 1345-1346 [arrest warrant]; but see *People v. Gutierrez* (2018) 21 Cal.App.5th 1146, 1159 [30 to 50 minute detention of defendant was unduly prolonged because officers were only conducting random, routine and suspiciousless search of probationer's house where defendant was found].)

2545.1-Officer can order detainee to provide identification 6/20

A police officer has the right to request identification during a valid detention. (*Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.* (2004) 542 U.S. 177, 186.) "[A]sking a person who is lawfully detained for identification does not constitute an independent violation of the Fourth Amendment." (*People v. Vibanco* (2007) 151 Cal.App.4th 1, 13.) "[W]here there is … a right to … detain, there is a companion right to request, and obtain, the detainee's identification. [Citations.] Under such circumstances: 'Disclosure of name and address is an essentially neutral act,' beyond Fourth Amendment concern." (*People v. Rios* (1983) 140 Cal.App.3d 616, 621; see also *People v. Hart* (1999) 74 Cal.App.4th 479, 488.)

> We see no constitutional proscription against asking a *Terry* suspect to identify himself. Inquiries of the suspect's identity, address and his reason for being in the area are usually the first questions to be asked and may immediately dispel the officer's suspicions. Indeed, in *Terry*, the initial inquiry by the officer of the suspects was to ask their names. (*Terry v. Ohio* [(1968)] 392 U.S. [1] at pp. 6-7; see also *Peters v. New York*, decided with *Sibron v. New York* (1968) 392 U.S. 40, 49.) Without question, an officer conducting a lawful *Terry* stop must have the right to make this limited inquiry, otherwise the officer's right to conduct an investigative detention would be mere fiction. [¶] As part of this inquiry, the police officer may require the suspect to produce proof of identification, if he has it.

(*People v. Loudermilk* (1987) 195 Cal.App.3d 996, 1002.) This rule also applies to occupants of a house detained during the execution of a search warrant (*Muehler v. Mena* (2005) 544 U.S. 93, 101), as well as passengers detained during the course of a routine traffic stop (*People v. Vibanco*, *supra*, 151 Cal.App.4th at p. 14).

2545.2-Officer can retrieve detainee's ID for his or her safety 6/20

While an officer can ask a detainee to identify themselves, absent additional justification, an officer cannot search the detainee for proof of identification. (*People v. Garcia* (2006) 145 Cal.App.4th 782.) But if the proof of identification, such as driver's license, is on the detainee's person that, for safety purposes, the officer rather than the detainee retrieves the identification has no constitutional significance. (*People v. Hart* (1999) 74 Cal.App.4th 479, 489 [occupant of illegally parked van evasive in search for identification so officer entered vehicle and looked in purse]; *People v. Faddler* (1982) 132 Cal.App.3d 607, 610-611 [lone officer who stopped car with three boisterous and possibly intoxicate occupants decided it would be safer if he retrieved driver's license from glove compartment]; *Ingle v. Superior Court* (1982) 129 Cal.App.3d 188, 194 ["it would defy common sense not to hold that an officer, who has a right to see a motorist's driver's license, may enter a vehicle to obtain the license when the motorist, who is outside the vehicle, has told him where it is and has not otherwise objected to his entering the car without a warrant"]; similarly, see *People v. Webster* (1991) 54 Cal.3d 411, 431 [when all five occupant's denied ownership of car, officer entered to search for registration].)

2545.3-Officer can search for ID on evasive detainee 6/20

Under certain circumstances, an officer may search for proof of identity if the detainee is evasive either regarding their true name or when denying having any written identification on their person. (*People v. Long* (1987) 189 Cal.App.3d 77, 86-89 [defendant denied having any identification although officer could see wallet in his back pocket].)

> If [the detainee] refuses to identify himself to the officer, this fact may by itself be considered suspect and together with surrounding events may create probable cause to arrest. Likewise, the *Terry* suspect may not lie to the officer with impunity about his identity if there is a quick and minimally intrusive method of resolving the doubt. It is commonplace in our society for traffic officers to require motorists to remove their driver's license from their wallets when stopped by the officer. To require defendant in this case to display his driver's license or other proof of identification is a minor intrusion which is strictly limited to the sole justification of the detention.

(*People v. Loudermilk* (1989) 195 Cal.App.3d 996, 1102 (*Loudermilk*).)

In *Loudermilk*, police detained a pedestrian matching the description of a shooting suspect. The detainee claimed to have no identification although the officer felt a wallet during the patdown search for weapons.

> [W]e find that [the officer] acted reasonably in requesting defendant to produce identification. Defendant replied that he did not have any. Having discovered defendant's wallet during a lawful patdown search for weapons, the officer was justified in taking it from defendant's pocket to identify him. The seizure of defendant's wallet under these circumstances was reasonably related to the purpose and scope of the investigative detention. The officer was not conducting a general "fishing expedition" for whatever evidence he could find, but sought merely to learn defendant's identity. As such, the papers observed by the officers while searching for identification were lawfully seized and defendant's spontaneous confession was not the fruit of any illegal search.

(*Ibid*.)

> Once the officer found the wallet, it presents only a minor intrusion to look inside for identification, the same proof of identification the suspect was required to produce in the first instance. To require the officer to ignore the wallet and allow defendant to continue his deception would reduce the right to conduct a lawful detention to a nullity. Our interpretation of the Fourth Amendment does not command such an absurd result.

(*Id*. at p. 1003.)

> We must emphasize that we do *not* hold that a suspect may be detained and searched merely because he either refused to identify himself or refused to produce proof of identification. Nor do we hold that each time an officer conducts a *Terry* stop he may immediately conduct a search for identification. The rule we announce does not provide officers with unfettered discretion and does not open citizens to harassment. Our decision, allowing the officer to seize the wallet, is limited to the unique facts of this case, where defendant lied to the officer and himself created the confusion as to his own identity. The seizure of defendant's wallet was minimal and strictly limited to the legitimate inquiry into his identity

(*Id*. at p. 1004, italics in original.)

2550.1-Transport-detention permissible in some cases 8/09

In *People v. Harris* (1975) 15 Cal.3d 384 the California Supreme Court considered the propriety of in-the-field transportation of suspects prior to arrest. Although finding the transportation amounted to a de facto arrest under the facts presented in *Harris*, the court refused to hold that probable cause to arrest must exist before an officer may transport a suspect to another location for further interrogation or possible identification. (*Id*. at pp. 389-392.)

> We can conceive of factual situations in which it might be quite reasonable to transport a suspect to the crime scene for possible identification. If, for example, the victim of an assault or other serious offense was injured or otherwise physically unable to be taken promptly to view the suspect, or a witness was similarly incapacitated, and the circumstances warranted a reasonable suspicion that the suspect was indeed the offender, a "transport" detention might well be upheld. *Similarly, the surrounding circumstances may reasonably indicate that it would be less of an intrusion upon the suspect's rights to convey him speedily a few blocks to the crime scene, permitting the suspect's early release rather than prolonging unduly the field detention*.

(*Id.* at p. 391, italics added.)

Thus, the appellate court in *In re Carlos M.* (1990) 220 Cal.App.3d 372 approved transporting a rape suspect to the hospital where the victim was being examined rather than extending the detention two hours until completion of the examination. (*Id*. at pp. 383-384.) And in *People v. Soun* (1995) 34 Cal.App.4th 1499 the appellate court found it appropriate to move six dangerous suspects three blocks from a roadside stop to a nearby parking lot in order to clear the obstructed roadway and to enhance officer safety. (*Id*. at pp. 1519-1520.)

2560.1-Any violation of Vehicle Code sufficient for traffic stop 7/20

"[T]he Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.' [Citations.]" (*Kansas v. Glover* (2020) 589 U.S. ___, ___ [140 S.Ct. 1183, 1187, 206 L.Ed.2d 412, 419].) "Ordinary traffic stops are treated as investigatory detentions for which the officer must be able to articulate specific facts justifying the suspicion that a crime is being committed. [Citations.]" (*People v. Hernandez* (2008) 45 Cal.4th 295, 299.)

> A traffic stop is lawful at its inception if it is based on a reasonable suspicion that any traffic violation has occurred, even if it is ultimately determined that no violation did occur. [Citations.] The officer's duty is to resolve—through investigation—any ambiguity presented as to whether the activity observed is, in fact, legal or illegal. [Citation.]

(*Brierton v. D.M.V.* (2005) 130 Cal.App.4th 499, 510 [screeching tires].)

The issue is not whether the traffic law was actually violated, but whether an "objective manifestation" that the person may have committed such a violation was present. (*People v. Logsdon* (2008) 164 Cal.App.4th 741, 746.) But:

> [I]f the defendant does not actually break the law, the officer's mistaken belief there has been a violation adds nothing to the probable cause equation. [Citations.] In other words, "If an officer simply does not know the law, and makes a stop based upon objective facts that cannot constitute a violation, his suspicions cannot be reasonable. …" [Citation.] However, an officer's reliance on the wrong statute does not render his actions unlawful if there is a right statute that applies to the defendant's conduct. [Citation.] "If the facts are

sufficient to lead an officer to reasonably believe that there was a violation, that will suffice, even if the officer is not certain about exactly what it takes to constitute a violation. [Citations.]" [Citation.]

(*In re Justin K.* (2002) 98 Cal.App.4th 695, 700 [inoperable third brake light proper basis for stop]; but see *People v. Carmona* (2011) 195 Cal.App.4th 1385, 1391 [unsignaled turn not affecting other motorists was not proper basis for stop].)

Thus, an officer with reasonable suspicion that a motorist has violated the California Vehicle Code may stop the vehicle involved for investigation. (*People v. Parrott* (2017) 10 Cal.App.5th 484, 495 [driving without valid license although offices never saw driving but could reasonably infer it had occurred]; *People v. Corrales* (2013) 213 Cal.App.4th 696, 699-700 [texting while driving]; *People v. Carter* (2010) 182 Cal.App.4th 522, 529 [tinted front and side windows]; *People v. Hoyos* (2007) 41 Cal.4th 872, 892 [rear license plate light burned out]; *People v. Roberts* (2010) 184 Cal.App.4th 1149, 118-1191 [unlawfully tinted windows]; *People v. Logsdon*, *supra*, 164 Cal.App.4th at p. 744 [unsignaled lane change]; *People v. Duncan* (2008) 160 Cal.App.4th 1014, 1019 [upside down license plate]; *People v. Vibanco* (2007) 151 Cal.App.4th 1, 8 [cracked windshield & missing front license plate]; *People v. Castellon* (1999) 76 Cal.App.4th 1369, 1373 [expired registration]; *People v. Gomez* (2004) 117 Cal.App.4th 531, 537 [no seat belt]; *Kodani v. Snyder* (1999) 75 Cal.App.4th 471, 476-477 [same]; *People v. Bell* (1996) 43 Cal.App.4th 754, 760-761 [speeding]; *People v. Uribe* (1993) 12 Cal.App.4th 1432, 1436 [unsafe lane change]; *Byrd v. Superior Court* (1968) 268 Cal.App.2d 495, 496 [unreadable rear license plate].)

The Fourth Amendment also permits an officer to made a traffic stop when there is reasonable suspicion a "civil" traffic violation has occurred, such as illegal parking. (*Whren v. United States* (1996) 517 U.S. 806, 808-810; *People v. Bennett* (2011) 197 Cal.App.4th 907, 912-918.)

Note that frequently the officer's observations not only support reasonable cause to make a traffic stop, but also probable cause to arrest (or issue a citation). The temporary detention of a driver to investigate a suspected Vehicle Code violation "will not ordinarily be deemed an arrest." (*People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 200.) But once the officer has probable cause to conclude that a traffic violation occurred, such a violation does constitute a "public offense" for which a warrantless arrest may be made without violating the Fourth Amendment. (*Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 354; *People v. McKay* (2002) 27 Cal.4th 601, 607; *People v. Gomez* (2004) 117 Cal.App.4th 531, 538-539.) In other words, once there is probable cause to believe a Vehicle Code violation occurred, the Fourth Amendment rules governing detentions (i.e., length of detention) are replaced by the Fourth Amendment principles governing arrests (i.e., search incident to arrest).

2560.2-Erratic driving sufficient for traffic stop 7/14

The courts have consistently held that officers may lawfully stop cars being driven in an erratic or suspicious fashion. (See, e.g., *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 219; *People v. Bennett* (1983) 139 Cal.App.3d 767; *People v. Anguiano* (1961) 198 Cal.App.2d 426.) Even pronounced weaving within a lane may provide an officer with reasonable cause to stop a motorist on suspicion of driving under the influence. (*People v. Russell* (2000) 81 Cal.App.4th 96, 104-105; *People v. Bracken* (2000) 83 Cal.App.4th Supp. 1, 4; *People v. Perez* (1985) 175 Cal.App.3d Supp. 8, 10-11; see also *Arburn v. D.M.V.* (2007) 151 Cal.App.4th 1480, 1485-1486;

People v. Perkins (1981) 126 Cal.App.3d Supp. 12, 14.) In *Navarette v. California* (2014) 572 U.S. 393, the United States Supreme Court held an anonymous tip form a driver provided reasonable suspicion of criminal activity, specifically driving under the influence.

> The 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues. … And the experience of many officers suggests that a driver who almost strikes a vehicle or another object—the exact scenario that ordinarily causes "running [another vehicle] off the roadway"—is likely intoxicated. … As a result, we cannot say that the officer acted unreasonably under these circumstances in stopping a driver whose alleged conduct was a significant indicator of drunk driving.

(*Id*. 572 U.S. at p. 403; accord *People v. Wells* (2006) 38 Cal.4th 1078, 1081-1088.)

2560.3-May stop vehicle for no plates or expired registration even if permit displayed 7/20

Whether a traffic stop is permitted when an officer sees a vehicle without the required license plates or expired registration, but displaying a temporary permit, depends upon the totality of the circumstances. (*In re Raymond C.* (2008) 45 Cal.4th 303, 307 (*Raymond C.*) The appellate court in *People v. Greenwood* (2010) 189 Cal.App.4th 742 (*Greenwood*) summarized the case law on this point:

> In the absence of other incriminating or ambiguous evidence, a vehicle displaying a valid temporary permit and no license plates may not be stopped for the purpose of investigating the permit's validity. ([*People v.*] *Hernandez* [(2008)] 45 Cal.4th [295] at pp. 299-300; *People v. Nabong* [(2004)] 115 Cal.App.4th [Supp. 1] at pp. Supp. 3-5.) If the officer does not see the temporary permit and the vehicle has no license plates, it is reasonable for the officer to make a traffic stop. ([*People v.*] *Dotson* [(2009)] 179 Cal.App.4th [1045] at pp. 1051-1052.) A vehicle with expired license tabs, but displaying a temporary permit, may not be stopped if the officer has additional information that there is an ongoing process to cure the lapse in registration. ([*People v.*] *Brendlin* [(2006)] 38 Cal.4th [1107] at p. 1114.) A vehicle displaying a valid temporary permit may be stopped where there is some objective indicia that something may be amiss with the registration or permit, such as a missing front license plate. ([*People v.*] *Saunders* [(2006)] 38 Cal.4th [1129] at p. 1137.) Finally, a vehicle displaying no license plates and no temporary permit visible from the rear may be stopped for investigation. (*In re Raymond C.*, *supra*, 45 Cal.4th at pp. 307-308.

(*Greenberg*, *supra*, 189 Cal.App.4th at p. 748.)

The officers in *Greenwood* ran a computer check on a vehicle through the Department of Motor Vehicles records, which indicated the registration on the vehicle had expired two years earlier. The vehicle had a temporary registration permit affixed to the rear window. Unlike the facts of *Brendlin*, however, there was no evidence the computer check indicated the vehicle was in the process of being registered or had been issued the temporary registration sticker. The appellate court found the traffic stop was justified under these facts. (*Greenwood*, *supra*, 189 Cal.App.4th at p.

744.) "Presented with ambiguous evidence of a possible inconsistency between a registration that expired two years earlier and the temporary permit on display, a stop to investigate the status of the registration was consistent with the holding in *Saunders*." (*Id*. at p. 749.) Although it was later determined that the temporary permit was valid, this did not render the stop unreasonable. (*Ibid*.) "The DMV record showing expired registration provided the required articulable suspicion there was something amiss with the registration and justified the vehicle stop for Fourth Amendment purposes." (*Id*. at p. 750.)

In *Raymond C.*, *supra*, 45 Cal.4th 303, an officer saw a car without license plates. He did not see a temporary operating permit in the rear window. After making a vehicle stop, the officer discovered a temporary permit on the front window. (*Id*. at p. 305.) The California Supreme Court held the stop was lawful because there was no permit in the officer's view from the rear. (*Id*. at p. 307.) The court also rejected the defense argument that the officer was constitutionally required to drive in front of the defendant to look for a permit on the front window before making the stop. (*Id*. at pp. 307-308.) " 'The reasonableness of [an] officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques.' (*United States v. Sokolow* (1989) 490 U.S. 1, 11.)" (*Raymond C., supra*, 45 Cal.4th at p. 308.) In other words, the officer need not make any special effort to look for a temporary permit before initiating a traffic stop. (*People v. Dotson*, *supra*, 179 Cal.App.4th at pp. 1051-1052.)

2560.4-May stop vehicle if records show registered owner's license is suspended 7/20

The United States Supreme Court has held that an officer may stop a vehicle if the records show the registered owner's license has been suspended. (*Kansas v. Glover* (2020) 589 U.S. ___ [140 S.Ct. 1183, 206 L.Ed.2d 412].) The High Court reasoned an officer's reasonable cause to stop the vehicle under such circumstances is based on "commonsense judgments and inferences" that the owner will likely disregard the suspension and continue to drive. (*Id*. 589 U.S. at p. ___ [140 S.Ct. at p. 1188, 206 L.Ed.2d at pp. 419-420].) While not required to conduct further inquiry before initiating the stop, the officer should not stop the vehicle if additional facts emerge dispelling the reasonable suspicion. (*Id*. 589 U.S. at p. ___ [140 S.Ct. at p. 1191, 206 L.Ed.2d at p. 423].) "We hold that when the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable." (*Id*. 589 U.S. at p. ___ [140 S.Ct. at p. 1186, 206 L.Ed.2d at p. 418].)

2610.1-Items protected by attorney work product not discoverable 5/20

The attorney work product privilege is codified in Code of Civil Procedure section 2018.030 (§ 2018.030). (*Coito v. Superior Court* (2012) 54 Cal.4th 480, 488 (*Coito*); *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1275 (*Fireman's Fund*).) "The purpose of the attorney work product doctrine is to preserve the rights of attorneys in the preparation of their cases and to prevent attorneys from taking advantage of the industry and creativity of opposing counsel. (Code Civ. Proc., § 2018.020.)" (*League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 993.)

This statute provides two levels of protection, one described as "absolute" or "core" work product and one termed "qualified" work product. (*People v. Zamudio* (2008) 43 Cal.4th 327, 354-355.) Although section 2018.030 uses the term "writing," case law extends the privilege to unwritten opinion work product. (*Coito*, *supra*, 54 Cal.4th at p. 488; *Fireman's Fund*, *supra*, 196

Cal.App.4th at pp. 1278-1281.) The doctrine "is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a nonlitigation capacity." (*County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 833.)

The work product privilege applies only to the attorney, not to information unknown to the attorney in the client's possession. (*People v. Smith* (2007) 40 Cal.4th 483, 515.) Although the attorney is the holder of the work product protection, under certain circumstances a client may assert such doctrine on behalf of his or her attorney. (*League of California Cities v. Superior Court*, *supra*, 241 Cal.App.4th at p. 985; *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1257.) In addition, "[i]f the material sought would be subject to discovery from a represented party, it will be discoverable from a litigant appearing in propria persona." (*Dowden v. Superior* (1999) 73 Cal.App.4th 126, 135.) Conversely, "the policy rationale for section 2018 [now § 2018.030] supports interpreting the statute as protecting the work product of an unrepresented litigant." (*Ibid*.)

Both the "absolute" and "qualified" work product privileges set forth in section 2018.030 apply to habeas proceedings. (*Jimenez v. Superior Court* (2019) 40 Cal.App.5th 824, 833-836.)

2610.2-"Absolute" or "core" work product privilege defined 5/20

Subdivision (a) of section 2018.030 of the Code of Civil Procedure defines an "absolute" or "core" work product privilege such that "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances." (See, generally, *People v. Scott* (2011) 52 Cal.4th 452, 489 ["The fact that the bullet had been in the possession of a defense expert did not implicate the attorney work product privilege."]; *People v. Bennett* (2009) 45 Cal.4th 577, 595 [asking whether defense counsel had opportunity to retest prosecution evidence does not infringe on the absolute work product privilege]; similarly see *People v. Zamudio* (2008) 43 Cal.4th 327, 355; see also *Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1100-1101; distinguish *People v. Coddington* (2000) 23 Cal.4th 529, 604-606 [violated by referring to reports of experts not used by the defense].)

> If the party resisting discovery alleges that a witness statement, or portion thereof, is absolutely protected because it "reflects an attorney's impressions, conclusions, opinions, or legal research or theories" (§ 2018.030, subd. (a)), that party must make a preliminary or foundational showing in support of its claim. The trial court should then make an in camera inspection to determine whether absolute work product protection applies to some or all of the material.

(*Coito v. Superior Court* (2012) 54 Cal.4th 480, 499-500.)

The sole exception to the absolute work product privilege is by waiver. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1254.)

2610.3-"Absolute" or "core" work product privilege applies to prosecutors 5/20

Penal Code section 1054.6, added as a part of Proposition 115, explicitly extends the absolute work product protection under Code of Civil Procedure section 2018.030, subdivision (a), to criminal cases, including prosecutors. (See, generally, *People v. Zamudio* (2008) 43 Cal.4th 327, 355 and fn. 14; see also *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 380-382; *Hobbs v. Municipal Court* (1991) 233 Cal.App.3d 670, 690-695; *People v. Municipal Court (Street)* (1979) 89 Cal.App.3d 739, 750.) Even before the enactment of Proposition 115, the absolute privilege had

been applied to the work product of the prosecutor. (See, e.g., *People v. Yu* (1983) 143 Cal.App.3d 358, 378 [no showing that personal memoranda collected for possible book on case consisted of anything other than the prosecutor's impressions, conclusions, opinions, and legal theories]; *People v. Alexander* (1983) 140 Cal.App.3d 647, 659-661 [prosecutor's trial preparation notes during follow-up talk with potentially reluctant witnesses consisting of conclusions and opinions not discoverable]; *People v. Boehm* (1969) 270 Cal.App.2d 13, 21-22 [defense properly denied discovery of "notes, memoranda, or records pertaining to the interviews, dates, persons present between the district attorney's office" and an immunized witness].)

2610.4-"Qualified" work product privilege defined 5/20

Although not protected pursuant to Penal Code section 1054.6, Code of Civil Procedure section 2018.030, subdivision (b), provides a "qualified" privilege for all attorney work product not covered by subdivision (a). (*Coito v. Superior Court* (2012) 54 Cal.4th 480, 488; *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1275.) "Work product protected by the qualified privilege is discoverable only on a showing that denial of discovery will unfairly prejudice the party seeking discovery in the preparation of its case or will result in an injustice. (§ 2018.030, subd. (b).)" (*Id*. at p. 1275, fn. 12; see also *People v. Moore* (1975) 50 Cal.App.3d 989, 994.)

2630.1-Prop. 115 bars discovery for claim of discriminatory pros. 6/20

In 1975 the California Supreme Court gave criminal defendants the right to seek discovery of material to support a defense of discriminatory prosecution. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286 (*Murgia*).) Criminal discovery was strictly a judicial creation when *Murgia* was decided. Under *Murgia*, the defense needed only to describe the requested information with some degree of specificity and establish plausible justification for the requested information. (*Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 306-307.)

California criminal discovery underwent a revolution in 1990 when the electorate adopted the statutory discovery procedures of Penal Code section 1054, et seq., as part of Proposition 115. Subdivision (e) of section 1054 prohibits criminal discovery that is not expressly required by statute or mandated by the United States Constitution. Neither Penal Code section 1054.1, nor any other California statute, requires the prosecutor to disclose information to the defense which may support a discriminatory prosecution motion. After Proposition 115, therefore, discovery relating to a discriminatory prosecution claim is no longer authorized under California common law, except to the extent that it is required by the United States Constitution. (*People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, 1190.)

The federal standard for obtaining discovery related to a discriminatory prosecution claim was established by the United States Supreme Court in *United States v. Armstrong* (1996) 517 U.S. 456, 468 (*Armstrong*). Under *Armstrong* the defense must carry the burden of producing "some evidence" in support of all the requisite elements of a discriminatory prosecution claim before a court can justify burdening the prosecution with this non-case-specific discovery obligation. (*Id*. at p. 468.) But the High Court in *Armstrong* left open the question whether such discovery was required by the federal Constitution. (*Id*. at p. 463.)

The California Supreme Court in *People v. Montes* (2014) 58 Cal.4th 809, avoided deciding whether the right to obtain discovery in support of discriminatory prosecution

motion survived Proposition 115 because the defense showing was lacking under both the *Murgia* and *Armstrong* standards. (*Id*. at pp. 829-832.) "[W]e shall assume for the sake of argument that defendant's *Murgia* discovery motion was validly made." (*Id*. at p. 829.)

The better argument is that the defense right to *Murgia* discovery was vacated by Proposition 115. At most, any discovery related to a discriminatory prosecution claim is governed by the *Armstrong* decision (*People v. Superior Court (Baez)*, *supra*, 79 Cal.App.4th at p. 1190), although there a good argument that *Armstrong* is not constitutionally based and, thus, need not be followed by California state courts.

2630.2-Showing required to obtain discovery for claim of discriminatory pros. 10/20

The United States Supreme Court mandates discovery in support of a discriminatory prosecution claim only when the defense provides "some evidence" tending to show the existence of each essential element of the defense—discriminatory effect and discriminatory intent. (*United States v. Armstrong* (1996) 517 U.S. 456, 468 (*Armstrong*).) "The justifications for a rigorous standard for the elements of a selective-prosecution claim thus required a correspondingly rigorous standard for discovery in aid of such a claim." (*Id.* at pp. 468-469.) For example, "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." (*Id*. at p. 465.) In addition, "the defendant [must] produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not … ." (*Id*. at p. 1488.)

The federal public defender's office in *Armstrong* presented a "study" showing that all 24 defendants prosecuted for distribution of crack cocaine and represented by their office in a one year span were black. The High Court held this showing fell short.

> In the case before us, respondents' "study" did not constitute "some evidence tending to show the existence of the essential elements of" a selective-prosecution claim. … The study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted.

(*Armstrong*, *supra*, 517 U.S. at p. 470.)

Prior to the *Armstrong* decision, the California Supreme Court in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 (*Murgia*) set forth a more lenient standard for the defense to obtain discovery in support of a discriminatory prosecution claim. Under *Murgia*, the defense needed to describe the requested information with some degree of specificity and establish plausible justification for the requested information. (*Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 306-307.) "We have held a showing of 'plausible justification' requires a defendant to 'show by direct or circumstantial evidence that prosecutorial discretion was exercised with *intentional and invidious discrimination in his case*.' (*People v. Keenan* (1988) 46 Cal.3d 478, 506.)" (*People v. Montes* (2014) 58 Cal.4th 809, 829, italics in original.) One California appellate court has held that the *Murgia* standard has been replaced by the *Armstrong* standard. (*People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, 1190-1191.)

The required showing, whether under the old *Murgia* standard or the new *Armstrong* standard, generally consists of affidavits or declarations showing *facts* which demonstrate the evil alleged. The California Supreme Court in *People v. Montes*, *supra*, 58 Cal.4th 809 held the trial court properly denied a defense *Murgia* motion based on a statistical study of the racial characteristics of homicide victims. "[D]efendant's study failed to take into account the case

characteristics of the homicides, which is a crucial factor for a district attorney's capital charging decisions." (*Id*. at p. 831; similarly see *People v. Suarez* (2020) 10 Cal.5th 116, 176-178.) Similarly, in *People v. Keenan*, *supra*, 46 Cal.3d 478, the California Supreme Court held a declaration showing that other persons whose crimes were superficially similar were not charged with the death penalty was "patently insufficient to raise the issue of individual or systematic discrimination on invidious grounds." (*Id.* at p. 507.) Even under the more lenient *Murgia* standard, such discovery was properly denied where the defense showing consists only of opinions with few supporting facts. (See, e.g., *Perakis v. Superior Court* (1979) 99 Cal.App.3d 730, 733-734; *Robinson v. Superior Court* (1978) 76 Cal.App.3d 968, 982-983.)

2630.3-Court must weigh prosecution's evidence negating discrimination claim 6/20

Under federal law, the defense must support a request for discovery related to a claim of prosecutorial discrimination with "some evidence." (*United States v. Armstrong* (1996) 517 U.S. 456, 468 (*Armstrong*).) Under previous California case law, such a discovery requested had to be supported by "plausible justification." (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286 (*Murgia*).) In deciding whether the defense has made an adequate showing for such discovery, whether under *Armstrong* or *Murgia*, the court should also consider any counter affidavits submitted by the People negating either discriminatory effect or intent. (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1774-1776; *People v. Moya* (1986) 184 Cal.App.3d 1307, 1310; but see *People v. Ochoa* (1985) 165 Cal.App.3d 885, 888-889 [trial court had discretion to dismiss prosecutor's oral declaration denying discrimination when the People had access to stronger evidence].) "Absent a persuasive showing to the contrary, we must presume that the district attorney's decisions were legitimately founded on the complex considerations necessary for the effective and efficient administration of law enforcement. [Citation.]" (*People v. Haskett* (1982) 30 Cal.3d 841, 860.)

2650.1-PC1112 forbids psychiatric exam of witness per *Ballard* 8/07

In *Ballard v. Superior Court* (1966) 64 Cal.2d 159, the California Supreme Court held a trial court had discretion in cases involving sexual assault to order the victim to undergo a psychiatric examination. The Legislature took away this discretion in 1980 by enacting Penal Code section 1112, which now provides:

> Notwithstanding the provisions of subdivision (d) [now subd. (f)(2)] of Section 28 of Article I of the California Constitution, the trial court shall not order any prosecuting witness, complaining witness, or any other witness, or victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility.

Section 1112 specifically annulled trial court authority to order such an examination, thus overturning the *Ballard* case. (*People v. Anderson* (2001) 25 Cal.4th 543, 575; *People v. Barnes* (1986) 42 Cal.3d 284, 301; *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1311.) Legislative prohibition of psychiatric examinations beyond cases of sexual assault was unnecessary since judicial authority for such examinations was specifically limited to sexual assaults. (*People v. Haskett* (1982) 30 Cal.3d 841, 859, fn. 8; see *Ballard v. Superior Court*, *supra*, 64 Cal.2d at p. 172; see also *In re Darrell T.* (1979) 90 Cal.App.3d 325, 335-336.) Hence, there is no authority for a trial court to order a psychiatric examination of any witness or victim in any criminal case.

Nor can the defense offer expert psychiatric testimony regarding the credibility of a sex crime victim as "[t]he use of psychiatric testimony to impeach a witness is generally disfavored." (*People v. Marshall* (1996) 13 Cal.4th 799, 835; *People v. Anderson*, *supra*, 25 Cal.4th at p. 575; see also *People v. Espinoza*, *supra*, 95 Cal.App.4th at p. 1312.)

2660.1-*Brady* discovery is information that is both favorable and material 5/20

A criminal defendant has no general constitutional right to discovery. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258.) "*Brady* [*v. Maryland* (1963) 373 U.S. 83 (*Brady*)] exculpatory evidence is the only substantive discovery mandated by the United States Constitution." (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1314; see *Gray v. Netherland* (1996) 518 U.S. 152.) "*Brady* imposes a duty on prosecutors to volunteer *Brady* material to the defendant even if no request is made." (*People v. Harrison* (2017) 16 Cal.App.5th 704, 710.) "There need be no motion, request, or objection to trigger disclosure. The prosecution has a sua sponte duty to provide *Brady* information." (*Id*., at p. 706.)

"Under *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." (*Smith v. Cain* (2012) 565 U.S. 73, 75.)

> Evidence qualifies as material when there is" 'any reasonable likelihood' " it could have " 'affected the judgment of the jury.' " [Citations.] To prevail on his *Brady* claim, [the defendant] need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. [Citation.] He must show only that the new evidence is sufficient to "undermine confidence" in the verdict. …

(*Wearry v. Cain* (2016) 577 U.S. 385, 392; see also *United States v. Bagley* (1985) 473 U.S. 667, 674-678; *Brady*, *supra*, 373 U.S. at p. 87.)

> "The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant" when the evidence is "both favorable to the defendant and material on either guilt or punishment." [Citations.] Evidence is "favorable" if it hurts the prosecution or helps the defense. [Citation.] "Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result … would have been different.' " [Citations.]

(*People v. Earp* (1999) 20 Cal.4th 826, 866; see also *In re Sassounian* (1995) 9 Cal.4th 535, 543-545.)

"The showing that defendants must make to establish a violation of the prosecution's duty to disclose exculpatory evidence differs from the showing necessary merely to receive the evidence. … To prevail on a claim the prosecution violated this duty, defendants challenging a conviction … have to show materiality, but they do not have to make that showing just to be entitled to receive the evidence before trial." (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901; see also *People v. Lewis* (2015) 240 Cal.App.4th 257, 266.)

> "[The] touchstone of materiality is a 'reasonable probability' of a different result. ... The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " (*Kyles v. Whitley* (1995) 514 U.S. 419, 435.) In

> determining whether evidence is material under this standard, we consider " 'the effect of the nondisclosure on defense investigations and trial strategies.' " (*People v. Verdugo* (2010) 50 Cal.4th 263, 279.)

(*People v. Williams* (2013) 58 Cal.4th 197, 256.)

"The prosecution's withholding of favorable and material evidence violates due process 'irrespective of the good faith or bad faith of the prosecution.' (*Brady*, *supra*, at p. 87.)" (*In re Bacigalupo* (2012) 55 Cal.4th 312, 333.) "Moreover, the duty to disclose exists regardless of whether there has been a request by the accused, and the suppression of evidence that is materially favorable to the accused violates due process regardless of whether it was intentional, negligent, or inadvertent. [Citations.]" (*In re Sodersten* (2007) 146 Cal.App.4th 1163, 1225; see also *People v. Bowles* (2011) 198 Cal.App.4th 318, 325.)

Brady applies to juvenile delinquency proceedings. (*J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1334-1335.)

2660.2-*Brady* generally applies only to the "prosecution team" 9/20

The California Supreme Court has "used the term 'prosecution team' to describe the extent of the prosecutor's *Brady* [*Brady v. Maryland* (1963) 373 U.S. 83] obligations. [Citations.]" (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 905.)

> A prosecutor's duty under *Brady* to disclose material exculpatory evidence applies to evidence the prosecutor, or prosecution team, knowingly possesses or has the right to possess. The prosecution team includes both investigative and prosecutorial agencies and personnel. [Citations.] The prosecution must disclose evidence that is actually or constructively in its possession or accessible to it. [Citation.] The important determination is whether the person or agency has been "acting on the government's behalf" [citation] or "assisting the government's case" [citation].

(*People v. Jordan* (2003) 108 Cal.App.4th 349, 358; accord, *Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-870; *Kyles v. Whitley* (1995) 514 U.S. 419, 437; similarly see *People v. Aguilera* (2020) 50 Cal.App.5th 894, 913-914 [federal agency not part of prosecution team refused to turn over potentially exculpatory information to both prosecution and defense]; distinguish *People v. Whalen* (2013) 56 Cal.4th 1, 67 [no evidence prosecution had prior knowledge of events testified to by its witness].) In determining whether a particular law enforcement agency is part of the "prosecution team," the California Supreme Court adopted a three-part test from the federal courts.

> A federal court that had to decide whether an agency was part of the prosecution team for *Brady* purposes considered three relevant questions: " '(1) whether the party with knowledge of the information is acting on the government's "behalf" or is under its "control"; (2) the extent to which state and federal governments are part of a "team," are participating in a "joint investigation" or are sharing resources; and (3) whether the entity charged with constructive possession has "ready access" to the evidence.' " [Citations.]

(*Barnett v. Superior Court*, *supra*, 50 Cal.4th at p. 904.) Generally, for example, the fact that a victim or a victim's lawyer cooperated with the prosecution does not make them "team members" for purposes of the *Brady* rule. (*IAR Systems Software Inc. v. Superior Court* (2017) 12 Cal.App.5th 503, 522 [corporation's law firm handling civil case for fraud against former chief executive officer communicated with and shared financial auditing expert with local district attorney's office prosecuting the executive for embezzlement].)

However, in limited circumstances the prosecution's *Brady* duty may require disclosure of exculpatory and impeachment information contained in materials that are *not* directly connected to the case. For example, particularly upon the request of the defense, the prosecution has the duty to seek out critical impeachment evidence in records that are " 'reasonably accessible' " to the prosecution but not to the defense. (*People v. Little* (1997) 59 Cal.App.4th 426, 433-434 [prosecution must investigate key prosecution witness's criminal history and disclose felony convictions]; *People v. Santos* (1994) 30 Cal.App.4th 169, 178-179 [upon defense request, prosecution must disclose prosecution witnesses' misdemeanor convictions]; *People v. Hayes* (1992) 3 Cal.App.4th 1238, 1243, 1245 [upon defense request, prosecution must disclose prosecution witness's criminal convictions, pending charges, probation status, acts of dishonesty, and prior false reports]; *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1078; *In re Pratt* (1999) 69 Cal.App.4th 1294, 1317.)

(*J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1335-1336, italics in original.)

This does not mean that the prosecution must routinely review all available files for evidence that might impeach a prosecution witness. [Citations.] When deciding the scope of the prosecution's duty to search files unrelated to the case, the courts consider such factors as whether a request has been made by the defense; the prosecution's ease of access to the information; and the likelihood of evidence favorable to the defense. [Citations.]

(*Id*. at p. 1336, fn. 6 [prosecution has no duty to obtain court order to inspect juvenile files for *Brady* material—defense must seek court order on its own under Welf. & Inst. Code § 827].)

Even if an individual, business or government agency is deemed to be part of the prosecution team, it is improper for a court to order anyone but the prosecutor provide exculpatory evidence within the meaning of *Brady* directly to the defense. (*IAR Systems Software Inc. v. Superior Court*, *supra*, 12 Cal.App.5th at p. 515.)

2660.3-Court rather than prosecution can conduct *Brady* review of sensitive records 5/14

Disclosure of exculpatory evidence under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) may be required even when the evidence is subject to state privacy privileges. (Pennsylvania v. Ritchie (1987) 480 U.S. 39, 57-58 [confidential juvenile records.]; *People v. Webb* (1993) 6 Cal.4th 494, 518 [psychiatric records]; *J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1335 [juvenile records].) Rather than burden the prosecution with the task of determining if potentially private or privileged records contain *Brady* material, it is both legal and practical to have the court make this determination.

Although the government's *Brady* obligations are typically placed upon the prosecutor, the courts have recognized that the *Brady* requirements can also be satisfied when a trial court conducts an in camera review of documents containing possible exculpatory or impeachment evidence. [Citations.] For example, in [*Pennsylvania v. Ritchie* (1987) 480 U.S. 39], a defendant charged with sexual offenses against a minor sought discovery of the records of the state child protection agency that investigated the child's allegations. (*Ritchie*, *supra*, 480 U.S. at p. 43.) Rejecting the defense request for access to the files, the *Ritchie* court held that the defendant's right to a fair trial and the state's interest in confidentiality of the files could be properly accommodated through the court's in camera review of the files. (*Id*. at pp. 59-61.) The *Ritchie* court required the petitioner to

> make a threshold showing of materiality to trigger the trial court's duty to search the file. (*Id*. at p. 58, fn. 15 [petitioner "may not require the trial court to search through the ... [confidential] file without first establishing a basis for his claim that it contains material evidence"].) Subsequent to *Ritchie*'s selection of the in camera review procedure, courts have recognized that in camera inspection is appropriate when there is a "special interest in secrecy " afforded to the files. [Citations.]

(*J.E. v. Superior Court*, *supra*, 223 Cal.App.4th at p. 1336 [court rather than prosecution should screen juvenile files for *Brady* material in response to Welf. & Inst. Code 827 petition from defense]; see also *People v. Webb*, *supra*, 6 Cal.4th at p. 518 ["When the state seeks to protect such privileged items from disclosure, the court must examine them in camera to determine whether they are 'material' to guilt or innocence."].)

2660.4-All three components of *Brady* violation must be shown before sanctions 6/19

There are three components to a true violation of a prosecutor's duty to disclose exculpatory information to the defense under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

> Although most reviewing courts called upon to determine the existence of a *Brady* violation do so following a trial and conviction, the same standard applies when the issue arises pretrial: "[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97.) Thus, although "the term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called '*Brady* material' "—"strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: [1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282, fn. omitted; accord, *People v. Salazar* (2005) 35 Cal.4th 1031, 1042-1043.)

(*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 51 (*Meraz*), bracketed numbers added; see also *People v. Lucas* (2014) 60 Cal.4th 153, 274; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 175-176; *People v. Jimenez* (2019) 32 Cal.App.5th 409, 418.)

2660.5-*Brady* favorability component defined 5/20

As to the first component of a true *Brady* [*Brady v. Maryland* (1963) 373 U.S. 83] violation, "[e]vidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. [Citations.]" (*In re Sassounian* (1995) 9 Cal.4th 535, 544; see also *People v. Williams* (2013) 58 Cal.4th 197, 256; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132.) "The government has a constitutional duty to disclose both exculpatory evidence that casts doubt on the defendant's guilt and impeaching evidence that calls into question the credibility of government witnesses." (*People v. Jimenez* (2019) 32 Cal.App.5th 409, 417.) Stated yet another way, "[f]avorable evidence is evidence that the defense could use either to impeach the state's witnesses or to exculpate the accused." (*People v. Osband* (1996) 13 Cal.4th 622, 665.)

Whether a prosecutor has a pretrial duty to disclose impeachment evidence under Penal Code section 1054.1, subdivision (e), presents a different question than whether impeachment evidence was withheld at trial constituting a potential *Brady* violation. "It is well settled that the prosecution's *Brady* obligation to disclose material evidence favorable to the defense encompasses impeachment evidence." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1048but see *People v. Lewis* (2015) 240 Cal.App.4th 257, 266 ["whether exculpatory evidence includes impeachment evidence may be unsettled"]; *Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 377 ["there is reason to think the electorate intended to use the term 'exculpatory evidence' in its narrow sense and thus did not intend [Penal Code] section 1054.1(e) to require the disclosure of impeachment evidence"]; distinguish *People v. Jimenez* (2019) 32 Cal.App.5th 409, 420 ["Given the collateral nature of the report and the absence of any plausible factual foundation for allegations of Deputy A.'s bias or untruthfulness, we are unconvinced the report had impeachment value under *Brady*."];.)

2660.6-*Brady* suppression component defined 12/19

As to the second component of a *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) discovery violation, "evidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery. [Citations.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 715; see also *In re Masters* (2019) 7 Cal.5th 1054, 1088; *People v. Mora & Rangel* (2018) 5 Cal.5th 442, 467; *People v. Verdugo* (2010) 50 Cal.4th 263, 281.) "It would seem necessarily to follow that information disclosed in advance of trial is not considered suppressed, even assuming it should have been given to the defense earlier. On the other hand, we recognize that '[d]isclosure, to escape the *Brady* sanction, must be made at a time when the disclosure would be of value to the accused.' " (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 51, citations omitted.)

> Because *Brady* and its progeny serve "to restrict the prosecution's ability to suppress evidence rather than to provide the accused a right to criminal discovery," the *Brady* rule does not displace the adversary system as the primary means by which truth is uncovered. [Citation.] Consequently, "when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is [the defendant's] lack of reasonable diligence, the defendant has no *Brady* claim."

(*People v. Morrison*, *supra*, 34 Cal.4th at p. 715; see also *People v. Williams* (2013) 58 Cal.4th 197, 257.) If not in possession of the exculpatory information, the prosecution can satisfy its *Brady* obligation by alerting the defense to the existence of the evidence and making it available for viewing. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 51-52; see, e.g., *Assn. for Los Angeles Deputy Sheriffs v. Superior Court* (2019) 8 Cal.5th 28, 50-54 [authorizing law enforcement agencies to supply *Brady* list of officers with misconduct claims to prosecuting agencies who may then pass that information on to criminal defendants in appropriate cases].)

2660.7-*Brady* prejudice component defined 6/19

As to the third component of a *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), "a *Brady* violation requires not only the suppression of evidence that is favorable to an accused, but also that the evidence is material to guilt or punishment." (*People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th at p. 52 (*Meraz*).) "We must examine the trial record, 'evaluat[e]' the withheld evidence 'in the context of the entire record,' [citation] and determine in light of that examination

whether 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.' [Citation.]" (*Turner v. United States* (2017) 582 U.S. ___, ___ [137 S.Ct. 1885, 1893, 198 L.Ed.2d 443, 452]. "Put another way, the defendant must show 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' (*Kyles v. Whitley* (1995) 514 U.S. 419, 435.)" (*People v. Lewis* (2015) 240 Cal.App.4th 257, 263; see also *People v. Jimenez* (2019) 32 Cal.App.5th 409, 422.)

> " 'The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.' [Citation.]" *People v. Fauber* (1992) 2 Cal.4th 792, 829, quoting *United States v. Agurs* [(1976)] 427 U.S. [97] at pp. 109-110.) As we have described it in terms of posttrial analysis of nondisclosure, " '[m]ateriality … requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction "more likely" [citation], or that using the suppressed evidence to discredit a witness's testimony "might have changed the outcome of the trial" [citation]. A defendant instead "must show a 'reasonable probability of a different result.' " [Citation.]' [Citation.] Thus, '[e]vidence is "material" "only if there is a reasonable probability that, had [it] been disclosed to the defense, the result … would have been different." [Citations.] The requisite "reasonable probability" is a probability sufficient to "undermine [ ] confidence in the outcome" on the part of the reviewing court. [Citations.] It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.] Further, it is a probability that is, as it were, "objective," based on an "assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision," and not dependent on the "idiosyncrasies of the particular decisionmaker," including the "possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." [Citation.]' [Citations.]" (*In re Sodersten* [(2007)] 146 Cal.App.4th [1163] at pp. 1226-1227.)

(*Meraz*, *supra*, 163 Cal.App.4th at p. 52; see also *People v. Pettie* (2017) 16 Cal.App.5th 23, 72; *Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1065-1067.)

2660.8-*Brady* sanctions are limited 2/14

The trial court's power to impose sanctions because of a perceived violation of the prosecution's duty to provide discovery of exculpatory information to the defense under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) is limited. Such sanctions should be remedial, not punitive. "A determination that the prosecution improperly withheld material information requires reversal without further harmless error analysis. (*Kyles v. Whitley* [(1995)] 514 U.S.[419] at p. 435; *People v. Zambrano* [(2007) 41 Cal.4th 1082] at p. 1133.)" (*People v. Williams* (2013) 58 Cal.4th 197, 256.) Although "[t]he constitutional duty that requires prosecutors to disclose exculpatory evidence to a criminal defendant under *Brady* is independent from the statutory duty to provide discovery under [Penal Code] section 1054.1," such that "evidence that is material under *Brady* must be disclosed to the defense, notwithstanding any failure of the defense to enforce its statutory right to discovery" (*People v. Jordan* (2003) 108 Cal.App.4th 349, 359), whether a sanction of dismissal can be imposed in this state depends on whether dismissal is required by the United States Constitution.

Penal Code section 1054.5, subdivision (c) provides: "The court may prohibit the testimony of a witness pursuant to [Penal Code section 1054.5] subdivision (b) only if all other sanctions have been exhausted. *The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States*." (Italics added.) This statutory limitation on a court's authority to dismiss a "charge" under Penal Code section 1054.5, subdivision (c), includes charged allegations such as special circumstances. (*People v. Superior Court (Meraz)* (2008)163 Cal.App.4th 28, 49-50 (*Meraz*).) "Thus, the question … is not whether the trial court abused its discretion in dismissing the case, but whether the trial court erred as a matter of law in dismissing the case because the federal Constitution did not require dismissal." (*People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1212.)

2670.1-Prop. 115 bars discovery of prosecution jury records 8/07

With the adoption of Proposition 115, criminal discovery is now wholly a statutory procedure. Discovery orders may only be made as provided in chapter 10 of the Penal Code, commencing with section 1054. Section 1054.1 specifically defines what the prosecution must disclose. This section does not require prosecutors to provide their jury records to defendants. Nor does the Due Process clause of the Fourteenth Amendment impose such a burden of discovery upon the prosecution. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559; *Wardius v. Oregon* (1973) 412 U.S. 470, 474.)

Even under prior common law criminal discovery authorities, the defendant was required to make a substantial showing before such information could be ordered disclosed. To obtain criminal discovery under the common law the defense has to show good cause or plausible justification, and must show an inability to obtain the information by their own efforts. (*Hill v. Superior Court* (1974) 10 Cal.3d 812, 816-817.)

In *People v. Murtishaw* (1981) 29 Cal.3d 733 the California Supreme Court held trial courts had discretion to permit defense discovery of prosecution jury records when the defendant lacks funds necessary to acquire similar information about the prospective jury. (*Id*. at pp. 765-767.) The rationale for the decision was that when the prosecutor has "substantially more information" about jurors than the defense has, a condition of inequality exists which reflects adversely on the fairness of the criminal process. (*Ibid*.) But even when the defense made the appropriate showing under *Murtishaw*, denial of the motion was not found to be reversible error since the harm was entirely speculative. (*People v. Pride* (1992) 3 Cal.4th 195, 227; *People v. Morris* (1991) 53 Cal.3d 152, 180.)

2690.1-Police personnel records and citizen complaints privileged 12/19

In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), the California Supreme Court established the right of a criminal defendant to obtain discovery of police personnel files and records under certain circumstances. The court was careful to note, however, that the right was not absolute, even on a showing of good cause. (*Id.* at p. 538.) The court recognized that this form of criminal discovery was purely the product of judicial creation evolving in absence of guiding legislation. (*Id.* at p. 535.)

In response to *Pitchess*, the California Legislature created a statutory procedure for discovery of police personnel files and records in 1978. (See, generally, *Assn. for Los Angeles Deputy Sheriffs v. Superior Ct.* (2019) 8 Cal.5th 28, 40-43.) The Legislature declared these files and records

confidential, requiring that "*Pitchess*" motions for their discovery comply with the statutory procedure. (*Riske v. Superior Ct.* (2016) 6 Cal.App.5th 647, 654-655.) "Peace officer personnel records and records [of citizen complaints], or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." (Pen. Code, § 832.7, subd. (a).) "[T]he *Pitchess* scheme's purpose [is] 'to protect the defendant's right to a fair trial and the officer's interest in privacy [in his personnel records] to the fullest extent possible … .'" (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227; see also *People v. Galan* (2009) 178 Cal.App.4th 6, 9.)

Section 832.7 was intended by the Legislature to create a privilege for *all* information in an officer's personnel records, without regard to whether it might be obtained from the officer or elsewhere. (*Hackett v. Superior Court* (1993) 13 Cal.App.4th 96, 100-101.) Not only does it protect the record contents, it also protects the same information in the officer's personal recollections. Hence, the same privilege may be asserted by the officer in response to oral examination. (*City of San Diego v. Superior Court* (1981) 136 Cal.App.3d 236, 239.)

In *City and County of San Francisco v. Superior Court* (1981) 125 Cal.App.3d 879 the appellate court held that an officer's right of privacy in his or her personnel file is also founded on provisions of both the state and federal constitutions. (*Id*. at p. 882.) Where this right conflicts with a defendant's compelling need for disclosure, there must be a careful balancing of the compelling interests. (*Ibid.*) Any intervention into the officer's right of privacy must be justified by a compelling interest. (See *White v. Davis* (1975) 13 Cal.3d 757, 775.) The statutory privileges and procedures also apply in juvenile cases. (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53-54.)

2690.2-Failure to give proper notice to agency and prosecutor requires denial 12/19

"Peace officer personnel records are confidential and can only be discovered pursuant to Evidence Code sections 1043 and 1045." (*Giovanni B. v. Superior Court* (2007) 152 Cal.App.4th 312, 318; see also *People v. Yearwood* (2013) 213 Cal.App.4th 161, 180.) Such records may be obtained only by a discovery motion filed pursuant to Evidence Code section 1043. (Pen. Code, § 832.7; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81-82.) Evidence Code sections 1043 to 1047 were not overruled by Proposition 115. (*Albritton v. Superior Court* (1990) 225 Cal.App.3d 961.) Penal Code section 832.7, subdivision (a) forbids disclosure of the requested materials except under Evidence Code sections 1043 and 1046. Thus, the failure of a defendant to comply with these provisions must result in a denial of the motion. The same rules apply to renewed or supplemental discovery motions for police personnel records. (*City of Tulare v. Superior Court* (2008) 169 Cal.App.4th 373.)

Evidence Code section 1043 sets forth a specific procedure that must be followed before the motion may be heard. In a criminal case the written motion must be filed and served upon the police agency from which records are sought at least ten (10) court days before the hearing. (Evid. Code, § 1043, subd. (a)(2).) The motion must set forth the individual officer whose records are sought, the agency having custody of those records, a description of the records or information sought, and an affidavit showing good cause for the discovery. (Evid. Code, § 1043, subd. (b).) Evidence Code section 1043, subdivision (d), specifically prohibits hearing the motion without full compliance with these notice requirements.

Evidence Code section 1046 further requires a defendant who asserts an officer used excessive force in making an arrest to include a copy of the arrest report.

Finally, the prosecuting attorney must be properly noticed when a motion to disclose police personnel records is filed by a criminal defendant. "We have no doubt that, as a party to the underlying criminal proceeding, the district attorney under general due process principles is entitled to notice of the date and place of the hearing on a defense *Pitchess* motion." (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1044.)

2690.3-Disclosure of police records only on good cause showing 4/21

The *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) "statutes permit a criminal defendant to ' "compel discovery" of certain relevant information in the personnel files of police officers by making "general allegations which establish some cause for discovery" of that information and by showing how it would support a defense to the charge against him.' (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019 (*Warrick*).)" (*Galindo v. Superior Court* (2010) 50 Cal.4th 1, 5.) But a "*Pitchess*" motion for discovery of police personnel records must be supported by an affidavit showing good cause and setting forth the materiality of the requested information to the subject matter involved in the pending litigation. (Evid. Code, § 1043, subd. (b)(3); *Sisson v. Superior Court* (2013) 216 Cal.App.4th 24, 33.) The affidavit may be executed by counsel based on information and belief—it need not be based on personal knowledge. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 86-89.) Without an affidavit containing adequate factual allegations, the court is hindered from exercising its discretion in making an independent assessment of good cause. (*Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1150; see also *People v. Sanderson* (2010) 181 Cal.App.4th 1334, 1341 [*Pitchess* discovery properly denied because defendant's affidavit failed to present any specific factual allegations disputing the officer's report].) In short, the defense must request the information sought with adequate specificity to preclude the possibility that they are on a "fishing expedition." (*Pitchess*, *supra*, 11 Cal.3d at p. 538.)

"[A] showing of good cause requires a defendant seeking *Pitchess* discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick*, *supra*, 35 Cal.4th at p. 1021; see also *Pitchess*, *supra*, 11 Cal.3d at p. 538; *Sisson v. Superior Court*, *supra*, 216 Cal.App.4th at pp. 33-34.) "To show good cause for the requested discovery, defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges." (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 463, citing *Warrick*, *supra*, 35 Cal.4th at p. 1024.) "The proposed defense must have a 'plausible factual foundation' supported by the defendant's counsel's declaration and other documents supporting the motion." (*People v. Moreno* (2011) 192 Cal.App.4th 692, 701; see also *Hill v. Superior Court* (1974) 10 Cal.3d 812, 817; *Riske v. Superior Court* (2016) 6 Cal.App.5th 647, 655.) Plausibility requires that the defense describe a scenario of alleged police misconduct that "could or might have occurred." (*Warrick*, *supra*, 35 Cal.4th at p. 1026.) "Such a scenario is plausible [if] it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Ibid*.) "What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Id*. at p. 1025; see, e.g., *People v. Lewis* (2006) 39 Cal.4th 970, 991-992 [accusation of police conspiracy to frame

the defendant inadequate]; *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1315 ["Although his factual showing is possible, it is not plausible by any rational standard."].) In determining lack of plausibility, the court must consider whether the defendant has made statements inconsistent with the theory proposed by defense counsel and consistent with the officer's description of the events. (*People v. Galan* (2009) 178 Cal.App.4th 6, 8 [defense did not dispute sergeant's report that defendant made statements corroborating the report of the officers whose credibility was challenged and personnel records sought by defense counsel].) Of course, no *Pitchess* discovery should be ordered when the entirety of the events in question have been recorded leaving no legitimate questions regarding the officer's behavior or credibility. (*People v. Mackreth* (2020) 58 Cal.App.5th 317, 341-342.)

The *Warrick* standards do not fully apply when *Brady* material is known to exist in an officer's file, such as when the defense is notified by the prosecution that an officer is on a "*Brady* list." (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 721; *Serrano v. Superior Court* (2017) 16 Cal.App.5th 759, 774-776.) "A defendant's providing of that information to the court, together with some explanation of how the officer's credibility might be relevant to the proceeding, would satisfy the showing necessary under the *Pitchess* procedures to trigger in camera review." (*People v. Superior Court (Johnson)*, *supra*, 61 Cal.4th at p. 721.) "[W]hen the officer's personnel file is known to contain potential *Brady* material, the defendant cannot be required to allege that the officer engaged in misconduct." (*Serrano v. Superior Court*, *supra*, 16 Cal.App.5th at p. 776 [defense instead alleged officer's credibility was relevant to case]; but see *In re M.C.* (2020) 58 Cal.App.5th 1138, 1142 [denial of *Pitchess* review upheld because supporting declaration presents no scenario of officer misconduct].)

Finally, "[i]f the trial court finds good cause for the discovery, it reviews the pertinent documents in chambers and discloses only that information falling within the statutorily defined standards of relevance. [Citation.]" (*Warrick*, *supra*, 35 Cal.4th at p. 1019; see also *People v. Winbush* (2017) 2 Cal.5th 402, 424.) "The *Pitchess* discovery statutes … do not restrict the use of evidence obtained through such discovery to any particular proceeding." (*Galindo v. Superior Court*, *supra*, 50 Cal.4th at p. 11 [*Pitchess* discovery motion may be made before preliminary hearing, but magistrate has discretion to not continue the preliminary hearing over People's objection to litigate the motion].) Rulings on a *Pitchess* discovery motion are addressed to the sound discretion of the trial court. (*Pitchess*, *supra*, 11 Cal.3d at p. 535.)

2690.4-Discovery confined to officers involved 12/19

The California Supreme Court in *People v. Memro* (1985) 38 Cal.3d 658 authorized the discovery of police personnel records of officers not directly involved in relevant police misconduct when defendant alleges a pattern or policy of conduct and a link between the indirectly-involved officers and the directly-involved officers is established by a factual foundation. (*Id.* at p. 686, overruled on other grounds on *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)

The Legislature significantly limited *Memro* in 1986 by enacting Evidence Code section 1047. With some exceptions listed in subdivision (b), subdivision (a) of his section exempts from disclosure "[r]ecords of peace officers …, including supervisorial officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of arrest until the time of booking, or who were not present at the time the conduct at issues is alleged to have occurred within a jail facility … ." Hence, any citizen complaints or personnel records of officers

which were not directly involved in the defendant's arrest or booking are not discoverable. These restrictions apply regardless whether there was an arrest or booking. (*Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 400; distinguish *Alt v. Superior Court* (1999) 74 Cal.App.4th 950, 957 ["the discovery prohibition of section 1047 does not apply here because Alt is not requesting discovery based on his arrest or on any conduct between his arrest and booking"].)

The statutory *Pitchess* provisions, including the Evidence Code section 1047 limitations, apply even if the officer whose records are sought has retired. (*Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 57; *Davis v. City of Sacramento*, *supra*, 24 Cal.App.4th at p. 400.)

2690.5-Discovery confined to officer's conduct relevant to issue involved 5/10

A request for citizen complaints or police personnel files must focus on a specific form of conduct relevant to the case. Evidence of the alleged police misconduct must be relevant to a triable issue and be admissible or lead to other admissible evidence on that issue. (*People v. Memro* (1985) 38 Cal.3d 658, 682, overruled on other grounds on *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; see also, *People v. Worthy* (1980) 109 Cal.App.3d 514, 524.)

The California Supreme Court addressed this issue stating: "On its face, appellant's request for the identities of all complainants of excessive force was overly broad. Since appellant sought the information to bolster his claim of involuntariness in the interrogation setting, only complaints by persons who alleged coercive techniques in questioning were relevant." (*People v. Memro*, *supra*, 38 Cal.3d at p. 685; accord *People v. Jackson* (1996) 13 Cal.4th 1164, 1219-1221; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 825-827.)

2690.6-Officer's conclusions not discoverable 5/10

In *People v. Memro* (1985) 38 Cal.3d 658 the California Supreme Court noted that the scope of discovery of peace officer records has been narrowed by Evidence Code section 1045. Although such reports "were 'once generally permitted under established *Pitchess* principles,' their disclosure 'is now circumscribed under the statutory scheme.' " (*Id.* at p. 687, overruled on other grounds on *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) More specifically, Evidence Code section 1045, subdivision (b)(2), requires that the court "*shall exclude from disclosure* … the *conclusion of any officer investigating a complaint* filed pursuant to section 832.5 of the Penal Code." (Italics added.) The ban on disclosure of investigating officers' conclusions under section 1045, subdivision (b)(2), has also been applied and upheld by the appellate courts. (See *People v. Memro*, *supra*, 38 Cal.3d at p. 687; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53-55 [juvenile case]); see also *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1088-1089 [civil case].)

2690.7-Officer's psychological records are generally not provided 5/10

Access to psychological records intrudes on an officer's constitutional right to privacy. (*Arcelona v. Municipal Court* (1980) 113 Cal.App.3d 523, 532.) Furthermore, communications between a patient and psychotherapist are presumptively privileged. (Evid. Code, §§ 917, 1012, 1014.)

The psychotherapist-patient privilege permits a patient to refuse to disclose and to prevent another from disclosing a confidential communication between patient and psychotherapist. (Evid. Code, § 1014.) Confidential communications are defined in section 1012 to include "information obtained by an examination of the patient," which is disclosed to "no third persons other than those

who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the court of that relationship."

Records of psychiatric or psychotherapeutic treatment and results of psychological or psychiatric testing are directly covered by the above definition of privileged information and are therefore not discoverable. (Evid. Code, § 1044; *Arcelona v. Municipal Court*, *supra,* 113 Cal.App.3d at p. 532; *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 157-158.)

The only minor exception to this rule was carved out by the California Supreme Court in *People v. Memro* (1985) 38 Cal.3d 658, which held that psychological records are discoverable, but only when the officer places mental or emotional condition in issue or where there is information indicating the patient is a danger to self or others. (*Id.* at p. 687 & fn. 31, overruled on other grounds on *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) Only in that situation are statements of psychotherapists contained in the officer's personnel file discoverable.

2690.8-Citizen complaints over 5 years old generally not discoverable 6/20

In *People v. Memro* (1985) 38 Cal.3d 658 the California Supreme Court noted that the scope of discovery of peace officer records has been narrowed by Evidence Code section 1045. Although such reports "were 'once generally permitted under established *Pitchess* principles,' their disclosure 'is now circumscribed under the statutory scheme.' " (*Id.* at p. 687.) More specifically, Evidence Code section 1045, subdivision (b), requires that the court "*shall exclude from disclosure*":

> (1) Information consisting of complaints concerning *conduct occurring more than five years before* the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.
>
> …
>
> (3) Facts sought to be disclosed which are so remote as to make disclosure of little or no practical benefit.

(Italics added.)

In *City and County of San Francisco v. Superior Court* (1981) 125 Cal.App.3d 879 the appellate court upheld the five-year limitation upon the disclosure of information described in Evidence Code section 1045, subdivision (b)(1). The court held the limitation gives "effect to the public policy against use of stale and remote evidence of doubtful relevance, of claimed misconduct." (*Id.* at p. 883; see also *Riske v. Superior Court* (2016) 6 Cal.App.5th 647, 656; but see *Riske v. Superior Court* (2018) 22 Cal.App.5th 295, 308-309 [personnel records other than citizen complaints are not subject to five-year limitation].)

The five-year limitation is not an absolute bar, however. (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 13-16 (*Brandon*); *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 60.) But the standards for whether to conduct an in camera review for such older information, as well as to disclose it, changes dramatically from the *Pitchess* test to the more stringent *Brady* test. (*Brandon*, *supra*, 29 Cal.4th at p. 16, & fn. 3 [limited to documents containing information "whose use at trial could be dispositive on either guilt or punishment"].)

> In [*Brandon*], the California Supreme Court clarified the distinctions between, and interplay of, *Brady* and *Pitchess*. The court noted that *Pitchess* "creates both a broader and lower threshold for disclosure than does the high court's decision in *Brady* [*v. Maryland*

(1963)] 373 U.S. 83. Unlike *Brady*, California's *Pitchess* discovery scheme entitles a defendant to information that will 'facilitate the ascertainment of the facts' at trial [citation], that is, 'all information pertinent to the defense' [citation]." (*Brandon*, at p. 14.) "Unlike the high court's constitutional materiality standard in *Brady*, which tests whether evidence is material to the fairness of trial, a defendant seeking *Pitchess* disclosure must, under statutory law, make a threshold showing of 'materiality.' (§ 1043, subd. (b).) Under *Pitchess*, a defendant need only show that the information sought is material 'to the subject matter involved in the pending litigation.' (§ 1043, subd. (b)(3).) Because *Brady*'s constitutional materiality standard is narrower than the *Pitchess* requirements, any citizen complaint that meets *Brady*'s test of materiality necessarily meets the relevance standard for disclosure under Pitchess. (§ 1045, subd. (b).)" (*Brandon*, at p. 10.) The court held that the five-year time limit set forth in section 1045, subdivision (b)(1) did not operate to bar disclosure under *Brady*: the *Pitchess* process " 'operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information.' " (*Brandon*, at p. 14.) Thus, if materiality under the more stringent *Brady* standard is shown, the statutory restrictions pertaining to the *Pitchess* procedure are inapplicable (*Brandon*, at p. 14); but if the defendant only shows materiality under the less stringent *Pitchess* standard, the statutory limitations apply (*Brandon*, at pp. 14, 16).

(*Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1064-1065.)

Finally, the five-year limitation period of Evidence Code section 1045, subdivision (b)(1), does not bar discovery of citizen complaints made after the event at issue. (*Blumberg v. Superior Court* (2011) 197 Cal.App.4th 1245.)

2690.9-*Pitchess* procedure satisfies *Brady* due process 1/18

In *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Id*. at p. 87.) But *Brady* and its progeny do not require the prosecutor to personally review the employment files of police officer witnesses for any exculpatory or impeaching material. California's statutory *Pitchess* discovery scheme is more than adequate to safeguard the defendant's right to due process under *Brady*. (See, generally, *Serrano v. Superior Ct.* (2017) 16 Cal.App.5th 759, 768.)

Law enforcement employment and personnel files are not part of the investigative material in the underlying criminal proceeding. Rather, they are confidential administrative files. *Brady* discovery is a component of due process. Due process in this context is a question of balancing the officer's right to privacy in the personnel file against the defendant's right to a fair trial. California has chosen to develop a statutory system for resolving these issues, and any rational review of that system supports a finding of adequate due process. (Pen. Code, § 832.7; Evid. Code, §§ 1043-1047.) The California Supreme Court has noted of the "*Pitchess*" motion: "This procedural mechanism for criminal defense discovery, which must be viewed against the larger background of the prosecution's constitutional obligation to disclose to a defendant material exculpatory evidence so as not to infringe the defendant's right to a fair trial [citations], is now an established part of criminal procedure in this state. [Citations.]." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225-1226.)

In *Garden Grove Police Department v. Superior Court* (2001) 89 Cal.App.4th 430, the defendant obtained a discovery order for *Pitchess* material under Penal Code section 1054.1 and the federal due process clause. The Court of Appeal commanded the order be vacated, holding a defendant cannot make that sort of end run on established *Pitchess* procedure. "[The defendant's] motion circumvented the *Pitchess* process by requesting the officers' criminal records from the district attorney and not from the police department. We cannot allow [the defendant] to make an end run on the *Pitchess* process by requesting the officers' personnel records under the guise of a Penal Code section 1054.1 and *Brady* discovery motion." (*Id.* at pp. 434-435, fns. omitted.)

In *People v. Gutierrez* (2003) 112 Cal.App.4th 1463 the appellate court rejected defendant's argument that statutory *Pitchess* procedures conflict with *Brady*. "In other words, the statutory *Pitchess* procedures implement *Brady* rather than undercut it, because a defendant who cannot meet the less stringent *Pitchess* standard cannot establish *Brady* materiality." (*Id.* at p. 1474.) Therefore, prosecutors are not obligated under *Brady* to conduct a review of the files of all significant police officer witnesses and disclose any *Brady* material. (*Id*. at pp. 1474-1475.) The court reasoned that because the *Pitchess* procedure is the only avenue by which citizen complaints may be discovered, and since the prosecutor does not generally have the right to possess and does not have access to confidential peace officer files, there is no obligation for routine review of the complete files of all police officer witnesses in a criminal proceeding. (*Id*. at p. 1475.)

2690.10-Only names and addresses of complainants to be released 5/14

If the defense makes an adequate showing of good cause for disclosure of citizen complaints, the court must then conduct an in camera review of the records produced by their custodian to determine their relevance to the pending litigation pursuant to Evidence Code sections 915 and 1045(b). As succinctly stated in *People v. Jackson* (1996) 13 Cal.4th 1164:

> Evidence Code sections 1043 through 1045 codify *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 … . "The statutory scheme carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to the defense." [Citation.] The legislation achieves this balance primarily through a procedure of in camera review, set forth in section 1045, subdivision (b), whereby the trial court can determine whether a police officer's personnel files contain any material relevant to the defense, with only a minimal breach in the confidentiality of that file.

(*Id*. at p. 1220.)

Even if relevant material is discovered during the in camera hearing, the defense should first be given only the names and addresses of complainants rather than the documents in the files. In *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823 (*Kevin L.*) the appellate court explained:

> Petitioner has demonstrated the necessity for discovering the names, addresses and telephone numbers of citizens who have lodged complaints of excessive force …but has made no showing that this information will be inadequate to enable him to prepare his case. As presented his motion was, therefore, too broad. If, for one reason or another, it does prove inadequate, petitioner may move for further discovery.

(*Id*. at pp. 828-829.)

This same procedure has been found appropriate after adoption of Evidence Code section 1043 et seq. Thus, in *Carruthers v. Municipal Court* (1980) 110 Cal.App.3d 439, the appellate court upheld the lower court's ruling that the defendant was entitled to only the names and addresses of persons who had complained of officer misconduct on an initial discovery motion, adopting the limited discovery rule of the *Kelvin L.* case. (*Id*. at p. 442.) And the California Supreme Court noted in *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, that "the courts have generally refused to disclose verbatim reports or records of any kind from peace officer personnel files, ordering instead … that the agency reveal only the name, address and phone number of any prior complainants and witnesses and the dates of the incidents in question." (*Id*. at p. 84; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1285-1286.) "When the trial court, in exercising its discretion, grants a defendant's *Pitchess* motion, it orders disclosure of the names, addresses, and telephone numbers of individuals who have in the past witnessed alleged officer misconduct or who have complained of misconduct by the officer named in the motion." (*Galindo v. Superior Court* (2010) 50 Cal.4th 1, 5.)

But this general limitation on *Pitchess* discovery yields when it does not provide the defense with sufficient information to prepare for trial. "On those occasions when that information proves insufficient, either because a witness does not remember the earlier events or the witness cannot be located, a supplemental *Pitchess* motion may be filed and the statements of the witnesses may be disclosed to the defendant." (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 757.) For example, in *People v. Matos* (1979) 92 Cal.App.3d 862, the appellate court ordered copies of complaints disclosed, but only after the release of names proved inadequate because the complainants had "only a vague recollection of the events." And in *Alvarez v. Superior Court* (2004) 117 Cal.App.4th 1107 the complainant's refusal to discuss with the defense an incident of alleged workplace violence by the officer justified disclosure of the complainant's statement in a supplemental discovery motion.

The prosecutor is not automatically entitled to share in defense-initiated *Pitchess* discovery. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1046 & fn. 6.)

2690.11-Protective order required if police personnel records disclosed 5/10

Whenever "*Pitchess*" discovery is order, the trial court must issue a protective order. Pursuant to Evidence Code section 1045, subdivision (e), the court shall, where permitting disclosure pursuant to Evidence Code section 1043, order that the information disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law. (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 52-53.) This provision means that the information may not be used outside the proceeding in which discovery was ordered. And the information cannot be shared with other defendants, even when they are represented by the same attorney or group of attorneys. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1040-1043.)

Evidence Code section 1045, subdivision (e), recognizes that the disclosure of confidential information from police personnel records intrudes upon peace officers' fundamental right of privacy. Thus the court should temper disclosure of information from police personnel records with a strict protective order protecting the officer whose records are disclosed or the agency from unnecessary annoyance, embarrassment or oppression under Evidence Code section 1045, subdivision (d). (*City of San Jose v. Superior Court*, *supra*, 5 Cal.4th at pp. 52-53.)

2690.12-Court must preserve record of in camera hearing 7/13

The California Supreme Court has emphasized the importance of the trial court providing the appellate court with an adequate record of the files or documents examined in camera during a *Pitchess* motion. (*People v. Mooc* (2001) 26 Cal.4th 1216.) This has two aspects. First, the court recognized that the custodian is obligated to produce only those items in the officer's file which are potentially responsive to the defendant's specific request for discovery. Doubtfully relevant items should be produced. Thus, the custodian should describe on the record of the reported in camera hearing any items in the personnel file that were not produced for judicial review, and explain why. Second, the trial court should make a record of the documents examined in camera before ruling on the *Pitchess* motion. The court can accomplish this by describing the documents on the oral record, preparing a list or index of the documents, or photocopying them. The court must examine the records produced rather than defer to the custodian of records as to the relevancy of their content. (*Sisson v. Superior Court* (2013) 216 Cal.App.4th 24, 38-39.) The transcript of the in camera hearing and all copies of the documents should then be sealed. (*People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228-1230; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1284-1286.) Failure to make a proper record can result in a conditional reversal and remand from the appellate court. (See, e.g., *People v. Guevara* (2007) 148 Cal.App.4th 62.) Similarly, failure to swear the custodian of records during the in camera hearing can result in a conditional reversal and remand on appeal. (See, e.g., *People v. White* (2011) 191 Cal.App.4th 1335.) Finally, as the sealed transcripts and records from a *Pitchess* motion are not part of the normal record on appeal, appellate counsel should take the necessary steps to ensure these materials are transmitted to the appellate court. (*People v. Rodriguez* (2011) 193 Cal.App.4th 360, 366.)

2700.1-Reciprocal discovery is constitutional 1/10

In June 1990 the voters passed Proposition 115 amending the California Constitution to read in pertinent part: "In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process." (Cal. Const., Art. I, § 30, subd. (c).) To implement the constitutional reciprocal discovery provision, the initiative added a new chapter to the Penal Code at section 1054 et seq., which included defense mandated discovery obligations (Pen. Code § 1054.3.)

The benefit of such a statute to the fair and orderly conduct of a criminal trial was discussed in *Taylor v. Illinois* (1988) 484 U.S. 400: "Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. The 'State's interest in protecting itself against an eleventh hour defense' is merely one component of the broader public interest in a full and truthful disclosure of critical facts." (*Id.* at pp. 411-412; similarly, see *In re Littlefield* (1993) 5 Cal.4th 122, 130-131; *People v. Jackson* (1993) 15 Cal.App.4th 1197, 1201.)

In *Izazaga v. Superior Court* (1991) 54 Cal.3d 356 (*Izazaga*), the California Supreme Court upheld the prosecution discovery provisions of Proposition 115 against all major defense challenges. The court held that pretrial prosecutorial discovery of defense witness names and addresses does not violate the right against self-incrimination. This information is not personal to the defendant and does not come within the protection of the Fifth Amendment. (*Id.* at pp. 365-367, 369-372.) Penal Code section 1054.3 requires the defendant to disclose only that which he or she intends to offer at trial. Accelerated disclosure of such material does not violate the Fifth Amendment self-

incrimination privilege. (*Williams v. Florida* (1970) 399 U.S. 78, 85.) Disclosure of statements or reports summarizing statements of defense witnesses also does not violate the defendant's Fifth Amendment rights. (*United States v. Nobles* (1975) 422 U.S. 225, 234; *Izazaga*, *supra*, at pp. 367-369.)

Nor does prosecutorial discovery violate the Sixth Amendment right to counsel. (*United States v. Nobles*, *supra*, 422 U.S. at p. 241; *Izazaga*, *supra*, 54 Cal.3d at pp. 379-380.) And, Penal Code section 1054.3 does not violate a defendant's Sixth Amendment due process rights because there are reciprocal discovery requirements imposed on the prosecution which are far more extensive than those imposed on the defendant. (*Izazaga*, *supra*, at pp. 372-378.)

2700.2-Defense discovery obligations are broad 5/19

Penal Code section 1054.3 requires the defense to disclose:

> (a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.
>
> (b) Any real evidence which the defendant intends to offer in evidence at the trial.

But "unless a claimed item of discovery falls within the express terms of section 1054.3, 'there is no statutory or constitutional duty on the part of the defendant to disclose anything to the prosecution.' [Citation.]" (*People v. Landers* (2019) 31 Cal.App.5th 288, 308.)

Penal Code section 1054.3 requires disclosure of witnesses and evidence the defendant intends to call or offer at trial. "For both the defense (§ 1054.3, subd. (a)(1)) and the prosecution (§ 1054.1, subd. (a)), …, ' "inten[t] to call" ' means that ' "all witnesses [a party] reasonably anticipates it is likely to call" ' must be disclosed." (*People v. Landers*, *supra*, 31 Cal.App.5th at p. 308, citing *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375-376 and fn. 11 (*Izazaga*). This means that the defense must disclose all discoverable material they can "reasonably anticipate" they are "likely" to at any stage of the trial, including in rebuttal. (*Izazaga*, *supra*, 54 Cal.3d at p. 375.) "Trial" in the context of defendant's obligation to disclose before trial, includes the penalty phase of a capital case in the absence of a showing justifying deferral. (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229; *People v. Superior Court (Sturm)* (1992) 9 Cal.App.4th 172.)

> [S]ection 1054.3 … reasonably should be construed to require the defense to provide the prosecution with the names and addresses of prospective defense witnesses to the extent this information is known to, or reasonably accessible to, the defense. Allowing the defense to refrain deliberately from learning the address or whereabouts of a prospective witness, and thus to furnish to the prosecution nothing more than the name of such a witness, would defeat the objectives of the voters who enacted section 1054.3.

(*In re Littlefield* (1993) 5 Cal.4th 122, 131.)

Similarly, the defense cannot avoid its obligation to disclose statements of those witnesses to a defense investigator or defense counsel by simply not writing them down or otherwise recording them. (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 165.) The objective of promoting the ascertainment of truth in trials "is achieved only if section 1054.3 is interpreted to require not only the disclosure of relevant written and recorded statements of intended witnesses, other than the

defendant, but also the disclosure of relevant oral statements communicated directly to counsel by such a witness or communicated to counsel via an investigator or some other third party." (*Id.* at p. 167; see also *People v. Lamb* (2005) 136 Cal.App.4th 575, 580.)

2700.3-Order to provide blood, hair or saliva violates no privilege 8/07

"The privilege against self-incrimination applies to evidence of 'communications or testimony' of the accused, but not to 'real or physical' evidence derived from him." (*People v. Ellis* (1966) 65 Cal.2d 529, 533; and see *Schmerber v. California* (1966) 384 U.S. 757, 764.) Fourth Amendment standards of reasonableness may be applicable, however, to intrusions which are not justified under the circumstances, or are carried out in an improper manner. (*Id.* at p. 768; see also, *People v. Scott* (1978) 21 Cal.3d 284.) "A crucial factor in analyzing the magnitude of the intrusion in *Schmerber* is the extent to which the procedure may threaten the safety or health of the individual." (*Winston v. Lee* (1985) 470 U.S. 753, 761.)

The courts have long approved a number of minimal "intrusions" under these standards. Thus, drawing a blood sample from an accused violates no constitutional privilege. (*Schmerber v. California*, *supra*; *People v. Thomas* (1986) 180 Cal.App.3d 47, 52.) Taking hair samples from an accused's head or body has been upheld as a minor intrusion to privacy. (*People v. Thomas*, *supra*; *People v. Allen* (1974) 41 Cal.App.3d 196, 202.) Similarly, orders to retrieve saliva samples have been upheld. (*People v. Thomas*, *supra*.)

A court may properly order an accused to provide such samples. (See, e.g., *People v. Thomas*, *supra*, 180 Cal.App.3d 47.) The accused's refusal to comply with such an order may properly be introduced into evidence and commented upon as evidencing a consciousness of guilt. (*People v. Farnum* (2002) 28 Cal.4th 107, 153.)

2700.4-Order to provide handwriting exemplar violates no privilege 8/07

"The privilege against self-incrimination applies to evidence of 'communications or testimony' of the accused, but not to 'real or physical' evidence derived from him." (*People v. Ellis* (1966) 65 Cal.2d 529, 533; and see *Schmerber v. California* (1966) 384 U.S. 757, 764-765.) Hence, requiring a defendant to provide a handwriting exemplar does not violate the privilege. Handwriting is a non-testimonial, identifying physical characteristic outside the ambit of the Fifth Amendment. (*Gilbert v. California* (1967) 388 U.S. 263, 266-267.)

It is likewise settled that taking a handwriting exemplar does not violate any Fourth Amendment interest. "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice." (*United States v. Mara* (1973) 410 U.S. 19, 21.) Thus, a court order requiring a person to furnish a handwriting specimen is proper and violates neither the person's Fourth nor Fifth Amendment rights. (*Ibid.*; *United States v. Euge* (1980) 444 U.S. 707, 718; *People v. Paine* (1973) 33 Cal.App.3d 1048.)

An accused has no right to refuse to comply with such an order or to alter or disguise exemplar handwriting. Such conduct may properly be introduced into evidence and commented upon as an admission by conduct or as evidence of consciousness of guilt. (*People v. Farnum* (2002) 28 Cal.4th 107, 153; *People v. Clark* (1993) 5 Cal.4th 950, 1003; *People v. Tai* (1995) 37 Cal.App.4th 990, 996-998.)

2700.5-Order for fingerprinting violates no privilege 10/10

A court order compelling a criminal defendant to provide the prosecution with fingerprint or palm print samples does not infringe the privilege against self-incrimination. (*People v. Collie* (1981) 30 Cal.3d 43, 55, fn. 7; *People v. Williams* (1969) 71 Cal.2d 614, 625.) Fingerprinting does not involve a bodily intrusion and does not offend due process. (Cf. *Rochin v. California* (1952) 342 U.S. 165; *People v. Scott* (1978) 21 Cal.3d 284.)

In *Virgle v. Superior Court* (2002) 100 Cal.App.4th 572, the appellate court held:

> A defendant who is detained pursuant to a lawful arrest may be ordered to provide a fingerprint exemplar. There is no requirement for a separate probable cause determination before such an order may be made. [¶] The magistrate compelled petitioner Anthony Glenn Virgle to provide a fingerprint exemplar during his preliminary hearing. Identity was a key issue and, without the exemplar, the prosecution was unable to lay an adequate foundation to show that the Anthony Glenn Virgle, whose prints were displayed on a "known print card" and whose prints matched the latent print left at the scene of the crime, was the same person as the Anthony Glenn Virgle who was present in court.

(*Id*. at pp. 573-574.)

It is only if the defendant's detention or arrest was illegal that a judge must make an independent finding of probable cause to order the taking of fingerprints. (*People v. Rosales* (1984) 153 Cal.App.3d 353, 365-366; see also *Fogg v. Superior Court* (1971) 21 Cal.App.3d 1, 7-8 [despite illegal arrest, defendant was legally in custody on another conviction]; *People v. Solomon* (1969) 1 Cal.App.3d 907, 910 [despite illegal arrest, defendant had been bound over for trial before he was fingerprinted].)

The defendant has no right to refuse to obey such a lawful court order. Refusal to comply may properly be introduced into evidence and commented upon as an admission by conduct. (*People v. Farnum* (2002) 28 Cal.4th 107, 153; *People v. Sudduth* (1966) 65 Cal.2d 543, 546-547; *People v. Ellis* (1966) 65 Cal.2d 529, 536-538; see also *People v. Smith* (1970) 13 Cal.App.3d 897, 910.)

2700.6-Orders to speak, wear clothing or expose body for identification proper 12/14

"The privilege against self-incrimination applies to evidence of 'communications or testimony' of the accused, but not to 'real or physical' evidence derived from him." (*People v. Ellis* (1966) 65 Cal.2d 529, 533; see also *Schmerber v. California* (1966) 384 U.S. 757, 764 (*Schmerber*).) The law was well summarized in *Schmerber*: "[B]oth federal and state courts have usually held that [the privilege against self-incrimination] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." (*Schmerber*, *supra*, 384 U.S. at p. 764.)

Under this doctrine, the courts have long upheld orders requiring defendants to exhibit certain physical characteristics they possess. For example, defendants may be required to exhibit areas of the body to jurors or expert witnesses when appearance is relevant. (*People v. Traylor* (1972) 23 Cal.App.3d 323, 332-333; *People v. Smith* (1956) 142 Cal.App.2d 287, 293-294.)

Similarly, defendants can be ordered to speak for purposes of in-court identification by a witness. Orders to speak do not violate defendants' rights against self-incrimination or privacy since

their voices are "constantly exposed to public observation and [are] merely another identifying physical characteristic." (*People v. Ellis*, *supra*, at pp. 534-535; similarly see *People v. Sims* (1976) 64 Cal.App.3d 544, 552.)

Defendants may also be ordered to participate in demonstrations before the jury relevant to identification. They can be compelled to wear clothing similar to that of the perpetrator, or to hold weapons in the manner of the perpetrator. (*People v. Holt* (1972) 28 Cal.App.3d 343, 351 [disapproved on other grounds in *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625, fn. 6]; *People v. Turner* (1971) 22 Cal.App.3d 174, 180-182.) They may be required to shave off beards grown while awaiting trial. (*People v. Carpenter* (1997) 15 Cal.4th 312, 372-373.)

Defendants have no right to refuse to comply with such orders. Their refusal to comply may properly be introduced into evidence and commented upon as an admission by conduct. (*People v. Alexander* (2010) 49 Cal.4th 846, 905-906; *People v. Farnum* (2002) 28 Cal.4th 107, 153; *People v. Sudduth* (1966) 65 Cal.2d 543, 546-547; *People v. Ellis*, *supra*, 65 Cal.2d at pp. 536-538; see also *People v. Huston* (1989) 210 Cal.App.3d 192, 216-217; *People v. Smith* (1970) 13 Cal.App.3d 897, 910; similarly, see *People v. Peyton* (2014) 229 Cal.App.4th 1063, 1077-1078 [defendant's attempts to avoid being photographed for comparison to crime photos proper basis for consciousness of guilt jury instruction].)

2700.7-Order to submit to mental health examination (*Danis*/PC1054.3(b)) 6/20

The appellate court in *People v. Danis* (1973) 31 Cal.App.3d 782 (*Danis*) held the trial court had the inherent power to order a defendant who proffered a defense of insanity or of diminished capacity to submit to an examination of a mental health expert selected by the People. (*Id*. at p. 786.) Years later the California Supreme Court overturned this aspect of *Danis*, finding that the power to order this form of discovery must be granted by statute. (*Verdin v. Superior Court* (2008) 43 Cal.4th 1096 (*Verdin*).) The Legislature immediately responded to *Verdin* in 2009, by enacting Penal Code section 1054.3, subdivision (b). (See Pen. Code, § 1054.3, subd. (b)(2) [statement of legislative intent].) Penal Code section 1054.3, subdivision (b) applies "at any phase of the criminal action" in which the defense proposes to call its own mental health expert, including the sanity phase. (*Sharp v. Superior Court* (2012) 54 Cal.4th 168.) Similarly, "[w]hen a minor in a juvenile proceeding places his mental state in issue, the prosecution may obtain a court order that the defendant submit to examination by a prosecution-retained mental health expert. (§ 1054.3, subd. (b)(1); *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1119)." (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 536.) Subdivision (b)(1)(B) of section 1054.3 tracks existing case authority holding that the "examinations are permissible only to the extent they are reasonably related to the determination of the existence of the mental condition raised. (*People v. Carpenter* [(1997)] 15 Cal.4th [312] at p. 412.)" (*Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 45 [permitting testing regarding defendant's claim of mental retardation under Pen. Code, § 1376].)

> We do not suggest that the defense may dictate the tests that the prosecution may administer. Reasonable experts may differ. If the appropriateness of a proposed test is supported by the evidence, in that the proposed prosecution test is reasonably related to measuring the legitimacy of a defendant's mental retardation claim, that test may be permitted.

(*Id*. at p. 46.)

The provisions of Penal Code section 1054.3, subdivision (b), do not violate the defendant's constitutional rights. A defendant who tenders his or her mental condition as an issue waives his or her Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel to the extent necessary to permit a proper examination of that condition. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 412; *Danis*, *supra*, 31 Cal.App.3d at p. 786.) Any other result would "give an unfair tactical advantage to defendants." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1190.)

> [S]ince the defense did present expert testimony based on interviews with defendant, the court properly found that fairness required giving the prosecution the opportunity to counter that testimony. It is settled that a defendant who makes an affirmative showing of his or her mental condition by way of expert testimony waives his or her Fifth and Sixth Amendment rights to object to examination by a prosecution expert.

(*People v. Gonzales* (2011) 51 Cal.4th 894, 928-929; see also *Buchanan v. Kentucky* (1987) 483 U.S. 402, 422; *Estelle v. Smith* (1981) 451 U.S. 454, 465.)

Finally, "the Fifth Amendment protects … against any direct or derivative use of [a defendant's] statements to the prosecution examiners, except to rebut any mental-state evidence he presents through his own experts. That is all it does." (*Maldonado v. Superior Court*, *supra*, 53 Cal.4th at p. 1129.) "There is no constitution requirement that the prosecution be excluded from observing the examinations in real time, or barring the prosecution from all access to the examiners, or to the reports, notes, and recordings of the examinations, until the defendant has actually presented the mental defense evidence at trial. (*Id*. at pp. 1136-1138.) Nor should the trial court undertake pretrial examination of this material in camera to litigate defense claims of privilege before the prosecution is allowed to receive the material. (*Id*. at pp. 1136-1141.) "Generally, therefore, the proper balance between the competing interests is best maintained by resolving Fifth Amendment privilege issues arising from section 1054.3(b)(1) mental examinations after the prosecution has obtained unredacted access to the examination materials." (*Id*. at p. 1137.)

2700.8-Defense must disclose expert witness' reports, notes and test results 8/20

Penal Code section 1054.3, subdivision (a)(1), requires the defense to disclose to the prosecution, among other matters, "[t]he names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations … which the defendant intends to offer in evidence at the trial." "This provision includes the raw results of standardized psychological and intelligence tests administered by a defense expert upon which the expert intends to rely. (*Woods v. Superior Court* (1994) 25 Cal.App.4th 178, 184-185.)" (*People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1233; see also *Hines v. Superior Court* (1993) 20 Cal.App.4th 1818, 1822-1823; compare *People v. Smith* (2007) 40 Cal.4th 483, 507-511 [materials relied upon by defense expert at trial required to be disclosed under Evid. Code, §§, 721, subd. (a)(3), 771, subd. (a)].) Particularly when an expert has not prepared a formal report, handwritten notes and psychological tests administered to the defendant constitute a "report" for purposes of the statute. (*People v. Hajek & Vo*, *supra*, 58 Cal.4th at p. 1233; see also *People v. Lamb* (2006) 136 Cal.App.4th 575, 580 [defense experts notes were discoverable, notwithstanding defense's claim that the expert had not prepared a written report based on those notes]; accord *People v. Hughes* (2020) 50 Cal.App.5th 257, 278-280 [same rules apply to experts called by prosecution under Pen. Code, § 1054.1,

subd. (f)]; but see *Sandeffer v. Superior Court* (1993) 18 Cal.App.4th 672, 679 [defense not required to turn over drafts and random notes incorporated into expert's final report provided in discovery].) In some circumstances the defense can excise a defendant's statements regarding the crime from the discoverable material required to be turned over to the prosecution. (*Andrade v. Superior Court* (1996) 46 Cal.App.4th 1609, 1611-1614 [defendant's statements to defense expert regarding crime protected by attorney-client privilege]; *Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1269 [same].)

2700.9-Order to produce nontestimonial evidence (i.e., business records) is proper 10/11

Penal Code section 1054.4 states that nothing in the criminal discovery chapter (Pen. Code § 1054 et seq.) "shall be construed as limiting any law enforcement or prosecuting attorney from obtaining nontestimonial evidence to the extent permitted by law on the effective date of this section." It is the element of compulsion which distinguishes "testimonial" from "nontestimonial" evidence under section 1054.4. (*People v. Appellate Division (World Wide Rush, Inc.)* (2011) 197 Cal.App.4th 985, 991 (*World Wide Rush*); *People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1027 (*Sanchez*).) Section 1054.4 is not limited to forensic evidence, such as fingerprints and blood samples. (*World Wide Rush*, *supra*, 197 Cal.App.4th at pp. 992-993.) It also encompasses voluntarily created writings or corporate records, such as those created in the normal course of business, do not involve compelled testimony and, thus, fall within the category of nontestimonial evidence discoverable under section 1054.4. (*Id*. at p. 991; *Sanchez*, *supra*, 24 Cal.App.4th at p. 1028; see also *People v. Superior Court (Keuffel & Esser Co.)* (1986) 181 Cal.App.3d 785, 788 [same holding prior to the effective date of section 1054.4].)

2740.1-Only rap sheets of key witnesses are discoverable 1/10

The defendant is not entitled to prior criminal histories of all witnesses. Penal Code section 1054.1 requires that the prosecutor disclose to the defendant "[t]he existence of a felony conviction of any material witness *whose credibility is likely to be critical to the outcome of the trial*." (Italics added.) This statute codified part of the holding in *Hill v. Superior Court* (1974) 10 Cal.3d 812, in which the court held the prosecutor may be ordered to produce criminal histories for only those key witnesses whose testimony would be disputed. (*Id.* at p. 820.) The statute goes further, however, by limiting the prosecutor's disclosure obligation to evidence of felony convictions. The rap sheets themselves, which might contain many other matters, need not be disclosed. (*People v. Roberts* (1992) 2 Cal.4th 271, 308; *People v. Santos* (1995) 30 Cal.App.4th 169, 176-177.) This disclosure obligation includes a duty to inquire about the existence of felony convictions in "reasonably accessible" locations. (*People v. Little* (1997) 59 Cal.App.4th 426, 431-434.)

2750.1-Dismissal or suppression not proper remedy for late prosecution discovery 8/20

The appropriate remedy for the prosecution's failure to disclose evidence until the midst of trial, even where such evidence should have been earlier provided pursuant to a discovery order, is to give the defendant a continuance as necessary to meet the evidence. Suppression is *not* the answer. (*People v. Robbins* (1988) 45 Cal.3d 867, 883-884, superseded by statute on other grounds as recognized in *People v. Jennings* (1991) 53 Cal.3d 334, 387, fn. 13; *People v. Reyes* (1974) 12 Cal.3d 486, 501-502; *People v. McRae* (1967) 256 Cal.App.2d 95, 102-105.) "As we have stated, '[i]t is defendant's burden to show that the failure to timely comply with any discovery order is

prejudicial, and that a continuance would not have cured the harm.' (*People v. Pinholster* (1992) 1 Cal.4th 865, 941.)" (*People v. Jenkins* (2000) 22 Cal.4th 900, 950; see also *People v. Mora & Rangel* (2018) 5 Cal.5th 442, 468-470 [trial court properly denied dismissal and mistrial motions despite late discovery].)

Penal Code section 1054.5, enacted as a part of Proposition 115, follows the same philosophy.

> The trial court has broad discretion to fashion a remedy in the event of a discovery abuse to ensure that the defendant receives a fair trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 951.) The trial court may enforce the discovery statutes by ordering "immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." (§ 1054.5(b).) If these sanctions have been exhausted, the trial court may also prohibit the testimony of a witness. (§ 1054.5, subd. (c).) Finally, if required to do so by the Constitution of the United States, the trial court can dismiss a charge. (§ 1054.5, subd. (c).)

(*People v. Bowles* (2011) 198 Cal.App.4th 318, 325-326; but see *People v. Hughes* (2020) 50 Cal.App.5th 257, 283-285 [reversible error to allow prosecution to present testimony based on previously undisclosed expert notes and opinions rather than declare mistrial].) Dismissal of all or part of the case should never be ordered unless required by the United States Constitution. (Pen. Code, § 1054, subd. (b); *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 49-50; *People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1212.) Nor can section 1054.5 sanctions be imposed posttrial. (*People v. Bowles*, *supra*, 198 Cal.App.4th at p. 327.)

> Simply put, the purposes of the discovery statutes cannot be furthered where, as here, a jury has already rendered its verdict on the substantive charges against the defendant and the trial court has decided the remaining prior conviction allegations. Rather, in this situation any violation of a defendant's pretrial right to discovery is appropriately addressed by available posttrial remedies such as an appeal from the judgment [Citation], a motion for new trial [Citation], or a petition for habeas corpus [Citation].

(*Ibid*.)

2750.2-Defendant's failure to disclose evidence requires sanctions 5/19

A failure by either party to provide the disclosures required by the statute permits appropriate court action, which may range from an order enforcing the statute to one prohibiting related evidence or testimony. (Pen. Code, § 1054.5, subds. (b) and (c); see *People v. Gana* (2015) 236 Cal.App.4th 598, 612 [trial court's order prohibiting defense witness from testifying as sanction for late discovery upheld because testimony not relevant].) An informal request for discovery is all that is required to impose sanctions for a defendant's failure to comply with the statute. (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1202.) In *Taylor v. Illinois* (1988) 484 U.S. 400, the United States Supreme Court upheld the sanction of precluding the defense from calling a witness who was not named in the pretrial exchange of witnesses required by Illinois' pretrial discovery statute. Similarly, in *People v. Jackson*, *supra*, 15 Cal.App.4th 1197, the court found preclusion of a witness's exculpatory testimony an appropriate sanction for counsel's willful failure to disclose the witness to obtain a tactical advantage. (*Id*. at pp. 1203-1204; see also *People v. Lamb* (2005) 136 Cal.App.4th 575, 581-582 [defense precluded from recalling expert witness on surrebuttal.) And, in *People v. Hajek & Vo* (2014) 58 Cal.4th 1144, the California Supreme Court upheld the trial court's

order precluding a mental health expert from testifying because defendant's lawyer refused to disclose 20 pages of handwritten notes and the results of psychological tests performed by the expert to the prosecutor and co-defendant's counsel. (*Id*. at p. 1233.) Finally, in *In re Littlefield* (1993) 5 Cal.4th 122, the California Supreme Court held the defense counsel's refusal to obtain and provide the address of a witness the defense intended to call at trial constituted a punishable act of contempt. (*Id*. at pp. 136-137; but see *People v. Landers* (2019) 31 Cal.App.5th 288 [error to sanction attorney for not disclosing information on witness he did not intend to call but was called instead by counsel for a co-defendant].)

2750.3-No sanctions for late discovered witness 7/18

Penal Code section 1054.1, subdivision (a), requires, among other things, that the prosecuting attorney provide the defense with the "names and addresses of persons [he or she] intends to call as witnesses at trial." Similarly, Penal Code section 1054.3, subdivision (a)(1), requires the defense attorney to disclose to the prosecution the "names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial." Although neither statute expressly specify that rebuttal witnesses are included, the California Supreme Court held that "the only reasonable interpretation" of section 1054.1, subdivision (a), is that it "includes both witnesses in the prosecution's case-in-chief and rebuttal witnesses that the prosecution intends to call." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375.) The California Supreme Court also held the same interpretation applies to the defense under section 1054.3, subdivision (a)(1). (*Id*. at pp. 375-376.)

Thus no sanctions are appropriate if either party determines to call a new witness they did not intend to call previously. (*People v. Mireles* (2018) 21 Cal.App.5th 237, 248.)

> "A trial is not a scripted proceeding. ... [D]uring the trial process, things change and *the best laid strategies and expectations may quickly become inappropriate*: witnesses who have been interviewed vacillate or change their statements; *events that did not loom large prospectively may become a focal point in reality*. Thus, there must be some flexibility. After all, the ' "true purpose of a criminal trial" ' is ' "the ascertainment of the facts." ' [Citation.] *After hearing a witness, the necessity of a rebuttal witness may become more important*." (*People v. Hammond* (1994) 22 Cal.App.4th 1611, 1624, italic added.) The record below indicates that the state initially did not believe Roth was necessary for its prosecution of Mireles, then, as the trial unfolded, changed its mind about Roth, interviewed him, and immediately thereafter provided the interview notes to the defense. Such conduct did not violate either the letter or the spirit of section 1054.1.

(*People v. Mireles*, *supra*, 21 Cal.App.5th at pp. 248-249.)

2770.1-Prosecution discovery obligations are limited by statute 9/12

With the exception of evidence that tends to exculpate a defendant or reduce penalty, the Due Process clause of the Fourteenth Amendment imposes no burden of discovery upon the prosecution. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474.) Under the United States Constitution, there is no general constitutional right to discovery in a criminal case. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559.)

In California, prior to the passage of Proposition 115, discovery in criminal cases had developed through common law rather than constitutional interpretation or legislative enactment.

"Unlike the statutory development of civil discovery in California, the right of an accused to seek discovery in the course of preparing his defense to a criminal prosecution is a judicially created doctrine evolving in the absence of guiding legislation." (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535.)

With the adoption of Proposition 115, the Crime Victims Justice Reform Act, however, criminal discovery is now governed by constitutional and statutory enactment. Article I, section 30, subdivision (c), of the California Constitution provides: "In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process."

Proposition 115 also added a chapter to the Penal Code setting forth both substantive and procedural rules for discovery. One of the stated purposes of this chapter is, "[t]o provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (Pen. Code, § 1054, subd. (e).) Similarly, Penal Code section 1054.5, subdivision (a), states:

> No order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.

(See also, *In re Littlefield* (1993) 5 Cal.4th 122, 129 ["all court-ordered discovery is governed exclusively by—and is barred except as provided by—the discovery chapter newly enacted by Proposition 115"].) Hence, prior decisions of the California appellate courts no longer have force where inconsistent with the California Constitution and statutes regarding discovery in criminal cases.

2770.2-No discovery motion without informal request 8/09

The courts have long encouraged informal discovery procedure because "the use of more complex formal discovery procedures … would … 'place substantial additional burdens on our busy trial courts.' [Citation.]" (*People v. McManis* (1972) 26 Cal.App.3d 608, 618.) This policy of encouraging informal discovery is now one of the foundations of the statutory discovery provisions adopted by the voters in the Crime Victims Justice Reform Act [Proposition 115]. The codified discovery provisions were designed, in part, "[t]o save court time by requiring that discovery be conducted informally between and among the parties before judicial enforcement is requested." (Pen. Code, § 1054, subd. (b).)

This policy of encouraging informal discovery is implemented in section 1054.5. Subdivision (a) states: "No order requiring discovery shall be made in criminal cases except as provided in this chapter." And subdivision (b) states:

> Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with Section 1054.1 or 1054.3 [which define the discoverable material] and upon a showing that the moving party complied with the informal discovery

procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter … .

In San Diego County the procedure for implementing this provision is incorporated in the local rules of court.

> Discovery Motions: In accordance with Penal Code section 1054 et seq., discovery motions must include a declaration by counsel, under penalty of perjury, setting forth the previous oral and written efforts to obtain discovery by cooperative and informal means, and showing how the opposing party has failed to comply with Penal Code section 1054.1 or 1054.3. The motion must be limited to the disputed items, or class of items, listed in the declaration.

(San Diego County Superior Court Rules, Div. III, Rule 3.2.2.B.)

In the present case, the defense has failed to file an affidavit which makes the required showing. In view of this failure, it is clear the motion for discovery may not be heard.

2770.3-Prosecution need only supply discovery from the prosecution team 9/20

Penal Code section 1054.1 specifically defines the matters the district attorney must disclose to the defendant. The prosecutor's obligation extends under this statute only to information "in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies." (*Ibid*.)

> Section 1054 et seq. dictates "an almost exclusive procedure for discovery in criminal cases" in this state. [Citations.] It provides "the only means for [a] defendant to compel discovery 'from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.' " [Citation.] However, "[t]hese provisions do not regulate discovery from third parties," which must be sought by way of subpoena duces tecum. [Citations.]

(*People v. Superior Court (Dominguez)* (2018) 28 Cal.App.5th 223, 233.) Hence the prosecutor has no general obligation to seek out information from other agencies or sources for the benefit of the defense. (*In re Littlefield* (1993) 5 Cal.4th 122, 135; see, e.g., *Rezek v. Superior Court* (2012) 206 Cal.App.4th 633 [defense may use *Pitchess* procedure to obtain witness statements in police personnel files when prosecutor does not possess them].)

This limitation is certainly supported by the reasoning of cases which have addressed this issue before the adoption of Proposition 115:

> From an examination of the record of the hearing on the motion, it appears that the prosecution did not have such information; however, the defense in essence argued that it would be easier for the prosecution to obtain it and transfer it to the defense. Thus, had defendant's motion been granted, compliance would have required the prosecution to prepare the case for the defense. This is an obligation not imposed by the law.

(*People v. Gurtenstein* (1977) 69 Cal.App.3d 441, 449; similarly, see *People v. Cohen* (1970) 12 Cal.App.3d 298, 323.) The prosecutor has no duty to actively investigate the facts and circumstances of the case or gather all potential evidence for the benefit of the accused. (*People v. Perez* (1979) 24 Cal.3d 133, 145; *People v. Gurtenstein*, *supra*, 69 Cal.App.3d at p. 449.) Nor are the People required to make a complete and detailed accounting to the defense of all police

investigative work on a case. (*Moore v. Illinois* (1972) 408 U.S. 786, 795; *People v. Nation* (1980) 26 Cal.3d 169, 175.)

Finally, Penal Code section 1054.1 is consistent with the prosecution's constitutional duties under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). The prosecution is responsible only for that material in their possession or in the possession of the investigating agency. (*Kyles v. Whitley* (1995) 514 U.S. 419.) "There is no reason to assume the ... statutory phrase ["in the possession of the prosecuting attorney or ... investigating agencies" (§ 1054.1)] assigns the prosecutor a broader duty to discover and disclose evidence in the hands of other agencies than do *Brady* and its progeny." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1133-1134; see also *People v. Aguilera* (2020) 50 Cal.App.5th 894, 913-914.) The California Supreme Court has "recognized that ' "[I]nformation possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team' " with respect to the prosecution's duty to disclose exculpatory information under the federal constitution and state discovery rules. (*In re Steele* (2004) 32 Cal.4th 682, 697.)" (*People v. Ervine* (2009) 47 Cal.4th 745, 768; see e.g., *People v. Superior Court (Dominguez)*, *supra*, 28 Cal.App.5th at pp. 235-240 [company that supplied DNA testing equipment and software to police laboratory not part of prosecution team].) Similarly, there is no statutory or *Brady* obligation to obtain physical evidence from third parties, only a duty to make such available to the defense if it comes into the prosecutor's possession. (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 474.)

2770.4-Witness's address may be withheld for danger to safety 3/17

The discovery provisions of the Penal Code, as enacted as a part of Proposition 115, provide for discovery of "[t]he names and addresses of persons the prosecutor intends to call as witnesses at trial." (Pen. Code, § 1054.1, subd. (a).) This rule is subject to several limitations. First, defense counsel is specifically prohibited from providing victims' or witnesses' addresses or telephone numbers to his client, unless permitted by the court on good cause. (Pen. Code, § 1054.2.) Second, the home addresses of police officer witnesses are protected from disclosure. (See Pen. Code, §§ 146e, 1328.5.) Finally, Penal Code section 1054.7 permits the prosecutor to deny, restrict or defer disclosure upon a showing of good cause. " 'Good cause' is limited to *threats or possible danger to the safety of a victim or witness*, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (*Ibid.*, emphasis added.) Section 1054.7 further permitting the showing of good cause to be made in camera is constitutional. (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1134-1135.) "Orders under this section are subject to review for abuse of discretion." (*People v. Panah* (2005) 35 Cal.4th 395, 458; see also *People v. Thompson* (2016) 1 Cal.5th 1043, 1105 [defense counsel accepted compromise of witness being produced for interview in lieu of disclosure of address]; *People v. Williams* (2013) 58 Cal.4th 197, 262.)

The California Supreme Court in *Alvarado* upheld the trial court's refusal to require the prosecution to disclose the names of some of their witnesses in a capital case.

> In view of the circumstances of the offense a jailhouse murder with likely prison gang involvement and crucial prosecution witnesses who themselves were jailhouse inmates and thus particularly vulnerable to threats, coercion, or violent acts of other inmates, the trial court clearly had discretion to permit the prosecution to withhold pretrial disclosure of the witnesses' names and photographs. Particularly in a capital case, where pretrial preparation

> and investigation often extend over a considerable period of time, early disclosure of the identity of a vulnerable and threatened witness greatly may increase the danger of "the elimination of an adverse witness or the influencing of his testimony." [Citation.]

(*Alvarado v. Superior Court*, *supra*, 23 Cal.4th at p. 1136.)

In *People v. Panah*, *supra*, 35 Cal.4th 395, the prosecution requested that a witness's "out-of-state address not be disclosed to defendant based on allegations that he had conspired with others to kill her and another witness." (*Id*. at p. 457.) The trial court granted the prosecution's request. The California Supreme Court held "where there appears to have been a credible allegation of potential injury to the witness, we find no abuse of discretion." (*Id*. at p. 458; accord *People v. Williams*, *supra*, 58 Cal.4th at pp. 262-263.)

In *Montez v. Superior Court* (1992) 5 Cal.App.4th 763, the appellate court upheld the refusal to provide witnesses' addresses to the defense pursuant to section 1054.7. The court noted the witnesses were unconnected to the crime and there was no suggestion they had a criminal history. Each had expressed fear of the defendant, who was charged with robbery and murder. There was no issue of their reputation for veracity in their own neighborhoods, and the court concluded defendant was deprived of no constitutional rights. (*Id.* at pp. 768-772; accord *People v. Panah* (2005) 35 Cal.4th 395, 458.)

Withholding such information on evidence of substantial danger was generally permitted by case authorities even prior to the adoption of Proposition 115. (*Alvarado v. Superior Court*, *supra*, 23 Cal.4th at p. 1135; see also *People v. Castro* (1979) 99 Cal.App.3d 191; *People v. Benjamin* (1975) 52 Cal.App.3d 63; *People v. Patejdl* (1973) 35 Cal.App.3d 936.) Such orders generally do not implicate a defendant's constitutional confrontation or due process rights. (*People v. Thompson*, *supra*, 1 Cal.5th at p. 1105; *People v. Williams*, *supra*, 58 Cal.4th at pp. 263-266.)

2780.1-No need to record witness' oral statement for defendant's benefit 8/20

Subdivisions (f) of Penal Code section 1054.1 requires the prosecutor to disclose to the defendant the written or recorded statements or reports of the statements of witnesses who will be called at trial. This obligation includes disclose of relevant oral statements communicated to the prosecutor directly by the witness or indirectly through a third party. It does not include a duty, at the defendant's request, to prepare notes of conversations not presently reduced to writing. (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 165-167; *People v. Alexander* (1983) 140 Cal.App.3d 647, 659-660.) But any existing raw written notes of witness interviews are "statements" within the meaning of both subdivision (f) and section 1054.3, subdivision (a), and must be disclosed. (*Thompson v. Superior* Court (1997) 53 Cal.App.4th 480, 485 and fn. 3.) This includes raw notes of experts. (*People v. Hughes* (2020) 50 Cal.App.5th 257, 278-280.)

In contrast to witness statements, subdivision (b) requires disclosure of all the statements of all defendants. (*People v. Jackson* (2005) 129 Cal.App.4th 129, 168-172.) As to unrecorded statements of the defendant, however, the defense is only entitled to be notified of statements *known* to the prosecutor. (*People v. Campbell* (1972) 27 Cal.App.3d 849, 858.)

2780.2-Defendant not entitled to discover statements of all witnesses 11/18

"[T]he federal Constitution does not confer a general right to criminal discovery." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258.) Under the discovery rules enacted as a part of Proposition 115, the prosecutor is required to provide to the defendant only those statements of the defendants, witnesses whom the prosecutor intends to call at trial, or any exculpatory evidence. (Pen. Code, § 1054.1.) Even under prior law, the defendant was not entitled to statements of all witnesses. (*Joe Z. v. Superior Court* (1970) 3 Cal.3d 797, 806; *People v. Cooper* (1960) 53 Cal.2d 755, 770.) Of course, the prosecution has the duty to disclose those statements which are required to be disclosed as defined in *Brady v. Maryland* (1963) 373 U.S. 83. But, "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one. …" (*Weatherford v. Bursey* (1977) 429 U.S. 545, 559; see also *Gray v. Netherland* (1996) 518 U.S. 152, 168.)

For example, the prosecution is not required to supply the defense with a statement by a co-defendant which is inculpatory as to the defendant unless and until the co-defendant becomes a witness for the prosecution. (*People v. Anderson* (2018) 5 Cal.5th 372, 396.) Similarly, "no provision in the statutory scheme governing criminal discovery explicitly or even impliedly requires one codefendant to disclose any evidence to another codefendant." (*People v. Thompson* (2016) 1 Cal.5th 1043, 1094; see also *People v. Hunter* (2017) 15 Cal.App.5th 163, 175.)

2780.3-Discovery affecting third parties may violate privacy right 9/21

Requests for defense discovery involving the right of privacy of third parties run afoul of the protection of article I, section 1, of the California Constitution. While this provision does not prohibit all incursions into individual privacy, "any such intervention must be justified by a compelling interest." (*White v. Davis* (1975) 13 Cal.3d 757, 775; see also *People v. Wiener* (1994) 29 Cal.4th 1300, 1307.)

This provision was added to the constitution in 1972 by initiative. It was designed to protect individual privacy from snooping by the government as well as private parties, such as the defense. (*Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 15-20.) "Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone." (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829.) In view of their absence from the present proceeding, the court may, on its own motion, protect the absent holders of the privilege. (See, e.g., *Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 932-933.) And "it is well established that, under appropriate circumstances, a litigant 'may assert the privacy rights of third parties.' [Citation.]" (*County of Los Angeles v. Superior Court* (2021) 65 Cal.App.5th 621, 635.)

Several cases provide guidance in resolving the conflict between a defendant's right to a fair trial and the constitutionally protected rights of third parties. For example, appellate courts have found that witnesses have the same Fourth Amendment protections as defendants in criminal cases. (*People v. Browning* (1980) 108 Cal.App.3d 117, 124 [denying defense motion to have bullet surgically removed from victim]; see also *Bullen v. Superior Court* (1988) 204 Cal.App.3d 22 [denying defense motion to examine inside of victim's home].) In *Fults v. Superior Court* (1979) 88 Cal.App.3d 899, the appellate court noted that when the discovery sought intrudes upon constitutionally protected areas, it cannot be justified solely on the ground that it may lead to relevant information. The party seeking discovery must also show that the inquiry will likely be productive and that its parameters are carefully circumscribed. (*Id.* at pp. 904-905 [mandate issued limited questioning regarding witness' sexually activities in civil case].)

2790.1-PC1054.9 does not permit "free-floating" discovery 12/19

PENAL CODE SECTION 1054.9 IS NOT DESIGNED TO PROVIDE "FREE-FLOATING" POSTCONVICTION DISCOVERY.

On January 1, 2003, the Legislature added Penal Code section 1054.9, which as amended on January 1, 2019, reads, in pertinent part:

> (a) In any case in which a defendant is or has ever been convicted of a serious felony or a violent felony resulting in a sentence of 15 years or more, upon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment, or in preparation to file that writ or motion, and on a showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful, the court shall … order that the defendant be provided reasonable access to any of the materials described in subdivision (c). …
>
> (c) For purposes of this section, "discovery materials" means materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial. …

Section 1054.9 is only available to a narrow range of defendants and encompasses a limited amount of "discovery materials."

The California Supreme Court has interpreted and limited the scope of section 1054.9. In *In re Steele* (2004) 32 Cal.4th 682 the Court held that "section 1054.9 does provide only limited discovery." (*Id*. at p. 695.) "It does not allow 'free-floating' discovery asking for virtually anything the prosecution possesses." (*Ibid*.) In other words, "section 1054.9 provides only for specific discovery and not the proverbial 'fishing expedition' for anything that might exist … ." (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 894.)

Finally, as with any defense request for discovery, when ruling on a section 1054.9 motion, the court should refuse to grant discovery if the burdens placed on the prosecution and on third parties substantially outweigh the demonstrated need for such discovery. (See generally *People v. Jenkins* (2000) 22 Cal.4th 900, 957; *People v. Kaurish* (1990) 52 Cal.3d 648, 686; see also *People v. Jackson* (2003) 110 Cal.App.4th 280, 286; *People v. Littleton* (1992) 7 Cal.App.4th 906, 910; *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 164-165.)

2790.2-PC1054.9 applies to a limited number of convictions and sentences 6/19

PENAL CODE SECTION 1054.9 IS LIMITED TO THE CONVICTIONS FOR SERIOUS OR VIOLENT FELONIES RESULTING IN A PRISON SENTENCE OF 15 YEARS OR MORE.

Penal Code section 1054.9 is limited to cases involving a conviction of a serious felony or a violent felony resulting in a sentence of 15 years or more. (Subd. (a).) A "serious felony" is defined as a felony enumerated in Penal Code section 1192.7, subd. (c).) (1054.9, subd. (h).) A "violent felony" is defined as a felony enumerated in Penal Code section 667.5, subd. (c).) (1054.9, subd. (i).) Prior to January 1, 2019, section 1054.9 applied only to cases in which a sentence of death or of life in prison without the possibility of parole [LWOP] had been imposed. Section 1054.9 does not apply unless the defendant suffered a qualifying conviction and sentence.

The California Supreme Court has noted that section 1054.9 modified the general rule that a trial court lacks jurisdiction to order discovery after a judgment had become final. (*In re Steele* (2004) 32 Cal.4th 682, 690-691.) The general rule is that a person seeking habeas corpus relief

postconviction is not entitled to court-ordered discovery unless they have filed a petition stating a prima facie case for relief and the court has issue an order to show cause. (*Id*. at p. 690; see also *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1255-1261.) It is the issuance of an order to show cause which "creates [a] cause or proceeding which would confer discovery jurisdiction." (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258.) Thus, except for those defendants who have suffered a qualifying conviction and sentence under section 1054.9, the general rule still applies: No postconviction discovery can be ordered prior to the issuance of an order to show cause. (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1241-1242.)

2790.3-PC1054.9 discovery motion must be filed in proper court 6/19

A MOTION FOR POSTCONVICTION DISCOVERY UNDER PENAL CODE SECTION 1054.9 MUST BE FILED IN THE APPROPRIATE COURT.

A motion for discovery under Penal Code section 1054.9 generally should first be made in the trial court that rendered the judgment. (*In re Steele* (2004) 32 Cal.4th 682, 688, 691-692.) "The nature of the discovery the statute permits makes the trial court generally the appropriate place to first file the motion. (*Id*. at p. 692.) A reviewing court can, and should, deny without prejudice a motion not first filed in the trial court. (*Ibid.*) The only exception is the rare situation when an execution date has been set and "execution is imminent." (*Id*. at pp. 691-692.)

2790.4-DA entitled to notice and opportunity to be heard in PC1054.9 motion 6/19

THE DISTRICT ATTORNEY'S OFFICE IS ENTITLED TO NOTICE AND AN OPPORTUNITY TO OBJECT TO ANY PENAL CODE SECTION 1054.9 MOTION.

The District Attorney's Office is entitled to notice and an opportunity to object to any Penal Code section 1054.9 motion. The appellate court in *Burton v. Superior Court* (2010) 181 Cal.App.4th 1519 held that both represented and unrepresented (pro per) defendants may bring a motion for postconviction discovery under Penal Code section 1054.9. In remanding the case to the trial court, the appellate court also concluded "that the superior court should evaluate any objections by the district attorney's office to granting relief in this matter before ruling on petitioner's section 1054.9 request." (*Id*. at p. 1522.) "Before entering a final ruling on petitioner's section 1054.9 motion, respondent superior court shall afford the district attorney's office the opportunity to file a response raising any objections to granting the relief requested and shall afford petitioner the opportunity to file a reply to the district attorney's response (if any is filed)." (*Id*. at p. 1523.)

2790.5-Defense must have filed or be prepared to file for post-conviction relief 6/19

PENAL CODE SECTION 1054.9 APPLIES ONLY IF THE DEFENDANT HAS FILED, OR IS PREPARING TO FILE, A PETITION OR MOTION FOR POSTCONVICTION RELIEF.

Penal Code section 1054.9 permits postconviction discovery only "[u]pon the prosecution of a postconviction writ of habeas corpus or a motion to vacate a judgment, or in preparation to file that writ or motion … ." (Subd. (a).) The latter clause, added January 1, 2019, codifies language from *In re Steele* (2004) 32 Cal.4th 682 (*Steele*). In *Steele*, the California Supreme Court rejected the argument that the previous version of section 1054.9 requires that the postconviction habeas petition or motion to vacate currently be "pending" before the court. (*Id*. at p. 691.)

> In context, we believe the Legislature used the word "prosecution" flexibly to include cases in which the movant is *preparing* the petition as well as cases in which the movant has already filed it. … Defendants are now entitled to discovery to assist in stating a prima facie case for relief. … Reasonably construed, the statute permits discovery as an aid in preparing the petition, which means discovery may come before the petition is filed. Thus, we believe a defendant is entitled to seek discovery if he or she is *preparing to file the petition* as well as after the petition has been filed.

(*Id*. at p. 691, italics in original.) Thus, if the defense has not yet filed a habeas petition or motion to vacate the judgment, they must prove that they are "in preparation to file" such a petition or motion. Unfortunately, neither the new legislation nor the Supreme Court in *Steele* define what it means to be "in preparation to file" a writ or motion." But, in keeping with the general purpose of section 1054.9 to "not allow 'free-floating' discovery … for virtually anything the prosecution possesses" (*id*. at p. 695), if the defense has not yet filed a petition or motion, it should be demonstrated that they are, in fact, in the final stages of "preparation to file" such a petition or motion rather than just investigating, researching or contemplating such action.

2790.6-Proof that petition is being "prepared" requires specifying grounds for relief 6/19

A PETITION IS "BEING PREPARED" WITHIN THE MEANING OF PENAL CODE SECTION 1054.9 AND *STEELE* ONLY IF THE DEFENDANT CAN SPECIFY THE GROUNDS UPON WHICH THEY INTEND TO SEEK RELIEF.

If the defense has not yet filed a habeas petition or motion to vacate the judgment, they must prove that they are "in preparation to file" such a petition or motion to be eligible for discovery under Penal Code section 1054.9, subdivision (a). (See also *In re Steele* (2004) 32 Cal.4th 682, 691 (*Steele*).) At a minimum this means the defense must prove that a writ petition is actually being drafted, not just contemplated. This also means the defense has identified and can articulate specific, proper grounds for relief.

The requirements for proper petition for writ of habeas corpus are well established:

> To satisfy the initial burden of pleading adequate grounds for relief, an application for habeas corpus must be made by petition, and "[i]f the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists." (§ 1474, subd. 2.) The petition should both (i) state fully and with particularity the facts on which relief is sought [citations] [and] (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. [Citation.] "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." [Citation.] We presume the regularity of proceedings that resulted in a final judgment [citation] … .

(*People v. Duvall* (1995) 9 Cal.4th 464, 474 (*Duvall*).) Unless the defendant can establish that a petition is actively being drafted with these principles in mind, an order for discovery under section 1054.9 would be premature.

As stated in *Steele*, the purpose of section 1054.9 is only "to assist in stating a prima facie case for relief." (*Steele*, *supra*, 32 Cal.4th at p. 691.) It cannot be said a petition is "in preparation" if the defense is seeking discovery merely to identify potential grounds for relief. Section 1054.9, as interpreted by *Steele*, may advance habeas discovery to the pre-filing stage, but it does not do away the basic need to identify the grounds upon which relief is being sought. "This process of defining

the issues is important because issues not raised in the pleadings need not be addressed." (*Duvall*, *supra*, 9 Cal.4th at p. 478.) If the defense is simply exploring or investigating possible grounds for postconviction relief, then under section 1054.9, their motion for must be denied.

In other words, as its placement within the pretrial discovery provisions of Proposition 115 implies, section 1054.9 is a discovery tool for specified criminal litigants. It is not an investigatory tool to allow defendants or their counsel free-floating postconviction access to the files of the prosecution or the law enforcement agencies which investigated the case. As one appellate case noted, section 1054.9 is simply "an aid in stating a prima facie claim for relief." (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1241.) Section 1054.9 does not change the basic principle that "there is no postconviction right to 'fish' through official files for belated grounds of attack on the judgment, or to confirm mere speculation or hope that a basis for collateral relief may exist." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1259-1260.) Habeas corpus "is not a device for investigating possible claims, but a means for vindicating actual claims." (*Id*. at p. 1260.) "The state may properly require that a defendant obtain some concrete information on his own before he invokes collateral remedies against a final judgment." (*Ibid*.)

Unless the defense can articulate a cogent theory that would entitle the defendant to some form of postconviction relief, the court must assume they are not "in preparation to file" a petition within the meaning of subdivision (a) of section 1054.9. Without the ability to identify "a prima facie case for relief" there is nothing for the "discovery materials" under section 1054.9 to "aid" or "assist." The court should not order any discovery under section 1054.9 without solid proof the defense needs the information to bolster the postconviction claims they intend to make.

Finally, the requirement that the defense specify their grounds for relief also helps the court weed out discovery requests that do not involve qualifying convictions and sentences to which section 1054.9 applies only.

2790.7-Defense must explain how items sought support proffered grounds for relief 6/19

A PENAL CODE SECTION 1054.9 DISCOVERY REQUEST MUST BE DENIED UNLESS THE DEFENSE EXPLAINS HOW THE SPECIFIED ITEMS SUPPORT THE PROFFERED THEORY OF POSTCONVICTION RELIEF.

The purpose of Penal Code section 1054.9 is only "to assist in stating a prima facie case for relief." (*In re Steele* (2004) 32 Cal.4th 682, 691 (*Steele*).) Neither the prosecution, nor the court, can properly analyze what "discovery materials" would "assist" the defense unless their section 1054.9 discovery request identifies how the requested discovery would support the specific theory which they believe would entitle the defendant to some form of postconviction relief. Usually this would not present a problem for a defendant who has already filed their petition for writ of habeas corpus or motion to vacate their judgment which identifies their theory of relief. But it is vital that a defendant who claims to be merely "in preparation to file" a writ or motion under subdivision (a) of section 1054.9, to specify their theory of postconviction relief and how the requested material would support this theory. Otherwise there is no rational basis for determining what information would be reasonably necessary to assist the defendant in stating a prima case for relief under *Steele*.

The common law rules governing non-section 1054.9 habeas discovery support this limitation. "[T]here is no discovery jurisdiction as to issues 'upon which the petition fails to state a prima facie case for relief.' (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261 … .) It follows that the discovery in a habeas corpus proceeding must be relevant to the issues upon which the petition

states a prima facie case for relief and an order to show cause has issued." (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1243.) Although, subdivision (a) of section 1054.9, may advance habeas discovery to the pre-filing stage in some cases, it does not do away the basic requirement that the discovery being ordered "be relevant to the issues."

This was the holding in *Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100. Petitioner Hurd was convicted of murder and sentenced to LWOP. Relying on section 1054.9, as interpreted by *Steele*, he made a pre-filing motion for discovery of peace officer personnel records for several officers involved in the investigation of the case. The appellate court found the request came within the scope of section 1054.9. (*Id*. at pp. 1106-1110.) But the court also held "a criminal defendant who makes such a motion without having made one during the original prosecution must show that the records are material to the habeas corpus claims he or she proposes, and that those proposed claims are cognizable on habeas corpus." (*Id*. at p. 1105.)

> We deem the litigation to which the discovery must be material within the meaning of [Evidence Code] section 1043 to be the habeas corpus proceeding that has been or will be initiated by petitioner's habeas corpus petition. We deem the scope of *Pitchess* discovery available under section 1054.9 to be that justified by such current materiality to claims cognizable on habeas corpus.

(*Id*. at p. 1111.)

A similar approach was taken in *Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359:

> Additionally, to obtain discovery under section 1054.9 of materials within the scope of section 1054.1(e) and/or *Brady*, a defendant must do more than simply assert, as Kennedy does here, that the materials he seeks might include "evidence of third party culpability" or "evidence that could have been used to impeach [certain] prosecution witnesses." Where the defendant seeks to justify a discovery request based on a theory of third party culpability, the defendant must—at the very least—explain *how* the requested materials would be relevant to show someone else was responsible for the crime. Likewise, where the defendant seeks to justify a discovery request on the ground the requested materials would have been relevant to impeach a prosecution witness, the defendant must—at the very least—explain what that witness's testimony was and how the requested materials could have been used to impeach that testimony.

(*Id*. at p. 372, italics in original.)

2790.8-Defense must identify discovery sought with reasonable specificity 6/19

A MOTION FOR POSTCONVICTION DISCOVERY UNDER PENAL CODE SECTION 1054.9 MUST IDENTIFY THE MATERIALS SOUGHT WITH REASONABLE SPECIFICITY.

A motion for postconviction discovery under Penal Code section 1054.9 must identify the materials sought with reasonable specificity. *In re Steele* (2004) 32 Cal.4th 682 starts with a summary of the California Supreme Court's holdings, including "we conclude that section 1054.9's discovery includes, and is limited to, specific materials the prosecution or law enforcement authorities involved in the case currently possess … ." (*Id*. at p. 688.) This theme is carried throughout the opinion. The Court's analysis concludes that a motion for discovery under Penal Code section 1054.9 must be "reasonably specific." (*Id*. at p. 702.) The motion should be "a focused request for specific information," otherwise it is outside the scope of section 1054.9 as "just a free-

floating request for anything the prosecution has that may be relevant to the case." (*Ibid*.) The importance of this use of the term "specific" was noted in a subsequent California Supreme Court opinion. "In discussing what materials beyond file reconstruction defendants were entitled to obtain, we repeatedly used the word 'specific.' " (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 899 (*Barnett*).) In *Barnett*, the defense requested "any information in the government's hands regarding any of its witnesses' motives to lie or biases for the State or against Mr. Barnett." The California Supreme Court characterized this as "a proverbial fishing expedition for anything that might exist." (*Id*. at p. 898.)

The defense in *Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359 made the following requests:

> … Kennedy requested "[a]ny and all other records, of any kind and in any form, not covered by the requests above that would tend to exonerate or exculpate [Kennedy] as to guilt or punishment, diminish or reduce any personal culpability for the charged offenses, or constitute information that the defense might use to impeach or contradict prosecution witnesses … ." [¶] Kennedy also requested "[a]ny other relevant discovery materials covered under the statute of which petitioner is not yet aware, whether due to the State's concealment or its oversight."

(*Id*. at pp. 397-398.) The appellate court found these were properly denied:

> We find no abuse of discretion. [¶] The two requests at issue here are exactly the sort of "free-floating" requests the *Steele* court disapproved. In effect, they ask for anything to which Kennedy is entitled under section 1054.9 that is not encompassed in his previous requests. Because they are not focused requests for specific information, the trial court did not abuse its discretion in denying them.

(*Id*. at p. 398.)

2790.9-Court need no parse overbroad discovery requests under PC1054.9 6/19

RATHER THAN PARSE OVERBROAD PENAL CODE SECTION 1054.9 DISCOVERY REQUESTS, THE COURT SHOULD DENY SUCH REQUESTS IN THEIR ENTIRETY.

The court is not required to parse overbroad Penal Code section 1054.9 requests looking for subsets of discoverable items. Instead, the court should deny such requests in their entirety.

> Instead of requesting specific materials and showing how those materials fell within the prosecution's constitutional duty of disclosure under *Brady* [*Brady v. Maryland* (1963) 373 U.S. 83] and/or the statutory duty of disclosure under section 1054.1(e), Kennedy has requested a broad array of materials regarding his activities in the 10 days before the murder and asserted, without further explanation, that some of those materials might contain information that would provide evidence of third party culpability or evidence that could have been used to impeach certain prosecution witnesses. This assertion falls far short of showing that Kennedy would have been entitled to the requested materials at time of trial. Although the materials Kennedy requested might include evidence favorable to him, they would also likely include evidence that was entirely neutral and might even include evidence unfavorable to him. Since neutral and unfavorable materials are clearly not materials to which Kennedy would have been entitled at time of trial even under the broadest reading of section 1054.1(e) and *Brady*, Kennedy's request does not describe

materials to which he would have been entitled at time of trial and thus it is overbroad. *The trial court was under no obligation to parse Kennedy's request and issue a discovery order for some subset of materials encompassed by his request.* If Kennedy's request, *taken as a whole*, did not ask for materials to which he would have been entitled at time of trial, then the trial court was justified in denying it.

(*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 371-372, original italics omitted, new italics added.)

2790.10-There must be a reasonable basis to believe materials sought actually exist 6/19

DEFENDANTS SEEKING PENAL CODE SECTION 1054.9 DISCOVERY, BEYOND RECOVERING WHAT THE PROSECUTION HAD PROVIDED BEFORE TRIAL, MUST SHOW A REASONABLE BASIS TO BELIEVE THAT THE REQUESTED MATERIALS ACTUALLY EXIST.

"[W]hen trying to reconstruct files, defendants need not identify all missing discovery materials that the prosecution had previously provided to the defense or show that they are still in the prosecution's possession." (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 898 (*Barnett*).) But, "[b]ecause [Penal Code] section 1054.9 provides only for specific discovery and not the proverbial 'fishing expedition' for anything that might exist, defendants seeking discovery beyond recovering what the prosecution had provided to the defense before trial must show a reasonable basis to believe that specific requested materials actually exist." (*Id*. at p. 894.)

> As we have explained, the Legislature was primarily concerned with preventing the problems that occur when the trial attorney's files no longer exist through no fault of the defendant. This concern, together with the Legislature's evident intent to make section 1054.9 an efficient method of discovery, causes us to conclude that section 1054.9 requires defendants who seek discovery beyond file reconstruction to show a reasonable basis to believe that other specific materials actually exist. Otherwise, a discovery request can always become … a free-floating request for anything the prosecution team may possess.

(*Id*. at p. 899.)

> Requiring defendants to show they have reason to believe specific materials actually exist does not place an onerous burden on them. Defendants have access to the trial record and to the discovery materials the prosecution provided to the defense before trial. Defendants may obtain those materials either from trial counsel or through file reconstruction. As the Attorney General notes, a person could use these resources "to make the necessary showing. For example, if a witness testifies about a particular report that the petitioner does not possess, the petitioner would have sufficient evidence to justify a request for that report under section 1054.9. It would also be appropriate for a petitioner to seek access to a report he or she does not possess that is cross-referenced in a police report possessed by the petitioner. Similarly, if evidence in the record indicates that a particular witness was interviewed three times and the petitioner has reports documenting only two interviews, that petitioner could make the necessary showing, based on the record, that a third report likely exists."

(*Id*. at p. 900.)

> To obviate one concern that petitioner has expressed, we note that a reasonable basis to believe that the prosecution had possessed the materials in the past would also provide a reasonable basis to believe the prosecution still possesses the materials. Petitioner need not make some additional showing that the prosecution still possesses the materials, a showing that would be impossible to make.

(*Id*. at p. 901, italics omitted.)

These principles also apply to exculpatory evidence under *Brady v. Maryland* (1963) 373 U.S. 83, although the defense need not show that the material sought is "material." "If petitioner can show he has a reasonable basis for believing a specific item of exculpatory evidence exists, he is entitled to receive that evidence without additionally having to show its materiality." (*Barnett*, *supra*, 50 Cal.4th at p. 901.)

2790.11-Attempts to obtain discovery from trial attorney must be unsuccessful 6/19

PENAL CODE SECTION 1054.9 REQUIRES A SHOWING THAT ATTEMPTS TO OBTAIN DISCOVERY FROM TRIAL COUNSEL WERE "UNSUCCESSFUL."

Defense discovery under Penal Code section 1054.9, subdivision (a), is conditioned upon a "showing that good faith efforts to obtain discovery materials from trial counsel were made and were unsuccessful." This is because "replacing materials that the defense once possessed but has since lost … is one purpose, perhaps the main purpose, of the statute." (*In re Steele* (2004) 32 Cal.4th 682, 693 (*Steele*).) Thus, to be entitled to any discovery order under section 1054.9, a petitioner, at a minimum, must make two important showings: (1) That he or she made good faith efforts to obtain discovery materials from trial counsel; and (2) that those efforts were unsuccessful.

In *Steele*, the "good faith" requirement was not at issue. (*Steele*, *supra*, 32 Cal.4th at p. 690.) The California Supreme Court noted, however, that "[t]he reason for the good faith effort requirement of section 1054.9, subdivision (a), is not difficult to discern—to prevent defendants from clogging the courts with requests to obtain materials they could simply get from trial counsel." (*Id*. at pp. 693-694.) A showing of good faith efforts should be very easy. A petitioner must simply show that he or she made reasonably diligent efforts to contact and obtain the requested discovery materials from trial counsel.

Once a petitioner establishes that good faith efforts to obtain discovery materials were made, the showing under section 1054.9 is not complete—the petitioner must also establish that those efforts were "unsuccessful."

> The Legislature's purpose of enabling file reconstruction should not be difficult to implement. *Defendants should first seek to obtain their trial files from trial counsel.* But if a defendant can show a legitimate reason for believing trial counsel's current files are incomplete (for example, if, as here, not all numbered discovery is available), the defendant should be able to work with the prosecution to obtain copies of any missing discovery materials it had provided to the defense before trial (assuming it still possesses them). (See *Steele*, *supra*, 32 Cal.4th at p. 692 [suggesting informal efforts to resolve discovery matters].) If necessary, the trial court can order the prosecution to provide any materials it still possesses that it had provided at time of trial.

(*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 898, italics added.)

To assist a defendant who may be entitled to section 1054.9 discovery, the Legislature added a requirement that "[i]n criminal matters involving a conviction for a serious or a violent felony resulting in a sentence of 15 years or more, trial counsel shall retain a copy of a former client's files for the term of his or her imprisonment." (Subd. (g).)

2790.12-PC1054.9 discovery materials limited to the 3 *Steele* categories 10/19

THE DEFINITION OF "DISCOVERY MATERIALS" UNDER SUBDIVISION (c) OF PENAL CODE SECTION 1054.9 IS LIMITED TO THE THREE *STEELE* CATEGORIES.

The California Supreme Court's decision in *In re Steele* (2004) 32 Cal.4th 682 (*Steele*) placed significant limitations on the scope of discovery available to petitioners under Penal Code section 1054.9. In addition to procedural issues, the Court also discussed the scope of materials that would be subject to disclosure under section 1054.9. In the introductory paragraphs of the *Steele* opinion, the Court summarized the specific materials covered by section 1054.9 as limited to three categories:

> Substantively, we conclude that section 1054.9's discovery includes, and is limited to, specific materials the prosecution or law enforcement authorities involved in the case currently possess that the defendant can show fall into any of these categories: (1) materials the prosecutor provided at time of trial but have since become lost to the defendant, (2) materials the prosecution should have provided at time of trial, or (3) materials the defendant would have been entitled to at time of trial had the defendant specifically requested them.

(*Id*. at p. 688.)

But in the final analysis in *Steele*, the Court expanded this list to four categories of materials:

> Accordingly, we interpret section 1054.9 to require the trial court, on a proper showing of a good faith effort to obtain the materials from trial counsel, to order discovery of specific materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case that the defendant can show either (1) the prosecution did provide at time of trial but have since become lost to the defendant; (2) the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence; (3) the prosecution should have provided at time of trial because the defense specifically requested them at that time and was entitled to receive them; or (4) the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them.

(*Id*. at p. 697.) Essentially the second category in the introduction was split into the second and third categories in the conclusion. For purpose of analysis below, the People will refer to the three categories of *Steele* from the opinion's introduction.

Although section 1054.9's "main focus was to permit reconstruction of lost files" (category 1 materials) this was not its only function. (*Steele*, *supra*, 32 Cal.4th at p. 694.) The statute, as interpreted by the Court in *Steele*, "does not limit the discovery to materials the defendant

possessed to the exclusion of materials the defense *should have possessed*." (*Id*. at p. 693, italics in original.)

Note, that while the Court identified three categories of materials subject to discovery, the *Steele* case only involved the last category of materials: Those that would have been subject to discovery if the defendant had made a specific request at trial. The relatively narrow scope of the

opinion has left several important issues unresolved regarding the application of section 1054.9 to the other categories, specifically the second category, not involved in *Steele*.

But one thing is clear, "it is *the defendant* who must show that the materials he is requesting are materials to which he would have been entitled to at the time of trial to obtain a discovery order pursuant to section 1054.9." (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 366, italics in original.)

2790.12a-*Steele* category 1 materials 10/19

Steele Category 1 Materials.

The first category of items discoverable under section 1054.9 are "materials the prosecution provided at the time of trial but have since become lost to the defendant." (*Steele*, *supra*, 32 Cal.4th at p. 688.)

> Accordingly, we interpret section 1054.9 to require the trial court, on a proper showing of a good faith effort to obtain the materials from trial counsel, to order discovery of specific materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case that the defendant can show either (1) the prosecution did provide at time of trial but have since become lost to the defendant … .

(*Id*. at p. 697.)

The first *Steele* category is designed to assist the defense in "file reconstruction" which is the main purpose of the statute. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 897; *Steele*, *supra*, 32 Cal.4th at p. 693.) "[S]ection 1054.9 clearly permits record reconstruction; thus, the defendant is entitled to materials the prosecution provided at trial but that the defendant can show have since been lost." (*Id*. at p. 695.) This finding by the Court is amply supported by the legislative history which stressed the need for the statute to replace lost files:

> The problem that occurs all too often that *a defendant's files are lost or destroyed* after trial and habeas counsel is unable to obtain the original documents because the State has no legal obligation to provide them absent a court order. This leads to many delays and causes unnecessary public expenditures as prosecutors and habeas counsel litigate whether the defendant can demonstrate a need to *re-access* the materials and information *originally available to him or her at trial*.

(Sen. Rules Com., Sen. Floor Analysis, Rep. on Sen. Bill No. 1391 as amended Aug. 26, 2002 (2001-2002 Reg. Sess.), Aug. 30, 2002, pp. 4-5, italics added.)

2790.12b-*Steele* category 2 materials 10/19

Steele Category 2 Materials.

The second category of items discoverable under section 1054.9 are "materials the prosecution should have provided at the time of trial." (*Steele*, *supra*, 32 Cal.4th at p. 688.)

> Accordingly, we interpret section 1054.9 to require the trial court, on a proper showing of a good faith effort to obtain the materials from trial counsel, to order discovery of specific materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case that the defendant can show … the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time, a statutory duty to provide discovery, or the constitutional duty to disclose exculpatory evidence … [or] because the defense specifically requested them at that time and was entitled to receive them … .

(*Id*. at p. 697.)

> We believe [section 1054.9] also includes materials to which the defendant was *actually* entitled at time of trial, but did not receive. This category includes specific materials that the defendant can show the prosecution should have provided (but did not provide) at the time of trial because they came within the scope of a discovery order the trial court actually issued at time of trial or a statutory duty to provide discovery. (See Pen. Code, § 1054 et seq.) Additionally, "The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant" that is "both favorable to the defendant and material on either guilt or punishment." (*In re Sassounian* (1995) 9 Cal.4th 535, 543 …; see also *Brady v. Maryland* (1963) 373 U.S. 83 … .)

(*Steele*, *supra*, 32 Cal.4th at p. 695.)

2790.12c-*Steele* category 3 materials 6/20

Steele Category 3 Materials.

The final category of items discoverable under section 1054.9 are "materials the defendant would have been entitled to at the time of trial had the defendant specifically requested them." (*Steele*, *supra*, 32 Cal.4th at p. 688.)

> Accordingly, we interpret section 1054.9 to require the trial court … to order discovery of specific materials currently in the possession of the prosecution or law enforcement authorities involved in the investigation or prosecution of the case that the defendant can show … the prosecution had no obligation to provide at time of trial absent a specific defense request, but to which the defendant would have been entitled at time of trial had the defendant specifically requested them.

(*Id*. at p. 697.) This category does not involve an alleged discovery violation by the prosecution because "the duty to disclose exculpatory evidence cannot extend to evidence the prosecution had no reason to believe the defense would consider exculpatory." (*Id*. at p. 700.) If anything this category involves a failure by trial counsel to make a specific request for discovery of exculpatory evidence.

> The rationale for creating this last category was explained by the California Supreme Court: Use of the conditional perfect tense—"would have been"—indicates the Legislature intended broader discovery than just materials to which the defendant *was* entitled. This

> gives rise to another category of materials we believe the statute covers: materials that the prosecution would have been obligated to provide had there been a specific defense request at trial, but was not actually obligated to provide because no such request was made. These are materials to which the defendant *would have been entitled* had he or she requested them.

(*Steele*, *supra*, 32 Cal.4th at p. 696, italics in original.) "In some circumstances, the obligation to disclose evidence favorable to the defendant may require the prosecution to provide materials that the defendant specifically requests as potential exculpatory materials even if their potential exculpatory nature would not otherwise be apparent to the prosecution." (*Id*. at p. 700.) The Court recognized that a specific defense request could alert the prosecution to the potential exculpatory nature of the evidence that was unrelated to the crime. (*Ibid*.)

The *Steele* decision presents an example of the proper use of section 1054.9 to request category 3 materials that the defendant had a good faith basis to believe existed. There, defendant's trial counsel requested materials relating to the defendant's involvement in providing information to law enforcement about the Nuestra Familia prison gang. The record indicated that the prosecution had obtained some of this material from prison officials and that trial counsel had obtained copies of everything that the prosecution deemed relevant. (*Steele*, *supra*, 32 Cal.4th at pp. 701-702.) Although the prosecution provided trial counsel some documents that fit this category during trial, it was not clear from the record whether the prosecution had provided all the documents that it obtained from the prison. It was also unclear whether trial counsel had specifically requested that the prosecution turn over all such materials. Since the materials were not relevant to guilt or innocence and did not impact the prosecution's penalty phase evidence, the prosecution had no reason to recognize the information as exculpatory or *Brady* material. But the section 1054.9 postconviction discovery motion in *Steele* made a sufficient showing the records might be exculpatory. This triggered the defendant's right to section 1054.9 discovery under Category 3. The Court ordered the records disclosed "that the prosecution or law enforcement agencies involved in the investigation and prosecution of this case possess today, if they exist." (*Id*. at p. 703.)

Another example of potential category 3 material is *Pitchess* materials not requested by trial counsel at the time of trial.

> Discovery of relevant peace officer personnel records currently in the possession of law enforcement authorities involved in the investigation of the case falls within this description. They are materials that the prosecution had no obligation to provide absent a request, but that the defendant would have been entitled to if the defendant had specifically requested them through a motion supported by good cause—albeit a motion directed not to the prosecutor but to the custodian of records of the investigating law enforcement agency.

(*Hurd v. Superior Court* (2006) 144 Cal.App.4th 1100, 1107-1108.)

2790.13-PC1054.9 discovery materials limited to original time of trial 6/19

PENAL CODE SECTION 1054.9 APPLIES ONLY TO MATERIALS THAT WERE DISCOVERABLE "AT THE TIME OF TRIAL."

Penal Code section 1054.9 is, at its core, a remedial statute—designed to place the petitioner in the same position he or she would have been at trial, assuming proper discovery occurred. In *In re Steele* (2004) 32 Cal.4th 682 (*Steele*), the California Supreme Court concluded that "the statute is limited to materials to which the defendant would have been entitled *at the time of trial*." (*Id*. at p.

695, original italics.) Thus, section 1054.9 is backward-looking in that it only applies to materials that would have been subject to discovery "at time of trial." (Subd. (c).) "[T]he defendant must show the trial court [hearing the section 1054.9 motion] he would have been entitled to the materials he is requesting at time of trial. …" (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 363 (*Kennedy*).)

Thus, any materials that the prosecution and law enforcement authorities did not possess at trial are outside the scope of section 1054.9. That is not to say the prosecution does not have constitutionally-imposed post-conviction discovery obligations. "[A]fter a conviction the prosecutor … is bound by the ethics of his office to inform the appropriate authority of … information that casts doubt upon the correctness of the conviction." (*Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25; see also *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261.) But as to information not available "at time of trial," this obligation is separate and independent from, and therefore not enforceable under, section 1054.9.

> To the extent Kennedy is suggesting he had a right under *Brady* independent of section 1054.9, to obtain a court order for discovery to assist him in prosecuting his habeas corpus petition, he has failed to offer any authority supporting that suggestion. Certainly, if Kennedy is able to identify materials to which he would have been entitled at time of trial under *Brady*, and he has requested discovery of those materials in the present motion, then he is entitled to an order for discovery of those materials under section 1054.9 (assuming he has satisfied all other requirements for obtaining such an order). But he has not shown any right to such a discovery order based on *Brady* alone, independent of section 1054.9.

(*Kennedy*, *supra*, 145 Cal.App.4th at p. 369.)

In addition, the amount of material available for discovery "at time of trial" under subdivision (c) of section 1054.9 depends on whether the trial occurred before or after the passage of Proposition 115. The law in effect at the time of any pre-trial discovery orders and during the trial governs the scope of materials which the defendant is entitled under section 1054.9.

1. Pre-Proposition 115 Trials

Any trial of a capital case occurring before June 5, 1990 was governed by common law criminal discovery rules. The guilt phase trial in *Steele* arose prior to the enactment of section 1054 et seq. In fact, the new statutory scheme became effective during the penalty phase. Thus, the California Supreme Court held it "did not govern pretrial discovery here." (*Steele*, *supra*, 32 Cal.4th at p. 695, fn. 3.)

Pre-Proposition 115 discovery was actually broader in many ways than post-Proposition 115 discovery.

> Kennedy's discovery request might have sufficed under the California case law that governed discovery in criminal proceedings before the adoption of Proposition 115 in 1990, but it does not suffice under section 1054.9. Under that case law, a criminal defendant was generally entitled to discovery of information that would assist in his defense or be useful for impeachment or cross-examination of adverse witnesses. [Citation.] In making a motion for discovery, the defendant was required to describe only the information sought with some specificity and to provide a plausible justification for disclosure. [Citation.]

(*Kennedy*, *supra*, 145 Cal.App.4th at p. 371.)

2. Post-Proposition 115 Trials

Any trial of a capital case occurring on or after June 5, 1990 was governed by the reciprocal discovery provision of Proposition 115, including section 1054.1. These statutory procedures were

enacted by the Legislature "[t]o provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States." (§ 1054, subd. (e).) Section 1054, et seq., "set forth an almost exclusive procedure for discovery in criminal cases." (*People v. Jordon* (2003) 108 Cal.App.4th 349, 357.) The new statutory scheme limited defense discovery in many ways. For example:

> Under section 1054.9 … it is not sufficient for the defendant to simply offer a plausible justification for disclosure of information he has described with some specificity. … Thus, when a defendant seeks discovery under section 1054.9, he must identify those materials with sufficient specificity to show that he *would*, in fact, have been entitled to *those* materials at time of trial.

(*Kennedy*, *supra*, 145 Cal.App.4th at p. 371, original italics.)

2790.14-PC1054.9 applies only to "prosecution team" 4/20

PENAL CODE SECTION 1054.9 ONLY APPLIES TO DISCOVERY SOUGHT FROM THE "PROSECUTION TEAM" WITHIN THE MEANING OF PENAL CODE SECTION 1054.5(a).

Postconviction discovery under Penal Code section 1054.9, subdivision (c), is limited to materials in the current possession of the "prosecution and law enforcement authorities." The phrase "law enforcement authorities" has been construed to be similar to the definition of the phrase "investigating agencies" in Penal Code section 1054.1. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 902 (*Barnett*).) Thus, the California Supreme Court in *In re Steele* (2004) 32 Cal.4th 682 (*Steele*) limited the right to discovery under section 1054.9 to the law enforcement agencies who investigated and prosecuted the case (the "prosecution team"). In making this determination, the Court adopted a three-part test from the federal courts.

> A federal court that had to decide whether an agency was part of the prosecution team for *Brady* [*Brady v. Maryland* (1963) 373 U.S. 83] purposes considered three relevant questions: " '(1) whether the party with knowledge of the information is acting on the government's "behalf" or is under its "control"; (2) the extent to which state and federal governments are part of a "team," are participating in a "joint investigation" or are sharing resources; and (3) whether the entity charged with constructive possession has "ready access" to the evidence.' " [Citations.]

(*Barnett*, *supra*, 50 Cal.4th at p. 904.)

> The statute also presents the question of exactly who must possess the materials for them to come within its scope. Section 1054.9, subdivision (b) [now subd. (c)], refers to "materials in the possession of the prosecution and law enforcement authorities … ." Thus, the materials include not only those the prosecution itself possesses but those that law enforcement authorities possess. The discovery obligation, however, does not extend to all law enforcement authorities everywhere in the world but, we believe, only to law enforcement authorities who were involved in the investigation or prosecution of the case. … Section 1054.9 does not require that the prosecutor *know* the materials are in the possession of the investigating agencies, but we believe the reference to "law enforcement authorities" in section 1054.9, subdivision (b), must be read in light of these other provisions. *At trial*, these discovery obligations do not extend to materials possessed by law enforcement agencies that were not involved in investigating or preparing the case against

the defendant. Section 1054.9, subdivision (b), should not be read as creating a broader *postconviction* discovery right.

(*Steele*, *supra*, 32 Cal.4th at p. 696, original italics.)

Thus, the prosecution is responsible not only for evidence in its own files but also for information possessed by others acting on the government's behalf that were gathered in connection with the investigation. *But the prosecution cannot reasonably be held responsible for evidence in the possession of all governmental agencies, including those not involved in the investigation or prosecution of the case.* "Conversely, a prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant unless the prosecution team actually or constructively possesses that evidence or information. Thus, information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material." (*People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1315 … .)

(*Steele*, *supra*, 32 Cal.4th at p. 697, italics added; see also *People v. Ervine* (2009) 47 Cal.4th 745, 768.)

Outside the scope of section 1054.9, therefore, are materials which the prosecution obtains either voluntarily or by court order from law enforcement agencies not involved in the investigation and prosecution of the case at the time of trial. For example, the capital murder in *Barnett* was investigated and prosecuted by local law enforcement in Butte County. In preparing for the penalty phase the prosecution asked several out-of-state law enforcement agencies to provide reports relating to previous criminal conduct by the defendant. Some of the agencies perhaps also interviewed a few potential witnesses. The California Supreme Court held these out-of-state agencies were not involved in the investigation and prosecution of the case within the meaning of section 1054.9 and *Steele*. (*Barnett*, *supra*, 50 Cal.4th at pp. 903-906.) "Section 1054.9 does not govern materials in the possession of out-of-state law enforcement agencies that merely provided the prosecution with information or assistance under the circumstances of this case." (*Id*. at p. 894.) "Accordingly, we conclude the prosecution is not required to provide discovery of materials from the out-of-state law enforcement agencies of this case that the prosecution does not itself possess." (*Id*. at p. 906.)

As to private parties who assist in the prosecution of the case among the important considerations are whether the third party performed investigative duties, acted under the direction of the prosecutor, or aided the prosecution in crafting trial strategy. (*Bracamontes v. Superior Court* (2019) 42 Cal.App.5th 102, 115; *Dominguez)* (2018) 28 Cal.App.5th 223, 234-235.) "The standard … is whether the private party is acting on the government's behalf and assisting in investigation and prosecution of the crime, such that it is reasonable to impute the private party's knowledge to the prosecution. [Citations.]" (*Bracamontes v. Superior Court*, *supra*, 42 Cal.App.5th at p. 116 [private DNA testing companies helping to investigate murder were part of prosecution team, but private experts hired to render opinions at trial were not].)

2790.15-Prosecution has no duty to create or reconstruct discovery under PC1054.9 6/19

THE PROSECUTION HAS NO DUTY EITHER TO GATHER OR CREATE NEW DISCOVERY, NOR TO RECONSTRUCT ALLEGEDLY MISSING OR DESTROYED DISCOVERY UNDER PENAL CODE SECTION 1054.9.

Penal Code section 1054.9 "does not require the retention of any discovery materials not otherwise required by law or court order." (Subd. (f).) Instead, section 1054.9 is designed to restore the defense to the state of discovery to which they would have been entitled "at time of trial." (Subd. (c).) Moreover, subdivision (c) of section 1054.9 "includes only materials 'in the possession of the prosecution and law enforcement authorities.' " (*In re Steele* (2004) 32 Cal.4th 682, 695 (*Steele*).) The California Supreme Court in *Steele* interpreted this "to mean in their possession *currently*." (*Ibid*., italics in original.) Thus, section 1054.9 is limited to discovery "currently" in the possession of the prosecution or the law enforcement agencies involved in the investigation of the case. "The statute imposes no preservation duties that do not otherwise exist. It does not impose a duty to search for or obtain materials not currently possessed." (*Steele*, *supra*; see also *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.)

2790.16-PC1054.9 discovery subject to privileges and other statutory restrictions 6/19

ALL PRIVILEGES AS WELL AS ALL STATUTORY OR CONSTITUTIONAL RESTRICTIONS PRECLUDING DISCOVERY APPLY TO PENAL CODE SECTION 1054.9.

Even if discovery is ordered under Penal Code section 1054.9, this does not mean the defense is automatically entitled to all "discovery materials." Section 1054.9 does not authorize discovery of information subject to claims of privilege or other statutory or constitutional restriction. Penal Code section 1054.6, in the same chapter of the Penal Code as section 1054.9, states: "Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of section 2018.030 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States.

For example, some or all of the requested "discovery materials" may be subject to the official information privilege. (Evid. Code, § 1040 et seq.)

In addition, there may be other considerations establishing "good cause" to limit or deny discovery. (See Pen. Code, § 1054.7.) " 'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (§ 1054.7, subd. (a).)

Similarly, Penal Code section 1054.2 prohibits a criminal defendant from gaining access to the addresses and telephone numbers of all victims and witnesses absent a strong showing of good cause. Penal Code section 1054.2 is in the same chapter of the Penal Code as section 1054.9. According to section 1054: "This chapter shall be interpreted to give effect to all of the following purposes: [¶] … (d) To protect victims and witnesses from danger [and] harassment … ." In addition, the prosecution's discovery obligation for victim/witness address and telephone records to which the defendant was entitled "at time of trial" under section 1054.9 derives from section 1054.1. Section 1054.2 modifies section 1054.1. Thus, if any discovery materials are ordered disclosed under section 1054.9, it is imperative that the defendant be precluded from learning the addresses and telephone numbers of all victims and witnesses. This is especially true if when a pro per

defendant is making the section 1054.9 request as allowed by *Burton v. Superior Court* (2010) 181 Cal.App.4th 1519. Therefore, the court should not order the disclosure to the defendant of the addresses and telephone numbers of any victims and witnesses absent a strong showing of good cause. Any defense attorney or licensed private investigator assisting the defendant should be similarly ordered not to disclose such information to the defendant.

2790.17-Defense entitled only to reasonable access to real evidence under PC1054.9 10/19

THE DEFENDANT IS ONLY ENTITLED TO "REASONABLE ACCESS" TO PHYSICAL EVIDENCE UNDER PENAL CODE SECTION 1054.9, EXCEPT FOR DNA TESTING UNDER PENAL CODE SECTION 1405.

Penal Code section 1054.9 states in pertinent part:

> (d) In response to a writ or motion satisfying the conditions in subdivision (a), the court may order that the defendant be provided access to physical evidence for the purpose of examination, including, but not limited to, any physical evidence relating to the investigation, arrest, and prosecution of the defendant only upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief. The procedures for obtaining access to physical evidence for purposes of postconviction DNA testing are provided in Section 1405, and this section does not provide an alternative means of access to physical evidence for those purposes.

Several principles emerge from subdivision (d).

First, the defendant must overcome all the hurdles for obtaining discovery under subdivision (a) of section 1054.9. This includes, for example, explaining how and why he or she was unsuccessful in obtaining the necessary information related to the physical evidence from trial counsel.

Second, under subdivision (d) the defendant is not entitled to gain access to the prosecution's physical evidence except "upon a showing that there is good cause to believe that access to physical evidence is reasonably necessary to the defendant's effort to obtain relief." This means, for example, the defendant must proffer the specific grounds upon which he or she is seeking relief (particularly if the defendant is still "in preparation to file" a postconviction writ or motion). Otherwise the court is no position to find "good cause to believe" that access to the physical evidence is "reasonably necessary" to support the defendant's effort to obtain relief.

Third, subdivision (d) requires the defendant to explain why there is no satisfactory alternative besides gaining direct access to the physical evidence. For example, the defendant may have to explain why taking photographs or making videotapes of the physical evidence would be inadequate.

Next, section 1054.9 does not apply at all if the defendant seeks DNA testing of any physical evidence. The defendant must make separate application under section 1405 for any DNA testing.

Finally, section 1054.9 and its "good cause" requirement does not apply when the physical evidence is in the possession of the court rather than the prosecution or law enforcement. (*Satele v. Superior Court* (2019) 7 Cal.5th 852.)

2790.18-Defense generally must pay for PC1054.9 discovery 6/19

THE DEFENSE MUST PAY FOR PENAL CODE SECTION 1054.9 DISCOVERY.

Penal Code section 1054.9 is generally designed to provide the defendant with the same discovery that was available at the time of trial. According to subdivision (e), "[t]he actual costs of examination and copying pursuant to this section shall be borne or reimbursed by the defendant." (Similarly see *Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1245 ["Just as a nonindigent criminal defendant can be required to pay for the costs associated with his defense, including attorney's fees, we conclude it does not offend the Constitution to require a nonindigent defendant to pay reasonable fees for duplicating discovery materials disclosed by the district attorney pursuant to section 1054.1."].)

The phrase "actual costs of examination" refers to the costs related to the defendant's request for examination of physical evidence." (*Rubio v. Superior Ct.* (2016) 244 Cal.App.4th 459, 475.) The "actual costs of … copying" clause has distinct meaning as well:

> [W]here the subject of the section 1054.9 request is paper or electronic discovery, "actual costs" of copying does not encompass costs related to examining, redacting, and preparing documents for production. However, "actual costs" does include the People's real expenditures in copying, including the media, that is, paper, ink or toner, compact discs, and the like; a proportional share of equipment costs; and the labor cost of the employee who performs the actual copying or transfer of documents to electronic media.

(*Id*. at p. 487.)

Finally, advance payment is not required if the defendant can be made to reimburse the costs. (*Davis v. Superior Ct.* (2016) 1 Cal.App.5th 881, 889-890.)

> A defendant's inability to pay discovery costs before receiving responsive documents is not a basis for denying discovery. Where … a moving party demonstrates entitlement to postconviction discovery but asserts he is unable to pay copy costs, the court should determine if defendant is indigent as claimed and, if so, order reimbursement. In most cases the court will be able to make this determination based on the documentation submitted in support of the application. In the unlikely event that the defendant makes the necessary showing of indigency and the district attorney submits evidence to the contrary or there is reason to question the defendant's showing, a hearing will be required to determine the issue.

(*McGinnis v. Superior Ct.* (2017) 7 Cal.App.5th 1240, 1247.)

2840.1-No dismissal under PC1385 without detriment to defendant 12/17

The court's discretion to dismiss under Penal Code section 1385 in the furtherance of justice is very broad. Furtherance of justice requires consideration of the constitutional rights of the defendant and the interests of society represented by the People. (*People v. Orin* (1975) 13 Cal.3d 937, 945; *People v. Superior Court (Flores)* (1989) 214 Cal.App.3d 127, 144.) In this evaluation the court must consider the interests of the People as equal in importance to the rights of the accused. (*People v. Andrade* (1978) 86 Cal.App.3d 963, 976.) " '[I]n view of the fundamental right of the People to prosecute defendants upon probable cause to believe they are guilty [citations], neither judicial convenience, court congestion, nor judicial pique, no matter how warranted, can supply justification for an order of dismissal.' " (*People v. Ferguson* (1990) 218 Cal.App.3d 1173, 1183.)

The reasons for the dismissal must be set forth on the record, including upon the minutes if requested by a party. (Pen. Code, § 1385, subd. (a); see, generally, *People v. Jones* (2016) 246 Cal.App.4th 92 [discussing effect of 2015 amendment to § 1385]; see also *People v. Fuentes* (2016) 1 Cal.5th 218, 231.) This requirement is mandatory. (*People v. Bonnetta* (2009) 46 Cal.4th 143, 149-151.) Moreover, the reasons given must be such as would motivate a reasonable judge. (*People v. Orin*, *supra*, 13 Cal.3d at p. 945; *People v. S.M.* (2017) 9 Cal.App.5th 210, 218; *People v. Verducci* (2016) 243 Cal.App.4th 952, 962.) "In the light of the importance to the administration of criminal justice of not having a case brought by the People of the State of California thrown out of court except for a reason which can be said to be that which would motivate a reasonable judge, we conclude that a judge does not have absolute discretion to dismiss a criminal case." (*People v. Curtiss* (1970) 4 Cal.App.3d 123, 126.)

A judge's ruling under section 1385 is reviewed for abuse of discretion. (*People v. Halim* (2017) 14 Cal.App.5th 632, 649; *People v. S.M.*, *supra*, 9 Cal.App.5th at p. 218.) A dismissal arbitrarily terminating the right of the People to prosecute a properly alleged offense without any showing of detriment to the defendant is an abuse of discretion. (*People v. Orin*, *supra*, 13 Cal.3d at p. 947; *People v. Uribe* (2011) 199 Cal.App.4th 836, 882.) "A dismissal not in furtherance of justice is an abuse of discretion requiring reversal. [Citation.]" (*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1541.)

2840.2-Discretion to dismiss three strike priors is limited (*Romero*) 8/21

The California Supreme Court in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) held that trial courts have discretion to dismiss "three-strike" prior convictions. In the appropriate case, the sentencing court also has the discretion to dismiss such prior "strike" allegations as so some counts, but not as to others. (*People v. Garcia* (1999) 20 Cal.4th 490, 499-502.)

The California Supreme Court has emphasized that the discretion to dismiss prior conviction allegation is limited and must not be abused. (*Romero*, *supra*, 13 Cal.4th at p. 530.) This discretion must proceed in strict compliance with both the procedural and substantive provision of Penal Code section 1385, subdivision (a). (*Ibid*.) The California Supreme Court has "established stringent standards that sentencing courts must follow in order to [grant *Romero* relief]." (*People v. Carmony* (2004) 33 Cal.4th 367, 377; see also *People v. Scott* (2009) 179 Cal.App.4th 920, 926.) If a repeat criminal commits the requisite number of strikes, the circumstance must be "extraordinary" before he or she can be deemed to fall outside the spirit of the three strikes law. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378; see also *People v. Anderson* (2019) 42 Cal.App.5th 780, 786; *People v. Finney* (2012) 204 Cal.App.4th 1034, 1040.)

Penal Code section 1385, subdivision (a) requires that the dismissal be "in furtherance of justice." The California Supreme Court in *Romero* offered some guidelines to evaluate "in furtherance of justice." The principle concern is "… consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*. …" (*Romero*, *supra*, 13 Cal.4th at p. 530, italics in original.) Furthermore, the court adds that this discretion is subject to an objective standard, that a dismissal must be supported by a reason "which would motivate a reasonable judge." (*Id*. at pp. 530-531, citations deleted.) The court in *Romero* listed several reasons which would be abuse of discretion, including: if a dismissal were made for judicial convenience, or simply because the defendant pleads guilty, or if guided by personal antipathy for the effect of the

three strikes law on the defendant while ignoring his background, the nature of the present offenses and other individualized considerations. (*Id*. at p. 531; see, e.g., *People v. Williams* (1998) 17 Cal.4th 148, 162-164 [setting aside the superior court's order dismissal of one of the defendant's three strikes priors as an abuse of discretion].) Reliance on factors that have "no bearing on either the nature of defendant's prior offenses or his background and character as they relate to the Three Strikes law" is error. (*People v. Wallace* (2004) 33 Cal.4th 738, 748.) For example, the court should not consider the cost of incarcerating a three strikes defendant for an indeterminate life term. (*People v. Gaston* (1999) 74 Cal.App.4th 310, 322.) Finally, a judge's individual opinion that a particular sentence is "too harsh" is not an adequate basis to dismiss a strike prior. (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 477.)

Not all perceived mitigating factors relating to the defendant's character or background can justify the exercise of section 1385 discretion at sentencing. A defendant's drug addiction, for example, is not an appropriate consideration when the defendant has had a long-term problem and is unwilling to pursue treatment or otherwise follow through in efforts to control his or her drug problem. (*People v. Williams*, *supra*, 17 Cal.4th at p. 163; *People v. Gaston*, *supra*, 74 Cal.App.4th at p. 322; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511.) That the defendant is older is generally not a proper ground to exercise section 1385 discretion as to charged and proven three strike priors. (*People v. Taylor* (2020) 43 Cal.App.5th 1102, 1113; *People v. Strong* (2001) 87 Cal.App.4th 328, 343-345; but see *People v. Dryden* (2021) 60 Cal.App.5th 1007, 1031 [appellate court reversed the trial judge's denial of defendant's *Romero* motion as to all "strike" priors because, among other factors mitigating the crimes, the total sentence was "de facto life imprisonment for defendant who was 53 years old when sentenced"].) Nor does the fact that the defendant has little or no history of violence, or that the defendant has never used a firearm, necessarily justify dismissing a strike prior. (*Id*. at pp. 345-346.) Finally, that the strike prior is remote in time is offset when the defendant led a continuous life of crime afterward. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813; distinguish *People v. Avila* (2020) 57 Cal.App.5th 1134, 1140-1145 [abuse of discretion not to dismiss remote strikes, committed while defendant very young, when current crimes, committed by now middle-aged defendant did not involve actual violence]; distinguish *People v. Brugman* (2021) 62 Cal.App.5th 608, 640 ["court denying a motion to strike may reasonably focus on the fact that the prior strike was recently committed"].)

" 'A court's discretionary decision to dismiss or to strike a sentencing allegation under section 1385 is' reviewable for abuse of discretion." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 373; see also *People v. Pearson* (2019) 38 Cal.App.5th 112, 116.) Thus, the dismissal of a three strikes prior conviction allegation is subject to appellate review for abuse of discretion. (*People v. Williams*, *supra*, 17 Cal.4th at p. 162; *Romero*, *supra*, 13 Cal.4th at p. 530.) Dismissal of a three strikes prior must be supported by articulable reasons that can withstand appellate scrutiny for abuse of discretion. (*People v. Mayfield* (2020) 50 Cal.App.5th 1096, 1105 [dismissal reversed because reasons given were inadequate].) On the other hand, "an appellate court will not disturb the trial court's ruling denying defendant's request to dismiss his strike conviction absent an affirmative showing of an abuse of discretion. (*People v. Gillispie* (1997) 60 Cal.App.4th 429, 434-435.)" (*People v. Uecker* (2009) 172 Cal.App.4th 583, 599; see also *People v. Shaw* (2020) 56 Cal.App.5th 582, 587 [similar analysis applies when judge denies request to strike five-year serious felony prior].)

2840.3-Judge cannot dismiss under PC1385 after sentence or probation completed 10/19

Penal Code section 1385 provides, in part, "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." While the statute has potentially broad application, the California Supreme Court has cautioned that a trial court's power "is by no means absolute." (*People v. Orin* (1975) 13 Cal.3d 937, 945; see also *People v. Espinoza* (2014) 232 Cal.App.4th Supp. 1, 5.) A court does not have Penal Code section 1385 jurisdiction after a conviction has become final by virtue of the defendant serving his or her sentence. (*People v. Kim* (2012) 212 Cal.App.4th 117, 123; *People v. Espinoza*, *supra*, 232 Cal.App.4th Supp. at pp. 7-8.) Penal Code section 1385 "has never been held to authorize dismissal of an action after the imposition of sentence and rendition of judgment." (*People v. Barraza* (1994) 30 Cal.App.4th 114, 121, fn. 8; see also *People v. Kim*, *supra*, 212 Cal.App.4th 117, 123.)

"And such a construction of section 1385 would be impossible to reconcile with the Supreme Court's careful delineation of the available avenues for postjudgment relief in *People v. Villa* (2009) 45 Cal.4th 1063, and [*People v.*] *Kim* [(2009)] 45 Cal.4th 1078, which omitted any reference to section 1385." (*People v. Kim*, *supra*, 212 Cal.App.4th at p. 123.) This falls within the rule that: "Trial courts do not have unlimited authority to modify a sentence once imposed. The common law rule is that, once a defendant begins serving a sentence, the sentencing court loses jurisdiction to modify the sentence it imposed." (*Ibid*.) Similarly, a court does not have authority to "dismiss" a statutorily required period of parole. (*People v. VonWahlde* (2016) 3 Cal.App.5th 1187, 1197-1198 ["A period parole is not a criminal action or a part thereof as contemplated by section 1385."].) Nor can a judge use section 1385 to dismiss a parole violation petition. (*People v. Wiley* (2019) 36 Cal.App.5th 1063, 1067-1069.)

The same rule applies to completion of a sentence suspended by a grant of probation. (*People v. Chavez* (2018) 4 Cal.5th 771, 777.)

> What we hold is that a trial court exceeds the authority conferred by section 1385 when it dismisses an action after the probation period expires. Under well-established case law, a court may exercise its dismissal power under section 1385 at any time before judgment is pronounced—but not after judgment is final. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 524, fn. 11 (*Romero*).) Yet in the case of a successful probationer, final judgment is never pronounced, and after the expiration of probation, may never be pronounced. To address this situation, we extend *Romero* by concluding that section 1385's power may be exercised until judgment is pronounced or when the power to pronounce judgment runs out. Because the trial court's authority to render judgment ends with the expiration of probation, the court has no power to dismiss under section 1385 once probation is complete.

(*Ibid*.; see also *People v. Espinoza*, *supra*, 232 Cal.App.4th Supp. at pp. 7-8 ["Appellant's cases were final more than ten years ago and there is nothing—no on-going action or pending proceeding—which makes his cases subject to section 1385 relief."].)

2900.1-General test for finding prosecutorial misconduct 7/18

"[P]rosecutors 'are held to an elevated standard of conduct' 'because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state.' [Citations.]" (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1326.) "Under the federal Constitution, a prosecutor's behavior deprives a defendant of his rights 'when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' (*People v. Espinoza* (1992) 3 Cal.4th 806, 820; accord, *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Wallace* [(2008)] 44 Cal.4th [1032] at p. 1070.)" (*People v. Gamache* (2010) 48 Cal.4th 347, 370-371; see also *Parker v. Matthews* (2012) 567 U.S. 37, 45.) "Conduct that falls short of that standard 'may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.' (*People v. Panah* (2005) 35 Cal.4th 395, 462; accord, *Wallace*, at p. 1070.)" (*People v. Gamache*, *supra*, 48 Cal.4th at p. 371; see also *People v. Gonzales* (2011) 51 Cal.4th 894, 920; *People v. Vines* (2011) 51 Cal.4th 830, 873.) But unprofessional behavior does not equate with prosecutorial misconduct. (*People v. Peoples* (2016) 62 Cal.4th 718, 793.) "Using colorful or hyperbolic language will not generally establish prosecutorial misconduct. [Citation.] Neither does making overly dramatic gestures." (*Ibid*.) But when a major theme of the prosecutions argument is improper prosecutorial misconduct may be established. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 504 [repeated references to defendants and associates as "cockroaches" was an improper argument based on guilt by association].)

"It is a fundamental principle that reversal for prosecutorial misconduct is not required unless the defendant can show that he has suffered prejudice." (*People v. Uribe* (2011) 199 Cal.App.4th 836, 873.)

> Under California law, a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " [Citations.]

(*People v. Riggs* (2008) 44 Cal.4th 248, 298; see also *People v. Clark* (2011) 52 Cal.4th 856, 960; *People v. Otero* (2012) 210 Cal.App.4th 865, 870; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1402.) " 'The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor.' (*People v. Hamilton* (2009) 45 Cal.4th 863, 920; see *People v. Hill* (1998) 17 Cal.4th 800, 822-823.)" (*People v. McKinzie*, *supra*, 54 Cal.4th at p. 1326.) "Misconduct is judged by an objective standard, and the defendant is not required to show bad faith to obtain relief for misconduct. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)" (*In re Brian J.* (2007) 150 Cal.App.4th 97, 122; see also *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1085.)

2900.2-A prosecutor must not knowingly present false evidence 12/19

"A prosecutor's presentation of knowingly false testimony (*Mooney v. Holohan* (1935) 294 U.S. 103, 112]), or the failure to correct such testimony after it has been elicited (*Napue v. Illinois* (1959) 360 U.S. 264, 265-272), violates a defendant's right to due process of law under the United States Constitution. (See also *People v. Marshall* (1996) 13 Cal.4th 799, 829; *In re Jackson* (1992) 3 Cal.4th 578, 595.)" (*People v. Vines* (2011) 51 Cal.4th 830, 873; see also *In re Masters* (2019) 7 Cal.5th 1054, 1089.) But "[m]ere inconsistencies between a witness's testimony and her prior statements do not prove the falsity of the testimony. [Citation.]" (*Id*. at p. 874.) "[A] prosecutor's presentation of conflicting evidence does not necessarily mean that a prosecutor has presented false evidence. So long as impeachment material is not concealed, a prosecutor may present conflicting testimony and let the jury make a determination as to the witnesses' credibility." (*In re Masters*, *supra*, 7 Cal.5th at p. 1089.)

2900.3-A prosecutor has wide latitude in closing argument 20/20

" ' "[T]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom" ' [citation] … ." (*People v. Welch* (1999) 20 Cal.4th 701, 752-753; see also *People v. Spector* (2011) 194 Cal.App.4th 1335, 1403.) "When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of. [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 689.)

> " ' " '[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. …' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets … ." ' " [Citation.]' " (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952; see also *People v. Jablonski* (2006) 37 Cal.4th 774, 835.) "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*People v. Frye* (1998) 18 Cal.4th 894, 970.)

(*People v. Gamache* (2010) 48 Cal.4th 347, 371; see also *People v. Bell* (2019) 7 Cal.5th 70, 111; *People v. Mendoza* (2016) 62 Cal.4th 856, 905; see, e.g., *People v. Arredondo* (2018) 21 Cal.App.5th 493, 504 [repeated references to defendants and associates as "cockroaches" was an improper argument based on guilt by association]; but see *People v. Zaheer* (2020) 54 Cal.App.5th 326, 33 [prosecutor should also avoid making misleading suggestion regarding gaps in defense case when he or she knows there was evidence to the contrary].)

2900.4-Referring to facts not in evidence and vouching prohibited 7/20

"Counsel may not state or assume facts in argument that are not in evidence. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 102.)" (*People v. Cash* (2002) 28 Cal.4th 703, 732; see also *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1323.) " '[S]tatements of facts not in evidence by the prosecuting attorney in his argument to the jury constitute misconduct.' (*People v. Kirkes* (1952) 39 Cal.2d 719, 724; accord, *People v. Hill* (1998) 17 Cal.4th 800, 828 [' "Statements of supposed facts not in evidence … are a highly prejudicial form of misconduct" ']; *People v. Bolton* (1979) 23 Cal.3d 208, 212.)" (*People v. Armstrong* (2019) 6 Cal.5th 735, 797; see also *People v. Woods* (2006) 146 Cal.App.4th 106, 111-117.)

Vouching is a form of offering facts outside the record.

> The general rule is that improper vouching for the strength of the prosecution's case " 'involves an attempt to bolster a witness by reference to facts outside the record.' " [Citation.] Thus, it is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. [Citations.] Specifically, a prosecutor's reference to his or her own experience, comparing a defendant's case negatively to others the prosecutor knows about or has tried, is improper. [Citation.] Nor may prosecutors offer their personal opinions when they are based solely on their experience or on other facts outside the record. [Citations.])

(*People v. Huggins* (2006) 38 Cal.4th 175, 206-207; see, e.g., *People v. Rodriguez* (2020) 9 Cal.5th 474, 481-483 [arguing that officers would not put careers at risk by lying, without evidentiary support, was form of vouching]; but see *People v. Williams* (2013) 56 Cal.4th 165, 193 ["It is settled that making a record of the terms of a plea agreement requiring a witness to tell the truth does not constitute impermissible vouching"].)

Not every expression of a personal opinion by a prosecutor is improper.

> " '[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] …" [Citation.] Nevertheless, "[a] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citation.] Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching. [Citations.]" [Citation.]

(*People v. Ward* (2005) 36 Cal.4th 186, 215; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 336-337; *People v. Young* (2005) 34 Cal.4th 1149, 1197-1198; accord *People v. Fernandez* (2013) 216 Cal.App.4th 540, 561; *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1269-1270.)

2900.5-A prosecutor should not elicit inadmissible evidence 8/19

"A prosecutor may not ask questions of a witness suggesting facts harmful to a defendant without a good faith belief that such facts exist." (*People v. Pearson* (2013) 56 Cal.4th 393, 434; see also *People v. Sanchez* (2019) 7 Cal.5th 14, 64.) " 'It is, of course, misconduct for a prosecutor to "intentionally elicit inadmissible testimony." [Citations.]' [Citation.] Such misconduct is exacerbated if the prosecutor continues to attempt to elicit such evidence after defense counsel has objected." (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) "However, a prosecutor cannot be faulted for a witness's nonresponsive answer that the prosecutor neither solicited nor could have anticipated. (*People v. Valdez* (2004) 32 Cal.4th 73, 125.)" (*People v. Tully* (2012) 54 Cal.4th 952, 1035; see also *People v. Robbins* (2018) 19 Cal.App.5th 660, 676; *People v. O'Malley* (2016) 62 Cal.4th 944, 998.) But "[a] prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. [Citations.] If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement." (*People v. Warren* (1988) 45 Cal.3d 471, 481-482.)

2900.6-A prosecutor should not misstate the law 9/21

"Although counsel have broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law … [citation]." (*People v. Bell* (1989) 49 Cal.3d 502, 538.)

> Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, "it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its ... obligation to overcome reasonable doubt on all elements [citation]." [Citations.] To establish such error, bad faith on the prosecutor's part is not required.

(*People v. Centeno* (2014) 60 Cal.4th 659, 666; see also *People v. Meneses* (2019) 41 Cal.App.5th 63, 70.) "A prosecutor has wide latitude during closing argument to make assertions of common knowledge or use illustrations based on common experience. [Citations.]" (*People v. Wang* (2020) 46 Cal.App.5th 1055, 1085.)

These principles apply, for example, when a prosecutor misstates the law regarding the presumption of innocence. "[T]hese cases distinguish closing arguments that are acceptable–wherein the prosecution essentially contends the evidence has overcome the presumption of innocence–from statements that constitute misconduct, wherein the prosecution tells the jury it need no longer apply the presumption because it is no longer in effect as procedural matter." (*People v. Jimenez* (2019) 35 Cal.App.5th 373, 385; see also *People v. Roberts* (2021) 65 Cal.App.5th 469, 481.)

On appellate review:

> When attacking the prosecutor's remarks to the jury, the defendant must show that, "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." [Citation.]

(*People v. Centeno*, *supra*, 60 Cal.4th at pp. 666-667; see also *People v. Medellin* (2020) 45 Cal.App.5th 519, 533.) "Although we generally review claims of prosecutorial error for an abuse of

discretion [citation], we independently examine what the law is [citation] and "objective[ly]" examine how a "reasonable juror" would likely interpret the prosecutor's remarks [citations]… . " (*People v. Collins* (2021) 65 Cal.App.5th 333, 340.)

2900.7-Fair attacks on defense evidence, without disparaging defense counsel, okay 5/20

"Although counsel have broad discretion in discussing the legal and factual merits of a case [citation], it is improper to … resort to personal attacks on the integrity of opposing counsel [citation]." (*People v. Bell* (1989) 49 Cal.3d 502, 538; see also *People v. Spector* (2011) 194 Cal.App.4th 1335, 1405.) " 'In evaluating a claim of such misconduct, we determine whether the prosecutor's comments were a fair response to defense counsel's remarks' (*People v. Young* (2005) 34 Cal.4th 1149, 1189), and whether there is a reasonable likelihood the jury construed the remarks in an objectionable fashion [citation]." (*People v. Edwards* (2013) 57 Cal.4th 658, 738.)

For example, "[i]t is improper for a prosecutor to argue to the jury as an analysis of the defense argument or strategy that defense counsel believes his client is guilty. [Citation.]" (*People v. Bell*, *supra*, 49 Cal.3d at p. 538.) "It is error for a prosecutor to argue that defense counsel knew his client was guilty but proceeded with a sham defense." (*People v. Williams* (2016) 1 Cal.5th 1166, 1188.) "The unsupported implication by the prosecutor that defense counsel fabricated a defense constitutes misconduct." (*People v. Bain* (1971) 5 Cal.3d 839, 847; see also *People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1077.) "If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) On the other hand, "[a]n argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper." (*Id*. at p. 1302, fn. 47; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1002 [referring to prosecutor's permissible argument that defense counsel's " 'job is to create straw men. Their job is to put up smoke, red herrings. And they have done a heck of a good job. And my job is to straighten that out and show you where the truth lies. …' "].)

2900.8-Harsh attacks on defense expert's bias and credibility permitted 5/20

Although it is misconduct for a prosecutor to improperly denigrate defense counsel, "an 'argumentative reminder' that defense counsel selected expert witnesses whose opinions were favorable to defendant's case is not an insinuation of deceit." (*People v. Clark* (2011) 52 Cal.4th 856, 961.) In *People v. Monterroso* (2004) 34 Cal.4th 743, for example, the prosecutor discussed a defense expert's substantial fee and her history of testifying only for criminal defendants, remarking: " 'See, what you people probably don't understand, because you haven't been around the system, but there's a whole industry of these defense experts that bounce around from trial to trial, state to state, collecting good money for testimony. It is a whole industry. They don't just show up here, this isn't the first case. Next week she'll be talking about somebody else.' " The appellate court held: "The district attorney's characterization of [the expert's] credibility was within the bounds of proper argument." (*Id*. at p. 784; see also *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1272; but see *People v. McGreen* (1980) 107 Cal.App.3d 504, 517, disapproved on another ground in *People v. Wolcott* (1983) 34 Cal.3d 92, 101 [misconduct for prosecutor to accuse a defense expert of having actually committed perjury while testifying in another case].)

> Although prosecutorial arguments may not denigrate opposing counsel's integrity, "harsh and colorful attacks on the credibility of opposing witnesses are permissible. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 162 [claimed disparagement of defense expert was not misconduct].) Moreover, a prosecutor "is free to remind the jurors that a paid witness may accordingly be biased and is also allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent 'lie.' " (*Ibid*. [prosecutor properly implied that defense expert " 'stretch[ed] [a principle] for a buck' "]; see *People v. Alfaro* [(2007)] 41 Cal.4th [1277] at p. 1328 ["it is not misconduct to question a defense expert's veracity"].)

(*People v. Parson* (2008) 44 Cal.4th 332, 360; see also *People v. Spector* (2011) 194 Cal.App.4th 1335, 1407-1408.)

2900.9-Prosecutor can argue defense's failure to call logical witnesses 5/20

A prosecutor's comment in argument regarding the defense's failure to call a logical witness is proper. (*People v. Bell* (2019) 49 Cal.4th 70, 539.) There is " '[a] distinction … between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.' " (*People v. Thomas* (2012) 54 Cal.4th 908, 939, citing *People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

> The former is permissible because a prosecutor generally is permitted to remark on the state of the evidence at closing argument. (E.g., *People v. Weaver* (2012) 53 Cal.4th 1056, 1077.) "[T]he prosecutor may comment ' "on the state of the evidence, or on the failure of the defense to introduce material evidence or call logical witnesses." ' " (*People v. Carter* [(2005)] 36 Cal.4th [1215,] 1277.)

(*People v. Jasso* (2013) 211 Cal.App.4th 1354, 1370.)

2900.10-In rebuttal prosecutor can fairly respond to defense arguments 5/20

"Rebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel." (*People v. Bryden* (1998) 63 Cal.App.4th 159, 184; see also *People v. Reyes* (2016) 246 Cal.App.4th 62, 74.) Indeed, "even otherwise prejudicial prosecutorial argument, when made within proper limits in rebuttal to arguments of defense counsel, does not constitute misconduct." (*People v. McDaniel* (1976) 16 Cal.3d 156, 177; see also *People v. Hill* (1967) 66 Cal.2d 536, 560-561 ["a prosecutor is justified in making comments in rebuttal, perhaps otherwise improper, which are fairly responsive to argument of defense counsel and are based on the record"].)

A prosecutor should not "sandbag" defense counsel by making a perfunctory opening argument, saving the major points of the argument for rebuttal. (*People v. Robinson* (1995) 31 Cal.App.4th 494, 505 [prosecutor committed misconduct by giving a "perfunctory (three and one-half reporter transcript pages) opening argument designed to preclude effective defense reply," followed by a "rebuttal" argument that was "10 times longer (35 reporter transcript pages) than his opening argument"] distinguish *People v. Fernandez* (2013) 216 Cal.App.4th 540, 563-564.) [prosecutor's opening argument (20 transcript page) was not perfunctory and her rebuttal was six pages shorter].)

2910.1-There was no *Doyle* error 6/20

Under *Doyle v. Ohio* (1976) 426 U.S. 610, 619 (*Doyle*), the use against defendant of a postarrest invocation of rights following a *Miranda* admonition violates due process. (*People v. Thomas* (2012) 54 Cal.4th 908, 936; *People v. Clark* (2011) 52 Cal.4th 856, 959.)

But "*Doyle* does not apply where … the conversation in which the defendant was silent involved a private party 'absent a showing that such conduct was an assertion of [the defendant's] rights to silence and counsel.' (*People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520.)" *(People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1212.) In *People v. Medina* (1990) 51 Cal.3d 870, for example, the California Supreme Court held the jury could draw adverse inferences from the defendant's silence when his sister asked him why he shot the victims, because the "record [did] not suggest that defendant believed his conversation with his sister was being monitored, or that his silence was intended as an invocation of any constitutional right." (*Id*. at p. 890.)

The *Doyle* rule is not violated when " 'the evidence of defendant's invocation of the right to counsel was received without objection and the remarks of the prosecutor did not invite the jury to draw any adverse inference from either the fact or the timing of defendant's exercise of his constitutional right.' " (*People v. Huggins* (2006) 38 Cal.4th 175, 199.) Moreover, a "… *Doyle* violation does not occur unless the prosecutor is permitted to use a defendant's postarrest silence against him at trial … ." (*People v. Clark*, *supra*, 52 Cal.4th at p. 959.) Thus, if "the prosecutor did not attempt and was not permitted to use the comment against defendant by inviting the jury to draw any adverse inferences from the remark … there was no violation of the *Doyle* rule." (*People v. Thomas*, *supra*, 54 Cal.4th at p. 936.)

The *Doyle* rule does not apply to post-arrest, pre-*Miranda* warning silence, unless the defendant can meet the burden of establishing that he or she was clearly invoking the privilege against self-incrimination. (*People v. Tom* (2014) 59 Cal.4th 1210, 1215, 1225.) "We … conclude that defendant, after his arrest but before he had received his *Miranda* warnings, needed to make a timely and unambiguous assertion of the privilege [against self-incrimination] in order to benefit from it." (*Id*. at p. 1215.)

> [T]he Fifth Amendment privilege against self-incrimination does not categorically bar the prosecution from relying on a defendant's pretrial silence. The prosecution may use a defendant's pretrial silence as impeachment, provided the defendant has not yet been *Mirandized*. (*Fletcher v. Weir* (1982) 455 U.S. 603 [postarrest silence]; *Jenkins v. Anderson* (1980) 447 U.S. 231 [prearrest silence]; cf. *Doyle v. Ohio* (1976) 426 U.S. 610 [postarrest, post-*Miranda* silence is not admissible as impeachment].) The prosecution may also use a defendant's prearrest silence in response to an officer's question as substantive evidence of guilt, provided the defendant has not expressly invoked the privilege. (*Salinas* [*v. Texas* (2013)] 570 U.S. [178] at p. 181 (plur. opn. of Alito, J.).)

(*People v. Tom*, *supra*, 59 Cal.4th at p. 1223.)

And *Doyle* is not violated when the prosecutor's reference to post-*Miranda* silence is a fair response to the defendant's testimony or fair comment on the evidence in rebuttal to defense argument. (*People v. Campbell* (2017) 12 Cal.App.5th 666, 672 [defendant testified he cooperated with police]; *People v. Champion* (2005) 134 Cal.App.4th 1440, 1448 [defendant testified he never had chance to explain his side of the story].) "When a defendant creates the impression at trial that he fully cooperated with police and answered any questions they asked, the prosecutor may fairly comment on his post-*Miranda* silence. (*People v. Delgado* (2010) 181 Cal.App.4th 839, 853.)"

(*People v. Campbell*, *supra*, 12 Cal.App.5th at p. 672.) "Fair response is also allowed when a defendant gives the impression he did not have a fair chance to explain his innocence. (*United States v. Robinson* (1988) 485 U.S. 25, 32.)" (*People v. Campbell*, *supra*, 12 Cal.App.5th at p. 673; accord *People v. Wang* (2020) 46 Cal.App.5th 1055, 1082.)

Finally, the *Doyle* rule does not apply to mere witnesses because they have no constitutional right to remain silent. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1334.)

2920.1-There was no *Griffin* error 10/20

In *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*), the United States Supreme Court held that the prosecution may not comment upon a defendant's failure to testify in his or her own behalf. (*People v. Lopez* (2018) 5 Cal.5th 339, 368; *People v. Thomas* (2012) 54 Cal.4th 945; see also *People v. Thompson* (2016) 1 Cal.5th 1043, 1117 [can apply to comments by trial judge also].) "The *Griffin* rule has been extended to prohibit a prosecutor from commenting, either directly or indirectly, on the defendant's failure to testify. (*People v. Medina* (1995) 11 Cal.4th 694, 755.)" (*People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1524; see also *People v. Denard* (2015) 242 Cal.App.4th 1012, 1020 [*Griffin* error held harmless].)

The *Griffin* "holding does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. [Citations]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339; see also *People v. Gomez* (2018) 6 Cal.5th 243, 299.) "Nonetheless, as defendant observes, we have held that a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided only by the defendant, who therefore would be required to take the witness stand." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1339.) But there is no *Griffin* violation when "the prosecutor's comments were framed in terms of the failure to call some person other than defendant who would testify that defendant 'was with me' " (*People v. Thomas*, *supra*, 54 Cal.4th at p. 945; see also *People v. Brady* (2010) 50 Cal.4th 547, 565-566; *People v. Brown* (2003) 31 Cal.4th 518, 554.)

And *Griffin* is not violated when the prosecutor's claimed reference to defendant's failure to testify is a fair response to defense counsel's argument. (*United States v. Robinson* (1988) 485 U.S. 25, 32.) "Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, *Griffin* holds that the privilege against compulsory self-incrimination is violated. But whereas in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege." (*Id*. at p. 32; see also *People v. Hubbard* (2020) 52 Cal.App.5th 555, 564-566.)

Appellate courts "evaluate claims of *Griffin* error by inquiring whether there is 'a reasonable likelihood that any of the [prosecutor's] comments could have been understood, within its context, to refer to defendant's failure to testify.' (*People v. Clair* (1992) 2 Cal.4th 629, 663.)" (*People v. Sanchez*, *supra*, 228 Cal.App.4th at p. 1523.)

2930.1-Prosecutor can be called as defense witness if no other source of information 8/19

"It is generally prohibited for a prosecutor to act as both an advocate and a witness. ([former] Rules Prof. Conduct, rule 5-210.)" (*People v. Linton* (2013) 56 Cal.4th 1146, 1185 [now Rules Prof. Conduct, rule 3.7.) "Within the criminal justice system, the prohibition against a prosecutor's acting as both advocate and witness addresses 'the concern that jurors will be unduly influenced by the prestige and prominence of the prosecutor's office and will base their credibility determinations on improper factors.' " (*People v. Donaldson* (2001) 93 Cal.App.4th 916, 928-929 … .) " 'Only in extraordinary circumstances should an attorney in an action be called as a witness, and before the attorney is called, defendant has an obligation to demonstrate that there is no other source for the evidence he seeks.' (*People v. Garcia* (2000) 84 Cal.App.4th 316, 332.)" (*People v. Linton*, *supra*, 56 Cal.5th at p. 1186; see also *People v. Dalton* (2019) 7 Cal.5th 166, 212.)

2940.1-General principles governing recusal of DA 5/20

"The recusal of an entire prosecutorial office is a serious step, imposing a substantial burden on the People, and the Legislature and the courts may reasonably insist upon a showing that such a step is necessary to assure a fair trial." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1156; see also *People v. Pierce* (2019) 38 Cal.App.5th 321, 344.) Moreover, "[d]isqualification of an entire prosecutorial office from a case is disfavored by the courts, absent a substantial reason related to the proper administration of justice." (*People v. Hernandez* (1991) 235 Cal.App.3d 674, 679-680; see also *Melcher v. Superior Ct.* (2017) 10 Cal.App.5th 160, 167.) The showing of a conflict of interest necessary to justify so drastic a remedy must be especially persuasive. (*Id*. at p. 678; see also *People v. Petrisca* (2006) 138 Cal.App.4th 189, 195.)

In considering a motion for recusal, the court must presume the district attorney properly and conscientiously will discharge his or her duties and has performed official duty properly. (*People v. Superior Court (Martin)* (1979) 98 Cal.App.3d 515, 521.) In *Martin*, the appellate court pointed out that an erroneous judicial recusal denying the district attorney his or her lawful power is much more than "ordinary judicial error." In overturning the trial court's order of recusal, the court emphasized the importance of the district attorney's function:

> "The district attorney is the public prosecutor. [¶] He shall attend the courts, and conduct on behalf of the people all prosecutions for public offenses." (Gov. Code, § 26500.) He is the People's choice of an attorney to represent them in their public affairs. (See Gov. Code, § 24009.) "He acts as both a county officer and a state officer in the exercise of the powers for which he has been elected." [Citation.] In the performance of his duties he is thus primarily responsible to the electorate. "There is [ordinarily] no review [of his power to prosecute] nor can a court control this statutory power by mandamus." [Citation.]

(*Id*. at p. 519, citing *People v. Adams* (1974) 43 Cal.App.3d 697, 707-708; similarly, see *People v. Eubanks* (1996) 14 Cal.th 580, 589.)

Recusal deprives county residents of the services of their elected representative in the prosecution of criminal cases. (*People v. Eubanks*, *supra*, 14 Cal.4th at p. 594, fn. 6.) "[T]he People have an interest in being heard throughout the course of a criminal prosecution and it is the duty of the district attorney to advocate on the People's behalf in an effort to achieve a fair and just result." (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1388.) "The attorney general is, of course, an elected state official, but unlike the district attorney, is not accountable at the ballot box exclusively to the electorate of the county." (*People v. Lopez* (1984) 155 Cal.App.3d 813, 822.)

> Prosecutors are public fiduciaries. They are servants of the People, obliged to pursue impartially in each case the interests of justice and of the community as a whole. When conflicts arise that compromise their ability to do so, they can and should be recused. But defendants bear the burden of demonstrating a genuine conflict; in the absence of any such conflict, a trial court should not interfere with the People's prerogative to select who is to represent them.

(*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 709, fn. omitted.)

Finally, there must be "no other alternative available but to recuse the entire district attorney's office." (*People v. Merritt* (1993) 19 Cal.App.4th 1573, 1579; see also *People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1482.) "If a defendant seeks to recuse an entire office, the record must demonstrate 'that the conduct of any deputy district attorney assigned to the case, or of the office as a whole, would likely be influenced by the personal interest of the district attorney or an employee.' [Citation.]" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 374; see also *People v. Dekraai* (2016) 5 Cal.App.5th 1110, 1139.) "Even if specific prosecutors had engaged in misconduct, this behavior standing alone would not necessarily evince a likelihood that other prosecutors would exceed the bounds of proper advocacy." (*People v. Bryant et al.*, *supra*, 60 Cal.4th at p. 375.) Such less drastic alternatives that may suffice under the circumstances include, for example, "walling-off" a district attorney employee witness from the prosecution or transferring the case to another branch office. (*People v. Cannedy*, *supra*, 176 Cal.App.4th at p. 1491.)

2940.2-PC1424 test for recusal of DA 8/19

In *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, the California Supreme Court held that trial courts had inherent authority to disqualify the district attorney where a conflict of interest appeared that might prejudice the district attorney against the defendant and thereby affect or appear to affect the prosecutor's ability to act impartially. (*Id*. at p. 269.) The Legislature responded to *Greer* in 1980 by codifying the standard for recusal. Penal Code section 1424, subdivision (a), currently provides: "The motion [to recuse] may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." No longer is continued prosecution by the district attorney barred for the mere "appearance" of impropriety or unseemliness. (*People v. Eubanks* (1996) 14 Cal.4th 580, 592 (*Eubanks*); see also *Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93, 104; *People v. McPartland* (1988) 198 Cal.App.3d 569, 573-574; *People v. Lopez* (1984) 155 Cal.App.3d 813, 823-824.)

"Section 1424 sets out the standard governing motions to recuse a prosecutor: such a motion 'may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.' … The statute 'articulates a two-part test: "(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?" ' …" (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 701, 711, citations omitted; accord *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833; see also *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727-728; *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746.) "Thus, the first half of the inquiry asks only whether a 'reasonable possibility' of less than impartial treatment exists, while the second half of the inquiry asks whether any such possibility is so great that it is more likely than not the defendant will be treated unfairly during some portion of the criminal proceedings." (*Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at p.

713.) The defendant "bear[s] the burden of demonstrating a genuine conflict; in the absence of any such conflict, a trial court should not interfere with the People's prerogative to select who is to represent them." (*Id*. at p. 709; see also, *People v. Trinh* (2014) 59 Cal.4th 216, 229.) "That burden is especially heavy where … the defendant seeks to recuse not a single prosecutor but the entire office. [Citations.]" (*People v. Trinh*, *supra*.)

Under the first prong of section 1424 test, a conflict of interest " 'exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 968.) The statute continues to contemplate both "actual" and "apparent" conflicts of interest "when the presence of either renders it unlikely that defendant will receive a fair trial." (*People v. Conner* (1983) 34 Cal.3d 141, 147; *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277, 1282-1285.) "[T]he judicial inquiry under section 1424 must be on whether the appearance of impropriety resulting from the conflict of interest such as that involved here '[evidences] a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.' [Citation.]" (*People v. Lopez*, *supra*, 155 Cal.App.4that p. 828.) In short, the "defendant must identify, and a court must find, some *conflict of interest* that renders it unlikely defendant will receive a fair trial." (*Hollywood v. Superior Court*, *supra*, 43 Cal.4th at p. 735, italics in original.) The prosecutor's "[i]mpartiality, in this context, means not that the prosecutor is indifferent to the conviction or acquittal of the defendant—the prosecutor does not share in the neutrality expected of the judge and jury—but that the prosecutor is 'expected to exercise his or her discretionary functions in the interests of the People at large, and not under the influence or control of an interested individual.' (*Eubanks*, [*supra*, 14 Cal.4th] at p. 590.)" (*People v. Vasquez* (2006) 39 Cal.4th 47, 55.) The requisite conflict of interest can fall into several categories, including prosecutorial impartiality impaired or loyalties divided by institutional interests to other law enforcement agencies. (*People v. Dekraai* (2016) 5 Cal.App.5th 1110, 1144-1145.)

According to the second prong of the section 1424 test, the perceived conflict of interest, whether characterized as actual or apparent, "warrants recusal only if 'so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings.' " (*Eubanks*, *supra*, 14 Cal.4th at p. 592.) In other words, the likelihood the defendant will not receive such fair treatment must be real, not merely apparent. (*Ibid*.) Section 1424 requires the defendant to show the potential effect of the alleged conflict of interest on the trial. (*People v. Breaux* (1991) 1 Cal.4th 281, 294; *People v. Conner*, *supra*, 34 Cal.3d at p. 147.)

> [W]hether the prosecutor's conflict is characterized as actual or only apparent, the potential for prejudice to the defendant—the likelihood that the defendant will not receive a fair trial—must be real, not merely apparent, and must rise to the level of a likelihood of unfairness. Thus section 1424, unlike the *Greer* standard, does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would appear improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system.

(*Eubanks*, *supra*, 14 Cal.4th at p. 592; see also *Spaccia v. Superior Court*, *supra*, 209 Cal.App.4th at p. 106.)

"The trial court's decision on a motion to recuse the prosecutor is reviewed for abuse of discretion … ." (*People v. Bell* (2019) 7 Cal.5th 70, 97.)

2940.3-Recusal should not be used to punish past prosecutorial misconduct 5/20

"Recusal is not a mechanism to punish past prosecutorial misconduct. Instead, it is employed if necessary to ensure that future proceedings will be fair." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 375.) Thus, the disqualification statute, Penal Code section 1424, does not permit recusal just because the District Attorney's participation in the case would appear improper or unseemly, or could reduce public confidence in the integrity and impartiality of the criminal justice system. (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 835*;* see also *People v. McPartland* (1988) 198 Cal.App.3d 569, 573-574; *People v. Lopez* (1984) 155 Cal.App.3d 813, 827-828.) "[S]ection 1424 does not exist as a free-form vehicle through which to express judicial condemnation of distasteful, or even improper, prosecutorial actions." (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 735.) Instead, "[s]ection 1424's standards are 'prophylactic' [citation] and are designed 'to prevent potential constitutional violations from occurring' [citation]." (*People v. Trinh* (2014) 59 Cal.4th 216, 231.)

> [W]e emphasize that recusal motions are not disciplinary proceedings against the prosecutor. The ultimate focus of the section 1424 inquiry is on protection of the defendant's rights, not whether recusal may be just or unjust for the prosecutor. Thus, in some cases a prosecutor may have committed misconduct but not be subject to recusal because the misconduct does not impair the defendant's right to a fair proceeding; in other cases, a prosecutor may commit no misconduct but nevertheless be subject to recusal because a conflict, through no fault of the prosecutor's, jeopardizes the defendant's rights.

(*Hollywood v. Superior Court*, *supra*, 43 Cal.4th at p. 731.)

2940.4-No recusal merely because DA attorney or investigator is witness 5/11

Recusal of the entire prosecutor's office is not required merely because one member of the office may become a witness at trial. (*People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1489.) Penal Code section 1424 permits recusal only in the case of a demonstrated conflict of interest. Thus, the courts have almost always rebuffed attempts to recuse a District Attorney's Office simply because a deputy district attorney or other employee would be called as a witness, assuming no other conflict of interest existed. (See, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 85-87; *Trujillo v. Superior Court* (1983) 148 Cal.App.3d 368; see also *People v. Cannedy*, *supra*, 176 Cal.App.4th at p. 1489 ["Here, the potential for conflict is even more remote, as it is neither the deputy district attorney herself who is the potential witness nor another deputy district attorney, but support staff employees."]; *People v. Merritt* (1993) 19 Cal.App.4th 1573, 1580-1581; but see, *People v. Jenan* (2006) 140 Cal.App.4th 782 [upheld recusal of small DA's Office because DDA and DA Investigator were trial witnesses].)

The same was true under the pre-Penal Code section 1424 case law. (*People ex. rel. Younger v. Superior Court* (1978) 86 Cal.App.3d 180 (*Younger*); *People v. Superior Court (Hollenbeck)* (1978) 84 Cal.App.3d 491, 501-502 [that several district attorneys ought to testify at pretrial proceedings did not warrant recusal of entire district attorney's office as prosecutor at trial].)

In *Younger*, *supra*, 86 Cal.App.3d 180, the trial court recused the entire district attorney's office because a deputy district attorney became a potential witness at trial necessary to support a key witness's identification of the defendant. The Court of Appeal held recusal was an abuse of discretion. The court concluded there was no impropriety, apparent or real, in the fact one member of the office of the district attorney would testify in a case prosecuted by another member of the

same office. (*Id.* at p. 209.) Much of the court's analysis turned on the inapplicability of an old provision of the Rules of Professional Conduct prohibiting a law firm from handling a case in which a member was likely to be a witness. (Former rule 2-111(A)(4) [distinguish current rule 5-210].)

> We conclude, therefore, that that part of rule 2-111(A)(4) requiring withdrawal of an entire law firm when a member of the firm ought to testify on behalf of the client is inapplicable to a multideputy prosecutorial office of a district attorney and that the circumstances in the case at bench, which at most disclose that one deputy district attorney ought to be called as a witness on behalf of the prosecution at trial, do not reasonably require recusal of the entire prosecutorial office of the District Attorney of San Bernardino County to insure the integrity of the fact-finding process, the fairness or appearance of fairness at trial, the orderly or efficient administration of justice or public trust and confidence in the criminal justice system.

(*Id*. at pp. 210-211, footnote omitted.)

2940.5-No recusal of entire DA's Office because some employees have conflict 9/21

Even were it shown that some members of the District Attorney's Office manifest an actual conflict of interest that requires their individual recusal, the entire office of the district attorney need not be recused. "In most circumstances, the fact one or two employees of a large district attorney's office have a personal interest in a case would not warrant disqualifying the entire office. [Citations.]" (*People v. Vasquez* (2006) 39 Cal.4th 47, 57, fn. omitted.) "Ethical walls are an accepted means of reducing the likelihood of a disabling conflict." (*Melcher v. Superior Court* (2017) 10 Cal.App.5th 160, 167.)

The appellate courts have emphasized that particular caution should be exercised when the defendant tries to recuse the entire prosecutor's office. (*People v. Hernandez* (1991) 235 Cal.App.3d 674, 679-680; *Kain v. Municipal Court* (1982) 130 Cal.App.3d 499, 504.) Instances requiring recusal of an entire prosecutor's office to protect the integrity of the judicial process are rare. (*People v. Eubanks* (1996) 14 Cal.4th 580 [recusal of office proper where victim company contributed to DA's cost of investigation]; *Schumb v. Superior Court* (2021) 64 Cal.App.5th 973 [DA and his chief assistant had close personal and political (fundraising) relationship with defendant accused of bribery of members of Sheriff's Office]; *People v. Jenan* (2006) 140 Cal.App.4th 782 [upheld recusal of small DA's Office because DDA and DA Investigator were trial witnesses]; *Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277 [DA and staff were direct victims of alleged willful misconduct of elected auditor-controller]; see also *People v. Choi* (2000) 80 Cal.App.4th 476 [DA had strong personal opinions, expressed to press and judge, related to case]; distinguish *People v. Pierce* (2019) 38 Cal.App.5th 321, 340-345 [Worker's Compensation Fraud Unit need not be recused because grant funding came from state agency not victim insurance companies].)

Several California cases have held it appropriate to recuse only the deputy district attorney with the actual conflict of interest rather than the entire district attorney's office. (See, e.g., *Milsap v. Superior Court* (1999) 70 Cal.App.4th 196; see also *People v. Hernandez*, *supra*, 235 Cal.App.3d 674.) This includes cases with obvious conflicts of interest, such as, the defense attorney becoming a deputy district attorney. (*People v. Bell* (2019) 7 Cal.5th 70, 97-98; *In re Charles L.* (1976) 63 Cal.App.3d 760.)

In *People v. Gamache* (2010) 48 Cal.4th 347, Peggy Williams, a typist for the San Bernardino County District Attorney's Office and her husband were victims of a brutal home invasion robbery. The employee was shot several times but survived, while her husband was killed. The prosecution team, including the District Attorney who determined to seek the death penalty, had little to no familiarity with the surviving victim. All testified her status played no part in the decision to seek the death penalty. Meanwhile an ethical wall was created between the prosecution team and the members of the branch where the victim had worked. The California Supreme Court affirmed the trial court's denial of the defense's recusal motion. (*Id*. at pp. 365-366.) "The record thus supports the trial court's conclusion that, because of the prompt steps taken to screen off prosecution of this case from those employees who might have any connection to Peggy Williams, there was no likelihood the conflict would lead to unfair treatment of Gamache at trial." (*Id*. at p. 365; see also *People v. Petrisca* (2006) 138 Cal.App.4th 189, 196-198 [reversal of order recusing entire Los Angeles DA's Office even though defendant accused of murdering the mother of a DDA].)

Finally, in *Melcher v. Superior Court*, *supra*, 10 Cal.App.5th 160, the defendant was charged with aggravated felony assault against the husband of the elected District Attorney of Calaveras County. The District Attorney totally recused herself from the case, including waiving any Marcy's Law victim's rights. Although charged by the district attorney's office and prosecuted by a deputy district attorney, active supervision of the case was performed by the Office of the Attorney General. The appellate court upheld the trial court's denial of the defense motion to recuse the entire district attorney's office. (*Id*. at p. 163.)

> We conclude the trial court did not abuse its discretion in denying petitioner's motion to recuse. Substantial evidence supports its determination that no one in the district attorney's office assigned to the case is likely to be influenced by the district attorney's personal interest in the matter. First, the uncontested evidence demonstrates the district attorney recused herself. Other than to assign the case to [Deputy District Attorney] Matthews, she has had no personal involvement with the case. Second, the district attorney has exercised no discretion in the case's prosecution. Matthews charged the case and continued to prosecute it under the supervision of a deputy attorney general. [¶] Third, the district attorney established an ethical wall that no evidence shows anyone has breached. [¶] Fourth, there is no evidence the district attorney will testify at trial. [¶] Fifth, there is no evidence any of the deputy attorneys in the office have been influenced by the district attorney's interest in the case.

(*Id*. at pp. 167-168.)

2940.6-Court has discretion to decide if evidentiary hearing necessary 2/15

The statutory procedure for litigating a prosecutorial recusal motion pursuant to Penal Code section 1424 is a two-stage process. (*Packer v. Superior Court* (2014) 60 Cal.4th 695, 710 (*Packer*).)

> At the first stage, the defendant must file a notice of motion containing "a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied upon by the moving party," and those allegations must be supported by "affidavits of witnesses who are competent to testify to the facts set forth in the affidavit." (§ 1424, subd. (a)(1).) In opposition to the motion, the district attorney and the Attorney General may also file affidavits. (*Ibid*.) After considering the motion and affidavits, the trial court then

> decides whether or not the second stage, an evidentiary hearing, is necessary. (*Ibid*.) An evidentiary hearing may be ordered if the defendant's affidavits establish a prima facie case for recusal—that is, if the defendant's affidavits, if credited, would require recusal. [Citation.]

(*Packer*, *supra*, 60 Cal.4th at p. 710, italics deleted.)

"The decision whether to hold an evidentiary hearing 'contemplates an exercise of discretion on the part of the trial court in determining whether a hearing is necessary,' and we review a trial court's decision not to hold an evidentiary hearing for an abuse of that discretion." (*Packer*, *supra*, 60 Cal.4th at p. 710 [abuse of discretion by trial court in not holding evidentiary hearing in light of conflicting affidavits], citing *Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93, 109 .)

> We conclude that, at a minimum, in order to establish an abuse of discretion in the denial of a hearing, the moving party must show that it submitted sufficient affidavits to establish a prima facie case for disqualification. … "A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited." [Citation.] … In our view, a similar test should apply when a party seeks a hearing on a recusal motion under Penal Code section 1424: the party seeking an evidentiary hearing must make a prima facie showing by affidavit; a prima facie showing refers to those facts demonstrated by *admissible* evidence, which would sustain a favorable decision if the evidence submitted by the movant is credited.

(*Spaccia v. Superior Court*, *supra*, 209 Cal.App.4th. at pp. 111-112, fns. omitted, italics in original [trial court's failure to order evidentiary hearing not abuse of discretion because defendant's affidavits failed to establish likelihood she would not receive fair trial].)

2960.1-Presumption of vindictive prosecution may be rebutted 12/14

A criminal defendant is protected from both actual vindictiveness and the apprehension of retaliation for exercising a legal right. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 725; *People v. Puentes* (2010) 190 Cal.App.4th 1480, 1484 (*Puentes*).) "The gravamen of a vindictive prosecution is the increase in charges or a new prosecution brought in retaliation for the exercise of constitutional rights." (*People v. Valli* (2010) 187 Cal.App.4th 786, 802.)

> Absent a presumption, a denial of due process on grounds of prosecutorial vindictiveness requires objective evidence "that the prosecutor's charging decision was motivated by a desire to punish [the defendant] for doing something that the law plainly allowed him to do." [Citation.] "The charge of vindictive prosecution is not a substitute for evidence." [Citations.]

(*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1549; see also *People v. Peyton* (2014) 229 Cal.App.4th 1063, 1074-1075.)

"[T]he presumption of unconstitutional vindictiveness is a legal presumption which arises when the prosecutor increases the criminal charge against a defendant under circumstances which … are deemed to present a 'reasonable likelihood of vindictiveness.' " (*In re Bower* (1985) 38 Cal.3d 865, 879.) "Where the defendant shows that the prosecution has increased the charges in apparent response to the defendant's exercise of a procedural right, the defendant has made an initial showing of an appearance of vindictiveness." (*Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 371 (*Twiggs*) [prior conviction allegations added after first trial ended in hung jury and defendant insisted on second trial]; see also *Puentes*, *supra*, 190 Cal.App.4th at p. 1486 [presumption applied

when prosecutor refiled felony charge, which had been dismissed after jury hung, only after the related misdemeanor conviction was reversed on appeal].)

> [O]nce the presumption of vindictiveness is raised the prosecution bears a heavy burden of rebutting the presumption with an explanation that adequately eliminates actual vindictiveness. In this regard, the trial court should consider the prosecutor's explanation in light of the total circumstances of the case in deciding whether the presumption has been rebutted.

(*Twiggs*, *supra*, 34 Cal.3d at p. 374.) The People are entitled to an evidentiary hearing to meet its burden of rebutting the defense showing of vindictiveness (whether presumptive or actual) by showing that there was no actual vindictiveness. (*Id.* at p. 375.)

> In order to rebut the presumption of vindictiveness, the prosecution must demonstrate that (1) the increase in charge was justified by some objective change in circumstances or in the state of the evidence which legitimately influenced the charging process and (2) that the new information could not reasonably have been discovered at the time the prosecution exercised its discretion to bring the original charge.

(*In re Bower*, *supra*, 38 Cal.3d at p. 879.) For example, the presumption of vindictiveness can be rebutted by evidence of new facts developed through the first trial. (*Twiggs*, *supra*, 34 Cal.3d at p. 373.) In addition, new charges can be added to ensure the admissibility in the subsequent trial of evidence excluded from the first. (*Robinson v. Superior Court* (1986) 181 Cal.App.3d 746, 749-750.) In contrast, a prosecutor's change of mind as to the strength of the previously dismissed charges following a defendant's successful appeal does not rebut the presumption of vindictiveness. (*Puentes*, *supra*, 190 Cal.App.4th at p. 1488.)

2960.2-No presumption of prosecutorial vindictiveness pretrial 4/20

The presumption of vindictiveness does not apply in a pretrial setting. (*People v. Halim* (2017) 14 Cal.App.5th 632, 644.) In *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 371 (*Twiggs*), where charges were increased after a mistrial, the California Supreme Court distinguished cases in which more serious charges were added *pretrial* and in the "give and take" of plea bargaining, all of which were found to be proper. (*Id*. at p. 371, citing *Bordenkircher v. Hayes* (1978) 434 U.S. 357 and *United States v. Goodwin* (1982) 457 U.S. 368.) More specifically, *Twiggs* discussed and distinguished *People v. Farrow* (1982) 133 Cal.App.3d 147 (*Farrow*). (*Twiggs*, *supra*, 34 Cal.3d at pp. 372-373.) In *Farrow*, the appellate court held:

> Unless the [presumption] rule is limited to the postconviction appeal context, it becomes totally unworkable. Prosecutorial discretion in determining the charges to be filed is basic to the framework of our criminal justice system. [Citations.] Up to the time of verdict, the prosecution may amend the information to include additional offenses shown by the evidence at the preliminary hearing. To extend [the presumption] to the pretrial and trial context would unduly hamper the legitimate exercise of this prosecutorial discretion.

(*Id*. 133 Cal.App.3d at p. 152.) "In the pretrial situation, no presumption of vindictiveness arises. A presumption of vindictiveness arises only if the prosecutor 'ups the ante' after exercise of a postconviction right." (*People v. Puentes* (2010) 190 Cal.App.4th 1480, 1484.)

Thus, no presumption of prosecutorial vindictiveness arises from the addition of charges in a pretrial setting. (*People v. Peyton* (2014) 229 Cal.App.4th 1063, 1074-1075; *People v. Johnson* (1991) 233 Cal.App.3d 425, 447-449; *People v. Matthews* (1986) 183 Cal.App.3d 458, 465-466;

People v. Rivera (1981) 127 Cal.App.3d 136, 141-148.) Nor does it arise if charges are refiled after being previously dismissed in lieu of probation revocation proceedings. (*People v. Bracey* (1999) 21 Cal.App.4th 1532, 1546-1549.) And no presumption of vindictive prosecution was applied where the increased charges were the product of a reevaluation of the evidence by a different prosecutor after the defendant successfully made a motion to withdraw her guilty plea. (*People v. Hudson* (1989) 210 Cal.App.3d 784, 788 [original plea not part of negotiated agreement with prosecution].)

2960.3-No presumption of vindictiveness unless potential sentence increased 8/20

The presumption of vindictiveness applies only if, following a mistrial or a reversal on appeal, the prosecution increases the charges so that the defendant faces a sentence potentially more severe than the sentence he or she faced at the first trial. (*People v. Ledesma* (2006) 39 Cal.4th 641, 643; *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 368-369.) Thus, there is no presumption of vindictiveness if the prosecution does not increase the defendant's exposure to an increased sentence. (*People v. Lucas* (2014) 60 Cal.4th 153, 221 [motion to consolidate charges not vindictive act]; *People v. Sanchez* (2020) 49 Cal.App.5th 961, 984-985 [before retrial prosecutor added alternative lesser charges to counts on which jury hung]; *Short v. Superior Court* (2019) 42 Cal.App.5th 905, 915-916 [same]; distinguish *People v. Puentes*, *supra*, 190 Cal.App.4th 1480 [vindictive for prosecution to reinstate felony that had been dismissed "in interest of justice" after jury hung, following defendant's successful appeal of the misdemeanor conviction].)

In *People v. Villanueva* (2011) 196 Cal.App.4th 411, for example, the first jury convicted the defendant of the substantive charges but were unable to reach a verdict on the firearm enhancement allegation. These were held in abeyance during the subsequent appeal. Defendant's conviction was overturned and on retrial he was convicted of a lesser included offense. The second jury found the firearm enhancements true. As a result the defendant received a greater sentence that after the first trial. The defendant's claim of vindictiveness was rejected. "There was no increase in charges. Defendant was retried on *exactly the same charges* on which he was tried at the first trial. Defendant cannot argue that his intervening appeal somehow eliminated the mistried firearm enhancement allegations from the list of charges to which he was subject to retrial." (*Id*. at p. 419, italics in original.)

2960.4-No presumption of vindictiveness from failed plea bargain 4/20

"The courts have consistently refused to apply the presumption [of prosecutorial vindictiveness] in the context of failed pretrial plea bargains. [Citations.]" (*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1546.) "Absent proof of vindictiveness or other improper motive, increasing the charges or punishment when a plea bargain is refused does not constitute unconstitutional punishment or retaliation for the exercise of a defendant's legal rights." (*People v. Grimes* (2016) 1 Cal.5th 698, 736 ["In the present case, the record establishes nothing more than that a plea bargain was offered and refused."].) The United States Supreme Court has held a prosecutor's offer not to file the new charges in the context of a legitimate plea bargain offer does not implicate a defendant's due process right not to be subjected to vindictive prosecution. (*Bordenkircher v. Hayes* (1978) 434 U.S. 357 (*Bordenkircher*).) "[T]he course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process

Clause of the Fourteenth Amendment." (*Id*., at p. 365.) This reasoning was expanded by the United States Supreme Court in *United States v. Goodwin* (1982) 457 U.S. 368:

> … If a prosecutor could not threaten to bring additional charges during plea negotiation, and then obtain those charges when plea negotiation failed, an equally compelling argument could be made that a prosecutor's initial charging decision could never be influenced by what he hoped to gain in the course of plea negotiation. Whether "additional" charges were brought originally and dismissed, or merely threatened during plea negotiations, the prosecutor could be accused of using those charges to induce a defendant to forgo his right to stand trial. If such use of "additional" charges were presumptively invalid, the institution of plea negotiation could not survive. *Thus, to preserve the plea negotiation process, with its correspondent advantages for both the defendant and the State, the Court in* Bordenkircher *held that "additional" charges may be used to induce a defendant to plead guilty*.

(*Id*. at p. 378, fn. 10, italics added; see also *People v. Matthews* (1986) 183 Cal.App.3d 458, 463-467 [adding a prior felony enhancements that were not in the original complaint did not give rise to a presumption of prosecutorial vindictiveness where the counts were added in the normal course of pretrial proceedings after a failed plea bargaining and after a preliminary examination]; distinguish *People v. Barajas* (1983) 149 Cal.App.3d 30, 34 [rather than refiling misdemeanor as felony as threatened before trial, prosecutor induced mistrial during the misdemeanor trial and then refiled charge as felony].)

2960.5-Filing unrelated charges does not trigger the presumption of vindictiveness 4/20

The filing of unrelated new and additional charges against a previously prosecuted defendant does not trigger a presumption of vindictiveness, nor does it demonstrate actual prosecutorial vindictiveness.

The defendant in *People v. Valli* (2010) 187 Cal.App.4th 786, for example, was prosecuted for felony evading after being acquitted of murder. The conduct supporting the evading charge was admitted in the murder trial as consciousness of guilt evidence. The defendant's murder trial testimony was used to support the new felony evading prosecution. The defendant's motion to dismiss for vindictive prosecution was denied. "Numerous courts have held new charges after an acquittal on separate charges does not, without more, give rise to a presumption of vindictiveness. [Citations.]" (*Id*. at p. 805.) Indeed, such an acquittal can be considered an " 'objective change in circumstances' 'which legitimately influenced the charging process,' and which 'could not reasonably have been discovered at the time the prosecution exercised its discretion to bring the original charge.' [Citation.] Thus, the presumption would be rebutted. [Citation.]" (*Ibid*.)

In *People v. Lucious* (1984) 153 Cal.App.3d 416 the defendant was facing rape and other serious charges involving one victim. The defense sought discovery of a different set of crimes including assault with intent to commit rape against another victim. When the discovery motion was granted the prosecution decided to file charges from the second set of crimes involving the additional victim. Defendant was convicted after trial on the consolidated charges. On appeal the defendant claimed the new charges should be dismissed as the result of vindictive prosecution. The appellate court rejected this argument. "The facts of this case cannot be stretched into anything beyond a pretrial decision to file a further separate case." (*Id*. at p. 423.) "We refuse, absent logic, reason or higher judicial authority to extend *Blackledge* [*v. Perry* (1974) 417 U.S. 21] to interfere

with the prosecutor's wide discretion in timing the filing of charges against a defendant with crimes arising out of distinct criminal activity." (*Id*. at p. 424.)

People v. Tirado (1984) 151 Cal.App.3d 341 is another example of these principles. The defendant in *Tirado* was convicted by guilty plea of a gas station robbery. The prosecutor was aware of a shoe store robbery but apparently determined not to file these additional charges if the defendant received a substantial sentence for the gas station robbery. "The prosecution was awaiting the sentencing for the gas station offenses, hoping for a maximum sentence and thus to avoid the cost and effort of a second separate case filing." (*Id*. at p. 350.) After the defendant received a mitigated sentence, the prosecutor filed charges arising from the shoe store robbery. The appellate court rejected the claim these additional charges should be dismissed as vindictive.

> Here, Tirado offers no fact basis showing he had a right to be free of apprehension the state might subject him to an increased potential punishment by filing charges against him for another robbery because he requested a lesser sentence on a distinct and separate robbery conviction. No connection was found between the two sets of crimes with which Tirado was charged. They were not part of the same act or a course of conduct. … The prosecution could have sought Tirado's indictment for either robbery at any time before the statute of limitations had run, subject only to the due process constraint requiring the statute of limitations not be invoked to curtail the self-executing constitutional guaranty of the right to a speedy trial.

(*Id*. at p. 353.)

In *People v. Bracey* (1994) 21 Cal.App.4th 1532 the prosecution filed criminal charges against the defendant for conduct that also constituted violation of an existing grant of felony probation. The new prosecution was dismissed in lieu of the pending probation revocation matter. When the defendant was reinstated on probation rather than sent to prison as requested by the prosecutor, the prosecutor refiled the previously dismissed criminal charges. The defense claimed the new charges were the product of vindictive prosecution. The trial court agreed and dismissed the case. The appellate court ruled it was error for the trial court to apply the presumption of prejudice to the filing of the new charges. "[W]e believe the court abused its discretion in presuming that the prosecutor acted vindictively in refiling charges." (*Id*. at p. 1546.) "

> While it is true the original proceeding had been dismissed and no criminal charges were pending against defendant when the probation revocation hearing was held, the prosecution had a clearly recognized right to refile, and respondent had no "right" to expect otherwise. *In this regard, we see no meaningful difference between this case and one in which criminal charges are pending at the time of the revocation hearing and are later pursued, or one in which no criminal charges are filed until after the revocation hearing*.

(*Id*. at p. 1547, italics added.) "Finally, by presuming vindictiveness under the circumstances of this case the trial court failed to recognize the separateness of the probation revocation proceeding and the new criminal proceeding." (*Id*. at p. 1548.) The appellate court also found no actual vindictiveness by the prosecutor. Examining the testimony of the deputy district attorney regarding his reasons for filing the new criminal charges after failing to obtain a prison commitment on the probation revocation matter, the appellate court found no evidence of improper motive or vindictiveness. Instead, the court concluded "the refiling was a response to respondent's criminal activity, not his assertion of any constitutional or statutory right." (*Id*. at p. 1550.)

2970.1-General standard for proof of discriminatory prosecution 1/10

A motion to dismiss based on the defense of discriminatory prosecution has can only succeed if a number of facts are proved. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 298 (*Murgia*); see also *People v. Milano* (1979) 89 Cal.App.3d 153, 165; *People v. Garner* (1977) 72 Cal.App.3d 214, 216-217.) Specifically, the defendant must prove by a preponderance of evidence all of the following points:

1. That he or she was prosecuted because of membership in a certain classification protected by the equal protection clause (*Murgia*, *supra*, 15 Cal.3d at pp. 301-302);

2. That the prosecution was based on an intentional, purposeful, and unjustifiable classification such as race, religion or other arbitrary classification (*Oyler v. Boles* (1962) 368 U.S. 448; *In re Elizabeth G.* (1975) 53 Cal.App.3d 725);

3. That the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities (*Murgia*, *supra*, at p. 298; *People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338); and

4. That the prosecution is unfair and accompanied by a malicious intent (*In re Elizabeth G.*, *supra*, at p. 732).

"Although referred to for convenience as a 'defense,' a defendant's claim of discriminatory prosecution goes not to the nature of the charged offense, but to a defect of constitutional dimension in the initiation of the prosecution." (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 831.)

"[A]n equal protection violation does not arise whenever officials 'prosecute one and not [another] for the same act' [citation]; instead, the equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis." (*Murgia*, *supra*, 15 Cal.3d at p. 297.) Part of the discriminatory effect element includes proof that similarly situated individuals of a different race or class could have been prosecuted, but were not. (*United States v. Armstrong* (1996) 517 U.S. 456, 465.) And the defendant must prove that enforcement would be unfair and is accompanied by a malicious intent on the part of the prosecutor. (*In re Elizabeth G.*, *supra*, 53 Cal.App.3d at p. 732.) But the defendant need not prove that law enforcement harbors any specific intent to punish the defendant for membership in a particular class. (*Baluyut v. Superior Court*, *supra*, 12 Cal.4th at p. 838.) Even if the defendant successfully proves all these elements, the action need not be dismissed if the People can establish a compelling reason for selective enforcement of the law. (*Id*. at pp. 831-832.)

The defendant has both the burden of producing evidence and the overall burden of proof in establishing a defense of discriminatory prosecution. (*People v. Superior Court (Hartway)*, *supra*, 19 Cal.3d at p. 348; *Lyons v. Municipal Court* (1977) 75 Cal.App.3d 829, 844.) The cases repeatedly have emphasized the defendant must overcome the presumption under Evidence Code section 664 that official duty has been regularly, and thus constitutionally, performed. (*People v. Superior Court (Hartway)*, *supra*; *People v. Sperl* (1976) 54 Cal.App.3d 640, 657.) Defendant's burden in this issue has been described as "heavy." (*People v. Milano*, *supra*, 89 Cal.App.3d at p. 165.) A successful discriminatory prosecution defense remains rare. (See, e.g., *Baluyut v. Superior Court*, *supra*, 12 Cal.4th 826; *People v. Owens* (1997) 59 Cal.App.4th 798.)

2970.2-Discriminatory prosecution not shown by selectivity 1/10

The second element of the defense of discriminatory prosecution is that defendant's selection was deliberate and based on an invidious standard. The mere conscious exercise of some selectivity in enforcement is not itself a constitutional violation. (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 299.) "Prosecutorial discretion permits the choice among possible defendants which to prosecute." (*People v. Superior Court (Lyons Buick-Opel-GMC, Inc.)* (1977) 70 Cal.App.3d 341, 344.) The equal protection clause does not abrogate a prosecutor's authority in the charging process. (*Davis v. Municipal Court* (1988) 46 Cal.3d 64, 87.) The prosecution can discriminate among offenders if there is a reasonable basis for such discrimination. (See, e.g., *People v. Keenan* (1988) 46 Cal.3d 478, 505-507 [prosecutorial discretion in choosing among defendants eligible for death penalty does not show arbitrariness or violate constitutional principles]; *People v. Garner* (1977) 72 Cal.App.3d 214 [proper to prosecute bookmakers instead of bettors]; *People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338 [proper to prosecute prostitutes instead of customers]; see also *People v. Owens* (1997) 59 Cal.App.4th 798 [proper to prosecute police officer involved in illegal chain mail scheme for a felony while allowing civilian defendants to plead to misdemeanors].)

3010.1-DA's eligibility determination not reviewable pretrial 1/10

A defendant charged with both divertible and nondivertible drug offenses is not eligible for diversion under Penal Code section 1000, subdivision (a). (*People v. Duncan* (1990) 216 Cal.App.3d 1621, 1626-1628; *People v. Alonzo* (1989) 210 Cal.App.3d 466, 469; *People v. Wright* (1975) 47 Cal.App.3d 490, 494.) Under Penal Code section 1000, subdivision (a)(3), a defendant "is not eligible for diversion if there is evidence that he or she has committed a drug related offense '*other than a violation of the sections listed in this subdivision*.' (Italics added.)" (*People v. Duncan*, *supra*, 216 Cal.App.3d at pp. 1626-1627.)

> Penal Code section 1000 imposes on the district attorney the duty to determine whether the eligibility requirements for diversion are met based on the information contained in the district attorney's file. [Citation.] The determination of the district attorney that a defendant is ineligible for diversion because there is evidence of a violation of a nondivertible offense is not subject to pretrial judicial review.

(*People v. McAlister* (1990) 225 Cal.App.3d 941, 944.)

The level of evidence necessary to support the district attorney's determination of ineligibility under Penal Code section 1000, subdivision (a)(3), is "more than mere suspicion or rumor; it means, in this context, reports of actual instances of trafficking or other information showing that the defendant has probably committed narcotics offenses in addition to those listed in the statute." (*Sledge v. Superior Court* (1974) 11 Cal.3d 70, 75.) "The 'evidence' required by Penal Code section 1000(a)(3), it is settled, need be nothing more than information in the form of reports or documents, in the possession of the district attorney or available to him." (*People v. Hayes* (1985) 163 Cal.App.3d 371, 374.) It can include a preliminary hearing transcript. (*Id.* at p. 375.) Notwithstanding *People v. Harvey* (1979) 25 Cal.3d 754, the prosecutor also can consider the facts from dismissed charges. (*People v. Sturiale* (2000) 82 Cal.App.4th 1308, 1315.) The district attorney's decision "does not involve the resolution of conflicting inferences or the determination of credibility." (*People v. Williamson* (1982) 137 Cal.App.3d 419, 422.)

A court has no discretion to admit an otherwise ineligible defendant to diversion. (*Sledge v. Superior Court*, *supra*, 11 Cal.3d at p. 74; *People v. Paz* (1990) 217 Cal.App.3d 1209, 1217.) Nor

can the court overrule the prosecutor's initial determination of ineligibility. (*People v. Wright* (2002) 99 Cal.App.4th 201, 207.) Except under very limited circumstances, the defendant has no right to a pretrial hearing to have the court review the prosecutor's determination of ineligibility for diversion. (*People v. Sturiale*, *supra*, 82 Cal.App.4th at p. 1314; *People v. Brackett* (1994) 25 Cal.App.4th 488, 500-501; distinguish *People v. Williamson*, *supra*, 137 Cal.App.3d at p. 422 [court can review whether cultivation of marijuana charge involved amount only for personal use].) Generally, review of the district attorney's determination of ineligibility is available only by appeal from a judgment of conviction. (*Sledge v. Superior Court*, *supra*, 11 Cal.3d at pp. 75-76; *People v. Paz*, *supra*, 217 Cal.App.3d at p. 1217.)

3070.1-Defense expert testimony regarding partition ratio variability is inadmissible 2/14

"Scientific analysis of breath samples to determine the concentration of alcohol in blood is premised on a conversion methodology utilizing what is known as the 'blood-alcohol:breath-alcohol partition ratio.' The standard partition ratio long used in California … is legislatively set at 2100:1—meaning that the amount of alcohol in 2100 milliliters of a breath sample is deemed to correspond to the amount of alcohol in 1 milliliter of blood." (*People v. Vangelder* (2013) 58 Cal.4th 1, 17 (*Vangelder*); see also *People v. McNeal* (2009) 46 Cal.4th 1183, 1188, 1191 (*McNeal*).) The per se offense of driving with a blood alcohol level of .08 percent or more under Vehicle Code section 23152, subdivision (b), is "intended to criminalize the act of driving with either the specified blood-alcohol level or the specified breath-alcohol level." (*Vangelder*, *supra*, at p. 22; *People v. Bransford* (1994) 8 Cal.4th 885, 888-891 (*Bransford*).) Subdivision (b) of section 23152, thus includes the "prohibited the act of driving with 0.08 percent or more of blood alcohol as defined by grams of alcohol in 210 liters of breath." (*Bransford*, *supra*, at p. 890, italics omitted.)

Proffered defense expert testimony challenging blood alcohol results from a properly operating breath testing machine, therefore, are not relevant to a charge of violating subdivision (b) of section 23152.

> Having determined that the amended statute alternatively "defined the substantive offense of driving with a specified concentration of alcohol *in the body* " (*Bransford*, *supra*, 8 Cal.4th at pp. 892-893, italics added), we also concluded that the amended statute rendered *irrelevant* consideration of matters such as partition ratio variability, because the revised statute "defined the offense without regard to such ratios." (*Id*., at p. 893.) It followed, we held, that expert evidence concerning partition ratio variability was properly excluded in trials under the amended per se statute. (*Ibid*.)

(*Vangelder*, *supra*, 58 Cal.4th at p. 22, italics in original, fn. omitted.)

Similarly, proffered defense expert testimony challenging whether the breath machine captured a sample from the defendant's upper airway rather than "deep alveolar lung air" is irrelevant.

> [W]e conclude that when the Legislature employed the word "breath" in section 23152(b), it had in mind the air that is exhaled into a properly working and calibrated breath-testing machine. It follows that, like the expert testimony regarding partition ratio variability that was held irrelevant and inadmissible in *Bransford*, the expert testimony under review here is similarly inadmissible insofar as it relates to the statutory per se charge because it as well conflicts with the underlying premise and definition of the per se offense

(*Vangelder*, *supra*, 58 Cal.4th at p. 27.)

Encompassed within this prohibition is any proffered defense expert testimony regarding the physiological factors, such as individual breathing patterns (speed and depth of exhalation), body and breath temperature, sex, and hematocrit level (ratio of red blood cells to total blood volume), that may make a breath test result vary from results of testing a blood sample. (*Vangelder*, *supra*, 58 Cal.4th at pp. 35-38.) "[T]his aspect of the expert testimony would essentially constitute partition ratio variability evidence, which, as noted, is barred in section 23152(b) per se prosecutions under *Bransford*, *supra*, 8 Cal.4th 885." (*Vangelder*, *supra*, 58 Cal.4th at p. 36.)

In contrast, the traditional driving under the influence offense set out in Vehicle Code section 23152, subdivision (a), is not defined by reference to a prohibited alcohol concentration level. (*Vangelder*, *supra*, 58 Cal.4th at p. 22; *McNeal*, *supra*, 46 Cal.4th at pp. 1192-1193.) Subdivision (a) carries a rebuttable presumption allowing the jury to presume the defendant is "under the influence" if the jury finds the defendant has a blood-alcohol level of 0.08 percent or more. (*McNeal*, *supra*, at pp. 1197-1199; see Veh. Code, § 23610, subd. (a)(3).) Although the standard partition ratio of 2100:1 can be used to translate a breath-alcohol result into a blood-alcohol level, that conversion factor is not a part of the Legislature's definition of this statutory presumption. (*Id*. at pp. 1197-1198) "Accordingly, we held in *McNeal* that whereas evidence of partition ratio variability remains irrelevant and inadmissible with regard to a per se charge of driving with a prohibited concentration of alcohol under section 23152(b), that same evidence is relevant and admissible to rebut the presumption underlying a generic charge of driving under the influence under section 23152(a) when the prosecution relies on the results of a breath machine test. (*McNeal*, *supra*, at pp. 1196-1202; compare *Bransford*, *supra*, 8 Cal.4th at p. 885.)" (*Vangelder*, *supra*, 58 Cal.4th at p. 23, fn. omitted.)

Finally, a defendant remains free to argue, and present evidence, that the particular machines used in his or her case malfunctioned, or that they were improperly calibrated or employed. (*Vangelder*, *supra*, 58 Cal.4th at p. 34.)

3080.1-Implied consent law warning does not render consent to DUI test involuntary 12/17

"[W]e conclude that free and voluntary submission to a blood test, after receiving an advisement under the implied consent law, constitutes actual consent to a blood draw under the Fourth Amendment." (*People v. Harris* (2015) 234 Cal.App.4th 671, 685.) "The fact that a motorist is told he will face serious consequences if he refuses to submit to a blood test does not, in itself, mean that his submission was coerced." (*Id*. at p. 687.)

> [A] motorist's submission to a chemical test, if freely and voluntarily given, is actual consent under the Fourth Amendment. That the motorist is forced to choose between submitting to the chemical test and facing serious consequences for refusing to submit, pursuant to the implied consent law, does not in itself render the motorist's submission to be coerced or otherwise invalid for purposes of the Fourth Amendment.

(*Id*. at p. 689, fn. omitted.) Although "the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make," the difficultly of the decision does not mean the motorist's ultimate choice is coerced. (*Dakota v. Neville* (1983) 459 U.S. 553, 564.) "[T]he criminal process often requires suspects and defendants to make difficult choices. [Citation.]" (*Ibid*; see also *People v. Agnew* (2015) 242 Cal.App.4th Supp. 1 [simply saying the taking of a chemical test is required by law, without explaining the consequences of refusal, does not render the consent involuntary]; contra *People v. Mason* (2016) 8 Cal.App.5th Supp. 11 [disagreed with *Agnew*,

finding consent coerced when officer said test required and not fully explaining choices and consequences of refusal].)

> Additionally, this Court notes that although the actions of the arresting officer failed to comply with the requirements of the implied consent law, no court has held that such a failure rises to the level of a constitutional violation, and we do not so hold now. However, while not equating a failure by peace officers to abide by the requirements of the implied consent law with a constitutional violation, effectively, their level of compliance with the implied consent law will likely be considered as part of the totality of the circumstances when determining the constitutionality of blood draws that the People attempt to justify by consent. Evidence showing officers explaining the implied consent law so that those arrested for suspicion of DUI understand that a blood draw will not be compelled against their will bolster a subsequent assertion that the blood draw was voluntarily consented to while evidence showing that officers asserted only the requirement of a blood draw will undercut such an assertion of consent. Ultimately, the determination of the lawfulness of any chemical test, such as the chemical test conducted here, will be based on a consideration of the totality of all the circumstances.

(*People v. Ling* (2017) 15 Cal.App.5th Supp. 1, 10-11 [no consent found when officer simply told arrestee he had to submit to chemical test and then drove him to police station where blood drawn without resistance].)

Note that, although California's implied consent admonition threaten criminal in addition to administrative license sanctions for refusing to submit to a blood or breath test (Veh. Code, § 23612), it is unclear whether this would make consent to a blood test involuntary. (See *Birchfield v. North Dakota* (2016) 579 U.S. ___ , ___ [136 S.Ct. 2160, 2186, 195 L.Ed.2d 560, 589-590].)

3080.2-No suppression for failure to advise of DUI test choices 4/15

Under Vehicle Code section 23612 [formerly sections 11353(a) and 23157], the "Implied Consent Law," the Legislature "devised an *additional* or *alternative* method for compelling a person arrested for drunk driving to submit to a test for intoxication … ." (*People v. Superior Court (Hawkins)* (1972) 6 Cal.3d 757, 765 [the original method being a forced blood draw as approved by the United States Supreme Court in *Schmerber v. California* (1966) 384 U.S. 757].) But "California case law unequivocally establishes a police officer's failure to comply with the implied consent law does not amount to a violation of an arrestee's constitutional rights." (*Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, 118; see also *People v. Superior Court (Maria)* (1992) 11 Cal.App.4th 134, 144; *People v. Ryan* (1981) 116 Cal.App.3d 168, 181-183; *People v. Brannon* (1973) 32 Cal.App.3d 971, 975-976.)

Thus, for example, the arresting officer's failure to advise a motorist of the choice of tests under this statute, or to request a blood test in addition to a driver's choice of breath test, infringes no constitutional right and does not otherwise affect the admissibility of any sample compelled incident to arrest. (*People v. Harris* (2015) 234 Cal.App.4th 671, 691-692; see also *In re Garinger* (1987) 188 Cal.App.3d 1149, 1156 [breath test-officer failed to advise that no sample saved or that defendant could request additional blood or urine test]; *People v. Bloom* (1983) 142 Cal.App.3d 310, 316-318 [blood test-officer did not offer another choice]; *People v. Ritchie* (1982) 130 Cal.App.3d 455, 457-459 [defendant chose breath test but officer had blood drawn instead because defendant suspected of being under the influence of drugs rather than alcohol].)

Likewise, an officer's failure to advise a suspect choosing a breath test, pursuant to Vehicle Code section 23614, subdivision (a), that no breath sample would be retained violates no constitutional protection and does not require suppression of the test results. (*People v. Mills* (1985) 164 Cal.App.3d 652, 656-657.) Indeed, the statute provides "[n]o failure or omission to advise pursuant to this section shall affect the admissibility of any evidence of the alcoholic content of the blood of the person arrested." (Veh. Code, § 23614, subd. (d) [formerly § 23157.5, subd. (d)].)

3080.3-Implied consent refusal following DUI arrest is admissible evidence 4/15

Incident to arrest and pursuant to the "implied consent" law, police officers are authorized to request a person arrested for drunk driving to submit to a chemical test. (Veh. Code, § 13353.) No *Miranda* admonition is required for the admission of a defendant's refusal to take a test or any other statement made in response to the request. (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 604.) A refusal can be used as evidence of consciousness of guilt at trial. (*South Dakota v. Neville* (1983) 459 U.S. 748; *People v. Municipal Court (Gonzales)* (1982) 137 Cal.App.3d 114, 117-119.)

3080.4-Refusal to take DUI test cannot be retracted 11/16

A person arrested for driving under the influence who has refused a chemical test after fair warning under Vehicle Code section 23612, may not thereafter change his or her mind and legally compel a test. (*Zidell v. Bright* (1968) 264 Cal.App.2d 867 (*Zidell*).) In *Zidell*, the defendant changed his mind and desired a chemical test within 30 to 45 minutes after refusing a test. The arresting officer had left the booking facility by then and refused to return. The appellate court approved the driving suspension imposed by the Department of Motor Vehicles, holding: "It would be inconsistent with the purpose of the statute to hold that either [the arresting officer], or the officers on duty at the police station, were required to turn aside from their other responsibilities and arrange for administration of a belated test when once appellant had refused to submit after fair warning of the consequences." (*Id.* at p. 870; similarly, see *Morgan v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 165, 170.) The appellate court refused to concede any relevance to the possibility of calculating the defendant's blood alcohol level back to the time of arrest after a delay in testing. (*Zidell*, *supra*, 264 Cal.App.2d at p. 869.) The appellate court held that Vehicle Code section 13353 made no provision for such an inquiry. (*Ibid*., see also, *Skinner v. Silas* (1976) 58 Cal.App.3d 591, 599.) Even the fact that a chemical test is ultimately taken does not change the legal effect of the arrestee's initial refusal. (*Payne v. Department of Motor Vehicles* (1991) 235 Cal.App.3d 1514, 1518-1519; *Barrie v. Alexis* (1984) 151 Cal.App.3d 1157, 1162.)

3090.1-DUI laws apply to private property 2/10

The various statutes prohibiting driving under the influence, such as Vehicle Code section 23152, do not distinguish between driving on public or private property. (*People v. Malvitz* (1992) 11 Cal.App.4th Supp. 9, 11-13.) The driving under the influence statutes are contained in a chapter of the Vehicle Code that begins with a statutes stating "[t]he provisions of this chapter apply to vehicles upon the highways and elsewhere throughout the State unless expressly provided otherwise." (Veh. Code § 23100.)

> There is no question that the drunk driver is an "extremely dangerous" person [citation] who obviously poses more danger when he or she drives on public streets and highways and encounters the general public in greater numbers [citation]. However,

> regardless of any subjective legislative intent, the objective intent of the Legislature as derived from the language of the pertinent Vehicle Code provisions is that a person who is driving while under the influence of alcohol and/or drugs is always a threat and the purpose of section 23152 is to prohibit those "extremely dangerous" persons from driving anywhere in California.

(*People v. Malvitz*, *supra*, 11 Cal.App.4th Supp. at p. 14.)

3100.1-General standard for proof of possession of controlled substance 7/21

The elements of possession of a controlled substance are "(1) unlawfully exercising control over a controlled substance, (2) having knowledge of the substance's presence, (3) having knowledge of the substance's nature as a controlled substance, and (4) possessing the substance in an amount sufficient to be used as a controlled substance." (*People v. Polk* (2019) 36 Cal.App.5th 340, 349; see also *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242; *People v. Carrasco* (1981) 118 Cal.App.3d 936, 947-948.) Each of these elements may be proved circumstantially. (*People v. Palaschak*, *supra*, 9 Cal.4th at p. 1242.)

Possession of a controlled substance may be actual or constructive. "[T]he prosecution must show something more than the mere presence of controlled substances in the place where the defendant is found or to which he has access." (*People v. Washington* (2021) 61 Cal.App.5th 776, 793.) But a defendant has constructive possession when the evidence, whether direct or circumstantial, shows he or she maintains some control or right to control the contraband. (*People v. Rogers* (1971) 5 Cal.3d 129, 134; *People v. Showers* (1968) 68 Cal.2d 639, 643-644; *People v. Busch* (2010) 187 Cal.App.4th 150, 162.)

Exclusive possession of the contraband or the premises in which a controlled substance is found is not required. (*People v. Rushing* (1989) 209 Cal.App.3d 618, 622; *People v. Boddie* (1969) 274 Cal.App.2d 408, 411.) Whether there is joint possession is a question for the trier of fact which may be established by circumstantial evidence and any reasonable inferences to be drawn therefrom. (*Ibid.*; *People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1018.) One may also be convicted of possession of controlled substances even without having either actual or constructive possession of the substance, if the person aided and abetted the possession of another. (*People v. Valerio*, *supra*, 13 Cal.App.3d at p. 921.) Evidence that the controlled substance was found in an area subject to the joint control of the defendant and another person is sufficient to support the conclusion that the defendant had knowledge of its presence. (*People v. White* (1969) 71 Cal.2d 80, 83.)

Proof that the defendant ingested narcotics, or is under the influence of such, alone does not prove prior or current possession. (*People v. Morales* (2001) 25 Cal.4th 34, 44.) But, "[c]ertainly, evidence of being identifiably under the influence of a specific drug or other evidence of having introduced it into one's body tends to prove having knowingly, and hence unlawfully, possessed it." (*Ibid*.)

Possession of a controlled substance does not automatically prove beyond a reasonable doubt that the defendant had the requisite knowledge of its nature or character. (See, e.g., *People v. Tripp* (2007) 151 Cal.App.4th 951, 957.) It does, however, raise a strong suspicion of guilt. (*Id*. at p. 958; see also *People v. Williams* (1971) 5 Cal.3d 211, 216.) Additionally, "[k]nowledge of a substance's narcotic nature may be shown by evidence of the defendant's furtive acts and suspicious conduct indicating a consciousness of guilt, such as an attempt to flee or an attempt to hide or dispose of the contraband." (*People v. Tripp*, *supra*, 151 Cal.App.4th at p. 956; see also *People v. Williams*, *supra*,

5 Cal.3d at pp. 215-216.) Such knowledge can also be inferred circumstantially by evidence showing a familiarity with the substance, such as needle marks or other physical manifestations of drug use or instances of prior drug use. (*People v. Tripp*, *supra*, 151 Cal.App.4th at p. 956; *People v. Thornton* (2000) 85 Cal.App.4th 44, 49-50; *People v. Simmons* (1971) 19 Cal.App.3d 960, 965.)

Finally, an essential element of unlawful possession of a controlled substance is that the substance be possessed in a quantity usable for consumption or sale. (*People v. Martin* (2001) 25 Cal.4th 1180, 1184.) In other words, "a usable amount of a controlled substance is needed for a possession conviction. (*People v. Polk* (2019) 36 Cal.App.5th 340, 348-349; *People v. Hamernik* (2016) 1 Cal.App.5th 412, 423.)" (*People v. Blanco* (2021) 61 Cal.App.5th 278, 285.)

3110.1-General standard for proof of possession for sale 3/16

Possession of a controlled substance for sale is established by proof that the defendant possessed a controlled substance for the purpose of selling it. The offense includes all the elements of simple possession, with the additional element of a specific intent to sell the controlled substance. (*People v. Newman* (1971) 5 Cal.3d 48, 52.)

As with simple possession:

> The elements of possession of narcotics are physical or constructive possession thereof coupled with knowledge of the presence and narcotic character of the drug. Constructive possession occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another. The elements of unlawful possession may be established by circumstantial evidence and any reasonable inferences drawn from such evidence.

(*People v. Newman, supra*, 5 Cal.3d at p. 52, citations omitted; see also *People v. Glass* (1975) 44 Cal.App.3d 772, 774.)

The offense of possession for sale requires a finding the defendant harbored a specific intent to sell a controlled substance. (*In re Christopher B.* (1990) 219 Cal.App.3d 455, 466) But the offense does not require that the defendant have the specific intent to sell the controlled substance *personally*. (*People v. Ramos* (2016) 244 Cal.App.4th 99, 105.) The only requirement is that the defendant possessed the drugs with the specific intent that they be sold, by the possessor or someone else down the chain of distribution. There is no meaningful distinction in culpability between one who holds drugs to sell personally and one who holds them for others to sell. (*People v. Parra* (1999) 70 Cal.App.4th 222, 226-227; *People v. Consuegra* (1995) 26 Cal.App.4th 1726, 1731-1732.)

3110.2-Possession for sale may be shown by officer opinion 8/07

In cases involving possession of an illicit controlled substance, an experienced police officer may give an opinion that the controlled substance was held for purposes of sale. The opinion may be based on factors such as the quantity, packaging, and normal abuse dosage. (*People v. Newman* (1971) 5 Cal.3d 48, 53.) Similarly, expert opinion about items associated with the sale of controlled substances, such as scales, mixing spoons, packaging material, and cutting agents may also be sufficient to prove the intent of a defendant to sell. (*People v. Saldana* (1984) 157 Cal.App.3d 443, 455.) On the basis of such opinion evidence, convictions for possession for sale have been upheld.

(*People v. Newman*, *supra*, 5 Cal.3d at p. 53; *People v. Carter* (1997) 55 Cal.App.4th 1376; *People v. Peck* (1996) 52 Cal.App.4th 351, 357; *People v. Douglas* (1987) 193 Cal.App.3d 1691, 1694-1695.)

3110.3-Even small quantity may support possession for sale 8/07

While the quantity of the contraband seized may be relevant to whether it was held for sale or personal use, quantity alone is certainly not dispositive. In *People v. Wesley* (1986) 177 Cal.App.3d 397 the appellate court held that .02 grams of cocaine found on a mirror was sufficient to support a verdict of possession for sale. Circumstantial evidence considered by the court included the presence of diluting agents, packaging materials, and the opportunity of the occupants to flush evidence down the toilet. (*Id*. at p. 400; see also *People v. McAllister* (1990) 225 Cal.App.3d 941, 946.) And in *People v. Hale* (1968) 262 Cal.App.2d 780 the appellate court found that 40 milligrams of marijuana debris and plant material, in conjunction with packaging materials, evidence of frequent visits, telephone calls in which drug transactions were used, and the officer's expert opinion, were sufficient to support a conviction of possession for sale. (*Id*. at p. 788.)

3120.1-General standard for proof of sale of controlled substance 8/07

The offense of selling a controlled substance encompasses the exchange of narcotics for money, services, or anything of value. (*People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845.) The defendant need not personally conduct the transaction – simply handing the narcotics to another to complete the sale can suffice. (See, e.g., *People v. Colds* (1981) 125 Cal.App.3d 860, 863.) Nor is it a defense that the defendant was acting as an agent of the buyer rather than the seller. (*People v. Reyes* (1992) 2 Cal.App.4th 1598, 1604-1605.)

Unless based upon an aiding and abetting theory, the sale of controlled substances is a general intent crime. (*People v. Daniels* (1975) 14 Cal.3d 857, 861.) The defendant must have knowledge of the narcotic nature of the substance sold, although it is not a defense that the defendant was mistaken as to specific controlled substance actually sold. (*Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474; *People v. Romero* (1997) 55 Cal.App.4th 147.)

The amount of narcotics sold need not be a useable amount. (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524; *People v. Mata* (1986) 180 Cal.App.3d 955, 959-960.)

3120.2-General standard for proof of offering to sell controlled substance 8/07

The offense of offering to sell a controlled substance has two necessary elements: (1) an act of selling or offering to sell the controlled substance, and (2) the specific intent to sell it. The offense is complete when an offer to sell is made with the accompanying intent. Neither actual delivery of the controlled substance, an exchange of money, nor a direct, unequivocal act toward a sale are required (*People v. Jackson* (1963) 59 Cal.2d 468, 469-470; *People v. Encerti* (1982) 130 Cal.App.3d 791, 800-801; *People v. Pimental* (1970) 6 Cal.App.3d 729, 734.) The specific intent to sell the controlled substance may be inferred circumstantially. (*People v. Pimental*, *supra*.)

3130.1-Proof that item is controlled substance may be done circumstantially 4/20

Proof of the nature of the item as a controlled substance can be accomplished through direct or circumstance evidence. Direct evidence would be a chemical test of the item.

> [O]ur case law is clear that the element may be established by circumstantial evidence – that is, by evidence other than direct, chemical testing. (*People v. Francis* (1969) 71 Cal.2d 66, 72 ["the narcotic character of a substance may, of course, be proved by circumstantial evidence"]; *People v. Palaschak* (1995) 9 Cal.4th 1236, 1242 [similar]; *People v. Sonleitner* (1986) 183 Cal.App.3d 364, 369 [similar]; *People v. Galfund* (1968) 267 Cal.App.2d 317, 320 [similar].)

(*People v. Veamatahau* (2020) 9 Cal.5th 16, 36 [combination of experienced arresting officer's opinion viewing substance, defendant's admissions and laboratory expert comparison using drug identification website was sufficient evidence to prove pill was a controlled substance].)

3140.1-Usable quantity element defined 10/19

"A usable quantity of a controlled substance is shown if 'it was of a quantity which could be potentiated by consumption in any of the manners customarily employed by users, rather than useless traces or debris of narcotic.' (*People v. Piper* (1971)19 Cal.App.3d 248, 250.)" (*People v. Polk* (2019) 36 Cal.App.5th 340, 349 (*Polk*).) Thus, a defendant may not be convicted of possession of a useless trace or the blackened residue of a controlled substance. (*People v. Vargas* (1973) 36 Cal.App.3d 499, 506.)

The prosecution must establish only the existence of a controlled substance in the material possessed, "a quantitative amount need not be proven." (*Polk*, *supra*, 36 Cal.App.5th at p. 350.) It also need not establish the purity of the specific ingredients. (*People v. Rubacalba* (1993) 6 Cal.4th 62, 65-66; *People v. Pohle* (1971) 20 Cal.App.3d 78, 82.) Nor is it necessary to establish the quantity involved could produce a narcotic effect. (*People v. Rubacalba*, *supra*; *People v. Shenk* (1972) 24 Cal.App.3d 233, 238, 239.) Hence, questions or argument regarding the quantitative amount or purity of the material possessed are not relevant to the issue of usability. (*People v. Rubacalba*, *supra*, 6 Cal.4th at pp. 66-67; *Polk*, *supra*, 36 Cal.App.5th at pp. 355-356.)

Whether there was a sufficient quantity of the controlled substance is a factual question to be determined by the trier of fact. (*People v. Leal* (1966) 64 Cal.2d 504, 512.) In the absence of any suggestion in the record that only "minute traces or residue" were found, a reviewing court is bound to presume in support of the implied finding below by the magistrate, trial judge or jury that the amount was sufficient. (*Polk*, *supra*, 36 Cal.App.5th at p. 352; *People v. Simmons* (1971) 19 Cal.App.3d 960, 965-966, & fn. 2.)

3140.2-Proof of usable quantity not necessary for sale charge 8/07

Although proof that there is a usable quantity of a controlled substance may be required for a charge of simple possession, such a requirement does not apply to a charge of selling a controlled substance. (*People v. Mata* (1986) 180 Cal.App.3d 955, 959-960; *People v. Hardin* (1983) 148 Cal.App.3d 994, 999; *People v. Diamond* (1970) 10 Cal.App.3d 798, 801.) "It follows that, when the prosecution is for sale rather than for mere possession, the fact that the parties treated the amount delivered as being a saleable quantity is some evidence that it had the requisite 'narcotic potential.' " (*People v. Blackshear* (1968) 261 Cal.App.2d 65, 68.) As with a simple possession charge, a

possession for sale charge does not require proof the substance would produce a narcotic effect. (*People v. Diamond*, *supra*, 10 Cal.App.3d at p. 801.)

3400.1-Any emergency justifies immediate warrantless search 4/21

Under the emergency aid exception the existence of an emergency requiring quick action by police excuses the Fourth Amendment warrant requirement. (*Brigham City v. Stuart* (2006) 547 U.S. 398, 403; *People v. Rogers* (2009) 46 Cal.4th 1136, 1156; *People v. Smith* (2020) 46 Cal.App.5th 375, 384.) "Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose." (*People v. Roberts* (1956) 47 Cal.2d 374, 377.)

> " 'A long-recognized exception to the warrant requirement exists when "exigent circumstances" make necessary the conduct of a warrantless search.' " (*People v. Panah* (2005) 35 Cal.4th 395, 465.) The term "exigent circumstances" describes " ' "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence. There is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers." ' " (*Ibid*.) The high court has recognized that exigent circumstances may exist where there is probable cause to believe a crime has been committed but "an emergency leaves police insufficient time to seek a warrant." (*Birchfield v. North Dakota* (2016) 576 U.S. ___, ___ [136 S.Ct. 2160, 2173, 195 L.Ed.2d 560, 575].) It has also found exigency when an entry or search appears reasonably necessary to render emergency aid, whether or not a crime might be involved. "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. … 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' [Citation.]" (*Mincey* [*v. Arizona* (1978) 437 U.S. 385] at pp. 392-393, fns. omitted.)"

(*People v. Ovieda* (2019) 7 Cal.5th 1034, 1041-1042 (*Ovieda*).) Certainly, for example, police may enter a building when there is reason to believe a crime, such as burglary, is in progress. (*People v. Smith*, *supra*, 46 Cal.App.5th at p. 388; *People v. Lujano* (2014) 229 Cal.App.4th 175, 183.) Police may also ping the cell phone of someone who just violently attacked a senior citizen in broad daylight armed with a knife and was last seen near a preschool, a shopping center and a neighborhood crowded with people in order to quickly find and arrest him. (*People v. Bowen* (2020) 52 Cal.App.5th 130, 138-139.)

Of course, the scope of the warrantless search must be strictly circumscribed by the exigencies which justified its initiation. (*Mincey v. Arizona*, *supra*, 437 U.S. at p. 393; *People v. Troyer* (2011) 51 Cal.4th 599, 612 [police entered house looking for reported shooting victim].) "Here the same facts that justified entry into the residence justified search of the places where a victim could be, which included the upstairs bedroom." (*People v. Troyer*, *supra*, 51 Cal.4th at p. 612; see also *People v. Pou* (2017) 11 Cal.App.5th 143, 152 [permissible to look in closet for

potential injured victim or suspect]; distinguish *Ovieda*, *supra*, 7 Cal.5th at p. 1043 [detention of person reportedly acting suicidal and with access to guns outside his home, without more, removed exigent circumstances as justification for entering the house].) In addition, multiple law enforcement entries as part of a single, continuous search may be justified by a continuing emergency. (*City & County of San Francisco v. Sheehan* (2015) 575 U.S. 600, 612.)

Finally, officers may also seize any evidence seen in plain view during the course of their legitimate emergency activities. (*Mincey v. Arizona*, *supra*, 437 U.S. at p. 393; *Ovieda*, *supra*, 7 Cal.5th at p. 1042; *People v. Rogers*, *supra*, 46 Cal.4th at p. 1157.)

3400.2-Emergency search requires reasonableness, not probable cause 6/20

When an officer acts in response to a perceived exigency, there must be specific, articulable facts and reasonable inferences drawn therefrom sufficient to cause a reasonable officer to believe that swift action was necessary to prevent the perceived harm, as measured by an objective standard. (*People v. Hull* (1995) 34 Cal.App.4th 1448, 1455-1457; *People v. Ortiz* (1995) 32 Cal.App.4th 286, 292.) The requisite objectively reasonable basis for a warrantless entry under the emergency aid exception need not be established by proof amounting to probable cause. (*People v. Troyer* (2011) 51 Cal.4th 599, 606-607; *People v. Pou* (2017) 11 Cal.App.5th 143, 149.) What is required is a "reasonable suspicion based on articulable facts" rather than speculation or "mere hunch." (*People v. Ovieda* (2019) 7 Cal.5th 1034, 1047 [eliminating "community caretaking" as a warrant exception in the absence of exigent circumstances]; see also *People v. Smith* (2020) 46 Cal.App.5th 375, 386.)

> The court in *Troyer*, *supra*, 51 Cal.4th 599 further noted that, in applying the objective reasonableness standard, the police may even permissibly make mistakes if objectively reasonable, explaining that "when we balance the nature of the intrusion on an individual's privacy against the promotion of legitimate governmental interests in order to determine the reasonableness of a search in the circumstances of an emergency [citation], we must be mindful of what is at stake." (*Id*. at p. 606.) Accordingly, our Supreme Court concluded that "[t]he possibility that immediate police action will prevent injury or death outweighs the affront to privacy when police enter the home under the reasonable but mistaken belief that an emergency exists." (*Ibid*.)

(*People v. Pou*, *supra*, 11 Cal.App.5th at p. 150.) And an officer's action is reasonable under the Fourth Amendment, regardless of an officer's subjective state of mind or motivation, as long as the circumstances, viewed objectively, justify the officer's action. (See *Brigham City v. Stuart* (2006) 547 U.S. 398, 404.)

3400.3-Exigency exception applies to residences 9/21

Although warrantless searches of residences are presumed invalid, the emergency search exception to the warrant requirement applies to residences. (*People v. Nunes* (2021) 64 Cal.App.5th 1, 5-6.) "Generally, a court will find a warrantless entry justified if the facts available to the officer at the moment of entry would cause a person of reasonable caution to believe that the action taken was appropriate." (*People v. Rogers* (2009) 46 Cal.4th 1136, 1157; see also *People v. Troyer* (2011) 51 Cal.4th 599, 605.) For example, "the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence." (*Ryburn v. Huff* (2012) 565 U.S. 469, 474.) "Accordingly, law enforcement officers may enter a

home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." (*Brigham City v. Stuart* (2006) 547 U.S. 398, 403; see also *People v. Troyer*, *supra*, 51 Cal.4th at p. 602; *People v. Smith* (2020) 46 Cal.App.5th 375, 384.) "This 'emergency aid exception' … requires only 'an objectively reasonable basis for believing,' [citation] that 'a person within [the house] is in need of immediate aid,' [citation]." (*Michigan v. Fisher* (2009) 558 U.S. 45, 47; see also *Troyer*, *supra*, 51 Cal.4th at p. 605.) But the nonemergency "community caretaking" exception does not apply to searches of residences. (*Caniglia v. Strom* (2021) ___ U.S. ___, 141 S.Ct. 1596, 209 L.Ed.2d 604; see, e.g., *People v. Rubio* (2019) 43 Cal.App.5th 342, 348-355 [absent additional facts neither emergency aid doctrine nor exigent circumstances permitted police to enter residence simply because of report of shots having been fired in driveway outside the garage].) And once the emergency has abated, absent another warrant exception, police cannot enter a house. (*People v. Ovieda* (2019) 7 Cal.5th 1034, 1043, 1052; *People v. Nunes*, *supra*, 64 Cal.App.5th at p. 6.)

3400.4-Responding to person in distress can justify warrantless search 6/20

The emergency aid exception to the warrant requirement of the Fourth Amendment applies in a variety of situations when police enter premises to aid people inside who may be in need of immediate medical assistance or police protection. There are many case examples. (*People v. Roberts* (1956) 47 Cal.2d 374, 380 [moaning sound in apartment of sickly man]; *People v. Pou* (2017) 11 Cal.App.5th 143, 151 [report of screaming woman and distress moaning at location]; *People v. Seminoff* (2008) 159 Cal.App.4th 518, 528-530 [4-year-old child and adult employees of hotel could not wake child's mother in her room]; *People v. Snead* (1991) 1 Cal.App.4th 380, 385-386 [9-1-1 call of accidental stabbing]; *People v. Neighbours* (1990) 223 Cal.App.3d 1115, 1122 [officers entered to protect a young child from an intoxicated man who had just assaulted a woman and her baby]; *People v. Clark* (1968) 262 Cal.App.2d 471, 476 [neighbors heard woman yelling for help]). Other examples of permissible law enforcement entries based on such exigent circumstances include to quell a brawl inside a house (*Brigham City v. Stuart* (2006) 547 U.S. 398, 406); to rescue a person who has overdosed on drugs (*People v. Zabelle* (1996) 50 Cal.App.4th 1282, 1287-1288; *People v. Gallegos* (1970) 13 Cal.App.3d 239, 243; *People v. Neth* (1970) 5 Cal.App.3d 883, 887-888); to look for possible shooting victims or other armed assailants (*People v. Eckstrom* (1974) 43 Cal.App.3d 996, 1003-1004); to retrieve a handgun lying unattended in a side yard (*People v. Chavez* (2008) 161 Cal.App.4th 1493, 1503); to prevent a felonious assault upon a helpless victim (*People v. Brown* (1970) 12 Cal.App.3d 600, 605); to investigate and prevent ongoing spousal abuse (*People v. Frye* (1998) 18 Cal.4th 894, 989-990; *People v. Higgins* (1994) 26 Cal.App.4th 247, 251-255; *People v. Wilkins* (1993) 14 Cal.App.4th 761, 772); to prevent a potential explosion or to seize a possible explosive device (*People v. Patterson* (1979) 94 Cal.App.3d 456, 463-466 [suspected PCP manufacturing in progress]; *People v. Superior Court (Peebles)* (1970) 6 Cal.App.3d 379, 381-382) [police entered bombing suspect's apartment to check for other explosives]); to protect a police officer from potential danger (*People v. Wilson* (1997) 59 Cal.App.4th 1053, 1061-1062 [from slightly open door officer conducting investigation saw suspect reaching under bed]); or to return a two-year-old child found wandering unattended to the home while checking the welfare of the child's family (*People v. Miller* (1999) 69 Cal.App.4th 190, 198-200 [front door ajar but no one answered]; see also *People v. Gemmill* (2008) 162 Cal.App.4th 958, 967-971 [officer trying to

locate family of unattended child peeked through blinds of where the child lived when no one answered door]). In contrast, entry is not permitted if the perceived emergency is merely speculative. (*People v. Smith* (1972) 7 Cal.3d 282, 287 [no answer at door looking for mother of locked out child]; *People v. Smith* (2020) 46 Cal.App.5th 375, 386-390 [car left running with lights on in driveway].)

3400.5-Search for missing person can justify warrantless search 6/13

The exigency circumstances or community caretaking exception to the warrant requirement of the Fourth Amendment has been applied to justify many warrantless searches, including when police are summoned because a person is reported missing under unusual or suspicious circumstances. A warrantless entry of a home, for example, may be appropriate when the police are looking for an occupant reliably reported as missing. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1157; *People v. Hochstraser* (2009) 178 Cal.App.4th 883, 897.) Such exigency has justified a warrantless search to find a missing person who may be held captive in a storage area (*People v. Rogers*, *supra*, 46 Cal.4th at pp. 1153-1161); to find a missing and possibly injured child crime victim (*People v. Panah* (2005) 35 Cal.3d 395, 465-469; *People v. Lucero* (1988) 44 Cal.4th 1006, 1012-1017); to check on the welfare of a resident who suddenly went missing (*People v. Wharton* (1990) 53 Cal.3d 522, 577-578.) "In our view, the salient feature of *Lucero*, *Wharton*, *Panah* and *Rogers* remains that a reliable missing person report was made under circumstances known to the investigating officers which strongly suggested that the missing person was injured or worse, and would cause a reasonably cautious person to believe that the action taken was appropriate." (*People v. Hochstraser*, *supra*, 178 Cal.App.4th at p. 899.)

3400.6-Need to assist animal in distress can justify warrantless search 12/17

The exigent circumstances exception to the warrant requirement of the Fourth Amendment applies to animals who may be in distress because of abuse or neglect. (*People v. Wallace* (2017) 15 Cal.App.5th 111,122 [after finding evidence of animal neglect on property and unable to find homeowner, officers were justified in looking through broken window of garage to check on the welfare of a dog whining inside]; *People v. Chung* (2010) 195 Cal.App.4th 721, 729-732 [officers entered apartment where neighbor reported sounds of dog crying in pain]; *Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1220-1222 [officers entered to check on welfare of animals inside a stench-filled closed reptile business]; see also Pen. Code, § 597.1 ["When the officer has reasonable grounds to believe that very prompt action is required to protect the health or safety of the animal or the health or safety of others, the officer shall immediately seize the animal … ."].)

3410.1-Warrantless entry or search permitted to prevent destruction of evidence 6/20

There is an exception to the warrant requirement of the Fourth Amendment when " 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *(Mincey v. Arizona* (1978) 437 U.S. 385, 394.) "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." (*Payton v. New York* (1980) 445 U.S. 573, 590.) "It is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant." (*Kentucky v. King* (2011) 563 U.S. 452, 455 (*King*).) "[T]he need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search. [Citations.]" (*Id*. at p. 460.)

"As previously noted, warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, … the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense." (*King*, *supra*, 563 U.S. at p. 462.) Thus, although the exigent circumstances cannot be created by the conduct of the officers, if "the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." (*Ibid*., fn. omitted.) "[W]e conclude that the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment." (*Id*. at p. 469.)

The subjective intent or "bad faith" of the officers is not relevant to this inquiry. (*King*, *supra*, 563 U.S. at p. 464.) Nor is it relevant whether the officers, otherwise acting reasonably, could foresee their conduct would create the exigent circumstances. (*Id*. at pp. 464-465.) Even if the officers have probable cause and time to secure a warrant, the Fourth Amendment imposes no duty on them to do rather than employing another lawful strategy that leads to the exigent circumstances, such as knocking on the door of a suspected drug house. (*Id*. at pp. 466-467.) Finally, the High Court in *King* rejected as the test for a police created exigency whether the officers "engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable." (*Id*. at pp. 468-469.) Thus, that the officers knock forcefully and loudly announced their presence at a suspect's home does not impermissibly "create exigent circumstances." (*Id*. at p. 471.) "Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue." (*Id*. at p. 470.)

3410.2-Warrantless seizure of property to obtain warrant permissible 4/20

Law enforcement's seizure of potential evidence is far less intrusive than a search. (*People v. Tran* (2019) 42 Cal.App.5th 1, 8 (*Tran*).) "Whereas a search implicates a person's right to keep contents of his or her belongings private, a seizure only affects their right to possess the particular item in question. (*Segura v. United States* (1984) 468 U.S. 796, 806.)" (*Tran*, *supra*, 42 Cal.App.5th at p. 8.) "Consequently, police generally have greater leeway in terms of conducting warrantless seizure than they do in carrying out a warrantless search." (*Tran*, *supra*.) First, there must be probable cause to believe the item seized contains contraband or evidence of a crime. (*Id*. at pp.

8-9.) Second, the Fourth Amendment permits the warrantless "seizure of the property, pending issuance of a search warrant to examine its contents, if the exigencies of the situation demand it or some other recognized exception to the warrant requirement is present." (*United States v. Place* (1983) 462 U.S. 696, 701.) "Exigent circumstances include the need to prevent the destruction of evidence." (*Kentucky v. King* (2011) 563 U.S 452, 455.)

> [E]xigent circumstances are more generally described as circumstances that would case a reasonable office to believe immediate action is necessary to prevent, among other things, the destruction of relevant evidence or some other consequence improperly frustrating legitimate law enforcement efforts [Citation.] Thus, the threat that evidence will be destroyed or lost before the office can obtain a warrant is a valid exigent circumstance justifying the officer's immediate seizure of the evidence. [Citations.]"

(*Tran*, *supra*, 42 Cal.App.5th at p. 11 [warrantless seizure of dashboard camera from suspected reckless driver's backpack justified to prevent its loss or destruction before warrant could be obtained to review the video].) Finally, the seizure may violate the Fourth Amendment if it continues for an unreasonable amount of time. (*United States v. Place*, *supra*, 462 U.S. at p. 701-710; *Tran*, *supra*, 42 Cal.App.5th at pp. 13-14.)

3420.1-Reasonable force may be used to prevent swallowing drugs 7/11

It is common knowledge that persons engaged in narcotics activities frequently conceal the narcotics within their mouths. (*People v. Mora* (1965) 238 Cal.App.2d 1, 3.) The courts have often approved of the use of reasonable force to prevent a suspect from destroying or disposing of contraband by swallowing it. "We certainly do not intend to curtail proper police efforts to prevent the destruction of evidence. Inasmuch as the mouth is not a sacred orifice and there is no constitutional right to destroy or dispose of evidence, attempts to swallow evidence can be prevented [citations] as long as excessive force is not employed." (*People v. Bracamonte* (1975) 15 Cal.3d 394, 405, fn. 6.)

Typically, officers prevent persons from swallowing contraband by placing their hands upon the suspects' throats and pressing sufficiently to prevent swallowing, but not so hard as to prevent breathing. Application of such force and the retrieval of the contraband from the suspect's mouth are proper. (*People v. Fulkman* (1991) 235 Cal.App.3d 555, 561-564; *People v. Johnson* (1991) 231 Cal.App.3d 1, 15-17; *People v. Cappellia* (1989) 208 Cal.App.3d 1331, 1336-1339; see also *People v. Lara* (1980) 108 Cal.App.3d 237, 240-242; *People v. Miller* (1967) 248 Cal.App.2d 731, 735; *People v. Mora*, *supra*, 238 Cal.App.2d at p. 3.)

3500.1-Weapon need not be on defendant's person under PC12022(c) 8/09

Penal Code section 12022, subdivision (c), establishes a sentencing enhancement for any defendant being "personally armed" with a firearm during the commission of specified drug offenses. This enhancement has been broadly interpreted to effectuate it goal of deterring and punishing persons who create such dangerous situations in the course of committing their crimes. (*People v. Pitto* (2008) 43 Cal.4th 228, 236.)

This enhancement does not require the firearm to be one the defendant's person, however. In *People v. Superior Court (Pomilia)* (1991) 235 Cal.App.3d 1464, the appellate court held that "personally," as used in the statute, distinguishes personal from vicarious liability, rather than requiring that the defendant have the firearm on his or her person. ne is "armed" with a deadly

weapon when a person carries it " 'or has it available for use in either offense or defense.' " (*Id.* at p. 1472.) Thus, defendants who commit one of the specified offenses are subject to the additional penalty under section 12022, subdivision (c), if, at the time of the offenses, they carry firearms or have them available for offensive or defensive use. (*Ibid.*; similarly, see *People v. Gonzales* (1992) 8 Cal.App.4th 1658, 1661-1663; *People v. Mendival* (1992) 2 Cal.App.4th 562.)

> It would be ludicrous to conclude a criminal could have a gun on the console of his vehicle or on the table in front of him and find that this did not meet the definition of armed. He has insured that a firearm is as accessible to him as if he had placed it in a holster on his hip. It is the availability—the ready access—of the weapon that constitutes arming.

(*People v. Mendival*, *supra*, 2 Cal.App.4th at pp. 573-574 [pistol found on floorboard of vehicle occupied by the defendants].)

It is also not necessary that the defendant be present when drugs and a firearm are found in order to be personally armed. Recognizing that drug possession is a continuing offense, "it is immaterial whether defendant was present when police seized the assault rifle together with the cache of crack cocaine, so long as he had the firearm available for use in furtherance of the drug offense at any time during his possession of the drugs." (*People v. Bland* (1995) 10 Cal.4th 991, 1000; see also *People v. Delgadillo* (2005) 132 Cal.App.4th 1570, 1575 [methamphetamine manufacturing].)

In addition, the defendant's purpose for placing the narcotics and firearm in proximity to each other is irrelevant so long as it knowingly done. (*People v. Pitto*, *supra*, 43 Cal.4th at pp. 239-240.)

> When (1) a defendant, while perpetrating a drug offense, knows of the presence and location of a firearm near the drugs, (2) the proximity of the gun to the drugs is not the result of mere accident or happenstance, and (3) the defendant is in a position to use the gun offensively or defensively to aid in the commission of the offense, the gun facilitates that crime and has the requisite purpose or effect with respect to its commission.

(*Id*. at p. 240.)

Finally, two or more defendants can be "personally armed" with the same firearm. Certainly, both may have a single firearm available for their ready access. "It represents the same threat no matter which person grabs it. Ownership has no bearing, in our view, on culpability or degree of threat." (*People v. Mendival*, *supra*, 2 Cal.App.4th at pp. 574-575; see also *People v. Smith* (1992) 9 Cal.App.4th 196, 204-205.)

3500.2-Armed means available for use under PC12022(a) 8/07

Penal Code section 12022, subdivision (a)(1), provides a sentence enhancement for criminals who are armed with a firearm during the commission of a felony. Cases interpreting this section have uniformly held that one is "armed" with a firearm when carrying it or having it available for use in either offense or defense. (*People v. Wandick* (1991) 227 Cal.App.3d 918, 927-928; see also *People v. Searle* (1989) 213 Cal.App.3d 1091, 1099; *People v. Garcia* (1986) 183 Cal.App.3d 335, 350.) This enhancement applies if the defendant is armed at any point during the commission of a continuing offense such as conspiracy. (*People v. Becker* (2000) 83 Cal.App.4th 294.) The enhancement applies vicariously to all principles even if only one is armed. (*People v. Smith* (1992) 9 Cal.App.4th 196, 204; *People v. Gonzalez* (1992) 8 Cal.App.4th 1658, 1662.) Moreover, there is

no requirement that an aider and abettor know a principal is armed with a firearm to be found vicariously armed under this section. (*People v. Overton* (1994) 28 Cal.App.4th 1497, 1501.)

3510.1-Great bodily injury under PC12022.7 is any significant physical injury 8/20

Penal Code section 12022.7 provides a sentence enhancement for the personal infliction of great bodily injury on a non-accomplice in the commission of a felony. Subdivision (f) [formerly subd. (e)] defines great bodily injury as "a significant or substantial physical injury." Section 12022.8, providing enhancement for great bodily injury inflicted in the course of various sex crimes, adopts this same definition. Whether or not an injury meets this definition is essentially a question of fact rather than one of law. (*People v. Quinonez* (2020) 46 Cal.App.5th 457, 465; *People v. Saez* (2015) 237 Cal.App.4th 1177, 1189; *People v. Escobar* (1992) 3 Cal.4th 740, 750 (*Escobar*).)

In *Escobar*, the California Supreme Court retreated from its earlier opinion in *People v. Caudillo* (1978) 21 Cal.3d 562. The court held that the standard adopted by the Legislature "contains no specific requirement that the victim suffer 'permanent,' 'prolonged,' or 'protracted' disfigurement, impairment, or loss of bodily function." (*Escobar*, *supra*, 3 Cal.4th at p. 750; see also *People v. Cross* (2008) 45 Cal.4th 58, 63; *People v. Cardenas* (2015) 239 Cal.App.4th 220, 227.) Hence, the criteria of the *Caudillo* case, which examined whether the injuries were "transitory and short-lived" rather than "severe or protracted in nature," were based upon a misinterpretation of the statute and may not be applied. (*Escobar*, *supra*, 3 Cal.4th at pp. 747-750; see also *People v. Wallace* (1993) 14 Cal.App.4th 651, 665.) Instead, great bodily injury simply requires more than both minor and moderate harms. (*People v. Cross*, *supra*, 45 Cal.4th at p. 64; see also *People v. Sandoval* (2020) 50 Cal.App.5th 357, 360-362 [standard jury instruction upheld]; *People v. Quinonez*, *supra*, 46 Cal.App.5th at pp. 464-466 [same]; but see *People v. Medellin* (2020) 45 Cal.App.5th 519, 631 [vagueness of standard jury instruction, coupled with incorrect legal argument by prosecutor, resulted in reversal].)

An injury need not be permanent in order to constitute significant or substantial injury. (*People v. Harvey* (1992) 7 Cal.App.4th 823, 827 [second-degree facial burn, requiring medical treatment over a month, was held to constitute great bodily injury].) Bruising and swelling have been held to be great bodily injury, as have a broken nose and several cuts requiring three or four sutures each. (*People v. Quinonez*, *supra*, 46 Cal.App.5th at p. 466; *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 836; *People v. Salas* (1978) 77 Cal.App.3d 600, 606.) Contusions, lacerations, and abrasions can be sufficient to support the jury's finding of great bodily injury. (*People v. Escobar*, *supra*, 3 Cal.4th at pp. 749-750; *People v. Medellin*, *supra*, 45 Cal.App.5th at p. 529; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 733-734.) A victim's lost tooth and resulting disfigurement, plus suturing in mouth and over an eyebrow, qualified as great bodily injury. (*People v. Belton* (2008) 168 Cal.App.4th 432, 440.) And a gunshot wound to the leg, requiring no sutures, little loss of blood, no hospitalization other than to remove the fragments, no days off from work, and no permanent disability except for some pain, is enough to prove great bodily injury. (*People v. Wolcott* (1983) 34 Cal.3d 92, 107.) Soft tissue injuries can qualify as great bodily injury. (*People v. Le* (2006) 137 Cal.App.4th 54, 58-60.) Impregnating a child can be great bodily injury. (*People v. Cross* (2008) 45 Cal.4th 58, 65-66; *People v. Woods* (2015) 241 Cal.App.4th 461, 486-487; *People v. Meneses* (2011) 193 Cal.App.4th 1087, 1090-1092.) "A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description. Clearly it is the

trier of fact that must in most situations make the determination." (*People v. Jaramillo*, *supra*, 98 Cal.App.3d at p. 836.)

3510.2-Great bodily injury under PC12022.7 requires personal infliction 9/21

To "personally inflict" great bodily injury pursuant to Penal Code sections 12022.7 means a defendant is not liable for this enhancement if an accomplice inflicts the requisite injury. *People v. Cole* (1982) 31 Cal.3d 568, 571-573.) But each defendant involved in a group beating resulting in great bodily injury to the victim can be liable for an enhanced punishment. (*People v. Modiri* (2006) 39 Cal.4th 481, 495-487; *People v. Dunkerson* (2007) 155 Cal.App.4th 1413, 1417-1418.)

> [T]he meaning of the statutory requirement that the defendant *personally inflict* the injury does not differ from its nonlegal meaning. Commonly understood, the phrase "personally inflicts" means that someone "in person" [citation] that is, directly and not through an intermediary, "cause[s] something (damaging or painful) to be endured" [citation].

(*People v. Cross* (2008) 45 Cal.4th 58, 68, italics in original.)

For a great bodily injury enhancement to apply the defendant must be the direct, rather than proximate, cause of the victim's injuries. (*People v. Cardenas* (2015) 239 Cal.App.4th 220, 228; see, e.g., *People v. Elder* (2014) 227 Cal.App.4th 411, 418-421 [satisfied when victim hurt while resisting robbery even though defendant was struggling with victim and pulling away when injury occurred]; *People v. Warwick* (2010) 182 Cal.App.4th 788, 793 [satisfied when defendant failed to take any steps to protect her newborn baby]; distinguish *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 348-349 [not satisfied when officer injured chasing and tackling fleeing defendant].) Whether the furnishing of drugs to someone who voluntarily ingests them constitutes "personal infliction "within the meaning of section 12022.7 depends on the circumstances underlying the furnishing offense. (*People v. Ollo* (2021) 11 Cal.5th 682, 687.)

Finally, a defendant "personally" inflicts great bodily injury, not only when using an inanimate object, but also when they command an animal to attack the victim. (*People v. Frazier* (2009) 173 Cal.App.4th 613, 616-620.)

3600.1-Only relevant evidence is admissible 11/18

Evidence Code section 351 states that all relevant evidence is admissible. (See also Cal. Const., Art. 1, § 28, subd. (d), the Truth-in-Evidence provision of Proposition 8.) " '[R]elevancy' is the first rule of the admissibility of evidence … ." (*Traxler v. Thompson* (1970) 4 Cal.App.3d 278, 286.) "[T]he only test of relevancy is logic and common sense." (*Ibid*.) In the context of criminal cases, the general rule for relevancy is whether the evidence tends logically, naturally, and by reasonable inference to establish any material fact sought to be proved. (*People v. Lee* (2011) 51 Cal.4th 620, 642; *People v. Kelly* (1967) 66 Cal.2d 232, 239.)

> Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Relevance is established when the evidence tends " ' " 'logically, naturally, and by reasonable inference' " ' " to establish material facts, such as motive, intent, or identity. (*People v. Heard* (2003) 31 Cal.4th 946, 973.) When the relevance of proffered evidence depends on the existence of a disputed material fact or facts, the proponent of that evidence bears the burden of establishing all preliminary facts pertinent to the question of relevance. (Evid. Code, § 403, subd. (a)(1); *People v. Kaurish* (1990) 52 Cal.3d 648, 693.) The

> disputed evidence is inadmissible unless the court finds evidence sufficient to sustain a finding that those pertinent preliminary facts exist. (Evid. Code, § 403.) The trial court is accorded broad discretion in determining the relevance of evidence. (*People v. Jones* (2011) 51 Cal.4th 346, 373,

(*People v. Lucas* (2014) 60 Cal.4th 153, 229.)

As noted, "[t]he trial court has broad latitude in determining the relevance of evidence." (*People v. Scott* (2011) 52 Cal.4th 452, 490; see also *People v. Williams* (2008) 43 Cal.4th 584, 634 [describing trial court having "considerable discretion" in determining relevancy].) Appellate courts review such determinations for abuse of discretion. (*People v. Scott*, *supra*; see also *People v. Hardy* (2018) 5 Cal.5th 56, 87.)

3600.2-Relevant evidence may be excluded under EC352 12/19

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "For purposes of that section, 'prejudice' does not mean damage to a party's case that flows from relevant, probative evidence. Rather, it means the tendency of evidence to evoke an emotional bias against a party because of extraneous factors unrelated to the issues." (*People v. Cortez* (2016) 63 Cal.4th 101, 128.) For purposes of section 352, " 'prejudicial' means uniquely inflammatory without regard to relevance." (*People v. Zambran*o (2007) 41 Cal.4th 1082, 1138; see also *People v. Case* (2018) 5 Cal.5th 1, 43.)

> The determination as to whether the probative value of such evidence is substantially outweighed by the possibility of undue consumption of time, unfair prejudice or misleading the jury is "entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183.) The weighing process under section 352 "depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." ([*People v.*] *Jennings* [(2000)] 81 Cal.App.4th [1301] at p. 1314.) " 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

(*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1104-1105; see also *People v. Jones* (2017) 3 Cal.5th 583, 610; *People v. Virgil* (2011) 51 Cal.4th 1210, 1249.)

> "Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption " 'substantially outweigh' " the probative value of relevant evidence, a section 352 objection should fail. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) …" (*People v. Doolin* (2009) 45 Cal.4th 390, 438-439.)

(*People v. Scott* (2011) 52 Cal.4th 452, 490-491, italics in original.)

Some appellate cases have drawn a distinction between whether the challenged evidence is being proffered by the prosecution or the defense.

> "Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense. [Citations.]" (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599.) The "trial court's discretion should 'favor the defendant in cases of doubt' [citation.]" (*Id*. at p. 600; see *People v. Mizer* (1961) 195 Cal.App.2d 261, 269 ["We believe that it is fundamental in our system of jurisprudence that all of a defendant's pertinent evidence should be considered by the trier of fact"].) But of course, the rule generally tilting discretionary evidentiary calls in favor of a criminal defendant neither changes the definition of relevance nor alters other rules of admissibility. (*People v. Cornejo* (2016) 3 Cal.App.5th 36, 58-59.)

(*People v. Reardon* (2018) 26 Cal.App.5th 727, 737.)

"A trial court's decision whether to exclude evidence pursuant to Evidence Code section 352 is reviewed for abuse of discretion." (*People v. Mendoza* (2007) 42 Cal.4th 686, 699; see also *People v. Lee* (2011) 51 Cal.4th 620, 643.) " 'A trial court's exercise of discretion in admitting or rejecting evidence pursuant to Evidence Code section 352 'will not be disturbed on appeal unless there is a manifest abuse of that discretion resulting in a miscarriage of justice.' [Citation.]" (*People v. Cain* (1995) 10 Cal.4th 1, 33.)" (*People v. Thomas* (2011) 51 Cal.4th 449, 485.) The erroneous failure to exclude evidence under Evidence Code section 352 is subject to the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) "reasonable probability" standard of prejudice. (*People v. McDaniel* (2019) 38 Cal.App.5th 986, 1005.)

3600.3-Evidence of violent crime, even if gruesome, admissible 10/14

"As a rule, the prosecution in a criminal case involving charges of murder or other violent crimes is entitled to present evidence of the circumstances attending them even if it is grim" (*People v. Osband* (1996) 13 Cal.4th 622, 675), and even if it 'duplicate [s] testimony, depict[s] uncontested facts, or trigger[s] an offer to stipulate' (*People v. Stitely* (2005) 35 Cal.4th 514, 545)." (*People v. Boyce* (2014) 59 Cal.4th 672, 687-688.) " ' "[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant" ' [citations], and we rely on our trial courts to ensure that relevant, otherwise admissible evidence is not more prejudicial than probative [citation]." (*People v. Gurule* (2002) 28 Cal.4th 557, 624.)

In *People v. Boyce*, *supra*, 59 Cal.4th 672, for example, the California Supreme Court upheld admission of the surviving victims' 911 calls right after an armed robbery and shooting.

> The trial court did not abuse its discretion in admitting the tapes to provide a contemporaneous account of the crime scene and information about the robbers. Although Amy and Jennifer testified in detail at trial, the court had broad discretion to admit corroborating evidence that was nearly contemporaneous with the crimes. [Citation.] The tapes also assisted the jury in evaluating Amy's and Jennifer's credibility. The defense attempted to show that the intense trauma of the incident compromised their ability to accurately perceive the shooter's identity. By listening to the tapes, the jury was able to evaluate firsthand the women's demeanor in the moments following the crimes.

(*Id*., at p. 688.)

Similarly, in *People v. Roybal* (1998) 19 Cal.4th 481, the California Supreme Court upheld admission of spontaneous statements of the victim's husband to a 911 dispatcher and to an officer describing the crime scene and his wife's body. In the 911 call he reported that his wife was covered in blood and not breathing, and that it looked as if she had been murdered. During an interview, he described finding his dead wife lying in the hallway, and explained how he entered the house. (*Id*., at p. 515.) The court observed that the tapes were "relevant to show [the husband's] initial reaction to the discovery of his wife's body and dispel any suggestion that he was involved in the murder; they also described the scene of the crime." (*Id*., at p. 517; accord, *People v. Streeter* (2012) 54 Cal.4th 205, 236-238 [tape of victim screaming during an ambulance ride to the hospital properly admitted as relevant to show victim's pain and suffering at the time of actual events in a charge of torture murder].)

3600.4-Defendant's weapon possession may be relevant and admissible 4/20

The California Supreme Court in *People v. Riser* (1956) 47 Cal.2d 566 (*Riser*) developed a special rule related to the relevancy and admissibility under Evidence Code sections 350 to 352 related to evidence of a defendant's possession of a weapon which cannot be directly linked to the crime charged.

> In *Riser*, we held: "When the prosecution relies … on a specific type of weapon, it is error to admit evidence that other weapons were found in [the defendant's] possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*Id*. at p. 577.) On the other hand, "[w]e have also held that when weapons are otherwise relevant to the crime's commission, but are not the actual murder weapons, they may still be admissible." *People v. Cox* (2003) 30 Cal.4th 916, 956.) For example, in *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052, we held the trial court did not abuse its discretion by allowing a witness to testify the defendant had told her he kept a gun in his van. "Although the witnesses did not establish the gun necessarily was the murder weapon, it might have been. … The evidence was thus relevant and admissible as circumstantial evidence that [the defendant] committed the charged offenses." (*Ibid*.; see *People v. Neely* (1993) 6 Cal.4th 877, 896 [counsel not ineffective for failing to object to admission of rifle and ammunition found in defendant's truck shortly after commission of crime where "there was no direct evidence as to the fatal shooting that would render this evidence irrelevant to establish facts material to proof of the charged offenses"].)

(*People v. Homick* (2012) 55 Cal.4th 816, 876-877 [not error to admit testimony that defendant habitually carried a gun]; see also *People v. Sanchez* (2019) 7 Cal.5th 14, 55-56 [because murder weapon never found it was proper to admit evidence defendant possessed type of weapon that could have been used in murders]; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1073-1074 [evidence defendant possessed guns not used in charged crimes admissible over Evidence Code section 352 objection because relevant to prove defendant was gang member at war with rival gang]; *People v. Venegas* (2020) 44 Cal.App.5th 32, 40 [same]; distinguish *People v. Jefferson* (2015) 238 Cal.App.4th 494, 506-507 [reversible error to admit evidence that defendant on trial for possession of stolen firearm also owned legally registered firearms].)

3600.5-Deft.'s poverty, unemployment or drug use may be admissible in theft case 7/19

Under Evidence Code section 352, ordinarily, "[e]vidence of a defendant's poverty or indebtedness, without more, is inadmissible to establish motive for robbery or theft because it is unfair to make poverty alone a ground of suspicion and the probative value of the evidence is deemed to be outweighed by the risk of prejudice." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023-1024; see also *People v. Clark* (2011) 52 Cal.4th 856, 929 (*Clark*).) There are, however, "recognized circumstances under which evidence of a defendant's unemployment or financial status is relevant and admissible to [such a] charge … ." (*Clark*, *supra*.) Evidence of defendant's poverty may be "admitted for the limited purpose of rebutting an assertion that he did not commit the charged robberies because he did not need money." (*Ibid*., fn. omitted; see also *People v. Harris* (2005) 37 Cal.4th 310, 345-346; *People v. Koontz* (2002) 27 Cal.4th 1041, 1076-1077.) It may also be probative "that defendant suddenly had come into possession of a greater than usual sum of money after the crimes." (*Clark*, *supra*; see also *People v. Cornwell* (2006) 37 Cal.4th 50, 95-98 [evidence of the defendant's depleted bank balance and modest income was relevant circumstantial evidence properly admitted to eliminate legitimate explanations for his sudden possession of an unusually larger amount of money after the robbery]; *People v. Potts* (2019) 6 Cal.5th 1012, 1032 [accord].)

Similarly, a defendant's unemployment status may lead to relevant evidence.

> The defense objected on relevance grounds (Evid. Code, § 350) to Mizell's testimony that Oliver was unemployed in the weeks before the capital crime. However, Oliver's work history prompted further questioning that showed he was alone in Lewis's home throughout the day, and had access to the wedding album containing photographs of Mizell's relatives—people he later targeted for murder. Hence, such evidence served a foundational purpose. It also tended to show that Oliver was dependent, emotionally and financially, on Lewis, and thereby had a possible motive for helping Lewis harm his estranged wife and in-laws. The court did not err in overruling the objection

(*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1025.)

Finally, defendant's drug use may be admissible to show a motive to steal.

> Before trial, defendant moved to exclude evidence that he used crack cocaine. The court ruled that the prosecution could not present generalized evidence that defendant used drugs. It did allow testimony that defendant used money stolen from the store to buy and use drugs in order to show that he had a motive for robbery. Relying on *People v. Holt* (1984) 37 Cal.3d 436, 449-450 and *People v. Cardenas* (1982) 31 Cal.3d 897, 906-907, defendant assigns error. There was none. The rule from those cases "is that evidence of an accused's narcotics addiction is inadmissible where it 'tends only remotely or to an insignificant degree to prove a material fact in the case... .' " (*Cardenas*, at p. 906.) Whether defendant went to the store intending to steal or only decided to take the money after the murder was an issue hotly contested. Evidence that, shortly after the incident, defendant wanted to acquire and consume cocaine was directly relevant on the question of whether he had a preexisting motive to steal. The court properly admitted this limited evidence of drug use while excluding more generalized evidence not directly connected with the crime. (See also *People v. Felix* (1994) 23 Cal.App.4th 1385, 1392-1396 [holding evidence of heroin use admissible to show burglary motive].)

(*People v. Chatman* (2006) 38 Cal.4th 344, 371.)

3600.6-Relevant evidence of gang membership is admissible 9/21

"The People are generally entitled to introduce evidence of a defendant's gang affiliation and activity if it is relevant to the charged offense." (*People v. Chhoun* (2021) 11 Cal.5th 1, 31.) "While gang membership evidence does create a risk the jury will impermissibly infer a defendant has a criminal disposition and is therefore guilty of the offense charged (*People v. Williams* (1997) 16 Cal.4th 153, 193 (*Williams*)), 'nothing bars evidence of gang affiliation that is directly relevant to a material issue.' (*People v. Tuilaep*a (1992) 4 Cal.4th 569, 588.)" (*People v. Montes* (2014) 58 Cal.4th 809, 859 (*Montes*).) "We have observed that, because gang evidence may have a highly inflammatory impact on the jury, trial courts should carefully scrutinize such evidence before admitting it. (*Williams*, *supra*, 16 Cal.4th at p. 193.)" (*Montes*, *supra*, 58 Cal.App.5th at p. 859.)

> [E]vidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.

(*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; see also *People v. Duong* (2020) 10 Cal.5th 36, 64; *People v. Becerrada* (2017) 2 Cal.5th 1009, 1022.)

"The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court's decision exceeds the bounds of reason. [Citation.]" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369; see also *Montes*, *supra*, 58 Cal.4th at p. 860 ["Because the gang evidence was highly probative in this case, and the trial court gave a limiting instruction designed to lessen the risk of undue prejudice, we cannot say the trial court's decision to allow the gang affiliation evidence exceeded the bounds of reason"]; but see *People v. Huynh* (2021) 65 Cal.App.5th 969, 980-987 [reversed because no evidence defendant was either a member nor associate of a criminal street gang]; *People v. Coneal* (2019) 41 Cal.App.5th 951, 964-972 [harmless error to admit defendant's rap videos because no persuasive basis to infer lyrics intended to be taken literally].)

3600.7-Witness fearful to testify, and basis for such fear, relevant to credibility 2/21

"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 (*Burgener*); see also *People v. Flinner* (2020) 10 Cal.5th 686, 724.) "A witness's fear is relevant to his or her credibility, especially when it provides an explanation for conflicting statements by the same witness." (*People v. Johnson* (2015) 61 Cal.4th 734, 766; see also *People v. Chavez* (2018) 22 Cal.App.5th 663, 704.) "The trial court did not abuse its discretion in overruling the defense relevancy objection to Jennifer Bowkley's testimony that she did not want to be in court. [Citation.] As the Evidence Code makes clear, the witness's attitude toward testifying would have assisted the jury in evaluating her credibility. (Evid. Code, § 780, subd. (j).)" (*People v. Merriman* (2014) 60 Cal.4th 1, 85.) Such testimony is not limited to circumstances in which the witness hesitates in his or her responses or when nervousness or fear interferes with the witness's ability to testify truthfully. (*Id*. at p. 86.)

"Evidence of any explanation of the basis for such fear is likewise relevant to the jury's assessment of the witness's credibility and admissible for that nonhearsay purpose, but not for the truth of any matters asserted. (*Burgener*, at p. 869.)" (*People v. Chism* (2014) 58 Cal.4th 1266, 1292.) Given a witness's "professed inability to remember her previous statements, her equivocal responses to many of the prosecutor's questions, and the hesitancy and reluctance she demonstrated in answering the prosecutor's questions, the trial court did not abuse its discretion in determining that evidence of her fear in testifying was relevant to the jury's assessment of her credibility." (*People v. Valdez* (2012) 55 Cal.4th 82, 137; see also *People v. Harris* (2008) 43 Cal.4th 1269, 1287-1290 [evidence of threat to witness admissible given his professed inability at trial to remember prior statements that, while preparing for his testimony earlier that morning, he said he recalled]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1142 [evidence of witnesses' fear was admissible given their " hesitancy in responding to questions" at trial]; *People v. Avalos* (1984) 37 Cal.3d 216, 232 [testimony regarding witness's fear was admissible given her hesitation in responding when asked whether she saw in the court room the person she had identified in a lineup].)

Evidence that a witness fears testifying because of threats does not require that the threats be tied to the defendant. (*People v. Sandoval* (2015) 62 Cal.4th 394, 430 [court gave cautionary instruction that jury not "infer or assume that those threats are connected with the defendant in any way"].) "[E]vidence of a 'third party' threat may bear on the credibility of the witness, whether or not the threat is directly linked to the defendant. [Citations.]" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084.) "It is not necessarily the source of the threat – but its existence – that is relevant to the witness's credibility." (*Burgener*, *supra*, 29 Cal.4th at p. 870; see, e.g., *People v. Anderson* (2019) 42 Cal.App.5th 780, 785.)

On appellate review, a trial court's ruling on this issue is subject to the abuse of discretion standard. (*People v. Lopez* (2018) 5 Cal.5th 339, 360.)

3610.1-Admission of complete act, conversation or writing under EC356 5/19

Evidence Code section 356 states: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." The California Supreme Court has referred to this statute as the "rule of completeness." (*People v. Westerfield* (2019) 6 Cal.5th 632, 696; *People v. Brooks* (2017) 3 Cal.5th 1, 49.) " 'Although framed as an expansion of the concept of relevancy, Evidence Code [section] 356 most often operates in the manner of a hearsay exception.' [Citation.]" (*People v. Armstrong* (2019) 6 Cal.5th 735, 787.)

"The purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed." *(People v. Arias* (1996) 13 Cal.4th 92, 156; see also *People v. Melendez* (2016) 2 Cal.5th 1, 25.) "Evidence Code section 356 ' "is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on confrontation clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood." ' (*People v. Vines* (2011) 51 Cal.4th 830, 862, quoting *People v. Parris*h (2007) 152 Cal.App.4th 263, 272-273.)" (*People v. Melendez*, *supra*, 2 Cal.5th at p. 26.)

" ' "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence … .' [Citation.]" ' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 334-335.)

(*People v. Parrish*, *supra*, 152 Cal.App.4th at p. 274 .) "Because the statements proffered by defendant, when viewed in isolation, presented a misleading picture of the entirety of Child's interview, and the evidence proffered by the prosecution served to put those statements in context, the prosecution's proffered evidence had 'some bearing upon, or connection with' the statements introduced into evidence by defendant." (*Id*. at p. 276., italics omitted.)

"The 'other conversation' referred to in Evidence Code section 356 must have some bearing upon, or connection with, the admission or declaration in evidence." (*People v. Breaux* (1991) 1 Cal.4th 281, 302.) Thus, stand alone, self-serving statements of a defendant do not come within section 356. (*People v. Johnson* (2010) 183 Cal.App.4th 253, 285-288.)

A court does not abuse its discretion when under Section 356 it refuses to admit statements from a conversation or interrogation to explain statements made in a previous distinct and separate conversation. (See *People v. Williams* (2006) 40 Cal.4th 287, 319, [within court's discretion not to admit statements made by defendant in first interview with detectives to explain statements made in another interview 24 hours later]; *People v. Barrick* (1982) 33 Cal.3d 115, 131-132 [within court's discretion not to admit postarrest statements to explain prearrest statements; defendant's arrest and admonishment of constitutional rights separated the interrogation into two separate interrogations].)

(*People v. Johnson*, *supra*, 183 Cal.App.4th at p. 287 [exculpatory statements not made at same time as admissions and were not necessary to make his prior unambiguous admissions understood].)

"A trial courts determination of whether evidence is admissible under section 356 is reviewed for abuse of discretion. (See *People v. Pride* (1992) 3 Cal.4th 195, 235.)" (*People v. Parrish*, *supra*, 152 Cal.App.4th at p. 274.)

3620.1-A judge has a duty to prevent harassment and embarrassment of witnesses 7/20

The trial court has the power and duty to control the interrogation of witnesses to protect them from undue harassment or embarrassment. This power flows from the trial court's "inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice. (See, e.g., Pen. Code, § 1044; Evid. Code, § 765; [citations].)" (*People v. Cox* (1991) 53 Cal.3d 618, 700.) "The trial court has broad discretion under Evidence Code section 765 to exercise control over interrogation of witnesses and protect them from undue harassment or embarrassment." (*People v. Chenault* (2014) 227 Cal.App.4th 1503, 1514 [this authority extends to allowing a witness to have a support dog present during testimony]; see also *People v. Tafoya* (2007) 42 Cal.4th 147, 175; *People v. Spence* (2012) 212 Cal.App.4th 478, 517.) Similarly, trial judges have great discretion to curb redundant and cumulative questioning. (*People v. Robinson* (2020) 47 Cal.App.5th 1027, 1031-1032.) The appellate courts apply an abuse of discretion standard in reviewing a trial court's exercise of its authority under Evidence Code section 765. (*People v. Tafoya*, *supra*, 42 Cal.4th at p. 175.)

3630.1-Refreshing recollection under EC771 3/17

Evidence Code section 771, subdivision (a), states: "[I]f a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken." Subdivision (a) departs from the former rule by allowing present recollection to be revived by "a writing," with no express restrictions on the types of writings or the means used to refresh recollection. (*People v. Hess* (1970) 10 Cal.App.3d 1071, 1080.)

" 'The writing is used by the witness solely to assist him in giving his oral testimony. It has no independent evidentiary value for the party calling him, and is not admissible in evidence at his instance.'[Citation.]" (*People v. Lee* (1990) 219 Cal.App.3d 829, 840.) "[D]ocuments used to refresh a witness's recollection need not be admissible, and indeed are inadmissible under Evidence Code section 771, subdivision (b), except when proffered by the adverse party." (*LAOSD Asbestos Cases* (2016) 5 Cal.App.5th 1022, 1042.)

> [S]tatements which have no independent basis of admissibility may not be introduced under the guise of refreshing a witness' memory. If it is necessary to refresh the memory of a witness through the use of a prior recorded statement, that statement should not be read aloud before the jury but should be given to the witness to read or be read by the attorney outside the presence of the jury.

(*People v. Parks* (1971) 4 Cal.3d 955, 960-961.) "Further, the party offering a writing to refresh a witness's recollection does not have 'a right to have the jury see [the writing].' [Citation.]" (*People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1036.) "[S]ince writings used to refresh a witness's recollection need not be admissible evidence, the practice of displaying such writings to the jury was long ago condemned by the Supreme Court because it 'would open the door to the admission of hearsay and manufactured evidence without limit.' [Citation]." (*Id*. at p. 1039.)

Evidence Code section 771, subdivision (b) provides that: "If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness." And if the document produced at the hearing is merely a summary of other records which were actually used to refresh recollection, the original records should be produced upon request. (*People v. Goff* (1981) 127 Cal.App.3d 1039, 1045.)

3640.1-Demonstrations and experiments must meet foundational requirements 10/20

Demonstrations and experiments, whether conducted inside or outside the courtroom, must meet certain foundational requirements. These requirements have been expressed in various ways. "[E]xperimental evidence is admissible only when the party offering it proves (1) that it is relevant; (2) that it was conducted under conditions substantially similar to the original occurrence tested; (3) that presenting the evidence of the experiment will not consume undue time, confuse the issues, or mislead the trier of fact; and (4) that the expert testifying about the experiment is qualified to do so. (*People v. Turner* (1994) 8 Cal.4th 137, 198.)" (*People v. Lucas* (2014) 60 Cal.4th 153, 228 [trial court did not err in denying defense request to have their expert perform handwriting analysis tests during in limine hearings].) "The party need not, however, show that the conditions were absolutely identical." (*People v. Boyd* (1990) 222 Cal.App.3d 541, 565.)

> The probative value of evidence of the reenactment of a crime depends primarily on its similarity to the events and conditions that existed at the time of the crime. [Citations.] To be admissible, demonstrative evidence must satisfy two requirements: first the evidence must be a reasonable representation of that which it is alleged to portray; and second, the evidence must assist the jurors in their determination of the facts of the case, rather than serve to mislead them. [Citations] Demonstrative evidence must accurately depict what it purports to show. [Citation.] The demonstration must be relevant to an issue in dispute "and 'must have been conducted under at least substantially similar, although not necessarily absolutely identical, conditions as those of the actual occurrence.' " [Citations.] " 'Within these limits, " 'the physical conditions which existed at the time the event in question occurred need not be duplicated with precision nor is it required that no change has occurred between the happening of the event and the time' " ' " of the reenactment. [Citations.]

(*People v. Rivera* (2011) 201 Cal.App.4th 353, 363.)

"A ruling admitting or excluding the results of an experiment or demonstration as evidence for the existence or nonexistence of a material fact in controversy 'is a determination largely within the discretion of the trial court and its ruling will not be disturbed except upon a clear showing of an abuse thereof.' [Citation.]" (*People v. Zaragoza* (2016) 1 Cal.5th 21, 50; see also *People v. Jackson* (2016) 1 Cal.5th 269, 342.) Similarly, "[a] trial court's decision to admit demonstrative evidence under section 352 will be upheld on appeal unless the prejudicial effect of the evidence clearly outweighs its probative value. (*People v. Mills* (2010) 48 Cal.4th 158, 191-192; *People v. Moon* (2005) 37 Cal.4th 1, 34.)" (*People v. Rivera*, *supra*, 201 Cal.App.4th at pp. 362-363; see also *People v. Anderson* (2018) 5 Cal.5th 372, 402.)

As an example:

> We recognize that the use of mannequins as illustrative evidence has been approved to assist the jury in understanding the testimony of witnesses or to clarify the circumstances of a crime, even if the evidence is cumulative. (See *People v. Williams* (1997) 16 Cal.4th 153, 214 (*Williams*); *People v. Cummings* (1993) 4 Cal.4th 1233, 1291 (*Cummings*).) Here, however, the strangling of a mannequin by defendant was presented under conditions that were far from substantially similar to the killing as described by his testimony, and was not demonstrative evidence that contributed to an understanding of the case by the jury. [Citations.]

(*People v. Rivera*, *supra*, 201 Cal.App.4th at pp. 364-365, fn. omitted.) "In *Williams* and *Cummings*, respectively, experts impaled mannequins with knitting needles and plastic dowels to demonstrate bullet trajectories." (*Id*. at p. 364, fn. 1; see also *People v. Peterson* (2020) 10 Cal.5th 409, 460-462 [trial court's ruling excluding defense demonstration upheld because conducted under circumstances too dissimilar to those involved in case].)

3650.1-General principles re judicial notice 4/20

Judicial notice can only be taken by a court when authorized by law. (Evid. Code, § 450.) A trial court must take judicial notice of the matters listed in Evidence Code section 451. This includes "[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be subject to dispute." (Evid. Code, § 451, subd. (f).) The court also may, and if certain circumstances are met (see Evid. Code, § 453) is required to, take judicial notice of the matters listed in Evidence Code section 452. This includes "[f]acts and circumstances that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).) In addition, Evidence Code section 452, subdivision (d) allows the trial court in its discretion to take judicial notice of its own records or "any court of this state." Additional requirements of certification are required when such court records are computer generated. (Evid. Code, § 452.5; *People v. Gonzalez* (2019) 42 Cal.App.5th 1144, 1148-1149.) "[I]f the subject of judicial notice is 'of substantial consequence to the determination of the action,' Evidence Code section 455 requires the court to allow each party to present information relevant to the propriety of taking judicial notice and as to the tenor of the matter to be noticed." (*People v. Banda* (2018) 26 Cal.App.5th 349, 360.)

3650.2-Judicial notice on appeal 4/17

Judicial notice can only be taken by a court when authorized by law. (Evid. Code, § 450.) A trial court must take judicial notice of the matters listed in Evidence Code section 451. This includes "[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be subject to dispute." (Evid. Code, § 451, subd. (f).) The court also may, and if certain circumstances are met (see Evid. Code, § 453) is required to, take judicial notice of the matters listed in Evidence code section 452. This includes "[f]acts and circumstances that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subd. (h).)

Similarly, an appellate court may take judicial notice of the matters listed in the above provisions of the Evidence Code. (Evid. Code, § 459; *Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 153.) Normally, however, "[a]n appellate court cannot take judicial notice of additional facts the prosecution failed to prove at trial to affirm a conviction." (*People v. Davis* (2013) 57 Cal.4th 353, 360; *People v. Jackson* (1992) 7 Cal.App.4th 1367, 1373.) "[F]acts are deemed within the common knowledge of the jury only if they are matters of common human experience or well known laws of natural science." (*People v. Love* (1961) 56 Cal.2d 720, 732, disapproved on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2, 649.)

> If the People seek to excuse the production of evidence by urging the fact is one of common knowledge, the following test applies. First, "is the fact one of common, everyday knowledge in that jurisdiction, which everyone of average intelligence and knowledge of things about him can be presumed to know; and [second,] is it certain and indisputable?"[Citation.] "[I]f there is any reasonable question whatever as to either point, proof should be required." [Citation.]

(*People v. Davis*, *supra*, 57 Cal.4th at p. 360.)

3660.1-General principles re character & reputation for honesty 7/21

Evidence of a witness' character for truthfulness, or its opposite, is relevant to credibility and admissible for this purpose. (Evid. Code, § 780, subd. (e).) "This evidence may be shown by '(a) evidence of specific instances of conduct, (b) opinion evidence, or (c) reputation evidence.' [Citation.]" (*People v. Bell* (2019) 7 Cal.5th 70, 106; see, e.g., *People v. Hines* (2020) 58 Cal.App.5th 583, 609 [testimony of two witnesses that defense witnesses had threaten them in other matters on defendant's behalf was relevant and admissible to show the defense witnesses had bias in favor of defendant].) As with any lay person, they may testify as to their opinion of another witness' character for honesty if the testimony is based on the person's personal observations or knowledge. (*Id*. at p. 107; see also *People v. McAlpin* (1991) 53 Cal.3d 1289, 1306-1307.) "An individual who has known a witness for a reasonable length of time or who knows the reputation of that witness for honesty and veracity in the community may qualify to testify as to the witness' character for honesty or veracity." (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39.) A lay person can also testify as to a witness' reputation for honesty even if limited to their personally knowledge as to a smaller subset of society, such as other family members. (*People v. Bell*, *supra*, 7 Cal.5th at p. 107; *People v. Cobb* (1955) 45 Cal.2d 158, 164.)

Thus, a criminal defendant may introduce evidence of his or her own good character, whether in the form of a witness's own opinion, based on the witness's perceptions; or in the form of the defendant's reputation, based on what the witness has heard from others. (*People v. Hawara* (2021) 61 Cal.App.5th 704, 712-713 (*Hawara*), citing Evid. Code, §§ 800, 1102, subd. (a), and 1324.) It is a common and accepted method of cross-examination for a prosecutor to ask whether such a witness is aware of instances of the defendant's bad character or whether the witness's opinion would change if the witness became aware of instances of the defendant's bad character. (*Hawara*, *supra*, 61 Cal.App.5th at p. 713.) "[W]hen the witness has testified to the defendant's reputation, based on what the witness has heard, the proper form is to ask, 'if you heard'." (*Ibid*.) "However, when the witness has testified to the witness's own opinion, based on the witness's perceptions, it is perfectly proper to ask, 'if you knew'." (*Ibid*., italics omitted; see also *People v. Lopez* (2005) 129 Cal.App.5th 1508, 1528.)

And "[w]hen, as here, a witness is called to express an opinion as to the good character of the defendant, the prosecution must have the opportunity to let the jury test the validity of the opinion or the weight to be given to it by asking whether the holder of the opinion has knowledge of events or acts which have indisputably occurred." (*People v. Hempstead* (1983) 148 Cal.App.3d 949, 954.) It is not a requirement that the events or acts may have "indisputably" occurred. (*Hawara*, *supra*, 61 Cal.App.5th at p. 713, fn. 8.) "It is enough that 'the cross-examiner ha[s] in his possession information that reasonably leads him to believe that the acts of conduct by defendant have in fact been committed or the reports of their commission have been generally circulated. [Citation.]' [Citation.]" (*Ibid*.)

3700.1-PC1538.5 is limited to federal constitutional (4th Amend.) violations 9/19

The Fourth Amendment to the United States Constitution provides that individuals are entitled "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." (U.S. Const., 4th Amend.) "Although this amendment restricts only the federal Government, the 'right of privacy' also extends to protect against state action through the due process clause of the Fourteenth Amendment. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655.)" (*People v. Parrott* (2017) 10 Cal.App.5th 485, 492.)

In California, "[c]hallenges to the admissibility of evidence obtained by a police search and seizure are reviewed under federal constitutional standards. [Citations.]" (*People v. Schmitz* (2012) 55 Cal.4th 909, 916.) "Pursuant to article I, section 28, of the California Constitution, a trial court may exclude evidence under Penal Code section 1538.5 only if exclusion is mandated by the federal Constitution." (*People v. Banks* (1993) 6 Cal.4th 926, 934; see also *People v. Maikhio* (2011) 51 Cal.4th 1074, 1089; *People v. Barnes* (2103) 216 Cal.App.4th 1508, 1513.) "Our Constitution thus prohibits employing an exclusionary rule that is more expansive than that articulated by the United States Supreme Court." (*People v. Robinson* (2010) 47 Cal.4th 1104, 1119; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 129.)

> California has generally adopted Fourth Amendment jurisprudence for interpreting analogous provisions of the California Constitution. (See [*People v.*] *Buza* [(2018)] 4 Cal.5th [658] at pp. 685-686; *People v. Celis* (2004) 33 Cal.4th 667, 673 [interpreting probable cause for purposes of arrest and reasonable suspicion for purposes of detention]; see also *People v. Camacho* (2000) 23 Cal.4th 824, 830 [application of exclusionary rule]; Cal. Const., art. I, § 13.) Our courts therefore apply federal legal standards when analyzing the reasonableness of a search or seizure under California constitutional law.

(*People v. Perry* (2019) 36 Cal.App.5th 444, 466.)

3700.2-PC1538.5 motions limited to search issues 12/09

Penal Code section 1538.5 creates a pretrial motion procedure "to suppress as evidence any tangible or intangible thing obtained *as a result of* a search or seizure. …" (Pen. Code, § 1538.5, subd. (a), italics added.) California case law has long held that a statement allegedly obtained in violation of *Miranda* is not a proper subject for a pretrial motion to suppress under Penal Code section 1538.5. (*People v. Campa* (1984) 36 Cal.3d 870, 885; *People v. Superior Court (Redd)* (1969) 275 Cal.App.2d 49.) A Penal Code section 1538.5 motion may be employed to shield a defendant only from Fourth Amendment violations; it has no part in protecting against Fifth or Sixth Amendment infringements. (*People v. Superior Court (Zolnay)* (1975) 15 Cal.3d 729, 734.) The motion does not become appropriate merely because a confession is offered in a tangible form, such as a tape recording. (*People v. Brown* (1981) 119 Cal.App.3d 116, 124-125.)

Nor is Penal Code section 1538.5 motion appropriate to suppress physical evidence that is the product of a simple *Miranda* violation. In *Oregon v. Elstad* (1985) 470 U.S. 298, the United States Supreme Court held that voluntary admissions made after a person was fully advised of and waived his *Miranda* rights were not the poisoned fruit of an earlier unwarned, but otherwise voluntary, statement. The *Miranda* exclusionary rule does not require that a statement excluded from the prosecutor's case-in-chief or its fruits be discarded as inherently tainted. (*Id.* at pp. 305-309; see also *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1403-1409.)

California courts have extended the *Elstad* rule to physical evidence, holding that evidence seized as the product of a simple *Miranda* violation should not be suppressed as tainted derivative evidence. In other words, fruit of the poisonous tree analysis does not apply to a noncoercive *Miranda* violation. (*People v. Brewer* (2000) 81 Cal.App.4th 442, 453-455; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 953-957.) It follows that Penal Code section 1538.5 may not be used to suppress physical evidence obtained in violation of Fifth and Sixth Amendment principles since the motion is limited to search and seizure issues. (*Brewer, supra,* at pp. 453-454; *Whitfield, supra,* at pp. 957-958.)

A motion to suppress evidence on grounds other than an allegedly illegal search or seizure is ordinarily reserved to the trial court. (See, e.g., *People v. Stearns* (1973) 35 Cal.App.3d 304, 306 [challenge to lineup].) Any pretrial ruling on such a motion is not binding on the parties or on the trial court. (*People v. Superior Court (Zolnay)*, *supra*, 15 Cal.3d at pp 733-735; *Saidi-Tabatabai v. Superior Court* (1967) 253 Cal.App.2d 257, 266.)

3700.3-No suppression of evidence for failure to comply with *Miranda* 12/09

Physical evidence discovered as a result of a voluntary statement by the defendant is not subject to suppression even when the statement was taken in technical violation of the *Miranda* rule. Traditional Fourth Amendment "fruit of the poisonous tree" jurisprudence does not apply to a noncoercive *Miranda* violation. (*Oregon v. Elstad* (1985) 470 U.S. 298, 305-309 (*Elstad*); *Michigan v. Tucker* (1974) 417 U.S. 433, 446 (*Tucker*); see also *People v. Brewer* (2000) 81 Cal.App.4th 442, 453-455; *People v. Whitfield* (1996) 46 Cal.App.4th 947, 953-957.) Only when the derivative evidence is the product of a direct violation of the Fourth Amendment is the remedy of suppression appropriate.

In *Tucker*, the United States Supreme Court was asked to extend the fruit of the poisonous tree doctrine to suppress testimony from a prosecution witness whose identity was discovered from a statement elicited from the defendant in violation of his *Miranda* rights. The High Court refused, holding that a failure to give *Miranda* warnings did not violate the defendant's constitutional privilege against self-incrimination. Rather, the officer's conduct "departed only from the prophylactic standards later laid down by this court in *Miranda* to safeguard that privilege. (*Tucker*, *supra*, 417 U.S. at p. 446.)

The Supreme Court elaborated on *Tucker* in *Elstad*. In *Elstad*, the High Court held that voluntary admissions made after a person was fully advised of and waived his *Miranda* rights were not the poisoned fruit of an earlier unwarned, but otherwise voluntary, statement. The *Miranda* exclusionary rule does not require that a statement excluded from the prosecutor's case-in-chief or its fruits be discarded as inherently tainted. (*Elstad*, *supra*, 470 U.S. at pp. 305-309.) Of *Tucker* the court wrote: "Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed." (*Id.* at p. 308; see also *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1403-1409.)

The reasoning of *Tucker* and *Elstad* equally to physical evidence obtained from a simple *Miranda* violation. Physical evidence seized as a result of a noncoercive *Miranda* violation is not excludable as tainted derivative evidence. (*People v. Brewer*, *supra*, 81 Cal.App.4th at pp. 453-455; *People v. Whitfield*, *supra*, 46 Cal.App.4th at pp. 953-957.)

The United States Supreme Court complicated the issue when it struck down a federal statute designed to eliminate the need for *Miranda* warnings. (*Dickerson v. United States* (2000) 530 U.S. 428, 444 (*Dickerson*).) In doing so, the High Court pointed out that it has always considered the *Miranda* rule to have constitutional underpinnings. Thus, the federal statute improperly interfered with the court's authority to interpret the constitution. (*Id.* at pp. 438-441.) The court also explained that the existing exceptions to the *Miranda* rule do not undermine its constitutional basis. "[T]he sort of modifications represented by these cases are as much a normal part of the constitutional law as the original decision." (*Id.* at p. 441.)

Despite *Miranda's* constitutional basis, the *Dickerson* court reaffirmed that usual "fruit of the poisonous tree" rules do not apply to a simple *Miranda* violation. "Our decision in [*Elstad*]—refusing to apply the traditional fruits doctrine developed in Fourth Amendment cases—does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." (*Dickerson*, *supra*, 530 U.S. at p. 441.)

In sum, the law continues to recognize that physical evidence derived from a defendant's voluntary statement to a law enforcement officer is not subject to suppression even when the statement was taken in technical violation of the *Miranda* rule.

3700.4-No suppression for failure to comply with statute or admin. reg. 4/20

In *Oregon v. Elstad* (1985) 470 U.S. 298, the United States Supreme Court established the principle that the Fourth Amendment's exclusionary rule requires an underlying federal constitutional violation. "Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed." (*Id.* at p. 308; see also *People v. McKay* (2002) 27 Cal.4th 601, 607-619.)

Thus, a state constitutional, statutory or administrative law violation does not implicate the exclusionary rule. (*People v. Guzman* (2011) 201 Cal.App.4th 1090, 1097 [otherwise lawful request for records by Medi-Cal investigators did not violate Fourth Amendment despite noncompliance with statutory notice requirements].) "The United States Supreme Court has held that, as far as the federal Constitution is concerned, 'whether state law authorized the search [is] irrelevant.' (*Virginia v. Moore* (2008) 553 U.S. 164, 171 … .)" (*People v. Robinson* (2010) 47 Cal.4th 1104, 1122.)

In *People v. Rawlings* (1974) 42 Cal.App.3d 952, a misdemeanor drunk driving case, the defendant brought a pretrial Penal Code section 1538.5 motion to suppress the results of a gas chromatograph test. The defendant contended the test was not performed in accordance with the provisions of title 17 of the Administrative Code. Over the People's opposition, the hearing judge ordered the evidence suppressed. In reviewing this ruling, the appellate court held the issue defendant raised was not within the province of Penal Code section 1538.5.

> Where a statute, such as this, does not specifically provide that evidence shall be excluded for failure to comply with said statute and there are no constitutional issues involved (and none are involved here) such evidence is not inadmissible. Statutory compliance or noncompliance merely goes to the weight of the evidence. [Citations.] [¶] The so-called "order of suppression" was not within the purview of Penal Code section 1538.5 which provides for pretrial suppression hearings dealing with the issue of search and seizure. Here there was no issue of search and seizure involved.

(*Id.* at p. 956, overruled on other grounds in *People v. Chacon* (2007) 40 Cal.4th 558, 565, fn. 7; see also *People v. Wade* (1989) 208 Cal.App.3d 304, 308.) Similarly, the mere fact that blood was drawn for blood alcohol testing in violation of the statutory requirements for the manner of drawing blood does not violate the Fourth Amendment. (*People v. Mateljan* (2005) 129 Cal.App.4th 367, 373-376; *People v. McHugh* (2004) 119 Cal.App.4th 202, 212-214; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1038-1039.)

As another example, that a blood sample was taken for DNA identification from a convicted felon without statutory authorization does not implicate the Fourth Amendment. (*People v. Robinson*, *supra*, 47 Cal.4th at p. 1122 ["The fact that defendant Robinson's blood was collected in violation of our state law at the time does not alter our Fourth Amendment analysis."].) Violation of the prohibition against recording telephone conversation under Penal Code section 632 is not grounds for invoking the Fourth Amendment even though subdivision (d) of this law specifically provides exclusion as a remedy. (*People v. Guzman* (2019) 8 Cal.5th 673.) Finally, that Internet subscriber information is obtained without complete compliance with the applicable statute, Penal Code section 1524.2, does not implicate the exclusionary rule. (*People v. Stipo* (2011) 195 Cal.App.4th 664, 671.)

3700.5-No suppression for violations of evidentiary privileges 6/10

An alleged violation of an evidentiary privilege by officers during an investigative search and seizure does not implicate the exclusionary rule. "Pursuant to article I, section 28, of the California Constitution, a trial court may exclude evidence under Penal Code section 1538.5 only if exclusion is mandated by the federal Constitution." (*People v. Banks* (1993) 6 Cal.4th 926, 934.) "Our Constitution thus prohibits employing an exclusionary rule that is more expansive than that articulated by the United States Supreme Court." (*People v. Robinson* (2010) 47 Cal.4th 1104, 1119; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 129.) "The United States Supreme Court has held that, as far as the federal Constitution is concerned, 'whether state law authorized the search [is] irrelevant.' (*Virginia v. Moore* (2008) 553 U.S. 164, 171 … .)" (*People v. Robinson*, *supra*, 47 Cal.4th at p. 1122.)

In *People v. Navarro* (2008) 138 Cal.App.4th 146, the defense claimed law enforcement used privileged attorney-client information supplied by an attorney to obtain a search warrant and, therefore, the warrant should be quashed as the "fruit of the poisonous tree." Although this contention was framed as being a violation of the Sixth Amendment, the defense sought an exclusionary rule remedy apparently through the Fourth Amendment. The appellate court rejected this argument.

> The attorney-client privilege is a testimonial *privilege*. [Citation.] By itself, this privilege is merely a rule of evidence and does not supply a constitutional right. [Citation.] However, where the government intrudes into the attorney-client relationship to obtain privileged information, the Sixth Amendment right to counsel may be violated. This usually involves some type of government misconduct, such as infiltrating the defense by planting informants or intercepting confidential communications. [Citation.] However, the constitutional right to counsel does not attach until charges are actually brought. [Citations.] Because [the attorney's] alleged misconduct prompted the search warrant which thereafter led to charges being brought against the Navarro defendants, it is clear that her supposed breach of the attorney-client privilege came before charges were filed, and before the Sixth

> Amendment right to counsel attached. If appellants were entitled to quash the search warrant and suppress the evidence, their right to such relief must come from some other source.

(*Id*. at p. 157, italics in original.) The defense also claimed the alleged violation of the statutory attorney-client privilege under Evidence Code section 952 provided a basis for quashing the warrant and suppressing the evidence seized as a result. Again the appellate court rejected this contention.

> As discussed earlier, the attorney-client privilege is testimonial and evidentiary in nature. Such privileges frustrate the fundamental principle that the public has a right to all available evidence and must be strictly construed to the limited extent that excluding relevant evidence serves a greater public good. [Citation.] As a testimonial or evidentiary privilege has no direct bearing on the process by which the police obtain information to support the determination of probable cause, evidence properly considered at the probable cause stage may still be excluded at trial. Conversely, it is inappropriate to apply the rules of evidence as a criterion to determine probable cause.

(*Id* at p. 161.) The court concluded: "Where a search warrant is obtained based on information provided to the police in breach of the lawyer-client privilege, the privilege by itself does not provide a 'fruit of the poisonous tree' type remedy absent the sort of governmental misconduct needed to establish a constitutional violation." (*Id*. at p. 162.)

Similarly, in *People v. Morgan* (1989) 207 Cal.App.3d 1384, the appellate court affirmed the denial of a pre-trial motion to suppress an arrest warrant for lack of probable cause based on a claimed violation of the marital communications privilege. (Evid. Code, § 980.) Relying on the United States Supreme Court opinion in *Brinegar v. United States* (1949) 338 U.S. 160, the appellate court held that "[t]he rules of evidence applicable at trial do not apply in determining probable cause for arrest." (*People v. Morgan*, *supra*, at p. 1389.)

3700.6-No suppression of testimony of crimes against officers 1/21

Where a defendant is charged with assaulting an officer or interfering with an officer's duties, the lawfulness of the officer's actions in detaining or arresting the defendant is an evidentiary question that should be resolved by the trier of fact, not by a pretrial motion to suppress. " 'Rather it is a question of fact and an essential part of the corpus delicti itself.' [Citations.]" (*People v. Henderson* (1976) 58 Cal.App.3d 349, 359.) A judge hearing a pretrial motion to suppress pursuant to Penal Code section 1538.5 based on such grounds can summarily deny the motion without conducting an evidentiary hearing. (*People v. Chavez* (2020) 54 Cal.App.5th 477, 480.)

"California cases hold that although the court, not the jury, usually decides whether police action was supported by legal cause, disputed facts bearing on the issue of legal cause must be submitted to the jury considering an "engaged in duty" element, since the lawfulness of the victim's conduct forms part of the corpus delicti of the offense." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217; see also *People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1543-1544.)

Even if one concludes an officer may have committed some technical breach of duty in attempting to arrest or detain the defendant, the policies behind the exclusionary rule are not served by excluding evidence of crimes committed against the officer in response.

> There are limitations to the exclusionary rule which are largely based on common sense. One such limitation is that the rule does not immunize crimes of violence committed on a peace officer, even if they are preceded by a Fourth Amendment violation. For example,

would the exclusionary rule operate to exclude testimony that an unlawfully arrested person shot the arresting police officer? The answer is, plainly, no.

(*In re Richard G.* (2009) 173 Cal.App.4th 1252, 1260-1261.)

In *Pittman v. Superior Court* (1967) 256 Cal.App.2d 795, the defendant drew a gun on officers forcibly entering his residence and later kicked an officer while being handcuffed. The defendant was convicted of violating Penal Code section 245(b) and appealed on the basis of an illegal entry by the officers. The appellate court held:

> [A]ssuming, without deciding, that the deputies entered the house illegally, the evidence of the assault which followed is not inadmissible. [¶] The rule excluding evidence obtained by illegal entries was adopted for the purpose of eliminating the incentive for police officers to use illegal methods. [Citations.] That purpose is not advanced by forbidding proof of assaults committed against an officer following his entry. Had the petitioner in this case pulled the trigger, as he threatened to do, he might have killed the officer. The judicial policy of discouraging overzealous entries does not go so far as to authorize imposition of the death penalty upon the offending officer in the discretion of the party offended.

(*Id.* at p. 798.)

Numerous appellate courts have also pointed out that subsequent illegal acts by the defendant dissipate any taint caused by unauthorized police action, and serve as a lawful basis justifying the defendant's apprehension. (See, generally, *In re Richard G.*, *supra*, 173 Cal.App.4th at pp. 1261-1262.) "An individual's decision to commit a new and distinct crime, even if made during or immediately after an unlawful detention, is an intervening act sufficient to purge the 'taint' of a theoretical illegal detention." (*Id*. at p. 1262; see also *People v. Cox* (2008) 168 Cal.App.4th 702, 712.)

Thus, any evidence that may result, including the officer's testimony describing the defendant's acts of resistance, is admissible. (*In re Robert D.* (1979) 95 Cal.App.3d 767, 771-772.) To hold otherwise would give a defendant carte blanche to break the law following any impropriety by the police. "Just as an individual has no right to resist an unlawful arrest [citation], [defendant had] no right to commit numerous additional unlawful acts in order to avoid that which may concededly in the first instance have been an unjustified attempt at detention." (*Id.* at p. 772.)

3700.7-Exclusionary rule generally does not apply to EC1101(b) evidence 8/15

When the People seek to introduce evidence of an uncharged offense under Evidence Code section 1101, subdivision (b), the defendant is not entitled to suppress that evidence under Penal Code section 1538.5, absent proof of a sufficiently close nexus between the two incidents. (*People v. Beuer* (2000) 77 Cal.App.4th 1433, 1435 (*Beuer*).) In *Beuer*, the appellate court followed the test set forth in a lower federal circuit case that " '[a]bsent any threshold showing of a connection or "nexus" in time, place, or purpose between the [prior] searches and the subsequent prosecution,' " the Fourth Amendment's exclusionary rule does not apply as " 'there is no appreciable deterrent purpose in suppressing the evidence.' [Citation.]" (*Id*. at p. 1439.) In applying this standard to the facts of *Beuer*, the appellate court held there was no showing of a connection or nexus between the prior and instant offenses because (1) the two police agencies involved in the two incidents were separate, (2) there was no showing that the later agency had any knowledge of the previous incident, and (3) the current arrest was not within the zone of interest of the police department responsible for

the first incident. (*Ibid*.) Thus, the court held that, even if the earlier search was improper, evidence from the first search was admissible in the later prosecution for purposes of Evidence Code section 1101, subdivision (b). (*Ibid*.)

3700.8-S.D. local rules permit pretrial suppression on 4th Amend. grounds only 6/10

In San Diego County a local rule of court specifically prohibits the filing of a motion in the criminal law and motion department when the only binding ruling on the issue can be made in the trial department. San Diego Superior Court Rules, Division III "Criminal," Rule 3.2.1, subdivision (F), entitled "Trial Department Motions," states:

> No party may file in any law and motion department a motion which must be decided by the trial judge. Such motions include, but are not limited to, motions to suppress based upon confessions or admissions which are not a product of alleged Fourth Amendment violations (e.g., alleged violations of the Fifth and Sixth Amendments, such as *Miranda* violations, involuntary confessions, or denial of counsel), *Trombetta/Youngblood* motions, and severance motions resting on evidentiary considerations.

3710.1-Exclusionary rule not appropriate for every Fourth Amendment violation 5/20

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," but "contains no provision expressly precluding the use of evidence obtained in violation of its commands." (*Arizona v. Evans* (1995) 514 U.S. 1, 10.) "But despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. As in the case of any remedial device, 'the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.' [Citation.]" (*Stone v. Powell* (1976) 428 U.S. 465, 486-487.)

Thus, "[t]he fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. [Citation.] Indeed, exclusion 'has always been our last resort, not our first impulse,' [citation], and our precedents establish important principles that constrain application of the exclusionary rule." (*Herring v. United States* (2009) 555 U.S. 135, 140 (*Herring*); see also *People v. Marquez* (2019) 31 Cal.App.5th 402, 412.) "We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." (*Herring*, *supra*, 555 U.S. at p. 141.) "Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future." (*Ibid*.)

> In addition, the benefits of deterrence must outweigh the costs. [Citation.] "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." [Citation.] "[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." [Citation.] The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that "offends basic concepts of the criminal justice system." [Citation.]

(*Ibid*.) "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." (*Id*. 555 U.S. at p. 143.)

With these principles in mind, the High Court in *Herring* laid out the basic test:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

(*Herring*, *supra*, 555 U.S. at p. 144.)

> When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. [Citation.] But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful [citation], or when their conduct involves only simple, "isolated" negligence [citation], the " 'deterrence rationale loses much of its force,' " and exclusion cannot "pay its way."

(*Davis v. United States* (2011) 564 U.S. 229, 238.)

The defendant in *Herring* was arrested by the Sheriff Department in Coffee County after being told by a Sheriff's clerk in neighboring Dale County that he had an outstanding felony arrest warrant. A search incident to arrest resulted in discovery of methamphetamine on defendant's person and a pistol in his vehicle. Within 15 minutes, however, the clerk in Dale County relayed back that there had been a mistake and, for some unknown reason, that she had not been informed that the arrest warrant had been recalled several months earlier. There was no dispute that defendant's arrest lacked probable cause and, therefore, violated the Fourth Amendment. Applying the principles described above, the High Court held, nevertheless, that the negligence of Dale County officials in not updating their computer system to reflect the recall of the warrant did not require application of the exclusionary rule. (*Herring*, *supra*, 555 U.S. at p. 144.) The fact that the conduct of law enforcement was negligent, rather than reckless or deliberate, was crucial to the High Court's decision. (*Id*. 555 U.S. at p. 140.) "An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the [exclusionary] rule in the first place." (*Id*. 555 U.S. at p. 144.)

> In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system [citation], we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not "pay its way." [Citation.] In such a case, the criminal should not "go free because the constable has blundered." [Citation.]

(*Id*. 555 U.S. at pp. 147-148.)

The California Supreme Court has applied the same rationale to find that a non-consensual blood draw from a convicted felon for a DNA database, arguably taken in violation of both the Fourth Amendment and statutory requirements, did not require application of the exclusionary rule. (*People v. Robinson* (2010) 47 Cal.4th 1104, 1124-1129 [law enforcement merely negligent in their early attempts to understand and implement the new DNA collection laws]; see also *People v. Marquez*, *supra*, 31 Cal.App.5th at pp. 412-414 [sufficient evidence of attenuation to reject application of exclusionary rule to unlawful taking of DNA sample during prior arrest resulting in "cold hit" connecting defendant to robbery two years later].)

3710.2-Evidence may be admissible despite illegal police conduct 4/17

Proof of some illegal police conduct, standing alone, is irrelevant to a motion to suppress evidence. (*People v. Richards* (1977) 72 Cal.App.3d 510, 514.) It is the defendant's initial burden to offer some evidence that a constitutional violation led to tainted derivative evidence. (*People v. Demoray* (1970) 5 Cal.App.3d 127, 131.) It is only after meeting this initial burden does the ultimate burden of overcoming such taint shift to the prosecution. (*Ibid*.)

> "If the challenged police conduct is shown to be violative of the Fourth Amendment, the exclusionary rule requires that all evidence obtained as a result of such conduct be suppressed. [Citations.] [¶] Such evidence includes not only what was seized in the course of the unlawful conduct itself-the so-called 'primary' evidence [citations]—but also what was subsequently obtained through the information gained by the police in the course of such conduct—the so-called 'derivative' or 'secondary' evidence [citations]. Thus, the 'fruit of the poisonous tree,' as well as the tree itself, must be excluded." (*People v. Williams* (1988) 45 Cal.3d 1268, 1299 … .)
>
> "As for secondary evidence, the defendant bears the burden of making a prima facie case that such evidence was 'tainted' by—i.e., causally linked to—the primary illegality." (*People v. Williams*, *supra*, 45 Cal.3d 1268, 1300.) To do this, the defendant "must show more than that the challenged evidence 'would not have come to light *but for* the illegal actions of the police;' rather, [the defendant] must establish that it ' "has been come at by *exploitation* of that illegality … ." ' " (*Ibid.*, original italics.)

(*People v. Mayfield* (1997) 14 Cal.4th 668, 760.)

For example, "[w]hen the affidavit supporting a search warrant contains information derived from unlawful conduct as well as other, untainted, information, 'the reviewing court must excise all tainted information but then must uphold the warrant if the remaining information establishes probable cause.' [Citation.]" (*People v. Superior Ct. (Corbett)* (2017) 8 Cal.App.5th 670, 693.)

Assuming proof that some evidence has been illegally seized, there are three recognized methods by which evidence that is the "fruit of the poisonous tree" may be admitted despite its illegal origin. (*People v. Thierry* (1998) 64 Cal.App.4th 176, 180.) First, evidence will not be suppressed where there is some "independent source" for its discovery. (*Segura v. United States* (1984) 468 U.S. 796, 805; *Restani v. Superior Court* (1970) 13 Cal.App.3d 189, 198.) Second, under the doctrine of "inevitable discovery," evidence obtained illegally may be admissible if it would have been discovered eventually by legal means. (*Nix v. Williams* (1984) 467 U.S. 431, 441-448; *People v. Boyer* (2006) 38 Cal.4th 412, 448; *People v. Clark* (1993) 5 Cal.4th 950, 993-994.) And third, when the connection between illegal police conduct and the discovery of evidence is so "attenuated" as to dissipate the taint, the evidence is not excluded. (*Segura v. United States*, *supra*, 468 U.S. at p. 805; *People v. Boyer*, *supra*, 38 Cal.4th at p. 448.)

3710.3-California follows "minimal intrusion" exception to warrant requirement 11/12

"The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.' [Citation.]" (*United States v. Knights* (2001) 534 U.S. 112, 118-119 (*Knights*); see *People v. Sanders* (2003) 31 Cal.4th 318, 333 (*Sanders*); see also *People v. Boulter* (2011) 199 Cal.App.4th 761, 768 (*Boulter*).) "Whether an officer's conduct was reasonable

is evaluated on a case-by-case basis in light of the totality of the circumstances." (*In re Raymond C.* (2008) 45 Cal.4th 303, 307; see *Knights*, *supra*, at p. 118; *Sanders*, *supra*, at p. 333; *Boulter*, *supra*, at p. 768.)

> "[I]n most criminal cases," the balance between an individual's Fourth Amendment interests and the promotion of legitimate governmental interests "is struck in favor of the procedure described by the warrant clause (viewing a search as reasonable if conducted pursuant to a warrant that has been issued by a neutral magistrate upon a showing of probable cause) … ." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 867-868.) Nevertheless, the United States Supreme Court has "made it clear that there are exceptions to the warrant requirement. When faced with special law enforcement needs, diminished expectations of privacy, *minimal intrusions*, or the like, [it] has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." (*Illinois v. McArthur* (2001) 531 U.S. 326, 330, italics added.)

(*People v. Robinson* (2012) 208 Cal.App.4th 232, 246 (*Robinson*).) "Although the United States Supreme Court has not clearly articulated the parameters of the exception, federal authorities provide sufficient support for concluding that, in appropriate circumstances, the minimal intrusion exception to the warrant requirement may be applied to uphold warrantless searches based on less than probable cause." (*Id*. at p. 249.)

"The minimal intrusion exception to the warrant requirement rests on the conclusion that in a very narrow class of 'searches' the privacy interests implicated are 'so small that the officers do not need probable cause' for the search to be reasonable. [Citations.]" (*Robinson* ,*supra*, at p. 247.) "The other critical consideration is the justification for the intrusion. … [I]t is also appropriate to consider the degree to which the search ' "is needed for the promotion of legitimate governmental interests," ' because that is the other side of the balancing in the determination of reasonableness … ." (*Id*. at p. 253.)

The appellate court in *Robinson* decided whether placing a lawfully seized key into the lock of a house by an officer was reasonable under the Fourth Amendment under the "minimal intrusion" exception. (*Robinson* ,*supra*, at p. 254.) "[A]ssuming the challenged key testing in the present case was a search, the search was based on reasonable suspicion and served legitimate investigative purposes, without disclosing anything about the contents of the residence or any information of a private nature." (*Ibid*.) "[I]n the circumstances of the present case, testing the key in the front door lock … was not, by itself, an unreasonable search under the Fourth Amendment, even though the act was not authorized by a warrant and regardless of whether the police had probable cause to believe there was evidence in the residence before testing the key in the lock." (*Ibid*.)

3720.1-Evidence admissible if seizure attenuated from taint 5/19

When the connection between illegal police conduct and the discovery and seizure of evidence is so attenuated as to dissipate the taint, the evidence will not be excluded. (*Segura v. United States* (1984) 468 U.S. 796, 805; *People v. Boyer* (2006) 38 Cal.4th 412, 448.) In other words:

> Not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." [Citation.] Rather, the appropriate test is "whether, granting establishment of the primary illegality, the evidence to which

instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." [Citations.]

(*Mann v. Superior Court* (1970) 3 Cal.3d 1, 8, quoting primarily from *Wong Sun v. United* States (1963) 371 U.S. 471, 488; see also *People v. Superior Ct. (Corbett)* (2017) 8 Cal.App.5th 670, 681.) Relevant factors in this attenuation analysis include the temporal proximity of the Fourth Amendment violation to the procurement of the challenged evidence, the presence of intervening circumstances, and the flagrancy of the official misconduct. (*Brown v. Illinois* (1975) 422 U.S. 590, 603-604; *People v. Boyer*, *supra*, 38 Cal.4th at p. 448; see also, *People v. Lujano* (2014) 229 Cal.App.4th 175, 188; *People v. Bates* (2013) 222 Cal.App.4th 60, 69; *People v. Rodriguez* (2006) 143 Cal.App.4th 1137, 1142-1143.) Under the attenuation doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.' [Citation.]" (*Utah v. Strieff* (2016) 579 U.S. ___, ___ [136 S.Ct. 2056, 2061, 195 L.Ed.2d 400, 407]; see also *People v. Marquez* (2019) 31 Cal.App.5th 402, 412.) The prosecution has the burden of proof on issues of attenuation. (*People v. Boyer*, *supra*, 38 Cal.4th at p. 449; *People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 411.)

3720.2-Arrest warrant or Fourth Amendment waiver can attenuate prior illegality 9/19

The "fruit of the poisonous tree" principle of attenuation operates to dissipate the taint of an unlawful detention or traffic stop when, before conducting a search incident to arrest, the officers discover the suspect has an outstanding arrest warrant. (*People v. Brendlin* (2008) 45 Cal.4th 262 (*Brendlin*).) In *Brendlin*, an outstanding warrant for defendant's arrest was discovered prior to any search of the defendant's person or of the car in which he was a passenger. The California Supreme Court held this discovery sufficiently attenuated the taint of a traffic stop lacking reasonable suspicion such that suppression of the drug evidence found in search incident to arrest was not required. (*Id*. at pp. 269-272.) The court held the challenged evidence was the lawful fruit of the outstanding warrant rather than of the unlawful stop, even though only a few minutes elapsed between the stop and the search. (*Id*. at pp. 269-270.) "[W]e conclude that the outstanding warrant, which was discovered prior to any search of defendant's person or of the vehicle, sufficiently attenuated the taint of the unlawful traffic stop." (*Ibid*.; see also *People v. Carter* (2010) 182 Cal.App.4th 522, 528-530.)

The same attenuation analysis applies if the officer discovers, prior to conducting the challenged search or seizure, that the suspect is on parole or probation with Fourth Amendment waiver. (*People v. Durant* (2012) 205 Cal.App.4th 57 (*Durant*).) In *Durant*, officers conducted what was alleged to be an illegal traffic stop. The officer then recognized the defendant as a probationer with a search and seizure condition.

> Applying the factors used by the *Brendlin* court to the case before us, we conclude that any illegality in the initial traffic detention was attenuated by appellant's probation search condition. Although the patdown search and discovery of the gun occurred shortly after the traffic detention, they did not occur until after Officer Taylor had recognized appellant as a person subject to a search condition. (*Brendlin*, *supra*, 45 Cal.4th at pp. 270-271.) The search condition supplied legal authorization to search that was completely independent of the circumstances leading to the traffic stop. (*Id*. at p. 271.) Nor is there any

flagrancy or purposefulness to the alleged unlawful conduct by Taylor—though the trial court found that the traffic stop was made without reasonable suspicion, it specifically found Taylor did not act in an arbitrary, capricious, or harassing manner. (*Id*. at pp. 271-272.)

The purpose of the exclusionary rule—deterring police misconduct—is not served by suppressing the gun that was seized simply because Officer Taylor did not recognize appellant as a probationer until immediately after he initiated a traffic stop made in good faith. (Contra, *People v. Wilkins* (1986) 186 Cal.App.3d 804, 807, 812 [taint of illegal detention not purged when officer first learned of probation condition during detention].) Because Taylor was aware of appellant's probation condition before the search, and because the existence of that probation condition dissipated any taint that might flow from the detention, the motion to suppress was properly denied.

(*Durant*, *supra*, 205 Cal.App.4th at p. 66; but see *People v. Kidd* (2019) 36 Cal.App.5th 12, 23 [in dicta, appellate court opined discovery of Fourth waiver would not have attenuated illegal detention]; *People v. Bates* (2013) 222 Cal.App.4th 60, 71 ["We do not read *Durant* to stand for the proposition that discovery after the fact of a probation search condition will sanitize any unlawful detention without regard to the circumstances surrounding that seizure"].)

3720.3-Attenuation doctrine applies to witness discovered as "fruit of poisonous tree" 10/14

The attenuation test is slightly different when the defense alleges that a witness is the "fruit of the poisonous tree" of a Fourth Amendment violation. "Where the testimony of live witnesses is at issue, the test focuses primarily on the effect of the illegality on the witness's willingness to testify, and less on whether illegal conduct led to discovery of the witness's identity. (*United States v. Ceccolini* (1978) 435 U.S. 268, 276-277.)" (*People v. Boyer* (2006) 38 Cal.4th 412, 448-449; see also *People v. McCurdy* (2014) 59 Cal.4th 1063, 1093 [witness voluntarily came forward after seeing defendant's picture on news following his alleged illegal arrest].)

3730.1-Tainted evidence admissible if independent source 8/21

Evidence should not be suppressed where there is some "independent source" for discovery of the evidence. (*Segura v. United States* (1984) 468 U.S. 796, 805.) Similarly, where illegal conduct merely contributed to discovery of the evidence, no exclusion is required. (*Restani v. Superior Court* (1970) 13 Cal.App.3d 189, 198.) The purpose of this doctrine is to position the officers as they would have been had they conducted themselves lawfully, rather than in a worse position. (*Murray v. United States* (1988) 487 U.S. 533, 537; *People v. Superior Ct. (Corbett)* (2017) 8 Cal.App.5th 670, 682.) "The independent source doctrine applies in California. (*People v. Bennett* (1998) 17 Cal.4th 373, 390.)" (*People v. Weiss* (1999) 20 Cal.4th 1073, 1078.)

In *Murray v. United States*, *supra*, 487 U.S 533 the United States Supreme Court held the independent source doctrine may overcome suppression not only of the evidence actually uncovered under the independent legal justification, but also of any evidence uncovered illegally that would have been discovered under the legal justification. Thus, a search warrant issued after an illegal search or seizure is sufficient to purge the taint for evidence found after its issuance, as well as for any evidence illegally discovered before the warrant, so long as the illegal evidence did not prompt the officer to seek the warrant or serve as the only probable cause supporting the warrant. (*Id*. at pp. 541-543; see also *People v. Bennett*, *supra*, 17 Cal.4th at pp. 389-391; similarly, see *People v.*

Lamas (1991) 229 Cal.App.3d 560, 568-571; *People v. Freeman* (1990) 219 Cal.App.3d 894, 904-906.) It is not necessary in such a situation that the court make some additional finding regarding the effect the incorrect or illegal obtained information had on the magistrate who issued the warrant. (*People v. Weiss*, *supra*, 20 Cal.4th at pp. 1081-1082.)

> For search warrant affidavits containing "both information obtained by unlawful conduct as well as untainted information, a two prong-test applies to justify application of the independent source doctrine." (*People v. Robinson* (2012) 208 Cal.App.4th 232, 241.) "First, the affidavit, excised of any illegally-obtained information, must be sufficient to establish probable cause." (*Ibid*.) Second, the evidence must support a finding that 'the police subjectively would have sought the warrant even without the illegal conduct.' " (Ibid.) "[W]e determine de novo whether the search warrant affidavit is sufficient to establish probable cause ... absent the information obtained by the illegal [conduct]." (*Ibid*.)

(*People v. Tousant* (2021) 64 Cal.App.5th 804, 818.)

The independent source justifying a seizure need not be an arrest or search warrant. An intervening independent act of the defendant or some third party is sufficient to break the causal chain between illegality and evidence. (*People v. Sims* (1993) 5 Cal.4th 405, 445; but see *People v. Medina* (2003) 110 Cal.App.4th 171, 178.) Thus, consent to a search, if sufficiently an act of free will, may purge the primary taint of the illegality. (*People v. Jaquez* (1985) 163 Cal.App.3d 918, 933.)

Finally, under the independent source rule, a warrantless but otherwise lawful arrest in one's home taints only evidence found as a result of a search of the home. Physical evidence seized from the person arrested or post-arrest statements need not be suppressed because the lawful arrest is an independent source for such evidence. (See *People v. Watkins* (1994) 26 Cal.App.4th 19, 31, fn. 8.)

3730.2-Suspect's subsequent illegal actions can be independent source of evidence 6/12

The independent source exception to the "fruit of the poisonous tree" principle operates when, in response to a possible Fourth Amendment violation by law enforcement, the defendant subsequently commits a new crime or otherwise gives valid cause to detain, arrest or search.

The independent source doctrine applies, for example, when a suspect chooses to resist or flee from officers conducting what may be an illegal detention or arrest. (*People v. Cox* (2008) 168 Cal.App.4th 702, 712.)

> Here, defendant chose of his own free will to resist and impede Officer Lannom's search, and then chose to flee. Both of these choices were independent, intervening acts, sufficiently distinct from the illegal detention to dissipate the taint. We thus affirm the trial court's ruling in denying defendant's motion to dismiss—not because (as the trial court found) defendant broke the law when he walked in the middle of the roadway, but rather because his resistance to arrest and attempted flight dissipated the taint created by the illegal detention.

(*Ibid*.)

It applies if the suspect acts in other illegal ways. In *People v. Guzman* (2011) 201 Cal.App.4th 1090, the defense argued that the request for certain records from the defendants by Medi-Cal investigators violated Fourth Amendment. The California Supreme Court rejected the defense "fruit of the poisonous tree" analysis.

> [H]ere the submitted invoices were not the fruit of any poisonous tree planted by the government. Appellant personally, or his agents, planted their own tree and harvested forged invoices. The Medi-Cal investigators certainly did not anticipate that demonstrably false invoices would be submitted as a result of the request for records. Tender of these documents was an independent crime, and appellant is fortunate that he was not charged with forgery. ([Pen. Code,] § 470, subd (d).) In *In re Richard G.* (2009) 173 Cal.App.4th 1252, 1262, this court concluded that "[a]n individual's decision to commit a new and distinct crime, even if made during or immediately after an unlawful [search or seizure], is an intervening act sufficient to purge the 'taint' " of the illegal police conduct. "[T]he defendant's new criminal behavior breaks the causal link between any constitutional violation and evidence of the new crime." (*Ibid*.)

(*Id*. at p. 1097.)

3740.1-Tainted evidence admissible under inevitable discovery doctrine 7/20

Under the doctrine of "inevitable discovery," evidence obtained illegally is admissible if it would have been discovered eventually by legal means. (*Nix v. Williams* (1984) 467 U.S. 431, 441-448 (*Nix*); *People v. Boyer* (2006) 38 Cal.4th 412, 448.) "The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." (*Murray v. United States* (1988) 487 U.S. 533, 539, italics omitted; see also *People v. Superior Ct. (Corbett)* (2017) 8 Cal.App.5th 670, 682.) "If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means … then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." (*Nix*, *supra*, 467 U.S.. at p. 444; *People v. Superior Ct. (Corbett)*, *supra*, 8 Cal.App.5th at p. 682.) The exclusion of physical evidence that would have been ultimately found through lawful means adds nothing to the integrity or fairness of a criminal trial. (*Nix*, *supra*, at p. 446.)

> "Although typically any evidence obtained, even indirectly, through the illegal actions of police is inadmissible as 'fruit of the poisonous tree,' where the court finds that the challenged evidence would have been eventually secured through legal means regardless of the improper official conduct, the inevitable discovery exception allows the evidence to be admitted. The doctrine was developed to prevent unjustly granting criminals immunity from prosecution." [Citation.]

(*People v. Superior Court (Tunch)* (1978) 80 Cal.App.3d 665, 673; see also *People v. Clark* (1993) 5 Cal.4th 950, 993-994; *People v. Rosales* (1987) 192 Cal.App.3d 759, 769.)

The prosecution bears the burden of proving by a preponderance of evidence that the otherwise unlawfully obtained evidence would have been inevitably discovered. (*People v. Cervantes* (2017) 11 Cal.App.5th 860, 872; *People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1217.) "The test is not one of certainty, but rather of a reasonably strong probability." (*People v. Superior Court (Tunch)*, *supra*, 80 Cal.App.3d at p. 681; see also *People v. Fayed* (2020) 9 Cal.5th 147, 184.)

> [T]o justify application of the inevitable discovery exception, [the prosecution] must demonstrate by a preponderance of the evidence that, due to a separate line of investigation, application of routine police procedures, or some other circumstance, the [evidence] would have been discovered by lawful means. The showing must be based not on speculation but on "demonstrated historical facts capable of ready verification or impeachment." (*Nix*, *supra*, 467 U.S. at pp. 444-445, fn. 5.)

(*People v. Hughston* (2008) 168 Cal.App.4th 1062, 1072; see also *People v. Wallace* (2017) 15 Cal.App.5th 82, 94.) "However, in assessing whether evidence would inevitably have been discovered, 'this "court does not leave its common sense at the door." ' [Citation.]" (*People v. Cervantes*, *supra*, 11 Cal.App.5th at p. 872.)

3750.1-Reasonable mistake of fact permits warrantless search or seizure 12/14

Reasonable mistakes of fact by law enforcement officers do not implicate the exclusionary rule of the Fourth Amendment. "The touchstone inquiry in all Fourth Amendment cases is the reasonableness—not certainty—of the official's conduct. (See *Hill v. California* (1971) 401 U.S. 797, 804.)" (*People v. Glick* (1988) 203 Cal.App.3d 796, 800.)

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

(*Herring v. U.S.* (2009) 555 U.S. 135, 144.)

In *Brinegar v. United States* (1949) 338 U.S. 160, the United State Supreme Court, while ruling whether there was probable cause to search a bootlegger's vehicles without a warrant, stated: "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." (*Id.* at p. 176.)

The High Court subsequently applied this principle in *Hill v. California*, *supra*, 401 U.S. 797, where officers had probable cause to arrest Hill, went to his apartment, and without a warrant arrested another man they thought was Hill. Evidence seized from the apartment in a proper search incident to that arrest was not suppressed, as the officers reasonably believed the man was Hill. (*Id.* at p. 804.)

The High Court has also held that evidence is not subject to suppression when seized from a residence by officers whose reasonable mistake of fact led them to believe they did not need a warrant to do so. In *Illinois v. Rodriguez* (1990) 497 U.S. 177, officers mistakenly accepted a woman's apparent authority to consent to their entry into Rodriquez's house, where they seized evidence. Holding that the search was reasonable because the officers' mistake was reasonable, the Court applied the "objectively reasonable" standard from *Terry v. Ohio*: "[W]ould the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" (*Id.* at pp. 188-189, quoting *Terry v. Ohio* (1968) 392 U.S. 1, 21-22, internal quotations and ellipsis omitted.) The Court noted that in questions regarding exceptions to the warrant requirement, "we have not held that the Fourth Amendment requires factual accuracy." (*Illinois v. Rodriguez*, *supra*, at p. 185.)

> It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable.

(*Ibid.*)

In *People v. Hardacre* (2004) 116 Cal.App.4th 1292, the officer stopped the defendant based on a radar reading showing the defendant was driving above the posted 25 mile per hour limit. It was later determined the defendant was driving under the influence. A court commissioner granted the defense's suppression motion finding that the posted limit was a "speed trap." The appellate court held, however, that the exclusionary rule did not apply because, among other reasons, the officer "could not have anticipated that the Commissioner would later determine the stop was illegal under the state speed trap laws because the posted speed limit was not supported by a current traffic and engineering survey." (*People v. Hardacre* (2004) 116 Cal.App.4th 1292, 1301.)

3750.2-Reasonable mistake of law may excuse otherwise illegal search or seizure 12/19

Just as the Fourth Amendment permits officers leeway to make reasonable factual mistakes without implicating the exclusionary rule, the same rationale applies to objectively reasonable mistakes of law by an officer. (*Heien v. North Carolina* (2014) 574 U.S. 54, 60 (*Heien*), overruling contrary California appellate authority, including *People v. Reyes* (2011) 196 Cal.App.4th 856, *People v. Cox* (2008) 168 Cal.App.4th 702, *People v. Ramirez* (2006) 140 Cal.App.4th 849, and *People v. White* (2003) 107 Cal.App.4th 636.)

> But reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

(*Heien*, *supra*, 574 U.S. at p. 61.) The mistake of fact must be objectively reasonable.

> The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be o*bjectively* reasonable. We do not examine the subjective understanding of the particular officer involved. [Citation.] … Thus, an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty-bound to enforce.

(*Id*. 574 U.S. at pp. 66-67, italics in original; see, e.g., *People v. Glick*, *supra*, 203 Cal.App.3d at p. 801 [California officer mistaken as to whether registration sticker required on New Jersey license plate]; *People v. Campuzano* (2015) 237 Cal.App.4th Supp. 14, 21 [Officer reasonably mistaken as to scope of municipal code prohibition on riding bicycle on sidewalk].)

3750.3-Officers can reasonably rely on binding appellate precedent 3/21

United States Supreme Court precedent holds that the exclusionary rule does not apply when police reasonably and in good faith rely on previous appellate court decisions authorizing their conduct. (*Davis v. United States* (2011) 564 U.S. 229, 231 (*Davis*); see also *People v. Silveria* (2020) 10 Cal.5th 195, 239; *People v. Stanley* (1995) 10 Cal.4th 764, 790.) "Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." (*Davis*, *supra*, 564 U.S. at p. 231; distinguish *People v. Smith* (2020) 46 Cal.App.5th 375, 390-392 [plurality opinion not "binding precedent"].) The High Court in *Davis* held that the good faith rule applied to preclude application of the Fourth Amendment exclusionary rule to automobile searches conducted before the decision in *Arizona v. Gant* (2009) 556 U.S. 332 limiting the scope of police authority to search an automobile incident to arrest. (*Davis*, *supra*, 564 U.S. at p. 249; distinguish *People v. Williams* (2016) 1 Cal.5th 1206, 1219-1226 [good faith rule did not apply because "a reasonably well-trained officer" would have known he could not legally conduct search incident to arrest for a simple traffic offense].)

The *Davis* principle has been applied to the holding in *Missouri v. McNeely* (2013) 569 U.S. 141 (*McNeely*). In *McNeely* the High Court held the natural dissipation of alcohol in the bloodstream does not establish a *per se* exigency that justifies warrantless nonconsensual blood testing in drunk driving investigations disapproving its prior decision in *Schmerber v. California* (1966) 384 U.S. 757 (*McNeely*, *supra*, 569 U.S. at pp. 145, 156, 165.). California appellate courts have consistently upheld warrantless blood draws conducted by police officers before the date of the *McNeely* decision, April 17, 2013. (*People v. Jimenez* (2015) 242 Cal.App.4th 1337, 1360-1365; *People v. Harris* (2015) 234 Cal.App.4th 671, 700-704; *People v. Jones* (2014) 231 Cal.App.4th 1257, 1262-1265; *People v. Rossetti* (2014) 230 Cal.App.4th 1070, 1076-1077 (*Rosetti*); *People v. Youn* (2014) 229 Cal.App.4th 571, 578-579 (*Youn*).)

> Based on the foregoing, the police conduct in this case falls within the parameters of the "good faith" exception to the exclusionary rule. Appellant does not identify any pre-*McNeely* California decision suggesting that, in the circumstances before us, the warrantless nonconsensual blood draw was legally impermissible. As the trial court found, Officer Tyhurst acted in accordance with existing legal precedent and with a reasonable, good faith belief that his actions were consistent with the law because "the applicable law at the time of the arrest [was] that a warrant wasn't necessary for a blood draw." Consequently, despite the change in the law, no " 'appreciable deterrence' " would result from suppressing the results of the blood draw in this case, and the trial court properly ruled this evidence was admissible. (*Davis*, *supra*, 564 U.S. at p. 237.)

(*Rossetti*, *supra*, 230 Cal.App.4th at pp. 1076-1077.)

The *Davis* good faith exception to the exclusionary rule was also applied when California law enforcement officers placed a GPS tracking device on a suspect's car without a warrant before such conduct was ruled a "search" under the Fourth Amendment by the United States Supreme Court in *United States v. Jones* (2012) 565 U.S. 400. (*People v. Mackey* (2015) 233 Cal.App.4th 32, 93-97.)

A similar variation on the good faith rule applies to statutory as well as appellate law. Thus, it is not within the scope of the exclusionary rule when an officer relies upon a presumptively valid state or local law which is subsequently declared unconstitutional. (*Illinois v Krull* (1987) 480 U.S. 340; *Michigan v. DeFillippo* (1979) 443 U.S. 31; distinguish *People v. McNeil* (2002) 96 Cal.App.4th 1302 [ordinance so undermined by earlier precedent that law enforcement should have known not to rely upon it].) "Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." (*Michigan v. DeFillippo*, *supra*, 443 U.S. at p. 38.)

Finally, an officer can rely on a facially valid warrantless search condition imposed by a judge even though after the search the condition is held to have been improper imposed. (*People v. Maxwell* (2020) 58 Cal.App.5th 546, 559-560.)

3800.1-Authenticity of a document can be proved many ways 7/21

"A document is not presumed to be what it purports to be. …" (*Fakhoury v. Magner* (1972) 25 Cal.App.3d 58, 65.) "To be relevant, and thus admissible, a writing must be authenticated as being what it is claimed to be." (*People v. Melendez* (2016) 2 Cal.5th 1, 23.) "Authentication of a writing is required before it may be received in evidence." (Evid. Code, § 1401.) "Authentication" means "(a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) "Authenticity may be established by the contents of the writing, or other means, including circumstantial evidence, and the author's testimony is not required." (*People v. Calhoun* (2019) 38 Cal.5th 275, 313; see also *People v. Wilson* (2021) 11 Cal.5th 259, 304; *People v. Cruz* (2020) 46 Cal.App.5th 715, 729.) "Even if conflicting inferences can be drawn from the evidence supporting authentication, that consideration goes to the weight of the evidence and not to its admissibility." (*People v. Lucas* (2014) 60 Cal.4th 153, 262; see also *Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1418; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.)

Evidence Code sections 1410 through 1421 list various methods of authentication of documents, such as by the testimony of a subscribing witness or a handwriting expert, but these methods are not exclusive. (Evid. Code, § 1410; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372.) "The author's testimony is not required to authenticate a document (Evid. Code, § 1411); instead, its authenticity may be established by the contents of the writing (Evid. Code, § 1421) or by other means (Evid. Code, § 1410 [no restriction on 'the means by which a writing may be authenticated']).") (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435-1437 ["My Space" contained sufficient password protected content, including photograph, to authenticate as belonging to defendant]; distinguish *People v. Beckley* (2010) 185 Cal.App.4th 509 [items posted on open website not sufficiently authenticated].)

"California courts have never considered the list set forth in Evidence Code sections 1410-1421 as precluding reliance upon other means of authentication." (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1372.) "Circumstantial evidence, content and location are all valid means of authentication." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383 [sufficient authentication that defendant wrote manuscript relevant to her charged crimes]; see, e.g., *People v. Cruz*, *supra*, 46 Cal.App.5th at pp. 730-731 [contents of Facebook messages sufficient to establish they were sent to stalking victim by defendant using aliases]; *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1373 [rap

lyric sufficiently authenticated as having been written by defendant]; distinguish *People Melendez*, *supra*, 2 Cal.5th at pp. 21-24 [rap lyrics not authenticated]; see also *People v. Smith* (2009) 179 Cal.App.4th 986, 1002 [Ponzi scheme records authenticated by their location and content]; *People v. Miller* (2000) 81 Cal.App.4th 1427, 1445 [deceased victim's charge account records authenticated in part because items described were found in defendant's possession].)

Authentication also can be by statutory presumption. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 268; see, e.g., *People v. Stiles* (2011) 51 Cal.4th 1178, 1186 [certified and uncertified copies of Alabama state court records sufficiently authenticated]; distinguish *People v. Anderson* (2019) 42 Cal.App.5th 1144, 1148-1151 [uncertified electronic copies of Alameda County court records not sufficiently authenticated].)

"Authentication is to be determined by the trial court as a preliminary fact ([Evid. Code] § 403, subd. (a)(3)) … ." (*People v. Goldsmith*, *supra*, 59 Cal.4th at p. 266; see also *People v. Landry* (2016) 2 Cal.5th 52, 87.) A trial court's finding that sufficient foundational facts have been presented to support admissibility is reviewed for abuse of discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 466; see also *People v. Flinner* (2020) 10 Cal.5th 686, 727.)

3800.2-Photograph, audio, video, film or drawing must be authenticated 1/18

"Authentication of a writing is required before it may be received in evidence." (Evid. Code, § 1401.) A photograph, audio or video recording is a form of "writing" that must be authenticated. (Evid. Code, § 250; see *People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*) [red light camera photograph]; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 1002 [9-1-1 call audio recording].) "As with other writings, the proof that is necessary to authenticate a photograph or video recording varies with the nature of the evidence that the photograph or video recording is being offered to prove and with the degree of possibility of error." (*Goldsmith*, *supra*, 59 Cal.4th. at p. 267.)

Such evidence may be admitted as either illustrative of testimony (i.e., depicting lighting conditions at the time of the crime) or as substantive evidence because of what is depicted (i.e., as a "silent witness"). (*People v. Bowley* (1963) 59 Cal.2d 855, 860; *People v Beckley* (2010) 185 Cal.App.4th 509, 515.) "We have long approved the substantive use of photographs as essentially a 'silent witness' to the content of the photographs. [Citation.]" (*Goldsmith*, *supra*, 59 Cal.4th at p. 267.)

For example: "In ruling upon the admissibility of a videotape, "a trial court must determine whether: (1) the videotape is a reasonable representation of that which it is alleged to portray; and (2) the use of the videotape would assist the jurors in their determination of the facts of the case or serve to mislead them." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1114.) "Within these limits, ' "the physical conditions which existed at the time the event in question occurred need not be duplicated with precision nor is it required that no change has occurred between the happening of the event and the time the [videotape] is taken. [Citation.]" ' [Citation.]" (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1114 [video reenactment of what witness saw on day of crime properly admitted]; see also *People v. Thomas* (2012) 53 Cal.4th 771, 804-805 [police artist drawings admissible despite some discrepancies identified by witnesses]; but see *People v. Gonzalez* (2006) 38 Cal.4th 932, 952 [defense videotape offered to show the lighting conditions at the time of the crime properly excluded because of significant differences between the videotape and the actual

lighting conditions at the time of the crime]; accord *People v. Jones* (2011) 51 Cal.4th 346, 375; *People v. Boyd* (1990) 222 Cal.App.3d 541, 565-566 [film].)

A common way to authenticate a photograph or video recording is to present testimony from the person taking the picture or video. (See, e.g., *People v. Richardson* (1968) 258 Cal.App.2d 23, 30.) "However, this is not necessary and it is well settled that the showing may be made by the testimony of anyone who knows that the picture correctly depicts what it purports to represent." (*People v. Doggett* (1948) 83 Cal.App.2d 405, 409 [prosecution produced evidence of when and where the picture was taken and that the defendants were the persons shown committing the crime].) Authentication also "may be supplied by other witness testimony, circumstantial evidence, content and location. [Citations.]" (*Goldsmith*, *supra*, 59 Cal.4th at p. 268; see also *In re K.B.* (2015) 238 Cal.App.4th 989, 997 [cell phone picture sufficiently authenticated by its content supplemented by investigating detective's testimony].)

> An audio recording is typically authenticated by showing it is a reasonable representation of that which it is alleged to portray. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 952.) Typically, a party to the conversation recorded is called to testify to the audio recording's accuracy. However, the foundation may, but need not be supplied by the person witnessing the event being recorded. It may be supplied by other witness testimony, circumstantial evidence, content and location, or any other means provided by law, including statutory presumption.

(*People v. Dawkins*, *supra*, 230 Cal.App.4th at p. 1002 [automated recording of 9-1-1 call authenticated by content, as well as by detective's testimony regarding operation of computer system]; see also *People v. Davis* (2005) 36 Cal.4th 510, 546 [voice on audio tape gives first name of defendant].)

Finally, even assuming proper authentication, "videotapes are admissible within the court's discretion when they assist the jury, and they are excludable within the court's discretion when they do not assist the jury." (*People v. Jones*, *supra*, 51 Cal.4th at p. 376.)

3800.3-Digital media (photos, videos, audios) presumptively presumed accurate 5/20

When dealing with digital evidence, some evidence should be presented that the images depicted have not been altered or falsified. (*People v. Beckley* (2010) 185 Cal.App.4th 509, 514 [neither purported gang roster, nor photograph, downloaded from Internet were properly authenticated]; distinguish *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435-1437 ["My Space" contained sufficient password protected content, including photograph, to authenticate as belonging to defendant]; see also *People v. Samuels* (1967) 250 Cal.App.2d 501, 512 [experts testified film depicting beating of unidentified victim not faked or retouched].) And:

> It is settled computer systems that automatically record data in real time, especially on government-maintained computers, are presumed to be accurate. Thus, a witness with the general knowledge of an automated system may testify to his or her use of the system and that he has downloaded the computer information to produce the recording. No elaborate showing of the accuracy of the recorded data is required.

(*People v. Dawkins* (2014) 230 Cal.App.4th 991, 1003; see also *People v. Rodriguez* (2017) 16 Cal.App.5th 355, 374-375.) In addition:

Evidence Code section 1553, subdivision (a), establishes a rebuttable presumption that "[a] printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent." The presumption affects the burden of proof and is rebutted by a showing that the "printed representation of images stored on [the] video or digital medium is inaccurate or unreliable." [Citation.] The burden then shifts to the proponent of the printed representation to prove by a preponderance of evidence that it accurately represents the existence and content of the images on the video or digital medium. [Citation.] If the proponent of the evidence fails to carry his burden of showing the printed representation accurately depicts what it purportedly shows, the evidence is inadmissible for lack of adequate foundation. [Citation.]

(*People v. Chism* (2014) 58 Cal.4th 1266, 1303; see also *People v. Rekte* (2015) 232 Cal.App.4th 1237, 1244-1246 [red light camera images inadmissible because defendant produced evidence rebutting the presumption of authenticity].)

3800.4-Computer printouts presumptively presumed accurate 4/15

Evidence Code section 1552, subdivision (a), provides that:

A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent.

This presumption serves to "eliminate the basis for any objection that a printed version of the described writings is not the 'original' writing." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 269.) As the presumption is for both "the existence and content" of computer information and digital images that the printed versions purport to represent, "the presumptions operate to establish, at least preliminarily, that errors in content have not been introduced in the course of printing the images and accompanying data." (*Ibid*; see also *People v. Peyton* (2014) 229 Cal.App.4th 1063, 1076.) In short, the presumption essentially operates to establish that "a computer's print function has worked properly." (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1450; but see *People v. Rekte* (2015) 232 Cal.App.4th 1237, 1244-1246 [red light camera images inadmissible because defendant produced evidence rebutting the presumption of authenticity].)

Although Evidence Code section 1552 is a version of the secondary evidence rule, it does not eliminate the need to authenticate the contents of a computer printout. (*People v. Goldsmith*, *supra*, 59 Cal.4th at p. 271; *People v. Skiles* (2011) 51 Cal.4th 1178, 1187.) "Authentication of a writing is required before secondary evidence of its content may be received in evidence." (Evid. Code, § 1401, subd. (b).)

3800.5-Certified copy of official writing is prima facie evidence of authenticity 12/19

The most common means of authenticating a copy of an official writing is by certification.

> [Evidence Code] Section 1530, subdivision (a), provides, in pertinent part, that: "A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if: [¶] (1) [t]he copy purports to be published by the authority of the … public entity therein in which the writing is kept; [¶] (2) [t]he office in which the writing is kept is within the United States … and the copy is *attested or certified as a correct copy* of the writing or entry by a public employee, or a deputy of a public employee, having the legal custody of the writing … ." (Italics added.) "[T]he attestation or certificate must state in substance that the copy is a correct copy of the original … ." (§ 1531.) Section 1530 requires only certification by signature. (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1530, fn. 5.)

(*People v. Skiles* (2011) 51 Cal.4th 1178, 1185 (*Skiles*).)

> Under section 1530's clear language, certification only establishes a presumption of authenticity and is not the sine qua non of admissibility of official writings. The statute provides that if a copy of an official writing is properly certified, then the writing "is prima facie evidence of the existence and content of such writing or entry." (§ 1530, subd. (a), italics added; see also Pen. Code, § 969b [certified official records constitute prima facie evidence of prior conviction].) "Prima facie evidence" is defined as "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." [Citation.] With proper certification, the copy of the official writing is presumed to be authentic, unless the opponent presents evidence to overcome the presumption that it is a true and correct copy. (*Ambriz v. Kelegian*, *supra*, 146 Cal.App.4th at p. 1530; see also *People v. Delgado* (2008) 43 Cal.4th 1059, 1066.)

(*Skiles*, *supra*, 51 Cal.4th at p. 1186.) Copies of official documents, including FAX copies, are properly certified if a public official certifies that the copy was compared to the original and is correct. (*Ibid*.)

A copy of an official writing may be admissible even if it is not properly certified in this manner. "[N]othing in section 1530 forbids authentication by another method. Other evidence may establish that a faxed copy of a certified copy of an official writing is authentic and reliable." (*Skiles*, *supra*, 51 Cal.4th at p. 1186.) "Because a noncertified copy of an official writing does not constitute prima facie evidence of the existence and content of such writing under section 1530, the proponent must present additional authenticating evidence." (*Id*. at p. 1189.)

> Nevertheless, the proponent of the evidence may introduce other "evidence sufficient to sustain a finding [of authenticity]." ([Evid. Code] § 1400, subd. (a).) The means of authenticating a writing are not limited to those specified in the Evidence Code. (§ 1410 ["[n]othing in this article shall be construed to limit the means by which a writing may be authenticated or proved"]; *People v. Gibson* (2001) 90 Cal.App.4th 371, 383.) For example, a writing can be authenticated by circumstantial evidence and by its contents." (*Ibid*.; *Young v. Sorenson* (1975) 47 Cal.App.3d 911, 915.)

(*Skiles*, *supra*, 51 Cal.4th at p. 1187; see, e.g., *People v. Hooper* (2019) 40 Cal.App.5th 685, 697 [cover letter written by administrator of government agency saying the attached records were "true and accurate" was sufficient authentication].)

3810.1-Failure to prove chain of custody affects weight only 12/10

When there is a chain of custody foundational objection, a "reasonable certainty" test is applied.

> In a chain of custody claim, " '[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.' [Citations.]" (*People v. Diaz* [(1992)] 3 Cal.4th [495,] at p. 559.)

(*People v. Catlin* (2001) 26 Cal.4th 81, 134; see also *People v. Wallace* (2008) 44 Cal.4th 1032, 1061; see, e.g., *People v. Hall* (2010) 187 Cal.App.4th 282, 294-297 [sufficient evidence of chain of custody of defendant's blood sample from being drawn at the hospital, packaged by the arresting officer, and delivered to the crime lab]; distinguish *People v. Jiminez* (2008) 165 Cal.App.4th 75 [reversal for failure to provide evidence linking defendant's DNA reference sample to reference sample tested by laboratory].)

Thus, a party relying on expert analysis of demonstrative evidence, for example, must show that between receipt and analysis there has been no substitution or tampering. (*People v. Riser* (1956) 47 Cal.2d 566, 580, disapproved on other grounds in *People v. Chapman* (1959) 52 Cal.2d 95, 98 and in *People v. Morse* (1964) 60 Cal.2d 631, 648; see also *People v. Hall*, *supra*, 187 Cal.App.4th at p. 297.) However, it is not incumbent on the party proffering the evidence to negate all possibility of tampering or substitution. (*People v. Lewis* (1987) 191 Cal.App.3d 1288, 1299; *People v. Lozano* (1976) 57 Cal.App.3d 490, 495.) And when there is only the "barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." (*People v. Riser*, *supra*, at p. 581.) Furthermore, the presumption that an official duty has been regularly performed may be applied to the handling of the exhibit unless there is some evidence to the contrary. (*People v. Hall*, *supra*, 187 Cal.App.4th at p. 296; *People v. Lugo* (1962) 203 Cal.App.2d 772, 775.)

Where a defendant neither pointed to any indication of actual tampering nor established that anyone who might have been interested in tampering with the exhibit knew where they were or had access to them, "it was proper to admit the evidence and permit the speculation urged by defendant to go to its weight." (*People v. Laursen* (1972) 8 Cal.3d 192, 202; see, e.g., *People v. Wallace*, *supra*, 44 Cal.4th at pp. 1060-1062.)

"The trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion. [Citation.]" (*People v. Catlin*, *supra*, 26 Cal.4th at p. 134.)

3820.1-Test for admission of secondary evidence 1/21

Evidence Code section 1521 provides in part: "The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following: [¶] (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion. [¶] (2) Admission of the secondary evidence would be unfair." "Enacted in 1998 … the secondary evidence rule replaced the best evidence rule, which was repealed. (*People v. Landry* (2016) 2 Cal.5th 52, 86.) "Under the secondary evidence rule, the content of a writing may now be proved either 'by an otherwise admissible original' ([Evid. Code,] § 1520 or by 'otherwise admissible secondary evidence' ([Evid. Code,] § 1521, subd. (a); [citation]).") (*People v. Goldsmith* (2014) 59 Cal.4th 258, 269.)

A writing can include an audio or video recording. (Evid. Code, § 250; *People v. Son* (2020) 56 Cal.App.5th 689, 696 [video].)

The Secondary Evidence Rule does not apply if the writing is also admitted into evidence. (*People v. Son*, *supra*, 56 Cal.App.5th at p.696 [witness allowed to describe contents of video recording which was also played for jury].)

"A writing that qualifies for admission under the secondary evidence rule must, nonetheless, be authenticated before it can be admitted." (*People v. Landry*, *supra*, 2 Cal.5th at p. 86.) "The Secondary Evidence Rule does not 'excuse[] compliance with [Evidence Code] Section 1401 (authentication).' ([Evid. Code] § 1521, subd. (c).) Thus, to be 'otherwise admissible,' secondary evidence must be authenticated." (*People v. Skiles* (2011) 51 Cal.4th 1178, 1187, fn. omitted; see Evid. Code § 1401, subd. (b) ["Authentication of a writing is required before secondary evidence of its content may be received in evidence"].)

3830.1-Gruesome photos should be admitted if relevant to any issue 9/19

The admissibility of photographs of a crime victim lies within the discretion of the trial court and that exercise of discretion will not be disturbed unless the probative value of the photographs is clearly outweighed by their prejudicial effect. (*People v. Winbush* (2017) 2 Cal.5th 402, 458; *People v. Carter* (2005) 36 Cal.4th 1114, 1167; *People v. Thompson* (1988) 45 Cal.3d 86, 114-115.) The trial court has broad discretion in determining the relevance of allegedly gruesome photographs. (*People v. Carter*, *supra*; *People v. Gurule* (2002) 28 Cal.4th 557, 624.) "The trial court has broad discretion over the admission of photographs that are alleged to include disturbing details." (*People v. Caro* (2019) 7 Cal.5th 463, 502.) These same principles apply to videotapes as well. (*People v. Mills* (2010) 48 Cal.4th 158, 191; *People v. Cain* (1995) 10 Cal.4th 1, 33.)

As the cliché goes, a picture is worth a thousand words. The prosecution is not required to rely solely upon verbal descriptions for proof. (*People v. Pride* (1992) 3 Cal.4th 195, 243; *People v. Turner* (1990) 50 Cal.3d 668, 706.) Photographs convey information with a degree of clarity and certainty that testimony often cannot match.

"Autopsy photographs of a murder victim 'are always relevant at trial to prove how the crime occurred; the prosecution need not prove these details solely through witness testimony.' (*People v. Carey* (2007) 41 Cal.4th 109, 127.)" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 471.) The prosecution is not limited to proving its case "solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case." (*People v. Gurule* (2002) 28 Cal.4th 557, 624.) "We routinely uphold the admission of

autopsy photos to establish the placement of a victim's wounds and clarify the testimony of prosecution witnesses." (*People v. Caro*, *supra*, 7 Cal.5th at p. 502.)

"It ill behooves one who has committed the sordid act of murder to complain over the sordid picture he has left. Words attempt to picture the condition of the victim. Why not save the words?" (*People v. Polley* (1983) 147 Cal.App.3d 1088, 1092.) "[A] defendant has no right to transform the facts of a gruesome real-life murder into an anesthetized exercise where only the defendant, not the victim, appears human. … A cardboard victim plus a flesh-and-blood defendant are likely to equal an unjust verdict." (*People v. Thompson* (1992) 7 Cal.App.4th 1966, 1974.)

Answering an allegation of undue prejudice from the receipt of photographic evidence, the California Supreme Court acknowledges that " 'murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant …' (Fn. omitted.)" (*People v. Pierce* (1979) 24 Cal.3d 199, 211; see also *People v. Thompson*, *supra*, 7 Cal.App.4th at pp. 1973-1974.) The photos, however, should not be of such a nature as to "overcome the jury's rationality." (*People v. Peoples* (2016) 62 Cal.4th 718, 748.)

The fact that the photographic evidence may be cumulative of other evidence is not a basis for exclusion. (*People v. Carter*, *supra*, 36 Cal.4th at pp. 1168-1170.) The admissibility of crime scene and victim photographs repeatedly has been upheld notwithstanding their gruesome character when they serve "to illustrate and corroborate the testimony given by various prosecution witnesses regarding the circumstances of the crime." (*People v. Heard* (2003) 31 Cal.4th 946, 976.) "Even somewhat cumulative photographic evidence may be admitted if relevant. The fact that there is other evidence on the point goes to the probative value of the photographs." (*People v. Thompson*, *supra*, 45 Cal.3d at pp. 115-116.)

3840.1-Proper scope of demonstrative evidence 9/19

"Demonstrative evidence is evidence that is shown to the jury 'as a tool to aid the jury in understanding the substantive evidence.' [Citation.]" (*People v. Diaz* (2014) 227 Cal.App.4th 362, 384, fn. 19.) "[D]emonstrative evidence [is] offered to help a jury understand expert testimony or other substantive evidence … ." (*People v. Duenas* (2012) 55 Cal.4th 1, 20 (*Duenas*); see also *People v. Vasquez* (2017) 14 Cal.App.5th 1019, 1022 (*Vasquez*).) Demonstrative evidence is "not offered as substantive evidence, but as a tool to aid the jury in understanding the substantive evidence." *(Duenas*, *supra*, 55 Cal.4th at p. 25; *Vasquez*, *supra*, 14 Cal.App.5th at pp. 1022-1023.)

"Common examples of demonstrative evidence include 'maps, charts, and diagrams' [citation] all of which 'illustrate a witness's testimony.' …" (*Vasquez*, *supra*, 14 Cal.App.5th at p. 1037.) For example, "[i]t is entirely proper for a prosecutor to use objects similar to those connected with the commission of a crime for purposes of illustration." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1135.) Also, "[m]annequins may be used as illustrative evidence to assist the jury in understanding the testimony of witnesses or to clarify the circumstances of a crime." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1291; see also *People v. Medina* (1995) 11 Cal.4th 694, 754.) More recently, demonstrative evidence has come to include computer-generated animation. (*People v. Caro* (2019) 7 Cal.5th 463, 508-510; *Duenas*, *supra*, 55 Cal.4th at p. 20.)

> We allow the admission of a computer animation as demonstrative evidence of expert testimony, but only if certain conditions are met. The animation must accurately depict an expert opinion, the expert opinion must fairly represent the evidence, the trial court must

provide a proper limiting instruction, and the animation must be otherwise admissible under Evidence Code section 352.

(*People v. Caro*, *supra*, 7 Cal.5th at p. 509.) "A computer simulation, by contrast, is itself substantive evidence." (*Duenas*, *supra*, at p. 20.)

" '[D]emonstrative evidence is admissible for the purpose of illustrating and clarifying a witness' testimony' so long as a proper foundation is laid." (*People v. Rolda*n (2005) 35 Cal.4th 646, 708.) In other words, demonstrative evidence should be adequately supported by the testimony of witnesses. (*Duenas*, *supra*, 55 Cal.4th at p. 24.) A display that includes inadmissible hearsay should not be shown however.

> While we agree that a chart summarizing a witness's testimony might constitute a proper demonstrative exhibit, the timeline in this case bears no resemblance to such a chart. To begin with, and most fundamentally, the timeline was based on *out-of-court* statements made by [the victim] to her therapist, not on her in-court testimony. As defense counsel correctly argued, displaying the timeline to the jury was no different from permitting the defense to display for the jury [the victim]'s inadmissible and inconsistent out-of-court statements contained in transcripts of [the victim]'s interviews with investigators.

(*Vasquez*, *supra*, 14 Cal.App.5th at pp. 1039-1040, italic in original, footnote omitted ["In addition, the prosecutor argued that the jury should accord the timeline *substantive* effect in proving the charged offenses, an impermissible use of demonstrative evidence."].)

A trial court's decision to admit demonstrative evidence is reviewed for abuse of discretion. (*Duenas*, *supra*, 55 Cal.4th at p. 21; *People v. Mills* (2010) 48 Cal.4th 158, 207.) The trial court's giving of cautionary instructions as to the limited purpose and use of the demonstrative evidence helps support its use when challenged on appeal. (*Duenas*, *supra*, 55 Cal.4th at p. 24.)

4000.1-PC1203.4 relief should be granted only for exemplary conduct on probation 12/19

Penal Code section 1203.4, subdivision (a)(1), allows a defendant to withdraw a plea of guilty or nolo contendere and receive a dismissal from the court upon successful completion of probation. (*People v. Marinelli* (2014) 225 Cal.App.4th 1, 4.) Subdivision (a)(1) of section 1203.4 provides in pertinent part:

> In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted … .

This statute applies when probation is granted after either imposition of sentence is suspended or sentence is imposed and suspended. (*People v. Parker* (2013) 217 Cal.App.4th 498.)

A court may grant section 1203.4 relief on some, but not all counts in the same case. (*People v. Mgebrov* (2008) 166 Cal.App.4th 579, 591 [defendant ineligible for § 1203.4 relief as to one of three counts].)

> There are three situations in which a defendant may be entitled to a dismissal of his or her conviction: (a) where the defendant has fulfilled the conditions of probation for the entire probationary period; (b) where the defendant has been discharged before the termination of the period of probation; or (c) in any case in which a court, in its discretion and the interests of justice, determines he should be granted relief. [Citations] The court is required to grant relief if the petitioner comes under either of the first two situations.

(*People v. Johnson* (2012) 211 Cal.App.4th 252, 262.)

"Relief under Penal Code section 1203.4 is intended to reward an individual who successfully completes probation by mitigating some of the consequences of the conviction." (*People v. Johnson*, *supra*, 211 Cal.App.4th at p. 260.) "[T]he expunging of the record of conviction is, in essence, a form of legislatively authorized certification of complete rehabilitation based on a prescribed showing of exemplary conduct during the entire period of probation." (*People v. Turner* (1961) 193 Cal.App.2d 243, 247; see also *People v. Smith* (2014) 227 Cal.App.4th 717, 724-725; *People v. Lewis* (2006) 146 Cal.App.4th 294, 297.) "[Section 1203.4] rewards those who comply with their terms of probation or are relieved from complying. No evidence of rehabilitation is required to be entitled to relief." (*People v. Butler* (1980 105 Cal.App.3d 585, 588.)

Finally, it is important to remember:

> Section 1203.4 does not, properly speaking, "expunge" the prior conviction. The statute does not purport to render the conviction a legal nullity. Instead it provides that, except as elsewhere stated, the defendant is "released from all penalties and disabilities resulting from the offense." The limitations on this relief are numerous and substantial, including other statutes declaring that an order under section 1203.4 is ineffectual to avoid specified consequences of a prior conviction.

(*People v. Frawley* (2000) 82 Cal.App.4th 784, 791; see also *People v. Vasquez* (2001) 25 Cal.4th 1225, 1230; *People v. Allen* (2019) 41 Cal.App.5th 312, 317, fn. 1; *People v. Mgebrov*, *supra*, 166 Cal.App.4th at p. 584.)

4000.2-PC1203.4 available only if defendant fulfilled conditions of probation 12/19

"[A] defendant moving under Penal Code section 1203.4 is entitled as a matter of right to its benefits upon a showing that he 'has fulfilled the conditions of probation for the entire period of probation.' " (*People v. Chandler* (1988) 203 Cal.App.3d 782, 788; see also *People v. Marinelli* (2014) 225 Cal.App.4th 1, 4.) "It was apparently intended that when a defendant has satisfied the terms of probation, the trial court should have no discretion but to carry out its part of the bargain with the defendant." (*People v. Johnson* (2012) 211 Cal.App.4th 252, 260 (*Johnson*).)

Similarly, if a defendant discharged and terminated from probation early can "affirmatively establish that he or she has fulfilled all probationary conditions," the trial court is required to grant section 1203.4 relief. (*Johnson*, *supra*, 211 Cal.App.4th at p. 261; see also *People v. Seymour*(2015) 239 Cal.App.4th 1418, 1429-1430; *People v. Hawley* (1991) 228 Cal.App.3d 247, 249-250.) "To be eligible for relief under section 1203.4, the defendant must show more than mere early termination of probation; he or she must show the early termination is attributable either to completion of the

conditions of probation during the probationary term, or early fulfillment of the conditions of probation resulting in discharge prior to termination of the period of probation." (*Johnson*, *supra*, 211 Cal.App.4th at p. 263.)

A trial court's finding that the defendant did not fulfill all the conditions of probation during the entire probationary period, however, does not require a formal revocation of probation took place. (See, e.g., *People v. Turner* (1961) 193 Cal.App.2d 243, 247-248 [supplemental probation report showing continued criminality by defendant during probationary period sufficient to deny § 1203.4 relief even though no action taken when report originally submitted to court].) "Thus, defendant who fails to make all court-ordered restitution payments during the entire period of probation fails to meet the requirement of full compliance and is not entitled to relief under Penal Code section 1203.4, even if the violation does not result in revocation. [Citations.]" (*Johnson*, *supra*, 211 Cal.App.4th at p. 261; see also *People v. Allen* (2019) 41 Cal.App.5th 312, 322-325; distinguish *People v. Seymour*, *supra*, 239 Cal.App.4th at pp. 1432-1436 [failure to pay restitution not basis to deny section 1203.4 relief when probation terminated early].) Similarly, a defendant's whose probation is terminated early because of a subsequent prison commitment, has not fulfilled the probationary terms and, thus, is not entitled to section 1203.4 relief. (*Johnson*, *supra*, 211 Cal.App.4th at pp. 261-264.)

In contrast, "evidence of crimes committed shortly after probation ends, which would seem to conclusively prove no rehabilitation had taken place, have no effect on the granting of the relief [citations].) (*People v. Butler* (1980) 105 Cal.App.3d 585, 588.) Similarly irrelevant is a defendant's failure to comply with other court orders unrelated to the terms and conditions of their probation. (*People v. Brodus* (2007) 149 Cal.App.4th 636, 641-643 [failure to repay cost of appointed attorney and costs of probation].) Finally, unless the criminal conviction is one exempted from section 1203.4, the seriousness of the original offense is irrelevant under these non-discretionary relief provisions of section 1203.4.

4000.3-PC1203.4 discretionary relief standard 12/19

Even if a defendant is not entitled to relief under the non-discretionary provisions of Penal Code section 1203.4, and assuming there is no statutory exemption barring it, the trial court can still grant relief under section 1203.4 in the "interest of justice." (*People .v Butler* (1980) 105 Cal.App.3d 585, 587.) Relief under this provision of section 1203.4 is discretionary. (*Ibid*.) When relief is sought under this discretionary provision of section 1203.4, the court is permitted to examine the defendant's conduct both during and after the probationary period. (*People v. McLernon* (2009) 174 Cal.App.4th 569, 577.) "Thus, in determining whether to grant relief under the discretionary provision, the trial court may consider any relevant information, including the defendant's postprobation conduct." (*Ibid*.) Note, "the denial of a prior request for relief under section 1203.4 does not preclude a subsequent request based upon different facts." (*Ibid*.; see, e.g., *People v. Allen* (2019) 41 Cal.App.5th 312, 329-330 [denial of discretionary § 1203.4 relief for failure to pay victim restitution upheld despite defendant's current inability to pay].)

4010.1-Certificate of rehabilitation procedure 11/15

Penal Code section 4852.01 et seq. authorizes the filing of a petition for certificate of rehabilitation in the trial court, which, if granted, becomes both an automatic application for a full pardon and a judicial recommendation that such pardon be granted by the Governor. (*People v. Shepard* (2015) 239 Cal.App.4th 786, 794.) It applies only to felons, so if the offense was reduced to a misdemeanor at any point, this procedure is not available. (*People v. Moreno* (2014) 231 Cal.App.4th 934, 940-941.)

In *People v. Ansell* (2001) 25 Cal.4th 868 (*Ansell*) the Supreme Court explained the statutory procedure for a certificate of rehabilitation:

> Proceedings begin when a qualified person petitions for a certificate of rehabilitation in the superior court of the county in which he [or she] lives. (§ 4852.06; see § 4852.07 [requiring notice to the Governor and to the district attorney in the county or counties where the petition is filed and the petitioner was convicted].) Other provisions allow the petitioner to pursue a certificate of rehabilitation without personal expense and with professional assistance. (§§ 4852.04 [establishing a right to counsel and to assistance from rehabilitative agencies, including probation and parole officers], 4852.08 [authorizing representation by the public defender or other appointed counsel], 4852.09 [prohibiting court fees of any kind], 4852.1 [authorizing the production of official records at no charge], 4852.18 [making the petition and other necessary forms available at no charge].)
>
> The superior court holds a hearing and considers testimonial and documentary evidence bearing on the petition. (§§ 4852.1, 4852.11.) To this end, the court may compel the production of judicial, correctional, and law enforcement records concerning the crimes of which petitioner was convicted, his [or her] performance in custody and on supervised release, and his [or her] conduct during the period of rehabilitation, including all violations of the law known to any peace officer. (*Ibid*.) The district attorney may be directed to investigate and report on relevant matters. (§ 4852.12.)

(*Id*. at p. 875.)

The statutory scheme does not grant a superior court of the State of California jurisdiction to issue a certificate of rehabilitation to a person convicted of a crime in another state. (*People v. Faranso* (2015) 240 Cal.App.4th 456, 463-465.)

4010.2-Certificate of rehabilitation requirements for obtaining relief 10/18

Penal Code section 4852.01 et seq. authorizes the filing of a petition for certificate of rehabilitation in the trial court, which, if granted, becomes both an automatic application for a full pardon and a judicial recommendation that such pardon be granted by the Governor. (*People v. Ansell* (2001) 25 Cal.4th 868, 874-875 (*Ansell*); *People v. Shepard* (2015) 239 Cal.App.4th 786, 794 (*Shepard*).)

> "[T]here is no circumstance under which the statutory scheme requires or guarantees issuance of a certificate of rehabilitation by the superior court" (*Ansell*, *supra*, 25 Cal.4th at pp. 887-888), which essentially amounts to "a personal representation to the Governor that [the petitioner is] worthy of a pardon." ([*People v.*] *Blocker* [(2010)] 190 Cal.App.4th [438] at p. 445 [(*Blocker*)].) We also note there are no penal consequences attendant to a trial court's decision to deny a petition for rehabilitation. [Citations.] Thus, the hearing contemplated by the statutory scheme is civil, rather than criminal, in nature.

(*Shepard*, *supra*, 239 Cal.App.4th at p. 796.)

In *Ansell*, the Supreme Court explained the legal requirements to obtain a certificate of rehabilitation:

> [T]he certificate of rehabilitation procedure is available to convicted felons who have successfully completed their sentences, and who have undergone an additional and sustained "period of rehabilitation" in California. (§ 4852.03, subd. (a) [imposing general minimum requirement of five years' residence in this state, plus an additional period typically ranging between two and five years depending upon the conviction]; see §§ 4852.01, subds. (a)-(c), 4852.06.) During the period of rehabilitation, the person must display good moral character, and must behave in an honest, industrious, and law-abiding manner. (§ 4852.05; see § 4852.06.) Several provisions make clear that a person is "ineligible to … petition for a certificate of rehabilitation" (§ 4852.03, subd. (b)), and that no such petition "shall be filed" (§ 4852.06), unless and until the foregoing requirements are met. (See § 4852.01, subds. (a)-(c) [describing who "may file" a petition].)
>
> …
>
> To enter an order known as a certificate of rehabilitation, the superior court must find that the petitioner is both rehabilitated and fit to exercise the rights and privileges lost by reason of his [or her] conviction. (§ 4852.13, subd. (a).) The issuing court transmits certified copies of the certificate of rehabilitation to the Governor, the Board of Prison Terms, the Department of Justice, and—in the case of persons twice convicted of a felony—the Supreme Court. (§ 4852.14.)

(*Ansell*, *supra*, 25 Cal.4th at pp. 875-876, fn. Omitted; see also *People v. Miller* (2018) 23 Cal.App.5th 973 [former felony probationer living out-of-state not eligible to apply].)

> We also note that "[t]he standards for determining whether rehabilitation has occurred are high. (§§ 4852.05, 4852.13(a); see §§ 4852.11, 4852.13(b).)" (*Ansell*, *supra*, 25 Cal.4th at p. 887.) "The hurdles erected by the Legislature to obtain a certificate of rehabilitation are not intended to be easily surmounted. The trial courts are entrusted with the responsibility, in the exercise of sound discretion, to ensure that the strict statutory standards for rehabilitation are maintained." (*People v. Blocker* (2010) 190 Cal.App.4th 438, 445.)

(*Shepard*, *supra*, 239 Cal.App.4th at p. 795; see also *People v. Faranso* (2015) 240 Cal.App.4th 456, 466.)

A petition for certificate of rehabilitation is addressed to the trial court's discretion. (*People v. Chatman* (2018) 4 Cal.5th 277, 286.) The exercise of that discretion will be overturned only for manifest abuse that results in a miscarriage of justice. (*People v. Faranso*, *supra*, 240 Cal.App.4th at p. 461; *Blocker*, *supra*, 190 Cal.App.4th at p. 442; *People v. Lockwood* (1998) 66 Cal.App.4th 222, 226-227.) In exercising its statutory discretion, the court can consider a refusal to admit guilt as a factor mitigating against granting a certificate of rehabilitation. (*Blocker*, *supra*, 190 Cal.App.4th at pp. 442-445.) The court can also consider criminal conduct even if no conviction ensued or charges were dismissed after successful completion of a diversion program. (*People v. Zeigler* (2012) 211 Cal.App.4th 457, 666, 669-670.)

4020.1-Factual innocence statute (PC851.8) purpose, scope and limitations 5/20

A motion for factual innocence is governed by Penal Code section 851.8.

> "Section 851.8 is for the benefit of those defendants who have not committed a crime. It permits those petitioners who can show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action—to purge the official records of any reference to such action. … Hence, much more than a failure of the prosecution to convict is required in order to justify the sealing and destruction of records under section 851.8." [Citation.] "Establishing factual innocence … entails establishing as a prima facie matter not necessarily just that the [defendant] had a viable substantive defense to the crime charged, but more fundamentally that there was no reasonable cause to arrest him in the first place." [Citation.]

(*People v. Adair* (2003) 29 Cal.4th 895, 905 (*Adair*), fn. omitted.)

A Penal Code section 851.8 petition is only directed at the specific crime(s) for which the person was actually arrested. It is not concerned with any other offenses for which the person could have been or were actually prosecuted for, even if these charges are related to the same "criminal" event as the crime of arrest. (*People v. Laiwala* (2006) 143 Cal.App.4th 1065, 1072.) In addition, section 851.8 does not apply to infractions. (Subd. (n).)

> There are three classes of persons who may petition the court for a finding of factual innocence. (§ 851.8, subds. (a)(c)(d) & (e).) "Those classes are: (1) persons who have been arrested but no accusatory pleading has yet been filed [subd. (a)]; (2) persons who have been arrested and an accusatory pleading has been filed but no conviction has occurred [subds. (c) & (d)]; and (3) persons who are 'acquitted of a charge and it appears to the judge presiding at trial … that the defendant was factually innocent' [subd. (e)]." [Citation.]

(*People v. Mazumder* (2019) 34 Cal.App.5th 732, 738.)

"A court cannot order the partial sealing and destruction of a factually innocent petitioner's arrest records." (*People v. Mazumder*, *supra*, 34 Cal.App.5th at p. 739.) Therefore, any conviction, including of a lesser included offense of the offense of arrest (whether by jury or guilty plea, disqualifies the petitioner from section 851.8 relief. (*Id*. at p. 742.) "[I]f there is a 'conviction' in the 'case' … then a court need not consider whether the defendant is factually innocent of the charges for which he was arrested, or the charges to which he pleaded guilty, because a convicted defendant is not among the three classes of persons that are statutorily eligible for relief. (See § 851.8, subds. (a)(c)(d) & (e).)" (*Id*. at p. 744.) The post-judgment dismissal of the conviction under Penal Code section 1203.4 does not change this result. (*Id*. at pp. 745-746.)

4020.2-Factual innocence petition must be timely filed 5/18

A motion for factual innocence under Penal Code section 851.8 (§ 851.8) must be timely filed. The time periods governing when a petition for factual innocence can be filed in are governed by subdivision (l) of section 851.8: "For arrests occurring on or after January 1, 1981, and for accusatory pleadings filed on or after January 1, 1981, petitions for relief under this section may be filed up to two years from the date of the arrest or filing of the accusatory pleading, whichever is later." (Subd. (*l*).) "The time limitation imposed in section 851.8, subdivision (*l*), applies to all petitions brought under section 851.8. (*People v. Bermudez* (1989) 215 Cal.App.3d 1226, 1230, fn. 5 (*Bermudez I*).)" (*People v. Gerold* (2009) 174 Cal.App.4th 781, 786 [People's failure to object

in superior court to untimely petition forfeited issue on appeal]; see also *People v. Bermudez* (2009) 172 Cal.App.4th 966, 970, fn. 5 (*Bermudez II*).)

If the petitioner has not yet been prosecuted for the crime of arrest, he or she can still serve a petition for factual innocence under subdivision (b) of section 851.8 directly on the arresting law enforcement agency or prosecuting attorney. But, unless the arresting law enforcement agency or prosecuting attorney respond, the petitioner cannot petition the superior court for a declaration of factual innocence until the applicable statute of limitations has expired. The petitioner then has 60 days after the expiration of the statute of limitations to file such a petition in the superior court. Subdivision (b)'s requirement that the petitioner wait until the statute of limitations has expired to have his or her factual innocence petition adjudicated does not violate due process or equal protection. (*People v. Bedrossian* (2018) 20 Cal.App.5th 1070, 1076.)

In contrast, if the petitioner was prosecuted for the crime of arrest, his or her petition for factual innocence can be made "at any time" after the accusatory pleading is dismissed. (Pen. Code, § 851.8, subd. (c).) In other words, a petition for factual innocence cannot be brought before the related criminal charges are adjudicated. (*Bermudez II*, *supra*, 172 Cal.App.4th at p. 972.) The two-year outside time limit set by subdivision (*l*) still applies. (*Id*. at p. 971.) But the person may be entitled to have his or her petition heard on the merits after an acquittal or dismissal if they can establish "good cause" under subdivision (*l*). (*Id*. at p. 972.)

Subdivision (*l*) contains a provision designed for situations when an arrestee's petition appears to be time-barred: "Any time restrictions on filing for relief under this section may be waived upon a showing of good cause by the petitioner and in the absence of prejudice." "One obvious example of good cause for exceeding the statutory deadline arises when the accusatory pleading is filed more than two years before the case is resolved in favor of the accused." (*Bermudez II*, *supra*, 172 Cal.App.4th at p.at p. 972, fn. 7.) The petitioner in *Bermudez II*, however, waited five years after his case was dismissed. The appellate court affirmed the superior court's finding that the petition as untimely. (*Id*. at pp. 968, 973; see also *Bermudez I*, *supra*, 215 Cal.App.3d at p. 1230 [four-year delay after grounds for petition arose].)

4020.3-"Factual innocence" defined 8/19

Penal Code section 851.8, subdivision (b), states in relevant part:

> In any court hearing to determine the factual innocence of a party, the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. If the court finds that this showing of no reasonable cause has been made by the petitioner, then the burden of proof shall shift to the respondent to show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made.

"A petitioner's burden to establish factual innocence has been described as ' "incredibly high" ' and as requiring ' "no doubt whatsoever." ' [Citation.]" (*People v. Mazumder* (2019) 34 Cal.App.5th 732, 738.)

Under section 851.8, subdivision (b), " ' " '[r]easonable cause' " ' is a well-established legal standard, ' "defined as that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." ' " (*People v. Adair* (2003) 29 Cal.4th 895, 904 (*Adair*); see also *People v. Esmaili* (2013) 213 Cal.App.4th 1449, 1458.) "[T]he record must exonerate [the defendant], not merely raise a

substantial question as to guilt." (*Adair*, *supra*, 29 Cal.4th at p. 909; see also *People v. Forrest* (2017) 16 Cal.App.5th 1099, 1109.) "Showing that one had a 'viable substantive defense' is not enough. [Citations.]" (*People v. Forrest* (2017) 16 Cal.App.5th 1099, 1110.) "In considering the petition, the court applies an objective standard." (*People v. Medlin* (2009) 178 Cal.App.4th 1092, 1101 (*Medlin*).)

"The present tense 'exists' necessarily means that the existence of reasonable cause depends on the current evidence rather than simply the evidence that existed at the time that the arrest and prosecution occurred." (*People v. Laiwala* (2006) 143 Cal.App.4th 1965, 1068, fn. 3; see also *Medlin*, *supra*, 178 Cal.App.4th at p. 1101 [acquittal did not establish defendant's factual innocence]; *People v. Gerold* (2009) 174 Cal.App.4th 781, 790 [NGI finding did not entitle defendant to finding of factual innocence].)

The California Supreme Court in *Adair*, citing *People v. Scott M*. (1985) 167 Cal.App.3d 688, at page 697, identified the principal function of the trial judge in determining factual innocence. *Adair* explains that while a defendant may be acquitted of a crime and related charges, the trial court may still find the defendant is not factually innocent. In such circumstances " '[t]he trial court does not "disagree" with the jury's verdict. … It refines that verdict by distinguishing between those cases where acquittal is based upon actual innocence and those where acquittal is based upon the prosecution's failure of proof.' " (*Adair*, *supra*, 29 Cal.4th at p. 907.)

> " '[F]actually innocent' as used in [section 851.8, subdivision (b)] does not mean a lack of proof of guilt beyond a reasonable doubt or even by 'a preponderance of evidence.' [Citation.]" [Citation.] Defendants must "show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action. …" [Citation.] In sum, the record must exonerate, not merely raise a substantial question as to guilt. [Citation.]

(*Id*. at p. 909.)

The function of the court:

> [I]nvolves resolving whether the evidence shows [the defendant] was actually innocent and under no set of circumstances could be subjected to the criminal process or whether the evidence on the record, while inadequate for a bind over, still leaves a person of ordinary care and prudence believing there is an honest and strong suspicion [the defendant] was guilty. The former option would lead us to conclude [the defendant] was entitled to a finding of factual innocence, while the latter would compel us to conclude [the defendant] was not entitled to such a finding.

(*People v. Bleich* (2009) 178 Cal.App.4th 292, 300 (*Bleich*).)

The appellate court in *Bleich* held that, despite the magistrate's finding insufficient evidence to hold the defendant to answer at the preliminary hearing, the denial of the subsequent motion for factual innocence was proper. "[T]he fact the trial court found there was insufficient evidence to bind over [the defendant] for trial based on its interpretation of the evidence (or lack thereof) does not, standing alone, sustain the defendant's burden of proof to show factual innocence." (*Bleich*, *supra*, 178 Cal.App.4th at p. 301; accord *People v. Esmaili*, *supra*, 213 Cal.App.4th at pp. 1460-1462; distinguish *People v. McCann* (2006) 141 Cal.App.4th 347, 356-358 [finding of factual innocence appropriate where appellant could not have legally violated Bus. & Prof. Code, § 2053]; *People v. Laiwala*, *supra*, 143 Cal.App.4th at pp. 1072-1073 [element of grand theft of a trade secret could not be proved because the information involved was not a trade secret; finding of factual innocence was proper].)

4020.4-Factual innocence motion evidence and hearing requirements 5/20

At a factual innocence motion hearing conducted under subdivision (c) of Penal Code section 851.8 "[a] trial court must consider the material, relevant and reliable evidence a petitioner seeks to present before it can apply the requisite 'objective legal standard' to determine whether reasonable cause exists to believe the petitioner committed the offense." (*People v. Chagoyan* (2003) 107 Cal.App.4th 810, 818 [error to preclude petitioner from presenting testimony in support of motion].) "The hearing is not limited to the evidence presented at trial." (*People v. Medlin* (2009) 178 Cal.App.4th 1092, 1101.)

> The court may consider any evidence relied upon to arrest and charge, including "declarations, affidavits, police reports, or any other evidence submitted by the parties which is material, relevant and reliable." (§ 851.8, subd. (b).) Even suppressed evidence is considered. (*Adair*, at p. 905, fn. 3.) The court may consider facts disclosed after arrest. (*Id*. at p. 905, fn. 4.)

(*People v. Medlin*, *supra*, 178 Cal.App.4th at pp. 1101-1102; but see *People v. Scott M.* (1985) 167 Cal.App.3d 688, 700-701, disapproved on other grounds in *People v. Adair* (2003) 29 Cal.4th 895, 908, fn. 6 [declarations of trial jurors attesting to their belief in the defendant's innocence properly disregarded by the trial court in ruling on a section 851.8 motion].)

No such evidentiary hearing is required when the factual innocence motion is made under subdivision (e) of section 851.8 because this provision applies after an acquittal and is heard by the judge who presided at the trial. (*People v. Fitzgerald* (2017) 18 Cal.App.5th Supp. 1, 4-6, disagreeing with *People v. Pogre* (1986) 188 Cal.App.3d Supp. 1, 7.)

4020.5-Factual innocence finding inadmissible in other proceedings 7/13

"A court making a finding of factual innocence must issue a written declaration to the defendant stating the court's determination that the defendant is factually innocent of the charges for which he or she was arrested and that the defendant is thereby exonerated. (Pen. Code, § 851.8, subd. (f).)" (*Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 122.) Subdivision (f) of Penal Code section 851.8 further states: "Thereafter, the arrest shall be deemed not to have occurred and the person may answer accordingly any question relating to its occurrence." Penal Code section 851.85 similarly states:

> Whenever a person is acquitted of a charge and it appears to the judge presiding at the trial wherein such acquittal occurred that the defendant was factually innocent of the charge, the judge may order that the records in the case be sealed, including any record of arrest or detention, upon the written or oral motion of any party in the case or the court, and with notice to all parties to the case. If such an order is made, the court shall give to the defendant a copy of such order and inform the defendant that he may thereafter state that he was not arrested for such charge and that he was found innocent of such charge by the court.

But, subdivision (i)(1) of Penal Code section 851.8 states: "Any finding that an arrestee is factually innocent pursuant to subdivision (a), (b), (c), (d), or (e) shall not be admissible as evidence in any action." "[W]e construe Penal Code sections 851.8, subdivision (i)(1) and 851.85 together to mean that a defendant who is found factually innocent of a charge may state that a court found him innocent of the charge, but such a statement is not admissible as evidence in any action, and no other evidence of a finding of factual innocence is admissible in any action." (*Kerner v. Superior*

Court, *supra*, 206 Cal.App.4th at p. 124; see also *Tennison v. Cal. Victim Comp. & Gov. Claims Bd.* (2007) 152 Cal.App.4th 1164 [factual innocence finding had no collateral estoppel effect in hearing regarding compensation for alleged wrongful incarceration].)

4030.1-Standards for reducing felony to misdemeanor per PC17(b) 7/20

"The Legislature has classified most crimes as either a felony or a misdemeanor, by explicitly labeling the crime as such, or by the punishment prescribed." (*People v. Park* (2013) 56 Cal.4th 782, 789 (*Park*).) Under Penal Code section 17, subdivision (b) [§ 17(b)], however, there is a special category of crimes that is punishable as either a felony or a misdemeanor, depending on the severity of the facts surrounding its commission. (*People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347, 360, fn. 17.) These crimes, referred to as "wobblers," are "punishable either by a term in state prison or by imprisonment in county jail and/or by a fine." (*Park*, *supra*, at p. 789.) The Legislature has empowered the courts to decide, in each individual case, whether the crime should be classified as a felony or a misdemeanor. (*People v. Tran* (2015) 242 Cal.App.4th 877, 885 (*Tran*); but see *Sannmann v. Dept. of Justice* (2020) 47 Cal.App.5th 676, 683-684 ["straight" felony, such as robbery, cannot be reduced to misdemeanor even if part of negotiated plea agreement].) In making a section 17(b) determination, the court considers the facts surrounding the offense and the characteristics of the offender. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978 (*Alvarez*).)

The purpose of the trial judge's sentencing discretion to downgrade certain felonies is to "impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon." (*In re Anderson* (1968) 69 Cal.2d 613, 664-665, conc. opn. of Tobriner, J.) The reduction of a wobbler to a misdemeanor is not based on the notion that a wobbler offense is "conceptually a misdemeanor." (*Necochea v. Superior Court* (1972) 23 Cal.App.3d 1012, 1016.) Rather, it is "intended to extend misdemeanant treatment to a potential felon" and "extend more lenient treatment to an offender." (*Ibid*.)

> "When the court properly exercises its discretion to reduce a wobbler to a misdemeanor, it has found that felony punishment, and its consequences, are not appropriate for that particular defendant. [Citation.] Such a defendant is not blameless. But by virtue of the court's proper exercise of discretion, neither is such defendant a member of the class of criminals" convicted of an offense the Legislature intended to be subject to felony punishment. (*Park*, *supra*, 56 Cal.4th at pp. 801-802.)

(*Tran*, *supra*, 242 Cal.App.4th at p. 886.)

> [S]ince all discretionary authority is contextual, those factors that direct similar sentencing decisions are relevant, including "the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his [or her] traits of character as evidenced by his [or her] behavior and demeanor at the trial." [Citations.] When appropriate, judges should also consider the general objectives of sentencing such as those set forth in California Rules of Court, rule [4.]410. The corollary is that even under the broad authority conferred by section 17(b), a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest "exceeds the bounds of reason." [Citations.]

(*Alvarez*, *supra*, 14 Cal.4th at p. 978; see also *People v. Mullins* (2018) 19 Cal.App.5th 594, 611.)

A trial court's determination whether to reduce a wobbler to a misdemeanor under section 17(b)(3) is reviewed using an abuse of discretion standard. (*Alvarez*, *supra*, 14 Cal.4th at p. 977; *People v. Mullins*, *supra*, 19 Cal.App.5th at p. 611; *Tran*, *supra*, 242 Cal.App.4th at p. 887.) "We will not disturb the court's decision on appeal unless the party attacking the decision clearly shows the decision was irrational or arbitrary." (*People v. Sy* (2014) 223 Cal.App.4th 44, 66; see also *People v. Medina* (2018) 24 Cal.App.5th 61, 65.)

4030.2-Felony probationer not automatically entitled to PC17(b)(3) reduction 4/18

" 'A wobbler offense charged as a felony is regarded as a felony for all purposes until imposition of sentence or judgment. [Citations.] If state prison is imposed, the offense remains a felony; if a misdemeanor sentence is imposed, the offense is thereafter deemed a misdemeanor. [Citations.]' " (*People v. Upsher* (2007) 155 Cal.App.4th 1311, 1320.) Under Penal Code section 17(b)(3), trial court has discretion to "reduce a wobbler to a misdemeanor either by declaring the crime a misdemeanor at the time probation is granted or at a later time—for example when the defendant has successfully completed probation." (*People v. Park* (2013) 56 Cal.4th 782, 793 (*Park*).) "A convicted defendant is not *entitled* to the benefits of section 17(b) as a matter of right. Rather, a reduction under section 17(b) is an act of leniency by the trial court, one that 'may be granted by the court to a seemingly deserving defendant, whereby he [or she] may escape the extreme rigors of the penalty imposed by law for the offense of which he [or she] stands convicted.' [Citation.]" (*People v. Tran* (2015) 242 Cal.App.4th 877, 892 (*Tran*), original italics.) Unlike Penal Code section 1203.4, "[u]nder section 17(b), the trial court is not required to grant this relief, even upon successful completion of probation." (*Ibid*.) Among the sources of information that the court may use to guide it decision under section 17(b)(3) are the presentence report and any post-sentencing reports prepared by the probation department. (*Tran*, *supra*, 242 Cal.App.4th at pp. 888-891.)

The People are entitled to at least two days' written notice under Penal Code section 1203, subdivision (b)(1),before the court can consider a defendant's post-sentence request to reduce a wobbler to a misdemeanor under section 17(b). (*People v. Burrows* (2014) 226 Cal.app.4th 811, 813.)

4100.1-Petitioner is fugitive regardless of intent leaving state 8/07

The sole issue here is whether petitioner was in the demanding state at the time the crime was committed there. Petitioner's state of mind upon leaving the demanding state to come to California is irrelevant to the issue of fugitivity. On this point the United States Supreme Court in *Hogan v. O'Neill* (1921) 255 U.S. 52 stated: "To be regarded as a fugitive from justice it is not necessary that one shall have left the state in which the crime is alleged to have been committed for the very purpose of avoiding prosecution, but simply that, having committed there an act which, by the law of the state, constitutes a crime, he afterwards has departed from its jurisdiction, and, when sought to be prosecuted, is found within the territory of another state." (*Id*. at p. 56.)

4110.1-Extradition compelled by state & fed. law and U.S. Const. 8/07

Extradition law springs from three sources. The fundamental source is the United States Constitution, article IV, section 2, clause 2, which provides: "A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Since the constitutional provision is not self-executing, Congress enacted legislation in 1793 relating to extradition, now found in title 18 of the United States Code, section 3181 et seq. (*Roberts v. Reilly* (1885) 116 U.S. 80, 94.) Under these authorities a demanding state has a constitutional right to delivery of a fugitive, and the asylum state has a corresponding duty to deliver. (*California v. Superior Court (Smolin)* (1987) 482 U.S. 400, 407; *In re Fabricant* (1981) 118 Cal.App.3d 115, 119.)

Federal law on the subject of extradition is not exclusive, and the states are free to legislate on the subject. State legislation may require a governor to surrender a fugitive on terms less burdensome than those imposed by Congress. On the other hand, an asylum state may not impose more onerous conditions on a demanding state's right to extradition than federal law permits. (*New Mexico, ex rel. Ortiz v. Reed* (1998) 524 U.S. 151, 154-155; *In re Tenner* (1942) 20 Cal.2d 670, 674-678.) In accordance with these principles, California and most other states have enacted the Uniform Criminal Extradition Act (Pen. Code, § 1548 et seq.) to facilitate extraditions.

Penal Code sections 1549.2 and 1549.3 authorize the Governor of the State of California, upon proper demand by another state, to issue a warrant for the arrest and rendition of a fugitive from another state.

A governor's warrant is presumed to be valid. (Pen. Code, § 1550.1.) On a petition for habeas corpus the petitioner has the burden of proving the warrant's invalidity by evidence which is convincing beyond a doubt. (*In re Rock* (1958) 161 Cal.App.2d 723, 725-726.)

4110.2-Extradition required despite conflicting evidence 11/11

Several general principles apply to the consideration by a court of conflicting evidence at an extradition hearing. The first principle is that the *guilt or innocence* of the petitioner is not a proper subject for inquiry in this forum. The demanding state alone determines the guilt or innocence of the subject of the extradition. (*In re Golden* (1977) 65 Cal.App.3d 789, 796.) Extradition is merely one step in the process of securing the presence of the defendant in the court where guilt or innocence will be determined by trial. (*In re Strauss* (1905) 197 U.S. 324, 333; see also Pen. Code, § 1553.2.)

Second, when a demanding state has made a judicial determination that there is probable cause to believe the petitioner has committed a crime, and the governor of the asylum state has issued a warrant of arrest and rendition, the courts of the asylum state have *no power* to reexamine the finding of probable cause; i.e., to determine whether there was a factual basis for the finding. (*Michigan v. Doran* (1978) 439 U.S. 282.)

Third, when a magistrate of the demanding state has issued an arrest warrant based upon an affidavit showing petitioner committed the crime (i.e., showing probable cause), the petition for habeas corpus must be denied even if the petitioner presents affidavits which purport to support an alibi (e.g., the person was outside the demanding state at the time of the crime.) (*Illinois ex rel. McNichols v. Pease* (1907) 207 U.S. 100.)

4110.3-Only four grounds to invalidate a fugitive warrant 8/07

Courts in the asylum state are limited to determining whether the requisites of the Extradition Act have been met. Thus, there are only four issues an asylum court may consider: " '(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.' " (*California v. Superior Court (Smolin)* (1987) 482 U.S. 400, 408; see also Pen. Code, § 1550.1; *People v. Superior Court (Ruiz)* (1986) 187 Cal.App.3d 686, 691; *In re Fabricant* (1981) 118 Cal.App.3d 115.) The court in the asylum state may make no inquiry into the sufficiency of the charging document, nor may it entertain defenses offered by the fugitive. (*California v. Superior Court (Smolin)*, *supra*, 482 U.S. at pp. 410-412.) Nor should the court consider the petitioner's health. (*In re Walton* (2002) 99 Cal.App.4th 934, 948.)

4230.1-General standard for proof of fraudulent possession of check 8/15

The possession of a completed check with an intent to utter or pass it, accompanied by an intent to defraud, is forgery. (Pen. Code, § 475, subd. (c); see generally, *People v. Reisdorff* (1971) 17 Cal.App.3d 675, 679 (*Reisdorff*).) A check is completed within the statute when the face of the check has been filled out, even if the check has not yet been endorsed. (*People v. Bartsch* (1963) 217 Cal.App.2d 318, 321.) The mere possession of a forged document is evidence of knowledge of the spurious nature of the document. (*People v. Norwood* (1972) 26 Cal.App.3d 148, 159; *Reisdorff*, *supra*, at p. 679.) The fact of possession, plus slight corroborative evidence of other inculpatory circumstances, is all that is required to support a conviction. (*People v. Martinez* (2005) 127 Cal.App.4th 1156, 1161; *Reisdorff*, *supra*, at p. 679.)

4250.1-General standard for proof of forgery 8/15

"Every person who, with the intent to defraud, knowing that he or she has no authority to do so, signs the name of another person" to a check or, "with the intent to defraud, falsely" passes a forged check, is guilty of forgery. (Pen. Code, § 470, subds. (a) & (d).) "[T]he various subdivisions of [Penal Code] section 470 do not set out greater and lesser included offenses, but different ways of committing a single offense, i.e., forgery." (*People v. Ryan* (2006) 138 Cal.App.4th 360, 364.) For example, the crime of forgery under subdivision (d) of section 470, can consist of uttering a known false document as true with the intent to defraud. (*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 397; *People v. Reisdorff* (1971) 17 Cal.App.3d 675, 678-679.) Presenting a forged check for payment constitutes such an uttering. (*People v. Allen* (1963) 212 Cal.App.2d 857, 860; *People v. Jones* (1962) 210 Cal.App.2d 805, 807.) This act must be accompanied by an intent to defraud.

> Transfer of funds that one exclusively owns, without obligation to third parties, from one account to another does not by itself constitute fraud, even if the transfer is effected by an imposture that violates the account agreement. "[W]hat makes the difference between the impostor in law and the forger in law is the intent of the maker, something not to be found on the face or back of the instrument." [Citation.]

(*Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 67.)

The simple possession of a recently forged check by one claiming under it, like the possession of goods recently stolen, is evidence against the possessor. (*People v. Norwood* (1972) 26 Cal.App.3d 148, 159; *People v. Murrie* (1959) 168 Cal.App.2d 770, 774.) Indeed, since such possession is a circumstance affording some evidence of knowledge of its spurious nature, only

slight corroborative evidence is required to support a conviction of forgery by uttering. (*People v. Reisdorff*, *supra*, 17 Cal.App.3d at p. 679.)

Moreover, the making or knowing possession or uttering of a forged instrument alone is generally strong circumstantial evidence of an intent to defraud. (*People v. Castellanos* (2003) 110 Cal.App.4th 1489, 1493-1494.) "The intent to defraud is inferred from the very act of passing the check. [Citations.] Intrinsically, the act is inconsistent with any intent other than to defraud." (*People v. Wing* (1973) 32 Cal.App.3d 197, 200.)

Finally, a forgery conviction also can be based on a document with a genuine signature. (*People v. Martinez* (2008)161 Cal.App.4th 754, 759 [defendant misrepresented nature of paperwork victim was told to sign].) "[F]orgery is committed when a defendant, by fraud or trickery, causes another to execute a … document where the signer is unaware, by reason of such trickery, that he is executing a document of that nature." (*People v. Parker* (1967) 255 Cal.App.2d 664, 672.)

4310.1-Only evidence negating guilt need be presented to grand jury 7/13

The United States Supreme Court has held that the federal courts lacked authority to place upon prosecutors the duty to inform the grand jury of exculpatory evidence in their possession because such a burden would be incompatible with the historic functioning of the grand jury. (*United States v. Williams* (1992) 504 U.S. 36.) In *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, the California Supreme Court recognized the importance of the decision in *United States v. Williams*, but concluded "we do not here have occasion to apply it given our analysis of the issues which are governed by state statute." (*Id.* at p. 1033, fn. 3.)

That statute is Penal Code section 939.71, which states:

> (a) If the prosecutor is aware of exculpatory evidence, the prosecutor shall inform the grand jury of its nature and existence. Once the prosecutor has informed the grand jury of exculpatory evidence pursuant to this section, the prosecutor shall inform the grand jury of its duties under [Penal Code] section 939.7. If a failure to comply with the provisions of this section results in substantial prejudice, it shall be grounds for dismissal of the portion of the indictment related to that evidence.
>
> (b) It is the intent of the Legislature by enacting this section to codify the holding in *Johnson v. Superior Court* [(1976)] 15 Cal.3d 248 and to affirm the duties of the grand jury pursuant to Section 939.7.

The California Supreme Court held in *Johnson v. Superior Court* (1975) 15 Cal.3d 248 that "… when a district attorney seeking an indictment is aware of evidence *reasonably tending to negate guilt*, he is obligated under [Penal Code] section 939.7 to inform the grand jury of its nature and existence, so that the grand jury may exercise its power under the statute to order the evidence produced." (*Id*. at p. 255, italics added; see also *Breceda v. Superior Court* (2013) 215 Cal.App.4th 934, 954-955 [Pen. Code, § 939.71 duty applies if anyone within the prosecutor's office is aware of potentially exculpatory information].) "Because it is unlikely the grand jury will learn of exculpatory evidence if the prosecution does not bring the evidence to its attention [citation] the indictment is deemed invalid if the prosecution fails to comply with its statutory obligation and the omission causes "substantial prejudice." (*Berardi v. Superior Court* (2007) 149 Cal.App.4th 476, 491; see also *McGill v. Superior Court* (2011) 195 Cal.App.4th 1454, 1503 [comparing language of Pen. Code, §§ 939.7 and 939.71].)

"[T]he traditional 'reasonably probable' test used for state law error applies to evaluate prejudice under section 939.71." (*Berardi v. Superior Court*, *supra*, 149 Cal.App.4th at p. 493.) "The test for assessing prejudice under state law is whether there has been a ' "miscarriage of justice," ' which is typically determined by evaluating the entire record to determine whether 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*Ibid*.)

> We note that not all cases involving some deficiency in disclosure and interference with the grand jury's independence will support dismissal. Rather, the court must evaluate the record as a whole, taking into consideration all relevant factors. These factors include the strength and nature of both the undisclosed exculpatory evidence and the probable cause evidence that was presented. Regarding the disclosure errors, pertinent inquiries include the extent of the impact on the grand jury's independence and the extent to which the material could "explain away the charge." If the record shows that sufficient evidence of probable cause remains even after considering the undisclosed evidence, this does not end the analysis. The court must still determine if there is " ' "such an equal balance of reasonable probabilities as to leave the court in serious doubt" ' " as to whether a properly informed jury would have declined to find probable cause to indict had it known of the omitted evidence. [Citation.]

(*Id*. at p. 495; see also *Breceda v. Superior Court*, *supra*, 215 Cal.App.4th at p. 959.)

4320.1-Grand juror bias alone not grounds to set aside indictment 3/20

The qualifications for service as a grand juror in California are prescribed by statute and relate to matters such as citizenship, age, mental competency, intelligence, and character. (Pen. Code, § 893, subd. (a).) The trial court determines these qualifications by personal interview and examination. (Pen. Code, §§ 896, subd. (a), 904.6, subd. (b).) An individual who is otherwise qualified is nevertheless deemed incompetent to serve only if he or she (1) is currently serving as a trial juror in another case; (2) has been discharged as a grand juror within the preceding year; (3) has been convicted of either malfeasance in office or any felony; or (4) is an elected public officer. (Pen. Code, § 893, subd. (b); CodeCiv.Proc., § 203, subd. (a).) Any person found qualified in accordance with the statutory factors must be accepted for service "unless the court, on the application of the juror and before he is sworn, excuses him from such service for any of the reasons prescribed in this title or in Chapter 1 (commencing with Section 190), Title 3, Part 1 of the Code of Civil Procedure." (Pen. Code, § 909.) Code of Civil Procedure section 204, subdivision (b), provides that a person who is otherwise eligible for service may be excused "only for undue hardship, upon themselves or upon the public . …" "No challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, except when made by the court for want of qualification, as prescribed in Section 909." (Pen. Code, § 910.)

"Although the court's statutory authority to excuse potential grand jurors is limited by [Penal Code] section 909, all grand jurors have a statutory duty to withdraw from serving on a particular case if they harbor a bias or prejudice against the defendant." (*Packer v. Superior Court* (2011) 201 Cal.App.4th 152, 163 (*Packer*).) Penal Code section 939.5 provides:

> Before considering a charge against any person, the foreman of the grand jury shall state to those present the matter to be considered and the person to be charged with an offense in connection therewith. He shall direct any member of the grand jury who has a state of mind

> in reference to the case or to either party which will prevent him from acting impartially and without prejudice to the substantial rights of the party to retire. Any violation of this section by the foreman or any member of the grand jury is punishable by the court as a contempt.

"The foreperson's failure to comply with this requirement is not, however, a ground for setting aside an indictment." (*Packer*, *supra*, 201 Cal.App.4th at p. 164.) California "follows the general rule that in the absence of a statutory provision to the contrary, an indictment is not subject to dismissal on the ground that individual grand jurors harbored bias or prejudice against the defendant." (*Id*. at p. 165, citing *People v. Kempley* (1928) 205 Cal. 441; see also *Avitia v. Superior Court* (2018) 6 Cal.5th 486, 493.) But: "We hold that a defendant can proceed by a section 995(a)(1)(A) motion to set aside an indictment on the ground that a section 939.5 violation substantially impaired the impartiality and independence of the grand jury." (*Avitia v. Superior Court*, *supra*, 6 Cal.5th at p. 495.)

4320.2-DA cannot excuse grand juror for bias but defense remedy limited 3/20

Only the grand jury foreperson, not the prosecutor, may dismiss a grand juror under Penal Code section 939.5. (*Avitia v. Superior Court* (2018) 6 Cal.5th 486, 492.) "In this context, Penal Code section 995, subdivision (a)(1)(A) allows a defendant to pursue a motion to set aside an indictment where the defendant alleges that a prosecutor's violation of section 939.5 has prejudiced a substantial right." (*Id*. at p. 494.) "We hold that a defendant can proceed by a section 995(a)(1)(A) motion to set aside an indictment on the ground that a section 939.5 violation substantially impaired the impartiality and independence of the grand jury." (*Id*. at p. 495.) "When a defendant seeks to set aside an indictment before trial under section 995(a)(1)(A) on the ground that the prosecutor violated section 939.5, the indictment must be set aside only when the defendant has shown that the violation reasonably might have had an adverse effect on the independence or impartiality of the grand jury." (*Id*. at pp. 497-498 [prosecutor's unauthorized excusal of grand juror for bias had no adverse effect on grand jury because done outside their presence]; *Ruiz-Martinez v. Superior Court* (2019) 41 Cal.App.5th 214, 225-229 [same]; distinguish *Williams v. Superior Court* (2019) 38 Cal.App.5th 1022, 1031-1033 [prosecutor's unauthorized excusal of grand juror for hardship had adverse effect on grand jury because done in their presence because: "The "prosecutor's actions could have led grand jurors to believe they were beholden to the prosecutor generally and during the decision-making process"].)

4400.1-Habeas corpus is a limited post-conviction remedy 3/20

Availability of the writ of habeas corpus is implemented by Penal Code section 1473, subdivision (a), which provides: "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." (See *In re Cook* (2019) 7 Cal.5th 439, 452; *People v. Villa* (2009) 45 Cal.4th 1063, 1068.) "A writ of '[h]abeas corpus may … provide an avenue of relief to those unjustly incarcerated when the normal method of relief—i.e., direct appeal—is inadequate' [citation], and the Great Writ has been justifiably lauded as ' "the safe-guard and the palladium of our liberties" ' [Citations]." (*In re Sanders* (1999) 21 Cal.4th 697, 703-704; see *In re Clark* (1993) 5 Cal.4th 750, 764.)

> Although habeas corpus thus acts as a "safety valve" … or "escape hatch" … for cases in which a criminal trial has resulted in a miscarriage of justice despite the provision to the accused of legal representation, a jury trial, and an appeal, this "safety valve" role should not obscure the fact that "habeas corpus is an extraordinary, *limited* remedy against a presumptively fair and valid final judgment" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, italics added.)

(*In re Reno* (2012) 55 Cal.4th 428, 450.) " ' "[I]t is well settled that the writ of habeas corpus does not afford an all-inclusive remedy available at all times as a matter of right. … ' … [T]he function of the writ is merely to determine the legality of the detention by an inquiry into the question of jurisdiction and the validity of the process upon its face, and whether anything has transpired since the process was issued to render it invalid.' " ' " (*In re Cook*, *supra*, 7 Cal.5th at p. 452.)

"This limited nature of the writ of habeas corpus is appropriate because use of the writ tends to undermine society's legitimate interest in the finality of its criminal judgments … ." (*In re Reno*, *supra*, 55 Cal.4th at p. 451.) "Our cases have long emphasized that habeas corpus is an extraordinary remedy 'and that the availability of the writ properly must be tempered by the necessity of giving due consideration to the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments.' " (*In re Morgan* (2010) 50 Cal.4th 932, 944.)

4400.2-Habeas corpus is a special proceeding, neither civil nor criminal 3/20

"Our Supreme Court has emphasized that the goal of 'the procedures that govern habeas corpus is to provide a framework in which a court can discover the truth and do justice in [a] timely fashion.' (*People v. Duvall* (1995) 9 Cal.4th 464, 482.)" (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1239-1240.)

> The Legislature has labeled [a habeas corpus proceeding] a 'Special Proceeding[] of a Criminal Nature' [citation], but the label is not dispositive. [Citations.] It is not itself a criminal case, and it cannot result in added punishment for the petitioner. Rather, it is an independent action the defendant in the earlier criminal case institutes to challenge the results of that case. [Citation.]

(*In re Scott* (2003) 29 Cal.4th 783, 815 (*Scott*).) In *Scott*, the California Supreme Court held that a habeas corpus proceeding is civil in nature for purposes of deciding how the petitioner may assert the privilege against self-incrimination. (*Ibid*.) However, the court stated that it "need not, and [did] not, decide whether a habeas corpus proceeding is civil or criminal for other purposes. [Citation.] It is a special proceeding and not entirely analogous to either category. [Citation.]" (*Id*. at p. 816, fn. 6; but see *In re Barnett* (2003) 31 Cal.4th 466, 478, fn. 10 ["habeas corpus proceedings like the one before us are properly viewed as civil actions designed to overturn presumptively valid criminal judgments and not as part of the criminal process itself"]; *Bontilao v. Superior Court* (2019) 37 Cal.App.5th 980, 999 [challenge to judge assigned to handle habeas petition attacking criminal sentence governed by criminal time limit provisions of Code.Civ.Proc. § 170.6].)

On the other hand, habeas corpus should not be used when more appropriate vehicles designed to handle the petitioner's complaints are available. (*In re Cook* (2019) 7 Cal.5th 439-452-458 [habeas not appropriate vehicle for juvenile murderer to make record of youth-related factors for later benefit of parole board].) For example, habeas is not the proper method of adjudicating a prison inmate's civil complaint for monetary damages against the prison authorities. (*Cox v.*

Superior Court (2016) 1 Cal.App.5th 855.) Nor is it the proper method of challenging the handling of administrative grievances against prison authorities which should be reviewed by way of petition for writ of mandate. (*Villery v. Dept. of Corrections & Rehabilitation* (2016) 246 Cal.App.4th 407.)

4400.3-Habeas procedures 4/20

The statutory procedures for litigating habeas corpus actions are set forth in Penal Code sections 1473 to 1508. "Additional procedures for habeas corpus proceedings in the superior court are set forth in California Rules of Court, rule 4.551, including a timetable for the court's ruling on a petition filed in that court, and are also discussed in appellate court decisions. (See, e.g., *Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1233-1235; *People v. Duvall* (1995) 9 Cal.4th 464, 474-477; *People v. Romero* (1994) 8 Cal.4th 728, 737-738.)" (*Jackson v. Superior Court* (2010) 189 Cal.App.4th 1051, 1063.) The process involves a written pleading stage, then any evidentiary hearings which may flow from the pleading stage, and culminating with rulings on whether the habeas petition is procedurally barred and, if not, whether it has substantive merit requiring the granting of some form of habeas relief. "Our Supreme Court has emphasized that the goal of 'the procedures that govern habeas corpus is to provide a framework in which a court can discover the truth and do justice in [a] timely fashion.' (*People v. Duvall*, *supra*, 9 Cal.4th at p. 482].)" (*Board of Prison Terms v. Superior Court*, *supra*, 130 Cal.App.4th at p. 1239.)

4400.3a-The petition 4/20

The habeas "petition serves primarily to launch the judicial inquiry into the legality of the restraints on the petitioner's personal liberty… ." (*People v. Romero* (1994) 8 Cal.4th 728, 738.) "[T]he petition states the grounds for the claimed illegality of the restraints on the petitioner's liberty … ." (*Ibid*.)

4400.3b-Informal response process 4/20

Without issuing an order to show cause (OSC), the court can ask for an informal response to the habeas petition.

> Through the informal response, the custodian or real party in interest may demonstrate, by citation of legal authority and by submission of factual materials, that the claims asserted in the habeas corpus petition lack merit and that the court therefore may reject them summarily, without requiring formal pleadings (the return and traverse) or conducting an evidentiary hearing. If the petitioner successfully controverts the factual materials submitted with the informal response, or if for any other reason the informal response does not persuade the court that the petition's claims are lacking in merit, then the court must proceed to the next stage by issuing an order to show cause or the now rarely used writ of habeas corpus.

(*People v. Romero* (1994) 8 Cal.4th 728, 742, fn. omitted.)

4400.3c-Order to show cause 6/21

The order to show cause (OSC) directs the respondent custodian to serve and file a written return." (*In re Hochberg* (1970) 2 Cal.3d 870, 873, fn. 2.)

> [I]ssuance of a writ of habeas corpus or an order to show cause is an intermediate but nonetheless vital step in the process of determining whether the court should grant the affirmative relief that the petitioner has requested. The function of the writ or order is to "institute a proceeding in which issues of fact are to be framed and decided." [Citation.] The issuance of either the writ of habeas corpus or the order to show cause creates a "cause," thereby triggering the state constitutional requirement that the cause be resolved "in writing with reasons stated" (Cal. Const., art. VI, § 14 …). Thus, the writ or order is the means by which issues are joined (through the return and traverse) and the need for an evidentiary hearing determined.

(*Id*. at p.740.)

"[A] court 'crafting [an] order to show cause has the power to explain its preliminary assessment of the petitioner's claims, restate inartfully drafted claims for purposes of clarity, and limit the issues to be addressed in the return to only those issues for which a prima facie showing has been made.' (*In re Kavanaugh* (2021) 61 Cal.App.5th 320, 342-343; citing *Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1239, italics deleted.) But "a court exceeds its authority when it 'issue[s] an order to show cause that requires the respondent to address new claims not expressly or implicitly raised in the original habeas corpus petition or supported by the factual allegations in the original habeas corpus petition, unless those claims were raised … in a supplemental or amended habeas corpus petition filed with the permission of the court.' [Citation]." (*In re Kavanaugh*, *supra*, 61 Cal.App.5th at p. 342, citing *Board of Prison Terms v. Superior Court*, *supra*, 130 Cal.App.4th at p. 1237.)

A court cannot summarily grant a habeas petition without issuing an OSC or writ of habeas corpus. (*In re Lugo* (2008) 164 Cal.App.4th 1522, 1542; *In re Olson* (2007) 149 Cal.App.4th 790, 800-802; see also *In re Campbell* (2017) 11 Cal.App.5th 742, 754-756 [prosecution did not impliedly waive right to issuance of OSC].) "Issuance of an order to show cause implies a preliminary determination the petitioner has made a sufficient prima facie showing of specific facts that, if established, entitle him or her to relief. (*In re Large* (2007) 41 Cal.4th 538, 549.)" (*In re Alvarez* (2013) 222 Cal.App.4th 1064, 1076.) "An OSC directing response on a particular issue indicates that the petitioner has failed to make a prima facie case as to the other issues presented." (*In re Sims* (2018) 27 Cal.App.5th 195, 203.)

4400.3d-The return 4/20

The habeas return is the pleading which responds to the claims in the habeas petition on which the order to show cause issued. "The return, which must allege facts establishing the legality of the petitioner's custody, 'becomes the principal pleading' [citation] and is 'analogous to the complaint in a civil proceeding' [citations]. Thus, the return 'is an essential part of the scheme' by which relief is granted in a habeas corpus proceeding." (*People v. Romero* (1994) 8 Cal.4th 728, 738-739.)

> The return is like a complaint in being the central pleading in the action, to which another pleading must respond, but it is unlike a complaint in other important respects. As we have already noted, a return must be responsive to the allegations of the petition

> [citation], whereas a complaint is generally not responsive to any other document. Also, a complaint generally seeks to alter the existing state of affairs by obtaining some form of judicial relief, whereas a return seeks to defend and preserve the status quo and to avoid any judicial relief.

(*Id*. at p. 739, fn. 6.)

> Moreover, the Supreme Court has "required more of the return than mere compliance with the literal language of [Penal Code] section 1480; we have required the return to 'allege facts tending to establish the legality of petitioner's detention.' [Citations.] Those facts are not simply the existence of a judgment of conviction and sentence when the petitioner challenges his restraint in prison. The factual allegations of a return must also respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful. [Citations.] In addition to stating facts, the return should also, 'where appropriate, … provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed.' [Citation.]" ([*People v.*] *Duvall* [(1995)] 9 Cal.4th [464] at p. 476, fn. omitted.) Consequently, "[a]t this early pleading stage ... we have required the People to set forth, in their return, facts responsive to the factual allegations in the original petition for a writ of habeas corpus." (Id. at p. 476, fn. 3

(*In re Duval* (2020) 44 Cal.App.5th 401, 407-408.) "If the People do not file a return, they forgo the opportunity to participate in the court's determination of the merits of the petitioner's claim." (*In re Serrano* (1995) 10 Cal.4th 447, 455; see also *In re Duval*, *supra*, 44 Cal.App.5th at p. 408.)

4400.3e-The traverse/denial 4/20

Upon the submission of the written return, the petitioner "may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge." (Pen. Code, § 1484.) "The petitioner's response to the return, commonly known as the traverse, may incorporate the allegations of the petition. [Citation.]" (*People v. Romero* (1994) 8 Cal.4th 728, 739.) "Any allegation of the return not controverted by the traverse is deemed admitted. [Citation.] The traverse is analogous to the answer in a civil proceeding. [Citation.] Thus, it is through the return and the traverse that the issues are joined in a habeas corpus proceeding. [Citations.]" (*Ibid*.) The habeas proceeding is limited to the claims which the court initially determined stated a prima facie case for relief and cannot be expanded in the traverse. (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16; *In re Arroyo* (2019) 37 Cal.App.5th 727, 732.) "To bring additional claims before the court, petitioner must obtain leave to file a supplemental petition for writ of habeas corpus." (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1235.)

4400.3f-Evidentiary hearing 4/20

Once the issues have been framed through the habeas pleadings (petition, return, traverse), the court must determine whether an evidentiary hearing is needed.

> If the written return admits allegations in the petition that, if true, justify the relief sought, the court may grant relief without an evidentiary hearing. [Citations.] Conversely, consideration of the written return and matters of record may persuade the court that the contentions advanced in the petition lack merit, in which event the court may deny the

petition without an evidentiary hearing. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 653-657; *People v. Babbitt* (1988) 45 Cal.3d 660, 707-708.) Finally, if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing. (Pen. Code, § 1484.)

(*People v. Romero* (1994) 8 Cal.4th 728, 739-740; see also *In re Duval* (2020) 44 Cal.App.5th 401, 408 [no need to conduct evidentiary hearing because People failed to file return].)

4400.3g-Ruling on the merits/relief 4/21

After submission of the habeas pleading in response to the order to show cause and any evidentiary hearings, if necessary, the court must rule on the matter. If the petitioner has not proven his or her claims by a preponderance of the evidence they must be denied. (*In re Champion* (2014) 58 Cal.4th 965, 1007.) But if proven, the "scope of a court's authority in granting habeas corpus relief is quite broad." (*In re Duval* (2020) 44 Cal.App.5th 401, 411.) "A court considering a petition for writ of habeas corpus has broad authority to craft a remedy 'as the justice of the case may require.' ([Pen. Code] § 1484; see *In re Lira* (2014) 58 Cal.4th 573, 584.)" (*In re Palmer* (2021) 10 Cal.5th 959, 976.) "[A] court, faced with a meritorious petition for a writ of habeas corpus, should consider factors of justice and equity when crafting an appropriate remedy." (*In re Harris* (1993) 5 Cal.4th 813, 851; see also *In re Crow* (1971) 4 Cal.3d 613, 619, fn. 7 ["Inherent in the power to issue the writ of habeas corpus is the power to fashion a remedy for the deprivation of any fundamental right which is cognizable in habeas corpus"].)

4400.4-Habeas corpus not available to challenge sufficiency of the evidence 1/13

Claims of the insufficiency of evidence supporting conviction are not cognizable in a habeas corpus proceeding. (*In re Reno* (2012) 55 Cal.4th 428, 505; *In re Lindley* (1947) 29 Cal.2d 709, 723 (*Lindley*).)

> The rule of *Lindley* recognizes that the job of sifting the evidence and weighing the credibility of witnesses is for the trier of fact, usually the jury, at the time of trial (see *People v. Farris* (1977) 66 Cal. App.3d 376, 383), and that claims of evidentiary insufficiency must be raised in either a motion for a new trial, on appeal, or both. Aside from a claim of newly discovered evidence, that is, evidence not presented at trial, which is itself subject to strict limits (see *In re Lawley* [(2008)] 42 Cal.4th [1231] at p. 1239), routine claims that the evidence presented at trial was insufficient are not cognizable in a habeas corpus petition.

(*In re Reno*, *supra*, 55 Cal.4th at p. 505, fn. omitted.) "The *Lindley* rule is a venerable one … ." (*Ibid*.)

4400.5-Habeas corpus not available to raise 4th Amendment issues 1/13

Claims the police violated a petitioner's rights under the Fourth Amendment to the United States Constitution are not cognizable in a habeas corpus proceeding. (*In re Reno* (2012) 55 Cal.4th 428, 506-507, described as the *Lessard/Sterling* rule as derived from *In re Lessard* (1965) 62 Cal.2d 497, 503 and *In re Sterling* (1965) 63 Cal.2d 486, 489; see also *In re Sakarias* (2005) 35 Cal.4th 140, 169 [citing *Sterling* with approval]; *In re Harris* (1993) 5 Cal.4th 813, 830 [same].) "We do not believe that petitioner may at this date employ the writ of habeas corpus to attack the introduction of evidence which allegedly has been illegally obtained." (*Lessard*, *supra*, 62 Cal.2d at p. 503.)

We explained the *Lessard/Sterling* rule in *In re Clark* [(1993) 5 Cal.4th [750] at p. 767: "[T]he erroneous admission of unlawfully seized evidence presented no risk that an innocent defendant might be convicted, and '[t]he risk that the deterrent effect of the [exclusionary] rule will be compromised by an occasional erroneous decision refusing to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack.' ([*In re Harris* (1961) 56 Cal.2d 879,] 884, conc. opn. of Traynor, J.) That reasoning persuaded the court that Fourth Amendment violations need not be considered on habeas corpus even when the issue had not been raised on appeal. 'Failure to exercise these readily available remedies will ordinarily constitute such a deliberate bypassing of orderly state procedures as to justify denial of federal as well as state collateral relief.' "

(*In re Reno*, *supra*, 55 Cal.4th at p. 507.)

4400.6-Superior court can reconsider a grant of a habeas petition before it is final 2/11

The superior court retains the inherent power to reconsider and vacate an order granting a petition for writ of habeas corpus, on its own motion or on motion of the People, within the statutory 60-day time period for the People to file a notice of appeal, as long as no appeal had yet been filed. (*Jackson v. Superior Court* (2010) 189 Cal.App.4th 1051, 1068 (*Jackson*).)

The People may file an appeal from an order granting a petition for writ of habeas corpus even if the order does not discharge a prisoner from custody. ([Pen. Code] §§ 1506, 1238, subd. (a)(5); *People v. Superior Court (Gregory)* (2005) 129 Cal.App.4th 324, 330.) Therefore, an order granting a petition for writ of habeas corpus is an appealable order analogous to a final judgment. (See, e.g.,[Pen. Code] §§ 1506, 1235, subd. (b); *Gregory*, *supra*, 129 Cal.App.4th at pp. 329-331; *In re Crow* (1971) 4 Cal.3d 613, 622.) [] If desiring to do so, the People must file a notice of appeal from an order granting a petition for writ of habeas corpus "within 60 days after the rendition of the judgment or the making of the order … ." ([Cal. Rules of Ct.] Rule 8.308(a).) "[I]f an appeal is not taken an order [granting a petition for writ of habeas corpus] becomes final when the time for appeal has passed (*In re Crow* [, *supra*,] 4 Cal.3d 613, 621-622 …) … ." (*People v. Huff* (1975) 46 Cal.App.3d 361, 365

(*Jackson*, *supra*, at p. 1064.)

The superior court's power to reconsider the granting of a habeas petition is not limited by Code of Civil Procedure section 1008. (*Jackson*, *supra*, 189 Cal.App.4th at p. 1067.)

Rather the court had the inherent power to reconsider its order granting the petition for writ of habeas corpus, and that power would only end with its loss of jurisdiction. ([*People v.*] *Castello* [(1998)] 65 Cal.App.4th [1242] at p. 1248.) The loss of jurisdiction for purposes of reconsideration of the ruling would occur when the order became final and binding, or when the People filed a notice of appeal from the order. (*Gregory*, *supra*, 129 Cal.App.4th at p. 329; *In re Crow*, *supra*, 4 Cal.3d at pp. 621-622; [*People v.*] *Wadkins* [(1965)] 63 Cal.2d [110] at p. 113.) In order to be timely, a notice of appeal from an order granting a petition for writ of habeas corpus in the superior court would have to be filed within 60 days from the filing of the order. (Rule 8.308(a).) Therefore, the superior court would not have lost its inherent power to reconsider and vacate its order granting the petition for writ of habeas corpus in this matter until 60 days after the filing of the order, as long as no

notice of appeal had been filed. (*Gregory*, *supra*, 129 Cal.App.4th at p. 329; *In re Crow*, *supra*, 4 Cal.3d at pp. 621-622.)

(*Jackson*, *supra*, at p. 1067.)

4400.7-Standard on appeal 4/18

The same standards of review applicable to an appeal also apply to a People's appeal from the granting of a habeas petition under Penal Code section 1506. (*In re Collins* (2001) 86 Cal.App.4th 1176, 1181; distinguish *People v. Garrett* (1998) 67 Cal.App.4th 1419, 1423 [defendant does not have right to appeal denial of a habeas petition].) On review from the granting of a writ of habeas corpus, the appellate court applies the substantial evidence test to pure questions of fact and independently review questions of law. (*In re Robinson* (2017) 19 Cal.App.5th 247, 252; *In re Corona* (2008) 160 Cal.App.4th 315, 320.) "[W]hen the application of law to fact is predominantly legal, such as when it implicates constitutional rights and the exercise of judgment about the values underlying legal principles, this court's review is de novo." (*In re Collins*, *supra*, 86 Cal.App.4th at p. 1181.)

4410.1-Petitioner has burden of adequately pleading and proving all habeas claims 11/18

"Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474, original italics; see also *In re Cowan* (2018) 5 Cal.5th 235, 243 *In re Price* (2011) 51 Cal.4th 547, 559.) Also, "the petitioner … bears the initial burden of alleging the facts on which he relies to explain and justify delay and/or a successive petition." (*In re Clark* (1993) 5 Cal.4th 750, 798, fn. 35.) Thus, for example, a court should summarily deny, without considering the merits, a petition that does not "state[] specific facts to establish that his newly made claims were presented without substantial delay" or explain why any of the claims were based on a legal error involving "a fundamental miscarriage of justice … ." (*Id*. at p. 799; see also *In re Reno* (2012) 55 Cal.4th 428, 455, 458 [describing failure of petitioner's counsel to acknowledge such procedural bars as an abuse of the writ process and possible ethical violation].)

" ' "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended." ' " (*In re Lawley* (2008) 42 Cal.4th 1231, 1240, italics in original, citations omitted.)

Accordingly a habeas corpus petitioner has the burden of alleging and proving all the facts upon which he or she relies to overturn the judgment. (*In re Lawler* (1979) 23 Cal.3d 190, 195.) The petition must contain adequate averments of specific facts; general conclusions and argumentative assertions are not sufficient. (*People v. Karis* (1988) 46 Cal.3d 612, 656; *In re Swain* (1949) 34 Cal.2d 300; see also *People v. Cooper* (1992) 7 Cal.App.4th 593, 597.) Petitioner's burden is to prove those facts by a preponderance of the evidence. (*In re Cowan*, *supra*, 5 Cal.5th at p. 243; *In re Crew* (2011) 52 Cal.4th 126, 149.) "Even when [a] court finds that a habeas corpus petition states a prima facie showing that the petitioner is entitled to relief, the petitioner must still ' "prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus." ' [Citations]" (*In re Champion* (2014) 58 Cal.4th 965, 1007.)

4410.2-Newly discovered evidence as basis for granting habeas relief 12/19

In the context of a habeas corpus claim, "newly discovered evidence" is evidence that the defense could not have discovered with reasonable diligence prior to judgment. (*In re Hardy* (2007) 41 Cal.4th 977, 1016.) Penal Code section 1473, subdivision (b)(3)(A), provides that a writ of habeas corpus should issue when "[n]ew evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial." New evidence is defined as "evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching." (Pen. Code, § 1473, subd. (b)(3)(B).)

A changed trial outcome means a result different from the guilty verdict the jury returned. (*People v. Sagin* (2019) 39 Cal.App.5th 570, 579 (*Sagin*).) Significantly, this definition does not require an acquittal, but also encompasses a hung jury. (*People v. Soojian* (2010) 190 Cal.App.4th 491, 521.) The habeas petitioner must show it is more likely than not the new evidence would have led at least one juror to maintain a reasonable doubt of guilt. (*Sagin*, *supra*, 39 Cal.App.5th at p. 579.) Penal Code section 1473, subdivision (b)(3), "creates a sliding scale: in a case where the evidence of guilt presented at trial was overwhelming, only the most compelling new evidence will provide a basis for habeas relief; on the other hand, if the trial was close, the new evidence need not point so conclusively to innocence to tip the scales in favor of the petitioner." (*Sagin*, *supra*, 39 Cal.App.5th at pp. 579-580.)

4410.3-Petitioner must show evidence material & suppression deliberate 9/09

Petitioner argues a denial of a fair trial resulted from the prosecution's suppression of substantial material evidence. "To establish such a charge the cases hold that the petitioner must show that the suppression was deliberate and that the evidence was material." (*In re Lessard* (1965) 62 Cal.2d 497, 508.) "Substantial material evidence" in this context means "evidence of such significance that with reasonable probability it could have affected the outcome of the trial." (*In re Wright* (1978) 78 Cal.App.3d 788, 811-814; and see *In re Ferguson* (1971) 5 Cal.3d 525.)

> "A judgment of conviction based on testimony known by representatives of the state to be perjured deprives the defendant of due process of law [citations] and may be attacked on habeas corpus [citations]. In making such an attack, however, petitioner must establish by a preponderance of the evidence that perjured testimony was adduced at his trial, that representatives of the state knew that it was perjured [citations], and that such testimony may have affected the outcome of the trial [citations]." (*In re Imbler* (1963) 60 Cal.2d 554, 560.)

(*In re Roberts* (2003) 29 Cal.4th 726, 740.)

4410.4-Petitioner must show false evidence was substantial and effected outcome 12/19

Penal Code section 1473, subdivision (b)(1), permits inquiry into the validity of a conviction by way of petition for writ of habeas corpus when "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his or her incarceration … ." A showing of false evidence does not require proof of perjury by a witness. (*In re Richards* (2012) 55 Cal.4th 948, 960-961 (*Richards I*); *In re Wright* (1978) 78 Cal.App.3d 788,809, fn. 5 (*Wright*).) "[S]ection 1473 does not require a petitioner

establish that a witness knowingly or intentionally testified falsely, provided the false testimony was material to his or her conviction or sentence." (*In re Rogers* (2019) 7 Cal.5th 817, 834 (*Rogers*).) "Additionally, it is no longer necessary to show a representative of the state knew the testimony was false." (*Wright¸ supra*.)

> Thus, under the present version of section 1473 it does not matter *why* evidence is false or *whether any party to the proceeding knew* it was false. So long as some piece of evidence at trial was actually false, and so long as it is reasonably probable that without that evidence the verdict would have been different, habeas corpus relief is appropriate.

(*Richards I*, *supra*, 55 Cal.4th at p. 961, original italics.)

A common basis for seeking relief under Penal Code section 1473, subdivision (b)(1), is a recanting witness. But, "[i]t has long been settled that 'the offer of a witness, after trial, to retract … sworn testimony is to be viewed with suspicion.' [Citations.]" (*In re Cox* (2003) 30 Cal.4th 974, 998; see also *In re Masters* (2019) 7 Cal.5th 1054, 1067; *Rogers*, *supra*, 7 Cal.5th at p. 835; *In re Roberts* (2003) 29 Cal.4th 726, 742 (*Roberts*).)

As noted, to obtain relief, a petitioner must show the false evidence may have affected the outcome. (*Richards I*, *supra*, 55 Cal.4th at p. 961.) In other words, there must be a "reasonable probability" that had the false evidence not been introduced, the result would have been different. (*Rogers*, *supra*, 7 Cal.5th at p. 848; *In re Richards* (2016) 63 Cal.4th 291, 312 (*Richards II*); *Roberts*, *supra*, 29 Cal.4th at p. 742; *Wright*, *supra*, 78 Cal.App.3d at pp. 808-809.) A showing of "reasonable probability" must undermine the reviewing court's confidence in the outcome. It is dependent on the totality of the circumstances and is determined objectively. (*In re Malone* (1996) 12 Cal.4th 935, 965-966; *In re Sassounian* (1995) 9 Cal.4th 535, 546.) This prejudice requirement is the same as that as that for state law error under *People v. Watkins* (1956) 46 Cal.2d 818. (*In re Masters*, *supra*, 7 Cal.5th at p. 1078; *In re Figueroa* (2018) 4 Cal.5th 576, 592.)

Even a petitioner who makes the required showing is not entitled to relief if the prosecution establishes the failure to disclose the evidence was harmless beyond a reasonable doubt. (*In re Pratt* (1980) 112 Cal.App.3d 795, 865; *Wright*, *supra*, 78 Cal.App.3d at pp. 808-814.) "[W]hile, of course, the discovery of perjured testimony will almost necessarily involve the discovery of new evidence, these constitute distinct grounds for habeas corpus relief, are subject to different legal standards and must be considered separately." (*Wright*, *supra*, at p. 802.)

As to expert testimony, Penal Code section 1473, subdivision (e)(1) states, " 'false evidence' shall include opinions of experts that have either been repudiated by the expert who originally provided the opinion at a hearing or trial or that have been undermined by later scientific research or technological advances." (See *In re Figueroa*, *supra*, 4 Cal.5th at p. 558.) By adding this language "the Legislature intended courts to treat lay and expert opinion equally in determining whether the testimony of an expert witness at trial satisfies the false evidence language of section 1473." (*Richards II*, *supra*, 63 Cal.4th at p. 311 [expert recanted trial testimony].)

As in all habeas matters, the petitioner bears the burden of proving, by a preponderance of the evidence, the facts that establish a basis for relief under Penal Code section 1473, subdivision (b)(1). (*Rogers*, *supra*, 7 Cal.5th at pp. 833-834.)

4420.1-Failure to pursue appeal precludes habeas writ as substitute 7/20

Because petitioner had a right of appeal from the judgment and sentence, the failure to pursue a remedy by appeal, or to offer any legal cause why relief from such failure should be granted, requires denial of the petition. "The general rule is that 'habeas corpus cannot serve as a substitute for appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.' " (*In re Walker* (1974) 10 Cal.3d 764, 773, citing *In re Dixon* (1953) 41 Cal.2d 756, 759 (*Dixon*); see also *In re Clark* (1993) 5 Cal.4th 750, 765.)

> Proper appellate procedure thus demands that, absent strong justification, issues that could be raised on appeal must initially be so presented, and not on habeas corpus in the first instance. Accordingly, an unjustified failure to present an issue on appeal will generally preclude its consideration in a postconviction petition for a writ of habeas corpus.

(*In re Harris* (1993) 5 Cal.4th 813, 829 (*Harris*); see also *In re Mazoros* (1977) 76 Cal.App.3d 50, 54-55.) The *Dixon* rule, prohibiting habeas corpus as a substitute for appeal, is consistent with legislative intent in establishing an elaborate appellate system. (*Harris*, *supra*, 51 Cal.4th at p. 827.) More importantly, an appeal provides the court with a full record of proceedings below while a petition for writ of habeas corpus is based upon mere allegations of fact. (*Ibid*.) Finally, the requirement that an appeal be prosecuted in a timely fashion insures fairness to the parties as compared to the much more lenient habeas corpus standard prohibiting "substantial delay." (*Id*. at pp. 827-828.)

> By insisting on presentation of claims on appeal if reasonably possible, the *Dixon* rule speeds resolution of claims, avoids delay, and encourages the finality of judgments. Prompt presentation on appeal makes sense because the evidence is relatively fresh; "[i]t would obviously be improper to permit a collateral attack because of claimed errors in the determination of the facts after expiration of the time for appeal when evidence may have disappeared and witnesses may have become unavailable." ([*Dixon*, *supra*, 41 Cal.2d] at p. 761.) [T]he *Dixon* rule is consistent with the concept of habeas corpus as an extraordinary remedy available in those infrequent and unusual situations in which regular appellate procedures prove inadequate. In short, a litigant is not entitled to raise an issue on habeas corpus after having failed to raise the same issue on direct appeal.

(*In re Reno* (2012) 55 Cal.4th 428, 490; but see *In re Hampton* (2020) 48 Cal.App.5th 463, 474 [failure to raise issue on appeal excused because of ineffective assistance of appellate counsel].)

4420.2-Argument rejected on appeal cannot be raised again by habeas corpus 12/18

Courts should summarily rejected petitions for writ of habeas corpus that attempt to raise issues already raised and decided on direct appeal. Repeatedly, the courts have held that habeas corpus will not serve as a second appeal. (*In re Harris* (1993) 5 Cal.4th 813, 825-826; *In re Waltreus* (1965) 62 Cal.2d 218, 225 (*Waltreus*); but see *In re Sims* (2018) 27 Cal.App.5th 195, 206 [issue related to but not identical to one raised on appeal.) "There may be no more venerable a procedural rule with respect to habeas corpus than what has come to be known as the *Waltreus* rule; that is, legal claims that have previously been raised and rejected on direct appeal ordinarily cannot be reraised in a collateral attack by filing a petition for a writ of habeas corpus." (*In re Reno* (2012) 55 Cal.4th 428, 476.)

> We begin with the state's powerful interest in the finality of judgments. This interest is particularly strong in criminal cases, for "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." … [¶] " 'No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.' "

(*In re Harris*, *supra*, at p. 831, internal citations omitted.)

> The *Waltreus* rule is thus consistent with the very nature of habeas corpus; that is, an extraordinary remedy applicable when the usual channels for vindicating rights—trial and appeal—have failed. If an issue has been raised and rejected first at trial and then on appeal, no reason exists to permit what amounts to a third bite of the apple. Indeed, in this age of dramatically increased filings and shrinking judicial resources, the justification for the *Waltreus* rule retains continued, if not enhanced, power, and the rule has been cited consistently and continuously since 1965 when *In re Waltreus* was first decided.

(*In re Reno*, *supra*, 55 Cal.4th at p. 477.)

4420.3-There are limited exceptions to the *Waltheus* and *Dixon* procedural bars 9/20

There are four exceptions to the *Waltreus* and *Dixon* rules prohibiting the use of habeas corpus to litigate claims that were made, or could have been pursued, by way of direct appeal. (*In re Reno* (2012) 55 Cal.4th 428, 477-478, 490-491.) "Just as a petitioner bears the burden in a habeas corpus petition to allege why the petition is timely … the petitioner must also allege why a claim raised and rejected on appeal is not barred by the *Waltreus* rule." (*Id*. at p. 481.)

The first traditional exception is for the claimed violation of a petitioner's "fundamental constitutional rights." This exception is limited to constitutional defects which create the risk of having convicted an innocent person. (*In re Miller* (2017) 14 Cal.App.5th 960, 978-979 [California Supreme Court subsequent reinterpretation of penal statute excluding petitioner's conduct from scope overcame *Waltreus* bar].) Hence, habeas corpus following an appeal can not be used for procedural or evidentiary issues, including Fourth Amendment search and seizure issues. (*In re Harris* (1993) 5 Cal.4th 813,. 829-830 (*Harris*); *In re Sterling* (1965) 63 Cal.2d 486, 487-488.) This exception was narrowed in *Harris*, *supra*, 5 Cal.4th 813, in view of the development of procedures for review of claims of incompetence of counsel:

> Thus, courts will presume that a litigant received sufficient review of his or her legal claims, both constitutional and otherwise, on direct appeal. Where an issue was available on direct appeal, the mere assertion that one has been denied a "fundamental" constitutional right can no longer justify a postconviction, postappeal collateral attack, especially when the possibility exists of raising the issue via the ineffective assistance of counsel doctrine. Only where the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process, is an opportunity for a third chance at judicial review (trial, appeal, postappeal habeas corpus) justified.

(*Id.* at p. 834.)

The second exception to the prohibition of habeas corpus following resolution by appeal is for cases in which the trial court was entirely without jurisdiction over the subject matter or the parties resulting in a void judgment. (*Harris*, *supra*, 5 Cal.4th at p. 836.)

The third exception is made when the trial court acted in excess of its jurisdiction. But this exception is applied only where there is no material factual dispute, and the judgment may be corrected without redetermining any of the facts underlying the claim. (*Harris*, *supra*, 5 Cal.4th at pp. 838-841.)

A final exception exists for cases in which the argument was previously raised by the petitioner and rejected by the court on direct appeal, but a later change in the law affects the petitioner. (*Harris*, *supra*, 5 Cal.4th at p. 841; *In re Saldana* (1997) 57 Cal.App.4th 620,627-628.) "Where a decision clarifies the kind of conduct proscribed by a statute, a defendant whose conviction became final before that decision 'is entitled to post-conviction relief upon a showing that his [or her] conduct was not prohibited by the statute' as construed in the decision." (*In re Scroggins* (2020) 9 Cal.5th 667, 673, citing *People v. Mutch* (1971) 4 Cal.3d 389, 392.)

4430.1-Repetitive, successive and piecemeal habeas petitions prohibited 7/20

A court should not consider a petition for writ of habeas corpus based on grounds that could have been raised on appeal but was not. (*In re Harris* (1993) 5 Cal.4th 813, 829; *In re Dixon* (1953) 41 Cal.2d 752, 759.) Similarly, courts do not consider repetitive or successive petition on grounds that were raised or should have been raised in earlier habeas petitions. (*In re Reno* (2012) 55 Cal.4th 428, 496-497 (*Reno*), described as the *Miller* rule because derived from *In re Miller* (1941) 17 Cal.2d 734, 735.) "The *Miller* rule is now, and for many years has been, black letter law applicable to habeas corpus petitions in this state" (*Reno*, *supra*, 55 Cal.4th at p. 496.) "It has long been the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected." (*In re Clark* (1993) 5 Cal.4th 750, 767 (*Clark*); see also *In re Sims* (2018) 27 Cal.App.5th 195, 206; *In re Martinez* (2009) 46 Cal.4th 945, 956; but see, *In re Bolton* (2019) 40 Cal.App.5th 611, 620 [successive petition allowed because of change in applicable law].)

Similarly, there is the *Clark/Horowitz* rule. (*Reno*, *supra*, 55 Cal.4th at p. 501, derived from the above-cited *Clark* case and *In re Horowitz* (1949) 33 Cal.2d 534, 546-547.) "The court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment. [Citations.]" (*Clark*, *supra*, 5 Cal.4th at pp. 767-768; see also *In re Martinez*, *supra*, 46 Cal.4th at p. 956) "In this state a defendant is not permitted to try out his contentions piecemeal by successive proceedings attacking the validity of the judgment against him." (*In re Connor* (1940) 16 Cal.2d 701, 705; accord *Clark*, *supra*, 5 Cal.4th at p. 770.) "We have consistently held that an issue which is raised in the trial court, and upon which conflicting testimony develops, cannot serve as a basis for habeas corpus; we cannot sanction piecemeal presentation or split adjudication of such issues between trial and post-conviction procedure." (*In re Shipp* (1965) 62 Cal.2d 547, 552.) "A successive petition presenting additional claims that could have been presented in an earlier attack on the judgment is, of necessity, a delayed petition." (*Clark*, *supra*, at p. 770; but see *In re Hampton* (2020) 48 Cal.App.5th 463, 474 [failure to raise issue on appeal excused because of ineffective assistance of appellate counsel].)

There are exceptions to these related procedural bars to filing successive habeas petitions.

> [A] petitioner can avoid the preclusive effect of the *Miller* rule if he can allege facts showing that a claim implicates a fundamental error of constitutional magnitude, that he is actually innocent, that the jury was presented with a grossly misleading profile of him at the

> penalty phase, or that he was convicted or sentenced under an invalid statute. A claim of ineffective assistance of prior habeas corpus counsel may also excuse compliance with the *Miller* rule. (*Clark*, at p. 780.)

(*Reno*, *supra*, 55 Cal.4th at p. 497; see also p. 504 [these exceptions apply to *Clark/Horowitz* rule also].) Conclusory allegations regarding these exceptions, however, are inadequate to satisfy the initial pleading burdens of a habeas petitioner. (*Id*. at p. 500.)

4440.1-Habeas petition must be timely filed 9/20

A petition for writ of habeas corpus must be filed in a timely fashion. (*In re Reno* (2012) 55 Cal.4th 428, 459 (*Reno*); *In re Clark* (1993) 5 Cal.4th 750, 782-783 (*Clark*); *In re Sanders* (1999) 21 Cal.4th 697, 703.) "[E]ven constitutional error may be waived by unjustified or unexplained delay." (*In re Douglas* (2011) 200 Cal.App.4th 236, 245 (*Douglas*)) "The burden is one placed even on indigent petitioners appearing in propria persona." (*Clark*, *supra*, 5 Cal.4th at p. 765.)

> Like the rule barring piecemeal presentation of claims, the requirement that a petitioner explain and justify delayed presentation of habeas corpus claims reflects recognition that a substantial delay will prejudice the respondent's ability to answer the petition, respects the importance of finality of judgments to the state, and recognizes the difficulty of retrial in the event that a judgment is set aside on habeas corpus many years after the conviction.

(*Id*. at pp. 786-787.) Similarly, timeliness rules also apply to "gap delay" when a claim is raised in a higher California court after denial in a lower court. (*Robinson v. Lewis* (2020) 9 Cal.5th 883, 901-902 [gap up to 120 days would never be considered substantially delayed].)

"[T]o avoid the bar of untimeliness with respect to each claim, the *petitioner* has the burden of establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness." (*In re Robbins* (1998) 18 Cal.4th 770, 780 (*Robbins*), italics in original; see also *Reno*, *supra*, 55 Cal.4th at p. 460; *Douglas*, *supra*, 200 Cal.App.4th at pp. 242-243.) "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." (*Robbins*, *supra*, at p. 780; see also *In re Sims* (2018) 27 Cal.App.5th 195, 205; *In re Lucero* (2011) 200 Cal.App.4th 38, 44.) "A petitioner bears the burden of *establishing*, through his or her specific allegations, which may be supported by any relevant exhibits, the absence of substantial delay." (*Robbins*, *supra*, at p. 780, original italics; see also *Catlin v. Superior Court* (2011) 51 Cal.4th 300, 307 [unreasonable delay in seeking post-conviction discovery under Pen. Code § 1054.9 may render subsequent habeas petition untimely]; accord *In re Steele* (2004) 32 Cal.4th 682, 692, fn. 2.) An unreasonable mistake of law is insufficient to explain and excuse delay in filing a habeas petition. (*Douglas*, *supra*, at p. 244; but see *In re Hampto*n (2020) 48 Cal.App.5th 463, 476 [petitioner acted promptly after discovering case authority which supported grounds for reversal which his appellate counsel inexplicably failed to cite].)

A habeas petitioner should not be allowed to delay the filing a petition to bolster the grounds for relief or to develop additional claims. "A petitioner who is aware of facts adequate to state a prima facie case for habeas corpus relief should include the claim based on those facts in the petition even if the claim is not fully 'developed.' " (*Clark*, *supra*, 5 Cal.4th at p. 781.)

> The delay will not be deemed justified … unless the petitioner demonstrates that there was good reason to believe that further investigation would lead to facts supportive of a clearly meritorious claim. Nor will the delay be deemed justified if, notwithstanding the existence of substantial, potentially meritorious claims, the petitioner delays filing the petition in order to investigate potential claims of questionable merit.

(*Id*. at p. 781, fn. 17.)

There are very few exceptions to these rules. "[A] petitioner who files an untimely habeas corpus petition may nonetheless be entitled to relief upon a showing 'that a *fundamental* miscarriage of justice occurred as a result of the proceedings leading to conviction and/or sentence.' (*In re Clark*, *supra*, 5 Cal.4th at p. 797.)" (*Catlin v. Superior Court*, *supra*, 51 Cal.4th at p. 307, italics in original.)

> A claim that is substantially delayed without good cause, and hence is untimely, nevertheless will be entertained on the merits if the petitioner demonstrates (i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute.

(*Robbins*, *supra*, 18 Cal.4th at pp. 780-781.) "The petitioner bears the burden to plead and then prove all of the relevant allegations" related to the issue of delay and these exceptions. (*Reno*, *supra*, 55 Cal.4th at p. 460.)

Finally, "unreasonable delay also bars consideration of a petition for writ of habeas corpus under the doctrine of laches. [Citation.] Application of the doctrine is appropriate where the delay is unreasonable and has prejudiced respondent." (*Douglas*, *supra*, 200 Cal.App.4th at p. 245.) Prejudice for purposes of applying the doctrine of laches refers both to the People's ability to respond to the petitioner's allegations, as well as to the ability to retry the case if that is the relief sought. (*Id*. at pp. 245-246.)

4450.1-Habeas jurisdiction limited to persons in actual or constructive custody 8/19

"Our state Constitution guarantees that a person improperly deprived of his or her liberty has the right to petition for a writ of habeas corpus." (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) Penal Code section 1473, subdivision (a) limits habeas relief to a "person *unlawfully imprisoned or restrained of his liberty,* under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." (Italics added.) Thus, the court lacks jurisdiction to grant habeas relief for a person who is not "in custody," whether actual or constructive. (*In re Douglas* (2011) 200 Cal.App.4th 236, 247.) " 'Through a habeas corpus proceeding, a court may grant relief from various forms of constructive custody, as well as from physical restraints.' [Citation.]" (*In re Azurin* (2001) 87 Cal.App.4th 20, 23.) Appellate cases have expanded the writ's application so "that a person is in custody constructively if he may later lose his liberty and be eventually incarcerated.' [Citation.]" (*Ibid*.; see, e.g., *In re White* (2019) 34 Cal.App.5th 933, 944 [parolee].) "When a petitioner is in custody at the time the petition is filed, the petitioner's later discharge does not deprive the trial court of jurisdiction because, once acquired, the

court's jurisdiction continues throughout the proceeding and any appeals." (*In re Hernandez* (2019) 33 Cal.App.5th 530, 542.) But where the petitioner is "neither actually nor constructively restrained, such writ would be inappropriate." (*Williams v. Department of Motor Vehicles* (1969) 2 Cal.App.3d 949, 952.)

> The critical factor in determining whether a petitioner is in actual or constructive state custody, then, is not necessarily the name of the governmental entity signing the paycheck of the custodial officer in charge, or even if the petitioner is within the geographic boundaries of the State of California. Instead, courts should realistically examine the nature of a petitioner's custody to determine whether it is currently authorized in some way by the State of California.

(*People v. Villa* (2009) 45 Cal.4th 1063, 1073.)

Therefore, if the petitioner "is not in prison or on probation or parole or otherwise in constructive custody, the remedy of habeas corpus is not available to him—and it is immaterial that lingering noncustodial collateral consequences are still attached to his conviction." (*Mendez v. Superior Court* (2001) 87 Cal.App.4th 791, 796.) Thus, for example, that a California criminal conviction, for which sentence was imposed and fully expired, later forms the basis for federal deportation proceedings does not satisfy the constructive custody test. (*People v. Kim* (2009) 45 Cal.4th 1078, 1108; *People v. Villa*, *supra*, 45 Cal.4th at p. 1072; see *People v.* Aguilar (2014) 227 Cal.App.4th 60, 68; People *v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1149; see also *Maleng v. Cook* (1989) 490 U.S. 488, 490-494 [federal law in accord].) "[F]or habeas purposes, custody on a later case does not allow an earlier, expired conviction to be collaterally challenged, even if it is used to enhance a later case." (*In re Douglas*, *supra*, 200 Cal.App.4th at p. 249.)

Finally, neither the prospect of the loss of a medical license nor the risk of future custody in the event a convicted defendant fails to register as a sex offender proves constructive custody as required in a habeas corpus action. (*In re Stier* (2007) 152 Cal.App.4th 63, 82-83; *In re Douglas*, *supra*, 200 Cal.App.4th at pp. 247-249.)

4470.1-Factual allegations of writ must be sworn & not hearsay 9/09

"It is the law of this state that a habeas corpus petition must reveal a 'prima facie case' for relief. [Citation.] Such petition, or affidavit, based on information and belief is 'hearsay and must be disregarded.' [Citation.]" (*People v. McCarthy* (1986) 176 Cal.App.3d 593, 597.) " 'It has long been the rule of California that factual allegations on which a petition for habeas corpus are based must be "in such form that perjury may be assigned upon the allegations if they are false." [Citation.]'… ." (*Ibid*.)

4480.1-Discovery can be ordered after issuance of an OSC 12/19

Generally, court-ordered discovery is unavailable in habeas corpus proceedings "unless and until a court issues an order to show cause." (*People v. Superior Court (Morales)* (2017) 2 Cal.5th 523, 528; distinguish Pen. Code, § 1054.9.) But once an order to show cause has issued, courts have discretion to order discovery as to issues on which the petition has stated a prima facie case. (See *In re Scott* (2003) 29 Cal.4th 783, 815 (*Scott*)[discovery order following order to show cause was not abuse of discretion]; *Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1243 [discovery following order to show cause "must be relevant to the issues upon which the petition

states a prima facie case for relief"].) The same principles apply to discovery whether ordered on behalf of the People or the petitioner. (*Scott*, *supra*, 29 Cal.4th at p. 814.)

The scope of habeas discovery after issuance of an order to show cause is not governed by either criminal or civil rules. Instead, the standard is simply that the court make "a fair discovery rule" under the circumstances of the case.

> The precise nature and scope of discovery following an order to show cause "has generally been resolved on a case-by-case basis." (*Scott*, *supra*, 29 Cal.4th at p. 813.) Habeas corpus "is a special proceeding and not entirely analogous to either [civil or criminal proceedings]." (*Id*. at p. 815, fn. 7.) Thus, the statutory provisions governing discovery in criminal trials do not apply to habeas corpus matters (*id*. at p. 813), "although they may provide guidance in crafting discovery orders on habeas corpus" ([*People v. Superior Court (Pearson)* (2010) 48 Cal.4th [564] at p. 572). Nor has our Supreme Court indicated that the civil discovery scheme governs discovery in habeas proceedings. Instead, the Court has tasked trial courts with "fashion[ing] a fair discovery rule." (*Scott*, at p. 814, (*Jimenez v. Superior Court* (2019) 40 Cal.App.5th 824, 831 (*Jimenez*).) Nevertheless, the criminal discovery rules (Pen. Code, § 1054 et seq.) are a logical place to look in fashioning a fair discovery order in a habeas proceeding. (*Id*. at p. 832, citing *Scott*, *supra*, 29 Cal.4th at p. 814.) But "we conclude that under *Scott*, a trial court has discretion to exceed the bounds of the criminal discovery scheme in fashioning a 'fair' discovery rule." (*Jimenez*, *supra*, 40 Cal.App.5th at p. 833.)

For example, unlike a criminal trial where the attorney work-product privilege is limited to "core" materials (Pen. Code, § 1054.6), the privilege for both "core" and "qualified" work-product material, as defined in Code of Civil Procedure section 2018.030, may be claimed in habeas proceedings. (*Jimenez*, *supra*, 40 Cal.App.5th at pp. 833-836.) "We therefore hold that where, as here, the discovery sought exceeds the scope of the criminal discovery scheme, the qualified work-product protection is available in habeas corpus proceedings following an order to show cause" (*Id*. at p. 836 [upholding qualified work-product privilege as to defense interviews of jurors sought by prosecution as premature].)

Like any other discovery order, a discovery order in a habeas action is reviewed for abuse of discretion, unless the legality of the order turns on a question of law which is reviewed de novo by the appellate court. (*Jimenez*, *supra*, 40 Cal.App.5th at p. 829.)

4500.1-Out-of-court statements offered for truth are hearsay 3/17

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a); see also *People v. Nelson* (2012) 209 Cal.App.4th 698, 707.) "Except as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200, subd. (b); see also *Correa v. Superior Court* (2002) 27 Cal.4th 444, 451 ["In general, hearsay evidence is inadmissible."].) A "statement" covered by the hearsay rule "means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code § 225; see, e.g., *People v. Covarrubias* (2016) 1 Cal.5th 838, 886 [witness pointing in response to investigator's inquiry was hearsay].) But the hearsay rule does not apply to nonverbal, nonassertive or emotional conduct or behavior. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1161-1162.) Nor does the hearsay rule apply to out-of-court statements not offered for the truth of the content of the statement. (Law Revision Commission Comments to Evid. Code § 1200.) "Out-of-court statements

that are not offered for their truth are not hearsay under California law … .” (*People v. Ervine* (2009) 47 Cal.4th 745, 775.) Sometimes a question can contain a “statement” “offered for its truth” under the hearsay rule. (See, e.g., *People v. Reyes* (2008) 159 Cal.App.4th 214, 219-220.)

Hearsay evidence may be admissible if it comes within an exception. (*People v. Nelson*, *supra*, 209 Cal.App.4th at p. 707.) These exceptions are mainly statutory, such as those found in the Evidence Code (§ 1220 et seq.), although the courts have a “little used” “power to create new exceptions to the hearsay rule not found in the Evidence Code.” (*In re Cindy L.* (1997) 17 Cal.4th 15, 25-27; see also *People v. Ayala* (2000) 23 Cal.4th 225, 268.) But the Due Process Clause does not require “admission of any hearsay statement made under circumstances demonstrating some trustworthiness or reliability” proffered by a criminal defendant. (*People v. Garcia* (2005) 134 Cal.App.4th 521,539.) Certainly, “ ‘[a] defendant does not have a constitutional right to the admission of unreliable hearsay statements.’ ” (*People v. Ayala*, *supra*, 23 Cal.4th at p. 269.) in short, “[a] defendant has no constitutional right to present evidence that contains hearsay and is lacking in foundation or other indicia of reliability.” (*People v. Williams* (2016) 1 Cal.5th 1166, 1198.)

4500.2-Multiple layers of hearsay 11/18

Sometime the proffered hearsay consists of several layers of hearsay each being offered for their truth. “The admission of multiple hearsay is permissible where each hearsay level falls within a hearsay exception.” (*People v. Williams* (1997) 16 Cal.4th 153, 199; see also *People v. Anderson* (2018) 5 Cal.5th 372, 403; *People v. Riccardi* (2012) 54 Cal.4th 758, 831.) Evidence Code section 1201 states: “A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule.” In other words, “multiple hearsay is admissible only ‘if each hearsay layer separately meets the requirements of a hearsay exception.’ (*People v. Arias* (1996) 13 Cal.4th 92, 149.)” (*People v. Roldan* (2005) 35 Cal.4th 646, 714, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Nelson* (2012) 209 Cal.App.4th 698, 707.)

4500.3-Translators do not add a layer of hearsay 12/10

Assuming there is an applicable hearsay exception as between the hearsay declarant’s out-of-court statement and the testifying witness, it is generally not a problem that an interpreter was used to translate for the hearsay declarant. In short, the use of a translator does not create an added layer of hearsay requiring a hearsay exception. (*Correa v. Superior Court* (2002) 27 Cal.4th 444, 453-463 (*Correa*).)

> Employing an image that we find useful in understanding the issue before us, many courts state that translation simply does not add a layer of hearsay when a translator acts as a “language conduit” so as to cause the statement to be fairly attributable to the declarant. In most cases, these courts hold, the statement simply is considered to be the statement of the original declarant, and not of the translator, so that no additional level of hearsay is added by the translation.

(*Id*. p. 455.) In adopting the “language conduit” rational, the Supreme Court recognizes it applies to a party (criminal defendant) and a non-party (witness) hearsay declarant. “This concept of the

language conduit has been applied in cases in which it is a defendant who has made an admission or confession through a translator." (*Id*. at p. 456; see also *People v. Torres* (1989) 213 Cal.App.3d 1248, 1258-1259 [using the authorized agent of a party hearsay exception under Evid. Code § 1222 to admit translated statement of a defendant].) "Although some of the cases we have discussed speak of the translator as an agent of a party, the language-conduit concept is not limited to the hearsay exception applicable to the statements of the agent of a party." (*Correa*, *supra*, at p. 457.)

The California Supreme Court has also adopted, from other courts, a test for determining when the "language conduct" theory can be used to admit a translated hearsay statement. "The language-conduit theory calls for a case-by-case determination whether, under the particular circumstances of the case, the translated statement fairly may be considered to be that of the original speaker. (*Correa*, *supra*, 27 Cal.4th at p. 457.) Among the factors the court should consider in determining whether the interpreter's statements should be attributed to the declarant, include who supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, whether actions taken subsequent to the conversation or other events were consistent with the statements as translated. (*Id*. at p. 458.) Only when the particular facts of a case cast significant doubt upon the accuracy of a translated statement, should the translator or a witness who heard and understood the untranslated statement be available for testimony and cross-examination at the hearing before the statement can be admitted. (*Id*. at p. 459; see, e.g., *People v. Pantoja* (2004) 122 Cal.App.4th 1, 12 [no foundational facts offered for who helped non-English speaking murder victim write domestic violence restraining order declaration].)

"In sum, we agree with the general view, expressed in the majority of recent cases we have discussed above, that if a contemporaneously translated statement fairly may be attributed to the declarant under the particular circumstances of the case, applying the factors we have outlined, the translation does not add a layer of hearsay." (*Correa*, *supra*, 27 Cal.4th at p. 463.)

4500.4-Hearsay affidavits are inadmissible over objection 9/09

It is elementary that inadmissible hearsay must be stricken on objection and must be disregarded by the court. (*Ziegler v. Reuze* (1945) 27 Cal.2d 389, 398-399; *Houghtaling v. Superior Court* (1993) 17 Cal.App.4th 1128, 1149-1150.) Thus, defense declarations and affidavits offered to prove disputed facts are hearsay and are inadmissible under Evidence Code section 1200. Such a declaration of a defendant was offered in *People v. Williams* (1973) 30 Cal.App.3d 502, in support of a pretrial motion. The appellate court ruled: "It is a commonly known rule that no witness, even a defendant in a criminal case, will be permitted to testify concerning a matter while refusing cross-examination as to the same matter. In such situations the constitutional privilege against self-incrimination as to the subject matter of his direct examination is deemed waived." (*Id.* at p. 510.)

Affidavits or declarations may not be used in evidence unless permitted by statute, by stipulation of the parties, or by failure to object. (*Estate of Fraysher* (1956) 47 Cal.2d 131, 135; *Houghtaling v. Superior Court*, *supra*, 17 Cal.App.4th at p. 1149-1150; *People v. Dickinson* (1976) 59 Cal.App.3d 314, 319.) Such affidavits or declarations are hearsay because they are prepared without the opportunity to cross-examine the affiant. (*Windigo Mills v. Unemployment Insurance Appeals Board* (1979) 92 Cal.App.3d 586, 597.) Even in situations where an affidavit or declaration may be an acceptable method for the defense to make factual allegations, "the trial court retains the discretion to permit the prosecutor to cross-examine a declarant [and] [i]f the declarant refuses to

testify or answer, the trial court may strike the declaration. (*People v. Estrada* (2003) 105 Cal.App.4th 783, 794.)

4500.5-A hearsay declarant can be impeached with hearsay and other matters 3/20

When a hearsay statement is properly admitted for its truth, the credibility of the hearsay declarant (who in most instances is unavailable for cross-examination) may be challenged in a number of ways. Evidence Code section 1202 states in pertinent part:

> Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing.

" 'The purpose of section 1202 is to assure fairness to the party against whom hearsay evidence is admitted without an opportunity for cross-examination.' [Citation.]" (*People v. Curl* (2009) 46 Cal.4th 339, 361.)

> [Evidence Code] Section 1202 [provides] a uniform rule permitting a hearsay declarant to be impeached by inconsistent statements in all cases, whether or not the declarant has been given an opportunity to explain or deny the inconsistency. If the hearsay declarant is unavailable as a witness, the party against whom the evidence is admitted should not be deprived of both his right to cross-examine and his right to impeach. … If the hearsay declarant is available, the party electing to use the hearsay of such a declarant should have the burden of calling him to explain or deny any alleged inconsistencies.

(Law Revision Commission Comments to Evid. Code, § 1202.)

Evidence Code section 1202 does not prohibit the proponent of the hearsay declarant's statement from also impeaching such statement with extrinsic evidence. (*People v. Osorio* (2008) 165 Cal.App.4th 603, 616-617 ["Read together [Evid. Code, §§ 785 and 1202] allow a prosecutor to use a prior inconsistent statement to partially impeach a hearsay statement the prosecutor had previously introduced"]; see also *People v. Carkhum-Murphy* (2019) 41 Cal.App.5th 289, 296-297;.) In some instances, Evidence Code section 1202 also permits a criminal defendant to admit their own inconsistent hearsay statements to rebut hearsay statements (e.g. admission of a party) introduced by the prosecution. (See *People v. Baldwin* (2010) 189 Cal.App.4th 991, 1003-1005.) The only difference when impeaching a hearsay declarant with a prior inconsistent statement, in contrast to a testifying witness, is that the prior inconsistent statement cannot be used to prove the truth of the matter contained within such inconsistent statement. (*Ibid*.; see also *People v. Ross* (1979) 92 Cal.App.3d 391, 406; distinguish Evid. Code, §1235.)

In addition to using prior inconsistent statements, the credibility of a hearsay declarant can be impeached like any other witness under Evidence Code ,section 780. (*People v. Marquez* (1979) 88 Cal.App.3d 993, 997-998 [police officer's testimony concerning a hearsay declarant's (defense witness testified at preliminary hearing but unavailable for trial) statements to him about threats on his life properly admitted under Evid. Code, § 1020 as evidence of "bias, interest, or other motive"].) A hearsay declarant, including one who is a non-testifying defendant, may also be impeached with prior felony convictions under Evidence Code section 788. (*People v. Carkhum-*

Murphy, *supra*, 41 Cal.App.5th at pp. 295-296; *People v. Little* (2012) 206 Cal.App.4th 1364, 1367, 1375-1377; *People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1449-1452.)

As with any proffered impeachment evidence, the court can decline to admit impeachment evidence regarding the hearsay declarant under Evidence Code section 352. (Law Revision Commission Comments to Evid. Code, § 1202.)

4510.1-Statements not offered for their truth are not hearsay 4/20

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) "In contrast,"[o]ut-of-court statements that are not offered for their truth are not hearsay under California law [citations], nor do they run afoul of the confrontation clause. (See *Crawford v. Washington* (2004) 541 U.S. 36, 60, fn. 9.)" (*People v. Ervine* (2009) 47 Cal.4th 745, 775-776 [crime report admissible to establish officer's state of mind and that he was acting in the performance of his duties]; see also *People v. Cowan* (2010) 50 Cal.4th 401, 472 ["defendant's offer to talk to Detective Fraley was not hearsay but verbal conduct consisting of a proposal to perform an act"]; *People v. Mayfield* (1997) 14 Cal.4th 668, 751 [witness's out-of-court statement to officer that the defendant possessed a gun "was not admissible to prove that defendant in fact possessed a gun" but "was admissible for the nonhearsay purpose of establishing [the officer's] state of mind and the appropriateness of his ensuing conduct" to rebut a charge of excessive force].) In general, therefore, commands or requests are not characterized as hearsay. (*People v. Clark* (2016) 63 Cal.4th 522, 592; see, e.g., *People v. Curl* (2009) 46 Cal.4th 339, 361-362 [directive to tell someone to get rid of evidence "was not hearsay but simply verbal conduct consisting of a directive that was neither inherently true nor false"]; *People v. Venegas* (2020) 44 Cal.App.5th 32, 35-37 [text by codefendant admissible for nonhearsay purpose of showing consciousness of guilt as he and defendant were trying to sell gun used in murder]; but see *People v. Crew* (2003) 31 Cal.4th 822, 840 ["If you don't hear from me in two weeks, send the police." properly admitted under state of mind hearsay exception].)

" 'When evidence that certain words were spoken … is admitted to prove that the words were uttered and not to prove their truth, the evidence is not hearsay. [Citation.]' [Citation.]" (*People v. Armstrong* (2019) 6 Cal.5th 735, 786 [murder victim's purported racial slurs directed at defendant's group should have been admitted as non-hearsay to prove defendant's motive was revenge rather than rape or robbery as alleged by proxecution].) Thus, a statement or document that does "not consist of declarative assertions to be assessed as truthful or untruthful," but rather circumstantial evidence of some other fact in issue, is not hearsay. (*People v. Valdez* (2012) 201 Cal.App.4th 1429, 1437; see *People v. Myers* (2014) 227 Cal.App.4th 1219, 1227 [video showing robbery victim holding up hands in reaction to defendant's actions admissible for nonhearsay purpose of proving defendant used fear to commit the crime].) In addition, "an out-of-court statement can be admitted for the nonhearsay purpose of showing that it imparted certain information to the hearer, and that the hearer, believing such information to be true, acted in conformity with such belief." (*People v. Montes* (2014) 58 Cal.4th 809, 863.)

In *People v. Harris* (2013) 57 Cal.4th 804, a murder victim's letters to her boyfriend were admitted over the defense hearsay objection as relevant to prove she would not have had consensual sex with the defendant as he claimed. "Much of what Manning wrote, such as her future plans, was not hearsay in the first place because the statements were offered solely as circumstantial evidence

of her then state of mind, specifically, her feelings for Hill, and were not offered to prove the truth of what she wrote." (*Id*. at p. 843 [the California Supreme Court also held other statements of fact within the victim's letters were properly admitted under the state of mind exception to the hearsay rule]; see also *People v. Henriquez* (2017) 4 Cal.5th 1, 31-32 [murdered wife's statements to friend about defendant's criminal behavior admissible to prove defendant's motive for killing her]; *People v. Brooks* (2017) 3 Cal.5th 1, 39 [murder victim's statement to friend that defendant threatened to kill her properly admitted for non-hearsay purpose of showing victim's fear of defendant]; *People v. Sandoval* (2015) 62 Cal.4th 394, 428 [gang leader's meetings notes chiding member for not killing more people properly admitted for non-hearsay purpose to prove gang member defendant acted in conformity with the leader's directive to kill more people shortly thereafter].)

In addition, an out-of-court statement offered because it is false, leading to an inference of a consciousness of guilt by the declarant, is not hearsay because, by definition it is not being offer for its truth. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 157.) " 'A statement is not hearsay when offered to show the statement is false.'[Citations]" (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 774.)

But, "an out-of-court statement is not made admissible simply because its proponent states a theory of admissibility not related to the truth of the matter asserted. … 'The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute.' [Citation.]" (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1204; see also *People v. Montes*, *supra*, 58 Cal.4th at p. 863.)

Finally," '[i]f a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence.' [Citation.]" (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1069; see also *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316 ["Documents not offered for the truth of the matter asserted are, by definition, not hearsay."].) "Written or spoken words offered as original evidence rather than for their truth are generally referred to as 'operative facts.' [Citations.]" (*People v. Smith* (2009) 179 Cal.App.4th 986, 1003.)

4510.2-Fresh complaint of victim admissible as nonhearsay 9/19

Even if not admissible for its truth (e.g., spontaneous or excited utterance hearsay exception), evidence of the circumstances surrounding a victim's initial report of the crime often is relevant and admissible as nonhearsay under the "fresh complaint" doctrine.

> [W]e conclude that, under principles generally applicable to the determination of evidentiary relevance and admissibility, proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose—namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others—whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred. Under such generally applicable evidentiary rules, the timing of a complaint (e.g., whether it was made promptly after the incident or, rather, at a later date) and the circumstances under which it was made (e.g., whether it was volunteered spontaneously or, instead, was made only in response to the inquiry of another person) are not necessarily determinative of the admissibility of evidence of the complaint. Thus, the "freshness" of a complaint, and the "volunteered" nature of the

> complaint, should not be viewed as essential prerequisites to the admissibility of such evidence.

(*People v. Brown* (2004) 8 Cal.4th 746, 749-750, italics omitted.) "*Brown* held that evidence of a fresh complaint can sometimes be admitted for a relevant *nonhearsay* purpose." (*People v. Loy* (2011) 52 Cal.4th 46, 65.) Although not admitted for its truth, "[e]vidence admitted pursuant to this doctrine may be considered by the trier of fact for the purpose of corroborating the victim's testimony, but not to prove the occurrence of the crime. [Citation.]" (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1522; see also *People v. Manning* (2008) 165 Cal.App.4th 870, 880.) Upon objection, such evidence may be excluded under Evidence Code section 352. (*People v. Jimenez* (2019) 35 Cal.App.5th 373, 389-390 [trial court did not abuse its discretion in overruling Evid. Code, § 352 objection].)

4510.3-Computer-generated records are not hearsay 1/18

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) A "statement" can only come from "a person." (Evid. Code, § 225.) Thus, machine or computer generated information is not hearsay. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 274 [red light camera images]; *People v. Lopez* (2012) 55 Cal.4th 569, 583; see also *People v. Nazary* (2010) 191 Cal.App.4th 727, 754-755 (*Nazary*); *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1449 (*Hawkins*).) The point of distinction is whether the display or printout from the machine is reflecting information entered by human operators which may be hearsay if offered for its truth (albeit possibly covered by an exception such as for business records) or whether the information is generated by the machine, such as a computer, on its own. (*People v. Rodriguez* (2017) 16 Cal.App.5th 355, 378-379 [computer generated report defendant's ankle bracelet GPS location not hearsay]; *Nazary*, *supra*, 191 Cal.App.4th at pp. 754-755; *Hawkins*, *supra*, 98 Cal.App.4th at p. 1449.) If the latter is true, then the information is not hearsay because a machine is legally incapable of making a "statement." (*Nazary*, *supra*, 191 Cal.App.4th at p. 754.)

Instead, "the evidentiary issues concerning … machine-generated evidence are foundational, and … the test of admissibility is whether the machine was operating properly at the time of the reading, and … the mechanical recordings of information are subject to impeachment through evidence of machine imperfections or by cross-examination of the expert who explained or interpreted the information in the device. (*Hawkins*, *supra*, 98 Cal.App.4th at pp. 1449-1450.)" (*Nazary*, *supra*, 191 Cal.App.4th at p. 754.)

> Further, as our Supreme Court noted in *People v. Martinez* (2000) 22 Cal.4th 106, courts in California "have refused to require, as a prerequisite to admission of computer records, testimony on the 'acceptability, accuracy, maintenance, and reliability of, … computer hardware and software.' [Citation.] … [A]lthough mistakes can occur, ' "such matters may be developed on cross-examination and should not affect the admissibility of the [receipt] itself." [Citation.]' [Citations.]" (*Id*. at p. 132.)

(*Nazary*, *supra*, 191 Cal.App.4th at p. 755.) In *People v. Peyton* (2014) 229 Cal.App.4th 1063, at page 1075, for example, the appellate court held that "[b]ecause the ATM photos were computer generated, foundational testimony showing the accuracy and reliability of the photos was not required. (*People v. Martinez* (2000) 22 Cal.4th 106, 132.)"

4520.1-Admissions of a party 11/18

Evidence Code section 1220 states: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." "Evidence Code section 1220 makes a 'statement' of a party an exception to the general rule forbidding hearsay evidence when the statement is offered against that party." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 637.)

Thus, when offered by the prosecution, an out-of-court statement of the defendant is admissible as an exception to the hearsay rule pursuant to Evidence Code section 1220. (*People v. Anderson* (2018) 5 Cal.5th 372, 403.) "Although Evidence Code section 1220's exception to the hearsay rule is sometimes referred to an exception for admissions, the exception is not so limited. (*People v. Horning* (2004) 34 Cal.4th 871, 898, fn. 5.) Instead, the exception applies to all statements of the party against whom they are offered." (*People v. Rodriguez*, *supra*, 58 Cal.4th at p. 637.) But the use of the term "against" makes clear that Evidence Code section 1220 can be used by prosecution, but not the defense, to admit a defendant's hearsay statements. (*People v. Williamson* (1977) 71 Cal.App.3d 206, 213-214.)

> Admissibility into evidence of an admission by a party is an exception to the hearsay rule. In legal contemplation an admission is an extrajudicial statement by a party—in a criminal case, by the defendant. It is an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction and which only tends toward the ultimate proof of guilt. [Citations.] The theory of the admissibility of an admission is that the policy of the hearsay-exclusionary rule cannot reasonably be invoked by a party who is himself present and can testify in explanation or contradiction of the prior statement or conduct and can cross-examine the witness who testifies to the party's statement. (See Evid. Code, § 1220, Comment.)

(*People v. Wheelwright* (1968) 262 Cal.App.2d 63, 69; see also *People v. Nelson* (2012) 209 Cal.App.4th 698, 709.)

To be admissible under Evidence Code section 1220, the declarant defendant's hearsay statement "must assert facts which would have a tendency in reason either (1) to prove some portion of the proponent' cause of action, or (2) to rebut some portion of the party declarant's defense." (*People v. Allen* (1976) 65 Cal.App.3d 426, 433.)

"It is well established … that an admission, even though not in writing and signed by the defendant, may be proved by the testimony of anyone who was present and heard the declarations when they were made." (*People v. Robinson* (1969) 1 Cal.App.3d 555, 561.) That the defendant's statement cannot be recited verbatim goes to its weight, not its admissibility under Evidence Code section 1220. (*People v. Cortez* (2016) 63 Cal.4th 101, 125; *People v. Riccardi* (2012) 54 Cal.4th 758, 832.) "Nor does ambiguity regarding the meaning of a party's out-of-court statement automatically render the party admissions exception inapplicable. [Citations.]" (*People v. Cortez*, *supra*, 63 Cal.4th at p. 125.)

A defendant's statements, even if made during a joint interview with another person, are admissible against the defendant as admissions of a party under Evidence Code section 1220. (*People v. Jennings* (2010) 50 Cal.4th 616, 660; see also *People v. Horning* (2004) 34 Cal.4th 871, 898, fn. 5 ["section 1220 covers all statements of a party, whether or not they might otherwise be characterized as admissions" (italics omitted)].) A defendant's in-court outburst may qualify as an

unsolicited admission. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1404.) A defendant's testimony from the first trial ending in a mistrial can be used in the prosecution's case-in-chief in the second trial under Evidence Code section 1220 and does not violate the defendant's privilege against self-incrimination. (*People v. O'Connell* (1984) 152 Cal.App.3d 548, 553-554.) Similarly, a defendant's testimony from a former trial on another charge may be used against the defendant in a subsequent prosecution. (*People v. Valli* (2010) 187 Cal.App.4th 786, 800.) "Further, the content of defendant's testimony can be used as the basis for a new prosecution." (*Ibid*.) Even a pro per defendant's factual statements during argument in the first trial ending in mistrial, can be admitted against the defendant at the retrial. (*People v. Kiney* (2007) 151 Cal.App.4th 807, 815-816.)

4520.2-Adoptive admissions 5/20

"The law pertaining to adoptive admissions is well settled." (*People v. Jennings* (2010) 50 Cal.4th 616, 661.) "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.)

> If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.

(*People v. Preston* (1973) 9 Cal.3d 308, 313-314; see also *People v. Sample* (2011) 200 Cal.App.4th 1253, 1262.) "In determining whether a statement is admissible as an adoptive admission, a trial court must first decide whether there is evidence sufficient to sustain a finding that: (a) the defendant heard and understood the statement under circumstances that normally would call for a response; and (b) by words or conduct, the defendant adopted the statement as true." (*People v. Davis* (2005) 36 Cal.4th 510, 535; see also *People v. Dalton* (2019) 7 Cal.5th 166, 229; *People v. Charles* (2015) 61 Cal.4th 308, 322-323.)

> "[A] typical example of an adoptive admission is the accusatory statement to a criminal defendant made by a person other than a police officer, and defendant's conduct of silence, or his words or equivocal and evasive replies in response. With knowledge of the accusation, the defendant's conduct of silence or his words in the nature of evasive or equivocal replies lead reasonably to the inference that he believes the accusatory statement to be true." [Citation.]

(*People v. Silva* (1988) 45 Cal.3d 604, 623-624.)

"For the adoptive admission exception to apply, however, a direct accusation in so many words is not essential." (*People v. Fauber* (1992) 2 Cal.4th 792, 852; see also *People v. Zavala* (2008) 168 Cal.App.4th 772, 779.)

> "When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." [Citation.]

(*People v. Riel* (2000) 22 Cal.4th 1153, 1189; distinguish *People v. McDaniel* (2019) 38

Cal.App.5th 968, 997-1000 [defendant's failure to respond to text message that indirectly accused him of crime insufficient to satisfy elements of Evid. Code, § 1221].)

"[P]revious denials are not determinative when evaluating the admissibility of the statements" under the adoptive admissions exception to the hearsay rule. (*Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 85.) So too are "contradictory statements." (*People v. Mendez* (2019) 7 Cal.5th 680, 702.) In addition, "[t]he personal knowledge requirement does not apply to an evaluation of the manner in which a defendant responds to accusations." (*Id*. at p. 86.) Similarly, exculpatory statements made after the initial adoptive admission may be excluded as not being a contemporaneous response. (*People v. Anderson* (2012) 208 Cal.App.4th 851, 883-884.)

It is proper to admit the defendant's silence or refusal to respond to accusations by law enforcement as an adoptive admission "absent any indication that such refusal is an invocation of *Miranda* rights" (*People v. Hurd* (1998) 62 Cal.App.4th 1084, 1093-1094; see also *People v. Jennings*, *supra*, 50 Cal.4th at p. 664 & fn. 17; *People v. Combs* (2004) 34 Cal.4th 821, 842-843) or "unless the circumstances support an inference that the defendant was relying on the right to silence guaranteed by the Fifth Amendment" (*People v. Jurado* (2006) 38 Cal.4th 72, 116.)

Whether the defendant's conduct actually constituted an adoptive admission is a question for the jury to decide. (*People v. Mendez*, *supra*, 7 Cal.5th at p. 701.) "A court thus decides only whether a reasonable jury could so conclude on the facts before it." (*Ibid*.)

Finally, the adoptive admission exception to the hearsay rule applies only to statement offered against a "party." (Evid. Code, § 1222.) In a criminal case, the only "party" is the defendant. A crime victim is not a "party" and, thus, their silence when confronted with impeaching information cannot be admitted into evidence as an adoptive admission. (*People v. Bishop* (1982) 132 Cal.App.3d 717, 722.)

4520.3-Adoptive admissions can be in writing 5/20

An adoptive admission can also occur in writing. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131-135 [signature on motel registration card can be adoptive admission as to incriminating information entered by clerk]; but see *People v. Maki* (1985) 39 Cal.3d 707, 709-711 [insufficient foundation that defendant knew contents of document].)

> While the letter was plainly accusatory and would call for a response if the accusations were untrue and were known to defendant, there is no evidence of the circumstances under which defendant read the letter, if he had done so, and there is no evidence of defendant's reaction upon reading it. There was no showing that, by words or conduct, defendant manifested his adoption of, or belief in, the contents of [the] letter. Defendant's mere possession of it is insufficient to satisfy this requirement.

(*People v. Chism* (2014) 58 Cal.4th 1266, 1297; see also *People v. Lewis* (2008) 43 Cal.4th 415, 499 [evidence of the defendant's possession of drawings that purportedly bore his nickname and indicated he identified with the Penal Code section for robbery and considered himself a menace to society was insufficient to support a finding that he manifested a belief in what the drawings depicted].)

4520.4-Neither *Crawford* nor *Aranda-Bruton* apply to adoptive admissions 5/20

Neither the principles enunciated in *Crawford v. Washington* (2004) 541 U.S. 36, nor in *Aranda-Bruton* (*Bruton v. U.S.* (1968) 391 U.S. 123; *People v. Aranda* (1965) 63 Cal.2d 518) are implicated when evidence is properly admitted for its truth as an adoptive admission. (*People v. Jennings*, *supra*, 50 Cal.4th at pp. 662-663.)

> Moreover, it is well settled that an adoptive admission can be admitted into evidence without violating the Sixth Amendment right to confrontation "on the ground that 'once the defendant has expressly or impliedly adopted the statements of another, the statements become his own admissions, and are admissible on that basis as a well-recognized exception to the hearsay rule.' [Citation.]"

(*People v. Cruz* (2008) 44 Cal.4th 636, 672; see also *People v. Armstrong* (2019) 6 Cal.5th 735, 790.) "Being deemed the defendant's own admissions, we are no longer concerned with the veracity or credibility of the original declarant. Accordingly, no confrontation right is impinged when those statements are admitted as adoptive admissions without providing for cross-examination of the declarant." (*People v. Silva* (1988) 45 Cal.3d 604, 624; see also *People v. Mendez* (2019) 7 Cal.5th 680, 700-701.)

4520.5-Authorized admission 3/17

Evidence Code section 1222 states: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence." The appellate court in *People v. Selivanov* (2016) 5 Cal.App.5th 726 held this hearsay exception permitted the introduction of business records printout from the defendant's business.

> The People presented evidence that AJFK/EGeneration was a business owned and operated by [defendant] Selivanov and [co-defendant] Berkovich, and that Selivanov was personally involved in the day-to-day financial affairs of AJFK/EGeneration. They also presented evidence that Selivanov, with assistance from Pilyavskaya, was exclusively responsible for preparing and maintaining similar QuickBooks accounts at Ivy Academia; that Pilyavskaya had nothing to do with the AJFK/EGeneration QuickBooks; that the AJFK/EGeneration QuickBooks were found on an Ivy Academia server after Selivanov denied their existence to both [Investigator] Atkinson and [forensic accountant] Delos Santos; that an accountant prepared EGeneration's taxes in accordance with the QuickBooks; and that the accountant had no contact with Berkovich. Collectively, this evidence was sufficient to satisfy the authorized statements exception: the jury readily could infer that Selivanov either prepared the AJFK/EGeneration QuickBooks himself or directed someone else affiliated with AJFK/EGeneration to do so.

(*Id*. at p. 776.)

4530.1-Business records are admissible with proper foundation 5/20

The business records exception to the hearsay rule is contained in Evidence Code section 1271:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
> (a) The writing was made in the regular course of a business;
> (b) The writing was made at or near the time of the act, condition, or event;
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

"[T]he object of the business records exception is 'to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event.' [Citation.]" (*People v. Nelson* (2012) 209 Cal.App.4th 698, 709.) The proponent of the evidence has the burden of establishing the foundation requirements for admission of a business records, including trustworthiness. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1011 (*Hovarter*); *People v. Diaz* (1992) 3 Cal.4th 495, 534-535; *People v. McVey* (2018) 24 Cal.App.5th 405, 414 (*McVey*).)

Evidence Code section 1271 "requires a witness to testify as to the identity of the record and its mode of preparation in every case." (*People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1477.) In compliance with a lawfully issued subpoena duces tecum, however, the custodian of records for the subpoenaed business may submit a declaration attesting to the necessary foundational facts. (Evid. Code, § 1560 et seq.; see also *McVey*, *supra*, 24 Cal.App.5th at p. 414; *Taggart v. Super Seer Corp.* (1995) 33 Cal.App.4th 1697.) But the mere fact that the medical records have been subpoenaed do not make them reliable or otherwise admissible as business records. (*People v. Yates* (2018) 25 Cal.App.5th 474, 486; *McVey*, *supra*, 24 Cal.App.5th at p. 415.)

> " 'Whether a particular business record is admissible as an exception to the hearsay rule … depends upon the "trustworthiness" of such evidence, a determination that must be made, case by case, from the circumstances surrounding the making of the record. [Citations.]' " (*People v. Matthews* (1991) 229 Cal.App.3d 930, 939.) "The foundation for admitting the record is properly laid if in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." (*People v. Williams* (1973) 36 Cal.App.3d 262, 275.)

(*People v. Zavala* (2013) 216 Cal.App.4th 242, 246 (*Zavala*).) "But that a business record contains some omissions does not necessarily render unreliable the information the record includes." (*Hovarter*, *supra*, 44 Cal.4th at p. 1011 [logsheets]; see also *People v. Diaz*, *supra*, 3 Cal.4th 495, 535 [medical records].) Nor does a business record's "relative lack of orderliness rendered the information contained therein unreliable. (Cf. *Arques v. National Superior Co.* (1945) 67 Cal.App.2d 763, 777 [stating, under a predecessor statute to the business records exception: 'This is not the best method of bookkeeping but no item has been called to our attention that suggests a definite inaccuracy.'].)" (*Hovarter*, *supra*, 44 Cal.4th at p. 1012.)

How the records are kept and retrieved is not relevant so long as the requirements of Evidence Code section 1271 are met. "California cases have held generally that computer printouts are admissible when they fit within a hearsay exception as business records under Evidence Code section 1271. (*People v. Lugashi* (1988) 205 Cal.App.3d 632, 641-642.)" (*Zavala*, *supra*, 216

Cal.App.4th at p. 246; see, e.g., *People v. Peyton* (2014) 229 Cal.App.4th 1063, 1075 [sufficient foundation laid by bank fraud investigator for admission of computer record and photos of defendant using stolen credit card at bank's ATM].) Thus, "a printed compilation of [cell phone] call data produced by human query for use at trial falls under the business records exception where the underlying data is automatically recorded and stored by a reliable computer program in the regular course of business." (*Zavala*, *supra*, 216 Cal.App.4th at p. 248.)

A trial court is vested with wide discretion in determining whether sufficient foundation is laid to qualify evidence under the hearsay exception for business records and on appeal, exercise of that discretion can be overturned only upon a clear showing of abuse. (*McVey*, *supra*, 24 Cal.App.5th at p. 414; *Zavala*, *supra*, 216 Cal.App.4th at pp. 245-246; *People v. Lugashi*, *supra*, 205 Cal.App.3d at pp. 638-639.)

4530.2-Opinions and conclusions within business records not admissible 5/20

The business records exception to the hearsay rule is contained in Evidence Code section 1271 applies to "a record of an act, condition, or event" and, thus, does not apply to conclusions and opinions within a record. (*People v. Reyes* (1974) 12 Cal.3d 486, 503; *People v. Campos* (1995) 32 Cal.App.4th 304, 309.) For example, police reports, probation reports, psychiatric evaluations and emergency call logs generally do not qualify as business records because they contain hearsay statements made by participants and bystanders and inadmissible opinions and conclusions. (*People v. McVey* (2018) 24 Cal.App.5th 405, 415 [police reports]; *People v. Ayers* (2005) 125 Cal.App.4th 988, 994-995 [multiple levels of hearsay in domestic violence hotline form]; *Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1203-1207 [911 dispatch log]; *People v. Hernandez* (1997) 55 Cal.App.4th 225, 239-240 [search result from database containing information derived from police reports]; *People v. Campos*, *supra*, 32 Cal.App.4th at pp. 309-310 [probation report]; *People v. Baeske* (1976) 58 Cal.App.3d 775, 780-781 [report of crime by neighbor to police department]; *People v. Reyes*, *supra*, 12 Cal.3d at pp. 502-503 [psychiatric evaluation]; *Kramer v. Barnes* (1963) 212 Cal.App.2d 440, 446 [police reports].)

4530.3-Official records are admissible with proper foundation 8/21

The official records exception to the hearsay rule is contained in Evidence Code section 1280:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
> (a) The writing was made by and within the scope of duty of a public employee.
> (b) The writing was made at or near the time of the act, condition, or event.
> (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

The term " '[p]ublic employee' means an officer, agent, or employee of a public entity." (Evid. Code, § 195.)

> The object of this hearsay exception "is to eliminate the calling of each witness involved in preparation of the record and substitute the record of the transaction instead. [Citations.]" [Citation.] Accordingly, for the exception to apply, "[i]t is not necessary that the person making the entry have personal knowledge of the transaction. [Citations.]" [Citation.]

(*Gananian v. Zolin* (1995) 33 Cal.App.4th 634, 639-640; see also *People v. Nelson* (2012) 209 Cal.App.4th 698, 708; *Hildebrand v. Dept. of Motor Vehicles* (2007) 152 Cal.App.4th 1562, 1571.)

The first foundational element, subdivision (a), is often satisfied by identifying a statutory, regulatory, or other requirement that the writing be produced and applying the presumption, contained in Evidence Code section 664, "that official duty has been regularly performed." (*People v. Martinez* (2000) 22 Cal.4th 106, 125 (*Martinez*).)

As to the timeliness requirement of subdivision (b): "How soon a writing must be made after the act or event is a matter of degree and calls for the exercise of reasonable judgment on the part of the trial judge." (*Martinez*, *supra*, 22 Cal.4th at p. 128, fn. 7, italics omitted.)

> [T]he timeliness requirement "is not to be judged … by arbitrary or artificial time limits, measured by hours or days or even weeks." [Citation.] Rather, "account must be taken of practical considerations," including "the nature of the information recorded" and "the immutable reliability of the sources from which [the information was] drawn." [Citation.] "Whether an entry made subsequent to the transaction has been made within a sufficient time to render it within the [hearsay] exception depends upon whether the time span between the transaction and the entry was so great as to suggest a danger of inaccuracy by lapse of memory." [Citation.]

(*Id*. at p. 128.)

As to the trustworthiness requirement of subdivision (c):

> "[T]he trustworthiness of the method of preparation of the record is … supported by the presumption, contained in Evidence Code section 664, that 'official duty has been regularly performed.' " (*Fisk* [*v. Dept. of Motor Vehicles* (1981)] 127 Cal.App.3d 972] at p. 77; see also *People v. Baeske* (1976) 58 Cal.App.3d 775, 780 [trustworthiness requirement "is established by a showing that the [record] is based upon the observations of public employees who have a *duty* to observe the facts and report and record them correctly"].) "This presumption shifts the burden of proving the foundational issue of trustworthiness of the method of preparing the official writing to the party objecting to the admission of the official writing. [Citation.]" (*Preis v. American Indemnity Co.* [(1990)] 220 Cal.App.3d [752] at p. 759.)

(*Martinez*, *supra*, 22 Cal.4th at p. 130, original italics; see also *People v. Orey* (2021) 63 Cal.App.5th 529, 551-552.)

"Evidence Code section 1280 'permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness.' [Citations.]" (*People v. Martinez*, *supra*, 22 Cal.4th at p. 129; see also *Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929.)

A trial court is vested with wide discretion in determining whether sufficient foundation is laid to qualify evidence under the hearsay exception for official records and on appeal, exercise of that discretion can be overturned only upon a clear showing of abuse. (*Martinez*, *supra*, 22 Cal.4th at p. 120.)

Finally, a copy of an official writing meeting the appropriate requirements is admissible in lieu of the original writing. (Evid. Code, §§ 1452-1453, 1530-1532; *People v. Skiles* (2011) 51 Cal.4th 1178 [describing authentication requirements in context of out-of-state court records]; distinguish *People v. Gonzalez* (2019) 42 Cal.App.5th 1144, 1148-1151 [uncertified electronic copies of court records not properly authenticated]; *In re Shannon C.* (1986) 179 Cal.App.3d 334,

342 [explaining that none of cited sections allow a copy of a writing to be admitted for its truth in the absence of establishing the requirements of a hearsay exception].)

4530.4-Opinions and conclusions within official records not admissible 5/20

The official records exception to the hearsay rule is contained in Evidence Code section 1280 applies to "a record of an act, condition, or event" and, thus, does not apply to conclusions and opinions within a record. (*People v. Reyes* (1974) 12 Cal.3d 486, 503; *People v. Hall* (2019) 39 Cal.App.5th 831, 844; *People v. Campos* (1995) 32 Cal.App.4th 304, 309.) For example, assuming no other basis for objection (e.g., *Crawford v. Washington* (2004) 541 U.S. 36) portions of an arrest report reciting personal factual observations of a law enforcement officer generally satisfy the requirements of the official records hearsay exception. (*People v. Hall*, *supra*, 39 Cal.App.5th at pp. 843-844 [Proposition 64 eligibility hearing].) But the officer's conclusions and opinions are not admissible. (*Id*. at p. 845.)

4535.1-Statement of co-conspirator in furtherance admissible 3/17

Statements made by co-conspirators in furtherance of their conspiracy are admissible under an exception to the hearsay rule and not subject to the Confrontation Clause. (*People v. Williams* (1997) 16 Cal.4th 635, 681-682; *People v. Hardy* (1992) 2 Cal.4th 86, 150-151; see generally *United States v. Inadi* (1986) 475 U.S. 387.) Such a statement offered against a party is admissible under Evidence Code section 1223 if:

> (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
> (b) The statement was made prior to or during the time the party was participating in that conspiracy; and
> (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

(See also *People v. Arceo* (2011) 195 Cal.App.4th 556, 578; *People v. Gann* (2011) 193 Cal.App.4th 994, 1005 (*Gann*).)

A court need only find that a *prima facie* showing of the preliminary facts specified in subdivisions (a) and (b) has been made to admit statements under Evidence Code section 1223. (*Gann*, *supra*, 193 Cal.App.4th at p. 1005.) These preliminary facts need not be proven beyond a reasonable doubt or even by a preponderance of the evidence. (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1402; *People v. Jourdain* (1980) 111 Cal.App.3d 396, 404; *People v. Earnest* (1975) 53 Cal.App.3d 734, 741.)

> In order for a declaration to be admissible under the coconspirator exception to the hearsay rule, the proponent must proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence. A prima facie showing of a conspiracy for the purposes of admissibility of a coconspirator's statement under Evidence Code section 1223 simply means that a reasonable jury could find it more likely than not that the conspiracy existed at the time the statement was made.

(*People v. Herrera* (2000) 83 Cal.App.4th 46, 63; accord *People v. Thompson* (2016) 1 Cal.5th 1043, 1111.) In addition, co-conspirator statements may be received before proof of the preliminary facts. (*People v. Hinton* (2006) 37 Cal.4th 839, 895; *In re David B.* (1978) 81 Cal.App.3d 806, 810;

see also Evid. Code, § 403(b).) Indeed, this order of proof is more often the rule than the exception. (*People v. Leach* (1975) 15 Cal.3d 419, 430, fn. 10.)

A conspiracy does not have to be charged in the complaint or information for the exception to apply. (*Gann*, *supra*, 193 Cal.App.4th at p. 1005; *In re David B.*, *supra*, 81 Cal.App.3d at p. 810.)

> Once the existence of the conspiracy has been independently established, the offering party must then make three additional showings in order for the content of the coconspirator's statement to be considered by the trier of fact. That party must show: (1) that the declarant (who may or may not be the defendant) was participating in a conspiracy at the time of the declaration; (2) that the declaration was made in furtherance of the objective of the conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating, or would later participate, in the conspiracy.

(*People v. Herrera*, *supra*, 83 Cal.App.4th at p. 64; see also *People v. Thompson*, *supra*, 1 Cal.5th at p. 1108; *People v. Clark* (2016) 63 Cal.4th 522, 562; *People v. Homick* (2012) 55 Cal.4th 816, 871.)

4535.2-Evidence of conspiracy necessary to admit co-conspirator statement 2/13

"A conspiracy is an agreement between two or more persons, with specific intent, to achieve an unlawful objective, coupled with an overt act by one of the conspirators to further the conspiracy." (*People v. Gann* (2011) 193 Cal.App.4th 994, 1005 (*Gann*); see also *People v. Homick* (2012) 55 Cal.4th 816, 870.) Stated alternatively, "[a] conspiracy exists when one or more persons have the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act by one or more of the parties to such agreement in furtherance of the conspiracy." (*People v. Herrera* (2000) 83 Cal.App.4th 46, 64.) "The conspiracy may be shown by circumstantial evidence and 'the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute.' [Citations.]" (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1402-1403; see also *People v. Thompson* (2016) 1 Cal.5th 1043, 1111; *Gann*, *supra*, 193 Cal.App.4th at pp. 1005-1006; *People v. Longines* (1995) 34 Cal.App.4th 621, 626.)

4535.3-Co-conspirator statement must be made during conspiracy 2/13

The co-conspirator hearsay exception does not apply to statements made before the conspiracy had been formed. (*People v. Homick* (2012) 55 Cal.4th 816, 872; *People v. Han* (2000) 78 Cal.App.4th 797, 805.) Nor does it apply to statements made "after the alleged conspiracy had achieved its objective." (*People v. Smith* (2005) 135 Cal.App.4th 914, 922.) But a conspiracy does not necessarily end with the commission of the planned crime.

> While a conspiracy is usually deemed to have ended when the substantive crime for which the coconspirators are being tried is either attained or defeated [citation], it is for the trial court to determine precisely when the conspiracy has ended [citation]. " 'A conspiracy is not necessarily a single event which unalterably takes place at a particular point in time when the participants reach a formal agreement; it may be flexible, occurring over a period of time and changing in response to changed circumstances.' [Citation.]" [Citation.]) Further, there may be "a situation where the conspiracy will be deemed to have extended beyond the substantive crime to activities contemplated and undertaken by the conspirators in pursuance of the objectives of the conspiracy." Citation.]

(*People v. Gann* (2011) 193 Cal.App.4th 994, 1006 (*Gann*).) The appellate court in *Gann* held it was proper to admit the false post-murder statements of co-defendant Hansen to police because "[t]he evidence supports the trial court's determination that the scope of the Gann-Hansen conspiracy encompassed both the murder of their stepfather and making it appear that the murder took place during a home invasion robbery." (*Id*. at pp. 1006-1007; see also *People v. Arceo* (2011) 195 Cal.App.4th 556, 578-579 ["It is reasonable to infer that, because Adan [the testifying witness] saw one of the bodies, Mejorado [codefendant declarant] had to explain what had happened in order to have Adan join in the conspirators' efforts to clean up the house, dispose of the bodies and otherwise conceal the murders."].)

The co-conspirator hearsay exception can apply regardless whether the defendant was a member of the conspiracy at the time the statements are made.

> Likewise, it is irrelevant that some of the coconspirator statements allegedly preceded defendant's involvement in the conspiracy. Once independent evidence to establish the prima facie existence of the conspiracy has been shown, all that is needed is a showing that the *declarant* was participating in a conspiracy at the time of the declaration, that the declaration was in furtherance of the objective of that conspiracy, and that at the time of the declaration the party against whom the evidence is offered was participating or *would later participate* in the conspiracy. [Citations.]

(*People v. Hinton* (2006) 37 Cal.4th 839, 895, original italics, internal quote marks omitted.)

4540.1-Elements of declarations against interest hearsay exception 8/19

An out-of-court statement by an unavailable witness is admissible as a declaration against interest if the statement "so far subjected him to the risk of civil or criminal liability … that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.) To satisfy the requirements of this exception to the hearsay rule the declarant must be unavailable, the declaration must be distinctly against the declarant's interest when made, and the declaration must be clothed with the indicia of reliability. (*People v. Grimes* (2016) 1 Cal.5th 698, 711; *People v. Duarte* (2000) 24 Cal.4th 603, 610-611; *People v. Cudjo* (1993) 6 Cal.4th 585, 607; see also *People v. Almeda* (2018) 19 Cal.App.5th 346, 363; *People v. Tran* (2013) 215 Cal.App.4th 1207, 1216.) The focus of the declaration against interest hearsay exception is the basic trustworthiness of the proffered declaration. (*People v. Geier* (2007) 41 Cal.4th 555, 584; *People v. Reyes* (2019) 35 Cal.App.5th 538, 545; *People v. Smith* (2017) 10 Cal.App.5th 297, 303.)

Note, however:

> As to hearsay statements that qualify under the party admissions exception to the hearsay rule (Evid. Code § 1220), "[w]e have long recognized that … persons are often unable ' " 'to state the exact language of an admission.' " ' [Citations.] This recognition, however, does not automatically render any statements of a party inadmissible. …" [Citation.] Nor does ambiguity regarding the meaning of a party's out-of-court statement automatically render the party admissions exception inapplicable. [Citations.] The same principles logically apply to the admissibility of a hearsay statement under the exception for statements against penal interest.

(*People v. Cortez* (2016) 63 Cal.4th 101, 125.)

The trial court's ruling on the admissibility of a proffered statement against interest is reviewed for abuse of discretion. (*People v. Geier*, *supra*, 41 Cal.4th at p. 585; *People v. Lawley* (2002) 27 Cal.4th 102, 153.) "The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1251, overruled on other grounds in *People v. Hamilton* (2009) 45 Cal.4th 863, 926; accord, *People v. Edwards* (1991) 54 Cal.3d 787, 819-820; but see *People v. Tran*, *supra*, 215 Cal.App.4th at p. 1281 ["[W]e independently review the trial court's preliminary determination that a declarant's statements bore sufficiently particularized guarantees of trustworthiness to be admissible."].) "Whether a trial court has correctly construed Evidence Code section 1230 is, however, a question of law that we review de novo." (*People v. Grimes*, *supra*, 1 Cal.5th at p. 712.)

Finally, even if a hearsay statement satisfies the requirements for admissibility as a declaration against interest, the trial court still has discretion to exclude it under Evidence Code section 352. (*People v. Maciel* (2013) 57 Cal.4th 482, 527; *People v. Geier*, *supra*, 41 Cal.4th at p. 485.)

4540.2-Third party declarations that implicate the defendant may be admissible 4/18

Third party declarations against penal interest meeting the requirement of Evidence Code section 1230 can be admitted for their truth to implicate a charged defendant. (See, e.g., *People v. Samuels* (2005) 36 Cal.4th 96, 120 [declarant admitted to being accomplice to defendant's murder-for-hire scheme]; *People v. Tran* (2013) 215 Cal.App.4th 1207, 1218-1220 [in context of statement to friend about defendant shooting someone, declarant implicated himself as accessory after the fact to murder].)

In *People v. Arauz* (2012) 210 Cal.App.4th 1394, for example, the appellate court upheld admission of an accomplice Velasquez's statements to an undercover informant while in jail on an unrelated charge.

> Velasquez's "facially incriminating comments [implicating himself and identifying appellants by their gang monikers] were in no way exculpatory … ." (*People v. Samuels* (2005) 36 Cal.4th 96, 120.) His detailed statements were part of his explanation to someone he thought was "running court" for the Mexican Mafia. Although the conversation was a question and answer session, Velasquez's statements were "inextricably tied to and part of a specific statement against penal interest. [Citation.]" (*Id*. at p. 121.) Such specificity, including naming both appellants as the actual shooters, shows "trustworthiness." The trial court did not err in finding that the statements implicating himself and appellants were "specifically disserving," and thus admissible as a declaration against penal interest. (*People v. Cervantes* (2004) 118 Cal.App.4th 162, 176.)

(*People v. Arauz*, *supra*, 210 Cal.App.4th at p. 1401.)

Similarly, the appellate court in *People v. Cervantes* (2004) 118 Cal.App.4th 162 reasoned:

> The evidence here showed Morales made the statement within 24 hours of the shooting to a lifelong friend from whom he sought medical treatment for injuries sustained in the commission of the offenses. Further, it is likely Morales wanted to have his wounds treated without going to the hospital. Regarding the content of the statement, Morales did attribute blame to Cervantes and Martinez but accepted for himself an active role in the crimes and

> described how he had directed the activities of Martinez. Thus, Morales's statement specifically was disserving of his penal interest because it subjected him to the risk of criminal liability to such an extent that a reasonable person in his position would not have made the statement unless he believed it to be true.

(*Id*. at p. 175.)

The declaration identifying the defendant by name, when viewed in context, can be specifically disserving of the declarant's penal interest and, thus, admissible without need for redaction. (*People v. Cortez* (2016) 63 Cal.4th 101, 126-128.)

The analysis is the same if the declaration against interest is made by a codefendant. (*People v. Arceo* (2011) 195 Cal.App.4th 556, 570-575 [*Aranda-Burton* rule inapplicable].) "[S]tatements by a nontestifying codefendant that implicate the defendant, even by name, may be admissible if they are disserving to the codefendant's interest and are not exculpatory, self-serving, or collateral." (*People v. Almeda* (2018) 19 Cal.App.5th 346, 364 [defendant's statements to cellmate implicating his co-defendant were neither self-serving or collateral to his confession to being the actual shooter].)

Distinguish *People v. Duarte* (2000) 24 Cal.4th 603, where accomplice Morris and the defendant committed a drive by shooting. After his arrest, Morris told the police that he did not want to kill anybody and that he "shot high" to avoid harming anyone. The California Supreme Court concluded that the statement lacked trustworthiness and was not "specifically disserving" of Morris's penal interest. (*Id*. at p. 613.) Similarly, see *People v. Gallardo* (2017) 18 Cal.App.5th 51, where the co-defendant minimized his own role in a drive-by shooting, claiming only to be acting as a backup getaway driver, while implicated one defendant as the actual shooter and the other defendant as the actual driver. (*Id*. at pp. 74-76.)

4540.3-Declaration against interest must be shown trustworthy before admission 8/19

One requirement of the declaration against interest exception to the hearsay rule is that the declaration must be clothed with the indicia of reliability. (Evid. Code, § 1230.) The credibility of the testifying witness is not properly considered in deciding admissibility under section 1230. (*People v. Dalton* (2019) 7 Cal.5th 166, 207; *People v. Cudjo* (1993) 6 Cal.4th 585, 608.) Instead, the focus of this exception is the basic trustworthiness of the declaration itself. (*People v. Westerfield* (2019) 6 Cal.5th 632, 704; *People v. Frierson* (1991) 53 Cal.3d 730, 745.) The trustworthiness of the declaration, in turn, most often focuses on the credibility of the hearsay declarant. (See, e.g., *People v. Geier* (2007) 41 Cal.4th 555, 583-585.)

"In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*People v. Frierson*, *supra*, 35 Cal.3d at p. 745; see also *People v. Masters* (2016) 62 Cal.4th 1019, 1055-1056; *People v. Almeda* (2018) 19 Cal.App.5th 346, 367.) "This necessarily requires a 'fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved … .' [Citation.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 332; see also *People v. Arceo* (2011) 195 Cal.App.4th 556, 577.)

> There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. [Citations.]

(*People v. Greenberger*, *supra*, 58 Cal.App.4th at p. 334; see also *People v. Tran* (2013) 215 Cal.App.4th 1207, 1217; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1400.) In other word, "assessing trustworthiness ' "requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception." ' " (*People v. Duarte* (2000) 24 Cal.4th 603, 614; see also *People v. Reyes* (2019) 35 Cal.App.5th 538, 547.)

"The significant passage of time is a relevant circumstance to be considered when determining a statement's reliability." (*People v. Masters*, *supra*, 62 Cal.4th at p. 1057.) "Inconsistent statements by a declarant raise obvious questions about the credibility of a subsequent contrary assertion, and inconsistent statements are 'obvious indicators' of unreliability. [Citations.]" (*People v. Smith* (2017) 10 Cal.App.5th 297, 304.)

4540.4-Statement must be against the declarant's interest and not self-serving 6/21

One requirement of the declaration against interest exception to the hearsay rule is that the declaration must be distinctly against the declarant's interest when made. (Evid. Code, § 1230.) Statements that are exculpatory or self-serving as to the declarant are not admissible under Evidence Code section 1230. (*People v. Samuels* (2005) 36 Cal.4th 96, 120; *People v. Almeda* (2018) 19 Cal.App.5th 346, 364; *People v. Smith* (2005) 135 Cal.App.4th 914, 922.) Evidence Code section 1230 does not authorize the admission of "those portions of a third party's confession that are self-serving or otherwise appear to shift responsibility to others." (*People v. Grimes* (2016) 1 Cal.5th 698, 715; see also *People v. Gallardo* (2017) 18 Cal.App.5th 51, 71.)

The appellate courts have upheld trial court rulings excluding statements proffered by defendants to shift blame on others that appeared at first glance to be against the declarant's interest, but were not.

In *People v. Alexander* (2010) 49 Cal.4th 846, the California Supreme Court held:

> We conclude the trial court's decision to exclude Sherow's proffered testimony was not an abuse of discretion because defendant failed to establish that Charles's actual statement "so far subjected him to the risk of … criminal liability … that a reasonable man in his position would not have made [it] unless he believed it to be true." (Evid. Code, § 1230.) Sherow repeatedly testified at the hearing that Charles said only he "knew about" the murder. Merely knowing about a murder is not a crime, and it follows that admitting to someone that one knows about a murder is not a statement against one's penal interest, or any other interest listed in section 1230 of the Evidence Code.

(*Id*. at p. 916.)

In *People v. Frierson* (1991) 53 Cal.3d 730, the California Supreme Court upheld exclusion as untrustworthy of a statement made by a confederate of defendant accepting blame for a shooting. The statement was made long after the crime and at very little risk of prosecution of the confederate under the circumstances. (*Id*. at p. 745; accord *People v. Chhoun* (2021) 11 Cal.5th 1, 45-50.)

And in *People v. Traylor* (1972) 23 Cal.App.3d 323, the driver of a vehicle said that someone other than the defendant was the passenger in the vehicle when drugs were found. The appellate court held the statement was not distinctly against the declarant's interest since the average lay person would not understand the law of constructive possession and, therefore, not realize the potential criminal liability. (*Id*. at p. 331.)

4540.5-Collateral assertions are inadmissible 5/20

Collateral assertions within a declaration against interest are inadmissible hearsay. (*People v. Lawley* (2002) 27 Cal.4th 102, 153; *People v. Almeda* (2018) 19 Cal.App.5th 346, 364.) Thus, generally, if a statement is inculpatory in part and exculpatory in part, only the inculpatory material is admissible as specifically disserving to the declarant's penal interest. The exculpatory portions must be excised from the statement. (*People v. Duarte* (2000) 24 Cal.4th 603, 611-612.) In determining whether portions of a statement containing declarations against interest are collateral, the court must view those portions in context of the entire statement. (*People v. Grimes* (2016) 1 Cal.5th 698, 716 (*Grimes*).)

> [T]he nature and purpose of the against-interest exception does not require courts to sever and excise any and all portions of an otherwise inculpatory statement that do not 'further incriminate' the declarant. Ultimately, courts must consider each statement in context in order to answer the ultimate question under Evidence Code section 1230: Whether the statement, even if not independently inculpatory of the declarant, is nevertheless against the declarant's interest, such that "a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true."

(*Ibid*.) The "contextual approach" adopted by California Supreme Court in *Grimes* instructs that trial courts should, for example, consider whether the portion of a confession that tends to exculpate the declarant nonetheless may be admitted "in view of surrounding circumstances, even though the exculpatory portion of the statement is not independently disserving of the declarant's interests." (*Id*. at p. 715.)

In *Grimes*, the California Supreme Court held it was error to exclude those portions of an accomplices' confessions which tended to exonerate the defendant as they "are not practically separable from the remainder of the statements." (*Grimes*, *supra*, 1 Cal.5th at p. 717.) "We therefore conclude that Morris's statements to Misty and Lawson that he acted alone and that defendant and Wilson appeared startled when he killed Bone were so disserving to his interests that a reasonable person in his position would not have made them unless they were true." (*Id*. at p. 719; see also *People v. Maciel* (2013) 57 Cal.4th 482, 526-527 [trial court did not abuse discretion in finding challenged portion of statement in context was disserving of declarant's penal interest and not collateral]; *People v. Samuels* (2005) 36 Cal.4th 96, 120-121 [portion of accomplice's statement implicating defendant not collateral]; *People v. Smith* (2017) 12 Cal.App.5th 766, 792-794 [upholding admission of co-defendant's statement which described her role in the murder while implicating the defendant as one of the actual killers].)

The redaction of such collateral assertions, however, does not enhance the general trustworthiness of the proffered declaration against penal interest. Instead, the entire declaration still must be considered in evaluating trustworthiness under Evidence Code section 1230. (*People v. Duarte*, *supra*, 24 Cal.4th at pp. 614-618.) Thus, "a hearsay statement 'which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility

on others) does not meet the test of trustworthiness and is thus inadmissible.' [Citations.]" (*Id*. at p. 612.) For example, in *People v. Dixon* (2007) 153 Cal.App.4th 985, an accomplice offered a signed declaration admitting his role in a robbery, but purporting to exonerate the defendant. The appellate court upheld the trial court's decision to only admit those portions which were inculpatory as to the accomplice and exclude the remainder as untrustworthy:

> Wallace's declaration was anything but spontaneous. It was a written declaration obtained by Dixon's private investigator. The two obviously had time to confer about it. They were housed in the same jail and Dixon knew in advance that Wallace would sign the declaration. It is only a single statement, not one that was repeated to law enforcement numerous times. Further, it was not reliable since Wallace had a motive to lie. Wallace knew he would most likely be convicted and that Dixon faced a much longer sentence given his prior strike convictions. Wallace also knew he was terminally ill and believed he had nothing to lose.

(*Id*. at p 1000; see also *People v. Vasquez* (2012) 205 Cal.App.4th 609, 624-624 [codefendant's statements to police after arrest exculpating defendant not sufficiently disserving of his penal interests when considered in context and not trustworthy].)

4550.1-Statements of a declarant who believes he or she is dying are admissible 8/19

The dying declaration exception to the hearsay rule is contained in Evidence Code section 1242: "Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death. (See generally *People v. Monterroso* (2004) 34 Cal.4th 743, 763-765 [admission into evidence of dying declaration, even if testimonial in nature, does not violate a defendant's Sixth Amendment right to confrontation]; accord *People v. Johnson* (2015) 61 Cal.4th 734, 763; *People v. D'Arcy* (2010) 48 Cal.4th 257, 291-292.)

The phrase "cause and circumstances of … death" is broadly interpreted to embrace " 'not only the actual facts of the assault and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with the assault as well as acts, immediately following the assault and so closely connected with it as to form in reality a part of the occurrence.' [Citation.]" (*People v. Gatson* (1998) 60 Cal.App.4th 1020, 1025 [listing many case examples of this principle].)

The requirement of the declarant's " 'sense of impending death may be shown in any satisfactory mode, by the express language of the declarant, or be inspired from his evident danger, or the opinions of medical or other attendants stated to him, or from his conduct, or other circumstances in the case, all of which are resorted to in order to ascertain the state of the declarant's mind.' " (*People v. Tahl* (1967) 65 Cal.2d 719, 725; *People v. Monterroso*, *supra*; *People v. Sims* (1993) 5 Cal.4th 405, 458.) " 'The fact that a [dying] declaration was made in response to questions, even leading questions, does not affect its admissibility.' " (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441.) Finally:

> The fact the statements were made after the witness chose to die rather than accept life-support treatment does not render them untrustworthy. The crucial element in determining whether a declaration is sufficiently trustworthy for admission under the dying declaration exception to the hearsay rule is the declarant's sense of impending death—not the

precipitating cause of death. [Citations.] "The sense of impending death is presumed to remove all temptation to falsehood." (*Mattox v. U.S.* (1895) 156 U.S. 237, 244.)

(*People v. Adams*, *supra*.)

In *People v. Black* (1979) 96 Cal.App.3d 846, for example, the wounded victim of a shooting stumbled and fell upon a nearby security guard. The victim begged the guard, "[H]elp me, I don't want to die. I've been shot." When the guard asked the victim who had shot him, he identified the defendant. After a police officer arrived and asked the victim what had happened, the victim said, "please don't let me die," and again identified the defendant as his assailant. On appeal the defendant argued that the victim's statements negated a finding of a sense of impending death, instead indicating he desired medical aid and comfort. The Court of Appeal rejected the contention, observing: "At the time [the victim] made his statements in question, he was dying. Furthermore, it is apparent that [he] had knowledge of his critical condition which prompted him to plea emotionally to [the] Officer not to let him die." (*Id*. at p. 851; accord *People v. Sims*, *supra*, 5 Cal.4th at p. 459; see also *People v. Mayo* (2006) 140 Cal.App.4th 535, 553-554; distinguish *People v. Ramirez* (2019) 34 Cal.App.5th 823, 829 [no evidence hospitalized victim believed his death was imminent at the time of the alleged statement]; *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 87-89 [statements or notes made while contemplating suicide do not qualify as dying declarations].)

Before the admission of the proffered dying declaration, the foundational elements must be determined preliminarily by the trial court and unless there has been an apparent abuse of discretion in that regard, the ruling of the trial court will not be disturbed on appeal. (*People v. Gaston*, *supra*, 60 Cal.App.4th at p. 1024; *People v. Tahl*, *supra*, 65 Cal.2d at p. 725.)

4555.1-Forfeiture by wrongdoing exception to *Crawford* 6/20

Crawford v. Washington (2004) 541 U.S. 36 (*Crawford*) the United States Supreme Court held that the confrontation clause bars the admission of out-of-court "testimonial" statements except when the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Although *Crawford* dramatically departed from prior Confrontation Clause case law, it renounced only those exceptions to the Confrontation Clause that purported to assess the reliability of testimony. (*Crawford*, *supra*, 541 U.S. at p. 62.) The High Court noted that "forfeiture by wrongdoing," an equitable principle, remains a valid exception to the Confrontation Clause: "For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. [Citation.]" (*Ibid*.) Subsequently, in *Davis v. Washington* (2006) 547 U.S. 813, the High Court stated: "We reiterate what we said in *Crawford* that 'the rule of forfeiture by wrongdoing … extinguishes confrontation claims on essentially equitable grounds.' [Citations.] That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (*Id*. 547 at p. 833.)

In the *Giles v. California* (2008) 554 U.S. 353 (*Giles*) the United States Supreme Court held the forfeiture by wrongdoing doctrine applies when the defendant specifically intended by their actions to make the witness unavailable. Citing common law, the High Court stated:

> The manner in which the [forfeiture by wrongdoing] rule was applied makes plain that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that

> the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying-declaration exception.

(*Giles*, *supra*, 554 U.S. at pp. 361-362, original italics.) In the domestic violence context, the High Court noted:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

(*Id*. 554 U.S. at p. 377.)

The United States Supreme Court opinion in *Giles v. California* overturned that portion of the California Supreme Court opinion in *People v. Giles* (2007) 40 Cal.4th 833, holding the defendant's intent was not relevant to the forfeiture by wrongdoing rule. The High Court opinion does not impact the California Supreme Court's ruling on a number of sub-issues relating to the proper scope and application of the forfeiture by wrongdoing doctrine in California. For example, the California Supreme Court held that the forfeiture by wrongdoing doctrine can apply even when the alleged wrongdoing is the same as the charged offense. (*People v. Giles*, *supra*, 40 Cal.4th at pp. 851-852.)

Subsequent case law, relying upon *Giles v. California*, holds that the forfeiture by wrongdoing doctrine "is implicated not only when the defendant intends to prevent a witness from testifying in court but also when the defendant's efforts were designed to dissuade the witness from cooperating with the police or other law enforcement authorities." (*People v. Banos* (2009) 178 Cal.App.4th 483, 501.) The doctrine also applies if the defendant had other, concurrent motives for making the witness unavailable. (*Id*. at p. 504 [evidence suggested defendant killed victim also out of revenge for making previous domestic violence complaints against him].) Finally, the doctrine extends to victims and witnesses whose testimony was prevented by murder or any other wrongful means. (*People v. Jones* (2012) 207 Cal.App.4th 1392, 1399.)

4555.2-Forfeiture by wrongdoing exception codified in EC1390 9/20

The forfeiture by wrongdoing doctrine, an established exception to the constitutional right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36, is codified as a hearsay exception in Evidence Code section 1390 (§ 1390). "Because of the similarity of the legal standards, case law developed under the forfeiture by wrongdoing doctrine is helpful in applying Evidence Code section 1390." (*People v. Quintanilla* (2020) 45 Cal.App.5th 1039, 1051 (*Quintanilla*).) Section 1390 states in pertinent part:

> (a) Evidence of a statement is not made inadmissible by the hearsay rule if the statement is offered against a party that has engaged or aided and abetted in the wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(b)(1) The party seeking to introduce a statement pursuant to subdivision (a) shall establish, by a preponderance of the evidence, that the elements of subdivision (a) have been met at a foundational hearing.
(2) The hearsay evidence that is the subject of the foundational hearing is admissible at the foundational hearing. However, a finding that the elements of subdivision (a) have been met shall not be based solely on the unconfronted hearsay statement of the unavailable declarant, and shall be supported by independent corroborative evidence.
(3) The foundational hearing shall be conducted outside the presence of the jury. However, if the hearing is conducted after a jury trial has begun, the judge presiding at the hearing may consider evidence already presented to the jury in deciding whether the elements of subdivision (a) have been met.
(4) In deciding whether or not to admit the statement, the judge may take into account whether it is trustworthy and reliable.
…

Section 1390 effectively subsumed an existing, more limited, wrongdoing by forfeiture provision. (See Evid. Code, § 1350.) The trial court must use the preponderance of evidence standard to find the forfeiture by wrongdoing doctrine applicable. (*People v. Merchant* (2019) 40 Cal.App.5th 1179, 1185-1186.)

Section 1390 is satisfied by a finding that at least one of the defendant's reasons for committing the wrongdoing that made the declarant unavailable was to make the declarant unavailable as a witness, although the defendant may also have had other reasons for the wrongdoing. (*People v. Kerley* (2018) 23 Cal.App.5th 513, 558, 563.) Relevant evidence supporting a finding that the defendant harbored, at least in part, the requisite intent under section 1390, would include that there was a pending cases against the defendant involving abuse of the victim or showing that the defendant threatened the victim if the victim called the police or testified against the defendant. (*Id*. at pp. 556-559; *People v. Banos* (2009) 178 Cal.App.4th 483, 502-503 [decided before enactment of § 1390]; distinguish *Quintanilla*, *supra*, 45 Cal.App.5th at pp. 1057-1059 [lacking such evidence, there was insufficient proof to admit murder victim's hearsay statements regarding defendant's numerous acts of domestic violence].) This exception "does not preclude courts from finding that nonthreatening conduct such as occurred here qualifies as wrongdoing under the appropriate legal standard where the defendant acted with the intent to procure the witness's absence from court." (*People v. Reneaux* (2020) 50 Cal.App.5th 852, 868 [defendant told girlfriend not to cooperate with law enforcement, promising to marry her but only if he got out of jail].) "Depending on the facts, trial strategies, letters and phone calls from jail colluding or confirming that a witness will not appear, and even a marriage proposal may constitute wrongdoing for purposes of the forfeiture-by-wrongdoing doctrine if the defendant engaged in those actions with the intent to prevent the witness from testifying." (*Id*. at p. 873.)

On appellate review, "[w]e evaluate whether there is sufficient evidence from which the trial court could make its finding on a preponderance standard." (*People v. Merchant*, *supra*, 40 Cal.App.5th at p. 1186.) "Although we apply a substantial evidence standard of review to the trial court's factual finding, '[w]e review for abuse of discretion the ultimate decision whether to admit the evidence.' (*People v. Phillips* (2000) 22 Cal.4th 226, 236.)" (*Quintanilla*, *supra*, 45 Cal.App.5th at p. 1050.) The erroneous admission of hearsay evidence under section 1390 is subject to the reasonable probability test of prejudice from *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Quintanilla*, *supra*, 45 Cal.App.5th at pp. 1059-1060.)

4560.1-Former testimony of unavailable witness is admissible at trial 5/19

The former testimony of an unavailable witness is admissible under an exception to the hearsay rule when "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a)(2).) The former testimony must have been given under oath "in a former hearing or trial of the same action." (Evid. Code § 1290, subd. (a).)

> "Evidence Code section 1291 codifies this traditional exception" to the confrontation clause right. (*People v. Wilson* (2005) 36 Cal.4th 309, 340 (*Wilson*).) "When the requirements of … section 1291 are met, 'admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution.' " (*Wilson*, at p. 340.) "The constitutional and statutory requirements are 'in harmony.' " (*People v. Smith* (2003) 30 Cal.4th 581, 609.)

(*People v. Hull* (2019) 31 Cal.App.5th 1003, 1022 (*Hull*).)

For the prosecution to admit former testimony under Evidence Code section 1291, it must be shown that the defendant's motive for cross-examining the now unavailable witness at trial is "sufficiently similar" or "closely similar" to defendant's motive at the prior hearing. (*People v. Carter* (2005) 36 Cal.4th 1114, 1173; *People v. Samoyoa* (1997) 15 Cal.4th 795, 850; *People v. Alcala* (1992) 4 Cal.4th 742, 784.) It need not be identical, however. (*People v. Alcala*, *supra*, 4 Cal.4th at p. 784; *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1528.) "We have recognized that in an *extraordinary case*, it might be ' "necessary to explore the character of the actual cross-examination to ensure that an adequate opportunity for full cross-examination had been afforded to the defendant." ' (*People v. Wilson* [(2005)] 36 Cal.4th [309] at pp. 346-347.)" (*People v. Valencia* (2008) 43 Cal.4th 268, 294, italics added.)

> Moreover, a defendant's interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of Evidence Code section 1291, subdivision (a)(2), simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars. [Citation.] The " 'motives need not be identical, only "similar" ' " [Citation.] "Both the United States Supreme Court and this court have concluded that 'when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony.' " [Citations]

(*People v. Harris* (2005) 37 Cal.4th 310, 333; see also *People v. Valencia*, *supra*, 43 Cal.4th at pp. 293-294; *People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1548-1549.) "In other words, the interest and motive for cross-examination does not necessarily change just because the defense develops information after the preliminary hearing about which it did not have the opportunity to cross-examine the witness." (*Hull*, *supra*, 31 Cal.App.5th at p. 1029.) "Preliminary hearing testimony may be introduced at trial over a section 1291 and confrontation clause objection even when the defense develops information or discovers evidence after the preliminary hearing about which it did not have the opportunity to cross-examine the witness." (*Id*. at p. 1031.)

The unavailable witness' inability to fully answer all questions on cross-examination, perhaps due to injury or loss of memory, does not render the former testimony inadmissible. (*People v. Blacksher* (2011) 52 Cal.4th 769, 805; *People v. Mayfield* (1997) 14 Cal.4th 668, 742.) Nor does the fact that the report containing the witness's statements to police had not been provided in discovery necessarily deprive the defense of adequate opportunity to cross-exam the witness. (*People v. Andrade* (2015) 238 Cal.App.4th 1274, 1295.)

In *People v. Zapien* (1993) 4 Cal.4th 929, the California Supreme Court found that "[a]s long as the defendant was given the opportunity for effective cross-examination, the statutory requirements were satisfied; the admissibility of this evidence did not depend on whether defendant availed himself fully of that opportunity." (*Id*. at p. 975; similarly, see *People v. Sul* (1981) 122 Cal.App.3d 355, 367; see also *People v. Cloyd* (1997) 54 Cal.App.4th 1402, 1409.)

> The defense cannot sit on information—whether because it was not communicated to the defense team by the defendant or not investigated by the defense team—and then later complain it did not have a meaningful opportunity to cross-examine a witness about that information. [D]efendant here knew about potentially impeachable information well before the preliminary hearing. He thus had the requisite opportunity to cross-examine on this matter

(*Hull*, *supra*, 31 Cal.App.5th at p. 1033.)

Finally, the mere age of the former testimony does not make it inadmissible. (*People v. Thomas* (2011) 51 Cal.4th 449, 503 [preliminary hearing testimony 15 years earlier properly admitted]; *People v. Wharton* (1991) 53 Cal.3d 522, 589-590 [11-year-old testimony].)

4570.1-Prior consistent statements must satisfy statutory requirements 7/20

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) One exception to the hearsay rule permits the introduction of prior consistent statements. (Evid. Code, §§ 791, 1236.) Under Evidence Code section 1236: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." Evidence Code section 791 states:

> Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

(See also *People v. Kennedy* (2005) 36 Cal.4th 595, 614; *People v. Smith* (2003) 30 Cal.4th 581, 630.)

"In evaluating the admissibility of prior consistent statements, the focus is on 'the specific agreement or other inducement suggested by cross-examination as supporting the witness's improper motive.' " (*People v. Crew* (2003) 31 Cal.4th 822, 843, citing *People v. Noguera* (1992) 4

Cal.4th 599, 630.) "[A] prior consistent statement is admissible if it was made before the existence of any one or more of the biases or motives that, according to the opposing party's express or implied charge, may have influenced the witness's testimony." (*People v. Hayes* (1990) 52 Cal.3d 577, 609; see also *People v. Jones* (2003) 30 Cal.4th 1084, 1106-1107.) For example, a claim of recent fabrication may be inferred when it is shown that a witness did not speak about an important matter at a time when it would have been natural for him or her to do so, and in such a circumstance, it is generally proper to permit rehabilitation by a prior consistent statement. (*People v. Riccardi* (2012) 54 Cal.4th 758, 803; see also *People v. Kopatz* (2015) 61 Cal.4th 62, 85-86; *People v. Lopez* (2013) 56 Cal.4th 1028, 1066.) "It has long been recognized that when, as in this case, a witness's silence is presented as inconsistent with his or her later testimony, a statement made at the earliest opportunity after the silence that is consistent with the witness's later testimony may be admissible as a prior consistent statement under section 791(b)." (*People v. Lopez*, *supra*, 56 Cal.4th at p. 1067.)

A prior consistent statement is not admissible either for its truth or to rehabilitate the credibility of the witness unless the prerequisites of Evidence Code section 791 are met. (See *People v. Ervine* (2009) 47 Cal.4th 745, 779-780 [defendant's written statements not inconsistent with later hearsay statements introduced by prosecution]; *People v. Hitchings* (1997) 59 Cal.App.4th 915, 921-922 [prior statements defense sought to introduce were not consistent with defendant's statements at trial because he did not testify].) For example, prior consistent statements are inadmissible under Evidence Code section 791, subdivision (b), if they were made after the improper bias or motive is alleged to have arisen. (*People v. Fayed* (2020) 9 Cal.5th 147, 200; see, e.g., *People v. Smith*, *supra*, 30 Cal.4th at p. 630 ["defendant's motive to fabricate and make himself look as good as possible existed at the time of the [prior] conversations, which occurred after his arrest"].) But a prior consistent statement may be admissible if the declarant is accused of developing new motive to fabricate different from one that existed at time of prior consistent statement. (*People v. Dalton* (2019) 7 Cal.5th 166, 234 ["our cases treat fear of voiding a plea bargain as a motivation to fabricate that arises at the time the plea bargain is entered into, and as a different motivation from the more general 'desire to obtain leniency at defendant's expense' "].)

"Evidence Code section 791 permits the admission of a witness' prior consistent statement when there is a charge that the testimony given by the witness is fabricated or biased, not just when a particular statement at trial is challenged." (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 614 [witness's prior statements, consistent with trial testimony, admissible to counter defense cross-examination suggesting she was fabricating to avoid prosecution and because she was granted immunity]; see also *People v. Brents* (2012) 53 Cal.4th 599, 616.) On the other hand, the California Supreme Court has "emphatically reject[ed]" the argument that any prior consistent statements automatically became admissible merely because the witness' "credibility in general" has been attacked during cross-examination. (*People v. Ervine*, *supra*, 47 Cal.4th at p. 780.)

Finally, if the prior consistent statement is used to rehabilitate the testimony of a witness who testified at the same hearing, such statement is also admissible as substantive evidence (for its truth) under Evidence Code section 1236. (*People v. Kopatz*, *supra*, 61 Cal.4th at p. 83-84.) But if the prior consistent statement relates to a hearsay declarant who did not testify at the current hearing, such statement is only admissible to rehabilitate the hearsay declarant's credibility under Evidence Code section 1202. (*Id*. at pp. 83-87.)

4570.2-Prior inconsistent statements must satisfy statutory requirements 4/19

Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 in turn provides:

> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action.

Under this hearsay exception, the witness' prior inconsistent statement is admitted for both its truth under Evidence Code sections 770 and 1235 as well as for impeachment. (*People v. Strickland* (1974) 11 Cal.3d 946, 954.) " 'A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.' [Citation.]" (*People v. Chism* (2014) 58 Cal.4th 1266, 1294; *People v. Cowan* (2010) 50 Cal.4th 401, 462, fn. omitted.) Distinguish Evidence Code section 1202 permitting inconsistent statement of non-testifying hearsay declarant to be used only for impeachment, not for its truth. (*People v. Blacksher* (2011) 52 Cal.4th 769, 806-808.)

If the prior inconsistent statement is in written form, that portion of the writing is admissible. (*People v. Price* (1991) 1 Cal.4th 324, 411.)

A fundamental requirement of section 1235 is that the statement in fact be inconsistent with the witness' trial testimony. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 462.) "A statement is inconsistent for this purpose if it has ' "a tendency to contradict or disprove the [witness's trial] testimony or any inference to be deduced from it." ' [Citation.]" (*Id* at p. 503.) " ' "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement … ." ' " (*People v. Hovarter* (2008) 44 Cal.4th 983, 1008.) In contrast, "[t]rustworthiness is not an element of the hearsay exception for prior inconsistent statements (Evid. Code, § 1235) but, like most kinds of evidence, a matter for the jury to judge." (*People v. Anderson* (2018) 5 Cal.5th 372, 404.)

As noted above, another requirement for admission of hearsay under the prior inconsistent statement exception is that there be the opportunity to confront the hearsay declarant. "An out-of-court statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted, so long as the witness has been given an opportunity while testifying to explain or deny the statement or is still subject to recall. (Evid. Code, § 1235; see *People v. Chism* (2014) 58 Cal.4th 1266, 1294.)" (*People v. Johnson* (2018) 6 Cal.5th 541, 583; see also *People v. Ledesma* (2006) 39 Cal.4th 641, 710.)

4570.3-Feigned memory loss permits use of prior inconsistent statements 12/16

A requirement of the prior inconsistent statement exception to the hearsay rule under Evidence Code sections 770 and 1235 is that the statement be inconsistent with the witness' trial testimony. (*People v. Cowan* (2010) 50 Cal.4th 401, 462.) Case law establishes that the required foundational element of inconsistency may arise from a feigned lack of recollection by the witness. (See, e.g., *People v. Homick* (2012) 55 Cal.4th 816, 859.)

> In normal circumstances, the testimony of a witness that he does not remember an event is not "inconsistent" with a prior statement by him describing that event. [Citation.]) But justice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement and the same principle governs the case of the forgetful witness.

(*People v. Green* (1971) 3 Cal.3d 981, 988; see also *People v. Johnson* (1992) 3 Cal.4th 1183, 1291.)

> [A]witness's deliberate evasion of questioning can constitute an implied denial that amounts to inconsistency, rendering a prior statement admissible under Evidence Code section 1235. [Citation.] Normally, the question of evasiveness arises when a witness claims memory loss about the subject of the questioning. [Citations.] Answering questions in a deliberately nonresponsive manner, however, also can rise to the level of evasion.

(*People v. Cowan*, *supra*, 50 Cal.4th at p. 463.) "[W]hen a witness's claim of a lack of present memory of prior statements is based on deliberate evasion, inconsistency is implied. (*People v. Ervin* (2000) 22 Cal.4th 48, 84-85.)" (*People v. Alexander* (2010) 49 Cal. 4th 846, 909; see also *People v. Ervin* (2000) 22 Cal.4th 48, 84-85.)

The trial court makes the initial determination whether there is a reasonable factual basis for concluding the witness' forgetfulness is feigned. (*People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1038; *People v Gunder* (2007) 151 Cal.App.4th 412, 418.) "As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220; see also *People v. Rodriguez* (2014) 58 Cal.4th 587, 633; *People v. Debouver* (2016) 1 Cal.App.5th 972, 980.)

Admission of prior inconsistent statements by a prosecution witness feigning memory loss, even though it may also preclude effective cross-examination by the defense, does not violate the defendant's constitutional rights to confrontation and cross-examination. (*People v. Homick*, *supra*, 55 Cal.4th at p. 861.)

4570.4-Prior inconsistent statement is sufficient to prove case 11/11

A prior statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under Evidence Code sections 1235 and 770. (*People v. Cowan* (2010) 50 Cal.4th 401, 462.) Although a prior inconsistent statement may be admitted for the truth of the matter asserted, there remains the question whether such evidence alone is sufficient to sustain a criminal conviction.

> Generally, an extrajudicial statement repudiated at trial cannot form the sole basis for a conviction. (*In re Miguel L.* (1982) 32 Cal.3d 100, 106; *People v. Gould* (1960) 54 Cal.2d 621, 631.) The concern is that "where 'no evidence' incriminates the accused save a single witness's extrajudicial statement repudiated under oath, the extrajudicial statement lacks the 'traditional indicia of reliability' which attach to an accusation made under oath and subject to cross-examination in a formal judicial proceeding. …" (*People v. Lucky* [(1988)] 45 Cal.3d 259, 289, quoting *Miguel L.*, *supra*, at pp. 106-107.)

(*People v. Montiel* (1993) 5 Cal.4th 877, 929.)

There are, however, exceptions to this rule.

We have since adopted a single exception to this rule. The repudiated identification may form the basis for conviction if it was "reiterated by the witness under oath at a preliminary examination or other judicial proceeding, and there was evidence from which the factfinder could credit the witness' prior testimony over his or her failure to confirm the extrajudicial statements at trial." (*In re Miguel L.*, *supra*, citing *People v. Ford* (1981) 30 Cal.3d 209, 214-215; *People v. Chavez* (1980) 26 Cal.3d 334 364

(*People v. Lucky*, *supra*, 45 Cal.3d at p. 288-289 [creating second exception allowing conviction to stand if based upon prior inconsistent statements of two separate witnesses repudiated at trial].)

The continued viability of this rule is also a question. In *People v. Cuevas* (1995) 12 Cal.4th 252 (*Cuevas*), the California Supreme Court overruled the *Gould* case as to extrajudicial identifications. The court replaced the *Gould* rule, deeming an uncorroborated out-of-court identification insufficient evidence as a matter of law to support a conviction, with the substantial evidence test.

[W]e conclude that we should overrule *Gould*'s holding that an out-of-court identification is in all cases insufficient by itself to sustain a conviction. Instead, the sufficiency of an out-of-court identification to support a conviction should be determined under the substantial evidence test … that is used to determine the sufficiency of other forms of evidence to support a conviction.

(*Id*. at p. 257.) There is nothing in the rationale of *Cuevas* that should limit its holding to out-of-court identifications as opposed to other out-of-court prior inconsistent statements repudiated by a witness at trial. (See also *People v. Brown* (1984) 150 Cal.App.3d 968.) "Logically, therefore, out-of-court identifications and other out-of-court statements should be measured by the same standard in judging their sufficiency to support a conviction." (*Cuevas*, *supra*, at p. 266.)

4570.5-EC1294 allows prior inconsistent testimony of unavailable witness 12/10

There are limited exceptions to the requirement in Evidence Code section 770 of confronting the witness with their prior inconsistent statement prior to introducing it through extrinsic evidence. Under Evidence Code section 1294:

(a) The following evidence of prior inconsistent statements of a witness properly admitted in a preliminary hearing or trial of the same criminal matter pursuant to Section 1235 is not made inadmissible by the hearsay rule if the witness is unavailable and former testimony of the witness is admitted pursuant to Section 1291:

(1) A video recorded statement introduced at a preliminary hearing or prior proceeding concerning the same criminal matter.

(2) A transcript, containing the statements, of the preliminary hearing or prior proceeding concerning the same criminal matter.

As one appellate court has explained, Evidence Code section 1294 was enacted to overrule the California Supreme Court decision in *People v. Williams* (1976) 16 Cal.3d 663. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 408.)

Evidence Code section 1294 appears to have been designed to overcome the admissibility problems associated with out-of-court statements which are inconsistent with an unavailable witness's former testimony by requiring that the recorded statement be introduced at the prior hearing where the witness actually testified. It is well settled that the

inherent unreliability typically associated with such out-of-court statements may be deemed nonexistent when the defendant has had an opportunity to question the declarant about the statements.

(*Id*. at p. 409.)

4575.1-Past statements of witness without present memory may be admitted 4/20

Past statements of a witness without sufficient independent memory may be admitted under the hearsay exception for past recollection recorded. (Evid. Code § 1237 [distinguish Evid. Code § 771 regarding refreshing witness' current recollection].) Under Evidence Code section 1237:

> (a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:
>
> (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
>
> (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
>
> (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and
>
> (4) Is offered after the writing is authenticated as an accurate record of the statement.
>
> (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

The trial court has the flexibility to consider all pertinent circumstances in determining, under subdivision (a)(1) of section 1237, whether the matter was "fresh" in the witness's memory when the statement was made. (*People v. Cowan* (2010) 50 Cal.4th 401, 466 [three months]; distinguish *In re Bell* (2017) 2 Cal.5th 1300, 1306-1308 [declaration produced 16 years after the event properly rejected as not sufficiently fresh]; *People v. Royal* (2019) 43 Cal.App.5th 121, 144-146 [insufficient showing of freshness as to statements made six years after the fact].)

The trial court also has discretion in determining if the witness can lay a sufficient foundation that the past statement was truthful under subdivision (a)(3). (*People v. Sanchez* (2019) 7 Cal.5th 14, 41-42 [child witness testified he remembered telling the police the truth even though he could not remember what he said]; *People v. Cowan*, *supra*, 50 Cal.4th at pp. 466-467 [witness testified he told truth to best of his ability at the time although evidence also showed he had multiple motives and opportunities to lie]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1293-1294 [statement admissible despite witness's delusions and drug problems at time of trial, where witness had sufficient recall of the events surrounding the statement that the trial court could conclude it was reliable]; but see *People v. Alexander* (2010) 49 Cal.4th 846, 909-910 [abuse of discretion to admit witness's statement through detective without evidence that witness had insufficient present recollection of the statement].)

4580.1-Prior identification must satisfy statutory requirements 12/10

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) One exception to the hearsay rule permits the introduction of a witness' prior identification. (Evid. Code § 1238.) Evidence Code section 1238 states:

> Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:
>
> (a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;
>
> (b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and
>
> (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time.

Under Evidence Code section 1238, "[e]vidence of an extrajudicial identification is independently admissible evidence of identity." (*People v. Fagalilo* (1981) 123 Cal.App.3d 524, 531.) "Evidence of an extrajudicial identification is admissible both to corroborate courtroom identification and as independent evidence of identity." (*People v. Scoglio* (1969) 3 Cal.App.3d 1, 5-6; *People v. Pedercine* (1967) 256 Cal.App.2d 328, 335.)

The witness' prior identification, even if uncorroborated, is admissible for its truth and is sufficient evidence to convict a criminal defendant. In *People v. Cuevas* (1995) 12 Cal.4th 252, the California Supreme Court overruled previous case law requiring corroboration of the witness' out-of-court identification and replaced it with the substantial evidence test.

> [W]e conclude that we should overrule [the prior case authority] holding that an out-of-court identification is in all cases insufficient by itself to sustain a conviction. Instead, the sufficiency of an out-of-court identification to support a conviction should be determined under the substantial evidence test … that is used to determine the sufficiency of other forms of evidence to support a conviction.

(*Id*. at p. 257; see also *United States v. Owens* (1988) 484 U.S. 554, 564 [conviction based on admission of prior identification of witness with no present memory of their attacker did not violate Confrontation Clause].)

The prior identification is not admissible unless the hearsay declarant testifies at the hearing in which it is being introduced. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 408.) But, the witness need not be asked in the exact words that "he [or she] made the identification and that it was a true reflection of his [or her] opinion at that time" under subdivision (c) so long as this is the substance of their testimony. (*People v. Redd* (2010) 48 Cal.4th 691, 728-730.)

4585.1-An excited or spontaneous utterance is an exception to the hearsay rule 11/20

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." "The rationale of this exception is that the spontaneity of such statements and the consequent lack of opportunity for reflection and deliberate fabrication provide an adequate guarantee of their trustworthiness." (Law Revision Commission

Comment to Evid. Code § 1240.) " '[T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief.' [Citation.]" (*People v. Lynch* (2010) 50 Cal.4th 693, 751 (*Lynch*).)

"The crucial element in determining whether an out-of-court statement is admissible as a spontaneous declaration is the mental state of the speaker." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 811.)

> To be admissible, "(1) there must be some occurrence startling enough to produce … nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citation.]

(*People v. Washington* (1969) 71 Cal.2d 1170, 1176; see also *People v. Penunuri* (2018) 5 Cal.5th 126, 152; *People v. Gonzalez* (2012) 54 Cal.4th 1234, 1289.) The crime or other event which triggers the spontaneous utterance need not be actually seen so long as it is personally perceived by the declarant in some way. (*People v. Blacksher* (2011) 52 Cal.4th 769, 810-811.)

The hearsay declarant need not be unavailable. (*People v. Dennis* (1998) 17 Cal.4th 468, 529; *People v. Hughly* (1987) 194 Cal.App.3d 1383, 1388-1394.)

Evidence Code section 1240 "permits admission of a spontaneous declaration notwithstanding the fact the declarant is too young to testify. (*People v. Orduno* (1978) 80 Cal.App.3d 738, 745.)" (*In re Damon H.* (1985) 165 Cal.App.3d 471, 475; see also *People v. Daily* (1996) 49 Cal.App.4th 543, 552.)

The identity of the hearsay declarant need not be established so long as there is sufficient evidence that the unidentified declarant was speaking from personal knowledge. (*People v. Provencia* (1989) 210 Cal.App.3d 290, 301-303.)

Because the spontaneous utterance should describe an event, that portion of the hearsay declarant's statement expressing a lay opinion is inadmissible just as if the declarant had testified in court. (*People v. Miron* (1989) 210 Cal.App.3d 580, 583-584.)

The trial court's ruling admitting statements as spontaneous is reviewed for abuse of discretion. (*People v. Lucas* (2014) 60 Cal.4th 153, 270; *People v. Ledesma* (2006) 39 Cal.4th 641, 708.) "Any preliminary factfinding undertaken to determine whether the requisite elements of the spontaneous statement exception have been met will be upheld if supported by substantial evidence." (*People v. Liggins* (2020) 53 Cal.App.5th 55, 61.) In addition, because the second admissibility requirement, i.e., that the statement was made before there was "time to contrive and misrepresent," "relates to the peculiar facts of the individual case more than the first or third [admissibility requirements], the discretion of the trial court is at its broadest when it determines whether this requirement is met." (*People v. Poggi* (1988) 45 Cal.3d 306, 318-319; see also *People v. Sanchez* (2019) 7 Cal.5th 14, 39-40; *People v. Gonzalez*, *supra*, 54 Cal.4th at p. 1271.)

4585.2-Factors relevant to excited or spontaneous utterance determination 8/19

A variety of factors should be evaluated to determine if the mental state of the declarant qualifies the hearsay statement as meeting the requirement of being made spontaneously or under the excitement of the moment. (*People v. Lynch* (2010) 50 Cal.4th 693, 752 (*Lynch*).) "These factors include the length of time between the startling occurrence and the statement, whether the statement was blurted out or made in response to questioning, how detailed the questioning was, whether the declarant appeared excited or frightened, and whether the declarant's 'physical condition was such as would inhibit deliberation.' (*People v. Raley* (1992) 2 Cal.4th 870, 894 … .)" (*Lynch*, *supra*, 50 Cal.4th at p. 752; see also *People v. Sanchez* (2019) 7 Cal.5th 14, 40; *People v. Merriman* (2014) 60 Cal.4th 1, 64.) "The amount of time that passes between a startling event and subsequent declaration is not dispositive, but will be scrutinized, along with other factors, to determine if the speaker's mental state remains excited." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 810; see also *People v. Clark* (2011) 52 Cal.4th 856, 926; *People v. Blacksher* (2011) 52 Cal.4th 769, 817.) That the hearsay declarant called 9-1-1 to report the event does not necessarily deprive those statements of the requisite spontaneity under Evidence Code section 1240. (See, e.g., *People v. Roybal* (1998) 19 Cal.4th 481, 515-516; *People v. Brenn* (2007) 152 Cal.App.4th 166, 172-173.) While, "responses to detailed questioning are likely to lack spontaneity, … an answer to a simple inquiry may be spontaneous." (*People v. Morrison* (2004) 34 Cal.4th 698, 719; *People v. Thomas* (2011) 51 Cal.4th 449, 495-496.)

> "When the statements in question were made and whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity. [Citations.] But ... ['n]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance*.' "

(*People v. Brown* (2003) 31 Cal.4th 518, 541, italics in original; see also *People v. Penunuri* (2018) 5 Cal.5th 126, 152.)

4585.3-A contemporaneous statement is admissible to explain conduct 7/20

Evidence Code section 1241 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and (b) Was made while the declarant was engaged in such conduct." According to the Law Revision Commission Comments related to the enactment of this provision in 1965:

> Under existing law, where a person's conduct or act is relevant but is equivocal or ambiguous, the statements accompanying it may be admitted to explain and make the conduct or act understandable. … Some writers do not regard evidence of this sort as hearsay evidence, but the definition in Section 1200 seems applicable to many of the statements received under this exception. … Section 1241 removes any doubt that might otherwise exist concerning the admissibility of such evidence under the hearsay rule.

There is little case authority interpreting the "contemporaneous statement" hearsay exception contained in Evidence Code section 1241. Certainly Evidence Code section 1241 does not come in play if the conduct of the declarant is not in issue. (*People v. Hines* (1997) 15 Cal.4th 997, 1034-1035, fn. 4.) The words must also accompany the conduct. (*People v. Cruz* (1968) 264 Cal.App.2d 350, 359.) Even if they satisfy the requirements of a "contemporaneous statement," however, the

statements may be inadmissible on other grounds. (See, e.g., *People v. Perez* (1978) 83 Cal.App.3d 718, 726 [*Aranda-Bruton*].) The contemporaneous statements hearsay exception under Evidence Code section 1241 must be contrasted with hearsay statements describing a past or present feeling or sensation covered by Evidence Code sections 1250 and 1251.

In *People v. Marchialette* (1975) 45 Cal.App.3d 974 the defendant was accused of murdering the victim in his residence by shooting him four times. An eyewitness saw defendant as he went into the room where the shooting occurred. The eyewitness heard a yell, a window breaking along with a sharp sound, followed by a burglar alarm going off. This witness did not know what had happened. The defendant then left the scene. The victim was found shortly thereafter. The defendant claimed self-defense. The prosecution called witness Ivory Collins to testify to what he heard while he happened to be on the telephone with the victim at the time of the shooting.

> Collier heard a "kind of a knock" on the door. The man on the other end of the phone said, " 'Who is it?' Or something." The man said, "come on in. Just a minute. I'm with someone. I'm talking to someone." The man came back on the phone and resumed talking to Collier. Collier heard a different voice say, "Go ahead and push it." Then immediately the voice said, "Go ahead and push it and I'll blow your fucking brains out." Then Collier heard a burglar alarm "right quick" and he heard a shot. Collier then heard a lot of screaming in his ear on the telephone. Then he heard another scream, then another shot, he heard "them scream again." And "there was another shot." "There was the third shot and then [he] heard the telephone fall down and hit the desk or whatever he was standing and talking … the receiver." Then he "heard another shot and everything got quiet and faded away and the guy stopped hollering."

(*Id*. at p. 979.) The defense argued that what Ms. Collins heard the declarant (which the circumstantial evidence strongly suggested was the defendant) say ("I'll blow your fucking brains out") was inadmissible hearsay. Relying on Evidence Code section 1241, the appellate court disagreed.

> Marchialette's argument that the court erroneously admitted evidence by Collier regarding what he heard over the telephone is predicated on the assumption that what Collier heard was hearsay. The authorities are in disagreement as to whether such evidence is nonhearsay [citation] or admissible as an exception to the hearsay rule. [Citation.] Without characterizing such evidence Evidence Code section 1241 expressly declares that such evidence is not made inadmissible by the hearsay rule. Such statements testified to by Collier were clearly verbal acts which explain qualify or make understandable the conduct of the declarant and they were made while the declarant was engaged in such conduct.

(*Id*. at pp. 979-980, fn. omitted.) "The testimony of Collier was competent. It was clearly relevant. It was direct ear-witness evidence of the actual homicide while it was in progress." (*Id*. at p. 980.)

4590.1-EC1250 covers the present state of mind hearsay exception 7/20

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Evidence Code section 1250, subdivision (a), allows into evidence a statement by the declarant expressing their "then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health)" notwithstanding the hearsay rule when: "(1) The evidence is offered to prove the declarant's state of mind, emotion, or

physical sensation at that time or at any other time when it is itself an issue in the action; or (2) The evidence is offered to prove or explain acts or conduct of the declarant." (See *People v. Fayed* (2020) 9 Cal.5th 147, 193 [distinguishing subds. (a)(1) and (a)(2)].) For example, "[a] declaration of then existing pain is admissible under section 1250 (*In re Tanya P.* (1981) 120 Cal.App.3d 66, 70), because it has essentially the same indicia of reliability as a spontaneous statement." (*People v. Nelson* (2012) 209 Cal.App.4th 698, 709.) The hearsay statements covered by Evidence Code section 1250 are only admissible to show the state of mind of the declarant, not the listener. (*People v. Luo* (2017) 16 Cal.App.5th 663, 677.)

"The evidence admitted under section 1250 is hearsay; it describes a mental or physical condition, intent, plan, or motive and is received for the truth of the matter stated." (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.) "In contrast, a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind." (*Ibid*.; but see *People v. Wang* (2020) 46 Cal.App.5th 1055, 1079 [hearsay statement of what defendant told victims inadmissible under either theory because it did reveal anything about victims' state of mind].)

A clear example of a statement professing the declarant's state of mind is a defendant's statement admitted in a felony-murder case, made three days before the killing, that he might kill any victim or witness to his crimes rather than go back to prison. (*People v. Karis* (1988) 46 Cal.3d 612, 634-637.) "[S]tatements of intent of this nature, reflecting intent to kill a particular category of victims in specific circumstances, fall within the state-of-mind exception to the hearsay rule. (Evid. Code, § 1250.)" (*Id*. at p. 637; see also *People v. Spector* (2011) 194 Cal.App.4th 1335, 1392-1398 [defendant's long history of "generic threats" to kill women admissible as evidence he had such a state of mind when woman acquaintance shot to death at his home].)

A key limitation to the "existing mental or physical state" hearsay exception under Evidence Code section 1250 is that a "statement of memory or belief" is not admissible to prove "the fact remembered or believed." (Evid. Code, § 1250, subd. (b).)

> This limitation is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the declarant's then existing state of mind—his memory or belief—concerning the past event. If the evidence of that state of mind—the statement of memory—were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by process of circuitous reasoning, admissible to prove that the event occurred.

(Law Revision Commission Comments to Evid. Code, § 1250; see also *Kincaid v. Kincaid* (2011) 197 Cal.App.4th 75, 92 ["[T]he state of mind hearsay exception does not apply to statements offered to prove that the alleged abuse occurred"].)

The present state of mind hearsay exception is for statements expressing a contemporaneous feeling or sensation and, thus, must be contrasted with hearsay statements explaining, qualifying or making understandable conduct made while engaged in such conduct under Evidence Code section 1241 or hearsay statements expressing a past feeling or sensation covered by Evidence Code section 1251. Note also that, unlike section 1251, section 1250 does not require that the hearsay declarant be unavailable.

4590.2-EC1251 covers the past state of mind hearsay exception 5/20

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Evidence Code section 1251 allows into evidence a statement by the declarant expressing their "state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement" notwithstanding the hearsay rule when: "(a) The declarant is unavailable as a witness; and (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation." A statement of a hearsay declarant's past state of mind is inadmissible if introduced not solely to prove the declarant's state of mind or emotional state, but to suggest a factual basis for that state of mind. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.)

The past state of mind hearsay exception is for statements expressing a prior feeling or sensation and, thus, must be contrasted with a hearsay statement of a "then existing" feeling or sensation covered by Evidence Code section 1250. Note also that unlike section 1250, section 1251 requires that the hearsay declarant be unavailable. Therefore, section 1251 will never apply to criminal defendants because they are always available to testify if they choose. (*People v. Ervine* (2009) 47 Cal.4th 745, 779, fn. 13.)

4590.3-State of mind hearsay exceptions require statement be trustworthy 5/20

The past and present state of mind exceptions to the hearsay rule are inapplicable "if the statement was made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code, § 1252.) The focus here is on the hearsay declarant, not the testifying witness. (*People v. Riccardi* (2012) 54 Cal.4th 758, 821.)

> " 'The decision whether trustworthiness is present requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion.' " (*People v. Edwards* (1991) 54 Cal.3d 787, 819-820.) "To be admissible under Evidence Code section 1252, statements must be made in a natural manner, and not under circumstances of suspicion, so that they carry the possibility of trustworthiness. Such declarations are admissible only when they are ' "made at a time when there was no motive to deceive." ' " (*Id*. at p. 820.)

(*People v. Ervine* (2009) 47 Cal.4th 745, 778-779.) "A reviewing court may overturn the trial court's finding regarding trustworthiness only if there was an abuse of discretion. [Citations.]" (*People v. Romeo* (2015) 240 Cal.App.4th 931, 947.)

4590.4-Per EC1252 a defendant's self-serving hearsay statements are not admissible 5/20

Out of court assertions and descriptions of a criminal defendant's own feelings and other mental states are hearsay which may come within the state of mind hearsay exceptions contained in Evidence Code section 1250 et seq. The key question usually is whether "the statement was made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code, § 1252.) California has long recognized that a criminal defendant's self-serving statement of his or her mental state is inherently unreliable and should be excluded. (See, e.g., *People v. Jurado* (2006) 38 Cal.4th 72, 129-130 ["the circumstance that defendant made his statements during a postarrest police

interrogation, when he had a compelling motive to minimize his culpability for the murder and to play on the sympathies of his interrogators, indicated a lack of trustworthiness"].)

> The admission of such evidence would have violated the cardinal rule that self-serving declarations are not admissible and in order to entitle any statement made by the defendant to admission it must be shown that it is within the rule denominated *res gestae*, which means that the declaration must be the "natural and spontaneous outgrowth of the act or assault", and not a mere narration of a past transaction. The *res gestae* include words and acts which are so closely connected with the main fact as to constitute a part of the transaction, and without a knowledge of which the main fact might not be understood. "They are the events themselves speaking through the instinctive words and acts of the participants; the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it and serve to illustrate its character." [Citation.] [¶] A number of cases may be cited in which the declarations or exclamations were made less than a half-hour after the homicide was executed or the assault was made and were held inadmissible on the ground that such evidence was no part of the *res gestae*, but was self-serving and hearsay.

(*People v. Perkins* (1937) 8 Cal.2d 502, 517.) Courts should not "effectively permit [the] defendant to address the jury without subjecting himself to cross-examination." (*People v. Whitt* (1990) 51 Cal.3d 620, 644.) Similarly, post-crime statements by criminal suspects are inherently untrustworthy. (*People v. Ervine* (2009) 47 Cal.4th 745, 779 [defendant's written statements made while trapped inside his house and surrounded by law enforcement officers properly excluded]; *People v. Edwards* (1991) 54 Cal.3d 787, 819-820 [notebook entries and statements to police 9 days after murder properly excluded]; see also *People v. Kaurish* (1990) 52 Cal.3d 648, 705 ["[T]here is no indication that defendant's exculpatory statements to detectives, made shortly after his arrest, were anything but self-serving."].)

4590.5-Victim state of mind evidence admissible when placed in issue 7/20

A victim's hearsay statements may be admissible under one of the state of mind exceptions if the victim's mental state or conduct is placed in issue. (Evid. Code, §§ 1250, subd. (a)(1), 1251, subd. (b); see *People v. Guerra* (2006) 37 Cal.4th 1067, 1114, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "A prerequisite to this exception to the hearsay rule is that the declarant's mental state or conduct be factually relevant." (*People v. Hernandez* (2003) 30 Cal.4th 835, 872.) For example, "evidence of the victim's general fear or dislike of the appellant is not relevant unless the victim's state of mind has been placed in issue." (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389; see also *People v. Noguera* (1992) 4 Cal.4th 599, 621-622.) "[H]earsay statements of victims concerning fears of or threats against them by the accused, when offered to prove the conduct of the accused, are not within the exception to the hearsay rule embodied in Evidence Code section 1250." (*People v. Noguera*, *supra*, 4 Cal.4th at p. 622; see also *People v. Flores* (2020) 9 Cal.5th 371, 410-411.) But, "an out-of-court statement describing the declarant's fear is not inadmissible simply because it also contains the reason for that fear, i.e., that the defendant had threatened the declarant. Instead, admissibility turns on whether the declarant's mental state has been placed in issue in the case." (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 887; distinguish *People v. Hernandez*, *supra*, 30 Cal.4th at p. 873 [neither victim's mental state or conduct at issue]) "Our cases repeatedly have held that under Evidence Code section 1250, a

victim's out-of-court statements expressing fear of a defendant are relevant only when the victim's conduct in conformity with that fear is in dispute. [Citations.]" (*People v. Riccardi* (2012) 54 Cal.4th 758, 816.)

The victim's hearsay statement may be in the form of writings. (See, e.g., *People v. Melton* (1988) 44 Cal.3d 713, 739-740 [notebook and calendar entries by the victim recording appointments with homosexual partners, containing references to an appointment with defendant, were admissible to show the victim's state of mind, i.e., that he knew defendant, had a link with him before his death, and expected a visit from him on the day he died.].)

4590.6-Victim state of mind hearsay may be relevant to element of crime or defense 5/20

Hearsay declarations reflecting a victim's past or present state of mind under Evidence Code sections 1250 and 1251 are admissible when they are relevant to an element of the crime or a defense, such as consent. "Evidence of the murder victim's fear of the defendant is admissible when the victim's state of mind is relevant to an element of an offense." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1114; see, e.g., *People v. Brooks* (2017) 3 Cal.5th 1, 37-38 [victim's fear of defendant is element of stalking charge].)

> Here, the trial court properly admitted [the victim's hearsay statement]. "In a prosecution for forcible rape, evidence is relevant if it establishes any circumstance making the victim's consent to sexual intercourse less plausible." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123-1124.) [The victim's] statements that she believed defendant came into her house as she napped and that she was afraid of him were clearly probative of her lack of consent to sexual intercourse in the attempted rape. Therefore, [the victim's] state of mind was relevant to prove the attempted-rape felony murder and the attempted-rape special-circumstance allegation, and thus fell within the state-of-mind exception. (Evid. Code, § 1250, subd. (a)(2).)

(*People v. Guerra*, *supra*, 37 Cal.4th at p. 1115; see also *People v. Becerrada* (2017) 2 Cal.5th 1009, 1027 ["The statement was admissible to show Maria's state of mind, that is, that she perceived defendant's statement as a threat and was therefore afraid of him. Maria's fear of defendant, and her conduct in light of that fear, was at issue in the action."]; *People v. Waidla* (2000) 22 Cal.4th 690, 723 [the decedent's statement that she feared defendant was relevant to whether the decedent would have consented to the defendant's entry into her residence where burglary and robbery special circumstances were alleged].) In *People v. Geier* (2007) 41 Cal.4th 555, the issue of consent was raised by the charge of forcible rape and the special circumstance allegation that the victim was murdered during the commission of a rape. A witness testified that the victim had indicated to him she liked to have sex with muscular African-American men bore. The California Supreme Court found this statement relevant to whether the victim would have consented to sexual relations with the defendant, who was white. (*Id*. at p. 587.)

The above rationale applies to hearsay statements of a victim's expression of fear and apprehension of the defendant when relevant to refute a defense claim that the victim was the aggressor and that the defendant was acting in self-defense. (See, e.g., *People v. Romero* (2007) 149 Cal.App.4th 29, 37-38.) It also applies to admit a victim's statement that tends to discredit a defense claim in seeking to reduce a murder charge to voluntary manslaughter, that the victim insulted and attacked the defendant resulting in the defendant killing the victim under the influence of a sudden quarrel or heat of passion. (See, e.g., *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1103-1104.)

4590.7-Victim fear of defendant may be admitted to prove motive 5/20

Evidence Code section 1250, subdivision (a), allows into evidence a statement by the declarant expressing their "then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health)" notwithstanding the hearsay rule when: "… (2) The evidence is offered to prove or explain acts or conduct of the declarant." "[W]e conclude that evidence of the decedent's state of mind, offered under Evidence Code section 1250, can be relevant to a defendant's *motive*—but only if there is independent, admissible evidence that the defendant was aware of the decedent's state of mind before the crime and may have been motivated by it." (*People v. Riccardi* (2012) 54 Cal.4th 758, 820, italics added.) "We caution, however, that those statements that go no further than to indicate the victim's fear of the defendant, even if known by a defendant, generally cannot be admissible unless they have some relevant effect on the defendant's behavior." (*Ibid*.)

4590.8-Victim intent to do future act may be admissible state of mind evidence 5/20

Evidence Code section 1250 permits introduction of the hearsay declarant's statement of their intention to do something or go somewhere. (*People v. Griffin* (2004) 33 Cal.4th 536, 578-579 [murder victim's statement that she intended to confront the defendant if he molested her again was admissible to prove her future conduct and, thus, supply the motive for defendant to kill her]; *People v. Majors* (1998) 18 Cal.4th 385, 403-405 [victim told several people he intended to conduct a drug deal with people form Arizona on the night he was killed]; *People v. Jones* (1996) 13 Cal.4th 535, 548 [murder victim told witness that she was going to "Oakland with Troy" [the defendant's name was "Troy Jones"] and that "if she didn't come back … to call … Aunty Bobbi"].)

In *People v. Crew* (2003) 31 Cal.4th 822, the defense claimed it that a witness' testimony that the murder victim, Nancy, told her "If you don't hear from me in two weeks, send the police," was inadmissible hearsay. The California Supreme Court disagreed:

> The statement was admissible under Evidence Code section 1250, subdivision (a)(2) to explain Nancy's conduct. The defense presented the theory that Nancy disappeared of her own accord because she was a troubled person suffering from stress and depression. Nancy's statement to [the witness] to send the police if she was not heard from in two weeks was admissible as evidence that Nancy did not disappear on her own. Because the statement was evidence of Nancy's state of mind to explain her conduct concerning going with defendant, it was also relevant. (Evid. Code, § 210.) [¶] Because the testimony was probative on whether Nancy's disappearance was of her own volition, its evidentiary value was not substantially outweighed by the danger of undue prejudice under Evidence Code section 352

(*Id*. at p. 840.)

4590.9-Victim state of mind hearsay can refer to defendant's past misconduct 5/20

Hearsay declarations showing the victim's state of mind under Evidence Code sections 1250 and 1251 are admissible even if they refer to past misconduct by the defendant. (*People v. Ortiz* (1995) 38 Cal.App.4th 377 386-389.) The trial court retains authority under Evidence Code section 352 to exclude such statements, although a limiting instruction under Evidence Code section 355 may be sufficient to prevent the jury from using the statement for an improper purpose. (*Id*. at pp. 388, 391-392; see also *People v. Riccardi* (2012) 54 Cal.4th 758, 823-824; *People v. Cox*

(2003) 30 Cal.4th 916, 963-963, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

> In determining whether an out-of-court statement offered as circumstantial evidence of the victim's state of mind should be excluded under [section 352], the trial court "may consider such things as the prejudicial nature of the conduct attributed to [the defendant]; the demeanor of the declarant as described by the witnesses and other circumstances attendant to the making of the statement; and whether the circumstances of the statement are such that the jury will be unable to follow the limiting instruction. If the court concludes that the jury will be unable to use the evidence solely within its limitations, the court should exercise its discretion and exclude the evidence." (*Ortiz*, *supra*, 38 Cal.App.4th at p. 392.)

(*People v. Kovacich* (2011) 201 Cal.App.4th 863, 889.)

4600.1-Scope of *Crawford* right to confrontation 7/20

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) the United States Supreme Court held that the Confrontation Clause (as envisioned by the Framers of the Constitution) bars the admission of out-of-court "testimonial" statements except when the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*Id*. at pp. 53-54; see also *People v. Hopson* (2017) 3 Cal.5th 424, 431.) *Crawford* overruled *Ohio v. Roberts* (1980) 448 U.S. 56, as to testimonial statements from witnesses who did not testify at trial. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford*, *supra*, 541 U.S. at pp. 68-69; see generally, *Davis v. Washington* (2006) 547 U.S. 813.) On the other hand, "the confrontation clause has no application to out-of-court nontestimonial statements. (*Whorton v. Bockting* (2007) 549 U.S. 406, 420; *People v. Gutierrez* (2009) 45 Cal.4th 789, 812.)" (*People v. Arceo* (2011) 195 Cal.App.4th 556, 571; see also *Crawford*, *supra*, 541 U.S. at p. 68; *People v. Cooper* (2007) 148 Cal.App.4th 731, 740.) Thus, the former standard for testing the admissibility of hearsay under the Confrontation Clause set forth in *Ohio v. Roberts* (1980) 448 U.S. 856 is no longer applicable. (*People v. Dalton* (2019) 7 Cal.5th 166, 208; *People v. Clark* (2011) 52 Cal.4th 856, 1000.) "Reliability is no longer the touchstone for determining violations of the confrontation clause." (*People v. Almeda* (2018) 19 Cal.App.5th 346, 362.)

Any statement offered for its truth first must be admissible hearsay under the Evidence Code before any analysis is necessary under *Crawford*. "In analyzing whether admission of an out-of-court statement violates the confrontation clause under [*Crawford*], the first question for the trial court is whether proffered hearsay would fall under a recognized state law hearsay exception; if it does not, the matter is resolved, and no further *Crawford* analysis is required." (*People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 5.)

> With this legal backdrop, we have set out a two-step inquiry to determine the admissibility of out-of-court statements in criminal cases: "The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." [Citations.]

(*People v. Fayed* (2020) 9 Cal.5th 147, 168, italics in original.)

Crawford is inapplicable to hearsay statements offered by the prosecution in response to statements offered by the defense under Evidence Code section 356. (*People v. Vines* (2011) 51 Cal.4th 830, 862-863; *People v. Parrish* (2007) 152 Cal.App.4th 263, 275-276.)

Crawford does not apply to adoptive admissions. (*People v. Armstrong* (2019) 6 Cal.5th 735, 790; *People v. Jennings* (2010) 50 Cal.4th 616, 662; *People v. Combs* (2004) 34 Cal.4th 821, 842-843.)

Crawford does not apply to dying declarations. (*People v. Johnson* (2015) 61 Cal.4th 734, 761-762; *People v. D'Arcy* (2010) 48 Cal.4th 257, 291-292; *People v. Monterroso* (2004) 34 Cal.4th 743, 765.)

Crawford does not apply to statements made in furtherance of a conspiracy, even when made to an investigating officer. (*People v. Gann*, *supra*, 193 Cal.App.4th 994, 1009-1011.)

> "For these reasons, we hold that when the object of a conspiracy is to obstruct justice, mislead law enforcement officers, or commit similar offenses by making false statements to investigating officers, truthful statements made to such officers designed to lend credence to the false statements and hence advance the conspiracy are not rendered inadmissible by the Confrontation Clause. A contrary reading of the rule would result in obvious and unacceptable impediments to prosecuting cases like this one, in which the very object of the charged conspiracy is for the defendants to mislead investigators by responding falsely to the investigators' questions in a structured setting, fully aware that their responses might be used in future judicial proceedings. For these reasons, there was no error here in admitting the testimonial statements of one Defendant against the other." [Citation.]

(*Ibid*.)

4600.2-*Crawford* satisfied by opportunity to confront and cross-examine 8/19

The rule of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) does not apply if the defendant is afforded the opportunity to confront and cross-examine the hearsay declarant. (*Crawford*, *supra*, 541 U.S. at p. 59 & fn. 9; *People v. Potts* (2019) 6 Cal.5th 1012, 1050; *People v. Dement* (2011) 53 Cal.4th 1, 23-24; *People v. Stevens* (2007) 41 Cal.4th 182, 199.) "[A]as the United States Supreme Court has stated, 'when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.' (*Crawford v. Washington* (2004) 541 U.S. 36, 59-60, fn. 9.) This is true even if the witness cannot recall the statement." (*People v. Sanchez* (2019) 7 Cal.5th 14, 42 [witness with no current memory testified and laid foundation for admission of statements under the hearsay exception for past recollection recorded]; see also *People v. Cowan* (2010) 50 Cal.4th 401, 468 [accord].) "The United States Supreme Court has made clear that admitting prior statements of a witness who testifies at trial and is subject to cross-examination does not violate a defendant's confrontation rights." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 632.) The opportunity to confront and cross-examination may be satisfied if it occurred at a prior hearing such as a preliminary examination or trial. (See *People v. Wilson* (2005) 36 Cal.4th 309, 343 [first trial]; *People v. Byron* (2009) 170 Cal.App.4th 657, 674 [preliminary hearing].)

4600.3-*Crawford* inapplicable if statement not offered for truth 8/19

The holding in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) only applies if the statement of the unavailable witness is offered for its truth. There are no Confrontation Clause restrictions on the introduction of out-of-court statements for nonhearsay purposes, i.e., purposes other than establishing the truth of the matter asserted. (*People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 6.) This is described by the California Supreme Court as the "not-for-the-truth limitation" on the holding in *Crawford*. (*People v. Hopson* (2017) 3 Cal.5th 424, 432 (*Hopson*); *People v. Sanchez* (2016) 63 Cal.4th 665, 682.)

> The first, and most basic, requirement for applying the not-for-the-truth limitation on the confrontation right is that the out-of-court statement must be offered for some purpose independent of the truth of the matters it asserts. That means that the statement must be capable of serving its nonhearsay purpose regardless of whether the jury believes the matters asserted to be true.

(*Hopson*, *supra*¸3 Cal.5th at p. 432.) It is *Crawford* error to use a statement offered and admitted for a nonhearsay purpose for its truth. (*Id*. at pp. 433-435 [error for prosecutor to argue dead accomplice's testimonial confession to police implicating defendant was true when statement only admitted under Evidence Code § 1202 to impeach defendant's testimony]; distinguish *Tennessee v. Street* (1985) 471 U.S. 409, 414-417 [accomplice's confession only admitted and used by prosecution for the legitimate, nonhearsay purpose of rebutting the defendant's testimony].)

In short, if the statement at issue is not being offered for its truth, there is no Confrontation Clause issue. (*People v. Bell* (2019) 7 Cal.5th 70, 100 [deceased accomplice's statement admitted only to explain detective's failure to have vehicle tested for bloodstains]; *People v. Mendoza* (2007) 42 Cal.4th 686, 698-699 [victim's accusation admitted only to demonstrate defendant's motive for killing]; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1370 [videotape of judge's words and actions at prior hearing intended to seek clarification of expert witness' testimony]; *People v. Gann* (2011) 193 Cal.App.4th 994, 1011, fn. 10 [statements by co-conspirator offered as nonhearsay because they were demonstrably false]; *People v. Cooper* (2007) 148 Cal.App.4th 731, 744-745 [portions of videotape offered only to demonstrate person's mental and physical condition]; *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1224-1225 [dispatch tape offered to show how police pursuit unfolded and how officers responded].)

4600.4-Two-part test whether hearsay is testimonial 9/21

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) the United States Supreme Court held that the Confrontation Clause bars the admission of out-of-court "testimonial" statements except when the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*Id*. at p. 59.) The issue whether a particular statement is testimonial or nontestimonial has been the subject of much litigation since the *Crawford* decision.

The California Supreme Court, attempting to define the line between testimonial and nontestimonial statements in light of the various pronouncements from the United States Supreme Court since *Crawford*, has formulated a two-part test.

> The California Supreme Court has extracted two critical components from the "widely divergent" views of the United States Supreme Court justices. [Citations.] To be "testimonial," (1) the statement must be "made with some degree of formality or solemnity," and (2) its "primary purpose" must "pertain[] in some fashion to a criminal

prosecution." ([*People v. Dungo* (2012) 55 Cal.4th 608] at p. 619; [*People v. Lopez* (2012) 55 Cal.4th 569] at pp. 581-582.)

(*People v. Holmes* (2012) 212 Cal.App.4th 431, 437-438; see also *People v. Gallardo* (2017) 18 Cal.App.5th 51, 66; *People v. Barba* (2013) 215 Cal.App.4th 712, 720-721.) "It is now settled in California that a statement is not testimonial unless both criteria are met." (*People v. Holmes*, *supra*, 212 Cal.App.4th at p. 438.)

The "primary purpose" requirement was introduced by the High Court in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*). The "primary purpose" test applies an objective examination of the facts and circumstances to determine if the primary purpose of law enforcement's questioning was testimonial or nontestimonial. (*Id*., 547 U.S. at p. 822, italics added, fn. omitted.) "When determining the primary purpose of an out-of-court statement, the [the court should take] into account all the surrounding circumstances." (*People v. Barba*, *supra*, 215 Cal.App.4th at p. 741.)

In *Michigan v. Bryant* (2011) 562 U.S. 344 (*Bryant*) the High Court reaffirmed the "primary purpose" test from *Davis*, emphasizing that it is an objective test.

> The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.

(*Id*. at p. 360, fn. omitted.) "*Davis* requires a combined inquiry that accounts for both the declarant and the interrogator. In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers." (*Id*. at pp. 367-368, fn. omitted.) "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.' [Citation.]" (*Ohio v. Clark* (2015) 576 U.S. 237, 245.) In short, "[t]he key distinction is whether the primary purpose of the questioning is to establish past facts, or to respond to an ongoing emergency." (*People v. Roberts* (2021) 65 Cal.App.5th 469, 478.)

The California Supreme Court has "identified six factors to consider in determining whether statements made in the course of police questioning were for the ' "primary purpose of creating an out-of-court substitute for trial testimony' that implicates the confrontation clause." ' [Citation.]" (*People v. Chism* (2014) 58 Cal.4th 1266, 1289.)

> These are (1) an objective evaluation of the circumstances of the encounter and the statements and actions of the individuals involved in the encounter; (2) whether the statements were made during an ongoing emergency or under circumstances that reasonably appeared to present an emergency, or were obtained for purposes other than for use by the prosecution at trial; (3) whether any actual or perceived emergency presented an ongoing threat to first responders or the public; (4) the declarant's medical condition; (5) whether the focus of the interrogation had shifted from addressing an ongoing emergency to obtaining evidence for trial; and (6) the informality of the statement and the circumstances under which it was obtained.

(*Ibid*.)

4600.5-*Crawford* applies only to statements made to law enforcement officers 2/21

Unless a hearsay statement is made to a law enforcement officer or other such official with the primary purpose of supplying evidence in a criminal prosecution, the Confrontation Clause as interpreted by the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) is not implicated. The High Court in *Crawford* "explained that the confrontation clause addressed the specific concern of '[a]n accuser who makes a formal statement to government officers' because that person 'bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.' [Citation.]" (*People v. Loy* (2011) 52 Cal.4th 46, 66; see also *People v. Brooks* (2017) 3 Cal.5th 1, 39.) "Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." (*Ohio v. Clark* (2015) 576 U.S. 237, 249; see *People v. Gomez* (2018) 6 Cal.5th 243, 298 [victim's handwritten note "not specifically intended for law enforcement"].)

Thus, for example, statements made unwittingly to a police informant or fellow prisoner are not testimonial. (*Davis v. Washington* (2006) 547 U.S. 813 835; *People v. Fayed* (2020) 9 Cal.5th 147, 169 [incriminating statements made to cellmate who agreed to wear a recording device]; *People v. Dalton* (2019) 7 Cal.5th 166, 209 [cellmate not acting as government agent]; *People v. Almeda* (2018) 19 Cal.App.5th 346, 362-363 [same]; *People v. Gallardo* (2017) 18 Cal.App.5th 51, 66-68 [incriminating statements made to informants placed in accomplice's jail cell]; *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1402 [same]; see also *People v. Maciel* (2013) 57 Cal.4th 482, 527 [statements to fellow gang members at secretly recorded meeting]; *People v. Washington* (2017) 15 Cal.App.5th 19, 28 [secretly recorded jailhouse conversation between codefendant's].) Nor would statements made in the course of a conspiracy. (*People v. Clark* (2016) 63 Cal.4th 522, 563-564.) Certainly statements to non-law enforcement acquaintances are not testimonial. (*People v. Smith* (2017) 12 Cal.App.5th 766, 787.)

A "law enforcement agent" for *Crawford* purposes may include, for example, a forensic nurse questioning a sex crime victim using state mandated protocols and forms. (See *People v. Vargas* (2009) 178 Cal.App.4th 647, 660-662.) It may include a firefighter providing medical assistance to a gunshot victim. (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466-1467 [dicta].) A law enforcement agent certainly does not include a relative or friend. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1270-1271 [brother-in-law]; *People v. Blacksher* (2011) 52 Cal.4th 769, 818 [family members]; *People v. Loy*, *supra*, 52 Cal.4th 46, 66-67 [child molest victim statement to friend not testimonial]; *People v. Griffin* (2004) 33 Cal.4th 536, 579, fn. 19 [out-of-court statement made to a friend at school does not constitute 'testimonial hearsay' under *Crawford*].) It does not include a trusted teacher or a private diary. (*Ohio v. Clark*, *supra*, 576 U.S. at pp. 246-251; *People v. Lopez* (2013) 56 Cal.4th 1028, 1065-1066.) It does not necessarily include a social worker conducting a brief and informal interview of a child at her home as part of a welfare check to determine if whether the child is at risk of molestation by her father, even if the social worker is accompanied by a law enforcement officer who surreptitiously records the interview. (*People v. Ruiz* (2020) 56 Cal.App.5th 809, 825-828.) Finally, it does not include statements and accusations made to the defendant by an investigating officer. (*People v. Morales* (2020) 44 Cal.App.5th 353, 362-363 ["Statements by law enforcement during an interrogation are rarely, if ever, meant to function as a substitute for trial testimony, because an officer would not expect that such statements be used as evidence at trial", italics omitted].)

4600.6-Statements made to aid in ongoing emergency are not testimonial 10/18

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*) the United States Supreme Court indicated that statements are not testimonial under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) when the primary purpose of police questioning is to deal with an ongoing emergency.

> Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: *Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.* They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(*Id*. 547 U.S. at p. 822, italics added, fn. omitted [statements to 9-1-1 operator about crime in progress were not testimonial]; but see *Hammon v. Indiana* (2006) 547 U.S. 813, 829-832 [victim's statements to responding police officer during questioning were testimonial because primary purpose of questioning was to establish facts for later prosecution].)

In *Michigan v. Bryant* (2011) 562 U.S. 344 (*Bryant*) the High Court provided "additional clarification with regard to what *Davis* meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency'." (*Id*. at p. 359.) "To determine whether the 'primary purpose' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' … which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." (*Ibid*.) Among the factors to consider in this "highly context-dependent inquiry" are the scope of the threat to public safety posed by suspect, use and nature of weapon involved, and the medical condition of the victim. (*Id*. at p. 363-365.) Examining these factors, the High Court in *Bryant* held that the statements of a shooting victim to police identifying the assailant and the circumstances of the crime were not testimonial. (*Id*. at p. 371-378.)

In *People v. Blacksher* (2011) 52 Cal.4th 769 the California Supreme Court discussed *Bryant*. "*Bryant* counsels that to determine the primary purpose with which a statement is given by the declarant or obtained by an officer a court must consider a number of factors … ." (*Id*. at p. 813.) These include objectively evaluating the circumstances of the encounter along with the statements and actions of the parties, determining whether an "ongoing emergency" exists or appears to exist, and, if so, whether it has dissipated, taking account of any medical condition of the declarant, and accounting for the informality of the statement and the circumstances of its acquisition. (*Id*. at pp. 813-815.) The Supreme Court held witness statements made in response to questioning by the initial officers on crime scene, which were designed to locate the shooting suspect and evaluate the nature and extent of the threat he posed, were not testimonial. (*Id*. at pp. 816-817; but see *People v. Cage* (2007) 40 Cal.4th 965, 984 [victim's statements to emergency room physician nontestimonial, but follow-up statement to police officer were testimonial]; accord *People v. Kerley* (2018) 23 Cal.App.5th 513, 551-553 [victim's statements to responding officers not testimonial, but statements during follow-up interviews were testimonial]; see also *People v. Livingston* (2012) 53 Cal.4th 1145, 1158-1159[taped witness interview months after crime was testimonial because primary purpose was to collect evidence].)

Other California decisions provide similar examples of statements held to be nontestimonial because they were designed primarily to meet an ongoing emergency situation, including those made directly to law enforcement personnel in response to questioning. (See, e.g., *People v. Chism* (2014) 58 Cal.4th 1266, 1289 [witness to shooting described crime and suspects in response to questioning from first police officer at the scene]; *People v. Thomas* (2011) 51 Cal.4th 449, 496-497 [bleeding victim's identification of defendant as stabber in response to guard's question "What happened?"]; *People v. Gann* (2011) 193 Cal.App.4th 994, 1008-1009 [call to 9-1-1 and statements to first responding officer]; *People v. Nelson* (2010) 190 Cal.App.4th 1453, 1467-1468 [severely injured victim naming shooter in response to firefighter's question in ambulance "Who shot you?"]; *People v. Johnson* (2010) 189 Cal.App.4th 1261, 1225-1226 [9-1-1 call by wife describing how her husband had just shot at her]; *People v. Banos* (2009) 178 Cal.App.4th 483, 497 [woman's call to 9-1-1 operator, and her statements to responding police officer, were part of investigation of ongoing emergency]; *People v. Osorio* (2008) 165 Cal.App.4th 603, 614-615 ["The evidence also demonstrates that [Sgt.] McElhaney posed his questions in the midst of an ongoing emergency [and] he obtained just enough information from [the victim] to warn the other officers to be on the lookout for the attacker"]; *People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1596-1598 [domestic violence victim drove to police station to report crime to police officer]; *People v. Brenn* (2007) 152 Cal.App.4th 166, 176-178 [stabbing victim's recorded statements to emergency dispatcher]; *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1477-1479 [prior victim's statements to police officers responding to disturbance call]; *People v. Chaney* (2007) 148 Cal.App.4th 772, 780 [witness statement about recent kidnapping to officer in area on other business].)

4600.7-*Crawford* may apply to statements used to support expert opinion 4/21

Opinion testimony given by an expert based upon reports, tests or examinations of others not called as witnesses, does not violate the holding in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427; *People v. Thomas* (2005) 130 Cal.App.4th 1202.) "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*People v. Ramirez*, *supra*, 153 Cal.App.4th at p. 1427; see also *People v. Huynh* (2012) 212 Cal.App.4th 285, 320-321 [SART photograph taken by another nurse could be relied upon by another nurse in describing basis of her expert opinion]; *People v. Nelson* (2012) 209 Cal.App.4th 698, 707-713 [SVP expert could rely on interdisciplinary notes prepared by others].)

In *Williams v. Illinois* (2012) 567 U.S. 50 (*Williams*), a rape case, the High Court considered a forensic DNA expert's testimony that the DNA profile, which was derived from semen on vaginal swabs taken from the victim and produced by an outside laboratory, matched a DNA profile derived from the suspect's blood and produced by the state police laboratory. Justice Alito, writing with the concurrence of three justices and with Justice Thomas concurring in the judgment, concluded that the expert's testimony did not violate the defendant's confrontation rights. The plurality held that the outside laboratory report, which was not admitted into evidence (*id*. 567 U.S. at p 62), was "basis evidence" to explain the expert's opinion, was not offered for its truth, and therefore did not violate the Confrontation Clause. (*Id*. 567 U.S. at pp. 77-78.)

People v. Steppe (2013) 213 Cal.App.4th 1116, also involving DNA testing done by non-testifying analysts whose results were testified to by a technical reviewing analyst. The appellate court held: "We agree with the People that the technical reviewer's brief reference to the

clothing/door analyst's reports and her reliance on the raw data was proper under California authority as well because such items are reasonably relied on by experts in the field of DNA analysis in forming their opinions." (*Ibid*.)

Other witnesses, such as gang experts, often rely upon out-of-court statements from third parties in forming their opinions, such as to the history, structure and criminal activities of particular gangs. There is authority for holding such statements are not admitted for their truth. (*People v. Gardeley* (1996) 14 Cal.4th 605, 619; see also *People v. Valadez* (2013) 220 Cal.App.4th 16, 30 [citing relevant cases] (*Valadez*).) But even if offered for their truth, an expert may rely on such statements if they are not testimonial without violating *Crawford*. (*Valadez*, *supra*, 220 Cal.App.4th at pp. 31-36.) "Officer Krish testified he simply talked to experienced officers, read materials, and discussed the gangs' history in casual, consensual encounters with gang members in order to learn more about the history of the gangs, which gang expert witnesses almost surely must do to become qualified as experts." (*Id*. at p. 35.)

The California Supreme Court in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) added additional barriers to the admission of evidence relied upon by an expert. *Sanchez* held "case-specific facts" upon which an expert relies, but for which they have no personal knowledge, are subject to the *Crawford* rule if these facts consist of testimonial hearsay, such as reports of police officers gathering evidence of a defendant's gang connections. (*Sanchez* (2016) 63 Cal.4th at pp. 679-698; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1245, 1249.) The California Supreme Court in *Sanchez* held, "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) If such hearsay was also "testimonial" under *Crawford*, and none of *Crawford*'s exceptions apply, the defendant must be given the opportunity to cross-examine the declarant. (*Id*. at p. 685; *People v. Bell* (2020) 47 Cal.App.5th 153, 192, 195 [whether a particular FI card used to document gang membership and activities qualifies as testimonial depends on primary purpose for which it was made]; *Menifee v. Superior Court* (2020) 57 Cal.App.5th 343, 358-365 [*Crawford* applies at preliminary hearing, but although some of gang expert's testimony was admissible background information and information supported by personal knowledge, other testimony was inadmissible case-specific hearsay because witness had no personal knowledge and relied on merely reading reports of others].)

Finally, "[a] testifying expert may base his or her opinion on hearsay statements, even if testimonial, at least when those who made the hearsay statements also testify and are subject to cross-examination." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 634.) What an expert cannot do is relate to the jury that another expert, such as a supervisor, had indicated approval of, and agreement with, the expert's conclusions. (*People v. Azcona* (2020) 58 Cal.App.5th 514.)

4600.8-Business and government records, with exceptions, are not testimonial 6/20

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) the United States Supreme Court held that the Confrontation Clause bars the admission of out-of-court "testimonial" statements except when the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. Much of the *Crawford* litigation has focused on "statements" contained in documents, including reports and analyses created by humans and machines in both private business, medical and government settings.

Crawford held the Confrontation Clause generally is inapplicable to business records not produced with the primary purpose of supplying evidence for a criminal prosecution. (*Crawford*, *supra*, 541 U.S. at p. 56; see *People v. Peyton* (2014) 229 Cal.App.4th 1063, 1076 [ATM's computer generated and stored images not testimonial].) California has included within this exception some government records. (See *People v. Nelson* (2012) 209 Cal.App.4th 698, 712-713 [state mental hospital "interdisciplinary notes" not testimonial]; *People v. Larson* (2011) 194 Cal.App.4th 832, 837-838 [post-*Melendez-Diaz* opinion holding that prison packet under Pen. Code § 969b, including clerk's authenticating certification, not testimonial]; *People v. Moreno* (2011) 192 Cal.App.4th 692, 707-711 [same]; *People v. Morris* (2008) 166 Cal.App.4th 363 [computerized rap sheet records]; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1224-1225 (*Taulton*) [same]; *People v. Saffold* (2005) 127 Cal.App.4th 979, 984 [proof of service of restraining order]; but see *People v. Garcia* (2020) 46 Cal.App.5th 123, 169-172 [prior conviction records only admissible to prove the fact of the prior conviction].) Additionally, "one of *Crawford*'s progeny makes clear that 'medical records created for treatment purposes ... would not be testimonial under our decision today." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 312, fn. 2.)" (*People v. Rodriguez*, *supra*, 58 Cal.4th at p. 634 [medical records from the victim's emergency room visit created for treatment purposes were not testimonial].) Finally, websites collecting and compiling information produced by and relied upon by businesses and experts are not testimonial. (*People v. Mooring* (2017) 15 Cal.App.5th 928, 942 [Ident-A-Drug].)

4600.9-Application of *Crawford* to DNA and other tissue sampling 6/16

The introduction of DNA and other tissue testing results from someone other than the person who performed the analysis can create issues under *Crawford v. Washington* (2004) 541 U.S. 36. The United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*) held that the admission of "certificates of analysis" sworn out by analysts at a state laboratory, without in-court testimony by the analysts, violated the Confrontation Clause. (See also *Bullcoming v. New Mexico* (2011) 564 U.S. 647 (*Bullcoming*) ["certificate of analyst" describing results of blood alcohol testing by an unavailable analyst, introduced as business record though testimony of another analyst who had no part in the testing, violated *Melendez-Diaz*].) "A document created solely for an 'evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial." (*Bullcoming*, *supra*, 564 U.S. at p. 664.)

> To rank as "testimonial," a statement must have a "primary purpose" of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." [Citations.] Elaborating on the purpose for which a "testimonial report" is created, we observed in *Melendez-Diaz* that business and public records "are generally admissible absent confrontation … because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." 557 U.S., at 324.

(*Bullcoming*, *supra*, 564 U.S. at p. 659, fn. 6.)

In *Williams v. Illinois* (2012) 567 U.S. 50 (*Williams*), a rape case, the High Court considered a forensic DNA expert's testimony that the DNA profile, which was derived from semen on vaginal swabs taken from the victim and produced by an outside laboratory, matched a DNA profile derived from the suspect's blood and produced by the state police laboratory. Justice Alito, writing with the concurrence of three justices and with Justice Thomas concurring in the judgment, concluded that

the expert's testimony did not violate the defendant's Confrontation Clause rights. The plurality held that even if the report had been offered for its truth, its admission would not have violated the Confrontation Clause because the report was not a formalized statement made primarily to accuse a targeted individual. (*Id*. at pp. 81-86.) Applying an objective test in which the court looks "for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances", the *Williams* plurality found that the primary purpose of the outside laboratory report "was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [the defendant], who was neither in custody nor under suspicion at that time." (*Id*. at p. 84.) Further, the plurality reasoned that no one at the outside laboratory could have possibly known that the profile it generated would result in inculpating the defendant, and, therefore, there was no prospect for fabrication and no incentive for developing something other than a scientifically sound profile. (*Id*. at pp. 84-85.) Justice Thomas concurred in the result in *Williams* on the basis the DNA report from the private laboratory lacked the requisite formality and solemnity to be testimonial. (*Id*. at pp. 103-104 (conc. opn. of Thomas, J.).)

The California Supreme Court has interpreted United States Supreme Court precedent since *Melendez-Diaz*, *Bullcoming*, and *Williams* as permitting an expert from a crime lab to testify to the results of blood alcohol testing conducted by another analyst. (*People v. Lopez* (2012) 55 Cal.4th 569 (*Lopez*).) The analyst made the notations of these testing results in a chart captioned "For Lab Use Only." Relying on the swing vote opinion of Justice Thomas in *Williams*, *supra*, 567 U.S. at pp. 103-113 and distinguishing *Bullcoming*, the *Lopez* court concluded these records were not testimonial because they lacked the formality and solemnity of an affidavit or similarly certified record prepared for litigation. (*Lopez*, *supra*, 55 Cal.4th at pp. 582-585.) The California Supreme Court also held the machine generated printouts reflecting the blood alcohol test results was not testimonial. (*Id*. at p. 583.)

The California appellate court in *People v. Holmes* (2012) 212 Cal.App.4th 431, also decided after *Williams*, held that a DNA expert could give an opinion in reliance on notes, DNA profiles, tables of results, typed summary sheets and laboratory reports prepared by other. (*Id*. at pp. 438-439.)

> The forensic data and reports in this case lack "formality." They are unsworn, uncertified records of objective fact. Unsworn statements that "merely record objective facts" are not sufficiently formal to be testimonial. ([*People v.*] *Dungo* [(2012) 55 Cal.4th [608] at p. 619.) [¶] The primary purpose of the materials did "pertain to criminal prosecution" because the recorded procedures were undertaken at the behest of police, using biological material taken from a crime scene to identify a suspect in a murder case. Some of the analysis was performed after appellant was targeted as a suspect. And the reports did not consist solely of machine-generated data. But they lacked formality and this primary purpose is immaterial under *Lopez* and *Dungo*.

(*Holmes*, *supra*, 212 Cal.App.4th at p. 438; see also *People v. Barba* (2013) 215 Cal.App.4th 712, 738-740 [absence of identified suspect not required for finding that a DNA profile test report is not testimonial].)

People v. Steppe (2013) 213 Cal.App.4th 1116, also involving DNA testing done by non-testifying analysts whose results were testified to by a technical reviewing analyst. The appellate court rejected two defense objections. The first concerned the testifying expert's reference to the raw testing data generated by the non-testifying analysts: "Defendant cites no authority that testimony concerning raw data, by an expert subject to cross-examination, violates the confrontation

clause." (*Id*. at p. 1126.) The second was to the testifying expert's reference to the conclusion reached in a report by a non-testifying analyst (the report itself was not introduced by the prosecution): "[A]s a general matter, as both *Williams* and *Lopez* concluded, such lab reports, containing these conclusions, lack the degree of formality and solemnity to be considered testimonial for purposes of the confrontation clause." (*Id*. at p. 1127; see also *People v. Barba*, *supra*, 215 Cal.App.4th at p.742 ["So long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence of the DNA tests themselves is admissible."].)

4600.10-Application of *Crawford* to autopsy evidence and reports 8/19

"The application of [*Crawford v. Washington* (2004) 541 U.S. 36.] principles to autopsy reports is somewhat complicated." (*People v. Leon* (2015) 61 Cal.4th 569, 603.)

> It is clear that the admission of autopsy photographs, and competent testimony based on such photographs, does not violate the confrontation clause. Hearsay is defined as an out-of-court "statement." (Evid. Code, § 1200.) A statement is defined for this purpose as an "oral or written verbal expression or … nonverbal conduct *of a person* " intended as a substitute for oral or written expression. (Evid. Code, § 225, italics added.) Only people can make hearsay statements; machines cannot. (See *People v. Goldsmith* (2014) 59 Cal.4th 258, 274.) It is also clear that testimony relating the testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay. (Evid. Code, § 801, subd. (b); *People v. Montiel* (1993) 5 Cal.4th 877, 918.) A testifying expert can be cross-examined about these opinions. The hearsay problem arises when an expert simply recites portions of a report prepared by someone else, or when such a report is itself admitted into evidence. In that case, out-of-court statements in the report are being offered for their truth. Admission of this hearsay violates the confrontation clause if the report was created with sufficient formality and with the primary purpose of supporting a criminal prosecution. [Citation.]

(*People v. Leon*, *supra*, 61 Cal.4th at p. 603 [any error in admission of autopsy report was harmless]; see, generally, *People v. Garton* (2018) 4 Cal.5th 485, 505-507.)

"Objective observations in an autopsy report … that are not made with a primary purpose of aiding a criminal investigation, are not testimonial under *Crawford*, *supra*, 541 U.S. 36. [Citations.]" (*People v. Rodriguez* (2014) 58 Cal.4th 587, 644.) For example, in *People v. Dungo* (2012) 55 Cal.4th 608, the doctor who performed the murder victim's autopsy did not testify. Without introducing the autopsy report, another pathologist testified regarding his opinion as to the cause of death. The testifying doctor relied on the observation of the victim's body in photographs and as described by the pathologist who wrote the autopsy report. The California Supreme Court held these portions of the autopsy report, describing the condition of the body, were not testimonial. (*Id*. at pp. 619-621.)

> In summary, Dr. Lawrence's description to the jury of objective facts about the condition of victim Pina's body, facts he derived from Dr. Bolduc's autopsy report and its accompanying photographs, did not give defendant a right to confront and cross-examine Dr. Bolduc. The facts that Dr. Lawrence related to the jury were not so formal and solemn as to be considered testimonial for purposes of the Sixth Amendment's confrontation right, and criminal investigation was not the primary purpose for recording the facts in question.

(*Id*. at p. 621; see also *People v. Edwards* (2013) 57 Cal.4th 658, 706-707 [testifying doctor who "recounted objective medical observations derived from [non-testifying doctor's] autopsy report and its accompanying photographs, microscopic slides, and X-rays, and expressed opinions based on those observations" did not violate confrontation clause]; *People v. Gonzales* (2019) 34 Cal.App.5th 1081, 1089-1090 [medical examiner who did not perform autopsy permitted to express opinion that death caused by stabbing of victim's neck including depth of knife wound]; *People v. Ford* (2015) 235 Cal.App.4th 987, 995-997 [testifying pathologist could give opinions based on photographs and autopsy report, properly admitted with conclusions redacted, of deceased autopsy surgeon]; *People v. Mercado* (2013) 216 Cal.App.4th 67, 90 [deputy medical examiner could opine on cause of death based on witness statements given to coroner's investigator].)

Even if notes or reports of an autopsy by an non-testifying pathologist are deemed testimonial, the testifying witness can still relate that he or she relied generally on such information in forming their expert opinion without violating the California Supreme Court's holding in *People v. Sanchez* (2016) 63 Cal.4th 665. (*People v. Perez* (2018) 4 Cal.5th 421, 456-457; *People v. Hall* (2018) 23 Cal.App.5th 576, 602.) "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 685, original italics.)

4600.11-Application of *Crawford* to narcotics testing reports 11/20

The introduction of narcotics testing results from someone other than the person who performed the analysis can create issues under *Crawford v. Washington* (2004) 541 U.S. 36. The United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*) held that the admission of "certificates of analysis" sworn out by analysts at a state laboratory, without in-court testimony by the analysts, violated the Confrontation Clause. (See also *Bullcoming v. New Mexico* (2011) 564 U.S. 647 ["certificate of analyst" describing results of blood alcohol testing by an unavailable analyst, introduced as business record though testimony of another analyst who had no part in the testing, violated *Melendez-Diaz*].)

In *People v. Ogaz* (2020) 53 Cal.App.5th 2809, a California appellate court held it was error to admit the report of narcotics testing done by forensic laboratory analyst Stevens who did not testify. The appellate court held this violated the Confrontation Clause as interpreted in *Crawford v. Washington* (2004) 541 U.S. 36, because the report was testimonial. The report contained statements made with the requisite degree of formality, including the signature of the analyst thereby attesting to its contents. (*Id*. at p. 291.) The report contained subjective conclusions of the analyst, not just machine generated results or administrative notations. (*Id*. at pp. 291-292.) The primary purpose of the report was testimonial because it was intended to produce evidence that could be used at trial. (*Id*. at p. 292.) Finally, the court held *Crawford* was not satisfied simply because laboratory supervisor Dickan who approved the report testified as to its preparation and results, but otherwise had no recollection or knowledge of the particular test. (*Id*. at pp. 292-295.) "That wouldn't be a problem if Dickan had formulated his own independent opinions based on the data that Stevens produced during the testing process. But this is not a situation where an expert witness reviewed the work of another analyst and came to his or her own conclusion about the matter at hand." (*Id*. at p. 293.)

4600.12-*Crawford* only applies to criminal prosecutions, not probation or civil matters 11/20

The Confrontation Clause, and thus the holdings in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, do not apply to probation revocation hearings. (*People v. Gomez* (2010) 181 Cal.App.4th 1028, 1039; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411-1412; but see *People v. Liggins* (2020) 53 Cal.App.5th 55, 64-69 [balancing test used to determine if due process requires defendant to be given right to confront witnesses in probation revocation hearings].)

> *Crawford*'s holding is based squarely on the Sixth Amendment right to confront witnesses. (*Crawford*, *supra*, 541 U.S. at pp. 37, 68.) Probation revocation proceedings are not "criminal prosecutions" to which the Sixth Amendment applies. [Citations.] Probationers' limited right to confront witnesses at revocation hearings stems from the due process clause of the Fourteenth Amendment, not from the Sixth Amendment. [Citation.] Thus, *Crawford*'s interpretation of the Sixth Amendment does not govern probation revocation proceedings.

(*People v. Johnson*, *supra*, 121 Cal.App.4th at p. 1411.) Nor does the Confrontation Clause apply to civil actions, such as mentally disordered offender and sexually violent predator cases. (*People v. Nelson* (2012) 209 Cal.App.4th 698, 712 [MDO]; *People v. Angulo* (2005) 129 Cal.App.4th 1349, 1367-1368 [SVP].)

4700.1-General standard for proof of attempted murder 7/21

The elements of attempted murder are the specific intent to kill a human being and a direct but ineffectual act in furtherance of such intent. (*People v. Ervine* (2009) 47 Cal.4th 745, 785; *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7; *People v. Lee* (2003) 31 Cal.4th 613, 623; see also *People v. Pettie* (2017) 16 Cal.App.5th 23, 52; *People v. Ramos* (2011) 193 Cal.App.4th 43, 47.) "[A]ttempted murder does not necessarily require a specific target. We have held that an indiscriminate would-be killer who fires into a crowd is just as culpable as one who targets a specific victim." (*People v. Houston* (2012) 54 Cal.4th 1186, 1218.)

The required act must be more than mere preparation. (*People v. Morales* (1992) 5 Cal.App.4th 917, 925.) The requisite direct step taking the defendant's conduct past the mere preparation stage are actions which, like any attempted crime, clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the execution of the criminal design. (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 556-557; see also Pen. Code, § 21, subd. (a).)

A specific intent to kill (express malice) is the requisite mental state element of attempted murder. (*People v. Virgo* (2013) 222 Cal.App.4th 788, 797; *People v. Montes* (2003) 112 Cal.App.4th 1543, 1550.) Implied malice is insufficient to sustain such a charge. (*People v. Bland* (2002) 28 Cal.4th 313, 327; *People v. Beck* (2005) 126 Cal.App.4th 518, 522.) Intent must be proven, and cannot be inferred merely from the commission of another dangerous crime. (*People v. Belton* (1980) 105 Cal.App.3d 376, 380.) For example, "[t]he act of shooting a firearm toward a victim at close range in a manner that could have inflicted a mortal wound had the shot been on target is sufficient to support an inference of an intent to kill. [Citation.]" (*People v. Houston*, *supra*, 54 Cal.4th at p. 1218.)

The intent with which an attempt or assault was made is a factual question. (*People v. Dick* (1968) 260 Cal.App.2d 369, 371.) "Evidence of intent to kill is usually inferred from defendant's

acts and the circumstances of the crime. (*People v. Smith* [(2005)] 37 Cal.4th 733, 741.)" (*People v. Ramos*, *supra*, 193 Cal.App.4th at p. 48; see also *People v. Lawrence*, *supra*, 177 Cal.App.4th at p. 557; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207-1208.) The nature of the assault, the weapon chosen, the manner in which the weapon is used, the actual consequences of the assault, including the nature, location and seriousness of the wound, all can provide evidence of the intent to kill necessary for this offense. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946; *People v. Johnson* (1978) 81 Cal.App.3d 380, 389, fn. 2; *People v. Becerra* (1963) 223 Cal.App.2d 448, 450.) " ' "[T]he act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill... .' [Citation.]" [Citations.]' [Citation.]" (*People v. Perez* (2010) 50 Cal.4th 222, 230.) "The fact that the bullet misses its mark or fails to prove lethal, is not dispositive." (*People v. Foster* (2021) 61 Cal.App.5th 430, 440.) Of course, a statement by the defendant of an intention to kill the victim is sufficient proof of the specific intent. (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1625; *People v. Morales*, *supra*, 5 Cal.App.4th at p. 925.)

4700.2-Premeditated attempted murder 7/09

Attempted murder, unlike the completed crime of murder, is not divided into degrees. Penal Code section 664, subdivision (a), imposes a penalty of life imprisonment with the possibility of parole for attempted murder that is "willful, deliberate, and premeditated." But this allegation is a penalty provision creating a greater base term for the attempt. It does not establish separate degrees of attempted murder. (*People v. Bright* (1996) 12 Cal.4th 652, 669.) The section 664, subdivision (a), allegation must be proved to the magistrate and is subject to Penal Code section 995 review. (*Huynh v. Superior Court* (1996) 45 Cal.App.4th 891, 895.) The sufficiency of the evidence of the "willful, deliberate, and premeditated" element of attempted murder is the same as that for first degree murder. (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223-1224; see also *People v. Ibarra* (2007) 151 Cal.App.4th 1145, 1152; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462, fn. 8.)

> Thus we have held that in order for a killing with malice aforethought to be first rather than second degree murder, " '[t]he intent to kill must be … formed upon a pre-existing reflection,' … [and have] been the subject of actual deliberation or forethought … ." [Citation.] We have therefore held that "[a] verdict of murder in the first degree … [on a theory of a willful, deliberate, and premeditated killing] is proper only if the slayer killed 'as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on coolly and steadily, [especially] according to a preconceived design.' [Citation.]" [Citation.]

(*People v. Anderson* (1968) 70 Cal.2d 15, 26; italics omitted.)

> In examining whether the evidence is sufficient to show that a defendant premeditated, a reviewing court may consider a tripartite framework—(1) planning activity, (2) motive, and (3) manner of the killing—in determining whether such intent may be inferred from the trial record. (See (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) This framework does not establish an exhaustive list of required evidence which excludes all other types and combinations of evidence that may support a jury's finding of premeditation [citation], nor does it require that all three elements must be present to affirm a jury's conclusion that premeditated murder was intended. [Citation.]

(*People v. Felix* (2009) 172 Cal.App.4th 1618, 1626.)

As with other mental states, these may be established entirely through circumstantial evidence. They may be inferred from a variety of circumstances, such as evidence of planning, lying in wait, motive, or the existence of prior threats. (See, e.g., *People v. Ibarra*, *supra*, 151 Cal.App.4th at p. 1152; *People v. Villegas*, *supra*, 92 Cal.App.4th at pp. 1224-1225; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1208.) The way the attempt to kill was carried out is also probative, for example, by the use of poison or application of torture. (See, e.g., *People v. Proctor* (1992) 4 Cal.4th 499, 528-529; *People v. Pride* (1992) 3 Cal.4th 195, 247; *People v. Perez* (1992) 2 Cal.4th 1117, 1125-1126; *People v. Brito* (1991) 232 Cal.App.3d 316, 323-324.) Of course, statements by the defendant admitting he determined ahead of time to stab someone is sufficient proof. (*People v. Felix*, *supra*, 172 Cal.App.4th at pp. 1626-1627; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1113-1114.)

4700.3-Defendant can have multiple and concurrent intents to kill 5/14

A specific intent to kill (express malice) is the requisite mental state element of attempted murder. (*People v. Virgo* (2013) 222 Cal.App.4th 788, 797; *People v. Montes* (2003) 112 Cal.App.4th 1543, 1550.) "When a defendant is charged with the attempted murders of multiple individuals, the defendant may not be convicted on all counts absent proof he intended to kill each of the victims." (*People v. Garcia* (2012) 204 Cal.App.4th 542, 554.)

> Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder—due to transferred intent—if the person were killed. To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others.

(*People v. Bland* (2002) 28 Cal.4th 313, 328; see also *People v. McCloud* (2012) 211 Cal.App.4th 788, 797.) The required intent to kill need not be directed to a specific target, such as when the defendant shoots into a crowd intending to kill a random person. (*People v. Stone* (2009) 46 Cal.4th 131, 140-141 (*Stone*).) "[A] person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind." (*Id*. at p. 140; see also *People v. Amperano* (2011) 199 Cal.App.4th 336, 341.)

> To establish specific intent, the prosecution does not need to show defendant intended to kill a particular person. In *Stone*, *supra*, 46 Cal.4th 131, our Supreme Court determined a shooter who fires a single shot into a group of people, intending to kill one of the group, but not knowing or caring which one, could be convicted of a single count of attempted murder. (*Id*. at p. 134.) The court explained that, "The mental state required for attempted murder is the intent to kill a human being, not a *particular* human being." (*Ibid*. original italics.)
>
> However, where there are multiple possible victims of the attempted murder, the prosecution must establish that defendant intended to kill each victim for each count charged. In [*People v. Perez* (2010)] 50 Cal.4th 222, the high court determined a shooter who fired a single shot from a moving car into a group of seven peace officers and a civilian could be convicted of only one count of attempted murder, not eight. Where the shooter intended to kill someone, without targeting any particular individual and without

using a means of force calculated to kill everyone in the group, he could be guilty of only a single count of attempted murder. (*Id*. at p. 225.)

(*People v. Virgo*, *supra*, 222 Cal.App.4th at p. 798.)

In certain circumstances, however, under the "kill zone theory," if the defendant has the specific intent to kill a particular person and fires into a crowd where they believe the intended target is located, the defendant may also be liable for attempted murder of other members of the crowd. (*People v. Bland*, *supra*, 28 Cal.4th at p. 330; *People v. McCloud*, *supra*, 211 Cal.App.4th at p. 797.) The concept of concurrent intent under the "kill zone theory" applies when a defendant intends to kill a particular target, and uses a mode of attack that, by its nature and scope, shows a concurrent intent to kill persons in the vicinity of the intended target. (*People v. Pham* (2011) 192 Cal.App.4th 552, 559.) It is a factual question for the jury "whether, based on the particular evidence in the case, it can be inferred that defendant had the concurrent intent to kill not only his intended target but others in the target's vicinity." (*Ibid*; see also *People v. Vang* (2001) 87 Cal.App.4th 554, 563-564 [in case involving shooting at two houses, "[t]he jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up"].) It is not enough, however, that the defendant merely knew of the risk of fatal injury to others and simply harbored a conscious indifference to this risk. (*People v. McCloud*, *supra*, 211 Cal.App.4th at pp. 798-807 [insufficient evidence of intent to kill 46 people in crowd when only 10 bullets fired].)

4700.4-Heat of passion can reduce attempted murder to attempted vol. manslaughter 8/18

In certain circumstances a trial court may be required to instruct on attempted voluntary manslaughter as a lesser included offense of attempted murder.

> When a person attempts to kill while acting upon a sudden quarrel or in the heat of passion—even if exercising a sufficient "measure of thought ... to form ... an intent to kill"—he or she acts with "a mental state that precludes the formation of malice." (*People v. Beltra*n (2013) 56 Cal.4th 935, 942 (*Beltran*).) A person acts upon a sudden quarrel or in the heat of passion if his or her reason " ' "was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation or reflection, and from such passion rather than from judgment." ' " *(Ibid*.) Thus, the offense of attempted murder is reduced to the lesser included offense of attempted voluntary manslaughter when the defendant acted upon a sudden quarrel or in the heat of passion. (*People v. Williams* (1988) 199 Cal.App.3d 469, 475; accord *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708-709.)

(*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1136-1137 (*Millbrook*).)

> Attempted manslaughter based on a sudden quarrel or heat of passion has both a subjective and an objective component (see *People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*)), and we consider each in turn. To satisfy the subjective component, the defendant must have attempted to kill "while under 'the *actual* influence of a strong passion' induced by [adequate] provocation." (*Id*. at p. 550, italics added.) As a result, "[i]f sufficient time has elapsed for one's passions to 'cool off' and for judgment to be restored," malice is not negated. (*Beltran*, *supra*, 56 Cal.4th at p. 951.) "No specific type of provocation is required, and 'the passion aroused need not be anger or rage, but can be any " ' "[v]iolent, intense,

high-wrought or enthusiastic emotion" ' " [citations] other than revenge.' " (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

(*Millbrook*, *supra*, 222 Cal.App.4th at p. 1139.)

To satisfy [the objective] component, " ' "the accused's heat of passion must be due to 'sufficient provocation.' " ' " (*Moye*, *supra*, 47 Cal.4th at p. 549.) The victim must cause the provocation or the defendant must reasonably believe that the victim caused it. (*Id*. at pp. 549-550.) "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Id*. at p. 550; see also *Beltran*, *supra*, 56 Cal.4th at p. 949 ["the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection," original italics].

(*Millbrook*, *supra*, 222 Cal.App.4th at p. 1140 [attempted murder conviction reversed for failure to give instructions on lesser offense of attempted voluntary manslaughter based on a heat of passion theory].)

Insults alone, however, are not sufficient provocation to reduce attempted murder to attempted voluntary manslaughter. (See, e.g., *People v. Enraca* (2012) 53 Cal.4th 735, 743-744, 759 [gang-related insults]; *People v. Avila* (2009) 46 Cal.4th 680, 706 [same]; *People v. Manriquez* (2005) 37 Cal.4th 547, 585-586 [victim repeatedly called defendant a " 'mother fucker' " and taunted him to use his weapon]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 739-740 [smirking, taunting, and name-calling]; but see *People v. McCowan* (1986) 182 Cal.App.3d 1, 15 [heat-of-passion instruction required where defendant confessed that "he became enraged" when his ex-wife "made an obscene gesture at him" as he drove by her home, prompting him to shoot her].)

The prosecution has the burden of proving beyond a reasonable doubt that the defendant did not act as a result of heat of passion or sudden quarrel. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1245.) Heat of passion is not an element of voluntary manslaughter or attempted involuntary manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, 454.) Instead, the People must prove its absence in order to obtain a conviction for attempted murder. (*People v. Franklin* (2018) 21 Cal.App.5th 881, 889.)

4700.5-"Kill zone" theory of attempted murder requires specific target 7/21

"To prove the crime of attempted murder, the prosecution must establish 'the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citation.] When a single act is charged as an attempt on the lives of two or more persons, the intent to kill element must be examined independently as to each alleged attempted murder victim; an intent to kill cannot be 'transferred' from one attempted murder victim to another under the transferred intent doctrine. [Citation.]" (*People v. Canizales* (2019) 7 Cal.5th 591, 602 (*Canizales*).) But when the defendant, in the attempt to kill an intended victim, chooses a means of killing that creates a zone of harm around the victim, the factfinder may reasonably infer that the defendant intended to harm everyone in that zone. (*Id*. at pp. 602-603; see also *People v. Mariscal* (2020) 47 Cal.App.5th 129, 137.) "When the kill zone theory is used to support an inference that the defendant concurrently intended to kill a nontargeted victim … evidence of a primary target is required." (*Canizales*, *supra*, 7 Cal.5th at p. 608.)

> We therefore conclude that the kill zone theory for establishing the specific intent to kill required for conviction of attempted murder may properly be applied only when a jury concludes: (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target; and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm. Taken together, such evidence will support a finding that the defendant harbored the requisite specific intent to kill both the primary target and everyone within the zone of fatal harm.

(*Id*. at p. 607.) "In determining the defendant's intent to create a zone of fatal harm and the scope of any such zone, the jury should consider the circumstances of the offense, such as the type of weapon used, the number of shots fired (where a firearm is used), the distance between the defendant and the alleged victims, and the proximity of the alleged victims to the primary target." (*Ibid*.)

A typical example of the kill zone theory involves shootings at occupied vehicles.

> [T]the circumstances in this case indicate appellant and Nguyen intentionally created a kill zone around the murder victim Bui. Indeed, by firing a hail of bullets at the vehicle in which Bui was riding, they intentionally exposed everyone in the vehicle to mortal danger. Under these facts, the jury could reasonably infer appellant and Nguyen not only intended to kill Bui, but everyone else in the vehicle, including James. Therefore, the kill zone instruction was factually applicable. (Compare *People v. Stone* (2009) 46 Cal.4th 131, 138 [kill zone theory deemed inapt because by firing but a single bullet into a crowd of people, the defendant did not employ a means of killing " 'that inevitably would result in the death of other victims within a zone of danger.' "])

(*People v. Tran* (2018) 20 Cal.App.5th 561, 567; distinguish *People v. Booker* (2020) 58 Cal.App.5th 482, 499-501 [evidence supported only a reasonable inference the defendants acted with conscious disregard of the risk the passenger next to the primary target might be seriously injured or killed]; *In re Rayford* (2020) 50 Cal.App.5th 754, 779-781 [reasonable alternative inference that shooters did not specifically intend to kill everyone in area]; *People v. Thompkins* (2020) 50 Cal.App.5th 365, 394-395 [instruction inappropriate because prosecution did not establish a kill zone or identify a target victim]; *People v. Mariscal*, *supra*, 47 Cal.App.5th at p. 139 [kill zone instruction inappropriate because defendant turned away from primary or intended target to shot at second victim].)

"Trial courts … should provide an instruction to the jury only in those cases where the court concludes there is sufficient evidence to support a jury determination that the *only* reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm." (*Canizales*, *supra*, 7 Cal.5th at p. 608, italics in original [insufficient evidence to support giving "kill-zone" instructions].) "The use or attempted use of force that merely *endangered* everyone in the area is insufficient to support a kill zone instruction." (*Ibid*., italics in original.) "Evidence that a defendant who intends to kill a primary target acted with only conscious disregard of the risk of serious injury or death for those around a primary target does not satisfy the kill zone theory. (*Id*. at p. 607; *People v. Cardenas* (2020) 53 Cal.App.5th 102, 113-116 [kill zone instruction inapplicable because insufficient evidence that defendant's only intent was to kill other victims near primary target]; distinguish *People v. Windfield* (2021) 59 Cal.App.5th 496, 514-519

[sufficient evidence to support kill zone theory because hail of gunfire aimed at two people standing right next to each other].)

4700.6-Multiple convictions of attempted murder possible when random targets 7/21

" 'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citation.]" (*People v. Sanchez* (2016) 63 Cal.4th 411, 457.) Multiple convictions of attempted murder are possible when there is no specific, targeted victim, but instead a group of random victims which the defendant intends to kill. A person who acts with intent to kill in firing at a group of people is "guilty of attempted murder even if he or she intended to kill a random person rather than a specific one." (*People v. Stone* (2009) 46 Cal.4th 131, 141 (*Stone*).) "Although a primary target often exists and can be identified, one is not required." (*Id*. at p. 140.) In describing this theory, the California Supreme Court explained that "[a]n indiscriminate would-be killer is just as culpable as one who targets a specific person." (*Ibid*.) Multiple attempted murder convictions can be supported by the same reasoning. (*Ibid*.; *People v. Medina* (2019) 33 Cal.App.5th 146, 156 ["A jury can reasonably conclude a defendant without a primary target who repeatedly shoots into a crowd with the intent to kill committed multiple counts of attempted murder"]; see also *People v. Thompkins* (2020) 50 Cal.App.5th 365, 396 ["under *Stone* it could be found … that [the defendant] intended to kill someone in the crowd—anyone who got in the way of his bullets—and thus attempted to murder each of those victims"]; *People v. Virgo* (2013) 222 Cal.App.4th 788, 790, 800 [although defendant fired at least fourteen times from inside a house in various directions, only ten of the shots exited the house which was surrounded by police offices, supporting tens counts of premeditated attempted murder of ten specifically named officers]; *People v. McCloud* (2012) 211 Cal.App.4th 788, 805-807 [ten bullets fired supported two counts of murder and eight counts of attempted murder]; distinguish *People v. Perez* (2010) 50 Cal.4th 222, 225, 230-231 [one shot fired at vehicle with multiple occupants could support only one attempted murder conviction].)

> The absence of a specific target distinguishes this case from the "kill zone" theory. … In contrast, the *Stone* theory applies when there is no specifically targeted individual. The two theories are mutually exclusive. (See *People v. McCloud* (2012) 211 Cal.App.4th 788, 798, 802, fn. 6,; see also *People v. Thompkins*, supra, 50 Cal.App.5th at p. 396, fn. 10 ["*Stone* establishes that the kill zone theory cannot be used when the defendant fires indiscriminately at a crowd of people, not aiming to kill anyone in particular, but hoping to kill as many as possible"].)

(*People v. Foster* (2021) 61 Cal.App.5th 430, 441, fn. 16.)

> Foster fired a semi-automatic weapon from a distance of 40 to 50 feet at a group containing at least six males standing so closely to one another that they fit within the frame of the metal door of the barbershop. The surveillance footage shows Foster firing toward the group and walking backward as he continues to fire his rounds. While Foster continues to aim in one direction, his hand is not perfectly steady throughout the shooting. Police officers found three strike marks along the hood of a mini-van parked approximately two car lengths from the metal door, in the line of fire. Officers also found a bullet hole that went through the center of the metal door, as well as strike marks in the frame and the stucco wall to the left of the door. The video footage shows the men diving and scattering as bullets ricochet off the stucco wall. Contrary to Foster's assertions, this evidence was

sufficient to establish that Foster fired indiscriminately at the group, intending to kill as many as possible with the bullets fired.

(*Id*. at pp. 443-444, fn. omitted [defendant fired seven times in the direction of at least six individuals in rival gang territory, killing one, properly resulting in five convictions of attempted murder].)

4710.1-Defendant liable if acts or omissions proximate cause of death 5/21

"Tort principles of proximate or legal causation apply to crimes; thus, the defendant's acts must be the legally responsible cause of the injury, death, or other harm constituting the crime. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 46-47.)" (*People v. Moncada* (2012) 210 Cal.App.4th 1124, 1132.) The defendant's criminal act or omission be the proximate cause of the death. (*Zemek v. Superior Court* (2020) 44 Cal.App.5th 535, 552.) "A 'cause of [death] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the [death] and without which the [death] would not occur.' [Citation.]" (*People v. Brady* (2005) 129 Cal.App.4th 1314, 1324.) "To be considered the proximate cause of the victim's death, the defendant's act must have been a substantial factor contributing to the result, rather than insignificant or merely theoretical." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 583-584.)

"Further, proximate causation requires that the death was a reasonably foreseeable, natural and probable consequence of the defendant's act, rather than a remote consequence that is so insignificant or theoretical that it cannot properly be regarded as a substantial factor in bringing about the death. [Citations.]" (*People v. Butler* (2010) 187 Cal.App.4th 998, 1009-1010; see also *People v. Skiff* (2021) 59 Cal.App.5th 571, 580-581.) Whether the defendant's conduct was a proximate, rather than remote, cause of death is ordinarily a factual question for the jury unless " 'undisputed evidence … reveal[s] a cause so remote that … no rational trier of fact could find the needed nexus.' [Citation.]" (*People v. Brady* (2005) 129 Cal.App.4th 1314, 1326; see also *Zemek v. Superior Court*, *supra*, 44 Cal.App.5th at p. 553.)

A jury's finding of proximate causation will be not disturbed on appeal if there is "evidence from which it may be reasonably inferred that [the defendant's] act was a substantial factor in producing" the death. (*People v. Scola* (1976) 56 Cal.App.3d 723, 726.)

4710.2-Defendant liable if acts or omissions concurrent proximate cause of death 4/20

If a defendant's acts are a concurrent cause of the death, it is no defense that the conduct of some other person contributed to the death. (*People v. Jennings* (2010) 50 Cal.4th 616, 643.) "[A]nother party's contributory negligence is not a defense to criminal liability. (See *People v. Schmies* (1996) 44 Cal.App.4th 38, 46.)" (*People v. Elder* (2107) 11 Cal.App.5th 123, 135.)

> " 'There may be more than one proximate cause of the death. When the conduct of two or more persons *contributes concurrently as the proximate cause of the death*, the conduct of each is a proximate cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the time of the death and acted with another cause to produce the death.' " [Citation.]

(*People v. Sanchez* (2001) 26 Cal.4th 834, 847, italics in original; see also *People v. Butler* (2010) 187 Cal.App.4th 998, 1009.) " '[A]s long as the jury finds that without the criminal act the death would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of death.' [Citation.]" (*People v. Jennings*, *supra*, 50 Cal.4th at p. 643.)

> When there are multiple concurrent causes of death, the jury need not decide whether the defendant's conduct was the primary cause of death, but need only decide whether the defendant's conduct was a substantial factor in causing the death. (*People v. Jennings* (2010) 50 Cal.4th 616, 634, 642-644 [defendant liable for murder by torture even though drugs given to victim were identified as sufficient to cause death; substantial factor standard subsumes and reaches beyond "but for" test]; *People v. Catlin* [(2001)] 26 Cal.4th [81] at pp. 154-156 [defendant liable for poisoning victim even though victim's preexisting illness may have contributed to death]; *People v. Caldwell* (1984) 36 Cal.3d 210, 221 [when codefendants act in concert, "the extent of [the defendant's] contribution to the resulting death need not be minutely determined"]; *People v. Vernon* (1979) 89 Cal.App.3d 853, 864 [defendant liable for death resulting from his participation in group beating; conduct of each person was proximate cause "regardless of the extent to which each contribute[d] to the death"]; see also *People v. Sanchez*, *supra*, 26 Cal.4th at pp. 838, 848-849 [defendant liable for death of innocent bystander during shootout with rival gang member even though it was not known who actually fired fatal shot; jury could find defendant's shooting at rival was a "substantial concurrent, and hence proximate" cause of bystander's death].)

(*People v. Butler*, *supra*, 187 Cal.App.4th at p. 1009 [sufficient evidence of causation although prosecution expert could not specify what act (blows to head, choking with cloth in mouth, injecting with cocaine) caused victim's death]; see also *People v. Canizalez* (2011) 197 Cal.App.4th 832, 845.)

4710.3-Defendant liable unless independent intervening cause of death 5/21

"A defendant's conduct is deemed not the legal cause of harm only when the harm is caused by an intervening act that is not reasonably foreseeable. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 46.)" (*People v. Elder* (2017) 11 Cal.App.5th 123, 132 [alleged contributory negligence of victim did not support defense requested jury instruction on superseding intervening causation].)

> Even if a victim's death occurs in an unanticipated manner, the defendant is liable for homicide unless a superseding intervening act has broken the chain of causation. The intervening cause must be unforeseeable and extraordinary, and a defendant remains criminally liable if he might reasonably have contemplated the possible consequence or should have foreseen the possibility of harm of the kind that could result from his act. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 371.) … [¶] Whether an independent act is a superseding cause of injury or death is generally a question of fact for the trier of fact beyond a reasonable doubt (*People v. Morse* (1992) 2 Cal.App.4th 620, 670), unless undisputed evidence reveals " 'a cause so remote that a court may properly decide that no rational trier of fact could find the needed nexus. [Citations.]' [Citation.]" (*People v. Cervantes* (2001) 26 Cal.4th 860, 871-872.)

(*People v. Moncada* (2012) 210 Cal.App.4th 1124, 1133 (*Moncada*); see also *People v. Tseng* (2018) 30 Cal.App.5th 117, 134.)

In *Moncada*, the defendant suffocated and severely shaken his infant son. This caused brain damage, poor vision, spastic quadriplegia, seizures, and other complications, including recurring gastrointestinal problems requiring surgery. At age 8, the son died from these complications, which the prosecution experts tied to the original trauma inflicted by the defendant. At trial the defense moved for an acquittal (Pen. Code, § 1118.1) based upon an alleged lack of proof of causation. The

appellate court held it was not error for the trial court to deny this motion. (*Moncada*, *supra*, 210 Cal.App.4th at pp. 1133-1133.) "In this case, the abundant medical testimony … created a question of fact for the trier of fact as to whether the rupture of Joseph's stomach was a superseding cause of his death. Substantial evidence supported the trial court's ruling on that issue in denying defendant's motion under section 1118.1." (*Id*. at pp. 1133-1134.)

In *People v. Funes* (1994) 23 Cal.App.4th 1506, the appellate court held that the trial court had properly rejected an instruction on intervening causes in a prosecution for murder when the victim died 46 days after his beating, following a medical decision to withhold antibiotics. The appellate court held that the decision to withhold antibiotics, as a matter of law, was not an independent intervening cause and was a reasonably foreseeable result of the defendant's act of hitting the victim on the head with a baseball bat. (*Id*. at pp. 1522-1523.)

In *Zemek v. Superior Court* (2020) 44 Cal.App.5th 535, a caregiver was held to answer for the murder because they failed in their duty of care and left the victim for days without care under circumstances that made it foreseeable she would overdose and die. The appellate court upheld the bindover rejecting the defense argument that the victim's own conduct was an independent intervening cause of death. (*Id*. at pp. 552-553.)

> Here, there was probable cause to believe that petitioner's act or omission of leaving Powell alone, for a prolonged period of time, surrounded by medication, set in motion a chain of events that resulted in Powell's death. Certainly Powell herself was an intervening cause. However, there was also sufficient evidence that her act of taking an overdose was readily foreseeable, given that she had done so before and had proven to be "unable to stay on track" with her medications in petitioner's absence.

(*Id*. at p. 553; similarly see *People v. Skiff* (2021) 59 Cal.App.5th 571, 580-582 [getting hit by car was foreseeable result of allowing dementia patient with history of wandering off to leave facility unattended].)

4720.1-Killing during perpetration of PC189 felony is 1st degree felony-murder 9/21

The first degree felony-murder rule as codified in subdivision (a) of Penal Code section 189, defines murder in the first degree as including any killing "committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death … ."

For the actual killer the following principles apply.

> This court has reiterated numerous times that "The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." [Citation.] The Legislature has said in effect that this deterrent purpose outweighs the normal legislative policy of examining the individual state of mind of each person causing an unlawful killing to determine whether the killing was with or without malice, deliberate or accidental, and calibrating our treatment of the person accordingly. Once a person perpetrates or attempts to perpetrate one of the enumerated felonies, then in the judgment of the Legislature, he is no longer entitled to such fine judicial calibration, but will be deemed guilty of first degree murder for any homicide committed in the course thereof.

(*People v. Burton* (1971) 6 Cal.3d 375, 388; see also *People v. Farley* (2009) 46 Cal.4th 1053, 1121.) Under Senate Bill Number 1437 (Stats. 2018, chap. 1015), effective January 1, 2019, these principles no longer completely apply to non-killer accomplices. Penal Code, section 189, subdivision (e), requires such non-killers act either with express malice or be a major participant acting with reckless indifference to human life.

"[A] conviction of first degree felony murder does not require proof of a strict causal relationship between the underlying felony and the homicide so long as the killing and the felony are part of one continuous transaction. [Citations.]" (*People v. Huynh* (2012) 212 Cal.App.4th 285, 307.)

> [F]or the purposes of the felony-murder rule, there is no requirement that death be caused as a consequence of the felony. "[T]he homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction." [Citation.] Such a killing is murder of the first degree by force of section 189 of the Penal Code, whether the killing was intentional or accidental.

(*People v. Atkins* (1982) 128 Cal.App.3d 564, 568; see also *People v. Portillo* (2003) 107 Cal.App.4th 834, 843.)

Felony-murder is simply a form of murder rather than a different or separate crime. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 89.) Hence, an information charging murder is sufficient to charge either felony-murder or murder with malice aforethought. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1236-1238; *People v. Hawthorne*, *supra*, 46 Cal.4th at p. 89.) And jurors need not agree upon which of the theories they rely to reach a verdict of guilty to first degree murder. (*People v. Valencia* (2008) 43 Cal.4th 268, 289; *People v. Guerra* (1985) 40 Cal.3d 377, 386; *People v. Wear* (2020) 44 Cal.App.5th 1007, 1020.)

4720.2-Felony-murder rule limited to actual killer and certain non-killers 3/21

Under the first degree felony-murder rule, even a non-killer participant in the felony can be liable for a homicide committed by another. "Liability for felony-murder thus extends to those who knowingly and purposefully participate in the underlying felony even if they take no part in the actual killing." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1159.)

Senate Bill number 1437 (Stats. 2018, chap. 1015), effective January 1, 2019, limited application of the first degree felony-murder rule to the "actual killer" (Pen. Code, § 189, subd. (e)(1)) and to certain non-killers (Pen. Code, § 189, subd. (e)(2)-(3)). Penal Code section 189 states in pertinent part:

> (e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:
>
> (1) The person was the actual killer.
>
> (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.
>
> (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(See *People v. Lamoureux* (2019) 42 Cal.App.5th 241, 248.)

The term "actual killer" means the person who personally kills the victim. (*People v. Garcia* (2020) 46 Cal.App.5th 123, 152 [interpreting comparable language in Pen. Code, § 190.2 special circumstance allegation].)

A number of factors go into determining whether the defendant was a "major participant" (*People v. Banks* (2015) 61 Cal.4th 788, 803-808 (*Banks*)), just as a number of factors go into determining if the defendant acted with "reckless indifference to human life" (*People v. Clark* (2016) 63 Cal.4th 522, 614-620 (*Clark*).)

> Reckless indifference to human life has a subjective and an objective element. [Citation.]As to the subjective element, "[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed," and he or she must consciously disregard "the significant risk of death his or her actions create." [Citations.] As to the objective element, " '[t]he risk [of death] must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him [or her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.' " [Citation.] "Awareness of no more than the foreseeable risk of death inherent in any [violent felony] is insufficient" to establish reckless indifference to human life; "only knowingly creating a 'grave risk of death' " satisfies the statutory requirement. [Citation.] Notably, "the fact a participant [or planner of] an armed robbery could anticipate lethal force might be used" is not sufficient to establish reckless indifference to human life. [Citations.]
>
> We analyze the totality of the circumstances to determine whether [the defendant] acted with reckless indifference to human life. Relevant factors include: Did the defendant use or know that a gun would be used during the felony? How many weapons were ultimately used? Was the defendant physically present at the crime? Did he or she have the opportunity to restrain the crime or aid the victim? What was the duration of the interaction between the perpetrators of the felony and the victims? What was the defendant's knowledge of his or her confederate's propensity for violence or likelihood of using lethal force? What efforts did the defendant make to minimize the risks of violence during the felony? [Citation.] " '[N]o one of these considerations is necessary, nor is any one of them necessarily sufficient.' " [Citations.]

(*In re Scroggins* (2020) 9 Cal.5th 667, 677, citing *Clark* and *Banks*; see, e.g., *In re Parrish* (2020) 58 Cal.App.5th 539, 543-544 [sufficient evidence defendant was major participant and acted with reckless indifference for human life of customer killed during armed robbery of market]; *People v. Douglas* (2020) 56 Cal.App.5th 1, 8-11 [finding sufficient evidence defendant was major participant and acted with reckless indifference for human life during armed robbery of video store]; *People v. Bascomb* (2020) 55 Cal.App.5th 1077, 1087-1091 [finding sufficient evidence defendant acted with reckless indifference for human life by planning and participating in a home invasion robbery]; see also *In re McDowell* (2020) 55 Cal.App.5th 999, 1008-1015 [using same analysis in analyzing sufficiency of evidence supporting Pen. Code, § 190.2, special circumstance allegation].)

4720.3-Escape doctrine 6/13

Penal Code section 189, defining the first-degree felony-murder rule, provides that "[a]ll murder … which is committed in the perpetration of, or attempt to perpetrate … [specified felonies] … is murder of the first degree." For the killing to be part of the felony's "perpetration" there must

be both a causal and temporal relationship between the two. (*People v. Russell* (2010) 187 Cal.App.4th 981, 988 (*Russell*).) "Putting it differently, it must be established that the killing and the felony are part of one continuous transaction. (*People v. Cavitt* (2004) 33 Cal.4th 187, 193.)" (*Russell*, *supra*, 187 Cal.App.4th at p. 988.)

> In determining whether the killing is part of a continuous transaction, the courts have applied what is known as the escape doctrine, which means that included within the perpetration of an offense is the reasonable notion that the perpetrator wants to escape without apprehension. Ordinarily, when a homicide occurs during the felon's immediate flight from the crime, the killing is in the perpetration of the felony because the felony is not legally complete until the felon has found a place of temporary safety. (*People v. Young* (1992) 11 Cal.App.4th 1299, 1305.) Whether or not the felon has reached a place of temporary safety is a matter of fact to be established by the prosecution beyond a reasonable doubt. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1016, 1025; *People v. Portillo* (2003) 107 Cal.App.4th 834, 843.)

(*Russell*, *supra*, 187 Cal.App.4th at p. 988.) "When the killing occurs during flight … the escape rule establishes the 'outer limits of the "continuous-transaction" theory.' [Citation.]" (*People v. Wilkens* (2013) 56 Cal.4th 333, 345.)

As noted, felony-murder liability continues while the perpetrator of the felony is in flight from the scene of the crime and has not reached a place of temporary safety. (*People v. Young* (2005) 34 Cal.4th 1149, 1175 [robbery]; see also *People v. Salas* (1972) 7 Cal.3d 812, 823 [robbery]; *People v. Thongvilay* (1998) 62 Cal.App.4th 71, 79-81 [auto burglary]; *People v. Bodely* (1995) 32 Cal.App.4th 311, 313 [commercial burglary]; *People v. Portillo*, *supra*, 107 Cal.App.4th at pp. 843-846 [sex crimes].) "Thus, a murder may be determined to have been committed in the perpetration of a felony if it occurred after the felony, e.g., during the attempt to escape or for the purpose of preventing discovery of the previously committed felony." (*People v. Jones* (2001) 25 Cal.4th 98, 109.) Whether the defendant has reached a place of temporary safety is an objective test. (*Russell*, *supra*, 187 Cal.App.4th at p. 911 [burglary].) Thus, it is not necessary to show the felon was either chased from the scene or that the felon knew the police had been called and were looking for the felon. (*Ibid*.; see also *People v. Johnson* (1992) 5 Cal.App.4th 552, 559-562 [robbery].)

Similarly, an underlying felony such as robbery or rape continues as long as the victim "remains at hand" and has not "reached a place of temporary safety." (*People v. Flynn* (2000) 77 Cal.App.4th 766, 772; *People v. Castro* (1994) 27 Cal.App.4th 578, 585-586.) When the perpetrator and victim remain in close proximity, a reasonable assumption is that, if not prevented from doing so, the victim will attempt to reclaim his or her property." (*People v. Flynn*, *supra*, 77 Cal.App.4th at p. 772.) "[F]or the purpose of felony murder, the commission of rape may be deemed to continue so long as the culprit 'maintains control over the victim.' [Citation.]" (*People v. Castro*, *supra*, 27 Cal.App.4th at p. 586.)

Finally, "[t]he escape rule also has been extended to other contexts requiring proof that an act occurred in the commission of a crime—such as inflicting great bodily injury in the course of the commission of a crime (*People v. Carroll* (1970) 1 Cal.3d 581, 584-585), kidnapping for purposes of robbery (*People v. Laursen* (1972) 8 Cal.3d 192, 199-200), and use of a firearm in the commission of a robbery (*People v. Fierro* (1991) 1 Cal.4th 173, 225-226.)" (*People v. Wilkins*, *supra*, 56 Cal.4th at p. 341.)

4730.1-Provocative act murder defined 7/20

When a defendant or an accomplice, acting with conscious disregard for life, intentionally commits an act that is likely to cause death and as a result a third party kills someone in reasonable response to the act, the defendant is guilty of murder under the provocative act murder doctrine. (*People v. Johnson* (2013) 221 Cal.App.4th 623, 629; *People v. Mejia* (2012) 211 Cal.App.4th 586, 602; *People v. Briscoe* (2001) 92 Cal.App.4th 568, 581 (*Briscoe*); but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 480-481 [explaining why third party response need not be reasonable, only proximately caused by the provocative act].) "The provocative act doctrine does not define a crime. (*People v. Cervantes* (2001) 26 Cal.4th 860, 867, fn. 10 (*Cervantes*).) Rather, 'provocative act murder' is a descriptive term referring to a subset of intervening-act homicides in which the defendant's conduct provokes an intermediary's violent response that causes someone's death. (*Id*. at p. 872-873, fn. 15.)" (*People v. Gonzalez* (2012) 54 Cal.4th 643, 649, fn. 2 (*Gonzalez*).) "Under the provocative act murder doctrine, the perpetrator of a crime is held vicariously liable for the killing of an accomplice committed by the third party." (*Briscoe*, *supra*, 92 Cal.App.4th at p. 581; see also *People v. Hunter* (2017) 15 Cal.App.5th 163, 170.)

The provocative act murder theory evolved from *People v. Washington* (1965) 62 Cal.2d 777 (*Washington*) and *People v. Gilbert* (1965) 63 Cal.2d 690 (*Gilbert*). In *Washington*, a robbery victim killed one of two robbers. The surviving robber was convicted of felony murder. The California Supreme Court reversed the conviction, holding that the felony-murder rule could not apply because neither the defendant nor his accomplice committed the killing. (*Washington*, *supra*, 62 Cal.2d at p. 781.) But, the court warned that the surviving robber could be convicted on another theory—robbers who initiate a gun battle may be guilty of murder when their intended victim resists and kills someone. Malice aforethought exists when one of the robbers does an act involving a high degree of probability that it will result in death, with a base, antisocial motive, and with wanton disregard for human life. (*Id*. at p. 782.)

In *Gilbert*, the defendant's accomplice was killed by a police officer who returned the defendant's gunfire during a bank robbery. The California Supreme Court held that a defendant could be convicted of murder, here in the first degree, for a killing committed by another: "When the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder." (*Gilbert*, *supra*, 63 Cal.2d at p. 704; but see *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 136-138 [explaining why third party response need not be reasonable, only proximately caused by the provocative act].)

Under the provocative act doctrine the killing may be committed by the victim of the felony, a police officer, or a potential rescuer. And the deceased may be the victim, an accomplice, or an innocent third party. (*Gilbert*, *supra*, 63 Cal.2d at p. 703; see *Pizano v. Superior Court*, *supra*, 21 Cal.3d at pp. 135-139 [victim]; *People v. Garcia* (1999) 69 Cal.App.4th 1324 [accomplice]; *People v. Gardner*, *supra*, 37 Cal.App.4th 473 [third party].) The doctrine can be applied to hostage or human shield cases during the commission of a felony (e.g., *Pizano*, *supra*), as well as high-speed car chases following the commission of a felony (e.g., *People v. Lima* (2004) 118 Cal.App.4th 259).

> A murder conviction under the provocative act doctrine thus requires proof that the defendant personally harbored the mental state of malice, and either the defendant or an accomplice intentionally committed a provocative act that proximately caused an unlawful killing. [Citations.] A provocative act is one that goes beyond what is necessary to

> accomplish an underlying crime and is dangerous to human life because it is highly probable to provoke a deadly response. [Citations.] Although the doctrine has often been invoked in cases where the defendant initiates or participates in a gun battle [citation], it is not limited to this factual scenario. [Citation.] Malice will be implied if the defendant commits a provocative act knowing that this conduct endangers human life and acts with conscious disregard of the danger.

(*Gonzalez*, *supra*, 54 Cal.4th at p. 655; see also *People v. Bell* (2020) 48 Cal.App.5th 1, 11; *Briscoe*, *supra*, 92 Cal.App.4th at p. 581.)

4730.2-Provocative act murder elements 1/18

The provocative act murder doctrine has both a physical and mental element. (*People v. Johnson* (2013) 221 Cal.App.4th 623, 629 (*Johnson*); *People v. Mejia* (2012) 211 Cal.App.4th 586, 603 (*Mejia*).)

"The physical element is satisfied when the defendant, or a surviving accomplice in the underlying crime, commits an act, the natural and probable consequence of which is the use of deadly force by a third party." (*Mejia*, *supra*, 211 Cal.App.4th at p.603; citing *People v. Cervantes* (2001) 26 Cal.4th at 860,868-869, 871, italics omitted.)

"As to the mental element of provocative act murder, the People must prove 'that the defendant personally harbored … malice.' [Citations.] But, malice may be implied[.]" (*Johnson*, *supra*, 221 Cal.App.4th at p. 630.) "[T]he central inquiry in determining criminal liability for a killing committed by a resisting victim or police officer is whether the conduct of a defendant or his accomplices was sufficiently provocative of lethal resistance to support a finding of implied malice." (*Taylor v. Superior Court* (1970) 3 Cal.3d 578, 583.) "With respect to the mental element of provocative act murder, a defendant cannot be vicariously liable; he must personally possess the requisite mental state of malice aforethought when he either causes the death through his provocative act or aids and abets in the underlying crime the provocateur who causes the death. [Citation.]" (*Mejia*, *supra*, 211 Cal.App.4th at pp. 603-604, citing *People v. Concha* (2009) 47 Cal.4th 653, 660-663, italics omitted.) "If the underlying crime which provokes the killing does not require an intent to kill, the provocative conduct must be an act beyond that necessary simply to commit the crime. [Citations.]" (*Mejia*, *supra*, 211 Cal.App.4th at p. 604; see also *People v. Hunter* (2017) 15 Cal.App.5th 163, 170.) "Where the underlying crime requires an intent to kill, however, conduct necessary to commit the crime is sufficient to constitute the provocative act. [Citations.]" (*Mejia*, *supra*, 211 Cal.App.4th at p. 604.)

4730.3-Provocative act murder proximate cause requirement 7/20

A provocative act murder must be attributable to a life-endangering act by the defendant which proximately cause the killing. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 655 (*Gonzalez*).) To be considered a proximate cause, the act must be a "substantial factor" contributing to the death. (*Gonzalez*, *supra*, 54 Cal.4th at p. 657; *People v. Caldwell* (1984) 36 Cal.3d 210, 219-220; *People v. Gilbert* (1965) 63 Cal.2d 690, 704-705; see also *People v. Bell* (2020) 48 Cal.App.5th 1, 18.)

"[W]hen the conduct of two felons acting in concert provokes a deadly response, the question is only whether the defendant's acts were a *substantial* factor contributing to the resulting death. If so, that defendant is guilty. Accompanying provocative acts of the accomplice do not dissipate culpability." (*Gonzalez*, *supra*, 54 Cal.4th at p. 659, original italics.) But a death caused by

the independent, intervening conduct of a third party is not attributed to the defendant. (*People v. Cervantes* (2001) 26 Cal.4th 860, 871-874.) "[T]he intervening act may be so attenuated, due to the passage of a significant period time, that defendant's act is no longer considered the proximate cause of the victim's death, for 'at some point the required causal nexus would have become too attenuated. …' [Citations.]" (*People v. Fiu* (2008)165 Cal.App.4th 360, 371, fn. 12.)

When the murder victim is an accomplice, the victim's provocative acts may be a partial cause of his or her death so long as the defendant's or a surviving accomplice's life-endangering acts were a substantial factor. (*People v. Garcia* (1999) 69 Cal.App.4th 1324, 1332; cf. *People v. Sanchez* (2001) 26 Cal.4th 834, 845-849.)

So long as the requisite proximate cause exists, however, the death of the victim need not be because the third-party acted in "reasonable response" or "self-defense" to the defendant's or the accomplice's provocative act. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 630-631; *People v. Gardner* (1995) 37 Cal.App.4th 473, 475, 480-481.) "Consequently, liability for provocative act murder is determined by whether the killing was a natural and probable consequence of the defendant's provocative act, not by whether the actual killer's use of force was reasonable." (*Sisson v. Superior Court* (2013) 216 Cal.App.4th 24, 37.)

"Most importantly, the issue of causation is a factual question, ordinarily to be decided by the jury." (*People v. Mejia*, *supra*, 211 Cal.App.4th at p. 609.)

4730.4-Provocative act murder additional concepts 1/18

The provocative act murder doctrine involves several additional, distinct concepts.

First, malice aforethought is implied from the defendant or accomplice committing a life-endangering act with wanton disregard for human life. The life-endangering act must be such that it is highly probable—not merely foreseeable—that death will result. (*People v. Caldwell* (1984) 36 Cal.3d 210, 223; *People v. Gilbert* (1965) 63 Cal.2d 690, 703 (*Gilbert*).)

> A provocative act is conduct that is dangerous to human life, not necessarily in and of itself, but because, in the circumstances, it is likely to elicit a deadly response. The danger addressed by the provocative act doctrine is not measured by the violence of the defendant's conduct alone, but also by the likelihood of a violent response. Thus, our cases have not required any particular level of violence to support provocative act murder liability.

(*People v. Gonzalez* (2012) 54 Cal.4th 643, 657 (*Gonzalez*).)

Second, generally the life-endangering act must be an act not inherent in the underlying felony. (*In re Joe R.* (1980) 27 Cal.3d 486; *People v. Superior Court (Bennett)* (1990) 223 Cal.App.3d 1166, 1172.) In other words, "[t]he provocative act must be something beyond that necessary to commit the underlying crime." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 583; see also *People v. Hunter* (2017) 15 Cal.App.5th 163, 170; *People v. Baker-Riley* (2012) 207 Cal.App.4th 631, 636.) But this requirement does not apply if the underlying felony involves an intent to kill. (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 59-60 [shooting at occupied vehicle].)

Finally, a defendant will be held vicariously liable for a life-endangering act committed by the accomplice in furtherance of their common criminal design under customary aider and abettor or conspiracy principles. (*Gilbert*, *supra*, 63 Cal.2d at p. 705.) But the provocative act must be committed by the defendant or a surviving accomplice, not an accomplice whose own actions result

in his or her death. (*People v. Concha* (2009) 47 Cal.4th 653, 663; see also *People v. Hunter*, *supra*, 15 Cal.App.5th at p. 171; *People v. Mejia* (2012) 211 Cal.App.4th 586, 603.)

4730.5-Provocative act murder degrees 2/14

Once murder is proved on a provocative act theory, the degree of murder can be established under Penal Code section 189. (*People v. Concha* (2009) 47 Cal.4th 653, 661 (*Concha*).) Thus, a provocative act murder is of the first degree when it is committed in perpetration of a robbery, or other enumerated felony, even though the felony-murder rule does not apply. (*People v. Gilbert* (1965) 63 Cal.2d 690, 705; see also *People v. Cervantes* (2001) 36 Cal.3d 860, 216, fn. 2; *People v. Johnson* (2013) 221 Cal.App.4th 623, 632; *People v. Baker-Riley* (2012) 207 Cal.App.4th 631, 635-636 .) Similarly, "when malice is *express* because the defendant possessed a specific intent to kill, first degree murder liability may be proper if the charged defendant personally acted willfully, deliberately, and with premeditation." (*Concha*, *supra*, 47 Cal.4th at p. 662; see also *People v. Gonzalez* (2012) 54 Cal.4th 643, 655, fn. 9.)

> To summarize, a defendant is liable for murder when the actus reus and mens rea elements of murder are satisfied. The defendant or an accomplice must proximately cause an unlawful death, and the defendant must personally act with malice. Once liability for murder is established in a provocative act murder case or in any other murder case, the degree of murder liability is determined by examining the defendant's personal mens rea and applying section 189. Where the individual defendant personally intends to kill and acts with that intent willfully, deliberately, and with premeditation, the defendant may be liable for first degree murder for each unlawful killing proximately caused by his or her acts, including a provocative act murder. Where malice is implied from the defendant's conduct or where the defendant did not personally act willfully, deliberately, and with premeditation, the defendant cannot be held liable for first degree murder.

(*Concha*, *supra*, 47 Cal.4th at pp. 663-664; see also *People v. Mejia* (2012) 211 Cal.App.4th 586, 604.)

4740.1-Transferred intent doctrine 12/16

"When intent to kill is at issue in murder, it may be proven through the doctrine of transferred intent." (*People v. Vasquez* (2016) 246 Cal.App.4th 1019, 1025.) " 'Under the classic formulation of California's common law doctrine of transferred intent, a defendant who shoots with the intent to kill a certain person and hits a bystander instead is subject to the same criminal liability that would have been imposed had " 'the fatal blow reached the person for whom intended.' " [Citation.] In such a factual setting, the defendant is deemed as culpable as if he had accomplished what he set out to do.' " (*People v. Bland* (2002) 28 Cal.4th 313, 320-321 (*Bland*); see also *People v. Sanchez* (2001) 26 Cal.4th 834, 850, fn. 9.)

Application of the transferred intent doctrine to charge a defendant with the death of an unintended victim does not foreclose charging the defendant with attempted murder of the intended victim.

> [R]eliance on a transferred intent theory of liability for the first degree murder of the unintended victim did not prevent the prosecutor from also charging defendants with attempted murder of the intended victim. As previously recounted, defendants shot at an intended victim, missed him, and killed another individual instead. In their attempt to kill

> the intended victim, defendants committed crimes against two persons. They may be held accountable for the death of the unintended victim on a theory of transferred intent. Their criminal liability for attempting to kill the intended victim is that which the law assigns, here, in accordance with the attempted murder statute … .

(*People v. Scott* (1996) 14 Cal.4th 544, 551.)

Thus the transferred intent doctrine applies even if the original target is also killed. "Whether one conceptualizes the matter by saying that the intent to kill the intended target transfers to others also killed, or by saying that intent to kill need not be directed at a specific person, the result is the same: assuming legal causation, a person maliciously intending to kill is guilty of the murder of all persons actually killed. If the intent is premeditated, the murder or murders are first degree." (*Bland*, *supra*, 28 Cal.4th at pp. 323-324.)

"But because '[t]he crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences,' the shooter who fails to kill the unintended victim cannot be convicted of attempted murder under a theory of transferred intent. (*Bland*, *supra*, at pp. 326-327.)" (*People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1243.)

4750.1-General PC995 standard for murder 4/20

Murder is "the unlawful killing of a human being … with malice aforethought." (Pen. Code, § 187, subd. (a).) Malice does not require that the perpetrator harbor any ill will or hatred toward the victim. (*People v. Cruz* (1980) 26 Cal.3d 233, 244; *People v. Matta* (1976) 57 Cal.App.3d 472, 480.) Once the evidence establishes that a killing was proximately caused by a defendant, the law generally presumes—for the purposes of indictment or information—that the killing was performed with malice.

> To sustain a conviction of either degree [first or second] of murder, therefore, it must be proved at the trial that the homicide was committed by the accused with the state of mind known in law as "malice aforethought." But it does not follow that the same showing must be made before the grand jury to support a mere accusation of murder. [¶] … [T]he rule is derived that "When the killing is proved to have been committed by the defendant, and nothing further is shown, *the presumption of law is that it was malicious and an act of murder* … ." (Italics added.) [Citations.]

(*Jackson v. Superior Court* (1965) 62 Cal.2d 521, 525; see also *People v. Superior Court (Day)* (1985) 174 Cal.App.3d 1008, 1020-1021; *Roads v. Superior Court* (1969) 275 Cal.App.2d 593, 598.) Thus, when the defendant is proved to have assaulted the victim in such a manner as to endanger life and death results, " 'malice is implied from such assault in the absence of justifying or mitigating circumstances.' [Citations]" (*Jackson v. Superior Court*, *supra*, 62 Cal.2d at p. 526.)

> The presumption of malice is rebutted by justifying or mitigating circumstances. … Although this is usually accomplished at trial, in the rare case the uncontroverted evidence presented at the preliminary hearing may establish a non-malicious killing. In such cases there is literally no evidence of malice and a murder charge may not lie. However, the evidence of a lack of malice must be both uncontroverted and sufficient as a matter of law to overcome the malice presumption.

(*People v. Superior Court (Day)*, *supra*, 174 Cal.App.3d at p. 1020.) But, even the presentation of evidence supporting a "credible defense of self-defense" is insufficient to set aside a murder charge before trial if the evidence also supports a credible inference of malice. (*Id*. at p. 1020; see also

People v. Superior Court (Smart) (1986) 179 Cal.App.3d 860 and *People v. Superior Court (Henderson)* (1986) 178 Cal.App.3d 516.)

4750.2-Murder with malice aforethought defined 4/20

Murder is the unlawful killing of a human being or a fetus "with malice aforethought." (Pen. Code, § 187, subd. (a).) "Malice aforethought 'may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' ([Pen. Code] § 188.)" (*People v. Bryant* (2013) 56 Cal.4th 959, 964; see also *People v. Cravens* (2012) 53 Cal.4th 500, 507; *People v. Blakeley* (2000) 23 Cal.4th 82, 87.) Evidence of intent to kill or express malice may be satisfied by proof of a single stab wound that penetrates a vital organ. (*In re M.S.* (2019) 32 Cal.App.5th 1177, 1185.) Murder in the second degree is "the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder." (*People v. Knoller* (2007) 41 Cal.4th 139, 151.)

Malice can also arise from a defendant's omission when there is a legal duty to act. (*Zemek v. Superior Court* (2020) 44 Cal.App.5th 535, 550-552.) For example:

> A parent owes his or her child a duty to obtain needed medical attention. (*People v. Burden* (1977) 72 Cal.App.3d 603, 614 (*Burden*); accord, [Pen. Code] § 270.) The "omission of a duty is in law the equivalent of an act …" (*Burden*, *supra*, at p. 616), and thus, a defendant's failure to perform an act that he or she has a legal duty to perform is identical to the defendant's affirmative performance of an act (*id*. at p. 618 ["common law does not distinguish between homicide by act and homicide by omission"] … .)

(*People v. Latham* (2012) 203 Cal.App.4th 319, 327.)

4750.3-Elements of implied malice murder 4/20

The California Supreme Court has interpreted implied malice murder as having both a physical and a mental component. (*People v Bryant* (2013) 56 Cal.4th 959, 965.) "Malice 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." ' [Citation.] In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another … ." (*People v. Knoller* (2007) 41 Cal.4th 139, 143; see also *People v. Jones* (2018) 26 Cal.App.5th 420, 442; *People v. Guillen* (2014) 227 Cal.App.4th 934, 984-985.)

As noted, the physical component of implied malice murder is the performance of an act, the natural consequences of which are dangerous to life. (*People v. Cravens* (2012) 53 Cal.4th 500, 508.) Under certain circumstances a single blow from a fist causing death can support both the physical and mental components of second degree implied malice murder. (*Id*. at pp. 508-511; *People v. Palomar* (2020) 44 Cal.App.5th 969, 976-977.)

As also noted above, the mental component of implied malice is that the person knew his or her conduct endangered life and he or she acted with conscious disregard for life. (*People v. Cravens*, *supra*, 53 Cal.4th at p. 508.) But, "[u]nlike express malice, implied malice does not require wrongful intent." (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1426.)

> "It is the ' " 'conscious disregard for human life' " ' that sets implied malice apart from gross negligence." (*People v. Contreras* (1994) 26 Cal.App.4th 944, 954.) "Implied malice is determined by examining the defendant's subjective mental state to see if … she actually appreciated the risk of … her actions." (*People v. Superior Court (Costa)* (2010) 183 Cal.App.4th 690, 697; see *People v. Olivas* (1985) 172 Cal.App.3d 984, 988 ["[T]he state of mind of a person who acts with conscious disregard for life is, 'I know my conduct is dangerous to others, but I don't care if someone is hurt or killed.' "].)

(*People v. Tseng* (2018) 30 Cal.App.5th 117, 128-129, fn. omitted.) To establish implied malice the trier of fact can infer a defendant's subjective awareness that his or her conduct endangered another's life from the circumstances of the attack alone, the natural consequences of which were dangerous to human life. (*People v. Gray* (2005) 37 Cal.4th 168, 218.)" (*People v. Cravens*, *supra*, 53 Cal.4th at p. 522; see also *People v. Guillen*, *supra*, 227 Cal.App.4th at pp. 984, 988.)

4750.4-Second degree *Watson* (DUI) murder 5/19

A conviction of second degree murder requires a finding of malice aforethought. (Pen. Code, §§ 187, subd. (a), 189.) "Malice 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." ' [Citation.]" (*People v. Knoller* (2007) 41 Cal.4th 139, 143.) "Voluntary intoxication does not negate implied malice." (*People v. McNeely* (2015) 236 Cal.App.4th 1419, 1431-1432.) Instead, "[a] person who, knowing the hazards of drunk driving, drives a vehicle while intoxicated and proximately causes the death of another may be convicted of second degree murder under an implied malice theory. (*People v. Watson* (1981) 30 Cal.3d 290, 300-301 (*Watson*).)" (*People v. Batchelor* (2014) 229 Cal.App.4th 1102, 1112.)

A finding of implied malice, unlike a finding of gross negligence, "depends upon a determination that the defendant actually appreciated the risk involved, i.e., a subjective standard." (*Watson*, *supra*, 30 Cal.3d at pp. 296-297.) "Even if the act results in a death that is accidental … the circumstances surrounding the act may evince implied malice. [Citations.]" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 110, fn. omitted; see *People v. Jarmon* (1992) 2 Cal.App.4th 1345, 1349-1351 [sufficient evidence of defendant's subjective awareness of risk when he ingested PCP before driving, even though he may have virtually unconscious when the fatal collision occurred].)

Appellate courts have identified several factors relevant for upholding a murder conviction based on drunk driving: "(1) a blood-alcohol level above the .08 percent legal limit; (2) a predrinking intent to drive; (3) knowledge of the hazards of driving while intoxicated; and (4) highly dangerous driving." (*People v. Talamantes* (1992) 11 Cal.App.4th 968, 973.) Similar factors apply when the allegation is driving under the influence of narcotics. (*People v. Jimenez* (2015) 242 Cal.App.4th 1337, 1359.) Not all these factors need be present to sustain a second degree murder under *Watson*. (*People v. Munoz* (2019) 31 Cal.App.5th 143, 152.)

In *Watson*, the California Supreme Court found the following evidence sufficient to hold the defendant to answer for second degree murder:

> Defendant had consumed enough alcohol to raise his blood-alcohol content to a level which would support a finding that he was legally intoxicated. He had driven his car to the establishment where he had been drinking, and he must have known that he would have to drive it later. It also may be presumed that defendant was aware of the hazards of driving

while intoxicated. … Defendant drove at highly excessive speeds through city streets, an act presenting a great risk of harm or death. Defendant nearly collided with a vehicle after running a red light; he avoided the accident only by skidding to a stop. He thereafter resumed his excessive speed before colliding with the victims' car, and then belatedly again attempted to brake his car before the collision (as evidenced by the extensive skid marks before and after impact) suggesting an actual awareness of the great risk of harm which he had created. In combination, these facts reasonably and readily support a conclusion that defendant acted wantonly and with a conscious disregard for human life.

(*Watson*, *supra*, 30 Cal.3d at pp. 300-301.)

Numerous appellate decisions since *Watson* have upheld second degree implied malice murder convictions based on driving under the influence. (See, e.g., *People v. Jimenez*, *supra*, 242 Cal.App.4th at pp. 1358-1359 [defendant in "Crash/Withdrawal" phase after smoking methamphetamine]; *People v. Batchelor*, *supra*, 229 Cal.App.4th at pp. 1112-1115; *People v. Johnigan* (2011) 196 Cal.App.4th 1084, 1092;*People v. Moore* (2010) 187 Cal.App.4th 937, 940-942; see also *People v. Autry* (1995) 37 Cal.App.4th 351, 356-359; *People v. Contreras* (1994) 26 Cal.App.4th 944, 955-957; *People v. David* (1991) 230 Cal.App.3d 1109, 1114-1116; *People v. Murray* (1990) 225 Cal.App.3d 734, 745-749; *People v. McCarnes* (1986) 179 Cal.App.3d 525, 533-535; *People v. Olivas* (1985) 172 Cal.App.3d 984, 989.)

The key element of actual knowledge of the risk of drunk driving was found to be present in *People v. Wolfe* (2018) 20 Cal.App.5th 673.

Here, when we review the facts *in this case* we find sufficient evidence to support the jury's determination that Wolfe was subjectively aware that driving under the influence of alcohol was dangerous to human life. Wolfe had attended a victim impact panel, which had reviewed the consequences of drinking and driving. (See *People v. Murray*, *supra*, 225 Cal.App.3d at p. 746 [a jury can infer defendant's knowledge from exposure to drinking and driving educational programs].) Further, Wolfe had signed a DMV license renewal form, which explicitly told her of one of the serious consequences of driving under the influence: that she could be charged with murder. Wolfe had also previously called "Tommy Taxi" for a ride home after she had been drinking on many prior occasions. The jury could have reasonably inferred that Wolfe did this because she was aware of the possible lethal consequences of driving under the influence of alcohol.

(*People v. Wolfe*, *supra*, 20 Cal.App.5th at p. 683, italics in original; distinguish *People v. Diaz* (2014) 227 Cal.App.4th 362 [Evid. Code, § 352 error to admit unedited gruesome video from MADD classes attended by defendant].)

4760.1-No proof of degree of murder necessary before trial 5/11

It is well settled that it is for the jury, not the magistrate, to determine the degree of murder of which the defendant is guilty. (Pen. Code, § 1157; *People v. Buckley* (1986) 185 Cal.App.3d 512, 520-522; *People v. Stansbury* (1968) 263 Cal.App.2d 499, 503; *People v. Coston* (1948) 84 Cal.App.2d 645, 648.) The degree of murder neither need be alleged in the accusatory pleading nor proved at the preliminary hearing. (*In re Jessie P.* (1992) 3 Cal.App.4th 1177, 1181; *People v. Heffington* (1973) 32 Cal.App.3d 1, 11.) Indeed, "the magistrate has no power or obligation to determine factual support for an offense divided into degrees." (*People v. Estrada* (1987) 188

Cal.App.3d 1141, 1147.) And an allegation of murder charges all lesser included offenses *including* voluntary and involuntary manslaughter. (*People v. Heffington*, *supra*, 32 Cal.App.3d at p. 11.)

4760.2-Premeditation and deliberation 7/21

"All murder which is perpetrated by … willful, deliberate, and premeditated killing … is murder of the first degree." (Pen. Code, § 189.) "Murder that is premeditated and deliberated is murder of the first degree." (*People v. Cortez* (1998) 18 Cal.4th 1223, 1232.) "The very definition of 'premeditation' encompasses the idea that a defendant thought about or considered the act beforehand." (*People v. Pearson* (2013) 56 Cal.4th 393, 443.) " ' "[P]remeditation" means thought over in advance,' " and " ' "[d]eliberation" refers to careful weighing of considerations in forming a course of action … .' " (*People v. Solomon* (2010) 49 Cal.4th 792, 812, quoting *People v. Koontz* (2002) 27 Cal.4th 1041, 1080; see also *People v. Casares* (2016) 62 Cal.4th 808, 824.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) But "[t]o prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." (Pen. Code, § 189.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), the California Supreme Court identified three categories of evidence relevant to deciding whether to sustain a verdict of first degree murder based on premeditation and deliberation: (1) evidence of planning activity prior to the killing, (2) evidence of the defendant's prior relationship with the victim from which the jury could reasonably infer a motive to kill, and (3) evidence that the manner in which the defendant carried out the killing "was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Id*. at pp. 26-27; see *People v. Brooks* (2017) 3 Cal.5th 1, 58-59.)

> In the context of first degree murder, " 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly … .' [Citations.]" (*Ibid*.) "In [*Anderson]* we 'identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing.' [Citation.] However, these factors are not exclusive, nor are they invariably determinative. [Citation.] ' "*Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]" ' [Citation.]" (*People v. Combs* (2004) 34 Cal.4th 821, 850.)

(*People v. Lee* (2011) 51 Cal.4th 620, 636; see also *People v. Cage* (2015) 62 Cal.4th 256, 275-276; *People v. Streeter* (2012) 54 Cal.4th 205, 242; but see *People v. Wear* (2020) 44 Cal.App.5th 1007, 1023-1032 [insufficient evidence to support of premeditation or deliberation theory of first degree murder]; *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1266-1274 [insufficient evidence of

premeditation or deliberation to support first degree murder so appellate court reduced conviction to second degree murder].)

When addressing the sufficiency of evidence of premeditation and deliberation prior threats to kill the victim bears on the defendant's motive to kill. (*People v. Wear*, *supra*, 44 Cal.App.5th at p. 1028-1029.) Whether the manner of killing supports a finding of premeditation or deliberation often turns on the existence of the other *Anderson* factors. (*Id*. at pp. 1029-1031; see also *People v. Williams* (2018) 23 Cal.App.5th 396, 410-412.) Nevertheless, "strangulation as a matter of killing is sufficient evidence of premeditation and deliberation because its prolonged nature provides amble time for the killer to consider his action." (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 11, citing *People v. Hovarter* (2008) 44 Cal.4th 983, 1020; see also *People v. Disa* (2016) 1 Cal.App.5th 654, 666-668.)

The motive to kill need not be rational or sensible to support a first degree murder conviction. (*People v. Pettigrew* (2021) 62 Cal.App.5th 477, 495.)

> "Motive is the emotional urge that induces a particular act." [Citation.] " '[T]he law does not require that a first degree murderer have a "rational" motive for killing.' " (*People v. Jackson* (1989) 49 Cal.3d 1170, 1200.) "Anger at the way the victim talked to [the defendant] [citation] or any motive, 'shallow and distorted but, to the perpetrator, genuine[,]' may be sufficient." (*People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102.) "[T]he incomprehensibility of the motive does not mean that the jury could not reasonably infer that the defendant entertained and acted on it." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1238.)

(*People v. Pettigrew*, *supra*, 62 Cal.App.5th at p. 495.)

4760.3-First degree torture murder 7/17

First degree murder includes a murder perpetuated by means of torture. (Pen. Code, § 189.) " 'The elements of torture murder are: (1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose.' [Citation.]" (*People v. D'Arcy* (2010) 48 Cal.4th 257, 293; see also *People v. Brooks* (2017) 3 Cal.5th 1, 65.) "Murder by torture does not require that a defendant have an intent to kill or that the victim be aware of the pain. (*People v. Cook* (2006) 39 Cal.4th 566, 602.)" (*People v. Streeter* (2012) 54 Cal.4th 205, 245.) "The jury may infer the intent to inflict extreme pain from the circumstances of the crime, the nature of the killing, and the condition of the victim's body. (*People v. Chatman* [(2006)] 38 Cal.4th [344] at p. 390.)" (*People v. Streeter*, *supra*, 54 Cal.4th at p. 245.) The California Supreme Court, however, has " 'cautioned against giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with a killing in the heat of passion, in an "explosion of violence," as with the intent to inflict cruel suffering.' [Citation.]" (*People v. Cole*, *supra*, 33 Cal.4th at p. 1214.)

4770.1-Voluntary manslaughter defined 5/20

Murder is the unlawful killing of a human being or a fetus "with malice aforethought." (Pen. Code, § 187, subd. (a).) "Manslaughter is 'the unlawful killing of a human being without malice.' ([Pen. Code] § 192.)" (*People v. Lasko* (2000) 23 Cal.4th 101, 108 (*Lasko*).) "A defendant commits voluntary manslaughter when a homicide that is committed either with intent to kill or with conscious disregard for life—and therefore would normally constitute murder—is nevertheless reduced or mitigated to manslaughter." (*People v. Bryant* (2013) 56 Cal.4th 959, 968 (*Bryant*); see also *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1086-1087.)

> [I]ntent to kill is not an element of voluntary manslaughter. (See *Lasko*, *supra*, 23 Cal.4th at pp. 108-111; *People v. Blakeley* (2000) 23 Cal.4th 82, 88-91 (*Blakeley*).) In the context of heat of passion voluntary manslaughter, we reasoned in *Lasko* that "[j]ust as an unlawful killing with malice is murder regardless of whether there was an intent to kill, an unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill." (*Lasko*, at pp. 109-110.) In *Blakeley*, we rejected the defendant's claim that an unintentional killing in unreasonable self-defense constituted involuntary manslaughter, noting that the defendant's position was based on the erroneous "assumption that intent to kill is a necessary element of voluntary manslaughter." (*Blakeley*, at p. 89.)

(*Bryant*, *supra*, 56 Cal.4th at p. 967.)

"Although we have on occasion employed somewhat different formulations to define the offense of voluntary manslaughter, we have never suggested that it could be committed without either an intent to kill or a conscious disregard for life." (*Bryant*, *supra*, 56 Cal.4th at p. 969.)

> Thus, the offenses that constitute voluntary manslaughter—a killing upon a sudden quarrel or heat of passion ([Pen. Code] § 192, subd. (a)), a killing in unreasonable self-defense [citation], and, formerly, a killing committed by one with diminished capacity [citation]—are united by the principle that when a defendant acts with an intent to kill or a conscious disregard for life (i.e., the mental state ordinarily sufficient to constitute malice aforethought), other circumstances relating to the defendant's mental state may preclude the jury from finding that the defendant acted with malice aforethought. But in all of these circumstances, a defendant convicted of voluntary manslaughter has acted either with an intent to kill or with conscious disregard for life.

(*Id*. at pp. 969-970.)

Voluntary manslaughter is a lesser included offense of intentional murder. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; see also *People v. Beltran* (2013) 56 Cal.4th 935, 942.) But "[v]oluntary manslaughter … is not a lesser included offense of felony murder." (*People v. Price* (2017) 8 Cal.App.5th 409, 430.) And a defendant cannot commit voluntary manslaughter under the natural and probable consequences doctrine of aiding and abetting. (*People v. Turner* (2020) 45 Cal.App.5th 428, 439.)

4770.2-Heat of passion/provocation can reduce murder to voluntary manslaughter 5/20

Murder is the unlawful killing of a human being or a fetus "with malice aforethought." (Pen. Code, § 187, subd. (a).) "A murder … may be reduced to voluntary manslaughter if the victim engaged in provocative conduct that would cause an ordinary person with an average disposition to act rashly or without due deliberation and reflection." (*People v. Booker* (2011) 51 Cal.4th 141, 183, fn. 23.)

> Heat of passion … is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice.

(*People v. Beltran* (2013) 56 Cal.4th 935, 942 (*Beltran*); see also *People v. Landry* (2016) 2 Cal.5th 52, 97.)

> Heat of passion has both objective and subjective components. Objectively, the victim's conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. (E.g., *People v. Moye* (2009) 47 Cal.4th 537, 549-550 (*Moye*).) The standard is not the reaction of a "reasonable gang member." (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087.)
>
> Subjectively, "the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation. [*People v.*] *Wickersham* [(1982)] 32 Cal.3d [307,] 327.) 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." [Citations.]' (*People v. Barton* [(1995)] 12 Cal.4th [186,] 201.)" (*Moye*, *supra*, 47 Cal.4th at p. 550.)

(*People v. Enraca* (2012) 53 Cal.4th 735, 759.)

As to the objective component of the heat of passion defense, "we have rejected arguments that insults or gang-related challenges would induce sufficient provocation in an ordinary person to merit an instruction on voluntary manslaughter. [Citations.]" (*Beltran*, *supra*, 56 Cal.4th at p. 949) "The provocation that incites the defendant must have been caused by the victim … ." (*People v. Robbins* (2018) 19 Cal.App.5th 660, 672.) Thus, "[p]redictable and reasonable conduct by a victim resisting felonious assault is not sufficient provocation to merit an instruction on voluntary manslaughter. [Citations.]" (*People v. Enraca*, *supra*, 53 Cal.4th at p. 760; see also *People v. Rountree* (2013) 56 Cal.4th 823, 855.) Psychological evidence supporting a defendant's claim to have acted in a subjective heat of passion is irrelevant to the objective element of the heat of passion defense. (*People v. Mercado* (2013) 216 Cal.App.4th 67, 82.)

The nature of the provocation which supports a heat of passion defense was explained by the California Supreme Court in *Beltran*:

> Here we clarify what kind of provocation will suffice to constitute heat of passion and reduce a murder to manslaughter. The Attorney General argues the provocation must be of a kind that would cause an ordinary person of average disposition *to kill*. We disagree. … The proper standard focuses upon whether the person of average disposition would be induced to react from passion and not from judgment.

(*Beltran*, *supra*, 56 Cal.4th at pp. 938-939, italics in original.) "The proper focus is placed on the defendant's state of mind, not on his particular act." (*Id*. at p. 949; *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1084.)

As to the subjective component of the heat of passion defense, lack of evidence that the defendant actually acted in a heat of passion is also fatal to a claim of error in failing to instruct on voluntary manslaughter. (*People v. Rountree*, *supra*, 56 Cal.4th at p. 855.) "In this case, the subjective component is missing. There is no evidence, and defendant's confession supplies none, that he killed in the heat of passion. He claimed the first shot was an accident, not a killing in the heat of passion." (*Ibid*.)

When prosecuting the defendant for murder, the prosecution has the burden of proving beyond a reasonable doubt that the defendant did not act as a result of heat of passion or sudden quarrel. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1245.)

4770.3-Test when to give heat of passion vol. manslaughter as LIO of murder 7/20

"In a homicide case, the trial court has a sua sponte duty to instruct on voluntary manslaughter as a lesser included offense of murder whenever there is evidence from which a reasonable jury could conclude that a manslaughter, but not a murder, was committed." (*People v. Thomas* (2013) 218 Cal.App.4th 630, 643 (*Thomas*), citing *People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*).) "This duty includes instruction on voluntary manslaughter due to a sudden quarrel or heat of passion when there is substantial evidence that shows such a theory is relevant." (*Thomas*, *supra*, 218 Cal.App.4th at p. 643, citing *Breverman*, *supra*, 19 Cal.4th at p. 154-155; see also *People v. Peau* (2015) 236 Cal.App.4th 823, 830.) "And it may apply even in cases when the defendant intended to kill." (*Thomas*, *supra*, 218 Cal.App.4th at p. 643, citing *Breverman*, *supra*, 19 Cal.4th at p. 163.) When manslaughter and murder are considered in the same case, provocation and sudden quarrel are not elements of voluntary manslaughter. (*People v. Rios* (2000) 23 Cal.4th 450, *Thomas*, *supra*.) "Rather, sufficient provocation and sudden quarrel present mitigating circumstances that may afford a defendant 'partial exculpation' for murder that results in a conviction for manslaughter." (*Thomas*, *supra*.) Sufficient provocation either negates the element of malice required for murder or causes it to be disregarded as a matter of law. (*People v. Beltran* (2013) 56 Cal.4th 935, 942; *People v. Bryant* (2013) 56 Cal.4th 959, 968; see *People v. Moye* (2009) 47 Cal.4th 537, 549.) Thus, when a defendant puts provocation in issue by some showing that is sufficient to raise a reasonable doubt whether a murder was committed, it is incumbent on the prosecution to prove malice beyond a reasonable doubt by proving that sufficient provocation was lacking. (*People v. Thomas*, *supra*.) But unless there is the requisite substantial evidence from which a jury could reasonably conclude the defendant acted from legally sufficient provocation or heat of passion, such instructions need not be given. (*People v. Nelson* (2016) 1 Cal.5th 513, 538-540 [California Supreme Court also rejected defendant's claim that provocation instructions should have been given]; see, e.g., *People v. Wang* (2020) 46 Cal.App.5th 1055, 1072-1073 [no evidence of objectively sufficient provocation or that defendant was subjectively motivated by passion when he killed female victim, which he claimed was accidental]; *People v. Johnson* (2019) 32 Cal.App.5th 26, 41-44 [failure to give voluntary manslaughter instructions upheld because evidence showed shooter entered building and leaving 16 seconds later precluding time for any quarrel to erupt]; *People v. Chestra* (2017) 9 Cal.App.5th 1116, 1122-1123 [no sua sponte duty to instruct on voluntary manslaughter because prior to trial defendant confessed to intentional killing in which he

was aggressor but at trial testified he did not commit killing at all]; but see *In re Hampton* (2020) 48 Cal.App.5th 463, 477-482 [new trial order because appellate counsel was incompetent for not raising trial court's failure to give sua sponte instruction on heat of passion defense despite jury's rejection of perfect and imperfect self-defense claims].)

4770.4-Heat of passion negated by cooling off period 5/20

If sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1225.)

> [The heat of passion defense] is further limited by the requirement that a defendant *actually* be motivated by passion in committing the killing. "[I]f sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter—'the assailant must act under the smart of that sudden quarrel or heat of passion.' [Citation.]" [Citations.] Thus, it is insufficient that one is provoked and later kills. If sufficient time has elapsed for one's passions to "cool off" and for judgment to be restored, [the heat of passion defense] provides no mitigation for a subsequent killing.

(*People v. Beltran* (2013) 56 Cal.4th 935, 951, italics in original.)

4780.1-Involuntary manslaughter defined 5/21

Penal Code section 192 defines manslaughter as "the unlawful killing of a human being without malice." "Involuntary manslaughter is 'the unlawful killing of a human being without malice aforethought and without an intent to kill.' [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 884; see also *People v. McGehee* (2016) 246 Cal.App.4th 1190, 1208.)

> "Involuntary manslaughter ' "requires proof that a human being was killed and that the killing was unlawful. [Citation.] A killing is 'unlawful' if it occurs (1) during the commission of a misdemeanor inherently dangerous to human life, or (2) in the commission of an act ordinarily lawful but which involves a high risk of death or bodily harm, and which is done 'without due caution or circumspection.' " [Citation.]' " [Citation.]"The failure to use due care in the treatment of another where a duty to furnish such care exists is sufficient to constitute that form of manslaughter which results from an act of omission." [Citation.]

(*People v. Skiff* (2021) 59 Cal.App.5th 571, 579.) Subdivision (b) of Penal Code section 192 defines involuntary manslaughter in two ways: As a killing in "the commission of an unlawful act, not amounting to felony" or a killing "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (*People v. Gana* (2015) 236 Cal.App.4th 598, 606.)

"The governing mens rea for both theories of involuntary manslaughter is criminal negligence. [Citation.]" (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1140.)

> [A]n appellate court stated the definition as follows: "[A]n act is criminally negligent when a man of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm. The risk of death or great bodily harm must be great. [Citation.]" [Citation.] And more recently, a court defined criminal negligence as "conduct [that is] such a sharp departure from the conduct of an ordinarily prudent person that it

evidences a disregard for human life, and raises a presumption of conscious indifference to the consequences. [Citations.]" [Citation.]

(*Id.* at p. 1141.) "A finding of gross negligence is made by applying an *objective* test: if a reasonable person in defendant's position would have been aware of the risk involved, then defendant is presumed to have had such an awareness." (*People v. Watson* (1981) 30 Cal.4th 290, 296, original italics [distinguishing implied malice second degree murder from "gross" or "criminal" negligence]; see also *People v. Skiff*, *supra*, 59 Cal.App.5th at p. 579; *People v. Mehserle*, *supra*, 206 Cal.App.4th at p. 1141.) "A defendant can be convicted of involuntary manslaughter despite a good faith belief that the conduct posed no risk, if that belief was objectively unreasonable under the circumstances." (*People v. Luo* (2017) 16 Cal.App.5th 663, 671.) It is error, however, to equate "gross negligence" or the synonymous term "criminal negligence" with "ordinary negligence." (*People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1174-1176.)

> An unlawful killing without malice is involuntary manslaughter. (§ 192; see, e.g., *People v. Blakeley* (2000) 23 Cal.4th 82, 91; *People v. Butler* (2010) 187 Cal.App.4th 998, 1008-1009 [addressing the difference between implied malice murder and involuntary manslaughter] …) "Generally, involuntary manslaughter is a lesser offense included within the offense of murder." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145.) Accordingly, an instruction on involuntary manslaughter is required whenever there is substantial evidence indicating the defendant acted without conscious disregard for human life and did not form the intent to kill.

(*People v. Vasquez* (2018) 30 Cal.App.5th 786, 793-794 [reversed for failure to give jury instructions on involuntary manslaughter as lesser included offense of second degree murder].)

4790.1-Gross vehicular manslaughter defined 12/19

Gross vehicular manslaughter under Penal Code section 192, subdivision (c)(1), is defined as "driving a vehicle in the commission of an unlawful act, not amounting to felony, and with gross negligence; or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence." " 'The finding of an operator's gross negligence in driving a motorcar, when supported by substantial evidence, is conclusive upon the reviewing court and can be reversed only when that court becomes convinced by the evidence that freedom from gross negligence was so clearly established that reasonable minds could not differ upon the question.' [Citation.]" (*People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1171.)

"Gross negligence (or criminal negligence) occurs when a person commits an act that is 'so different from how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.' [Citation]" (*People v. Kumar* (2019) 39 Cal.App.5th 557, 564, citing standard jury instruction.)

> "Gross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. [Citation.] 'The state of mind of a person who acts with conscious indifferences to the consequences is simply, "I don't care what happens." ' [Citation.] The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved. [Citation.]" (*People v. Bennett* (1991) 54 Cal.3d 1032, 1036.) "Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment." (CALCRIM No. 592.)

(*People v. Nicolas*, *supra*, 8 Cal.App.5th at p. 1171.) "[G]ross negligence may be shown from *all* the relevant circumstances, including the manner in which the defendant operated his vehicle, the level of his intoxication, and any other relevant aspects of his conduct." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1207, italics in original; see also *People v. Ho* (2018) 26 Cal.App.5th 408, 415 [prescription drug use still relevant on question of gross negligence although defendant not charged with vehicular manslaughter while intoxicated].)

> Gross vehicular manslaughter has been characterized as a general intent crime. [Citation.] But the crime more precisely entails the confluence of two different mental states: general intent in the driving of the vehicle, and gross negligence while committing a traffic violation (in this case "Speeding") or gross negligence in the commission of a lawful act not amounting to a traffic violation (in this case "Driving with Inattention"). [Citation.]

(*People v. Nicolas*, *supra*, 8 Cal.App.5th at p. 1173.) It is error to equate "gross negligence" or the synonymous term "criminal negligence" with "ordinary negligence." (*People v. Kumar*, *supra*, 39 Cal.App.5th at pp. 564, 567; *People v. Nicolas*, *supra*, 8 Cal.App.5th at pp. 1174-1176.)

4790.2-Gross vehicular manslaughter while intoxicated defined 12/14

A conviction of gross vehicular manslaughter while intoxicated under Penal Code section 191.5, subdivision (a), requires: "(1) driving a vehicle while intoxicated; (2) when so driving, committing some unlawful act, such as a Vehicle Code offense with gross negligence, or committing with gross negligence an ordinarily lawful act which might produce death; and (3) as a proximate result of the unlawful act or the negligent act, another person was killed." (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1159.) In *People v. Ochoa* (1993) 6 Cal.4th 1199, the appellate court defined gross negligence as " 'the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. … The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved.' " (*Id*. at p. 1204.) However, "gross negligence cannot be shown by the mere fact of driving under the influence and violating the traffic laws." (*People v. Von Staden* (1987) 195 Cal.App.3d 1423, 1427.)

In *People v. Ochoa*, *supra*, 6 Cal.4th 1199, the California Supreme Court determined that the evidence was sufficient to support the defendant's conviction of gross vehicular manslaughter while intoxicated when the "defendant, (a) having suffered a prior conviction for driving under the influence of alcohol, (b) having been placed on probation, (c) having attended traffic school, including an alcohol-awareness class, and (d) being fully aware of the risks of such activity, nonetheless (e) drove while highly intoxicated, (f) at high, unsafe and illegal speeds, (g) weaving in and out of adjoining lanes, (h) making abrupt and dangerous lane changes (i) without signaling, and (j) without braking to avoid colliding with his victims' vehicle." (*Id*. at p. 1208.)

In *People v. Bennet*t (1991) 54 Cal.3d 1032, the California Supreme Court upheld a finding of gross negligence when the defendant who was intoxicated wove in and out of traffic, passed several cars on a blind curve, exceeded the speed limit, and lost control of the car at the bottom of a hill. (*Id*. at pp. 1034-1035; see also *People v. Hansen* (1992) 10 Cal.App.4th 1065, 1070, 1076 [defendant's blood-alcohol level was .20% three hours after the accident; his passengers had repeatedly asked him to slow down, but he ignored their requests as well as one passenger's request for help in finding the seat belt]; *People v. Von Staden*, *supra*, 195 Cal.App.3d 1423, 1425-1426 [defendant had a blood-alcohol level of .22% and drove up to 30 miles per hour over the speed limit on a foggy night].)

In *People v. Batchelor* (2014) 229 Cal.App.4th 1102, the appellate court found there was sufficient evidence to support the defendant's conviction for gross vehicular manslaughter while intoxicated under Penal Code section 191.5, subdivision (a). The defendant drove himself and the victim to the bar, and after they shared one and a half to two pitchers of beer, he started driving the victim home. Defendant had a blood-alcohol level of between .13 percent and .24 percent. A witness testified that defendant was driving so fast up University Avenue that it sounded like his car engine was "revved up." A traffic reconstruction expert testified his speed had been at least 50 to 57 miles per hour when the vehicle crashed into the palm tree. The critical speed for travelling through the curve was 30 to 37 miles per hour, depending on which lane defendant was in, and the posted speed limit was 40 miles per hour. An officer testified defendant violated numerous Vehicle Code sections .It was undisputed that the victim's death resulted from the accident.

> As to whether he committed those unlawful acts with gross negligence, defendant had a prior conviction for driving under the influence of alcohol and had attended a first-time offender program that addressed the dangers of driving under the influence of alcohol. Substantial evidence therefore supports the conclusion a reasonable person in defendant's position would have been aware of the risk involved in his behavior.

(*Id*. at p. 1110.)

4840.1-Refusal to participate in lineup supports consciousness of guilt instruction 8/21

"A defendant's refusal to participate in a lineup is admissible evidence supporting an inference of consciousness of guilt. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1235.)" (*People v. Watkins* (2012) 55 Cal.4th 999, 1027; see also *People v. Scully* (2021) 11 Cal.5th 542, 588-589.)

> We agree with the People that "the mere fact that [defendant] had voiced a reason for his refusal did not require the court to make a specific finding that [defendant's] excuse was credible. Nor was the court obliged to find that [defendant's] professed reason for nonparticipation eliminated a reasonable inference of consciousness of guilt." Clearly there was "*some evidence* in the record that, if believed by the jury, would sufficiently support the suggested inference." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102, italics added … .) Defendant remained free, however, to argue to the jury that his refusal to stand in the lineup did not, in fact, reflect consciousness of guilt.

(*People v. Watkins*, *supra*, 55 Cal.4th at pp. 1027-1028.)

4850.1-Motion for lineup must be timely 5/12

In *Evans v. Superior Court* (1974) 11 Cal.3d 617 (*Evans*) the California Supreme Court found a defendant was entitled to a lineup in an appropriate case. But an *Evans* motion for a live lineup also must be timely made. "The broad discretion vested in a trial judge or magistrate includes the right and responsibility on fairness considerations to deny a motion for a lineup when that motion is not made timely. Such motion should normally be made as soon after arrest or arraignment as practicable." (*Evans*, *supra*, 11 Cal.3d at p. 626; see also *People v. Abel* (2012) 53 Cal.4th 891, 912; *People v. Baines* (1981) 30 Cal.3d 143, 147-149[motion made 90 days after crime and 60 days after preliminary hearing].) Thus, live lineup "motions which are not made until shortly before trial should, unless good cause is clearly demonstrated, be denied in most instances by reason of such delay." (*Evans*, *supra*, at p. 626; see also *People v. Abel*, *supra*, 53 Cal.4th at p. 912 [motion made year and a half after arrest and year after preliminary hearing]; *People v. Redd* (2010) 48

Cal.4th 691, 725 [the defense waited more than a year after the preliminary hearing and less than three months before trial in a death penalty case to make a motion for a live lineup].)

Similarly, a criminal case should not be unnecessarily delayed because of an untimely *Evans* motion. In *People v. Rivera* (1981) 127 Cal.App.3d 136, for example, the defense moved at the time of the preliminary hearing for a continuance in order to conduct a lineup. The magistrate denied the motion as untimely. The appellate court agreed, stating: "A continuance of the hearing would have inconvenienced the court, the prosecution and the witnesses who had been subpoenaed and were already present in court." (*Id.* at p. 149.)

4850.2-Motion for lineup must show likely mistaken ID 10/16

In *Evans v. Superior Court* (1974) 11 Cal.3d 617 (*Evans*) the California Supreme Court found a defendant was entitled to a lineup in an appropriate case when the defense shows a reasonable likelihood of a mistaken identification that a lineup would tend to resolve. Resolution of the issue turns not only upon the benefits to be derived by the accused, but also on the reasonableness of the request after considering the burden to be imposed on the prosecution, police, court, and witnesses. (*Id.* at p. 625; see also *People v. Masters* (2016) 62 Cal.4th 1019, 1045; *People v. Mena* (2012) 54 Cal.4th 146, 152.) "In the absence of a reasonable likelihood of a mistaken identification, [a] defendant had no right under *Evans* … to a lineup." (*People v. Redd* (2010) 48 Cal.4th 691, 725; see also *People v. Myles* (2012) 53 Cal.4th 1181, 1203-1204 [trial court properly declined request four years after the crime to conduct lineup with participants wearing ski masks over their faces].)

The appellate court in *People v. Sullivan* (2007) 151 Cal.App.4th 524 held, for example, that the trial court did not abuse its discretion in denying a live lineup request because there was not a reasonable likelihood of misidentification.

> Without considering the timeliness of defendant's motion in superior court, we conclude that he failed to make the prima facie showing required by *Evans*. Upon our review of the record we find no "reasonable likelihood of a mistaken identification" that would have been resolved by a pretrial lineup. First, witnesses to the robbery at Citibank positively identified defendant in the field after he was apprehended near the crime scene in a taxi—the same one that brought him to the bank—in possession of the money and demand note, along with a sweater that matched the one worn by the robber. Another Citibank employee identified defendant from a photo lineup and at trial as "the person who robbed the bank." The witnesses identified photographs of the robber taken by bank surveillance cameras, which were exhibited to the jury. The descriptions of the robber provided by the witnesses, although not identical, were fairly uniform and corresponded to defendant's appearance. Most of the witnesses managed to get a good look at the face of the robber during the crimes. Many, although not all, of the witnesses identified defendant from the photo lineups displayed to them, and defendant has not established that those photo lineups were in any way impermissibly suggestive. Defendant was provided with the statements and descriptions of the witnesses, along with all of the information associated with the photo lineups. He thus had ample opportunity to challenge the identifications at trial, even without a pretrial physical lineup. We are convinced that an additional pretrial lineup would not have yielded any different testimony by the witnesses, or cast doubt upon

any of the identifications made by them. Therefore, we find no abuse of discretion in the trial court's denial of defendant's motion for a lineup. [Citation.]

(*Id*. at pp. 560-561.)

4870.1-Suggestiveness motion limited to ID procedures conducted by police 4/17

Under the Due Process Clause, the United States Supreme Court has created "a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime." (*Perry v. New Hampshire* (2012) 565 U.S. 228, 231 (*Perry*).) This check allows a criminal defendant to make a motion to challenge the admissibility of such an alleged suggestive identification. (*Ibid*.) But the High Court has "not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers." (*Id*. 565 U.S.at p.232; see also *People v. Thomas* (2012) 54 Cal.4th 908, 931.) "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." (*Perry*, *supra*, 565 U.S.at p. 245.) "[W]e hold that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." (*Id.* 565 U.S. at p. 248.) This holding was applied in *Perry* in a scenario where the eyewitness to a crime, Mrs. Blandon, was asked by a police officer to describe the perpetrator. The witness spontaneously pointed out her kitchen window and identified Perry, who had been asked to remain at the scene by the police. The witness was unable to identify Perry in a later photographic lineup. "[W]e hold that the introduction of Blandon's eyewitness testimony, without a preliminary judicial assessment of its reliability, did not render Perry's trial fundamentally unfair." (*Ibid*.)

4870.2-Defendant's burden to prove pretrial identification was suggestive 8/19

"A due process violation occurs when a pretrial identification procedure is so impermissibly suggestive that it gives rise to a very substantial likelihood of irreparable misidentification." (*People v. Carlos* (1996) 138 Cal.App.4th 907, 912; see also *People v. Blair* (1979) 25 Cal.3d 640, 659.) In contesting the fairness of a lineup, it is defendant's burden to establish that the confrontation resulted in such unfairness that it infringed the right to due process of law. (*People v. Avila* (2009) 46 Cal.4th 680, 700; *People v. Hunt* (1977) 19 Cal.3d 888, 893; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 788.) In other words, the defendant bears the burden of showing unfairness " 'as a demonstrable reality, not just speculation.' [Citation.]" (*People v. Johnson* (2010) 183 Cal.App.4th 253, 271; see also *People v. Perkins* (1986) 184 Cal.App.3d 583, 589; *People v. Phan* (1993) 14 Cal.App.4th 1453, 1461.) An example of such unfairness is when the defendant is somehow made to "stand out" from the others in the lineup. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217; see, e.g., *People v. Carlos*, *supra*, 138 Cal.App.4th at p. 912 [defendant's name appeared below his photograph].)

The issue of constitutional reliability depends on a two part test: (1) Whether the identification procedure used was both unduly suggestive and unnecessary. (*Sexton v. Beaudreaux* (2018) 585 U.S. ___, ___ [138 S.Ct. 2555, 2559, 201 L.Ed.2d 986, 990]; *Perry v. New Hampshire* (2012) 565 U.S. 228, 238-239 (*Perry*); *Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107 (*Manson*).) And if so, (2) whether the identification itself was nevertheless reliable under the totality

of the circumstances, taking into account such factors as the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. *(Manson*, *supra*, 432 U.S. at pp. 109-114; *People v. Sanchez* (2019) 7 Cal.5th 14, 35.) This second question "requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.' [Citations.]" (*Perry*, *supra*, 565 U.S. at p. 239].) If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable. (*Manson*, *supra*, 432 U.S. at pp. 104-114; see also *Neil v. Biggers* (1972) 409 U.S. 188, 199; *People v. Alexander* (2010) 49 Cal.4th 846, 901-902; *People v. Cunningham* (2001) 25 Cal.4th 926, 989.) "If the answer to the first question is 'no,' because we find that the challenged procedure was not unduly suggestive, our inquiry into the due process claim ends." (*People v. Virgil* (2011) 51 Cal.4th 1210, 1256.)

On appellate review, "[a] claim that an identification procedure was unduly suggestive raises a mixed question of law and fact to which we apply a standard of independent review, although we review the determination of historical facts regarding the procedure under a deferential standard." (*People v. Clark* (2016) 63 Cal.4th 522, 556-557.)

4870.3-Even lineup with significant disparities not held suggestive 7/21

Whether law enforcement conducts a live or a photographic lineup, there is no requirement that the participants be nearly identical in appearance to the defendant. (*People v. Cook* (2007) 40 Cal.4th 1334, 1355; *People v. Blair* (1979) 25 Cal.3d 640, 661; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 790.) " 'The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citation.]" (*People v. Cunningham* (2001) 25 Cal. 4th 926, 990.) "We have held that an identification procedure is considered suggestive if it 'caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citation.]" (*People v. Cook*, *supra*, 40 Cal.4th at p. 1355.) But "[s]tanding out requires more than the defendant potentially being a different race than others pictured or having a photo background slightly different than other images in the array." (*People v. Wilson* (2021) 11 Cal.5th 259, 284.)

The appellate courts have upheld the validity of lineup identifications despite significant disparities among the participants. (See, e.g., *People v. Cook*, *supra*, 40 Cal.4th at p. 1355 [defendant shorter than others]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 943-944 [defendant only one with gang tattoo]; *People v. Blair*, *supra*, 25 Cal.3d at pp. 659-661 [defendant seven years older and 37 pounds heavier than others]; *People v. Faulkner* (1972) 28 Cal.App.3d 384, 390 [defendant was shortest by five inches and, in a repeated lineup, defendant had the same position number]; *People v. McDaniels* (1972) 25 Cal.App.3d 708, 710-711 [defendant was the only person with the same colored shirt as the suspect]; *People v. Thomas* (1970) 5 Cal.App.3d 889, 900 [defendant was the only barefooted participant]; and *People v. Davis* (1969) 2 Cal.App.3d 230, 237-238 [defendant was the tallest and at the end of the eight-person lineup].)

Similarly, photographic lineups have been upheld despite numerous disparities. (See, e.g., *People v. Gonzalez*, *supra*, 38 Cal.4th at pp. 943-944 [defendant only one with "droopy eye," "gang-type" clothing and discolored photograph]; *People v. Ochoa* (1998) 19 Cal.4th 353, 411-413 [after showing six full face photographs, at witness' request officer showed single profile photograph of defendant]; *People v. Blair*, *supra*, 25 Cal.3d at p. 660 [three photographs of defendant among those

shown]; *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1359 [one person had long hair]; *People v. Bethea* (1971) 18 Cal.App.3d 930, 938 [defendant's picture appeared in all three photo arrays shown to victim on different occasions]; *People v. Hill* (1974) 12 Cal.3d 731, 766 [mug shots of defendants were dated the day after the murder]; *People v. Hicks* (1971) 4 Cal.3d 757, 764 [photographs of defendants had different date and background than others]; and *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 556-557 [defendant had darkest skin color].) "We have previously rejected claims that photographic arrays were unduly suggestive based on minor variations in background color or discoloration of the photograph." (*People v. Clark* (2016) 63 Cal.4th 522, 557.)

Finally, the state and federal courts have rejected the argument "that identification procedures are impermissibly suggestive if the defendant is the only person appearing in both a display of photographs and a subsequent lineup." (*People v. Johnson* (2010) 183 Cal.App.4th 253, 272.) "[T]he fact that defendant alone appeared in both a photo lineup and a subsequent live lineup does not per se violate due process." (*People v. Cook*, *supra*, 40 Cal.4th at p. 1355

4870.4-Curbside lineup proper despite inherent suggestiveness 8/18

"A defendant who claims an unnecessarily suggestive pretrial identification bears the burden of showing it gave rise to 'a very substantial likelihood of irreparable misidentification.' (*Simmons v. United States* (1968) 390 U.S. 377, 384 … .)" (*People v. Cowger* (1988) 202 Cal.App.3d 1066, 1072.) This burden also applies when a defendant challenges the suggestiveness of a curbside lineup. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386.)

While a curbside lineup may be somewhat more suggestive than a formal lineup, that potential is balanced by the increased accuracy in identification made a short time after the crime vis-à-vis a belated identification days or weeks later. (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1359.) Such procedure is allowed "because the immediate knowledge whether or not the correct person has been apprehended is of overriding importance and service to law enforcement, the public and criminal himself." (*People v. Anthony* (1970) 7 Cal.App.3d 751, 765; see also *People v. Nyugen* (1994) 23 Cal.App.4th 32, 38-39.) "One of the justifications for a showup is the need to exclude from consideration innocent persons so that the police may continue the search for the suspect while it is reasonably likely he is still in the area." (*People v. Johnson* (1989) 210 Cal.App.3d 316, 323.) Should law enforcement arrest the incorrect person, the real perpetrator is allowed to put more time and distance between him or her self and the situs of the offense, and decrease the likelihood of detection or capture. (*People v. Rodriguez* (1987) 196 Cal.App.3d 1041, 1049.)

"An in-the-field showup is not the equivalent of a lineup. The two procedures serve different, though related, functions, and involve different considerations for all concerned." (*People v. Dampier* (1984) 159 Cal.App.3d 709, 713; see also *People v. Rodriguez*, *supra*, 196 Cal.App.3d at p. 1049.) Thus, there is no right to counsel during a curbside lineup. (*People v. Dampier*, *supra*, 159 Cal.App.3d 709.)

4870.5-Single person live or photo identification procedure not necessarily unfair 8/19

A single person showup is not necessarily unfair and must be assessed in the light of the totality of the circumstances. (*Stovall v. Denno* [(1967)] 388 U.S. [293,] 302; see also *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1359.) The propriety of even a single-suspect curbside lineup has been repeatedly and consistently upheld. (See, e.g., *Neil v. Biggers* (1972) 409 U.S. 188, 201; *People v. Bauer* (1969) 1 Cal.3d 368, 374; see also *People v. Rodriguez* (1987) 196 Cal.App.3d 1041, 1049; *People v. Craig* (1978) 86 Cal.App.3d 905, 913; *People v. Anthony* (1970) 7 Cal.App.3d 751, 765; but see, *People v. Bisogni* (1971) 4 Cal.3d 582, 587 [no exigency justifying stationhouse one-on-one viewing months after crime].)

> "Showing the witnesses a single photo of the defendant is no more impermissibly suggestive than an in-court identification with the defendant personally sitting at the defense counsel table in the courtroom." (*People v. Yonko* (1987) 196 Cal.App.3d 1005, 1008-1009.) A single person photograph is analogous to a single person showup that "may pose a danger of suggestiveness, but such lineups or showups are not necessarily or inherently unfair." (*Clark*, at p. 136.)

(*People v. Chavez* (2018) 22 Cal.App.5th 663, 674-675.) "We have said that such showups are not necessarily unfair. ([*Clark¸ supra*, at p. 136].)'Rather, all the circumstances must be considered.' (*Ibid*.)) Nevertheless, a single-photograph showup is inherently suggestive, at least to some extent. [Citation.]" (*People v. Sanchez* (2019) 7 Cal.5th 14, 36.)

> In short, although the suggestive nature of the identification does raise concerns, we find [the child witness'] identification of the single photograph as the man he saw in the bedroom sufficiently reliable to be admissible. Defendant did not carry his "burden of demonstrating the existence of an unreliable identification procedure." [Citation.] We note, however, that because single-photograph showups are inherently suggestive, they should be used very cautiously, and only when truly necessary.

(*Id*. at p. 37.)

4880.1-In-court ID valid despite suggestive lineup if untainted 8/10

Even when a defendant demonstrates that a pretrial identification procedure violated due process (e.g., unduly suggestive) or the right to counsel (e.g. failure to provide required counsel at live lineup), the result is not automatic suppression of all identification testimony. For even if a witness has participated in an unnecessarily suggestive or other improperly conducted lineup or other confrontation, the witness's in-court identification may be admitted on clear and convincing proof that the in-court identification is based upon observations of the defendant at the scene of the crime. (*United States v. Wade* (1967) 388 U.S. 218, 240; *People v. Ratliff* (1986) 41 Cal.3d 675, 689; *People v. Caruso* (1968) 68 Cal.2d 183, 189-190.) "[A] witness who participated in such an illegal lineup *may* identify the defendant at trial, provided the prosecution establishes by clear and convincing evidence that the in-court identification had an origin independent of the illegal lineup." (*People v. Yokely* (2010) 183 Cal.App.4th 1264, 1272, italics in original.)

> When considering whether the identification has an independent source, the court should consider such factors as the witness's opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification by the witness prior to the lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the

defendant on a prior occasion, and the period of time between the alleged act and the lineup identification.

(*Id*. at p. 1276.)

4890.1-Defendant need not be identified positively-weight for trier of fact 10/09

"The strength or weakness of identification is a matter solely within the province of the jury." (*People v. Jones* (1963) 221 Cal.App.2d 408, 409; see also, *People v. Lewis* (1966) 240 Cal.App.2d 546, 548.) An accused need not be identified positively and without inconsistency as the person who committed the crime. (*People v. Harrell* (1967) 252 Cal.App.2d 735, 741; *People v. Austin* (1961) 198 Cal.App.2d 669, 672; *People v. Daly* (1959) 168 Cal.App.2d 169. 172.) The lack of positiveness does not destroy the value of the identification testimony; it only goes to its weight. (*People v. Gonzalez* (1968) 68 Cal.2d 467, 472.) At a preliminary hearing or on review under Penal Code section 995, a victim's general suspect description and other corroborating evidence can be sufficient to justify holding the defendant to answer even if the victim cannot identify the defendant in court. (See, e.g., *People v. Mixon* (1982) 129 Cal.App.3d 118, 135.)

4900.1-Court cannot grant immunity without DA's consent 10/16

"Petitioner's claim of a right to compulsory prosecutorial immunity for his witnesses is easily rejected. Petitioner has no such right." (*In re Williams* (1994) 7 Cal.4th 572, 609.) "The grant of immunity is an executive function, and prosecutors are not under a general obligation to provide immunity to witnesses in order to assist a defendant." (*People v. Williams* (2008) 43 Cal.4th 584, 622.) One obvious reason for denying immunity to defense witnesses was stated by the court in *People v. Estrada* (1986) 176 Cal.App.3d 410: "There should be no requirement that the district attorney offer immunity upon the request of a defendant who wishes to produce exculpatory evidence. One need not speculate as to the long line of potential witnesses who would, upon a guarantee of immunity, then 'take the rap.' " (*Id*. at p. 418.)

Under Penal Code section 1324 the court can grant immunity from prosecution only on the written request of the prosecuting agency. Conditioning such immunity on the prosecutor's request does not violate a defendant's constitutional rights. The California Supreme Court in *In re Weber* (1974) 11 Cal.3d 703 held that the power to provide for a grant of immunity was essentially a legislative function. (*Id*. at p. 720, relying upon *Kastigar v. United States* (1972) 406 U.S. 441, 445-447.) It was within the Legislature's power to condition section 1324 immunity from prosecution on the district attorney's request. (*In re Weber*, *supra*.) The need for such a request does not invade judicial prerogative because the decision to seek immunity is an integral part of the *charging* process, a power residing with the prosecutor—not the court. (*Ibid*.) Thus, the trial court lacks the inherent power to grant Penal Code section 1324 immunity when the prosecutor refuses to request it. (*Ibid*.; see also *People v. Galante* (1983) 143 Cal.App.3d 709, 713; *People v. Traylor* (1972) 23 Cal.App.3d 323, 332.)

Similarly, courts have no authority to grant either *transactional* or *use* immunity for a defense witness over the prosecution's objection. (*People v. Stewart* (2004) 33 Cal.4th 425, 468; *People v. Hunter* (1989) 49 Cal.3d 957, 973-974; see also *People v. DeFreitas* (1983) 140 Cal.App.3d 835, 840.) The California Supreme Court has noted: "… [N]o court in this state has ever decided that granting a defense witness immunity from prosecution for his or her testimony was essential 'to vindicate a criminal defendant's rights to compulsory process and a fair trial.' " (*People*

v. Cudjo (1993) 6 Cal.4th 585, 620.) "We … now hold that California courts have no authority to confer use immunity on witnesses." (*People v. Master* (2016) 62 Cal.4th 1019, 1051.)

4900.2-Prosecutorial immunity may be compelled under very limited circumstances 12/19

California courts have no authority to confer judicial use immunity on witnesses. (*People v. Masters* (2016) 62 Cal.4th 1019, 1051 (*Masters*).) "While judicial immunity has been foreclosed, our high court in *Masters* recognized that prosecutorial immunity could be compelled as a requirement of due process if the prosecutor's refusal to grant immunity amounts to prosecutorial misconduct. (*Masters*, *supra*, 62 Cal.4th at pp. 1051-1052.)" (*People v. Hull* (2019) 31 Cal.App.5th 1003, 1023-1024 (*Hull*), fn. omitted.) Five factors have been used to evaluate claims of prosecutorial misconduct based on the refusal to grant immunity to a witness: (1) whether witness immunity was properly sought in the trial court; (2) whether the witness is available to testify; (3) whether the proffered testimony is clearly exculpatory; (4) whether the testimony is essential; and (5) the existence of strong governmental interests which countervail against a grant of immunity. (*Masters*, *supra*, 62 Cal.4th at pp. 1051-1052 ["[W]e cannot characterize the prosecutor's decision not to grant immunity to [the witness] as egregious, unfair, deceptive, or reprehensible. The prosecutor's decision was not misconduct."]; *Hull*¸ *supra*, 31 Cal.App.5th at p. 1024 [the witness' "testimony was not clearly exculpatory, nor was it essential"]; accord *People v. Capers* (2019) 7 Cal.5th 989, 1009 [not misconduct for prosecutor to deny immunity to defense witness who he determines has no credibility].) Since no California court, including *Masters*, *Capers* and *Hull*, has ever found such prosecutorial misconduct for refusing to grant immunity for the benefit of the defense, this entire line of authority may be dicta.

4910.1-Accomplice immunity or plea agreement based on truthful testimony proper 12/19

"[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." (*People v. Medina* (1974) 41 Cal.App.3d 438, 455 (*Medina*).)

> Thus, when the accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to police [citation], or that his testimony result in the defendant's conviction (*People v. Green* (1951) 102 Cal.App.2d 831, 837-839 (*Green*)), the accomplice's testimony is "tainted beyond redemption" [citation] and its admission denies the defendant a fair trial. On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is valid.

(*People v. Allen* (1986) 42 Cal.3d 1222, 1251-1252, fn. omitted; see also *In re Masters* (2019) 7 Cal.5th 1054, 1085-1086.) "[U]nless the bargain is expressly contingent on the witness sticking to a particular version, the principles of *Medina* … and *Green* … , are not violated." (*People v. Garrison* (1989) 47 Cal.3d 746, 771; see *People v. Reyes* (2008) 165 Cal.App.4th 426, 435 ["an agreement that binds the witness only to testify truthfully, and not in a prearranged fashion, cannot be deemed invalid."].) These principles are violated only when the agreement requires the witness to testify to prior statements regardless of their truth, but not when the truthfulness of those statements is the mutually shared understanding of the witness and the prosecution as the basis for the plea bargain. (*People v. Anderson* (2018) 5 Cal.5th 372, 398; *People v. Homick* (2012) 55 Cal.4th 816,

862-863 (*Homick*); *People v. Boyer* (2006) 38 Cal.4th 412, 456.)

In *Homick*, accomplice Dominguez testified at defendant's preliminary hearing but then recanted at trial.

> Dominguez's plea agreement did not require he testify in conformity with his statement to police, but only that he testify in a "truthful and honest and accurate" manner. Defendant focuses on the condition that if Dominguez was discovered to have lied or committed perjury the agreement would be void. Defendant claims this condition was *Medina* error because any material deviation would necessarily violate one or the other of these possible abrogating conditions. The language defendant cites from the agreement simply spells out the consequences present in every plea agreement conditioned on the witness testifying truthfully; it does not amount to *Medina* error.

(*Homick*, *supra*, 55 Cal.4th at p. 863.) The California Supreme Court also held in *Homick*, that "even if there were an understanding by the prosecution that Dominguez was not the shooter, this would not have invalidated the agreement. [Citation.]" (*Ibid*., citing *People v. Gurule* (2002) 28 Cal.4th 557, 615-616, fn. omitted.)

On appeal, the appellate court will "review the record and reach an independent judgment whether the agreement under which the witnesses testified was coercive and whether defendant was deprived of a fair trial by the introduction of the testimony, keeping in mind that generally we resolve factual conflicts in favor of the judgment below." (*People v. Jenkins* (2000) 22 Cal.4th 900. 1010; see also *People v. Anderson*, *supra*, 5 Cal.5th at p. 398.)

5060.1-Citizen informants are presumptively reliable 1/10

Information from a citizen who observes a crime is not subject to the same test of reliability as that of the common informant.

> The courts have recognized a distinction between informers who are virtual agents of the police and "citizen informants" who are chance witnesses to or victims of crime. The former are often criminally disposed or implicated, and supply their "tips" to the authorities on a recurring basis, in secret, and for pecuniary or other personal gain. The latter are innocent of criminal involvement, and volunteer their information fortuitously, openly, and through motives of good citizenship. [Citation.] Because of these characteristics, the requisite showing of reliability in the case of a citizen informant is significantly less than that demanded of a police informer. [Citations.]

(*People v. Ramey* (1976) 16 Cal.3d 263, 268-269.)

"A 'citizen-informant' is a citizen who purports to be the victim of or to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement. [Citations.] It is reasonable for police officers to act upon the reports of such an observer of criminal activity." (*People v. Schulle* (1975) 51 Cal.App.3d 809, 814.) "[N]either a previous demonstration of reliability nor subsequent corroboration is ordinarily necessary when witnesses to or victims of criminal activities report their observations in detail to the authorities." (*People v. Ramey*, *supra*, 16 Cal.3d at p. 269.) A "citizen informant" is presumed reliable even though reliability previously has not been tested. (*People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1504; *People v. Lombera* (1989) 210 Cal.App.3d 29, 32.)

5080.1-General standard for disclosure of informant 5/20

Evidence Code section 1041, subdivision (a), provides a privilege of nondisclosure of the identity of an informant who has furnished information in confidence to a law enforcement officer. "An informant under the statute is someone who confidentially discloses a violation of law." (*People v. Bradley* (2107) 7 Cal.App.5th 607, 619.) The privilege protects not only the informant's identity but also information from or about the informant tending to reveal identity. (*People v. Seibel* (1990) 219 Cal.App.3d 1279, 1289.) The privilege may be claimed when disclosure is forbidden by law or when the necessity for preserving confidentiality of the person's identity outweighs the necessity for disclosure in the interest of justice. (Evid. Code, § 1041, subd. (a)(2); *People v. Bradley*, *supra*, 7 Cal.App.5th at pp. 618-620.)

The applicable test was stated by the California Supreme Court in *People v. Wilks* (1978) 21 Cal.3d 460:

> It is well established that the prosecution must disclose the identity of an informant who is a "material witness" in a criminal case. Failure to do so results in the dismissal of charges against the defendant. [Citation.] An informant is a "material witness" if it appears from the evidence presented that there is a *reasonable possibility* the informant could give evidence on the issue of guilt *which might result in a defendant's exoneration*.

(*Id*. at p. 468, italics added.) Thus, that the confidential informant is a percipient witness to the crime does not make disclosure mandatory. (*Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1276.) "Rather, disclosure occurs only if the defendant makes an adequate showing that the informant can give *exculpatory* evidence." (*Id*. at p. 1277, italics added.)

It is, however, the burden of the defendant to make a sufficient showing that the unnamed informer does have information material to the defendant's guilt. (*Price v. Superior Court* (1970) 1 Cal.3d 836, 843.) Bare speculation or an unsupported conclusion that the informer is a "material witness" is insufficient to discharge a defendant's burden. (*People v. Luera* (2001) 86 Cal.App.4th 513, 525-526.) To satisfy their burden, the defendant must produce evidence or a declaration articulating the theory of the defense or demonstrating in what manner the defendant would be benefited by disclosure of the informant's name. (*People v. Oppel* (1990) 222 Cal.App.3d 1146, 1152-1153; *People v. McCoy* (1970) 13 Cal.App.3d 6, 12-13; *People v. Thomas* (1970) 12 Cal.App.3d 1102, 1112-1113.) But the defendant need not show what the informant would testify to, nor even whether the informer would actually give favorable testimony. (*Price v. Superior Court*, *supra*, 1 Cal.3d at p. 843.) Nevertheless:

> Where an informant is *not* a material witness and his whereabouts are unknown to the defendant, the state maintains its strong interest in protecting the informant, the informant's family, and the continuing flow of information the state can gain from the informant. There is no justifiable reason to disclose an informant's location when the informant is not a material witness, even though the defendant knows the informant.

(*People v. Bradley*, *supra*, 7 Cal.App.5th at p. 623, italics in original.)

Disclosure is not required when the informant "merely pointed the finger of suspicion at the defendant." (*People v. Wilks*, *supra*, 21 Cal.3d at p. 469; see also *People v. McCoy*, *supra*, 13 Cal.App.3d at p. 13.)

5080.2-No disclosure of informant merely to attack probable cause 1/13

It is well settled that California law does not require disclosure of the identity of an informant who merely supplied probable cause when disclosure is sought to aid in attacking probable cause. (*People v. Hobbs* (1994) 7 Cal.4th 948, 959; *People v. Luttenberger* (1990) 50 Cal.3d 1, 13; *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 88; see *People v. Martinez* (2005) 132 Cal.App.4th 233, 246; *People v. Siebel* (1990) 219 Cal.App.3d 1279, 1288; *People v. Sewell* (1970) 3 Cal.App.3d 1035, 1038; see also Evid. Code, § 1042, subds. (b) and (c).) The same principles, privileges and procedures apply to confidential informants supplying information used to support a wiretap authorization affidavits and orders. (*People v. Acevedo* (2012) 209 Cal.App.4th 1040, 1052-1057.)

5080.3-No disclosure because informant in house days before 10/09

It is often the case that an informant observed drugs or drug sales in a defendant's residence, and told a police officer who then used that information in an affidavit in support of a search warrant. If the defendant is then charged with possession for sale of the drugs found during the subsequent search, without any reference to drugs possessed or sold earlier, the informant need not be disclosed. Anything the informant might have to say is immaterial to guilt or innocence since the defendant is charged with possession for sale on the date of the search rather than the date the informant had contact with the defendant. (See, e.g., *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 30-31; *People v. Lizarraga* (1990) 219 Cal.App.3d 476, 482-483; *People v. Acuna* (1973) 35 Cal.App.3d 987, 991-992; compare *People v. Tolliver* (1975) 53 Cal.App.3d 1036, 1045-1050, and *People v. Long* (1974) 42 Cal.App.3d 751, 755-756.) The same principles apply to non-search warrant situations. (See, e.g., *People v. Fried* (1989) 214 Cal.App.3d 1309, 1315-1317; *People v. Rodgers* (1976) 54 Cal.App.3d 508, 518.)

In *People v. Hardeman* (1982) 137 Cal.App.3d 823 (*Hardeman*) the appellate court stated:

> The standard of "reasonable possibility" has "vague and almost limitless perimeters which must be determined on a case-by-case basis." The courts have indicated that the measure of the "reasonable possibility" standard to be utilized in individual cases is predicated upon the relative proximity of the informant to the offense charged. "[T]he evidentiary showing required by those decisions is … as to the quality of the vantage point from which the informer viewed either the commission or the immediate antecedents of the alleged crime." The existence of a reasonable possibility that testimony given by an unnamed informant could be relevant to the issue of defendant's guilt becomes less probable as "the degree of attenuation which marked the informer's nexus with the crime" decreases.

(*Id*. at p. 828; original italics and internal citations omitted.)

In *Hardeman*, the informant observed drug sales at the suspect premises at least eight days before execution of the search warrant. In denying disclosure, the appellate court stated:

> If the informer is not a percipient witness to the events which are the basis of the arrest, it is highly unlikely that he can provide information relevant to the guilt or innocence of a charge or information which rises from the arrest. Thus, "when the informer is shown to have been neither a participant in nor a non-participant eyewitness to the charged offense, the possibility that he could give evidence which might exonerate the defendant is even more speculative and, hence, may become an unreasonable possibility."

(*Id.* 137 Cal.App.3d at pp. 828-829, internal citations omitted.)

In other cases, denial of disclosure motions have been upheld where the time period between the informant's observations and the search varied from two to sixteen days. (*People v. Dimitrov*, *supra*, 33 Cal.App.4th at pp. 29-31 [2 to 11 days]; *People v. Hambarian* (1973) 31 Cal.App.3d 643 [4 days]; *People v. Fried*, *supra*, 214 Cal.App.3d 1309 [5 days]; *People v. Thompson* (1979) 89 Cal.App.3d 425 [10 to 16 days]; *People v. Alvarez* (1977) 73 Cal.App.3d 401, 408 [7 days]; *People v. Martin* (1969) 2 Cal.App.3d 121, 127 [3 days].)

5080.4-People's request for in camera hearing must be granted 4/17

The People request, should the court find the defendant has made an adequate showing for disclosure, that an in camera hearing be held pursuant to Evidence Code section 1042, subdivision (d). When the prosecution requests an in camera hearing, the court must conduct it outside the presence of the defendant and defense counsel. (Evid. Code § 1042, subd. (d); see also *People v. Reel* (1979) 100 Cal.App.3d 415, 420; *People v. Aguilera* (1976) 61 Cal.App.3d 863, 870.)

At the in camera hearing, the prosecutor may produce either the informant or another witness to provide evidence of the informant's relationship to the defendant, the crime, or the premises. (*People v. Alderrou* (1987) 191 Cal.App.4th 1074, 1079.) There is no requirement the informant testify. (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 29-30; *People v. Fried* (1989) 214 Cal.App.3d 1309, 1313-1314.) "The confidential informant's presence is not required at the in camera hearing." (*Davis v. Superior Court* (2010) 187 Cal.App.4th 1272, 1277.)

Where the hearing reveals that the informant's evidence would be incriminatory rather than exculpatory, the court should not order disclosure. (*People v. McCarthy* (1978) 79 Cal.App.3d 547, 552-555.) "Thus, an informant is not a 'material witness' nor does his nondisclosure deny the defendant a fair trial where the informant's testimony although 'material' on the issue of guilt could only further implicate rather than exonerate the defendant." (*People v. Alderrou*, *supra*, 191 Cal.App.3d at pp. 1080-1081; similarly see *People v. Ruiz* (1992) 9 Cal.App.4th 1485, 1488-1489; *People v. Lanfrey* (1988) 204 Cal.App.3d 491, 500-503.)

If the trial court complies with the statutory procedure and denies disclosure, the appellate court's will review the trial court's decision for an abuse of discretion. (*People v. Bradley* (2017) 7 Cal.App.5th 607, 621.)

5090.1-Reliability of informant tested by all circumstances 5/20

In evaluating whether probable cause for issuance of a search warrant based upon information received from an informant, the courts have adopted a flexible "totality of the circumstances" test from the United States Supreme Court decision in *Illinois v. Gates* (1983) 462 U.S. 213, 238 (*Gates*). Formerly, the courts followed a "two-pronged" approach in evaluating the reliability of an informant, originating from *Aguilar v. Texas* (1964) 378 U.S. 108 and *Spinelli v. United States* (1969)393 U.S. 410. This two-pronged test, however, was rejected by the High Court in *Gates*.

> [I]t is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations. [Citations.] The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis

> of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for … conclud[ing]" that probable cause existed. [Citations.]

(*Id.* at pp. 238-239; similarly, see, *Massachusetts v. Upton* (1984) 466 U.S. 727; *People v. Caramella* (1991) 54 Cal.3d 592, 600-601.)

Since the *Gates* decision, and under the Truth-in-Evidence provisions of Proposition 8, California courts have followed suit in abandoning the rigid two-pronged test in favor of the totality-of-the-circumstances. (See, e.g., *People v. Webb* (1993) 6 Cal.4th 494, 521.)

> *Gates* explained the importance of the "reliability" of the informant and the informant's " 'basis of knowledge,' " but eschewed any rigid formula requiring a certain threshold showing of both indicia, explaining that "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." (*Gates*, *supra*, 462 U.S. at p. 233.) The court further explained, "If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. [Citation.] Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary. [Citation.] Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." (*Id*. at pp. 233-234, fn. omitted; see also *Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 937 … [" ' "[V]eracity," "reliability," and "basis of knowledge" are weighed together with any other evidence that supports the finding of probable cause. They are viewed cumulatively, not as independent links in a chain. [Citation.]' [Citation.]"]; *People v. Lissauer* (1985) 169 Cal.App.3d 413, 423 … ["the quantum of detail, particularly as it describes subsequently verified future activity, is regarded as a significant factor in assessing the informant's reliability, unless, of course, the independent police investigation reveals patently criminal activity"].)

(*People v. French* (2011) 201 Cal.App.4th 1307, 1316.)

The *Gates* approach is also been applied to probable cause determinations regarding informants that do not involve search warrants. (See, e.g., *People v. Spencer* (2018) 5 Cal.5th 642, 664-665; *People v. Rosales* (1987) 192 Cal.App.3d 759, 767-768 [arrest].)

5090.2-Informant may be corroborated even by noncriminal activity 11/18

In evaluating probable cause based upon information received from an informant of unknown reliability, the courts have adopted a flexible "totality of the circumstances" test. Under this test, probable cause is determined by a practical, commonsense examination of all circumstances, including the veracity and basis of knowledge of persons supplying information. (*Illinois v. Gates* (1983) 462 U.S. 213, 238 (*Gates*); *People v. Ramirez* (1984) 162 Cal.App.3d 70, 73.) Of course, independent corroboration from other sources of information provides a substantial basis for crediting the information of unknown reliability. (*Gates*, *supra*, at pp. 244-245; *People v.*

Medina (1985) 165 Cal.App.3d 11, 18.) This "totality of the circumstances" test is applicable not only to a review of a search warrant affidavit, but also to review of searches or seizures conducted without a warrant (see, e.g., *People v. Lissauer* (1985) 169 Cal.App.3d 413, 420-421) and arrests (see, e.g., *People v. Spencer* (2018) 5 Cal.5th 642, 664).

Contrary to some earlier California cases, even non-criminal circumstances or behavior by a suspect can supply the necessary corroboration for the information. (*People v. Spencer*, *supra*, 5 Cal.5th at p. 665.) "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause … ." (*Gates*, *supra*, at 462 U.S. p. 243, fn. 13; see also *People v. Medina*, *supra*, 165 Cal.App.3d at p. 19, fn. 4; *People v. Ramirez*, *supra*, 162 Cal.App.3d at pp. 74-75.)

In *People v. Costello* (1988) 204 Cal.App.3d 431, probable cause for a search warrant was based on an anonymous telephone call to police relating detailed information about the defendant's role in a series of burglaries. The information about the crime was already known to officers, but they could corroborate only noncriminal information relating to the defendant. The appellate court held that the quantum of detail provided by the anonymous source, particularly as it described subsequently verified future activity, provided sufficient corroboration. (*Id.* at pp. 446-447; but see *People v. French* (2011) 201 Cal.App.4th 1307, 1316-1323 [hearsay statements from multiple informants, corroborated by only pedestrian details, combined only with conclusory statements regarding the informants' background and reliability, did not supply probable cause].)

5300.1-Court should only instruct on relevant principles of law 5/14

The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence and has the correlative duty to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues. (*People v. Mills* (2012) 55 Cal.4th 663, 680; *People v. Saddler* (1979) 24 Cal.3d 671, 681; *People v. Anderson* (1995) 26 Cal.App.4th 1241, 1250.) "Instructions on every aspect of the case must be given, and should be clear, concise and simple in order to avoid misleading the jury or in any way overemphasizing either party's theory." (*People v. Rice* (1976) 59 Cal.App.3d 998, 1004.) "The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request." (*People v. Burney* (2009) 47 Cal.4th 203, 250.)

The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (*People v. Perez* (1992) 2 Cal.4th 1117, 1129.) "A trial court is required to give a requested instruction on a defense only if substantial evidence supports the defense." (*People v. Panah* (2005) 35 Cal.4th 395, 484.) "The essential point is that instructions, whether sua sponte or otherwise, are instructions only on the *evidence received at trial*, rather than instructions on all possible theories which might have been, but were not, presented by the evidence submitted to the jury's consideration." (*People v. Lopez* (1993) 13 Cal.App.4th 1840, 1847, italics in original.)

Finally, the California Supreme Court has repeatedly held that a trial court has no sua sponte duty to instruct on a legal principle that has been "obfuscated by infrequent reference and inadequate elucidation." (*People v. Flannel* (1979) 25 Cal.3d 668, 681; see also *People v. Michaels*

(2002) 28 Cal.4th 486, 529 [a "trial court … has no duty to … instruct on doctrines of law that have not been established by authority"]; *People v. Bryant* (2013) 222 Cal.App.4th 1196, 1200.)

5300.2-Court has sua sponte duty to instruct on crime elements 7/13

The trial court is required to instruct the jury " ' "on the general principles of law relevant to the issues raised by the evidence." ' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) In other words, "[a] trial court has a sua sponte duty to instruct on all general principles of law that are closely and openly connected with the facts of the case. (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) In a criminal case, the general principles of the law include all the elements of the charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)" (*People v. Gonzales* (2010) 183 Cal.App.4th 24, 36.) In addition, a trial court must instruct the jury regarding how to evaluate circumstantial evidence " 'sua sponte when the prosecution substantially relies on circumstantial evidence to prove guilt. [Citations.]' " (*People v. Rogers* (2006) 39 Cal.4th 826, 885; see also *People v. Contreras* (2010) 184 Cal.App.4th 587, 591.)

> But " 'when a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking *sua sponte* instructional duties. While a court may well have a duty to give a "pinpoint" instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such "pinpoint" instructions are not required to be given *sua sponte* and must be given only upon request.' " (*People v. Saille* (1991) 54 Cal.3d 1103, 1117.)

(*People v. Anderson* (2011) 51 Cal.4th 989, 996-997; see also *People v. Lawson* (2013) 215 Cal.App.4th 108, 117-119.)

5300.3-Court's sua sponte duty to define certain legal terms is limited 7/15

"In general, the terms of a statute do not require special definition." (*People v. Verduzco* (2012) 210 Cal.App.4th 1406, 1419.) But, "if the elements of the offense include a term that has a technical legal meaning that is different from its common meaning, the court has a sua sponte duty to define that term. (*People v. Elam* (2001) 91 Cal.App.4th 298, 307.)" (*People v. Gonzales* (2010) 183 Cal.App.4th 24, 36.) This sua sponte duty also applies when a statutory term "does not have a plain, unambiguous meaning" or has a "particular and restricted meaning." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1012; *People v. Johnson* (2015) 234 Cal.App.4th 1432, 1454.)

> "In the absence of a specific request, a court is not required to instruct the jury with respect to words or phrases that are commonly understood and not used in a technical or legal sense. [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 503.) Courts do have a duty, however, "to define terms that have a technical meaning peculiar to the law. [Citations.]" (*People v. Bland* (2002) 28 Cal.4th 313, 334.) "A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that differs from its nonlegal meaning. [Citation.] Thus, … terms are held to require clarification by the trial court when their statutory definition differs from the meaning that might be ascribed to the same terms in common parlance. [Citation.]" (*People v. Estrada* (1995) 11 Cal.4th 568, 574-575.)

(*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1306-1307.) But " ' "[n]o such duty is imposed

when the terms ‘are commonly understood by those familiar with the English language.’ ” ’ [Citation.]” (*People v. Verduzco*, *supra*, 210 Cal.App.4th at p. 1419.)

5300.4-Court has duty to respond to jury question regarding the law 12/18

Penal Code section 1138 states in pertinent part: “After the jury have retired for deliberation, … if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court.” Penal Code section 1138 then requires the trial court to provide the jury with “any desired information ‘on any point of law arising in the case,’ ” and thereby creates a “ ‘mandatory’ duty to clear up any instructional confusion expressed by the jury.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212; see also *People v. Fleming* (2018) 27 Cal.App.5th 754, 766. *People v. Hodges* (2013) 213 Cal.App.4th 531, 539; *People v. Loza* (2012) 207 Cal.app.4th 332, 355.) “When presented with the jury’s inquiry, the trial court had the statutory obligation ‘to provide the jury with information the jury desires on points of law.’ (*People v. Smithey* (1999) 20 Cal.4th 936, 985; see also *People v. Waidla* (2000) 22 Cal.4th 690, 745-746.)” (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 128.)

> This means the trial “court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury’s request for information. …” [Citation.]

(*People v. Solis* (2001) 90 Cal.App.4th 1002, 1015; see also *People v. Smithey*, *supra*, 20 Cal.4th at p. 985; *People v. Davis* (1995) 10 Cal.4th 463, 522.)

5300.5-No sua sponte duty to instruct on evidence admitted for limited purpose 5/16

“As a general matter, the Legislature has determined that limiting instructions need not be given sua sponte.” (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1071.) “When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.” (Evid. Code, § 355.) “ ‘Absent a request, a trial court generally has no duty to instruct as to the limited purpose for which evidence has been admitted.’ (*People v. Cowan* (2010) 50 Cal.4th 401, 479.)” (*People v. Murtishaw* (2011) 51 Cal.4th 574, 590; see *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052 [no sua sponte duty to instruct on limited use of gang evidence]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5 [clarifying instruction on use of evidence of battered women’s syndrome might be appropriate on request]; *People v. Collie* (1981) 30 Cal.3d 43, 63 [limited purpose of prior criminal acts does not require sua sponte limiting instruction]; see also *People v. Mateo*, *supra*, 243 Cal.App.4th at pp. 1072-1074 [no sua sponte duty to instruct on expert testimony on CSAAS, disagreeing with contrary holding in *People v. Housley* (1992) 6 Cal.App.4th 947]; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316-1317 [no duty to give limiting instruction regarding evidence of other acts of domestic violence committed by defendant].) “There is a ‘possible’ narrow exception in the ‘ “occasional extraordinary case” ’ in which the evidence ‘ “is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose.” ’ [Citations.]” (*People v. Murtishaw*, *supra*, 51 Cal.4th at p. 590.)

5310.1-The defense is entitled to a pinpoint instruction only on their defense theory 7/20

The California Supreme Court in *People v. Sears* (1970) 2 Cal.3d 180 (*Sears*) stated that "a defendant, upon proper request therefor, has a right to an instruction that directs attention to evidence from a consideration of which a reasonable doubt of his guilt could be engendered." (*Id*. at p. 190.) Similarly, "[a] defendant is entitled to an instruction relating particular facts to any legal issue." (*Ibid*.) From this broad language came the concept of the "pinpoint" or "*Sears*" instruction. Subsequent case law has substantially narrowed these concepts.

> "None of the cases cited in *Sears* says, and *Sears* itself does not say, that upon request the judge must direct the attention of the jury to specific testimony and tell the jury it may look to that testimony for the purpose of forming a reasonable doubt on an issue." [Citation.] [¶] … In a proper instruction, "[w]hat is pinpointed is not specific evidence as such, but the theory of the defendant's case." [Citation.]

(*People v. Wright* (1988) 45 Cal.3d 1126, 1137, italics omitted.) "*Sears* does not require argumentative instructions that merely highlight specific evidence without further illuminating the relevant legal standards. [Citation.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 152; see also *People v. Kraft* (2000) 23 Cal.4th 978, 1063.)

> A criminal defendant is entitled, on request, to an instruction "pinpointing" the theory of his defense. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137; *People v. Sears* (1970) 2 Cal.3d 180, 190.) As we recently explained, however, instructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative (*Wright*, *supra*, at p. 1137), and the effect of certain facts on identified theories "is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate." (*Id*. at p. 1143.)

(*People v. Wharton* (1991) 53 Cal.3d 522, 570.) "What is pinpointed is not specific evidence as such, but the *theory* of the defendant's case. It is the specific evidence on which the theory of defense 'focuses' which is related to reasonable doubt." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 338, italics in original.)

> Under appropriate circumstances, "a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case by, among other things, relating the reasonable doubt standard of proof to particular elements of the crime charged. [Citations.] But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation]." (*People v. Bolden* [(2002)] 29 Cal.4th [515] at p. 558.)

(*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99; see also *People v. Fayed* (2020) 9 Cal.5th 147, 177; *People v. Williams* (2016) 1 Cal.5th 1166, 1193; *People v. Hartsch* (2010) 49 Cal.4th 472, 500.)

5310.2-There is no sua sponte duty to instruct on certain defense theories 7/17

The trial judge has a duty to instruct as to defenses " 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 157.)

> A trial court has a duty to instruct the jury "sua sponte on general principles which are closely and openly connected with the facts before the court." [Citation.] … [A] trial court has a sua sponte duty to give instructions on the defendant's theory of the case, including instructions "as to defenses ' "that the defendant is relying on …, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." ' " [Citation.]

(*People v. Abilez* (2007) 41 Cal.4th 472, 517; see also *People v. Brooks* (2017) 3 Cal.5th 1, 73; *People v. Zinda* (2015) 233 Cal.App.4th 871, 876.)

But trial courts do not have a duty to instruct sua sponte on the defenses which serve to negate the mental state required for the charged crime. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 873-874.)

> "However, when a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking sua sponte instructional duties. While a court may well have a duty to give a 'pinpoint' instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such 'pinpoint' instructions are not required to be given sua sponte and must be given only upon request. [Citations.]" [Citation.]

(*People v. Saille* (1991) 54 Cal.3d 1103, 1117.)

For example, the California Supreme Court in *People v. Anderson* (2011) 51 Cal.4th 989 (*Anderson*), explained that the defense of accident serves only to negate the mental state element of the offense charged, and the trial court's only obligation to instruct on accident is to provide an appropriate pinpoint instruction upon request. (*Id*. at pp. 997-998.) For example:

> A trial court has no sua sponte duty to instruct on the significance of voluntary intoxication. (*People v. Verdugo* (2010) 50 Cal.4th 263, 295).) To receive a voluntary intoxication instruction, defendant must demonstrate that there is " 'substantial evidence of the defendant's voluntary intoxication and [that] the intoxication affected the defendant's 'actual formation of specific intent." ' " (*Ibid*.)

(*People v. Olivas* (2016) 248 Cal.App.4th 758, 770-771.)

In *People v. Lawson* (2013) 215 Cal.App.4th 108, the appellate court held "the rationale of *Anderson* is applied with equal force to the defense of mistake of fact, or any other defense that operates only to negate the mental state element of the crime." (*Id*. at p. 117; but see *People v. Brooks*, *supra*, 3 Cal.5th at pp. 72-75 [sua sponte duty to give mistake of fact instruction as to defense that defendant believed victim was already dead when he allegedly kidnapped her].) Similarly, the appellate court in *People v. Hussain* (2014) 231 Cal.App.4th 261 held: "Since the claim of right defense, like accident or mistake of fact, serves only to negate the mental state required for grand theft, under *Anderson* the trial court had no duty to instruct sua sponte on it." (*Id*. at p. 269; approved by California Supreme Court in *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 874.)

5320.1-Argumentative or incorrect instructions must be rejected 12/19

"A trial court may properly reject an instruction proposed by the defendant if the instruction incorrectly states the law; is argumentative, duplicative, or potentially confusing; or is not supported by substantial evidence." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 53; see also *People v. Richardson* (2008) 43 Cal.4th 959, 1026.) "The court must … refuse an argumentative instruction, that is, an instruction 'of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437; see also *People v. Virgil* (2011) 51 Cal.4th 1201, 1280; *People v. Mullins* (2018) 19 Cal.App.5th 594, 608.) A proposed instruction is also argumentative if it "would simply add emphasis that would favor one side and not the other." (*People v. Ramirez* (2019) 40 Cal.App.5th 305, 308.) "An instruction is argumentative when it recites facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law. [Citation.]" (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1244; see also *People v. Battle* (2011) 198 Cal.App.4th 50, 85.) Thus, the court should not give an instruction which is argumentative or one calling upon the jury to consider specific evidence concerning which there is a factual dispute. (*People v. Watson* (1979) 89 Cal.App.3d 376, 386.) It is also improper for a court to single out a particular witness and charge the jury how his or her evidence should be considered. (*People v. Smith* (1977) 67 Cal.App.3d 45, 49.) "Instructions that highlight specific evidence, or invite the jury to draw inferences favorable to one side, are considered argumentative and generally should not be used." (*People v. Bell* (2019) 7 Cal.5th 70, 107.) Such proposed instructions constitute nothing more than a comment on the evidence masquerading as statements of law. (*People v. Assad* (2010) 189 Cal.App.4th 187, 199; *People v. Martin* (1980) 101 Cal.App.3d 1000, 1010.) " 'An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.' [Citations.]" (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.) " '[I]t is not a matter of law for the judge to say that certain evidence might give rise to a reasonable doubt as to the affirmative of an issue required to be proven by the prosecution. That is a comment on the evidence and any such comment should be identified as such.' [Citation.]" (*Id*. at p. 1136.)

5320.2-Duplicative and repetitive instructions should be rejected 2/16

"A court may refuse a proposed instruction if it is duplicative of other instructions." (*People v. Lucas* (2014) 60 Cal.4th 153, 285; see also *People v. Cage* (2015) 62 Cal.4th 256, 291; *People v. Bacon* (2010) 50 Cal.4th 1082, 1112.) "[A] judge need not include a legally correct jury instruction when it is duplicative of other instructions provided to the jury. (*People v. Sanders* (1995) 11 Cal.4th 475, 560; see also *People v. Gurule* (2002) 28 Cal.4th 557, 659.)" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 675; see also *People v. Panah* (2005) 35 Cal.4th 395, 486.) " 'When the jury is properly instructed as to pertinent legal principles, the court need not restate those principles merely in another way.' [Citations.]" (*People v. Martinez* (1989) 207 Cal.App.3d 1204, 1222.) In *People v. Frye* (1985) 166 Cal.App.3d 941, for example, the defense submitted a special instruction stating that the defendant must have had the requisite intent at the time of entering the dwelling to be guilty of the charged crime of burglary. The appellate court held this instruction was correctly refused because the jury was already properly instructed on this point of law. (*Id*. at pp. 951-952; see also *People v. Slocum* (1975) 52 Cal.App.3d 867, 893.) These principles apply equally to repetitive instructions on reasonable doubt. (*People v. Richardson* (2008) 43 Cal.4th 959, 1026;

People v. London (1988) 206 Cal.App.3d 896, 908.) "To emphasize factors already set out [in a standardized jury instruction] by repeating them in additional instructions is argumentative." (*People v. London*, *supra*.)

5320.3-Instruction not supported by legal authority must be rejected 7/21

A defense requested special instruction should be rejected if it fails to contain any legal issue or statement of law. For example, in *People v. Grant* (1970) 11 Cal.App.3d 687 (disapproved on other grounds in *People v. Beagle* (1972) 6 Cal.3d 441, 451), the defense requested an instruction relating certain facts to the issue of a prosecution witness' credibility. The appellate court found that the credibility of a witness was not a legal issue. It was an issue of fact. Therefore, the instruction was properly denied. (*People v. Grant*, *supra*, 11 Cal.App.3d at p. 690; see also *People v. Lawrence* (1985) 172 Cal.App.3d 1069, 1074 [pinpoint instruction that someone other than defendant had motive to commit crime was properly refused]; *People v. Walker* (1983) 145 Cal.App.3d 886, 897-900 [pinpoint instruction not containing statement of law was properly refused].) Similarly, a special instruction should be rejected if it is an incomplete statement of the law and, thus, could confuse the jury causing them to operate under an incorrect understanding of the law. (*People v. Brugman* (2021) 62 Cal.App.5th 608, 623-624.)

5330.1-Unanimity instruction not required for theory of crime 5/20

"In a criminal case, a jury verdict must be unanimous. [Citations.] … Additionally, the jury must agree unanimously the defendant is guilty of a specific crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) "Where a pleading charges a defendant with one criminal act but the evidence tends to show more than one such act, the prosecutor must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." (*People v. Kelly* (2016) 245 Cal.App.4th 1119, 1127.)

Where it is warranted, the court must give the unanimity instruction sua sponte. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

> In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.

(*Russo*, *supra*, 25 Cal.4th at p. 1135; see also *People v. Butler* (2012) 212 Cal.App.4th 404, 426.)

"[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*Russo*, *supra*, 25 Cal.4th at p. 1132.) "It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of [a crime] as that offense is defined by statute, it need not decide unanimously by which theory he is guilty." (*People v. Santamaria* (1994) 8 Cal.4th 903, 918; see also *People v. Guillen* (2014) 227 Cal.App.4th 934, 983; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1375.)

> Not only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt. Sometimes … the jury simply cannot decide beyond a reasonable doubt exactly who did what. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other.

(*People v. Santamaria*, *supra*, 8 Cal.4th at p. 919; see also *People v. Quiroz* (2013) 215 Cal.App.4th 65, 73-76; distinguish *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1277-1281 [unanimity as to theory of guilt necessary when each theory supported a different degree of the crime, here murder]; *People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1025 [same].)

For example, "[j]ury unanimity is not required as to the theory of theft [theft by larceny, theft by false pretenses or embezzlement]." (*People v. Kaufman* (2017) 17 Cal.App.5th 370, 381.) "A theft conviction must be affirmed if there is sufficient evidence to support any theory of theft as to which the jury was properly instructed." (*Ibid*.) The appellate court "simply review[s] the evidence to determine whether it supported any theory." (*Ibid*.) But if the prosecution relied on only one theory of theft, the appellate court need only reviews the evidence to determine if the evidence supports that theory, [e]ven if the same evidence might have supported conviction on a different theory." (*Id*. at p. 382.)

5330.2-Unanimity instruction not required for continuous course of conduct 9/21

"[N]o unanimity instruction is required if the case falls within the continuous-course-of-conduct exception." (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) The continuous-course-of-conduct exception "embraces two wholly distinct concepts." (*People v. Lueth* (2012) 206 Cal.App.4th 189, 196.)

First, the continuous-course-of-conduct exception applies if the statutory crime contemplates a series of acts over time, such as continuous sexual abuse of a child under Penal Code section 288.5. (*People v. Lueth*, *supra*, 206 Cal.App.4th at p. 196.)

> The unanimity rule has been refined in cases involving sexual molestation of children and repeated identical offenses. In such cases, although the jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described. [¶] … [E]ven generic testimony describes a repeated series of specific, though indistinguishable, acts of molestation. [Citation.] The unanimity instruction assists in focusing the jury's attention on each such act related by the victim and charged by the People. We see no constitutional impediment to allowing a jury, so instructed, to find a defendant guilty of more than one indistinguishable act, providing … three minimum prerequisites … are satisfied." ([*People v.*] *Jones* [(1990)] 51 Cal.3d [294] at p. 321.) Those prerequisites include generic evidence describing (1) the kind of acts committed, (2) the number of acts committed with sufficient certainty to support the alleged counts, and (3) the general time period in which the acts occurred. (*Id*. at p. 316; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448.)

(*People v. Fernandez* (2013) 216 Cal.App.4th 540, 556-557, italics omitted; see also *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1589.)

Even if different acts are involved in a continuous course of conduct, "a unanimity instruction is not required if 'the defendant offered the same defense to both acts constituting the

charged crime, so no juror could have believed defendant committed one act but disbelieved that he committed the other, or because "there was no evidence … from which the jury could have found defendant was guilty of" the crime based on one act but not the other.' [Citations.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 879 [multiple items taken home invasion robbery and murder]; distinguish *People v. Davis* (2016) 36 Cal.4th 510, 561-562 [two acts of robbery with items were taken at different times and the potential defenses were entirely different].)

Second, a "unanimity instruction is not required when the acts are so closely connected in time as to form part of one transaction. [Citations.] This branch of the 'continuous conduct' exception [citation] applies if the defendant tenders the same defense or defenses to each act and if there is no reasonable basis for the jury to distinguish between them. [Citations.]" (*People v. Crandell* (1988) 46 Cal.3d 833, 875; see also *People v. Williams* (2013) 56 Cal.4th 630, 682; *People v. Maury* (2003) 30 Cal.4th 342, 423; *People v. Sorden* (2021) 65 Cal.App.5th 582, 615.) This exception " 'is meant to apply not to all crimes occurring during a single transaction but only to those "where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the victim's testimony in toto." [Citation.]' [Citation.]" (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299; see also *People v. Lueth*, *supra*, 206 Cal.App.4th at p. 196; *People v. Bui* (2011) 192 Cal.App.4th 1002, 1010-1011; but see *People v. Hernandez* (2013) 217 Cal.App.4th 559, 571-576 [reversal error not to give unanimity instruction because two separate instances of weapons possession hours apart for which defense offered different defenses].)

5330.3-Failure to give unanimity instruction can be harmless error 5/20

The omission of a unanimity instruction is reversible error only if, without it, some jurors may have believed the defendant guilty based on one act, while others may have believed him guilty based on another. (*People v. Russo* (2001) 25 Cal.4th 1124, 1133.) "[C]ases generally hold the omission of a unanimity instruction harmless if the record reveals 'no rational basis, by way of argument or evidence, by which the jury could have distinguished between [the acts which would constitute the offenses].' [Citations.] In contrast, if there is a rational basis on which jurors could distinguish between alternative factual bases, omission of a unanimity instruction is normally reversible error." (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1589.)

5330.4-Unanimity instruction not needed if prosecutor elects act relied upon 7/21

An unanimity instruction is not required if the prosecution elects which criminal act it is relying upon to support the charged crime. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Kelly* (2016) 245 Cal.App.4th 1119, 1127.) "If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539; see also *People v. Brugman* (2021) 62 Cal.App.5th 608, 629 ["the prosecutor's election could not have been more clear," thus her "direct and clear statement qualifies as an effective election"]; *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1455 [an effective election was made when the prosecutor "repeatedly asserted in argument to the jury" the facts that formed the basis for the count].) "The prosecution can make an election by 'tying each specific count to specific criminal acts elicited from the victims' testimony'—typically in opening statement and/or closing argument. [Citations.] [¶] Under these principles, there is an implicit presumption that the jury will rely on the prosecution's election and, indeed, is bound by it." (*People v. Brown* (2017) 11 Cal.App.5th 332, 341.) Similarly, on appellate

"review is limited to whether there is sufficient evidence to support a conviction based exclusively on the act elected by the prosecution." (*Id*. at pp. 341-342.)

5340.1-Lesser included offenses (LIO's) defined 6/19

"A lesser offense is necessarily included in a greater offense if the greater offense cannot be committed without also committing the lesser offense. (*People v. Hughes* (2002) 27 Cal.4th 287, 366." (*People v. Mullendore* (2014) 230 Cal.App.4th 848, 854.) To determine if an offense is lesser and necessarily included in another offense … we apply either the elements test or the accusatory pleading test." (*People v. Shockley* (2013) 58 Cal.4th 400, 404; see also *People v. Hicks* (2017) 17 Cal.App.5th 496, 507.) "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117-118; see also *People v. Smith* (2013) 57 Cal.4th 232, 240; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1367; but see *People v. Mendoza* (2015) 240 Cal.App.4th 72, 82-84 [an attempt to commit a crime is not an included offense of a general intent crime].)

> Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former.

(*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) Facts derived from the preliminary hearing are not factored into the accusatory pleading analysis. (*People v. Munoz* (2019) 31 Cal.App.5th 143, 157-158 and *People v. Macias* (2018) 26 Cal.App.5th 957, 964-965, both relying on *People v. Montoya* (2004) 33 Cal.4th 1031, and rejecting contrary holding in *People v. Ortega* (2015) 240 Cal.App.4th 956, 968; see also *People v. Alvarez* (2019) 32 Cal.App.5th 781, 787-790 [rejecting *Ortega* on broader grounds].)

Under either test, enhancement allegations, such gun use and great bodily injury, are not examined to determine if an uncharged offense is necessarily included in the charged offense. (*People v. Wolcott* (1983) 34 Cal.3d 92, 100-102; *People v. Alarcon* (2012) 210 Cal.App.4th 432, 348; *People v. Parks* (2004) 118 Cal.App.4th 1, 6; *People v. Richmond* (1991) 2 Cal.App.4th 610, 616.) Similarly, a felony-murder special circumstance allegation is not an element of the crime of murder and, therefore, cannot be considered in determining whether the same felony, separately charged, is a lesser included offense of the murder. (*People v. Boswell* (2016) 4 Cal.App.5th 55, 59-60.)

5340.2-Court has duty to instruct on LIO's only if substantial evidence 9/20

"A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, ' "that is, evidence that a reasonable jury could find persuasive" ' [citation], which, if accepted, ' "would absolve [the] defendant from guilt of the greater offense" [citation] but not the lesser' [citation]." (*People v. Cole* (2004) 33 Cal.4th 1158, 1218; see also *People v. Landry* (2016) 2 Cal.5th 52, 96; *People v. Shockley* (2013) 58 Cal.4th 400, 403.) "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have

no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162; see also *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1367.) The lesser included offense may be an infraction. (*People v. Walker* (2015) 237 Cal.App.4th 111, 116.)

> The trial court must instruct the jury on necessarily included offenses if there is substantial evidence that one or more elements of the charged offense is missing. [Citation.] This duty arises even if the defendant fails to request the instructions or, as here, objects to them as a matter of trial tactics. [Citation.] "Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense." [Citation.]

(*People v. King* (2010) 183 Cal.App.4th 1281, 1318; see also *People v. Banks* (2014) 59 Cal.4th 1113, 1159-1160; *People v. Smith* (2013) 57 Cal.4th 232, 239-240; *People v. Walker*, *supr*a, 237 Cal.App.4th at p. 115.)

"Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction' [Citation.]" (*People v. Cole*, *supra*, 33 Cal.4th at p. 1215; see also *People v. Castenada* (2011) 51 Cal.4th 1292, 1327.) The court need not instruct "if the pertinent evidence is 'minimal and insubstantial' [citation]." (*People v. Hicks* (2017) 17 Cal.App.5th 496, 507.) "[A] court may refuse the instruction if there is insufficient evidence that the offense committed, if any, was less than that charged." (*People v. King*, *supra*, 183 Cal.App.4th at p. 1319; see also *People v. Aguilar* (2019) 41 Cal.App.5th 1023, 1028.) This particularly true if the defendant also "completely denies the charged crime." (*People v. Campbell* (2020) 51 Cal.App.5th 463, 503.) "[I]f there is no proof, other than an unexplainable rejection of the prosecution's evidence, that the offense was less than that charged, such instructions shall not be given." (*People v. Kraft* (2000) 23 Cal.4th 978, 1063.) "Speculation is insufficient to require the giving of an instruction on a lesser included offense." (*People v. Mendoza* (2000) 24 Cal.4th 130,174.) In other words, "[a] trial court need not … instruct on lesser included offense when the evidence shows that the defendant is either guilty of the crime charged or not guilty of any crime … ." (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5; see also *People v. Chenelle* (2106) 4 Cal.App.5th 1255, 1265.)

> In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury. [Citations.] Moreover, as we have noted, the sua sponte duty to instruct on lesser included offenses, unlike the duty to instruct on mere defenses, arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued. Hence, substantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself.

(*People v. Breverman*, *supra*, 19 Cal.4th at pp. 162-163.) "In this regard, the testimony of a single witness, including that of a defendant, may suffice to require lesser included offense instructions. (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)" (*People v. Wyatt* (2012) 55 Cal.4th 694, 698; see also *People v. Campbell* (2015) 233 Cal.App.4th 148, 165.)

"[U]ncertainty about whether the evidence is sufficient to warrant instructions should be resolved in favor of the accused (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.)" (*People v. Vasquez* (2018) 30 Cal.App.5th 786, 792.)

5340.3-Court has no duty to instruct on factually related offenses (LRO's) 6/19

There is no duty to instruct on lesser factually related offenses, whether requested by the defense or sua sponte. (*People v. Birks* (1998) 19 Cal.4th 108, 136; see also *People v. Mora & Rangel* (2018) 5 Cal.5th 442, 486-487; *People v. Carrera* (1989) 49 Cal.3d 291, 310; *People v. Lam* (2010) 184 Cal.App.4th 580, 583.) The accusatory pleading alone defines whether the offense is lesser included or lesser related. (*People v. Alvarez* (2019) 32 Cal.App.5th 781, 788-790.) "If a lesser offense shares some common elements with the greater offense, or if it arises out of the same criminal course of conduct as the greater offense, but it has one or more elements that are not elements of the greater offense as alleged, then it is a lesser related offense, not a necessarily included offense." (*People v. Hicks* (2017) 4 Cal.5th 203, 209.)

"… California law does not permit a court to instruct concerning an uncharged lesser related crime unless agreed to by both parties." (*People v. Hall* (2011) 200 Cal.App.4th 778, 781.) "[O]ne of the main differences between instructing on lesser included and lesser related offenses is that instruction on lesser included offenses is mandatory, while both parties must agree to have the court instruct on lesser related offenses." (*People v. Solis* (2015) 232 Cal.App.4th 1108, 1116.) Thus, a court can never instruct on a lesser related offense over the prosecution's objection. (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 684; *People v. Lam*, *supra*, 184 Cal.App.4th at p. 583; *People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387.) But even if agreed to by the parties, the trial court can still deny the request. (*People v. Hall*, *supra*, 200 Cal.App.4th at p. 806.)

5340.4-Court has no sua sponte duty to instruct on LIO's of felony-murder 7/17

A trial "court's sua sponte duty to instruct on lesser included offenses does not extend to an uncharged offense supporting a special circumstance allegation, or a charge of first degree felony murder." (*People v. Brooks* (2017) 3 Cal.5th 1, 77 [no sua sponte duty to give aggravated assault instruction as to torture murder theory of first degree felony murder and torture murder special circumstance allegation]; see also *People v. Valdez* (2004) 32 Cal.4th 73, 110-111 [when robbery is not a charged offense but rather forms the basis of a felony-murder charge and a robbery-murder special-circumstance allegation, the court has no sua sponte duty to instruct on theft as a lesser offense to robbery]; accord, *People v. Combs* (2004) 34 Cal.4th 821, 856 [same].)

5610.1-Judgment void only if court lacks fundamental jurisdiction 7/20

"[T]he concept of jurisdiction can be used in somewhat differing ways." (*People v. Lara* (2010) 48 Cal.4th 216, 224.) "[T]here is a multiplicity of meanings in the use of the word 'jurisdiction' under our law." (*People v. Ruiz* (1990) 217 Cal.App.3d 574, 584.) " 'A judgment is void on its face if the court which rendered the judgment lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief which the court had no power to grant. [Citations.]' [Citation.]" (*Carr v. Kamins* (2007) 151 Cal.App.4th 929, 933; see also *Sannmann v. Dept. of Justice* (2020) 47 Cal.App.5th 676, 685; *People v. Amaya* (2015) 239 Cal.App.4th 379, 386.) "[I]t is clear that a true lack of fundamental jurisdiction in the strict sense of the phrase results in a void judgment, for the court was entirely without power over the subject matter or the parties. [Citations.] A judgment rendered by a court wholly lacking jurisdiction may be challenged at any time." *(In re Harris* (1993) 5 Cal.4th 813, 836; see also *People v. Ford* (2015) 61 Cal.4th 282, 286.) And "[a] claim of fundamental jurisdictional defect is not subject to forfeiture or waiver." (*People v. Hoyt* (2020) 8 Cal.5th 892, 911.)

> The consequences of an act beyond the court's jurisdiction in the fundamental sense differ from the consequences of an act in excess of jurisdiction. An act beyond a court's jurisdiction in the fundamental sense is void; it may be set aside at any time and no valid rights can accrue thereunder. In contrast, an act in excess of jurisdiction is valid until set aside, and parties may be precluded from setting it aside by such things as waiver, estoppel, or the passage of time.

(*Ibid*.; see also *People v. Lara*, *supra*, 48 Cal.4th at pp. 224-225.)

> It is essential to distinguish between a court's lack of fundamental jurisdiction and a court's action taken in excess of jurisdiction, although the distinction is hazy. " 'Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. …' " (*People v. Ruiz* (1990) 217 Cal.App.3d 574, 584, quoting *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.) An act in excess of jurisdiction is an act beyond the court's power as defined by statute or decisional rule. (*In re Bakke* (1986) 42 Cal.3d 84, 89; *People v. Beebe* [(1989)] 216 Cal.App.3d [927] 932; *People v. Jones* (1989) 210 Cal.App.3d 124, 135.) An act beyond the court's fundamental jurisdiction is void and may be set aside at any time. (*People v. Ruiz, supra,* at p. 584.) By contrast, an act in excess of jurisdiction is valid until set aside, and a party may be precluded from setting it aside, due to waiver, estoppel or the passage of time. (*Ibid.*) An act in excess of jurisdiction refers to "a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." (*Abelleira v. District Court of Appeal*, *supra*, at p. 288.)

(*People v. Mendez* (1991) 234 Cal.App.3d 1773, 1781-1782, fn. omitted.)

5610.2-Subject matter jurisdiction obtained by filing criminal action 1/13

" 'In order to proceed, the court must have jurisdiction over the subject matter … .' " (*People v. Domagalski* (1989) 214 Cal.App.3d 1380, 1389; citing *Burns v. Municipal Court* (1961) 195 Cal.App.2d 596, 599.) Generally "[j]urisdiction over the subject matter is obtained by the filing of a valid complaint." (*Ibid.*) By statute, however, a notice to appear can confer jurisdiction upon a court in certain circumstances. (*Heldt v. Municipal Court* (1985) 163 Cal.App.3d 532, 537-539.) "A judgment is void rather than voidable only if the trial court lacked subject matter jurisdiction." (*People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1434.)

For example, that following a criminal trial it was discovered the defendant was a minor does mean the adult trial court lacked subject matter jurisdiction.

> Nevertheless, even if we assume petitioner did not turn 16 years old until his 16th birthday … his assertion that the superior court lacked subject matter jurisdiction to try him under general, adult law is incorrect. Whether a case should proceed in juvenile or adult court "does not involve an issue of subject matter jurisdiction." (*People v. Nguyen* (1990) 222 Cal.App.3d 1612, 1619.) There is but one superior court in a county, though it is divided into different departments. … Because petitioner was charged with a felony, the superior court had subject matter jurisdiction. If he was under 16 years of age, however, the criminal department of the superior court lacked jurisdiction *to act,* and its trial of petitioner

thus constituted *an excess* of jurisdiction, not a lack of fundamental jurisdiction.
(*In re Harris* (1993) 5 Cal.4th 813, 837, italics in original.)

5610.3-Jurisdiction over the person obtained regardless how deft. came before court 8/11

" 'In order to proceed, the court must have jurisdiction over … the person.' " (*People v. Domagalski* (1989) 214 Cal.App.3d 1380, 1389; citing *Burns v. Municipal Court* (1961) 195 Cal.App.2d 596, 599.) But:

> [O]nce a defendant is before the court, the court has jurisdiction over the person regardless of the procedural defects incident to how he got there. (*Ker v. Illinois* (1886) 119 U.S. 436; *People v. Garner* (1961) 57 Cal.2d 135.) When counsel appeared on respondent's behalf pursuant to Penal Code section 977, the court obtained jurisdiction over his person, and any procedural irregularity which prompted that event did nothing to defeat it.

(*People v. Domagalski*, *supra*, 214 Cal.App.3d at p. 1389.)

In *Ker v. Illinois*, *supra*, 119 U.S. 436, the United States Supreme Court considered the effect on jurisdiction of forcible abduction in Peru of a non-Peruvian national (without objection from Peru) for the purpose of prosecution in the United States. The Supreme Court held that "forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence … ." (*Id*. at p. 444.)

More recently, in *United States v. Alvarez-Machain* (1992) 504 U.S. 655, the United states Supreme Court observed it has " 'never departed from the rule announced in [*Ker*] that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction" … . There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.' " (*Id*. at pp. 661-662.)

In *People v. Salcido* (2008) 44 Cal.4th 93 the defendant was expelled by Mexican authorities who do not extradite their citizens to face capital punishment. The defendant claimed California law enforcement tricked the Mexican government into believing he was an American citizen. The California Supreme Court rejected defendant's various claims of lack of jurisdiction, including violation of international treaties.

> Even if we were to assume for the sake of argument that American law enforcement officers obtained custody of defendant from Mexican authorities by intentionally misrepresenting he was a citizen of the United States and that, had the Mexican authorities believed defendant was a Mexican national, they would have objected to a transfer of custody, as the high court in *Alvarez-Machain* has explained, such involuntary seizures are neither permitted nor prohibited under the terms of the Treaty. Had defendant's "abduction" been accomplished by mendacity rather than by force, that circumstance would not render the rule in *Ker* inapplicable.

(*Id*. at p. 125.)

5610.4-Defendant's consent may estop future challenge to court's jurisdiction 8/15

A party, including a criminal defendant, can consent to actions beyond or in excess of a court's jurisdiction and, thereafter, be estopped from any future challenge based upon lack of such jurisdiction. (*People v. Ford* (2015) 61 Cal.4th 282, 287-289.) This principle was explained by the California Supreme Court in *In re Griffin* (1967) 67 Cal.2d 343:

> When … the court has jurisdiction of the subject, a party who seeks or consents to action beyond the court's power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction. [Citations.] Whether he shall be estopped depends on the importance of the irregularity not only to the parties but to the functioning of the courts and in some instances on other considerations of public policy. A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when 'To hold otherwise would permit the parties to trifle with the courts.' [Citation.] On the other hand waiver of procedural requirements may not be permitted when the allowance of a deviation would lead to confusion in the processing of other cases by other litigants. [Citation.] Substantive rules based on public policy sometimes control the allowance or disallowance of estoppel.

(*Id*. at pp. 347-348; see also *People v. Sem* (2014) 229 Cal.App.4th 1176, 1194.)

> We need not decide whether a trial court retains jurisdiction to modify the amount of restitution once a defendant's term of probation has expired. So long as a court has subject matter jurisdiction—and both parties agree the trial court had it here—then a party seeking or consenting to action beyond the court's power may be estopped from complaining that the resulting action exceeds a court's jurisdiction. [Citation.] By agreeing to a continuance of the restitution hearing to a date after his probationary term expired, defendant implied his consent to the court's continued exercise of jurisdiction. He is therefore estopped from challenging it.

(*People v. Ford*, *supra*, 61 Cal.4th at pp. 284-285.)

5610.5-Parties cannot consent to lack of fundamental jurisdiction 12/19

"A court has no authority to confer jurisdiction upon itself where none exists." (*Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 636.)

> Generally, once the court has lost subject-matter jurisdiction, the parties cannot vest jurisdiction in the court by stipulation. "The parties to a judicial proceeding cannot, either jointly or severally, effectively stipulate or concede that the court either has or lacks jurisdiction to act in the particular matter." (*Griggs v. Superior Court* (1976) 16 Cal.3d 341, 344, fn. 2.) "Jurisdiction may not be conferred by stipulation." (*Kurtz v. Cutler* (1918) 178 Cal. 178, 181.) "If a court is without jurisdiction, no amount of consent or estoppel can bestow it." (*People v. Dethloff* (1992) 9 Cal.App.4th 620, 625.)

(*People v. Hampton* (2019) 41 Cal.App.5th 840, 846.) For example: "We are aware of no constitutional or statutory provision that authorizes the parties in a criminal action to stipulate to the trial court vacating its earlier dismissal of the entire action to restore jurisdiction to implement a plea bargain." (*Ibid*.)

There is an exception is if the court's loss of fundamental jurisdiction was a result of fraud.

> Although subject matter jurisdiction is vested by the constitution and statutes, courts have broad inherent powers apart from any statute to carry out their duties. Under these

powers, a court may be authorized to vacate a final judgment of dismissal that was procured by extrinsic fraud. (*Marler v. Municipal Court* (1980) 110 Cal.App.3d 155, 162.) However, we have found no case that holds that a criminal court can vacate a dismissal pursuant to the parties' stipulation as part of its inherent powers where the dismissal was not procured by fraud.

(*People v. Hampton*, *supra*, 41 Cal.App.5th at p. 847.)

5610.6-Judicial jurisdiction power is limited 12/19

California Constitution, article VI, section 1 provides: "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." " 'Our courts are set up by the Constitution without any special limitations; hence the courts have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government.' " (*People v. Engram* (2010) 50 Cal.4th 1131, 1146.)

> All courts have inherent powers which enable them to carry out their duties and ensure the orderly administration of justice. The inherent powers of courts are derived from article VI, section 1 of the California Constitution and are not dependent on statute. [Citations.] These powers entitle courts to " '… adopt any suitable method of practice, both in ordinary actions and special proceedings, if the procedure is not specified by statute or by rules adopted by the Judicial Council.' [Citation.]" [Citation.] Thus, a trial court has the inherent authority to create a new form of procedure in a particular case, where justice demands it. [Citations.] " 'The … power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function.' [Citation.]" [Citation.]

(*In re Amber S.* (1993) 15 Cal.App.4th 1260, 1264.) But, a "court has no authority to confer jurisdiction upon itself where none exists." (*Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 636.)

The court's inherent or common law power is limited, however, to matters necessary to perform its judicial function. (*Swarthout v. Superior Courts* (2012) 208 Cal.App.4th 701, 709.) Thus, for example, "the investigation of crimes … is an executive branch function. (*Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1542.) Without statutory authority, a court has no inherent powers to assist in the investigation of crimes." (*Swarthout v. Superior Court*, *supra* 208 Cal.App.4th at p. 709 [with no case pending, superior court prohibited from issuing an order transferring a state prisoner to a local jail to facilitate a law enforcement interview].)

5620.1-General rules for establishing of proper venue within California 9/20

One requirement of proper subject matter jurisdiction is whether there is the requisite connection between the location of the alleged criminal activity and the court where the criminal case is prosecuted.

> The subject matter jurisdiction of every superior court in California embraces the entire State of California. A California superior court has subject matter jurisdiction to conduct felony trials and to impose sentences for felonies defined by California statutes, as long as the felonies are committed within the state, even though some or all of them may be committed outside of the county in which that court sits.

(*People v. Remington* (1990) 217 Cal.App.3d 423, 428-429.) Subject matter jurisdiction over criminal conduct within the State of California is distinguishable from whether the resulting criminal case is being prosecuted in the appropriate venue.

"The terms 'venue' and 'territorial jurisdiction' are synonymous, and a criminal offense generally should be prosecuted in the county in which the crime was committed. [Citations.]" *People v. Thomas* (2012) 53 Cal.4th 1276, 1281-1282; see also *People v. Remington*, *supra*, 217 Cal.App.3d at p. 429, fn. 9.) "Every person is liable to punishment by the laws of this State, for a public offense committed by him therein … and except as otherwise provided by law the jurisdiction of every public offense is in any competent court within the territorial jurisdiction of which it is committed." (Pen. Code, § 777.) The "jurisdictional territory" is the "limited territory over which the criminal jurisdiction of the court extends, as provided by law, and in the case of a superior court mean[s] the county in which the court sits." (Pen. Code, § 691, subd. (b).) "Traditionally, venue in a criminal proceeding has been set, as a general matter, in the county or judicial district in which the crime was committed." (*People v. Simon* (2001) 25 Cal.4th 1082, 1093.) For example, "[u]nder [Penal Code] section 790, the proper venue for a murder trial lies in the county where the fatal injury was inflicted, where the victim died, or where the victim's body was discovered. But under [Penal Code] section 781, venue is also proper in the county where 'the defendant made preparations for the crime.' [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522, 533.)

" '[A]lthough subject-matter jurisdiction cannot be conferred on a court by consent of the parties, territorial jurisdiction can be so conferred.' [Citation.]" (*People v. Remington*, *supra*, 217 Cal.App.3d at p. 429.) Territorial jurisdiction is a nonfundamental, waivable aspect of jurisdiction and can be conferred simply by consent of the parties. (*People v. Anderson* (1991) 1 Cal.App.4th 1084, 1089; *People v. Remington*, *supra*, 217 Cal.App.3d at p. 429.) "[V]enue is a procedural issue involving the appropriateness of a place for the conduct of a defendant's trial on a criminal charge, and not a substantive issue relating to the defendant's guilt or innocence of the crime charged." (*People v. Posey* (2004) 32 Cal.4th 193, 208.)

Proper venue is a question of law to be decided before trial by the judge, not a jury. (*People v. Posey*, *supra*, 32 Cal.4th at pp. 200-201; see also *People v. Betts* (2005) 34 Cal.4th 1039, 1049; *People v. Campbell* (2020) 51 Cal.App.5th 463, 480; *People v. Federico* (2011) 191 Cal.App.4th 1418, 1425.) Venue or territorial jurisdiction need only be established by a preponderance of evidence, not beyond a reasonable doubt. (*People v. Thomas*, *supra*, 53 Cal.4th at p. 1283; *People v. Sering* (1991) 232 Cal.App.3d 677, 684; *Fortner v. Superior Court* (2013) 217 Cal.App.4th 1360, 1363-1364.) It may be established by the evidence presented at the preliminary hearing and need not be proved again at trial. (*People v. Calhoun* (2019) 38 Cal.App.5th 275, 311-312.)

Venue may be proved by circumstantial evidence. (*People v. Calderon* (1962) 205 Cal.App.2d 566, 574.) It is presumed that the magistrate or judge is aware of the boundaries of his or her judicial district and the streets therein. (*People v. Perry* (1963) 216 Cal.App.2d 8, 11.) Therefore, a description in the testimony of the streets involved is sufficient to circumstantially establish venue. (See *People v. Rippberger* (1991) 231 Cal.App.3d 1667, 1686; *People v. Ikner* (1956) 142 Cal.App.2d 145, 147-149.)

Finally, "[v]enue and vicinage are distinct. Venue concerns the location where the trial is held; vicinage refers to an area from which the jury pool is drawn." (*People v. Clark*, *supra*, 63 Cal.4th at p. 553.) "For vicinage rights under the state Constitution, 'the vicinage right implied in article I, section 16 of the California Constitution … constitutes simply the right of an accused to a

trial by an impartial jury drawn from a place bearing some reasonable relationship to the crime in question.' [Citation.]" (*Ibid*.) Trials conducted in accordance with California's venue statutes generally satisfy the vicinage "reasonable relationship" test. (*Ibid*.)

5620.2-Challenge to proper venue must be timely 5/10

A court acts "in excess of its territorial jurisdiction if, in violation of [Penal Code] section 777, it conducts a trial for an offense committed outside of the county in which it sits, over objection, and a judgment of conviction resulting from such a trial would be subject to reversal on appeal." (*People v. Remington* (1990) 217 Cal.App.3d 423, 429, fn. omitted.) But, a "defendant's failure to make any venue or vicinage objection in superior court precludes him from raising the point on appeal." (*Id*. at p. 431.)

Moreover, a challenge based on improper venue (i.e. territorial jurisdiction) must be timely. "[A] specific objection to venue by a defendant should be considered timely if made *prior to the commencement of trial*." (*People v. Simon* (2001) 25 Cal.4th 1082, 1107, italics in original.) "[W]e conclude that, in the absence of unusual circumstances, it is appropriate to consider untimely an objection to venue that is raised for the first time after the start of trial." (*Ibid*.) In addition, "we conclude that the entry of a not guilty plea cannot in itself reasonably be regarded as constituting an objection to venue." (*Id*. at p. 1105.)

Thus, the failure to establish proper venue cannot be raised on review of a conviction appeal unless the issue was raised first in the trial court. (*People v. Simon*, *supra*, 25 Cal.4th at p. 1093; *People v. Anderson* (1991) 1 Cal.App.4th 1084, 1088-1089.) "[W]e conclude that under the general forfeiture doctrine, a defendant in a felony proceeding who fails timely to assert an objection to the venue in which the proceeding has been brought and is to be tried should be found to have forfeited any right to object to trial in that venue." (*People v. Simon*, *supra*, 25 Cal.4th at p.1103.)

5620.3-Federal vicinage provision is inapplicable to state prosecution 12/16

The federal right vicinage right does not apply to a California state prosecution. (*People v. Clark* (2016) 63 Cal.4th 522, 555.)

> " '[V]icinage refers to the area from which the jury pool is drawn.' " (*Price v. Superior Court* (2001) 25 Cal.4th 1046, 1054 (*Price*).) The Bill of Rights guarantees the right to trial by a jury "of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." (U.S. Const., 6th Amend.) Defendant asserts his offenses … must be tried before a jury drawn from Los Angeles County, where the offenses occurred. [¶] But as defendant concedes, the California Supreme Court has held "the [Sixth Amendment's] vicinage clause is not applicable in a state criminal trial." (*Price*, *supra*, 25 Cal.4th at p. 1069.) "Nothing in the history of the Fourteenth Amendment … suggests to us that in making the right to jury trial applicable to the states, there was an intent to include the vicinage clause of the Sixth Amendment." (*Id*. at p. 1063.) And "[v]icinage is not a right that is fundamental and essential to the purpose of the constitutional right to jury trial, the test for incorporation from the Fourteenth Amendment. …" (*Id*. at pp. 1064-1065.)

(*People v. Delgado* (2010) 181 Cal.App.4th 839, 846; see also *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1109.)

5630.1-Jurisdiction lies in any county affected by the crime 8/18

"Traditionally, venue in a criminal proceeding has been set, as a general matter, in the county or judicial district in which the crime was committed." (*People v. Simon* (2001) 25 Cal.4th 1082, 1093; see also *People v. Thomas* (2012) 53 Cal.4th 1276, 1281.) Penal Code section 777 provides in pertinent part: "[E]xcept as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed." "[U]nder section 777 the county in which a felony was committed is, in the absence of another statute, the locale designated as the place for trial … ." (*People v. Simon*, *supra*, 25 Cal.4th at p. 1094.)

"The Legislature's power to designate the place for trial of a criminal offense is limited by the requirement that there be a reasonable relationship or nexus between the place designated for trial and the commission of the offense." (*Price v. Superior Court* (2001) 25 Cal.4th 1046, 1075 [upholding former version of Pen. Code, § 784.7]; see also *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1109-1110 [upholding current version of Pen. Code, § 784.7]; *People v. Delgado* (2010) 181 Cal.App.4th 839, 847 [same].)

The primary statutory provision satisfying this requirement as to criminal conduct spanning more than one California county is Penal Code section 781, which reads: "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory." (See *People v. Posey* (2004) 32 Cal.4th 193, 199-200; *People v. Federico* (2011) 191 Cal.App.4th 1418, 1425.) Penal Code section 781 has long been interpreted as a "remedial" statute and has been "liberally construed." (*People v. Thomas*, *supra*, 53 Cal.4th at p. 1283; see also *People v. Chapman* (1977) 72 Cal.App.3d 6, 11; *People v. Hernandez* (1976) 63 Cal.App.3d 393, 398.) Penal Code section 781 was "intended to broaden criminal jurisdiction beyond the rigid limits fixed by the common law in cases of crimes committed in more than one jurisdiction." (*People v. Powell* (1967) 67 Cal.2d 32, 63; see also *People v. Bismillah* (1989) 208 Cal.App.3d 80, 85.) It should be interpreted in a common sense manner with due regard to the factual circumstances of the case rather than to technical niceties. (*People v. Williams* (1973) 36 Cal.App.3d 262, 268.)

Under Penal Code section 781 an offense may properly be prosecuted in a county in which "preliminary arrangements" or "preparatory acts" for the crime are made, although the acts do not constitute an essential element of the completed crime or an attempt. (*People v. Thomas*, *supra*, 53 Cal.4th at p. 1284; *People v. Carrington* (2009) 47 Cal.4th 145, 182; *People v. Price* (1991) 1 Cal.4th 324, 385; *People v. Powell*, *supra*, 67 Cal.2d at p. 62.) The conduct involved is that which necessarily leads up to, or is "requisite" to, the commission of the offense. (*People v. Simms* (1956) 144 Cal.App.2d 189, 197.)

Also under Penal Code section 781, "[i]n addition to preparatory acts, we have also held that venue can be based on the *effects* of preparatory acts (what we have called "preparatory effects")." (*People v. Thomas*, *supra*, 53 Cal.4th at p. 1285, italics in original.) Thus, "criminal acts occurring during the commission of a single transaction may be prosecuted in any county *affected by the transaction*, regardless of where the essential elements of any crime involved in such acts occurred." (*People v. Hernandez*, *supra*, 63 Cal.App.3d at p. 403, italics added.)

And "[o]ne who aids and abets in the commission of a crime may be subject to prosecution for that crime in any county having jurisdiction over the offense." (*People v. Beatty* (2018) 21 Cal.App.5th 1273, 1288.) Thus, that an accomplice did the preparatory acts in one county and the

defendant completed the crime in another does not prevent the first county from prosecuting the defendant. (*People v. Beatty*, *supra*, 21 Cal.App.5th at pp. 1288-1295 [Yolo Co. proper venue because that is where defendant aided and abetted drug dealer who sold narcotics to undercover officer in Sacramento Co.]; *People v. Chavarria* (2013) 213 Cal.App.4th 1364, 1370-1371 [Ventura Co. proper jurisdiction because that is where defendant arranged drug sale consummated in Los Angeles Co.].)

"The prosecution has the burden of proving the facts supporting venue by a preponderance of the evidence." (*Thomas*, *supra*, 53 Cal.4th at p. 1283.) " 'On review, a trial court's determination of territorial jurisdiction will be upheld as long as there is "some evidence" to support its holding.' " (*Ibid*.; see also *Beatty*, *supra*, 21 Cal.App.5th at p. 1286; *People v. Chavarria*, *supra*, 213 Cal.App.4th at p. 1369.)

5640.1-California can prosecute interstate crimes 5/20

The State of California's criminal jurisdiction extends to crimes committed "in whole or in part" in the state. (Pen. Code, § 27, subd. (a)(1).) In addition, Penal Code section 778a states: "Whenever a person, with the intent to commit a crime, does any act within this state in execution or part execution or such intent, which culminates in the commission of a crime, either within or without this state, such person is punishable for that crime in this state in the same manner as if the same had been committed entirely within this state."

> California conducts criminal proceedings to enforce its own law and not to enforce the criminal law of other states or the federal government. At common law, criminal territorial jurisdiction was narrow and crimes were viewed as occurring in only one location. That view, however, has given way to a broader more pragmatic concept of territorial jurisdiction. [I]t is clear such extraterritorial jurisdiction is appropriate when the state has some legitimate interest in the criminal conduct involved. Statutes that extend a state's criminal jurisdiction to crimes that culminate beyond its borders " 'are premised on the belief that a state should have jurisdiction over those whose conduct affects persons in the state or an interest of the state, provided it is not unjust under the circumstances to subject the defendant to the laws of the state.' …" (*People v. Betts* (2005) 34 Cal.4th 1039, 1047 … .)

(*People v. Renteria* (2008) 165 Cal.App.4th 1108, 1115-1116.)

In *People v. Betts*, *supra*, 34 Cal.4th 1039, the California Supreme Court interpreted Penal Code section 778a to mean that "California has territorial jurisdiction over an offense if the defendant, with the requisite intent, does a preparatory act in California that is more than a de minimus act toward the eventual completion of the offense." (*Id*. at p. 1047; see also *People v. Morante* (1999) 20 Cal.4th 403, 436.)

> In addition, [Penal Code] sections 27 and 777b through 778b establish territorial jurisdiction for specific types of interstate situations or particular crimes. For example, a person who, acting outside the state, aids, advises, or encourages a person in the state to commit a crime in California can be punished in California in the same manner as if he or she had acted within the state. (§§ 27, subd. (a)(3), 778b.) A person who kidnaps someone in California and takes that victim to another state or country may be punished in California for any crime of violence or theft committed against the kidnap victim in the other state or country. (§ 778a, subd. (b).) Anyone who commits larceny, carjacking, or embezzlement

may be punished in California if the property taken is brought into the state. (§ 27, subd. (a)(2).)

(*People v. Betts*, *supra*, at p. 1046; but see *Fortner v. Superior Court* (2013) 217 Cal.App.4th 1360, 1364-1367 [no evidence connecting separate act of domestic violence in Hawaii to continuing domestic violence in California].) Special rules also apply when liability is based on conspiracy and/or aiding and abetting theories. (See, e.g., *People v. Garton* (2018) 4 Cal.5th 485, 510-515.)

There is no federal constitutional prohibition against states prosecuting such interstate crimes.

> Although the constitutional limits of state courts' extraterritorial jurisdiction in criminal matters have not been precisely delineated, it is clear that states may extend their jurisdiction beyond the narrow limits imposed by the common law. For example, a state may exercise jurisdiction over criminal acts that take place outside of the state if the results of the crime are intended to, and do, cause harm within the state.

(*People v. Betts*, *supra*, 34 Cal.4th at p. 1046.)

5660.1-Change of venue motion should be deferred to jury selection 9/11

The court should defer ruling on the defendant's change of venue motion until the end of jury selection. Voir dire of the venire, specifically the jurors actually selected, often provides the best evidence whether "there is a reasonable likelihood that a fair and impartial trial cannot be held in the county." (Pen. Code, § 1033, subd. (a); see *Maine v. Superior Court* (1968) 68 Cal.2d 375, 380 [it has long been the practice "to permit the trial court to defer its final ruling on a motion for a change of venue until the jury is empaneled"]; see also *People v. Leonard* (2007) 40 Cal.4th 1370, 1396 ["jurors selected to try this case bear out the trial court's conclusion that an unbiased jury could be found"].)

This is particularly true, when an alleged ground for change of venue is exposure of potential jurors to media coverage. In one reported case, change of venue was properly denied because "the jurors' ignorance of the pretrial publicity is a very strong indication that defendant was not tried by a biased jury." (*People v. Salas* (1972) 7 Cal.3d 812, 818-819 ["Eight of the twelve jurors did not recall reading or hearing about the case and the recollection of the remaining four was so dim as to be negligible."].) In another case, "[t]he jury voir dire bore out the trial court's conclusion that a fair jury could be chosen. Each juror assured the trial court that he or she could be unbiased notwithstanding exposure to media reports about the case. (*People v. Lewis* (2008) 43 Cal.4th 415, 450.)

Finally, the jury selection process itself is designed to weed out potential jurors with biases caused by pretrial publicity.

> But the circumstance that most of the actual jurors have prior knowledge of a case does not necessarily require a change of venue. [Citations.] "The relevant question is not whether the community remembered the case, but whether the jurors … had such fixed opinions that they could not judge impartially the guilt of the defendant." [Citation.] Here, all 12 jurors testified under oath that they could put aside outside influences and fairly try the case. Although such assertions of impartiality do not automatically establish that the defendant has received a fair trial, "a review of the entire record of voir dire may still demonstrate that pretrial publicity had no prejudicial effect." [Citation.] Here, our independent review of the record shows that the selection process resulted in a panel of

jurors untainted by the publicity surrounding this case, and we see no evidence that any of them held biases that the selection process failed to detect.

(*People v. Famalaro* (2011) 52 Cal.4th 1, 31.)

5660.2-General standards for change of venue 10/20

"A trial court must order a change of venue for trial of a criminal case to another county on motion of the defendant 'when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be held in the county.' ([Pen. Code] § 1033, subd. (a).)" (*People v. Haye*s (1999) 21 Cal.4th 1211, 1250.) The burden is on the defendant as the moving party to establish a reasonable likelihood that he or she cannot receive a fair and impartial trial in the county where the charges were filed. (*People v. Sanders* (1995) 11 Cal.4th 475, 505-506; *People v. Bonin* (1988) 46 Cal.3d 659, 673.)

The primary factors to be considered by the court in the determination whether a change of venue is required are (1) the nature and gravity of the offense, (2) the nature and extent of media coverage, (3) the size of the community, (4) the community status of the defendant, and (5) the prominence of the victim. (*People v. Rices* (2017) 4 Cal.5th 49, 72; *People v. Famalaro* (2011) 52 Cal.4th 1, 21.) "And while all factors are relevant, no single factor is dispositive." (*People v. Mackey* (2015) 233 Cal.App.4th 32, 75.) Nor should these factors be considered exclusively as, ultimately, the decision is based upon the totality of the circumstances. (*Id*. at pp. 75-76.)

A change of venue motion can be denied if futile. (*People v. Peterson* (2020) 10 Cal.5th 409, 440.) "Precisely because this case was the subject of such widespread media attention, it is unclear what purpose a second change of venue would have served. The publicity the Peterson trial generated, like the trials of O.J. Simpson, the Manson family, and any number of other so-called trials of the century before them, was intrinsic to the *case*, not the *place*." (*Id*., italics in original.)

5660.3-General standards for second change of venue motion 10/20

The test for granting a change of venue is well-established, and applies to a request to change venue a second time:

> A change of venue must be granted when the defendant shows "there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." ([Pen. Code] § 1033, subd. (a).) In deciding an initial motion to change venue, the trial court considers such factors as the nature and gravity of the offense, the size of the community, the status of the defendant, the popularity and prominence of the victim, and the nature and extent of the publicity. (*People v. Ramirez* (2006) 39 Cal.4th 398, 434.) The same factors apply to a motion for a second change of venue, except that "the fact that venue has already been changed once affects the analysis." (*People v. Cooper* [(1991)] 53 Cal.3d [771] at p. 805; *People v. Gallego* (1990) 52 Cal.3d 115, 167.)

(*People v. Davis* (2009) 46 Cal.4th 539, 578; see, e.g., *People v. Peterson* (2020) 10 Cal.5th 409, 438-443.)

5660.4-Change of venue only for most serious crimes 10/14

The nature and gravity of the offense is a prominent factor in deciding whether venue must be changed. "The nature and gravity of the offense are most serious, but those factors do not alone compel a change of venue." (*People v. Avila* (2014) 59 Cal.4th 496, 507.) In *Martinez v. Superior Court* (1981) 29 Cal.3d 574, the California Supreme Court distinguished the nature of a crime from its gravity: "The peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community, define its 'nature'; the term 'gravity' of a crime refers to its seriousness in the law and to the possible consequences to an accused in the event of a guilty verdict." (*Id*. at p. 582; see also *People v. Hamilton* (1989) 48 Cal.3d 1142, 1159.) "But the presence of this factor, standing alone, does not require a change of venue." (*People v. Famalaro* (2011) 52 Cal.4th 1, 22.)

In nearly every reported case involving lesser crimes than murder, change of venue was properly denied. For example, in *People v. Barger* (1974) 40 Cal.App.3d 662, the president of the Hell's Angels was charged with various drug charges. (*Id*. at p. 670.) The defendants were charged with illegal sales of securities in *People v. Murphy* (1973) 35 Cal.App.3d 905. No change of venue was required for an escape charge of an accused murderer in *Fain v. Superior Court* (1970) 2 Cal.3d 46. And in *People v. Blake* (1971) 21 Cal.App.3d 211, battery upon a police officer was held "not as grave as in practically all of the cases in which a change of venue was required." (*Id.* at p. 220.)

5660.5-Change of venue not presumed even in capital murder case 10/20

"Defendant was charged with the most serious of offenses, capital murder, and that fact weighs strongly in favor of a change of venue." (*People v. Balderas* (1985) 41 Cal.3d 144, 177.) But, "every capital case involves a serious charge. While this factor adds weight to a motion to change venue, it does not in itself require a change. [Citations.]" (*People v. Howard* (1992) 1 Cal.4th 1132, 1167.) "Although we have recognized that the gravity of a charge of murder with special circumstances is 'a factor weighing heavily in favor of the defendant' [citation], we have clearly rejected the establishment of a presumption in favor of a venue change in all capital cases. [Citation]." (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1159.) That capital crimes are charged "is not dispositive." (*People v. Farley* (2009) 46 Cal.4th 1053, 1083; see also *People v. Harris* (2013) 57 Cal.4th 804, 825; *People v. Rountree* (2013) 56 Cal.4th 823, 837.) The California Supreme Court has held on numerous occasions that capital defendants can receive fair and impartial trials in the county of commission (*People v. Farley*, *supra*, 46 Cal.4th at p. 1083, citing examples) and cases involving multiple murders (*People v. Doung* (2020) 10 Cal.5th 36, 47-48).

When a defendant's motion for a change of venue is made before the penalty phase retrial, the guilt and special-circumstances issues are no longer before the jury, and therefore "the sole consideration" is "whether the publicity preceding the penalty retrial had predisposed potential jurors toward choosing a death sentence over a sentence of life imprisonment without possibility of parole." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1321, fn. 17.)

5660.6-No change of venue needed from large community 8/21

The size of the community has always been a key factor to be considered in a change of venue motion. Virtually all decisions dealing with change of venue discuss the size of the community. Generally, even aggravated cases which occur and are tried in a large metropolitan area are held to be inappropriate for a change of venue. "A metropolitan setting with its diverse population tends to blunt the penetrating effect of publicity." (*People v. Manson* (1976) 61 Cal.App.3d 102, 190 [Los Angeles County].) "The fact that appellant was tried in a populous county with a heterogeneous and cosmopolitan population in itself is a factor which indicates the possibility of securing jurors unaffected by pretrial publicity." (*People v. Barger* (1979) 97 Cal.App.3d 661, 670 [Alameda County].)

People v. Harris (1981) 28 Cal.3d 935, involved a bank robbery and the senseless and brutal murder of two local teenagers by an ex-felon who had been released from prison a few months earlier for another homicide. Coverage of the crime was massive and continued virtually unabated up to the trial. The shocking details of the crime were well publicized. The confessions of defendant's brother and of defendant himself to his father were widely broadcast. Defendant was often described as a "recidivist psychopath" and a "subhuman type." The outpouring of community grief for the victims' families was overwhelming. The one factor which the California Supreme Court relied upon in upholding the trial court's refusal to order a change of venue was the size and nature of the County of San Diego:

> The community in which this case was tried is quite unlike the communities involved in the cases upon which defendant relies. Of the fifty-eight California counties, San Diego County is third in population and ninth in area. Moreover, the City of San Diego, where the trial took place, is the second largest city in this state. (State of Cal. Statistical Abstract (1979) pp. 1, 9, 12-15.) This is significant because the "adversities of publicity are considerably offset if trial is conducted in a populous metropolitan area." (*People v. Manson* (1976) 61 Cal.App.3d 102, 189, … and cases cited therein.) That the populous metropolitan character of the community dissipated the impact of pretrial publicity in this case was made clear on voir dire.

(*People v. Harris*, *supra*, 28 Cal.3d at p. 949.)

Other case examples abound:

Alameda County—*People v. Welch* (1999) 20 Cal.4th 701, 744; *People v. Mackey* (2015) 233 Cal.App.4th 32, 79-81.

Contra Costa County—*Odle v. Superior Court* (1982) 32 Cal.3d 932, 938-939, 942.

Fresno County—*People v. Jennings* (1991) 53 Cal.3d 334, 363.

Los Angeles County—*People v. Lewis* (2008) 43 Cal.4th 415, 448 ["[T]he crimes occurred in Los Angeles County, 'the largest and most populous in California' (*People v. Williams* (1997) 16 Cal.4th 635, 655), a factor that normally would weigh heavily against a change of venue"]; *People v. Ramirez* (2006) 39 Cal.4th 398, 434.

Marin County—*People v. Sommerhalder* (1973) 9 Cal.3d 290, 304.

Orange County—*People v. Alfaro* (2007) 41 Cal.4th 1277, 1323 ["Defendant's trial was held in Orange County, which, as we previously have observed, is one of the largest counties in population not only in the State of California, but in the entire United States. (*People v. Edwards* (1991) 54 Cal.3d 787, 807; *People v. Douglas* (1990) 50

Cal.3d 468, 495.)"]; see also *People v. Famalaro* (2011) 52 Cal.4th 1, 23.

Riverside—*People v. Hart* (1999) 20 Cal.4th 546, 598-599.

Sacramento County—*People v. Leonard* (2007) 40 Cal.4th 1370, 1396; *People v. Pride* (1992) 3 Cal.4th 195, 224.

San Bernardino County—*Lucero v. Superior Court* (1981) 122 Cal.App.3d 484, 492.

San Diego County—*People v. Prince* (2007) 40 Cal.4th 1179, 1213-1214.

San Mateo County—*People v. Sully* (1991) 53 Cal.3d 1195, 1237.

Santa Clara County—*People v. Farley* (2009) 46 Cal.4th 1053, 1084; *People v. Dennis* (1998) 17 Cal.4th 468, 523.

Sonoma County—*People v. Coleman* (1989) 48 Cal.3d 112, 134 ["Though not one of the state's major population centers, the county is substantially larger than most of the counties from which this court has ordered venue changes"]; see also *People v. Scully* (2021) 11 Cal.5th 542, 574-575.

Tulare County—*People v. Howard* (1992) 1 Cal.4th 1132, 1167; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1158-1159.

Ventura County—*People v. Fauber* (1992) 2 Cal.4th 792, 818.

5660.7-No change of venue needed from small to mid-sized community 4/21

The size of the community in which a criminal defendant is charged is recognized as a key factor is deciding a venue motion. "The size of the community is important because in a small rural community, a major crime is likely to be embedded in the public consciousness more deeply and for a longer time than in a populous urban area." (*People v. Coleman* (1989) 48 Cal.3d 112, 134.)

But, depending on other factors, in smaller or mid-sized communities a change of venue may be unnecessary even in a high profile case. (See, e.g., *People v. Weaver* (2001) 26 Cal.4th 876, 905 - 906 ["The moderate size of Kern County thus does not undermine the trial court's decision to deny the change of venue motion."]; see also *People v. Harris* (2013) 57 Cal.4th 804, 828 [Kern County]; *People v. Rountree* (2013) 56 Cal.4th 823, 839 [also Kern County]; *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1015 [also Kern County]; *People v. Smith* (2015) 61 Cal.4th 18, 40 [Shasta County appx. population 168,000 in 2001]; *People v. Proctor* (1992) 4 Cal.4th 499, 5625-526 [Shasta County, appx. population of 122,000 in 1982]; *People v. Johnigan* (2011) 196 Cal.App.4th 1084, 1100 [Santa Barbara County with more than 400,000 people]; cf. *People v. McCurdy* (2014) 59 Cal.4th 1063, 1078-1079 ["We cannot say the population size of Kings County by itself [about 116,000 at time of trial] compelled a change of venue; it may have at most somewhat favored one."].) "The trial court did not err in denying the motion for change of venue. Neither the publicity nor the small size of the community was reasonably likely to, and neither did, result in a jury pool from which appellant could not select from a number of jurors unaffected by the publicity." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1251 [Santa Cruz County].)

The California Supreme Court noted in *People v. Balderas* (1985) 41 Cal.3d 144: "Cases in which venue changes were granted or ordered on review have usually involved counties with much smaller populations than Kern County, population 405,600." (*Id*. at p. 179.) At that time, the court observed further: "We know of only one case in which an appellate court ordered venue changed from a county more populous than Kern." (*Id.* at p. 179, fn. 14.)

Similarly, the California Supreme Court affirmed the denial of a change of venue in a death penalty case from San Luis Obispo County:

> The record indicates that a few months before jury selection began, San Luis Obispo was a moderately sized county with a total population of almost 200,000. By contrast, motions to change venue have been granted where the county is relatively isolated and small. (See, e.g., *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582 [Placer County, population 106,500]; *People v. Tidwell* (1970) 3 Cal.3d 62, 64 [Lassen County, population 17,500].)

(*People v. Webb* (1993) 6 Cal.4th 494, 514.)

Later, the California Supreme Court affirmed the denial of a change of venue motion in a death penalty case from Stanislaus County, contrasting an earlier decision involving Placer County:

> Of great significance in [*People v. Williams* (1989) 48 Cal.3d 1112] was the size of Placer County, which at the time of trial had a population of 117,000. (*Williams, supra*, 48 Cal.3d at p. 1126.) As noted, Stanislaus County had at the time of trial a population over three times greater, including the city of Modesto with 80,000. The small size of the community in *Williams* was reflected in the fact that over one-third of the number of potential jurors knew people connected to the case, including the victim, members of her family, and the district attorney or investigators, which was not the case here. (*Ibid*., at p. 1130.)

(*People v. Vieira* (2005) 35 Cal.4th 264, 282-283 [population of 370,000 at time of trial]; see also *People v. Johnsen* (2021) 10 Cal.5th 1116, 1148 [population of Stanislaus County had increased to 405,000 at time of trial].)

5660.8-Change of venue most appropriate for outsiders to small community 8/13

When analyzing the need for a change of venue, the defendant's status within the community is more significant in a small rather than a large community.

The defendant in *Young v. Superior Court* (1981) 126 Cal.App.3d 167 was a City of San Luis Obispo police officer accused of soliciting other police officers to commit armed robberies. The defendant's law enforcement status combined with the sensational nature of the case, prompted to the appellate court to order a change of venue. "This case involves allegations of a police officer soliciting other police officers to commit numerous armed robberies. We infer that this case attracted the public's attention in San Luis Obispo County. Police involvement and the bizarre nature of the proposed fly-in robberies make this case unusual and interesting." (*Id*. at p. 170.)

In the typical case requiring a change of venue, however, the defendants are outsiders to a small and usually heterogeneous community. In *Maine v. Superior Court* (1968) 68 Cal.2d 375 and *People v. Tidwell* (1970) 3 Cal.3d 62, the defendants were described as "strangers" to the small communities where the crimes occurred. In *Martinez v. Superior Court* (1981) 29 Cal.3d 574, the defendant was described as a heroin addict and parole violator. In *Frazier v. Superior Court* (1971) 5 Cal.3d 287, the defendant was a member of a "hippie element" despised in that community. A short-time resident in *Fain v. Superior Court* (1970) 2 Cal.3d 46 had not been "integrated" into the small community involved. And, in *Clifton v. Superior Court* (1970) 7 Cal.App.3d 245 the defendant was described as a member of the " 'Death Riders' motorcycle gang."

In contrast to these cases, similar language used to describe a defendant being tried in a populous community has had much less significance. In *People v. Harris* (1981) 28 Cal.3d 935, no change of venue was required even though Harris was portrayed as an ex-felon who had just moved

to San Diego County after release on parole for an earlier homicide. (Similarly, see *People v. Rountree* (2013) 56 Cal.4th 823, 839 [capital case in Kern County committed by "outsiders from Missouri" did not require change of venue]; *People v. Coleman* (1989) 48 Cal.3d 112, 134; *Odle v. Superior Court* (1982) 32 Cal.3d 932, 940.)

5660.9-Change of venue most appropriate if victim prominent 10/14

In a change of venue motion, to be weighed along with the status of the defendant, is the element of popularity and prominence of the victim. The typical change of venue case involves a victim with some suggestion of prominence. (See, e.g., *People v. Williams* (1989) 48 Cal.3d 1112 [member of a prominent family in the community]; *Frazier v. Superior Court* (1971) 5 Cal.3d 287 [a prominent physician, his wife and two sons]; *People v. Tidwell* (1970) 3 Cal.3d 62 [well-known members of one of the oldest families in the community]; *Fain v. Superior Court* (1970) 2 Cal.3d 46 [a popular high school athlete]; *Maine v. Superior Court* (1968) 68 Cal.2d 375 [a popular teenage couple from respected families].) But the fact that a victim, previously unknown to the majority of the community, becomes prominent because of publicity surrounding his or her death, however, does not weigh in favor of a change of venue. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1079; *People v. Webb* (1993) 6 Cal.4th 494, 514-515.)

Nor is change of venue required because the death of victims evokes great sympathy within the community. Sympathy for a victim does not invariably demonstrate antipathy for the defendant. (*Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 385.) "Prospective jurors would have reason to sympathize with the victims and their families wherever the case was tried." (*People v. Pride* (1992) 3 Cal.4th 195, 225; see also *People v. Edwards* (1991) 54 Cal.3d 787, 807-808; *People v. Harris* (1981) 28 Cal.3d 935, 948-949.) "Some degree of juror identification with the victims would occur in any venue. (See *People v. Webb* (1993) 6 Cal.4th 494, 515 ['Any sympathetic features of the case would be apparent wherever it was tried'].)" (*People v. Farley* (2009) 46 Cal.4th 1053, 1084.)

5660.10-Law enforcement victim is not prominent in community 9/11

The fact that a victim, previously unknown to the majority of the community, is a member of law enforcement does not make them a prominent citizen for purposes of a change of venue motion. The California Supreme Court in *People v. Balderas* (1985) 41 Cal.3d 144, rejected defendant's contention that a change of venue should have been ordered by the trial court, noting: "All the victims were law-abiding citizens, and two, the jail guards, worked for law enforcement. However, none was especially prominent in the community. … The offenses against these persons were of vital concern to their families and friends, but nothing in their status was calculated to engender unusual emotion in the community." (*Id.* at p. 179; similarly, see *People v. Cummings* (1993) 4 Cal.4th 1233, 1276 ["Although the victim was a well-liked police officer and his status was emphasized in the news coverage, he was not a prominent person in the community."]; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 944 ["Although the victim was a police officer, apart from that status neither the victim nor defendant was prominent-or notorious-in the community."]; *People v. Johnigan* (2011) 196 Cal.App.4th 1084, 1100 ["Although the victim was well known in the law enforcement and equestrian communities, there is no evidence that her status or prominence in the community at large required a change of venue."].)

5660.11-Factual reporting of crime requires no change of venue 4/21

Change of venue may be appropriate when news coverage surrounding the crime charged is extensive, inflammatory and sensational. (See, e.g., *In re Miller* (1973) 33 Cal.App.3d 1005.) In contrast, a change of venue is properly denied when the media coverage is largely factual and decreases over time. (*People v. Farley* (2009) 46 Cal.4th 1053, 1083; see *Murphy v. Florida* (1975) 421 U.S. 794, 800, fn. 4 [the United States Supreme Court "distinguished largely factual publicity from that which is invidious or inflammatory"]; *Beck v. Washington* (1962) 369 U.S. 541, 556, [the High Court noted that "[e]ven the occasional front-page items were straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness"]; see also *People v. Hart* (1999) 20 Cal.4th 546, 599 [California Supreme Court noted the trial court found the reporting to be neutral, not inflammatory, and insufficient to sway public opinion]; accord *People v. Rountree* (2013) 56 Cal.4th 823, 838.) "Media coverage is not biased or inflammatory simply because it recounts the inherently disturbing circumstances of the case." (*People v. Harris* (2013) 57 Cal.4th 804, 826.)

In addition, as noted above, "the passage of time diminishes the potential prejudice from pretrial publicity." (*People v. Lewis* (2008) 43 Cal.4th 415, 449; see also *People v. Famalaro* (2011) 52 Cal.4th 1, 22 [Three years after heavy media reporting, "[i]t is reasonable to infer that the memories of any prospective jurors who read these newspaper stories or listened to these television reports would have been dimmed by the passage of time."].) In *People v. Jenkins* (2000) 22 Cal.4th 900, for example, the California Supreme Court affirmed the denial of a change of venue motion, reasoning: "Although extensive and sometimes editorial, the bulk of this coverage dated from the time the crime was committed, some two years before the hearing on the motion for change of venue, and all the articles dated from at least 10 months prior to the motion. Such a lapse of time weighs against a change of venue." (*Id*. at p. 944; accord *People v. Johnsen* (2021) 10 Cal.5th 1116, 1147 [most publicity two years before trial].)

Even in a case in which the trial court described the media coverage as "saturation," the California Supreme Court found no error in the denial of a motion for a change of venue. (*People v. Ramirez* (2006) 39 Cal.4th 398, 434-435.) The court noted, among other factors, that the "defendant did not show that the media coverage was unfair or slanted against him or revealed incriminating facts that were not introduced at trial." (*Id*. at p. 434.) "Further, the passage of more than a year from the time of the extensive media coverage served to attenuate any possible prejudice and supports the trial court's denial of the motion for change of venue." (*Ibid*.)

"[E]ven a case with heavy negative press coverage can survive a motion for change of venue if the other factors outweigh its significance … ." (*People v. Mackey* (2015) 233 Cal.App.4th 32, 77.) The risks created by pretrial publicity can be "significantly reduced, if not entirely eliminated, by the court's summoning of a large venire and employment of a targeted and particularly careful jury selection process." (*Id*. at p. 78.)

It is only in extraordinary cases, that the appellate courts find a presumption of prejudice in the community such that jurors' claims that they can be impartial should not be believed. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1086; *People v. Lewis*, *supra*, 43 Cal.4th at p. 450.) The presumption does not arise simply because most members of the jury venire have been exposed to pretrial publicity surrounding the case. (*People v. Prince* (2007) 40 Cal.4th 1179, 1216.) Instead, this "presumption arises only where defendant has made a showing that due process was violated." (*People v. Mackey*, *supra*, 233 Cal.App.4th at p. 86.)

5660.12-Jurors' knowledge of case does not require change of venue 8/13

A change of venue is not required simply because jurors have some knowledge of case or have formed impressions about it. "The relevant question is not whether the community remembered the case, but whether the jurors at [the defendant's] trial had such fixed opinions that they could not judge impartially the guilt of the defendant." (*Patton v. Yount* (1984) 467 U.S. 1025, 1035; see also *People v. Rountree* (2013) 56 Cal.4th 823, 840.) "We must distinguish between mere familiarity with [the defendant] or his past and an actual predisposition against him." (*Murphy v. Florida* (1975) 421 U.S. 794, 800, fn. 4; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1215.)

That only a significant portion of the jury pool is familiar with the case generally does not require a change a venue. In *People v. Johnigan* (2011) 196 Cal.App.4th 1084, for example, defense counsel stated:"The most troubling part is we have almost 30 percent, 28 of 96, … said they formed a preliminary opinion about the case, and they all had unfavorable opinions of Ms. Johnigan and the defense." (*Id*. at p. 1098, fn. 4.) The appellate court upheld the trial court's denial of the motion for change of venue. (*Id*. at p. 1100.)

> The prosecution noted that half of the jury pool "haven't heard anything about the case." This degree of exposure to publicity is lower than that in reported cases in which a change of venue was denied. (See, e.g., *People v. Jennings* (1991) 53 Cal.3d 334, 359 [72 percent of sample recalled the crime, and 31 percent believed the district attorney had a very strong case against the defendant]; *People v. Coleman* (1989) 48 Cal.3d 112, 135 [survey that 46.3 percent of public recalled the crime and 31 percent thought defendant was definitely or probably guilty].)

(*People v. Johnigan*, *supra*, 196 Cal.App.4th at pp. 1098-1099.)

Quoting from *Irvin v. Dowd* (1961) 366 U.S. 717, at page 732, the California Supreme Court maintains:

> "It is not required … that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion of the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any pre-conceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

(*People v. Harris* (1981) 28 Cal.3d 935, 949-950; see also *People v. Davis* (2009) 46 Cal.4th 539, 575; *People v. Howard* (1992) 1 Cal.4th 1132, 1169-1170.)

5660.13-Public opinion polls cannot predict chance of fair trial 10/09

The California Supreme Court in *Maine v. Superior Court* (1968) 68 Cal.2d 375 observed that evidence relevant to a motion for change of venue might include "qualified public opinion surveys." (*Id*. at p. 383.) Actual experience has demonstrated, however, that the techniques and predictions of pollsters conducting such surveys should be viewed with great skepticism.

The fallibility of these surveys was demonstrated by the opinion in *People v. Coleman* (1989) 48 Cal.3d 112, a capital case, in which a well-known pollster showed 31.4% of the populace subject to jury duty felt the defendant was guilty or probably guilty based on pretrial publicity. The

pollster testified there was a substantial likelihood defendant could not obtain a fair trial. But, when actual prospective jurors were examined, only 7.3% (3 of 41) of the prospective jurors were excused for cause, and only *one* prospective juror, or 2.4%, was prejudiced solely from pretrial publicity. (*Id*. at pp. 134-135.) The California Supreme Court concluded: "This record of the voir dire shows that the pretrial publicity was not a barrier to defendant's receiving a fair trial." (*Id.* at p. 136.)

The same kind of discrepancy between pollster's predictions and actual voir dire was noted in *People v. Murtishaw* (1989) 48 Cal.3d 1001. The California Supreme Court also noted a common and misleading technique employed by pollsters by basing their calculations upon a portion of the persons surveyed rather than the entire sample. (*Id*. at p. 1016.) There, the technique inflated an awareness figure that the defendant had previously received the death penalty from 7.7% to 45%. (*Ibid.*)

Similarly, in *People v. Harris* (1981) 28 Cal.3d 935, polls conducted showed an extremely high public awareness of the crime. One pollster testified, " 'this is the highest awareness factor in any of the polls that I have done regarding awareness of a particular alleged crime.' " (*Id.* at p. 972.) Nevertheless, the majority of the California Supreme Court held that "the voir dire clearly indicated pretrial publicity did not have the effect of denying defendant his right to a fair and impartial jury." (*Id.* at p. 950.)

In *People v. Pride* (1992) 3 Cal.4th 195, the pollster's opinion that prospective jurors could not be trusted on voir dire to remember or reveal the extent of their exposure to pretrial publicity was rejected by both the trial court and the California Supreme Court. (*Id.* at pp. 225-226.)

5660.14-Appellate review standards for change of venue issues 4/15

Whether on appeal or pretrial writ petition, the appellate courts in California review the evidence presented to the trial court at a change of venue motion hearing de novo. (*People v. Prince* (2007) 40 Cal.4th 1179, 1213; *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 577; *People v. Mackey* (2015) 233 Cal.App.4th 32, 74 (*Mackey*).)

> … If review is sought by pretrial writ, the appellate court redetermines independently whether it is reasonably likely that the defendant cannot get a fair trial in the county in which the crime occurred. [Citation.] If the issue is not raised until a postconviction appeal, the defendant must show both error and prejudice, specifically: (1) that at the time of the motion it was reasonably likely that a fair trial could not be had in the county; and (2) that it was reasonably likely that a fair trial was not, in fact, had. [Citations.] The phrase "reasonable likelihood" denotes a lesser standard of proof than "more probable than not." (*People v. Vieira* (2005) 35 Cal.4th 264, 279, 25 Cal.Rptr.3d 337 (*Vieira*).)
>
> " 'Of course, the question presented on appeal from a judgment of conviction is necessarily different from that on a petition for writ of mandate. … [¶] … [B]ecause the prejudicial effect of publicity before jury selection is necessarily speculative, it is settled that " 'any doubt as to the necessity of removal … should be resolved in favor of a venue change.' " [Citation.] After trial, any presumption in favor of a venue change is unnecessary, for the matter may then be analyzed in light of the voir dire of the actual, available jury pool and the actual jury panel selected. The question then is whether, in light of the failure to change venue, it is reasonably likely that the defendant in fact received a fair trial. [Citation.] [¶] Whether raised on petition for writ of mandate or on appeal from a

judgment of conviction, however, the standard of review is the same.' " (*Vieira*, *supra*, 35 Cal.4th at p. 279.)

(*Mackey*, *supra*, 233 Cal.App.4th at p. 75; see also *People v. Rountree* (2013) 56 Cal.4th 823, 837; see also *People v. Harris* (2013) 57 Cal.4th 804, 822.) "Although, as noted above, we independently review the court's ultimate determination of the reasonable likelihood of an unfair trial, factual findings of the trial court will be sustained if supported by substantial evidence. [Citations.]" (*Mackey*, *supra*, 233 Cal.App.4th at p. 75.)

In addition:

"Because the existence of unused peremptory challenges strongly indicates defendant's recognition that the selected jury was fair and impartial, the failure of the defense to exhaust all peremptory challenges, without a reasonable explanation, can be a decisive factor, even in close cases, in confirming that the denial of a change of venue was justified." [Citations.] "In the absence of some explanation for counsel's failure to utilize his remaining peremptory challenges, or any objection to the jury as finally composed, we conclude that counsel's inaction signifies his recognition that the jury as selected was fair and impartial." [Citation.]

(*Mackey*, *supra*, 233 Cal.App.4th at p. 91.)

5665.1-Choice of new venue must be in the interest of justice 10/09

"After a motion to change venue is granted, absent an agreement as to the new venue, the parties have a right to an evidentiary hearing to determine where the case should be transferred. [Citations.]" (*People v. Davis* (2009) 46 Cal.4th 539, 574.) After hearing any evidence, the court must make a decision in "the interest of justice" in choosing where the case should be transferred. (*People v. Cooper* (1991) 53 Cal.3d 771, 804-805.) The appellate court will review the trial court's decision for abuse of discretion. (*Ibid*.; see also *People v. Davis*, *supra*, 46 Cal.4th at p. 574.)

"The presence or absence of prejudicial publicity in [a successor county] is one of many facts and circumstances which should be considered by [a] court in the exercise of its discretion to decide where the cause should be transferred." (*McGown v. Superior Court* (1977) 75 Cal.App.3d 648, 653.) Even if the magnitude of pretrial publicity in a successor county may not otherwise merit a change of venue from that county, it may still be large enough to persuade a court not to transfer the case to that county. [Citations.] (*People v. Davis*, *supra*, 46 Cal.4th at p. 574.) But it also must be recognized that regardless of where the case may be moved, media attention often shifts to the new venue. (*Ibid*.)

In addition, even in capital cases, "considerations of relative hardship, and the conservation of judicial resources and public funds, are important factors in deciding between various possible venue sites." (*People v. Cooper*, *supra*, 53 Cal.3d at p. 805.) This may include choosing a new venue site near the original venue site for the convenience of witnesses, attorneys, and interested residents of the original venue site. (*People v. Davis*, *supra*, 46 Cal.4th at p. 574; *People v. Cooper*, *supra*, 53 Cal.3d at p. 805.) The court need not consider, however, whether the new county has socioeconomic characteristics similar to those where the crime was committed. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1280.)

5680.1-Trial court jurisdiction after judgment is limited 7/20

After entry of judgment in a criminal case, the trial court lacks jurisdiction to take any further action in the case, except in limited circumstances. "Subject to limited exceptions, well-established law provides that the trial court is divested of jurisdiction once execution of a sentence has begun." (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923.)

For example, a trial court cannot order post-judgment discovery in a criminal case. "The trial court lacked jurisdiction to order 'free-floating' postjudgment discovery when no criminal proceeding was then pending before it." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1256, superseded in part by Pen. Code § 1054.9, as explained in *In re Steele* (2004) 32 Cal.4th 682, 691.)

> As recently explained in *People v. Ainsworth* (1990) 217 Cal.App.3d 247, "a trial court [lacks authority] to entertain a postjudgment discovery motion which is unrelated to any proceeding then pending before [that] court … ." (P. 251.) As the Court of Appeal noted, "[t]he reason for such lack of authority is simple. As with any other motion, a discovery motion is not an independent right or remedy. It is ancillary to an ongoing action or proceeding. After the judgment has become final, there is nothing pending in the trial court to which a discovery motion may attach." (*Ibid*. … .)

(*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1257.) "Once a criminal proceeding is final in the trial court, that court's subsequent direct jurisdiction over the case is strictly limited by statute and by the appellate remittitur. [Citations.] Nothing remains pending in the trial court to which its discovery authority may attach." (*Ibid*.)

As another example, the trial court has no jurisdiction to entertain a motion to vacate the defendant's sex offender registration requirement when the defendant's conviction is final on appeal, his prison sentence has been served, and he is no longer on parole. (*People v. Picklesimer* (2010) 48 Cal.4th 330, 338.) "Accordingly, the trial court's jurisdiction to issue orders to carry out the judgment did not grant it authority to act on a motion seeking to modify an obligation that was not any part of the judgment." (*Ibid*.)

The trial court also has no "free-floating" power to change a criminal sentence post-judgment.

> "[G]enerally a trial court lacks jurisdiction to resentence a criminal defendant after execution of sentence has begun. [Citations.]" (*People v. Howard* (1997) 16 Cal.4th 1081, 1089; *People v. Karaman* (1992) 4 Cal.4th 335, 344, 347, 350 [court retains power to modify a sentence "at any time prior to execution of the sentence"]; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 455; *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1834-1835.) There are few exceptions to the rule.

(*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1204-1205; see also *People v. Alexander* (2020) 45 Cal.App.5th 341, 344-345; *People v. Dynes* (2018) 20 Cal.App.5th 523, 528; *People v. Antolin* (2017) 9 Cal.App.5th 1176, 1179.) The court also has no jurisdiction to correct fines and fees under Penal Code section 1237.2 after the direct appeal had concluded. (*People v. Torres* (2020) 44 Cal.App.5th 1081, 1088.)

In *People v. Borja* (2002) 95 Cal.App.4th 481, for example, after the defendant's probation term has expired, the trial court modified the previously served jail sentence from 365 to 364 days, so the defendant could avoid deportation. The appellate court overturned this illegal nunc pro tunc order because the original sentence contained neither a clerical, nor a judicial error. (*Id*. at pp. 485-486.) "To permit a court, years after a person has pleaded guilty and the term has been served, to

obtain a retroactive order altering the record in a manner so that the conviction could not be later used, violates that Legislature's clear intent and the rulings of the federal courts that prior convictions be available for future use, including, pursuant to the federal decisions, immigration consequences." (*Id*. at p. 487.)

5680.2-Trial court jurisdiction after notice of appeal is very limited 5/20

"Generally, the filing of a notice of appeal vests jurisdiction in the appellate court and divests the trial court of jurisdiction to make any order affecting the judgment. [Citations.]" (*People v. Espinoza* (2014) 229 Cal.App.4th 1487, 1496.) "Thus, action by the trial court while an appeal is pending is null and void. [Citations.]" (*People v. Alanis* (2008) 158 Cal.App.4th 1467, 1473; see also *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923.) "It is black letter law a trial court loses jurisdiction to vacate its own judgment once a party files a notice of appeal, thus shifting jurisdiction over the cause to the Court of Appeal." (*People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1434; see also *People v. Nelms* (2008) 165 Cal.App.4th 1465, 1471.)

> The filing of a valid notice of appeal transfers jurisdiction of a cause to the appellate court until the issuance of the remittitur. (*People v. Perez* (1979) 23 Cal.3d 545, 554.) Remittitur transfers jurisdiction from the appellate court to the court whose decision was reviewed. (*Gallenkamp v. Superior Court* (1990) 221 Cal.App.3d 1, 12.) "Until remittitur issues, the lower court cannot act upon the reviewing court's decision; remittitur ensures in part that only one court has jurisdiction over the case at any one time." (*Ibid*.) [¶] The trial court had no jurisdiction to retry appellant prior to issuance of the remittitur. (*People v. Sonoqui* (1934) 1 Cal.2d 364, 365-367.)

(*People v. Saunoa* (2006) 139 Cal.App.4th 870, 872.)

> "The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment … by conducting other proceedings that may affect it." [Citation.]

(*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1089; see also *People v. Bilbrey* (2018) 25 Cal.App.5th 764, 771; *People v. Superior Court (Gregory)* (2005) 129 Cal.App.4th 324, 329.)

"Even under the general rule, however, jurisdiction survives where provided by law. [Citation.]" (*People v. Superior Court (Gregory)*, *supra*, 129 Cal.App.4th at p. 329; see also *People v. Bilbrey*, *supra*, 25 Cal.App.5th at p. 771 [Pen. Code, § 1506 governs whether trial court has jurisdiction to act when People appeal the granting of a petition for writ of habeas corpus].) One such exception allows the trial court to vacate a void, but not voidable, judgment. (*People v. Malveaux*, *supra*, 50 Cal.App.4th at p. 1434.) "A judgment is void rather than voidable only if the trial court lacked subject matter jurisdiction." (*Ibid*.) "The trial court also retains jurisdiction to correct clerical errors in the judgment (*People v. Alanis*, *supra*, 158 Cal.App.4th at p. 1473) or to correct an unauthorized sentence (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1424)." (*People v. Nelms*, *supra*, 165 Cal.App.4th at p. 1472; see also *People v. Scarbrough*, *supra*, 240 Cal.App.4th at p. 923.) Another exception permits a court to recall and resentence a defendant under Penal Code section 1170, subdivision (d). (*People v. Nelms*, *supra*, 165 Cal.App.4th at p. 1472; *People v. Lockridge* (1993) 12 Cal.App.4th 1752, 1757; *Portillo v. Superior Court* (1992) 10 Cal.App.4th

1829, 1835-1836; but see *People v. Espinoza*, *supra*, 229 Cal.App.4th at pp. 1496-1500 [trial court cannot reduce degree of murder under Pen. Code, § 1181 while case on appeal].)

In addition, in limited circumstances the trial court may consider setting aside a judgment by way of habeas corpus while the case is pending appeal. "The trial court … has jurisdiction to hear a writ of habeas corpus while an appeal of the challenged judgment is pending, so long as the exercise of that jurisdiction does not ' "interfere with the appellate jurisdiction" ' in the pending matter. (*In re Carpenter* (1995) 9 Cal.4th 634, 645-646; see Cal. Const., art. VI, § 10.)" (*People v. Scarbrough*, *supra*, 240 Cal.App.4th at p. 924; see also *People v. Superior Court (Gregory)*, *supra*, 129 Cal.App.4th at pp. 329-330.)

Finally, even while an appeal is pending, the trial court retains jurisdiction over a probationer, such as to modify the terms of probation or revoke probation for a violation. (See *In re Osslo* (1958) 51 Cal.2d 371, 379-380.)

5680.3-Trial court jurisdiction after appellate decision limited by remittitur 9/21

After an appellate court issues a remittitur jurisdiction over the case reverts to the trial court but only for very limited purposes. "It is well-established that '[t]he order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned.' [Citation.]" (*People v. Ramirez* (2019) 35 Cal.App.5th 55, 64.) "Upon issuance of the remittitur, the trial court's jurisdiction with regard to the 'remitted action' is limited solely to the making of orders necessary to carry the judgment into effect. [Citations.]" (*People v. Ainsworth* (1990) 217 Cal.App.3d 247, 251-252.) But, an "unqualified reversal automatically remands the matter for renewed proceedings and places the parties in the same position as if the matter had never been heard. [Citation.]" (*In re K.W.* (2020) 54 Cal.App.5th 467, 472.)

According to Penal Code section 1265, subdivision (a): "After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect shall be made by the court to which the certificate is remitted. …"

> "The appellate court clerk's issuance of the remittitur effects the transfer of jurisdiction to the lower court. [Citation.] The reviewing 'court has no appellate jurisdiction over its own judgments, and it cannot review or modify them after the cause has once passed from its control by the issuance of the remittitur' [citation], although in very limited circumstances the remittitur may be recalled. [Citation.] At the same time, the terms of the remittitur define the trial court's jurisdiction to act. 'The order of the appellate court as stated in the remittitur, "is decisive of the character of the judgment to which the appellant is entitled." ' " (*Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 774, fn. 5 (*Snukal*); see *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701; *Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982 [directions are "binding on the trial court and *must* be followed. Any material variance … is unauthorized and void"].) [¶] According to the California Supreme Court, the rule requiring a trial court to follow the terms of the remittitur *is jurisdictional,* unlike the law of the case doctrine. (*Snukal, supra,* 23 Cal.4th at p. 774, fn. 5; *Rice* [*v. Schmid* (1944)] 25 Cal.2d [259] 263.) Therefore, whether the trial court believed our decision was right or wrong, or had been impaired by subsequent decisions, it was bound to follow the remittitur. (See also *People v. Lincoln* (2006) 144 Cal.App.4th 1016; *In re Terrance B.* (2006) 144 Cal.App.4th 965.)

(*People v. Dutra* (2006) 145 Cal.App.4th 1359, 1367, original italics.) In other words:

> When there has been a decision on appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void. The judgment directed by the reviewing court is the law of the case and is controlling on the jurisdiction of the trial court. [Citation.]"

(*Stafford v. Municipal Court* (1960) 180 Cal.App.2d 368, 371; accord *People v. Dutra*, *supra*, 145 Cal.App.4th at pp. 1366-1377.)

These principles apply even if there is a subsequent change in the law relied upon by the appellate court. (*People v. Berg* (2019) 34 Cal.App.5th 856, 861 ["a trial court lacks jurisdiction, after an unqualified affirmance, to reconsider the merits of an action, even in the face of a change in the law"]; but see *People v. Ramirez*, *supra*, 35 Cal.App.5th at p. 64 [when case remanded for resentencing, trial court has jurisdiction to reconsider and modify the entire sentencing scheme]; *People v. Hargis* (2019) 33 Cal.App.5th 199, 204-208 [although remand for limited purpose, trial court had jurisdiction to act on unrelated statutory change in law that came into effect before case final on appeal].) These principles apply to writ petition decisions, including habeas corpus actions, in addition to appeals. (*People v. Berg*, *supra*, 34 Cal.App.5th at pp. 861, 874-877.) Thus, an appellate remittitur directing the trial court to conduct a *Franklin* (*People v. Franklin* (2016) 63 Cal.4th 261) hearing years after the case has become final does not undo that finality and give the defendant the benefit of all intervening changes in the law. (*People v. Lizarraga* (2020) 56 Cal.App.5th 201, 206.)

5680.4-Post-judgment nonstatutory motion to vacate conviction limited 9/14

A post-judgment nonstatutory motion to vacate a conviction should not be used as " 'a catch-all by which those convicted may litigate and relitigate the propriety of their conviction *ad infinitum*.' " (*People v. Shokur* (2012) 205 Cal.App.4th 1398, 1404 (*Shokur*), citing *People v. Kim* (2009) 45 Cal.4th 1078, 1094 [writ of error *coram nobis*].) "[A] nonstatutory motion to vacate a plea is the legal equivalent of a petition for a writ of error *coram nobis*; the terms are interchangeable." (*People v. Aguilar* (2014) 227 Cal.App.4th 60, 72-73.) Such a nonstatutory motion affords a defendant no remedy "when relief by way of *coram nobis* is foreclosed as a matter of law, and the other remedies through which he might have obtained relief are no longer available." (*Id*. at p. 73)

> Essentially relying on a triumvirate of cases [citations omitted], defendant contends a nonstatutory motion to set aside the conviction is the proper vehicle in which to challenge his conviction on ineffective assistance of counsel grounds. According to defendant, these cases stand for the proposition the court has inherent authority to hear such a motion. The cases relied upon do not, however, compel the conclusion that the trial court retains jurisdiction to vacate its long-since final judgment when the state provides the means for challenging the judgment and the time limits in which the various remedies must be exercised have expired. In other words, a nonstatutory motion is not an all-encompassing safety net that renders all other remedies redundant and their respective time restrictions meaningless.

(*Shokur*, *supra*, 205 Cal.App.4th at p. 1404.) "It is one thing to say the court has jurisdiction to consider a constitutional claim in a case then pending before it. It is quite another to conclude a

court has jurisdiction to consider a constitutional claim long after its judgment has become final *and* the time limits on the various postjudgment vehicles in which such a constitutional claim may be raised have passed." (*Id*. at pp. 1405-1406, italics in original.)

> Having failed to pursue any of the remedies provided by law, defendant may not now, years later, obtain relief via a nonstatutory motion to vacate the judgment. " 'The maxim, "for every wrong there is a remedy" (Civ. Code, [§] 3523) is not to be regarded as affording a second remedy to a party who has lost the remedy provided by law through failing to invoke it in time—even through such failure accrued without fault or negligence on his part.' [Citations.]" (*People v. Kim*, *supra*, 45 Cal.4th at p. 1099.)

(*Shokur*, *supra*, 205 Cal.App.4th at pp. 1406-1407.)

5680.5-An unauthorized sentence can be corrected at any time 12/19

After entry of judgment in a criminal case, the trial court lacks jurisdiction to take any further action in the case, except in limited circumstances. One such exception applies to an illegal sentence. An unauthorized sentence may be corrected by the trial court at any time. (*People v. Scott* (1994) 9 Cal.4th 331, 354-355; *People v. Allison* (2019) 39 Cal.App.5th 688, 699; *People v. Crooks* (1997) 55 Cal.App.4th 797, 811.)

> "The unauthorized sentence exception is 'a narrow exception' to the waiver doctrine that normally applies where the sentence 'could not lawfully be imposed under any circumstance in the particular case,' for example, 'where the court violates mandatory provisions governing the length of confinement.' [Citations.] The class of nonwaivable claims includes 'obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings.' " (*People v. Brach* (2002) 95 Cal.App.4th 571, 578.) *People v. Smith* (2001) 24 Cal.4th 849 explained, "We deemed appellate intervention appropriate in these cases because the errors presented 'pure questions of law' [citation], and were ' "clear and correctable" independent of any factual issues presented by the record at sentencing.' " (*Id*. at p. 852.) For example, a sentencing court's computational error resulting in an unauthorized sentence can be corrected at any time. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764.) An unauthorized sentence because of an error in restitution must be vacated and the proper sentence imposed whenever the matter is brought to the attention of the trial or reviewing court. (*People v. Zito* (1992) 8 Cal.App.4th 736, 740-742 [restitution for $300,000 violated ex post facto prohibition to the extent victim restitution and the restitution fine exceeded $10,000 maximum set by pre-1990 law and would constitute an unauthorized sentence].)

(*People v. Turrin*, *supra*, 176 Cal.App.4th at p.1205 [trial court lacked jurisdiction to modify restitution fine where issue turned on factual question of defendant's ability to pay]; see also *People v. Nelms*, *supra*, 165 Cal.App.4th at p. 1472; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1424.) The unauthorized post-judgment granting of a motion to recall a felony conviction reducing it to a misdemeanor under Proposition 36 or Proposition 47 can also be corrected at any time. (*People v. Roth* (2017) 17 Cal.App.5th 694, 704-707.)

5680.6-Nunc pro tunc orders only proper to correct clerical, not judicial, error 7/21

After entry of judgment in a criminal case, the trial court lacks jurisdiction to take any further action in the case, except in limited circumstances. Nevertheless, a trial court may correct a clerical error, but not a judicial error, at any time. (*People v. Nelms* (2008) 165 Cal.App.4th 1465, 1472; *People v. Malveaux* (1996) 50 Cal.App.4th 1425, 1434.) "A clerical error is one that is made in recording the judgment; a judicial error is one that is made in rendering the judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *In re Candelario* (1970) 3 Cal.3d 702, 705; see *People v. Borja* (2002) 95 Cal.App.4th 481, 483-485.)" (*People v. Turrin*, *supra*, 176 Cal.App.4th at p. 1205.) The mechanism for making such corrections generally is a nunc pro tunc order.

> " 'A nunc pro tunc order or judgment is one entered as of a time prior to the actual entry, so that it is treated as effective at the earlier date.' " (*In re Marriage of Padgett* (2009) 172 Cal.App.4th 830, 851.) Trial courts have the authority to enter nunc pro tunc orders to address clerical errors, but not judicial errors. (*People v. Kim* (2012) 212 Cal.App.4th 117, 124 (*Kim*).) "The distinction between clerical error and judicial error is 'whether the error was made in rendering the judgment, or in recording the judgment rendered.' " (*In re Candelari*o (1970) 3 Cal.3d 702, 705; see *Kim*, at pp. 123-124; *People v. Borj*a (2002) 95 Cal.App.4th 481, 485 ["a nunc pro tunc order is generally limited to correcting clerical errors; ' "a nunc pro tunc order cannot declare that something was done which was not done." ' "].)

(*Sannmann v. Dept. of Justice* (2020) 47 Cal.App.5th 676, 683 [nunc pro tunc improperly used to retroactively modify the record to reflect conviction of different offense than one to which defendant plead guilty].) Correction of clerical errors, even those discovered by prison authorities, does not give the court jurisdiction to set aside any other part of the judgment or to resentence the defendant. (*People v. Magana* (2021) 63 Cal.App.5th 1120, 1122, 1125-1126.)

5710.1-*Batson-Wheeler* motion standards 3/20

"The [United States] 'Constitution forbids striking even a single prospective juror for a discriminatory purpose' [Citation]" (*Foster v. Chatman* (2016) 578 U.S. 488, 499; see also *Flowers v. Mississippi* (2019) 587 U.S. ___, ___ [139 S.Ct. 2228, 2242, 204 L.Ed.2d 638, 654].) Known in California as the *Batson-Wheeler* rule, "[b]oth the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based on group bias, such as race or ethnicity. (See *Batson v. Kentucky* (1986) 476 U.S. 79, 97; *People v. Wheeler* (1978) 22 Cal.3d 258, 276-277.)" (*People v. Davis* (2009) 46 Cal.4th 539, 582; see also *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157.) "The use of peremptory challenges to exclude prospective jurors based on gender [also] violates both the federal and state Constitutions." (*People v. Dement* (2011) 53 Cal.4th 1, 19.)

"Peremptory challenges are 'designed to be used "for any reason, or no reason at all." ' [Citations.]" (*People v. Armstrong* (2019) 6 Cal.5th 735, 765.) "There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.)

> Procedures governing motions alleging the discriminatory use of peremptory challenges are settled. "First, the defendant must make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral

justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide … whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.)

(*People v. Riccardi* (2012) 54 Cal.4th 758, 786; see also *People v. Williams* (2013) 56 Cal.4th 630, 649; *People v. Dement*, *supra*, 53 Cal.4th at p. 19 [same test for alleged improper exclusion based on gender].) "The defendant has the ultimate burden of persuasion." (*People v. Melendez* (2016) 2 Cal.5th 1, 14.) That burden is to demonstrate that it was more likely than not that the challenge was improperly motivated. (*People v. Armstrong*, *supra*, 6 Cal.5th at p. 766.)

5710.1a-*Batson-Wheeler* step one-prima facie showing 4/20

At step one of the *Batson-Wheeler* analysis the trial court considers the entire record although certain circumstances may be especially relevant to establishing a prima facie case of impermissible discrimination. (*People v. Parker* (2017) 2 Cal.5th 1184, 1211.) "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Johnson v. California* (2005) 545 U.S. 162, 170; see also *People v. Rhodes* (2019) 8 Cal.5th 393, 428.)

> [T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic–their membership in the group–and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention.

(*People v. Wheeler* (1978) 22 Cal.3d 258, 280-281; see also *People v. Reed* (2018) 4 Cal.5th 989, 999-1000.) Appellate courts also recognize that where the record reveals "obvious" non-discriminatory, neutral grounds for the challenge, those reasons can definitively undermine any inference of discrimination. (*People v. Rhodes*, *supra*, 8 Cal.5th at p. 431.)

5710.1b-*Batson-Wheeler* step two-justification 3/20

At step two the party accused of the *Batson-Wheeler* violation:

> … "must provide a ' "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges.' [Citation.] 'The justification need not support a challenge for cause, and even a "trivial" reason, if genuine and neutral, will suffice.' [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." [Citation.] However, "race-based decisions are not constitutionally tolerable." [Citations.]

(*People v. Winbush* (2017) 2 Cal.5th 402, 434 (*Winbush*).) "A juror's prior arrest is an accepted race-neutral reason for peremptory challenge. [Citation] For similar reasons, a juror's negative experience with law enforcement can also be a valid basis for exclusion. [Citations.]" (*Ibid*.) This

can include negative experiences by a relative. (*People v. Bryant* (2019) 40 Cal.App.5th 525, 537-538.) "[M]any cases have held service on a hung jury to be an appropriate, race-neutral reason for excusing a juror … ." (*Winbush*, *supra*, 2 Cal.5th at p. 438; see also *People v. Bryant*, *supra*, 40 Cal.App.5th at pp. 537, 540.) "Skepticism about the fairness of the criminal justice system to indigents and racial minorities has also been recognized as a valid race-neutral ground for excusing a juror." (*Winbush*, *supra*, 2 Cal.5th at p. 439.) "[B]oth the inability to follow the law and a belief that the criminal justice system is flawed are valid, race-neutral reasons for exercising a peremptory challenge." (*People v. Smith* (2019) 32 Cal.App.5th 860, 873.)

5710.1c-*Batson-Wheeler* step three-credibility 9/21

As to the third step of the *Batson-Wheeler* analysis:

> "[T]he critical question in determining whether a prisoner has proved purposeful discrimination" at a third-stage inquiry "is the persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, 'implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.' [Citation.] In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (*Miller-El v. Cockrell* (2003) 537 U.S. 322, 338-339 (*Miller-El I*), quoting *Purkett v. Elem* (1995) 514 U.S. 765, 768.) " 'In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." ' " (*Miller-El I*, *supra*, at p. 339, quoting [*Wainwright v.*] *Witt* [(1985)] 469 U.S. [412] at p. 428.)
>
> Accordingly, because the trial court is "well positioned" to ascertain the credibility of the prosecutor's explanations and a reviewing court only has transcripts at its disposal, on appeal " 'the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal' and will not be overturned unless clearly erroneous." (*Miller-El I*, *supra*, 537 U.S. at pp. 339, 340, quoting *Hernandez v. New York* (1991) 500 U.S. 352, 364.)
>
> Finally, given that we are engaging in a third-stage inquiry, we will examine defendant's claim that a comparative juror analysis shows that the prosecutor's stated reasons for striking the African-American prospective jurors were pretextual because non-African-American prospective jurors were not challenged for similar reasons. ([*People v.*] *Lenix* [(2008)] 44 Cal.4th [602] at p. 622.) … [I]f the record permits such comparisons, they can provide useful " 'circumstantial evidence' " in determining "the legitimacy of a party's explanation for exercising a peremptory challenge." ([*People v.*] *Mills* [(2010)] 48 Cal.4th [158] at p. 177,

(*People v. Riccardi* (2012) 54 Cal.4th 758, 787-788; but see *People v. Henderson* (2020) 46 Cal.App.5th 533, 559 [comparative analysis has inherent limitation on appeal if not raised in trial court and opponent given opportunity to explain other challenges].) Note, however, "comparative

juror analysis is but one form of circumstantial evidence that is relevant, but not necessarily dispositive, on the issue of intentional discrimination." (*People v. Lenix*, *supra*, 44 Cal.4th at p. 622; see also *People v. Miles* (2020) 9 Cal.5th 513, 543; *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1174; *People v. O'Malley* (2016) 62 Cal.4th 944, 975-976.) Other facts suggesting the genuineness of the non-discriminatory explanation for a challenge are whether the attorney asked focused questions of the juror regarding this topic area and whether other members of the cognizable group were not challenged by the attorney. (See, e.g., *People v. Krebs* (2019) 8 Cal.5th 265, 291-293; distinguish *People v. Collins* (2021) 60 Cal.App.5th 540, 546-555 [prosecutor did not ask same meaningful follow-up questions of challenged black female prospective juror that were asked of other potential jurors with similar answers and explanation given by prosecutor as well as other reasons hypothesized by judge were not supported by record].)

Finally, "when the prosecutor's explanation for the challenge is 'both inherently plausible and supported by the record,' the trial court need not make detailed findings. (People v. Silva (2001) 25 Cal.4th 345, 385-386.)" (*People v. Roberts* (2021) 65 Cal.App.5th 469, 476.)

5710.2-Court can impose reasonable limits on voir dire 8/19

"There is no constitutional right to voir dire per se. Nor is there any constitutional right to conduct voir dire in a particular manner. [Citation.] Rather, the voir dire process serves as a means of implementing the defendant's Sixth Amendment right to an impartial jury. [Citations.]" (*People v. Contreras* (2013) 58 Cal.4th 123, 143 (*Contreras*); see also *People v. Landry* (2016) 2 Cal.5th 52, 83.) The trial court has considerable discretion to contain voir dire of potential jurors within reasonable limits. (*People v. Rices* (2017) 4 Cal.5th 49, 78; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1120; *People v. Jennings* (2000) 22 Cal.4th 900, 990.) "Indeed, [the court] 'has a duty to restrict voir dire within reasonable bounds to expedite the trial.' (*People v. Avila* (2006) 38 Cal.4th 491, 536.)" (*People v. Bell* (2019) 7 Cal.5th 70, 91, italics omitted.)

Code of Civil Procedure section 223 (§ 223) sets forth the basic rules for conducting voir dire in criminal cases in California. The initial voir dire should be conducted by the judge although the parties may submit additional questions to be asked. (§ 223, subd. (a).) The parties may then question the prospective jurors

> The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion subject to the provisions of this chapter. During any examination conducted by counsel for the parties, the trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case or the parties before the court.

(§ 223, subd. (b)(1).)

> The trial judge shall not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire. As voir dire proceeds, the trial judge shall permit supplemental time for questioning based on individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case.

(§ 223, subd. (b)(2).) The judge's discretion should take into account an number of factors listed in the statue. (§ 223, subd. (c).)

"Consistent with applicable statutory law [Code Civ. Proc., § 223], the trial court has wide latitude to decide the questions to be asked on voir dire (*People v. Rogers* (2009) 46 Cal.4th 1136, 1149), and to select the format in which such questioning occurs. (See [*People v.*] *Stitely* [(2005)] 35 Cal.4th 514, 536-539.)" (*Contreras*, *supra*, 58 Cal.4th at p. 143, fn. omitted.)

"Trial court judges should closely follow the language and formulae for voir dire recommended by the Judicial Council in the Standards [for Judicial Administration] to ensure that all appropriate areas of inquiry are covered in an appropriate manner." (*People v. Holt* (1997) 15 Cal.4th 619, 661.) But the voir dire questions set forth in the Judicial Council's Standards for Judicial Administration "are only 'recommended,' not mandatory for trial courts to follow in every detail." (*People v. Asbury* (2016) 4 Cal.App.5th 1222, 1230.) On request, however, a trial court should question on racial bias in cases involving interracial defendants and victims. (*Id*. at pp. 1230-1231, citing *Turner v. Murray* (1986) 476 U.S. 28, 36-37, and *People v. Bolden* (2002) 29 Cal.4th 515, 539.) "Whether the prospective jurors are required to complete a written questionnaire is a matter within the trial court's discretion. [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 168; see also *People v. Leeds* (2015) 240 Cal.App.4th 822, 836.)

The trial court is encourages to give a brief overview of the facts of the case and charges made against the defendant before conducting voir dire. (*People v. Sorrels* (2012) 208 Cal.App.4th 1155, 1164.) And "[t]o facilitate the intelligent exercise of both peremptory challenges and those for cause, parties may inform prospective jurors of the general facts of the case." (*People v. Ochoa* (2001) 26 Cal.4th 398, 431.)

As noted, section 223 permits the trial court to set time limits on each party's voir dire. "Although it is impossible to state an absolute rule regarding the minimum amount of time a trial court must provide for voir dire, it would be a better practice, at least when allowing a relatively short time for voir dire, to establish only a presumptive time limit and allow additional questioning upon a showing of good cause." (*People v. Asbury*, *supra*, 4 Cal.App.5th at p. 1229, fn. 7 [20 minute total time per side "not perfect" but also "not sufficiently flawed to require reversal" when accompanied by written questionnaire and follow-up questions by the judge].)

5710.3-Voir dire should not be used for an improper purpose 4/20

"During any [voir dire] examination [of prospective jurors] conducted by counsel for the parties, the trial judge shall permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case or the parties before the court." (Code Civ. Proc., § 223, subd. (b)(1).)" "To facilitate the intelligent exercise of both peremptory challenges and those for cause, parties may inform prospective jurors of the general facts of the case." (*People v. Ochoa* (2001) 26 Cal.4th 398, 431.) But the judge should not permit an improper question, defined as a question which has "as its dominant purpose, attempts to precondition the prospective jurors to a particular result or indoctrinate the jury." (Code Civ. Proc., § 223, subd. (b)(3).) Within these statutory parameters, however, a "trial court has ' "wide latitude" ' in the conduct of voir dire, including with respect to questions to be asked and their format" (*People v. Hoyt* (2020) 8 Cal.5th 892, 915.)

The function of the examination of prospective jurors is not to educate the jury panel to the particular facts of the case, to invite prospective jurors to prejudge the case, to compel the such jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law. (*People v.*

Hoyt, *supra*, 8 Cal.5th at p. 915; *People v. Landry* (2016) 2 Cal.5th 52, 83.) "Such activities are taken care of by other phases of the trial, such as opening statements of counsel, presentation of proof, final arguments of counsel, and instruction in the law by the court. [Citations.]" (*Rousseau v. West Coast House Movers* (1967) 256 Cal.App.2d 878, 882.)

> [I]nsofar as defense counsel's questions sought to ascertain the prospective jurors' views as to hypothetical cases not before the court, they were improper and the court acted within its discretion in prohibiting such questioning.[Citation.] Insofar as counsel's questions sought to commit a prospective juror to vote in a certain way given a particular set of facts, the questions similarly were improper. [Citation.]

(*People v. Carter* (2005) 36 Cal.4th 1114, 1178.)

5710.4-Strong showing required for defense to get extra peremptory challenges 5/19

The number of peremptory challenges allowed a party in a criminal case depends on the penalty for the offense(s) charged, and the number of defendants, but the number of offenses is immaterial. (Code Civ. Proc., § 231.) When there is one defendant the People and the defendant receive an equal number of peremptory challenges. When two or more defendants are jointly tried all defendants receive a certain number of challenges that must be exercised jointly by mutual agreement, then each defendant is entitled to a certain number of additional challenges which may be exercised separately according to each defendant's individual discretion, and, finally, the People are entitled to additional challenges equal to the total number of peremptory challenges allowed all defendants. (Code Civ. Proc., § 231.)

A strong showing is required for a criminal defendant to justify obtaining additional peremptory challenges. To establish the constitutional entitlement to additional peremptory during jury selection a criminal defendant must show, at the very least, that in the absence of such additional challenges he or she is reasonably likely to receive an unfair trial before a biased jury. (*People v. Westerfield* (2019) 6 Cal.5th 632, 673; *People v. Avila* (2014) 59 Cal.4th 496, 513; *People v. Bonin* (1988) 46 Cal.3d 659, 679.)

5710.5-Appellate review standards for voir dire restrictions 2/17

"We review the trial court's procedure for questioning prospective jurors for abuse of discretion and will not reverse absent a miscarriage of justice. (Code Civ. Proc., § 223; *People v. Tafoya* (2007) 42 Cal.4th 147, 168.) 'Discretion is abused when the questioning is not reasonably sufficient to test prospective jurors for bias or partiality.' (*People v. Tafoya*, *supra*, at p. 168.)" (*People v. Leeds* (2015) 240 Cal.App.4th 822, 835-836; see also *People v. Chapman* (1993) 15 Cal.App.4th 136, 141-142 [reversed for failure to ask potential jurors about their attitudes regarding defendant's prior felony conviction].) Unless the voir dire "is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal." (*People v. Holt* (1997) 15 Cal.4th 619, 661; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 654; *People v. Bolden* (2002) 29 Cal.4th 515, 538; see also *People v. Asbury* (2016)4 Cal.App.5th 1222, 1230.)

5720.1-Defendant must show systematic exclusion of cognizable class 3/21

Both the Sixth Amendment to the federal Constitution and Article I, section 16 of the California Constitution guarantee the right to a jury drawn from a representative cross-section of the community. (*Duren v. Missouri* (1979) 439 U.S. 357, 359 (*Duren*); *People v. Burgener* (2003) 29 Cal.4th 833, 855.) This includes grand jurors. (*Castaneda v. Partida* (1977) 430 U.S. 482; *People v. Romero* (2012) 204 Cal.App.4th 704, 713-714.) " 'That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community. [Citation.]' " (*People v. Burgener*, *supra*, at p. 856; see also *People v. Ramirez* (2006) 39 Cal.4th 398, 444.) But, "[i]t is well settled that no litigant has the right to a jury that mirrors the demographic composition of the population, or necessarily includes members of his own group, or indeed is composed of any particular individuals." (*Williams v. Superior Court* (1989) 49 Cal.3d 736, 741.)

A violation of the requirement that a jury be drawn from a fair cross-section of the population is established by showing "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the selection process." (*Duren*, *supra*, 439 U.S. at p. 364; see also *People v. Henriquez* (2017) 4 Cal.5th 1, 19.)

The initial burden is upon the defense to establish a prima facie violation of the fair cross-section requirement. To make this showing, the defense must establish each of the three prongs of the *Duren* test. (*Duren*, *supra*, 439 U.S. at p. 364; see also *People v. Horton* (1995) 11 Cal.4th 1068, 1088; *People v. Howard* (1992) 1 Cal.4th 1132, 1159.) The level of proof necessary to establish this burden depends upon whether the defense is challenging a jury pool or is merely seeking an order for discovery to uncover evidence for making such a challenge.

> In order to investigate whether the court has failed to draw a jury from a representative cross-section of the community, we have recognized that a defendant has certain rights to discovery. In such a circumstance, "we consider not whether defendant has made a prima facie case [of underrepresentation], but the prior question of whether defendant was wrongly denied the discovery of information necessary to make such a case." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1194.) Accordingly, instead of making a prima facie case of underrepresentation, a defendant need only make "a particularized showing supporting a *reasonable belief* that underrepresentation in the jury pool or the venire exists as the result of practices of systematic exclusion." (*Ibid*., italics added.) Upon such a showing, "the court must make a reasonable effort to accommodate the defendant's relevant requests for information designed to verify the existence of such underrepresentation and document its nature and extent." (*Ibid*.)

(*People v. Lucas* (2014) 60 Cal.4th 153, 255; see also *Alfaro v. Superior Court* (2020) 58 Cal.App.5th 371, 380 [test for obtaining discovery of juror's names and zip codes].)

If and when a defendant is able to show a prima facie violation under the *Duren* test, the burden then shifts to the state to rebut defendant's prima facie case. This may be done by showing through more precise statistics that no constitutional disparity exists, or that there is a compelling justification for the procedures resulting in the disparity. (*People v. Horton*, *supra*, 11 Cal.4th at p. 1088; *People v. Sanders* (1990) 51 Cal.3d 471, 491.) It can also be shown by evidence that the

process of recruiting potential jurors included "motivations and methods" to increase diversity of the jury pool. (*People v. Garcia* (2011) 52 Cal.4th 706, 738-739.)

5720.2-Only classes based on race, gender or religion cognizable 12/14

The first element of the tripartite test established in *Duren v. Missouri* (1979) 439 U.S. 357, is that the defense must establish the existence of a distinctive or cognizable group. (*Id*. at p. 364.) To qualify an asserted group as cognizable for purposes of the representative cross-section rule, two requirements must be met.

> First, its members must share a common perspective arising from their life experience in the group, i.e., a perspective gained precisely *because* they are members of that group. It is not enough to find a characteristic possessed by some persons in the community but not by others; the characteristic must also impart to its possessors a common social or psychological outlook on human events. … [¶] … [Second, t]he party seeking to prove a violation of the representative cross-section rule must also show that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded.

(*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98, italics added; similarly, see *People v. Harris* (1989) 47 Cal.3d 1047, 1077.)

Groups defined by factors such as race, gender, or religion are clearly cognizable classes for Sixth Amendment purposes. (*People v. Garcia* (2011) 52 Cal.4th 706, 736; *People v. Fields* (1983) 35 Cal.3d 329, 347.) But the appellate courts repeatedly have refused to recognize socially and economically based groups as cognizable, including young people, youths, young adults, or persons aged 18-28 (*People v. Lucas* (2014) 60 Cal.4th 153, 256; *People v. Lewis* (2008) 43 Cal.4th 415, 482; *People v. Marbley* (1986) 181 Cal.App.3d 45, 47-48; *People v. Estrada* (1979) 93 Cal.App.3d 76, 93), persons over 70 years old (*People v. Carrington* (2009) 47 Cal.4th 145, 178; *People v. McCoy* (1995) 40 Cal.App.4th 778, 783-786), hearing impaired (*People v. Fauber* (1992) 2 Cal.4th 792, 817), low income people (*People v. Pride* (1992) 3 Cal.4th 195, 227; *People v. Burgener* (2003) 29 Cal.4th 833, 856; *People v. Johnson* (1989) 47 Cal.3d 1194, 1214), blue-collar workers (*People v. Estrada*, *supra*, at pp. 90-92), the less educated (*Estrada*, *supra*), persons who have been residents for less than a year (*Adams v. Superior Court* (1974) 12 Cal.3d 55), resident aliens (*People v. Beeler* (1995) 9 Cal.4th 953, 998; *People v. Karis* (1988) 46 Cal.3d 612, 631-634; *Rubio v. Superior Court*, *supra*, 24 Cal.3d at pp. 98-100), ex-felons (*People v. Karis*, *supra*; *Rubio v. Superior Court*, *supra*), and persons who are unalterably opposed to the death penalty (*Lockhart v. McCree* (1986) 476 U.S. 162). Nor do "persons of color" from different races and ethnic groups form a cognizable group. (*People v. Neuman* (2009) 176 Cal.App.4th 571, 578-579.)

5720.3-Disparity in representation of group in jury pool must be substantial 5/20

Under the second element of the tripartite test established in *Duren v. Missouri* (1979) 439 U.S. 357, the defendant must show that the group's representation is not fair and reasonable in relation to their numbers in the community. (*Id*. at p. 364.) "The relevant 'community' for cross-section purposes is the judicial district in which the case is tried," which in California means the county. (*People v. Horton* (1995) 11 Cal.4th 1068, 1088; see also *People v. Romero* (2012) 204 Cal.App.4th 704, 714.) And the comparison must be drawn between the cross-section of the community and the jury "pool" rather than the panel. (*Batson v. Kentucky* (1986) 476 U.S. 79, 85;

Apodaca v. Oregon (1972) 406 U.S. 404, 413; *Williams v. Superior Court* (1989) 49 Cal.3d. 736, 741.) Thus, in *People v. Morales* (1989) 48 Cal.3d 527, the California Supreme Court rejected a jury pool challenge because the showing was based upon an inadequate sample. The showing, which involved two consecutive jury panels, was held to be too small and too short in duration. (*Id.* at p. 548.)

The California Supreme Court has recognized the importance of using *jury eligible* statistics for comparison. In *People v. Bell* (1989) 49 Cal.3d 502 (*Bell*) the court observed that "… gross statistical disparities have little probative value in establishing a prima facie pattern or practice of discrimination." (*Id*. at p. 529.) Thus, "[i]n cases tried hereafter, however, a defendant who has access to census or other demographic data that reflect adult population figures must base his challenge on that data." (*Id.* at p. 526, fn. 12.) Additionally, "[w]here a defendant has access to census or other demographic data that reflect the percentage of the relevant group who are *adult* and thus *presumptively jury eligible*, there is no reason why he should not base his jury challenge on that data." (*Ibid*., italics in original.)

The appellate courts have never equated a "statistically significant" disparity with a disparity in the representation of a cognizable group within the meaning of the Sixth Amendment. In *Bell*, *supra*, 49 Cal.3d 502, the California Supreme Court discussed at length the appropriate statistical tests that should be used to successfully make out a prima facie fair cross-section violation. The court distinguished between the "absolute disparity" test, which is the simple numerical difference between the percentage a group represents in the community and in the jury pool, and the "comparative disparity" test, which shows the relative difference between the two. For example, the absolute disparity between a group making up 30 percent in the community and 20 percent in the jury pool is 10 percent; but their comparative disparity is 33 percent. Noting that many federal courts have approved the absolute disparity test as the test of choice, the court in *Bell* said that use of more "complex tests" such as the statistical significance test or comparative disparity test "… has been criticized as distorting the proportional representation when the group allegedly excluded is very small." (*Bell, supra*, at p. 527, fn. 14; see also *People v. Breaux* (1991) 1 Cal.4th 281, 297, fn. 3.)

Neither the United States Supreme Court nor the California Supreme Court has spoken definitively on the constitutional limit of permissible disparity. (*People v. Henriquez* (2017) 4 Cal.5th 1, 19-20; *People v. Garcia* (2011) 52 Cal.4th 706, 736.) But, in *People v. Burgener* (2003) 29 Cal.4th 833, 856, the California Supreme Court observed that it was "uncertain" whether an absolute disparity of 10.7 percent, which produced a relative disparity of 65 percent, was sufficient to satisfy the second prong of the *Duren* test. The same court indicated that an absolute disparities of 11.49 percent and under are likely constitutionally insignificant. (*Bell*, *supra*, 49 Cal.3d at p. 528, fn. 15.) In *People v. Sanders* (1990) 51 Cal.3d 471, the court turned aside a challenge where the evidence showed an absolute disparity of 8.3 percent, and a comparative disparity of 49 percent, in the representation of Hispanics on the jury. (*Id.* at pp. 489-492.) Similarly, in *People v. Ramirez* (2006) 39 Cal.4th 398, the court held "[t]he trial court in the present case was correct that the 3.5 percent absolute disparity and 20 percent relative disparity between the percentage of Hispanics who appeared for jury service and the percentage of Hispanics in the area within 20 miles of the courthouse was not constitutionally significant." (*Id*. at p. 446.)

5720.4-Defense must show disparity is due to systematic exclusion 10/15

The burden imposed by the third prong of the *Duren v. Missouri* (1979) 439 U.S. 357 (*Duren*) test—showing that the under-representation of a cognizable class is due to systematic exclusion—cannot be discharged by the bare showing of statistical disparity. The defense must show that the disparity is the result of an improper feature of the jury selection process. (*People v. Burgener* (2003) 29 Cal.4th 833, 857; *People v. Horton* (1995) 11 Cal.4th 1068, 1088; *People v. Romero* (2012) 204 Cal.App.4th 704, 714.) In *Duren*, for example, Missouri law automatically exempted all women from jury duty on their request. The underrepresentation of women on Missouri state juries was the immediate and direct result of the state's exemption policy. (*Duren*, *supra*, 439 U.S. at pp. 367-368; similarly, see *Taylor v. Louisiana* (1975) 419 U.S. 522, 524.) Other successful challenges in the federal courts uniformly show both the cause of the underrepresentation and its unconstitutional nature. (*Castenada v. Partida* (1977) 430 U.S. 482, 511 ["key man" system not racially neutral]; *Turner v. Fouche* (1969) 396 U.S. 346, 359 [blacks disproportionately excluded for lack of "intelligence" or "uprightness"]; *Whitus v. Georgia* (1966) 385 U.S. 545, 546 [names taken from segregated tax books]; and *Sims v. Georgia* (1967) 389 U.S. 404 [same].)

But a prima facie case of systematic exclusion of an underrepresented group cannot be proven simply by an "inference that a constitutional defect is inherent in the selection process." (*People v. Bell* (1989) 49 Cal.3d 502, 528 (*Bell*).)

> Were statistical evidence of recurring disparity alone adequate to establish a prima facie violation of the cross-section guaranty, the third prong of the *Duren* test would be surplusage. By including as an element of a prima facie case a demonstration that the disparity is caused by "systematic exclusion" of members of the underrepresented group, the Supreme Court clearly intended to require more.

(*Id*. at p. 529.) Thus, when the selection criteria are neutral with respect to race, ethnicity, sex, and religion, more than mere statistics are required to shift the burden of justification to the People. (*Id*. at p. 524; see also *People v. Burney* (2009) 47 Cal.4th 203, 227; *People v. Howard* (1992) 1 Cal.4th 1132, 1160.) "The defendant must identify some aspect of the manner in which those grand jury selection criteria are being applied that is: (1) the probable cause of the disparity, and (2) constitutionally impermissible." (*Bell*, *supra*, 49 Cal.3d at p. 524.)

Evidence that a neutral jury selection process nonetheless operates to permit the de facto exclusion of a higher percentage of a particular class of jurors than would occur in a random draw is insufficient to make out a prima facie case. (*People v. Morales* (1989) 48 Cal.3d 527, 546; see also *People v. Sanders* (1990) 51 Cal.3d 471, 492-493.) Thus, systematic exclusion is not demonstrated by the even-handed application of a neutral criterion, such as hardship (*People v. Burgener*, *supra*, 29 Cal.4th at p. 857, *Bell*, *supra*, 49 Cal.3d at pp. 530-531) or simply failure to respond to jury summons (*People v. Lucas* (2014) 60 Cal.4th 153, 258). In *People v. Breaux* (1991) 1 Cal.4th 281, for example, the California Supreme Court held that a demonstration that the disparity in the number of Hispanics appearing for jury duty could not have been due to chance, and the speculation of a defense expert that the disparity was due to the selection process, was inadequate to satisfy the third prong of *Duren*. (*Id.* at p. 298; see also *People v. Horton*, *supra*, 11 Cal.4th at 1089-1090.)

"The Sixth Amendment forbids the *exclusion* of members of a cognizable class of jurors, but it does not require that venires created by a neutral selection procedure be supplemented to achieve the goal of selection from a representative cross-section of the population. [Citation.]" (*Bell*, *supra*, 49 Cal.3d at p. 530, italics in original.) So long as the county uses criteria that are neutral with

respect to the underrepresented group, the county's failure to adopt other measures to increase the group's representation is not relevant under *Duren*'s third prong. (*People v. Ochoa* (2001) 26 Cal.4th 398, 427-428; see also *People v. Currie* (2001) 87 Cal.App.4th 225, 235-237.)

5720.5-Underrepresentation challenge to grand jury 6/20

Underrepresentation of minority groups on a grand jury implicates both the Sixth and Fourteenth Amendments to the federal Constitution. Whether there is a Sixth Amendment violation is determined by the three-part test set forth in *Duren v. Missouri* (1979) 439 U.S. 357, 359 (*Duren*). (*Castaneda v. Partida* (1977) 430 U.S. 482; *People v. Romero* (2012) 204 Cal.App.4th 704, 714 (*Romero*).) A violation of the Sixth Amendment requirement that a grand jury be drawn from a fair cross-section of the population is established by showing "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the selection process." (*Duren*, *supra*, 439 U.S. at p. 364; see also *People v. Carrington* (2009) 47 Cal.4th 145, 177; *Romero*, *supra*, 204 Cal.App.4th at p. 714.)

The test under the Fourteenth Amendment is slightly different.

> To make a prima facie showing that underrepresentation of a minority group on the grand jury violates a defendant's Fourteenth Amendment right to equal protection, he must: "(1) show that the excluded group is a cognizable class; (2) demonstrate a degree of underrepresentation given the proportion of the excluded group in the total population compared to the proportion called to serve as grand jurors over a significant period of time; and (3) show that the selection procedure is susceptible of abuse or is not racially neutral to bolster the presumption of discrimination raised by the statistical disparity. (*Castaneda v. Partida* [(1977)] 430 U.S. [482,] 494-495.)" (*People v. Brown* (1999) 75 Cal.App.4th 916, 924; see *People v. Garcia* (2011) 52 Cal.4th 706, 738-739.)

(*Romero*, *supra*, 204 Cal.App.4th at p. 714-715.) After rejecting the defense's Sixth Amendment claim of underrepresentation of minorities on the grand jury, the appellate court in *Romero* also rejected the defense's Fourteenth Amendment claim.

> Similarly, the Fourteenth Amendment claim is a nonstarter because, as in a recent California Supreme Court case, "nothing in [the] rules or procedures authorized, encouraged, or established that the judges nominated grand jurors in a manner that discriminated against [Hispanics and Asian-Americans]." (*People v. Garcia* [(2011)] 52 Cal.4th [706] at p. 738.) There is ample evidence in the record of nondiscriminatory motivations and methods of the superior court and its officers. (*Id*. at p. 739.)

(*Romero*, *supra*, 204 Cal.App.4th at p. 722.)

5720.6-Compiling jury pool lists from DMV and voter registration data approved 5/20

A standard method of compiling a master jury list is to merge non-duplicate names from voter registration lists and Department of Motor Vehicle driver's license and identification card records. The California Supreme Court has held such a list " 'shall be considered inclusive of a representative cross-section of the population' where it is properly nonduplicative." (*People v. Ochoa* (2001) 26 Cal.4th 398, 427; see also *People v. Cunningham* (2015) 61 Cal.4th 609, 652-653;

see, e.g., Code Civ. Proc., § 197.) Examining testimony regarding the jury summons system in San Diego County by the coordinator of jury services, the court explained:

> [E]very year the jury commissioner's office compiles the names of all registered voters and persons with a California driver's license or identification card onto a source list, which contains 2.5 million people. The county then uses a "sophisticated random sampling" technique to draw names from the source list to create a master list of 350,000 people, from which in turn individuals are summoned via a "second sophisticated random sampling" to form a venire. [¶] The foregoing method does not discriminate on the basis of ethnicity or national origin. [Citation.] Hence, defendant has not shown that the jury selection process contained an "improper feature" [Citation.]

(*People v. Ayala* (2000) 23 Cal.4th 225, 256 -257.)

5730.1-Propriety of allow jury view governed by PC1119 10/14

Penal Code section 1119 states in pertinent part that, "[w]hen, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body … to the place, or to the property, which must be shown to them by a person appointed by the court for that purpose . …" The trial court has wide discretion regarding a request for a jury view. (*People v. Jones* (2011) 51 Cal.4th 346, 378; *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1375.)

> The standard of review for a trial court's decision to grant or deny a request for a jury view is abuse of discretion. [Citation.] When the purpose of the view is to test the veracity of a witness's testimony about observations the witness made, the trial court may properly consider whether the conditions for the jury view will be substantially the same as those under which the witness made the observations, whether there are other means of testing the veracity of the witness's testimony, and practical difficulties in conducting a jury view.

(*People v. Price* (1991) 1 Cal.4th 324, 422; see also *People v. Jones*, *supra*, 51 Cal.4th at p. 378; *People v. Russell* (2010) 50 Cal.4th 1228, 1247; *People v. Guillen* 92014) 227 Cal.App.4th 934, 1022.)

5740.1-Court can declare mistrial if jury at impasse 8/14

"Jury deadlock constitutes necessity for declaration of a mistrial and permits retrial of the defendant." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 425.) Penal Code section 1140 "allows a trial court to discharge a jury and declare a mistrial if the court determines that the proper period of time for deliberation has expired and 'there is no reasonable probability' that the jurors can agree on a verdict. The decision whether to declare a hung jury or to order further deliberations rests in the trial court's sound discretion. (*People v. Bell* (2007) 40 Cal.4th 582, 616; *People v. Proctor* (1992) 4 Cal.4th 499, 539; *People v. Rodriguez* (1986) 42 Cal.3d 730, 775.)" (*People v. Debose* (2014) 59 Cal.4th 177, 209.)

> Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived " 'as a means of enabling the jurors to

enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.' " [Citations.]

(*People v. Proctor*, *supra*, 4 Cal.4th at p. 539.)

In determining whether or not to declare a jury at an impasse, it may be appropriate for the judge to inquire as to the numerical division of the jurors. "Although we have expressly approved of inquiring into a jury's numerical division in the event of a deadlock (see, e.g., *People v. Breaux* (1991) 1 Cal.4th 281, 319), we have never held this to be mandatory." (*People v. Debose*, *supra*, 59 Cal.4th at p. 210.) It is not error to ask a jury to continue deliberations after indicating they are split 11 to 1. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1254; *People v. Neufer* (1994) 30 Cal.App.4th 244, 253-254.)

5740.2-Court can use a number of methods to attempt to break a deadlocked jury 10/14

Penal Code section 1140 states in part that "the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict … or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree."

> The reason section 1140 ensures a jury deliberates until it has reached a verdict, unless it is unable to do so, is obvious. A jury trial that ends without a verdict results in the loss of judicial resources, the resources of the district attorney's office and the defense attorney (often the public defender), wastes the time invested by the jurors who have served on the jury, and prevents the defendant from achieving a resolution to the charges levied against him or her. For all of these reasons, trials should end in a verdict whenever possible. Accordingly, when a jury informs the trial court it has reached an impasse, the trial court "must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least consider how it can best aid the jury." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) [¶] The desirability of a verdict in each trial does not provide the trial court with unlimited power to achieve this result. … The trial court must exercise its discretion to determine whether there is a reasonable probability the jury will reach a verdict without coercion of the jury and "to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' [Citation.]" (*People v. Miller* (1990) 50 Cal.3d 954, 994.) In other words, the trial court must act carefully to ensure whatever result is reached is a direct result of the deliberative process and is not influenced by the trial court.

(*People v. Salazar* (2014) 227 Cal.App.4th 1078, 1086.) The judge has discretion in determining from all the surrounding circumstances whether a jury has reached an impasse. (*Id*. at p. 1089.)

Rule 2.1036 of the California Rules of Court provides several options a judge may take when a jury reaches an impasse during deliberations. These include advising "the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict." (Rule 2.1036, subd. (a).) The judge may also state:

> May I suggest that since you've been unable to arrive at a verdict using the methods that you have chosen, that you consider to change the methods you have been following, at least temporarily and try new methods. [¶] For example? You may wish to consider having different jurors lead the discussions for a period of time. You may wish to experiment with

> reverse role-playing by having those on one side of the issue present and argue the other side's positions and vice versa. This might enable you to better understand the other's positions.

(Approved in *People v. Whaley* (2007) 152 Cal.App.4th 968, 981-984, and *People v. Moore* (2002) 96 Cal.App.4th 1105, 1118-1121.)

In addition, if the judge determines it may assist the jury in breaking the impasse, the judge can clarify previous instructions or give additional instructions. (Rule 2.1036, subd. (b)(1)-(2).) If additional instructions are given, the judge may be obligated to provide counsel additional argument to the jury. (*People v. Ardoin* (2011) 196 Cal.app.4th 102, 129.) "The trial court's authority to give supplemental jury instructions to a deadlocked jury in a criminal case derives from Penal Code section 1140 … ." (*People v. Whaley, supra*, 152 Cal.App.4th at p. 979.)

Regardless of whether additional instructions are given, the judge may permit additional argument by counsel. (Rule 2.1036, subd. (b)(3).) Of course, the judge has discretion to limit the scope of such additional argument. (*People v. Salazar*, *supra*, 227 Cal.App.4th at p. 1089.) The judge also has discretion to permit the prosecution to present a rebuttal argument. (*Id*. at pp. 1090-1091.) All of the above flows, in part, from the judge's statutory discretion under Penal Code section 1094 to depart from the ordinary order of trial procedure set forth in Penal Code section 1093. (*Id*. at pp. 1085, 1088.)

5740.3-Court can require additional deliberations even after impasse declared 12/14

Penal Code section 1140 states: "Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." But simply because a jury indicates it may be deadlocked, does not preclude the court from requiring the jurors to continue their deliberations.

"The trial court may ask jurors to continue deliberating when there is a 'reasonable probability' of agreement, and that determination rests in the discretion of the court. (§ 1140; see *People v. Breaux* (1991) 1 Cal.4th 281, 319.)" (*People v. Lucas* (2014) 60 Cal.4th 153, 327.) The court, without coercion, can convey that the jury had not deliberated for a sufficient time relative to the complexity of the case, so long as the comments contain no impermissible reference to the expense and inconvenience of a retrial. (*Id*. at p. 328.) "The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' " (*People v. Breaux*, *supra*, at p. 319, quoting *People v. Carter* (1968) 68 Cal.2d 810, 817.) "Any claim that the jury was [unduly] pressured into reaching a verdict depends on the particular circumstances of the case." (*People v. Pride* (1992) 3 Cal.4th 195, 265.)

5750.1-Procedure to access sealed personal juror information 8/20

Protecting personal juror identifying information, a matter long within the inherent power of the court, now has a statutory basis as well. (See *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1091-1096 (*Townsel*).) There is no constitutional right permitting defendants or their attorneys to obtain such information. (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 383-385 (*Tuggles*).)

The trial court's record of personal juror identifying information—name, address, and telephone number—is sealed by operation of law upon recording the jury's verdict in a criminal case. (Code Civ. Proc., § 237, subd. (a)(2); see, generally, *People v. Johnson* (2013) 222 Cal.App.4th 486, 492 (*Johnson I*).) The defense may petition the court for access to personal juror identifying information "for the purpose of developing a motion for a new trial or any other lawful purpose." (Code Civ. Proc., § 206, subd. (g), § 237, subd. (b).) But they have no absolute right to this information. The matter is addressed to the court's discretion. (*Townsel*, *supra*, 20 Cal.4th at pp. 1096-1097; *People v. Jones* (1998) 17 Cal.4th 279, 317.) And absent a sufficient showing of good cause or need for the request, the trial court may summarily deny the petition. (See *People v. Barton* (1995) 37 Cal.App.4th 709, 716.)

Code of Civil Procedure section 237 (section 237) contemplates a multi-stage process when the defense is seeking access to confidential juror information.

First, under subdivision (b) of section 237, the defense petitions the court for access. The petition must be supported by a declaration that includes facts sufficient to establish good cause for the release of the sealed information. The declaration may include out-of-court statements by third parties, including statements purportedly from one or more jurors, because they are not offered for their truth and are not governed by Evidence Code section 1150. (*Johnson I*, *supra*, 222 Cal.App.4th at pp. 493-495.)

The trial court has three options on receipt of the petition. If the petition and declaration establish a prima facie showing of good cause for release of the sealed information the court normally should set the matter for a hearing. (*People v. Johnson* (2015) 242 Cal.App.4th 1155, 1158, 1164 (*Johnson II*) [credibility is not part of the analysis at this stage].) Conversely, the court may summarily deny the petition without a hearing if the petition and declaration fail to establish a prima facie showing of good cause. (See, e.g., *People v. McNally* (2015) 236 Cal.App.4th 1419, 1430-1431.) But even with a prima facie showing, the court must not set the matter for a hearing if the record already shows a compelling interest against disclosure. "Compelling interests include jurors' safety and the need for finality if a long period of time has elapsed since trial." (*Tuggles*, *supra*, 179 Cal.App.4th at p. 382.) When the court denies the petition without a hearing, it must create a minute order setting forth its reasons and making express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure.

If the court sets the matter for a hearing, under subdivision (c) of section 237, the parties are entitled to at least a 20-day notice, and the court must give notice of the hearing to each affected former juror.

Finally, the court resolves the merits of the petition at the noticed hearing. Under subdivision (c), any affected juror may appear in person, in writing, by telephone, or by counsel, to protest the granting of the petition. Under subdivision (d), the defense will gain access to the records unless the court sustains a former juror's protest to the granting of the petition. The court should sustain the protest if, in the exercise of the court's discretion, the petitioner ultimately fails to show

good cause, or the record establishes the presence of a compelling interest against disclosure, or the juror is unwilling to be contacted by the defense. If the juror is unwilling to be contacted, that ends the matter. (*Jones v. Superior Court* (1994) 26 Cal.App.4th 1202, 1209.) The court must set forth reasons and make express findings to support granting or denying the petition.

Even if the court orders disclosure of the sealed juror personal information, it may fashion a protective order to prevent the defense from divulging the information to others. (Code Civ. Proc., § 237, subd. (d).) "Nothing in Code of Civil Procedure sections 206 or 237 dilutes the trial court's inherent power to shield jurors from unwanted contact by parties or their counsel." (*Tuggles*, *supra*, 179 Cal.App.4th at p. 382.) The court should also act as a gatekeeper "to determine ahead of time from the jurors whether or not any wishes to speak" to counsel. (*Townsel*, *supra* 20 Cal.4th at p. 1095; *DeHoyos v. Superior Court* (2020) 50 Cal.App.5th 71, 82 [error to issue no contact order before surveying jurors defense sought to interview].) Under no circumstances should the juror personal information be divulged to the defendant. (*People v. Granish* (1996) 41 Cal.App.4th 1117, 1128-1229.)

5750.2-Good cause required to obtain personal juror information 5/20

The "good cause" required to disclose personal juror identifying information under Code of Civil Procedure section 237 is defined by case law. Some years before the statute, the appellate court in *People v. Rhodes* (1989) 212 Cal.App.3d 541 held that a defendant's motion for post-verdict disclosure of the names, addresses, and telephone numbers of the jurors who convicted him could be granted only on a showing of good cause. (*Id*. at pp. 553-554.) Good cause, in the context of a motion for new trial, requires that the defendant make a sufficient showing to support a reasonable belief that jury misconduct occurred, that diligent efforts had been made to contact the jurors through other means, and that further investigation is necessary to adequately prepare the motion. (*Ibid*.; see also *People v. Jones* (1998) 17 Cal.4th 279, 317.) The *Rhodes* test has continues to define the good cause requirement of section 237. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 990; see also *Townsel v. Superior Court* (1999) 20 Cal.3d 1084, 1093-1094 & fn. 3; *People v. Duran* (1996) 50 Cal.App.4th 103, 115-123; *People v. Wilson* (1996) 43 Cal.App.4th 839, 850-852; but see *People v. Johnson* (2013) 222 Cal.App.4th 486, 497 ["Because the Legislature provided that jurors' identifying information must be sealed, we conclude it did not intend to require a defendant to show diligent efforts to obtain the sealed information as a condition of unsealing it."])

> Good cause, in the context of a petition for disclosure to support a motion for a new trial based on juror misconduct, requires "a sufficient showing to support a reasonable belief that jury misconduct occurred. …" [Citations.] Good cause does not exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported. [Citation.] We review the denial of a petition for disclosure for an abuse of discretion. [Citation.]

(*People v. Cook* (2015) 236 Cal.App.4th 341, 345-346; see also *People v. Munoz* (2019) 31 Cal.App.5th 143, 165.)

5770.1-Juror testimony of misconduct only on strong showing 10/09

"The trial court has discretion to determine whether to conduct an evidentiary hearing to resolve factual disputes raised by a claim of juror misconduct. (*People v. Avila* (2006) 38 Cal.4th 491, 604.)" (*People v. Dykes* (2009) 46 Cal.4th 731, 809.)

> Defendant is not, however, entitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is 'necessary to resolve material, disputed issues of fact.' [Citation.] "The hearing … should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." [Citations.]

(*People v. Avila*, supra, 38 Cal.4th at p. 604; see also *People v. Hedgecock* (1990) 51 Cal.3d 395, 415-416.) "The hearing should not be used as a "fishing expedition" to search for possible misconduct … ." (*People v. Hedgecock*, *supra*, at p. 419.) Similarly, a defendant is not entitled to an evidentiary hearing when there are no material factual disputes in the jurors' affidavits and the only question is the legal effect of the matters contained therein. (*People v. Hord* (1993) 15 Cal.App.4th 711, 722-724.) In addition, "ordinarily a trial court does not abuse its discretion in declining to conduct an evidentiary hearing on the issue of juror misconduct when the evidence proffered in support constitutes hearsay. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1256 ["Normally, hearsay is not sufficient to trigger the court's duty to make further inquiries into a claim of juror misconduct"].) … ." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 810.)

"The trial court's decision whether to conduct an evidentiary hearing on the issue of juror misconduct will be reversed only if the defendant can demonstrate an abuse of discretion." (*People v. Dykes*, *supra*, 46 Cal.4th at p. 810.)

Finally, when it is necessary to call jurors, the trial court has the authority to conduct most or all of their questioning. (*People v. Hedgecock, supra,* 51 Cal.3d at p. 418.)

5770.2-EC1150(a) bars evidence of jurors' mental processes 11/18

"Evidence Code section 1150 plays an important role in protecting the finality of jury verdicts. A verdict cannot be impeached simply because it was mistaken or erroneous." (*People v. Engstrom* (2011) 201 Cal.App.4th 174, 184.) Subdivision (a) of Evidence Code section 1150 (§ 1150) states:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. *No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined*.

(Italics added.) Section 1150 permits evidence from jurors regarding " 'overt acts'—that is, such statements, conduct, conditions, or events as are 'open to sight, hearing, and the other senses and thus subject to corroboration' [but jurors] may not testify to 'the subjective reasoning processes of the individual juror … .' [Citation.]" (*In re Stankewitz* (1985) 40 Cal.3d 391, 398.) The prohibition of section 1150 extends beyond statements of jurors of their own mental processes and their conclusions regarding the mental processes of other jurors.

> The statute may be violated not only by the admission of jurors' testimony describing their own mental processes, but also by permitting testimony concerning statements made by jurors in the course of their deliberations. In rare circumstances a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible. [Citation] But when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150.

(*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419; see also *People v. Sanchez* (1998) 62 Cal.App.4th 460, 475-476; but see *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 786-789 ["rare circumstance" where juror statement she made up her mind mid-trial was admissible as circumstantial evidence of bias].)

> This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses *and are thus subject to corroboration*. … [A]dmission of jurors' affidavits within the limits set by section 1150 protects the stability of verdicts … .

(*People v. Hutchinson* (1969) 71 Cal.2d 342, 350, italics added.)

Thus, in *People v. Elkins* (1981) 123 Cal.App.3d 632, the appellate court held inadmissible affidavits of two jurors which purported to recite statements made by another juror. The statements of that juror consisted of his erroneous interpretation of instructions given by the court which, apparently, other jurors believed. The appellate court explained why such evidence was prohibited under section 1150:

> The subjective quality of one juror's reasoning is not purged by the fact that another juror heard and remembers the verbalization of that reasoning. To hold otherwise would destroy the rule of *Hutchinson* which clearly prohibits the upsetting of a jury verdict by assailing these subjective mental processes. It would also inhibit and restrict the free exchange of ideas during the jury's deliberations.

(*Id.* at p. 638.) Similarly, it is inadmissible under section 1150 that during deliberations some jurors discuss their religious beliefs or engage in prayer about a difficult decision, such as whether to impose the death penalty, because this behavior reflects only their mental process of reaching the decision. (*People v. Lewis* (2001) 26 Cal.4th 334, 387-391.)

Because the evidence barred by section 1150, subdivision (a), is neither relevant nor material to impeachment of the jurors' reasoning processes, that section has not been overturned with the adoption of Proposition 8, and is constitutional. (*People v. Steele* (2002) 27 Cal.4th 1230, 1261-1264.) But section 1150 must give way to the Due Process Clause of the United States Constitution in very limited cases. "[T]the Court now holds that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." (*Pena-Rodriguez v. Colorado* (2017) 580 U.S. ___, ___ [137 S.Ct. 855, 869, 197 L.Ed.2d 107, 125].) California appellate court have long held that "the rule against proof of juror mental processes is subject to the well-established exception for claims that a juror's preexisting bias was concealed

on voir dire." (*In re Hamilton* (1999) 20 Cal.4th 273, 298-299, fn. 19; see also *In re Manriquez* (2018) 5 Cal.5th 785, 800.)

5770.3-Affidavit from non-juror inadmissible to show misconduct 2/14

Evidence of juror misconduct may only be shown by affidavits of jurors or through the testimony of jurors or other percipient witnesses to the alleged misconduct. (*People v. Hutchinson* (1969) 71 Cal.2d 342, 348.) Juror affidavits must be properly executed and sworn under penalty of perjury to be the basis for a finding or jury misconduct. (*People v. Bryant* (2011) 191 Cal.App.4th 1457, 1467-1470.)

Affidavits by other persons, even if they purport to be based upon statements made by a juror or other percipient witness, cannot support an effort to overturn a jury's verdict. These hearsay statements and declarations are inadmissible over objection and should be disregarded by the court. (*People v. Federico* (1981) 127 Cal.App.3d 20, 38-39 [affidavit by defendant's counsel insufficient]; *People v. Villagren* (1980) 106 Cal.App.3d 720, 729-730 [affidavit of defendant's counsel insufficient].) "[A] trial court does not abuse its discretion in denying a motion for new trial based upon juror misconduct when the evidence in support constitutes unsworn hearsay. [Citations.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 810.)

Indeed, such hearsay does not justify any further inquiry by the court. "[A] trial court does not abuse its discretion in declining to conduct an evidentiary hearing on the issue of juror misconduct when the evidence proffered in support constitutes hearsay. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1256 ["Normally, hearsay is not sufficient to trigger the court's duty to make further inquiries into a claim of juror misconduct"].) …" (*People v. Dykes*, *supra*, 46 Cal.4th at p. 810; see also *People v. Manibusan* (2013) 58 Cal.4th 40, 55.)

5780.1-General standard for weighing evidence of juror misconduct 9/20

"Juror misconduct raises a rebuttable presumption of prejudice; a trial court presented with competent evidence of juror misconduct must consider whether the evidence suggests a substantial likelihood that one or more jurors were biased by the misconduct." (*People v. Dykes* (2009) 46 Cal.4th 731, 809; see also *People v. Weatherton* (2014) 59 Cal.4th 589, 598; *People v. Tafoya* (2007) 42 Cal.4th 147, 192.) If unrebutted by the prosecution, the presumption that the defendant suffered prejudice stands. (*People v. Hem* (2019) 31 Cal.App.5th 218, 229-230.) In other words, the presumption is not conclusive and may be rebutted by proof that no prejudice actually resulted from the misconduct. (*In re Carpenter* (1995) 9 Cal.4th 634, 653 (*Carpenter*); *People v. Pierce* (1979) 24 Cal.3d 199, 207; *People v. Honeycutt* (1977) 20 Cal.3d 150, 156.)

A substantial likelihood of juror bias can be found in two ways. The extrajudicial material, judged objectively, may be inherently and substantially likely to have influenced the juror, in light of the entire record. Alternatively, the nature of the misconduct and its surrounding circumstances may establish a substantial likelihood the juror was actually biased against the defendant, even though the material was not inherently prejudicial. (*Carpenter*, *supra*, 9 Cal.4th at pp. 653-654.)

The presumption of prejudice may be rebutted by affirmative evidence or by consideration of the entire record, including the nature of the misconduct and the surrounding circumstances, showing there is no reasonable probability of actual harm from the misconduct. (*In re Hamilton* (1999) 20 Cal.4th 273, 295-296; *In re Hitchings* (1993) 6 Cal.4th 97, 119; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 256.) "In regard to the amount of affirmative evidence that is needed,

the amount appears to vary depending on the specific facts of the case—the greater the misconduct, the more affirmative evidence that must be shown to rebut the presumption of prejudice." (*People v. Echavarria* (2017) 13 Cal.App.5th 1255, 1265.) "[T]he presumption of prejudice is 'stronger when, as here, the misconduct goes to a key issue in the case.' [Citation.]" (*Id*. at p. 1267.) "If a review of the entire record shows no substantial likelihood of juror bias, the presumption has been rebutted. [Citations.]" (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1116; see also *People v. Brooks* (2017) 3 Cal.5th 1, 93.) But "[w]here the jury has been exposed to improper outside influences, the test for prejudice is not the strength of the prosecution's case, but whether the impartiality of the jury has been compromised. (See *People v. Nesler* (1997) 16 Cal.4th 561, 578-579.)" (*People v. Vigil* (2011) 191 Cal.App.4th 1474, 1488, fn. 3.) One appellate court has admitted the "law of prejudice lacks clarity." (*People v. Echavarria*, *supra*, 13 Cal.App.5th at p. 1264.)

Not every insignificant infraction of the rules by a juror meets the substantial likelihood test and requires that a new trial be granted. Misconduct of a nature so trifling that it could not have prevented either party from having a fair trial will not cause a verdict to be set aside. (*People v. Sutter* (1982) 134 Cal.App.3d 806, 821.) For example, brief references to the fact the defendant did not testify, and mentions of the possible punishment, have been held innocuous. (*People v. Avila* (2009) 46 Cal.4th 680, 727; *People v. Hord* (1993) 15 Cal.App.4th 711, 726-728, and cases cited therein; distinguish *People v. Echavarria*, *supra*,13 Cal.App.5th at pp. 1265-1269 [presumption that juror misconduct in discussing punishment prejudicially influenced the verdict not rebutted].) And no prejudice arises simply because a juror has been placed in a compromising position. (*People v. Albert* (2020) 50 Cal.App.5th 743, 748 [juror felt scared when visited by defendant's brother].)

Minor jury misconduct is tolerated because, " '[i]t is an impossible standard to require … [the jury] to be a laboratory, completely sterilized and freed from any external factors.' " (*People v. Marshall* (1990) 50 Cal.3d 907, 950.) Indeed, the humanness of the jury system is both its strength and its weakness—jurors have foibles as well as virtues. The courts must accept a certain amount of imperfection short of actual bias if the jury system is to function at all. To demand theoretical perfection from every juror during the course of a trial is unrealistic and would render the criminal justice system impotent. (*Carpenter*, *supra*, 9 Cal.4th at pp. 654-655; see also *In re Hamilton*, *supra*, 20 Cal.4th at p. 296.)

Finally, in *People v. Von Villas*, *supra*, 11 Cal.App.4th 175, at page 258, the appellate court adopted the concern expressed by Justice Mosk in his concurring opinion in *Ballard v. Uribe* (1986) 41 Cal.3d 564. Justice Mosk wrote:

> I must express my apprehension at an incipient trend, that of losing parties attempting to impeach jury verdicts. We see this in numerous appeals and petitions for review based on juror affidavits. Giving such appeals and petitions any credence prevents the finality of judgments, places additional burdens on the judicial process, and contributes to disenchantment with the tort system. … [¶] In most cases it is not difficult for counsel to persuade a juror to sign a law-office-prepared affidavit.

(*Ballard v. Uribe*, *supra*, 41 Cal.2d at p. 575.)

5780.2-Court's duty to investigate potential cause for juror discharge 7/20

A trial court has discretion as to how to handle a claim of potential juror misconduct during the trial. "Whether and how to investigate an allegation of juror misconduct falls within the court's discretion." (*People v. Allen & Johnson* (2011) 53 Cal.4th 60, 69, citing *People v. Alexander* (2010) 49 Cal.4th 846, 926; compare *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854, 866 [post-verdict investigation into possible juror misconduct].) But: "When a court is informed of allegations which, if proven true, would constitute good cause for a juror's removal, a hearing is *required*." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1051, italics in original; see also, *People v. Dubose* (2014) 59 Cal.4th 177, 200.) "Although a court should exercise caution to avoid threatening the sanctity of jury deliberations, it must hold a hearing when it learns of allegations which, if true, would constitute good cause for a juror's discharge. (*People v. Lomax* (2010) 49 Cal.4th 530, 588.) Failure to do so may be an abuse of discretion. (*Ibid*.)" (*People v. Allen & Johnson*, *supra*; see, e.g., *People v. Hem* (2019) 31 Cal.App.5th 218 [reversible error not to inquire whether some jurors discussed compromise verdict in hallway to help break apparent deadlock].)

> [Penal Code] Section 1089 provides in part: "If at any time … a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged … ." In construing this statute, we have held that " '[o]nce a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty "to make whatever inquiry is reasonably necessary" to determine whether the juror should be discharged.' " [Citations.]"

(*People v. Martinez* (2010) 47 Cal.4th 911, 941-942; see also *People v. Virgil* (2011) 51 Cal.4th 1210, 1284; *People v. Williams* (1997) 16 Cal.4th 153, 230.) "The duty to conduct an investigation when the court possesses information that might constitute good cause to remove a juror rests with the trial court whether or not the defense requests an inquiry, and indeed exists even if the defendant objects to such an inquiry." (*People v. Cowan* (2010) 50 Cal.4th 401, 506.) " ' "Grounds for investigation or discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists." ' " (*People v. Homick* (2012) 55 Cal.4th 816, 898; see also *People v. Fayed* (2020) 9 Cal.5th 147, 174.) However, "to ensure the sanctity and secrecy of the deliberative process, a trial court's inquiry into grounds for discharging a deliberating juror should be as limited as possible, and should cease once the court is satisfied that the juror in question 'is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists.' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 53.)

" 'But not every incident involving a juror's conduct requires or warrants further investigation. 'The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court.' " (*People v. Cleveland* (2001) 25 Cal.4th 466, 478, quoting *People v. Ray* (1996)13 Cal.4th 313, 343; see also *People v. Virgil*, *supra*, 51 Cal.4th at p. 1284.) " '[A] hearing is required only where the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case.' " (*People v. Cleveland*, *supra*; see also *People v. Cowan*, *supra*, 50 Cal.4th at pp. 505-506.) And the taking of evidence at such hearing is not mandated, however, as the judge is only required to make whatever inquiry is reasonably necessary to resolve the matter. (*People v. Mora &*

Rangel (2018) 5 Cal.5th 442, 517.) Thus an evidentiary hearing is unnecessary when there is no significant factual dispute to resolve, only the legal question whether the undisputed facts demonstrate misconduct. (*People v. Wismer* (2017) 10 Cal.App.5th 1328, 1335.) Finally, "an evidentiary hearing on alleged jury misconduct 'should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred.' [Citation.]" (*People v. Manibusan*, *supra*, 58 Cal.4th at p. 58.)

5780.3-Concealment of information during voir dire 7/21

"A criminal defendant has a constitutional right to an impartial jury, and the pretrial voir dire process is important because it enables the trial court and the parties to determine whether a prospective juror is unbiased and both can and will follow the law. But the voir dire process works only if jurors answer questions truthfully." (*People v. Wilson* (2008) 44 Cal.4th 758, 822 (*Wilson*); see also *In re Cowan* (2018) 5 Cal.5th 235, 247.) "[I]t is misconduct, and therefore presumptively prejudicial, for a juror to conceal relevant facts during the jury selection process … ." (*People v. Merriman* (2014) 60 Cal.4th 1, 95.) But "[n]ot every failure to disclose background information in response to voir dire questioning constitutes misconduct by jurors." (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 371.)

> "Although intentional concealment of material information by a potential juror may constitute implied bias justifying his or her disqualification or removal [citations], mere inadvertent or unintentional failures to disclose are not accorded the same effect. '[T]he proper test to be applied to unintentional "concealment" is whether the juror is sufficiently biased to constitute good cause for the court to find under … [Penal Code] sections 1089 and [former] 1123 that he is unable to perform his duty.' "

(*Wilson, supra*, 44 Cal.4th at p. 823, quoting *People v. McPeters* (1992) 2 Cal.4th 1148, 1175; see also *People v. Wilson* (2021) 11 Cal.5th 259, 310.)

> Stated somewhat differently, with respect to a claim of concealment, a habeas corpus petitioner bears the initial burden of showing that a juror did not disclose requested material information. If such a nondisclosure is shown, a presumption of prejudice arises. An intentional concealment is strong proof of prejudice, while a showing that the nondisclosure was unintentional may rebut the presumption of prejudice. Whether any nondisclosure was intentional is not dispositive; an unintentional nondisclosure may mask actual bias, while an intentional nondisclosure may be for reasons unrelated to bias. The ultimate question remains whether petitioner was tried by a jury where a substantial likelihood exists that a juror was actually biased against petitioner.

(*In re Manriquez* (2018) 5 Cal.5th 785, 798.)

Assuming concealment of material facts by a juror, the test is the same as for other types of juror misconduct.

> Although juror misconduct raises a presumption of prejudice [citations], we determine whether an individual verdict must be reversed for jury misconduct by applying a substantial likelihood test. That is, the "presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors

were actually biased against the defendant." [Citation.] In other words, the test asks not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias.

(*In re Boyette* (2013) 56 Cal.4th 866, 889-890.) "We have held that 'good faith when answering voir dire questions is the most significant indicator that there was no bias" [citation] and "an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias' [citation]." (*Id*. at p. 890; see also *People v. Zaragoza* (2016) 1 Cal.5th 21, 59; *People v. Merriman*, *supra*, 60 Cal.4th at p. 97.)

5780.4-Exposure to extraneous information misconduct if content prejudicial 8/20

"A juror's receipt or discussion of evidence not submitted at trial constitutes misconduct. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 650.)" (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) Even when a juror's exposure to extraneous information about a party or a case, whether introduced by another juror or from an outside source, constitutes misconduct, " 'the verdict will be set aside only if there appears a substantial likelihood of juror bias.' " (*In re Boyette* (2013) 56 Cal.4th 866, 890 [jury foreman in capital case asked other jurors to watch movie about prison life when deciding if defendant would likely kill again in prison if not sentenced to death]; see also *People v. Miles* (2020) 9 Cal.5th 513, 601-602 [no substantial likelihood of bias when one juror inadvertently saw newspaper headlines but did not read contents of the stories].)

> The question of what constitutes juror bias varies according to the circumstances of the case. [Citation.] When, as here, juror misconduct arises from a juror's receipt of extraneous information, juror bias can be inherent or circumstantial. [Citations.] Under the inherent bias test, the court considers whether the "extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror." [Citations.] Even when the extraneous information is not so prejudicial, in and of itself, as to cause inherent bias, under the circumstantial bias test the court must examine the totality of the circumstances surrounding the misconduct to determine whether a substantial likelihood of actual bias nonetheless arose. [Citations.] The judgment must be set aside if the court finds prejudice under either the inherent or circumstantial bias test. [Citations.] "[B]efore a unanimous verdict is set aside, the likelihood of bias under either test must be substantial." [Citation.]

(*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1116-1117.)

In *People v. Neely* (1979) 95 Cal.App.3d 1011, for example, the appellate court upheld the denial of a new trial despite evidence a juror had brought legal instructions from another case on which the juror had served into deliberations because the content of the instructions could not have improperly influenced the verdict. (*Id.* at pp. 1020-1021; similarly see *People v. Marshall* (1990) 50 Cal.3d 907, 950-951; *People v. Martinez* (1978) 82 Cal.App.3d 1, 22-25.)

5780.5-Misconduct to discuss case with anyone other than during deliberations 4/21

"[A]ny unauthorized communication between a juror and a nonjuror regarding the matter pending before the jury is misconduct and presumptively prejudicial." (*People v. Merriman* (2014) 60 Cal.4th 1, 98; see also *In re Bell* (2017) 2 Cal.5th 1300, 1306.) "It is misconduct for a juror during the course of trial to discuss the case with a non-juror. [Citation.]" (*People v. Danks* (2004) 32 Cal.4th 269, 304; see also *People v. Hensley* (2014) 59 Cal.4th 788, 824-828 [misconduct to discuss death penalty with pastor]; *People v. Nunez & Satele* (2013) 57 Cal.4th 1, 55 [misconduct to

discuss with friend and mother anticipated vote on death penalty].) Similarly, "[i]t is misconduct for a juror to even inadvertently receive information about a party or the case from a nonparty." (*People v. Linton* (2013) 56 Cal.4th 1146, 1194 [non misconduct for juror to tell husband what she would do in a situation similar to that presented by evidence, especially since husband did not comment on the statement].) The presumption of prejudice has also been applied to conversations about the jury process. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1309 [presumption rebutted because juror only discussed how foreperson was selected and that results of first secret ballot were not revealed by the foreperson].) The presumption of prejudice arises most often, however, from unauthorized communication with or by jurors related to the guilt or innocence of the defendant. (*People v. Chavez* (1991) 231 Cal.App.3d 1471, 1484-1485; *People v. Federico* (1981) 127 Cal.App.3d 20, 38.)

> We have recognized that "a nonjuror's tampering contact or communication with a sitting juror[ ] usually raises a rebuttable 'presumption' of prejudice. [Citations.]" (*In re Hamilton* (1999) 20 Cal.4th 273, 295.) If we find misconduct, we proceed to determine whether that misconduct was prejudicial to defendant. We have identified two tests for prejudice, and "[t]he judgment must be set aside if the court finds prejudice under either test." (*In re Carpenter* (1995) 9 Cal.4th 634, 653.) First, we ask whether the external communication is so inherently prejudicial that it is substantially likely to have biased the juror. This "inherently prejudicial" standard is objective and is satisfied when "the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment." (*Ibid*.) If we find no inherent prejudice, then we apply the " 'circumstantial' test" for prejudice, recognizing that "the totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose." (*Id*. at p. 654.)

(*In re Welch* (2015) 61 Cal.4th 489, 599-500.)

It is not error to dismiss a juror who comments on and attempts to discuss the case with other jurors outside the courtroom during the trial despite admonishments not to do so. (See, e.g., *People v. Peterson* (2020) 10 Cal. 5h 409, 469-475.) But, when jurors discuss peripheral, collateral or trivial matters outside the jury room, either with other jurors or third parties, there is no prejudice. (*People v. Johnsen* (2021) 10 Cal.5th 1116, 1171-1172 [discussion with priest whether Catholic Church considered voting for death penalty a sin was not "inherently and substantially likely to result in bias"]; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1201-1203.)

> A defendant has the right to trial by unbiased, impartial jurors. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.) To preserve their impartiality, jurors are prohibited from discussing the case, even among themselves, until all evidence has been presented and the jury has retired to deliberate. (Pen. Code, § 1122, subd. (a); *People v. Wilson* (2008) 44 Cal.4th 758, 838.) [¶] The disapproval of juror conversations with nonjurors derives largely from the risk the juror will gain information about the case that was not presented at trial. (See, e.g., *In re Lucas* (2004) 33 Cal.4th 682, 696.) … On the other hand, where the juror conversations involve peripheral matters, rather than the issues to be resolved at trial, they are generally regarded as nonprejudicial. (See, e.g., *People v. Wilson*, at pp. 839-840 ["trivial" comments to a fellow juror not prejudicial where not meant to persuade]; *People v. Page* (2008) 44 Cal.4th 1, 58-59 [circulation of a cartoon in the jury room that did not bear on guilt not misconduct]; *People v. Avila* (2006) 38 Cal.4th 491, 605 [juror statements

disparaging counsel and the court not material because they have no bearing on guilt]; *People v. Stewart* (2004) 33 Cal.4th 425, 509-510 [juror who complimented the appearance of the defendant's former girlfriend committed nonprejudicial misconduct]; *People v. Majors* (1998) 18 Cal.4th 385, 423-425 [general comments by jurors that did not address the evidence found not prejudicial]; *People v. Loot* (1998) 63 Cal.App.4th 694, 698-699 [juror who asked a public defender whether the prosecutor was " 'available' " committed "technical," but nonprejudicial, misconduct]. When determining whether communications are prejudicial, the court must consider the " ' "nature and seriousness" ' " of the misconduct, particularly its connection with evidence extrinsic to the trial. (*People v. Wilson*, at p. 839, italics omitted.)

(*People v. Polk*, *supra*, 190 Cal.App.4th at pp. 1201-1202 [questions about wisdom of defendant choosing self-representation and exposure to press rumors that one juror was romantically involved with another not prejudicial].) "Nor will a new trial be granted for remarks overheard by jurors where neither party to the case was at fault, unless it can be said the remarks probably influenced the verdict." (*People v. Vernon* (1979) 89 Cal.App.3d 853, 865.)

5780.6-Unauthorized contact with witness is juror misconduct 9/20

"A juror's unauthorized contact with a witness is improper." (*People v. Cowan* (2010) 50 Cal.4th 405, 507; *People v. Hardy* (1992) 2 Cal.4th 86, 175; see also Pen. Code § 1122, subd. (a) [jurors should not converse with anyone on any subject connected to the trial].)

However, contact between a juror and a witness or between a juror and the defendant's family may be nonprejudicial if the contact was 'de minimis' (*People v. Hardy*, *supra*, 2 Cal.4th at p. 175) or if there is no showing that the contact related to the trial (cf. *People v. Cobb* (1955) 45 Cal.2d 158, 161 [mere showing that juror had communicated with defendant's relative did not raise a presumption that juror was improperly influenced]; *People v. Woods* (1950) 35 Cal.2d 504, 512 [mere fact that juror conversed with a witness is insufficient to raise a presumption of prejudice]; but cf. *People v. Ramirez* (1990) 50 Cal.3d 1158, 1175 [juror's out-of-court comment to two witnesses regarding their testimony was "clearly misconduct"]; *People v. Pierce* (1979) 24 Cal.3d 199, 207-209 [where juror discussed state of the evidence and prosecutor's tactics with police officer witness, reversal was required]).

(*People v. Cowan*, *supra*, 50 Cal.4th at p. 507.) Similarly, no juror misconduct should be found when a family member visits a juror's home causing them to be scared. (*In re Hamilton* (1999) 20 Cal.4rth 273, 305-306; *People v. Albert* (2020) 50 Cal.App.5th 743, 750-752.)

5780.7-Discussion of defendant's failure to testify not necessarily prejudicial 5/20

"Upon request, a defendant is entitled to an instruction that the jury may not consider or discuss the defendant's failure to testify [citation], but the trial court has no obligation to give such an instruction sua sponte [citation]." (*People v. Alaniz* (2017) 16 Cal.App.5th 1, 6.)

[B]y violating the trial court's instruction not to discuss defendant's failure to testify, the jury committed misconduct. [Citations.] This misconduct gives rise to a presumption of prejudice, which "may be rebutted … by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm.' [Citations.]

(*People v. Leonard* (2007) 40 Cal.4th 1370, 1425; see also *People v. Avila* (2009) 46 Cal.4th 680, 726; distinguish *People v. Alaniz*, *supra*, 16 Cal.App.5th at pp. 6-8 [no instruction given so no jury misconduct by discussing defendant's failure to testify].) Thus, the defendant is not automatically entitled to a new trial if one or more jurors improperly discuss his or her failure to testify in violation of the court's admonition not to do so. (*People v. Lavender* (2014) 60 Cal.4th 679, 682 (*Lavender*).)

The California Supreme Court in *Lavender* considered several factors in determining whether or not the prosecution rebutted the presumption of prejudice with evidence that no prejudice actually resulted. (*People v. Solario* (2017) 17 Cal.App.5th 398, 409 (*Solario*).) The appellate court in *Solorio* was uncertain if the strength of the case against the defendant was also a factor in the *Lavender* analysis. (*Solario*, *supra*, 17 Cal.App.5th at p. 408.) "The first rebuttal factor considers whether jurors drew adverse inferences of guilt from the defendant's decision not to testify. (*Lavender*, *supra*, 60 Cal.4th at pp. 689-690, 692.)" (*Solario*, *supra*, 17 Cal.App.5th at p. 409.) "The second rebuttal factor considers the length of discussion about the topic. (*Lavender*, *supra*, 60 Cal.4th at p. 692.)" (*Solario*, *supra*, 17 Cal.App.5th at p. 410.) "The third rebuttal factor—the crux of *Lavender*—considers whether jurors were reminded not to consider the defendant's decision not to testify. (*Lavender*, *supra*, 60 Cal.4th at p. 690.)" (*Solario*, *supra*, 17 Cal.App.5th at p. 410 [presumption of prejudice not rebutted].)

"Our case law indicates that a reminder to the jury of the court's instructions to disregard a defendant's decision not to testify is, in the absence of objective evidence establishing a basis to question the effectiveness of the reminder (see Evid. Code, § 1150), strong evidence that prejudice does not exist." (*Lavender*, *supra*, 60 Cal.4th at p. 687.)

> [T]he jury was instructed that it is not permitted to consider or discuss the fact that the defendant exercised his constitutional right not to testify. [Citation.] This rule is designed to prevent the jury from drawing adverse inferences against the defendant in violation of the constitutional right not to incriminate oneself. (*People v. Leonard*, *supra*, 40 Cal.4th at pp. 1424-1425.) In some cases the courts have found comments about a defendant's failure to testify to be nonprejudicial misconduct. (See, e.g., *People v. Hord* (1993) 15 Cal.App.4th 711, 726-728 [no prejudicial misconduct from jurors' mere mentioning of defendant's failure to testify; comments were transitory without further discussion and foreperson admonished jurors they could not consider the failure to testify]; *People v. Leonard*, *supra*, 40 Cal.4th at p. 1425 [no prejudicial misconduct from jurors' comments at penalty phase that they wished defendant had testified to assist them better in understanding him; comments were not akin to negative inferences from failure to testify]; *People v. Loker* [(2008)] 44 Cal.4th [691] at pp. 748-749 [no prejudicial misconduct from jurors' mentioning of defendant's failure to testify during penalty phase; comments were brief and foreperson admonished jurors not to consider this matter].)

(*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1120-1121 [reversed because juror's discussion with non-juror regarding defendant's failure to testify were extensive and prejudicial]; distinguish *People v. Manibusan* (2013) 58 Cal.4th 40, 59 ["The statement that defendant's failure to testify 'came up' suggests that any comments about this subject were merely brief and passing observations, and the record offers no basis for concluding otherwise."]; *People v. Avila*, *supra*, 46 Cal.4th at p. 727 ["[T]hat only two jurors recalled that any juror had commented on defendant's failure to testify indicates that the discussion was not of any length or significance [and] the

offending juror was immediately reminded he could not consider this factor and the discussion ceased.].)

5780.8-Exposure to exhibits not admitted at trial 11/18

It is error for jurors to consider extrinsic evidence. (See *Turner v. Louisiana* (1965) 379 U.S. 466, 472 ["The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."].) This includes instances when the jury is exposed to exhibits which were not admitted into evidence but were, for example, inadvertently sent into the deliberation room with the admitted exhibits. (See *People v. Gamache* (2010) 48 Cal.4th 347, 396 (*Gamache*).) But such occurrences are treated as ordinary trial error, and do not give rise to a presumption of prejudice unlike some forms of juror misconduct. (*Id*. at pp. 387-399.) "[T]hat presumption extends only to cases that involve the inadvertent receipt of outside information, and not to those where the court itself inadvertently furnished extrinsic information." (*Id*. at p. 398.)

> In *People v. Cooper* [(1991)] 53 Cal.3d 771, a transcript never intended for the jury's eyes was inadvertently marked as an exhibit, admitted, and sent to the jury room. The jury's consideration of the exhibit was only ordinary error: "When, as in this case, a jury innocently considers evidence it was inadvertently given, there is no misconduct." (*Id*. at p. 836.) *In People v. Clair* [(1992)] 2 Cal.4th 629, a court clerk inadvertently supplied jurors with an unredacted audiotape and transcript of statements by the defendant to the police; portions of the conversation had been excluded by the court as irrelevant and unduly prejudicial. (*Id*. at p. 665.) Relying on *Cooper*, we again characterized consideration of this material as ordinary error, not misconduct. (*Clair*, at pp. 667-668.) And in *People v. Jackson* (1996) 13 Cal.4th 1164, 1213, a clerical error may again have resulted in the jury's receiving an unredacted transcript of the defendant's statements; even if so, the court's error did not equate to juror misconduct. (See also *People v. Jordan* (2003) 108 Cal.App.4th 349, 364 [court's inadvertent submission of parole information to the jury was ordinary error]; *People v. Rose* (1996) 46 Cal.App.4th 257, 264 [inadvertent receipt of a police report during deliberations was ordinary error].)

(*Gamache*, *supra*, 48 Cal.4th at pp. 397-398.)

"[I]in the absence of misconduct, the burden remains with the defendant to demonstrate prejudice under the usual standard for ordinary trial error." (*Gamache*, *supra*, at p. 397.) "The situation [where a jury innocently considers evidence it was inadvertently given] is the same as any in which the court erroneously admits evidence." (*People v. Cooper*, *supra*, 53 Cal.3d at p. 836.) "We have consistently pardoned jurors for considering extrinsic evidence that finds its way into the jury room through party or court error." (*Gamache*, *supra*, 48 Cal.4th at p. 397.) Instead, the test for any reviewing court is whether there is a reasonable possibility the error affected the verdict. (*Id*. at p. 399; see also *People v. Anderson* (2018) 5 Cal.5th 372, 421.)

5780.9-Jurors can conduct experiments if within the scope of the evidence 10/20

Juror experiments conducted during deliberations based upon the evidence received during the trial do not constitute misconduct. The California Supreme Court in *People v. Collins* (2010) 49 Cal.4th 175 (*Collins*), reaffirmed the following principles from a much earlier decision:

> This court established the framework for analysis of a jury misconduct claim based on experimentation nearly a century ago in *Higgins v. L.A. Gas & Electric Co.* (1911) 159 Cal. 651 (*Higgins*). Justice Hinshaw explained: "It is a fundamental rule that all evidence shall be taken in open court and that each party to a controversy shall have knowledge of, and thus be enabled to meet and answer, any evidence brought against him. It is this fundamental rule which is to govern the use of exhibits by the jury. They *may use* the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter. They *may carry out experiments* within the lines of offered evidence, but if their experiments shall invade new fields and they shall be influenced in their verdict by *discoveries* from such experiments which will *not fall fairly within the scope and purview* of the evidence, then, manifestly, the jury has been itself *taking evidence* without the knowledge of either party, evidence which it is not possible for the party injured to meet, answer, or explain." (*Id*. at pp. 656-657, italics added.)

(*Collins*, *supra*, 49 Cal.4th at p. 243.)

The critical point of distinction, according to the court in *Collins*, was "between an experiment that results in the acquisition of new evidence, and conduct that is simply a 'more critical examination' of the evidence admitted. The former is misconduct; the latter is not." (*Id*. at p. 244.) The court in *Collins* examined numerous earlier appellate decisions applying this distinction. (*Id*. at pp. 244-249.)

> From the venerable authority of *Higgins* and its progeny, several principles emerge. Not every jury experiment constitutes misconduct. Improper experiments are those that allow the jury to discover *new* evidence by delving into areas not examined during trial. The distinction between proper and improper jury conduct turns on this difference. The jury may weigh and evaluate the evidence it has received. It is entitled to scrutinize that evidence, subjecting it to careful consideration by testing all reasonable inferences. It may reexamine the evidence in a slightly different context as long as that evaluation is within the " 'scope and purview of the evidence.' " [Citation.] What the jury cannot do is conduct a new investigation going beyond the evidence admitted.

(*Collins*, *supra*, 49 Cal.4th at p. 249, original italics; see also *People v. Peterson* (2020) 10 Cal.5th 409, 466-469.)

The defense in *Collins* made two claims of improper juror experiments. First, the jurors attempted to reconstruct the position of murder victim Rose and the shooter during deliberations. The California Supreme Court found no misconduct because "the jury here did not go beyond the record in its attempt to evaluate the trial evidence." (*Collins*, *supra*, 49 Cal.4th at p. 251.)

> Within the range discussed by [an expert witness] and the variety of possible physical positions, jurors conducted a demonstration to evaluate alternatives that could have produced the downward trajectory of Rose's wound. The jurors directed Juror C.C. to assume various positions. They specifically examined the prosecution's theory that Rose was "executed" while on his knees, and also considered whether Rose was shot while

standing with his head tilted back. Their evaluation critically considered the evidence presented. It did not invade a new field. [Citation.]

(*Collins*, *supra*, 49 Cal.4th at p. 252; see also *People v. Cook* (2015) 236 Cal.App.4th 341, 346 [use of toy cars to reenact collision not improper].)

The second claim of misconduct in *Collins* involved actions by a juror outside the deliberation room. Juror G.B. made a scale diagram on his home computer based on evidence received in the trial. The California Supreme Court found no misconduct.

Defendant argues that G.B. used his computer to create a model that allowed him to determine, under his interpretation of the evidence, the relative positions of the shooter and victim. He describes G.B.'s computer use as an improper experiment that provided him with new facts, and thus violated the trial court's admonition not to conduct experiments or independently investigate facts. As we shall explain, defendant mischaracterizes G.B.'s conduct. G.B.'s use of his computer was simply his own permissible thinking about the evidence received, and was not an experiment resulting in the acquisition of any new facts.

(*Id*. at p. 252.) Among the critical factors leading to this conclusion, the court found that "Juror G.B.'s scale diagram did not interject any information outside the record." (*Id*. at p. 253; see also, *People v. Calles* (2012) 209 Cal.App.4th 1200, 1212-1215 [not misconduct to use watch to time events as described by witnesses]; distinguish *People v. Wismer* (2017) 10 Cal.App.5th 1328, 1335-1337 [improper controlled psychological experiment by jury foreperson during deliberations to demonstrate what would be the "normal" react of someone to an accusation of misconduct]; *People v. Vigil* (2011) 191 Cal.App.4th 1474, 1486-1487 [improper experiment by juror outside deliberations].)

5780.10-Deliberating jurors can think about the case outside the deliberation room 5/20

It is not error for jurors to think about the case, or even makes notes and diagrams based on the evidence, outside the jury room after deliberations have started. "Jurors are allowed to reflect about a case during the trial and at home. [Citation.] In fact, it is unrealistic to expect them not to do so." (*People v. Linton* (2013) 56 Cal.4th 1146, 1195.)

Defendant equates thinking about the case with jury deliberations. Jurors must be admonished not to form an opinion concerning the case or to discuss it with anyone before it is submitted to them. ([Pen. Code] § 1122.) Once the case has been submitted to the jurors for decision, they may not deliberate except when all are together. ([Pen. Code] § 1128.) Although the deliberation process of course includes thinking, defendant has failed to cite any authority suggesting that jurors must be directed not to think about the case except during deliberations. A juror participates in the deliberative process by "participat[ing] in discussions with fellow jurors by listening to their views and by expressing his or her own views." [Citation.] Indeed, it would be entirely unrealistic to expect jurors not to think about the case during the trial and when at home. [Citation.]

(*People v. Ledesma* (2006) 39 Cal. 4th 641, 729.)

In *People v. Collins* (2010) 49 Cal.4th 175, a juror, identified as G.B., made a scale diagram on his home computer based on evidence received in the trial. The diagram was not shared with his fellow jurors. The California Supreme Court found no misconduct.

Defendant argues that G.B. used his computer to create a model that allowed him to determine, under his interpretation of the evidence, the relative positions of the shooter and

> victim. He describes G.B.'s computer use as an improper experiment that provided him with new facts, and thus violated the trial court's admonition not to conduct experiments or independently investigate facts. As we shall explain, defendant mischaracterizes G.B.'s conduct. G.B.'s use of his computer was simply his own permissible thinking about the evidence received, and was not an experiment resulting in the acquisition of any new facts.

(*Id*. at p. 252.) "Nor was Juror G.B.'s conduct improper because it occurred outside the presence of other jurors. The diagram assisted him in thinking about the evidence at a time when he was permitted to form an opinion about the case. He was not limited to thinking about the case in the deliberation room." (*Id*. at p. 253.)

In *Bormann v. Chevron USA, Inc.* (1997) 56 Cal.App.4th 260, one of the deliberating jurors prepared a statement of her view of the evidence during a weekend recess. When the jury reconvened, the juror read to the jury her typewritten statement, which contained no facts that had not been elicited at trial.

> The declarations showed that Juror C. prepared this writing as a recital of her impressions of the evidence, in order to assist her in orally communicating those ideas to the rest of the jury. To hold this to be misconduct would mean the same would be true of a few words on scratch paper, or a gummed reminder of a question, which a juror wished to raise in deliberations when they reconvened. But as long as such notations are the product of the juror's own thought processes and the evidence, rather than extraneous influences, their making or consultation does not exceed the boundaries of proper conduct.

(*Id*. at p. 264, fn. omitted.)

Finally, in *People v. Allen & Lewis* (2011) 53 Cal.4th 60, a juror made a statement during deliberations to the effect that, "When the prosecution rested, she didn't have a case." The California Supreme Court found this statement did not support a finding the juror had committed misconduct by making up his mind prior to the start of deliberations.

> A juror who holds a preliminary view that a party's case is weak does not violate the court's instructions so long as his or her mind remains open to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations. [¶] Juror No. 11's statement that the prosecutor had failed to prove her case was made at some point during deliberations, not during the presentation of evidence or even at the outset of the deliberations. The record does not demonstrate that Juror No. 11 refused to listen to all of the evidence, began deliberations with a closed mind, or declined to deliberate. Indeed, other evidence indicates the contrary.

(*Id*. at p. 73, fn. omitted.)

5780.11-Jurors can rely on personal life experiences but not special expertise 11/18

"A juror's application of his or her everyday life experience to the evaluation of evidence is not misconduct." (*People v. Linton* (2013) 56 Cal.4th 1146, 1195.) Indeed, "jurors generally are *expected* to interpret the evidence presented at trial through the prism of their life experiences." (*In re Manriquez* (2018) 5 Cal.5th 785, 815, italics in original.) The California Supreme Court has drawn a distinction between a juror impermissibly presenting "as facts specialized knowledge they claim to possess" and a juror permissibly evaluating and interpreting the evidence, including witness credibility, based upon their own life experiences. (*People v. Allen & Johnson* (2011) 53 Cal.4th 60, 76-77.)

"It is well established it is misconduct for a juror to conduct an independent investigation of the facts, to bring outside evidence into the jury room, to inject his or her own expertise into the jury's deliberation or to engage in an experiment which produces new evidence. [Citations.]" (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746.) [¶] A juror commits misconduct by making a "claim to expertise or specialized knowledge of a matter at issue." *(In re Malone* (1996) 12 Cal.4th 935, 963.) Nonetheless, "[i]t is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work." (*Ibid*.) Jurors " 'must be given enough latitude in their deliberations to permit them to use common experiences and illustrations in reaching their verdicts. [Citations.]' [Citation.]" (*People v. Cumpian* (1991) 1 Cal.App.4th 307, 316.)

(*People v. Engstrom* (2011) 201 Cal.App.4th 174, 185; see, r.g., *People v. Manibusan* (2013) 58 Cal.4th 40, 57-58 [not misconduct for juror who previously worked in prison to talk about prison life during deliberations]; *People v. Pride* (1992) 3 Cal.4th 195, 267-268 [accord].)

5780.12-Inattentive or sleeping juror can be discharged 5/20

A juror's inattentiveness, perhaps even to point of sleeping, during a trial may be cause for discharge. "Sleeping during trial constitutes good cause for the dismissal of a juror." (*People v. Williams* (2015) 61 Cal.4th 1244, 1277.)

The trial court has the authority to discharge jurors for good cause, including sleeping during trial. (*People v. Bradford* [(1997)] 15 Cal.4th [1229,] 1348-1349; [Pen. Code] § 1089.) When the trial court receives notice that such cause may exist, it has an affirmative obligation to investigate. (*Bradford*, at p. 1348; *People v. Burgener* (1986) 41 Cal.3d 505, 520-521.) Both the scope of any investigation and the ultimate decision whether to discharge a given juror are committed to the sound discretion of the trial court. (*Bradford*, at p. 1348.)

(*People v. Bonilla* (2007) 41 Cal.4th 313, 350.)

A trial court does not abuse its discretion if it discharges a juror who falls asleep during the trial. (*People v. Johnson* (1993) 6 Cal.4th 1, 22.) As we stated in *Johnson*, "the court's ruling excusing [the juror] can be sustained solely on the basis of its finding that [the juror] had fallen asleep during trial." (*Ibid*.) In the present case, the trial judge had observed that the juror had difficulty paying attention during trial and appeared to fall asleep. The judge's observations were consistent with the testimony of the jury foreperson that the juror had fallen asleep twice during deliberations. The trial court, therefore, did not abuse its discretion in discharging the juror.

(*People v. Ramirez* (2006) 39 Cal.4th 398, 458, italics in original.) Of course, "[a] juror must not be discharged for sleeping unless there is convincing proof the juror actually slept during trial." (*People v. Bowers* (2001) 87 Cal.App.4th 722, 731 [reversal for discharging inattentive, and perhaps sleeping, "holdout" juror during deliberations]; compare *People v. Williams* (1996) 46 Cal.App.4th 1767, 1780-1781 [upholding discharge of juror described by other jurors as "inattentive, constantly requested that the jurors take time to organize their notes, forgot previous votes or discussions, and even attempted to alter the jury instructions"].) In contrast, "the mere suggestion of juror

'inattention' does not require a formal hearing disrupting the trial of a case." (*People v. Espinoza* (1992) 3 Cal.4th 806, 821; see also *People v. Williams* (2013) 58 Cal.4th 197, 289 ["Under the circumstances in this case, the spectator's assertion that Juror No. 6 had been 'nodding off' was insufficient to apprise the trial court that good cause might exist to discharge him."].)

> We have observed that "[a]lthough implicitly recognizing that juror inattentiveness may constitute misconduct, courts have exhibited an understandable reluctance to overturn jury verdicts on the ground of inattentiveness during trial. In fact, not a single case has been brought to our attention which granted a new trial on that ground. Many of the reported cases involve contradicted allegations that one or more jurors slept through part of a trial. Perhaps recognizing the soporific effect of many trials when viewed from a layman's perspective, these cases uniformly decline to order a new trial in the absence of convincing proof that the jurors were actually asleep during material portions of the trial. [Citations.]" [Citation.]

(*People v. Bradford*, *supra*, 15 Cal.4th p. 1349.)

In contrast, the California Supreme Court in *People v. Montes* (2014) 58 Cal.4th 809, upheld the discharge of a juror whose inattention was caused by their losing employment benefits and needing to start a new job. "The court correctly recognized the impending employment date could consciously or unconsciously pressure Juror No. 7 to try to conclude the guilt phase deliberations within his time frame, and that the deadline could create an atmosphere of urgency. (See *People v. Gurule* [(2002)] 28 Cal.4th [5557] at p. 632 [the trial court ' "should refrain from placing specific time pressure on a deliberating jury" '].)" (*People v. Montes*, *supra*, 58 Cal.4th at p. 872.)

5780.13-Exposure to media reports may be juror misconduct 5/12

"[J]uror bias exists if there is a substantial likelihood that a juror's verdict was based on an improper outside influence, rather than on the evidence and instructions presented at trial, and the nature of the influence was detrimental to the defendant. [Citations.]" (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1116.)

> The question of what constitutes juror bias varies according to the circumstances of the case. [Citation.] When, as here, juror misconduct arises from a juror's receipt of extraneous information, juror bias can be inherent or circumstantial. [Citations.] Under the inherent bias test, the court considers whether the "extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror." [Citations.] Even when the extraneous information is not so prejudicial, in and of itself, as to cause inherent bias, under the circumstantial bias test the court must examine the totality of the circumstances surrounding the misconduct to determine whether a substantial likelihood of actual bias nonetheless arose. [Citations.] The judgment must be set aside if the court finds prejudice under either the inherent or circumstantial bias test. [Citations. "[B]efore a unanimous verdict is set aside, the likelihood of bias under either test must be substantial." [Citation.]

(*People v. Cissna*, *supra*, 182 Cal.App.4th at pp. 1116-1117.)

Exposure to media reports related to a case is a form of juror "misconduct" whether or not it was intentional.

> "Although inadvertent exposure to out-of-court information is not blameworthy conduct, as might be suggested by the term 'misconduct,' it nevertheless gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material

that the defendant has had no opportunity to confront, cross-examine, or rebut." (*People v. Nesler* (1997) 16 Cal.4th 561, 579. This "presumption of prejudice may be rebutted … by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm." (*People v. Hardy* (1992) 2 Cal.4th 86, 174.)

(*People v. Thomas* (2012) 53 Cal.4th 771, 819.) "In an extraneous-information case, the 'entire record' logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*In re Carpenter* (1995) 9 Cal.4th 634, 654.)

5780.14-Juror's refusal to deliberate and bias are grounds for removal 2/21

"The trial court may discharge a juror for good cause at any time, including during deliberations, if the court finds that the juror is unable to perform his or her duty. ([Pen. Code] § 1089.)" (*People v. Lomax* (2010) 49 Cal.4th 530, 588 (*Lomax*); see also *People v. Homick* (2012) 55 Cal.4th 816, 898.) "A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to discharge. [Citations.]" (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1051; see also *People v. Engelman* (2002) 28 Cal.4th 436, 442.) But the evidence showing the juror's inability to perform his or her duty must be a "demonstrable reality." (*People v. Armstrong* (2016) 1 Cal.5th 432, 450; *People v. Salinas-Jacobo* (2019) 33 Cal.App.5th 760, 776.)

For example, "[a] sitting juror's actual bias, which would have supported a challenge for cause, renders him 'unable to perform his duty' and thus subject to discharge and substitution … ." (*People v. Keenan* (1988) 46 Cal.3d 478, 532.) Bias can also occur if a juror makes up his or her mind during the trial. (*People v. Weatherford* (2014) 59 Cal.4th 589, 599; *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 790-792.) "Jurors must be admonished not to 'form or express any opinion about the case until the cause is finally submitted to them.' ([Pen. Code] § 1122, subd. (b).) Prejudgment 'constitute[s] serious misconduct' (*People v. Brown* (1976) 61 Cal.App.3d 476, 480), raising a presumption of prejudice." (*People v. Weatherford*, *supra*, 59 Cal.4th at p. 598.)

"It is beyond dispute that a juror who cannot follow the court's instructions because of a personal bias should be discharged under section 1089. [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 713.) Similarly, grounds for discharging a juror for bias can include the juror forming and expressing views contrary to the law, such as refusal to consider capital punishment after being selected on a death penalty case. (See, e.g., *People v. Homick*, *supra*, 55 Cal.4th at pp. 895-901.)

Although separate forms of juror misconduct, "[b]ias is often intertwined with a failure or refusal to deliberate." (*Lomax, supra*, 49 Cal.4th at p. 589.) "A refusal to deliberate is misconduct. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1411.)" (*Lomax*, *supra*, 49 Cal.4th at p. 589.) A juror who refuses to deliberate may be removed "on the theory that such a juror is 'unable to perform [her] duty' within the meaning of Penal Code section 1089." (*People v. Cleveland* (2001) 25 Cal.4th 466, 475 (*Cleveland*).)

A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of

deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.

(*Id*. at p. 485.)

But "a juror may not be removed for failing to deliberate simply because he or she 'does not deliberate well or uses faulty logic or analysis.' (*Cleveland*, *supra*, 25 Cal.4th at p. 485.)" (*People v. Armstrong*, *supra*, 1 Cal.5th at p. 452; see also *People v. Salinas-Jacobo*, *supra*, 33 Cal.App.5th at pp. 777, 780.) "[T]he court may not discharge a juror for failing to agree with the majority of other jurors or for persisting in expressing doubts about the sufficiency of the evidence in support of the majority view … ." (*People v. Engelman*, *supra*, 28 Cal.4th at p. 446.) "[T]he circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted … is not a ground for discharge." (*Cleveland*, *supra*, 25 Cal.4th at p. 485; see, e.g., *People v. Barton* (2020) 56 Cal.App.5th 496, 515 ["Once Juror No. 12 reached her conclusion, her refusal to change her mind and her decision to no longer attempt to explain that decision to the other jurors also does not amount to misconduct."].) A juror also should not be discharged simply because he or she finds it "very difficult" to deliberate feeling "bullied" by other jurors. (*People v. Jones* (2020) 50 Cal.App.5th 694, 701-705.)

5780.15-Failure to follow the law or court's admonishments grounds for discharge 11/15

It is proper to discharge a juror "where the facts demonstrate the juror is unable to follow the law." (*People v. Harrison* (2013) 213 Cal.App.4th 1373, 1382.) "The court may discharge a juror for good cause (see [Pen. Code] § 1089), which includes a failure to follow the court's instructions (e.g., *People v. Alexander* (2010) 49 Cal.4th 846, 926)." (*People v. Allen & Johnson* (2011) 53 Cal.4th 60, 69.) This may include failure to follow the court's admonishments not to form or express opinions about the case except during deliberations. (*Ibid*.; see Pen. Code, § 122, subd. (b); see also *People v. Williams* (2015) 61 Cal.4th 1244, 1262.) It may also encompass failure to follow an instruction not to consider or discuss facts as to which there is no evidence, including any warning not to visit the scene or conduct independent investigation of the facts. (*People v. Allen & Johnson*, *supra*, 53 Cal.4th at p. 69; *People v. Wilson* (2008) 44 Cal.4th 758, 829-830.) It may include a juror who is unable to understand or apply basic legal principles. The appellate court in *People v. Harrison*, *supra*, 213 Cal.App.4th 1373, upheld the discharge of the lone hold-our juror.

> [D]espite his best efforts, the juror manifestly was unable to focus on the relevant principles and to apply the court's instructions to the facts of the case before him. The juror appears to have been overwhelmed by the task of a juror, questioning the basic principles he was instructed to accept, such as the presumption of innocence, and the meaning of many commonly used words in the court's instructions. … [M]ost of the questions posed by Juror No. 9 clearly related his own deep uncertainties and inability to follow the court's instructions. [¶] The juror was unable to concentrate his attention on relevant legal matters despite accommodations and assistance by the trial court, including hours of independent study of jury instructions and trial notes. The trial court rightly concluded that Juror No. 9 went "way beyond the scope" of the trial as he "speculat[ed] on things that are far beyond the record" and was unable to follow the law applicable to the case.

(*Id*. at pp. 1383-1384.)

5780.16-Juror's expressed fear of defendant alone not grounds for discharge 12/18

A juror's expressed fear of a defendant does not automatically establishes bias or other grounds for discharge. (*People v. Manibusan* (2013) 58 Cal.4th 40, 56.) "[G]iven Juror No. 58's earlier verbal assurances to the court about her ability as a juror to deliberate impartially notwithstanding any fear of serving on the jury, the trial court did not abuse its discretion in concluding that the declarations did not warrant further inquiry into the issue." (*Ibid*.) In *People v. Navarette* (2003) 30 Cal.4th 458, the California Supreme Court held that the trial court had not abused its discretion in declining to discharge a juror who had expressed fear of the defendant, explaining:

> Defendant assumes that, because the juror had concerns about his family's safety and the safety of his property, he was therefore biased against defendant, requiring his removal. The record belies this assumption. The court specifically asked the jurors to report if they could no longer be fair and unbiased, and [the juror in question] did not pursue the matter further … .

(*Id*. at p. 500; see also *People v. Brown* (2003) 31 Cal.4th 518, 581-582 [trial court did not abuse its discretion in declining to conduct evidentiary hearing, notwithstanding declarations stating that "[a]ll 12 jurors expressed concern that defendant's gang would retaliate against them as a result of the verdict" and that one juror thought he might "have been followed by a gang member or a member of defendant's family"].) Contrast, the holding in *People v. Powell* (2018) 6 Cal.5th 136:

> The court was confronted with an emotionally fragile, frightened, and confused juror whose past experiences led her to identify herself both with prosecution witness Leisey and with the defendants. At the same time, she became fearful of the defendants when they looked at her. On this record, the court was well within its discretion to find that the juror was emotionally unable to discharge her duty to decide the case impartially.

(*Id*. at p. 156 .)

5780.17-Appellate review standards for juror misconduct issues 9/20

The appellate review standard for juror misconduct depends upon the nature of the alleged misconduct, the stage at which it was litigated (during voir dire, during trial or as a post-trial motion for a new trial), and whether the issue is one of fact (i.e., juror credibility) or law.

"While removal of a juror is committed to the discretion of the trial court, upon review, the juror's disqualification must appear on the record as a demonstrable reality." (*People v. Homick* (2012) 55 Cal.4th 816, 899.) "[A]n appellate court's review of the decision to remove a seated juror is not conducted under the typical abuse of discretion standard, but rather under the 'demonstrable reality' test." (*People v. Fuiava* (2012) 53 Cal.4th 622, 711; see also *People v. Armstrong* (2016) 1 Cal.5th 432, 450-451; *People v. Romero* (2017) 14 Cal.App.5th 774, 781.) The "heightened" and "more stringent" demonstrable reality standard that governs appellate review of a trial court's decision to retain or remove a sitting juror under section 1089 "more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

> "The demonstrable reality test entails a more comprehensive and less deferential review" than substantial evidence review. "It requires a showing that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not reweigh the

> evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052-1053.)

(*People v. Homick*, *supra*, at p. 899; see also *People v. Romero*, *supra*, 14 Cal.App.5th at p. 782; *People v. Harrison* (2013) 213 Cal.App.4th 1373, 1383.) The appellate court also only considers the reasons given by the trial judge for discharging a juror, not other bases that may have supported the ruling. (*People v. Jones* (2020) 50 Cal.App.5th 694, 703.)

In contrast, when a conflict exists in the available evidence regarding any area of potential misconduct, it is the function of the trial court to resolve the factual dispute. The trial court should consider the admissible portions of all juror affidavits and any other properly offered evidence. The trial court's credibility determinations and resolution of questions of historical fact are binding on the reviewing court if supported by substantial evidence and may not be disturbed absent a showing of a clear abuse of discretion. (*People v. Dykes* (2009) 46 Cal.4th 731, 809; *People v. Ault* (2004) 33 Cal.4th 1350, 1264; *People v. Danks* (2004) 32 Cal.4th 269, 304.)

When the issue on appeal involves juror misconduct to which the presumption of prejudice applies:

> "[T]he presumption of prejudice is rebutted, and the verdict will not be disturbed, if a reviewing court concludes after considering the entire record, including the nature of the misconduct and its surrounding circumstances, that there is no substantial likelihood that the juror in question was actually biased against the defendant. [Citations.] Our inquiry in this regard is a 'mixed question of law and fact' subject to independent appellate review. [Citation.] But ' " [w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." ' " (*People v. Merriman* (2014) 60 Cal.4th 1, 95-96.)

(*People v. Brooks* (2017) 3 Cal.5th 1, 98-99.) One appellate court has admitted the "law of prejudice lacks clarity." (*People v. Echavarria* (2017) 13 Cal.App.5th 1255, 1264.)

> Our understanding of the law is as follows: Juror misconduct raises a presumption of prejudice. The People may rebut the presumption by showing no prejudice actually resulted from the misconduct. [Citation.] If the People fail in their rebuttal, then prejudice exists. The appellate court must then examine the entire record to determine if " ' "there is a reasonable probability of actual harm to the [defendant] resulting from the misconduct." ' " [Citation.] If the reviewing court finds there is not a substantial likelihood of harm then there is no need for a new trial. [Citation.] [¶] The prejudice analysis raises mixed questions of law and fact. The trial court's factual findings are accepted if they are supported by substantial evidence. The trial court's ultimate finding concerning prejudice is reviewed de novo. [Citation.]

(*Id*. at p. 1265.)

5790.1-Technical defects generally do not invalidate a jury verdict 1/15

Technical defects in a jury verdict or a verdict form does not invalidate the verdict if the intent of the jury is otherwise clear. "A verdict should be read in light of the charging instrument and the plea entered by the defendant. … [T]he form of the verdict generally is immaterial, so long as the intention of the jury to convict clearly may be seen. [Citations.]" (*People v. Paul* (1998) 18 Cal.4th 698, 706-707.)

> " 'A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court.' [Citations.]" [Citations.] "The form of a verdict is immaterial provided the intention to convict of the crime charged is unmistakably expressed. [Citation.]" [Citation.] "[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.]" [Citation.]

(*People v. Jones* (1997) 58 Cal.App.4th 693, 710-711; accord, *People v. Jones* (2003) 29 Cal.4th 1229, 1259; see also *People v. Jones* (2014) 230 Cal.App.4th 373, 376-379 [requirement of Pen. Code, § 1157, that verdict specify degree of crime (first degree murder) satisfied even though information did not charge degree of crime].)

5790.2-Inconsistent verdicts generally allowed to stand 7/21

"Occasional inconsistent jury verdicts are inevitable in our criminal justice system." (*People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 5; see also *Bravo-Fernandez v. United States* (2016) 580 U.S. ___, ___ [137 S.Ct. 352, 357, 196 L.Ed.2d 242, 247] ["actual inconsistency in a jury's verdicts is a reality"].) "[A]s a general rule, inherently inconsistent verdicts are allowed to stand." (*People v. Lewis* (2001) 25 Cal.4th 610, 656; see also *United States v. Powell* (1984) 469 U.S. 57, 68-69; *People v. Bell* (2020) 48 Cal.App.5th 1, 10; *In re E.R.* (2010) 189 Cal.App.4th 466, 470-471.) "An acquittal of one or more counts shall not be deemed an acquittal of any other count." (Pen. Code, § 954; see *People v. Hussain* (2014) 231 Cal.App.4th 261, 273; *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1656-1657.) For example, "if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both." (*People v. Santamaria* (1994) 8 Cal.4th 903, 911; see also *People v. Abilez* (2007) 41 Cal.4th 472, 513; but see *Yeager v. United States* (2009) 557 U.S. 110, 122-125 [acquittal on one count and hung jury on another factually indistinguishable count prevents retrial on hung count under "issue preclusion" doctrine of Double Jeopardy Clause].) If inconsistent verdicts forms are submitted on the same count, the juror's oral declaration in open court signifies the true return of their verdict. (*People v. Valenzuela* (2018) 23 Cal.App.5th 82, 85.)

"The rule applies equally to inconsistent enhancement findings [citation], and to an enhancement finding that is inconsistent with the verdict on a substantive offense [citation]." (*People v. Miranda* (2011) 192 Cal.App.4th 398, 405.) "Moreover, case law makes clear that a jury's inconsistent verdict or inconsistent findings on an enhancement allegation should not be used on appeal as an indication that the jury did not understand certain aspects of the trial because juries have many reasons for delivering inconsistent verdicts, including 'lenity' and 'compromise.' (*People v. Lewis* (2001) 25 Cal.4th 610, 656 ["Nor does the existence of inconsistent verdicts imply that the jury must have been confused. [Citation.] An inconsistency may show no more than jury

lenity, compromise, or mistake, none of which undermines the validity of a verdict."].)" (*People v. Brugman* (2021) 62 Cal.App.5th 608, 629-630.)

Similarly, "if a verdict regarding one participant in alleged criminal conduct is inconsistent with other verdicts, all of the verdicts may stand. (*Standefer v. United States* (1980) 447 U.S. 10, 25-26; *People v. Palmer* (2001) 24 Cal.4th 856, 860.) Accordingly, a verdict regarding one defendant has no effect on the trial of a different defendant." (*People v. Superior Court (Sparks)*, *supra*, 48 Cal.4th at p. 5.)

5790.3-Minor discrepancies between charges and proof at trial are inconsequential 12/11

Variance between the charging document and the proof at trial, such as to properly named victim in an attempted murder case, does not require reversal when, unless it is material. (*People v. Amperano* (2011) 199 Cal.App.4th 336, 343 ["we find that defendant was adequately advised of the charge against him and given a meaningful opportunity to defend against it"].) " '[T]echnical or trifling matters of discrepancy will not furnish ground for reversal. Under the generally accepted rule in criminal law a variance is not regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense, or is likely to place him in second jeopardy for the same offense.' " (*Ibid*., citing *People v. Williams* (1945) 27 Cal.2d 220, 226.)

5900.1-Test for whether current prosecution barred by *Kellett* rule 8/20

Penal Code section 654, subdivision (a) states:

> An act or omission 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 in no case shall the act of omission be punished under more than one provision. *An acquittal or conviction and sentence* under any one bars a prosecution for the same act or omission under any other.

(Italics added.) Penal Code section 654's " 'preclusion of multiple prosecution is separate and distinct from its preclusion of multiple punishment. The rule against multiple prosecutions is a procedural safeguard against harassment and is not necessarily related to the punishment to be imposed … .' " (*People v. Britt* (2004) 32 Cal.4th 944, 950; see also *In re Dennis B.* (1976) 18 Cal.3d 687, 692 (*Dennis B.*).)

In *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*) the California Supreme Court set forth a test for when multiple prosecutions are improper under Penal Code section 654:

> When … the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence.

(*Id.* at p. 827, fn. omitted; see also *People v Goolsby* (2015) 62 Cal.4th 360, 366; *People v. Britt*, *supra*, 32 Cal.4th at p. 954.) "Thus, there are two related but distinct questions: (1) whether 'the same act or course of conduct play[ed] a significant part' in both offenses (*Kellett*, *supra*, 63 Cal.2d at p. 827); and (2) 'whether on the record herein the prosecution was or should have been "aware of more than one offense." ' (*Dennis B.*, *supra*, 18 Cal.3d at pp. 692-693.)" (*People v. Hendrix* (2018) 20 Cal.App.5th 457, 464.)

Finally, *Kellett* applies only to separate prosecutions. For example, "[Penal Code] section 654's bar against multiple prosecutions does not apply to the amendment of an information to add new charges after a mistrial." (*People v. Sanchez* (2020) 49 Cal.App.5th 961, 988; see also *People v. Short* (2019) 42 Cal.App.5th 905, 913-914.)

5900.2-*Kellett* applies only to transactionally related offenses 5/20

"[T]he offenses must be transactionally related, and not just joinable, before the *Kellett* [*Kellett v. Superior Court* (1966) 63 Cal.2d 822] rule applies." (*People v. Valli* (2010) 187 Cal.App.4th 786, 796 (*Valli*); *People v. Turner* (1985) 171 Cal.App.3d 116, 129.) Whether the offenses are transactionally related under *Kellett* depends on whether they are factually "too interrelated to permit their being prosecuted successively." (*Kellett*, *supra*, 63 Cal.2d at p. 827; see also *People v. Flint* (1975) 51 Cal.App.3d 333, 336.) In other words, if the evidence needed to prove one offense necessarily supplies proof of the other the two offenses must be prosecuted together. (*People v. Hamernik* (2015) 1 Cal.App.5th 412, 427.) The crucial test is whether "the same act or course of conduct play[ed] a significant part …" in the two prosecutions. (*Kellett*, *supra*, 63 Cal.2d at p. 827; *People v. Linville* (2018) 27 Cal.App.5th 919, 928 (*Linville*); *Valli*, *supra*, 187 Cal.App.4th at pp. 796-797.) "Whether the rule of *Kellett* … applies must be determined on a case-by-case basis." (*People v. Britt* (2004) 32 Cal.4th 944, 955.)

The appellate courts have adopted two different tests under *Kellett* to determine whether multiple offenses occurred during the same course of conduct. (*Linville*, *supra*, 27 Cal.App.5th at p. 931; *People v. Ochoa* (2016) 248 Cal.App.4th 15, 28 (*Ochoa*).) The first is the "time and place test." (*Ochoa*, *supra*, 248 Cal.App.4th at p. 29.) "One line of cases finds *Kellett* not applicable where the offenses are committed at separate times and locations. [Citations.] … [¶] While we agree with the results in [these cases], we believe *Kellett* is not necessarily a simple 'different time/different place' limitation." (*Valli*, *supra*, 187 Cal.App.4th at pp. 797-798.) Instead, the second test, "the 'evidentiary test' … looks to the evidence necessary to prove the offenses." (*Ochoa*, *supra*, 248 Cal.App.4th at p. 29.)

> A second test was set forth in *People v. Flint* (1975) 51 Cal.App.3d 333 (*Flint*) … . The court found various cases on *Kellett* could be harmonized by considering the totality of the facts and whether separate proofs were required for the different offenses. (*Flint*, *supra*, at pp. 337-338.) "Neither the purpose of the rule—prevention of needless harassment and waste of public funds; nor the criterion for its applicability—whether the same act or course of conduct plays 'a significant part' with respect to each crime—suggests that its applicability in a particular case depends on abstract definitions of the elements of the respective crimes or on the precise moment when, as a matter of law, one crime was completed. What matters, rather, is the totality of the facts, examined in light of the legislative goals of sections 654 and 954, as explained in *Kellett*." (*Id*. at p. 336, fn. omitted.)

(*Valli*, *supra*, 187 Cal.App.4th at pp. 798-799; see also *Short v. Superior Court* (2019) 42 Cal.App.5th 905, 912; *People v. Witcraft* (2011) 201 Cal.App.4th 659, 667.) "The evidentiary test … requires more than a trivial overlap of the evidence. Simply using facts from the first prosecution in the subsequent prosecution does not trigger application of *Kellett*." (*Valli*, *supra*, 187 Cal.App.4th at p. 799.)

"When there is a course of conduct involving several physical acts, the actor's intent or objective and the number of victims involved, which are crucial in determining the permissible punishment, may be immaterial when successive prosecutions are attempted." (*Kellett*, *supra*, 63 Cal.2d at p. 827; see also *Valli*, *supra*, 187 Cal.App.4th at p. 797.) "*Kellett* does not require, nor do the cases construing it, that offenses committed at different times and at different places must be prosecuted in a single proceeding. (*People v. Cuevas* (1996) 51 Cal.App.4th 620, 624 [separate narcotics offenses].) Nor does *Kellett* apply to crimes involving separate victims. (*People v. Marlow* (2004) 31 Cal.4th 131, 143-144 [murders in separate counties]; *People v. Ward* (1973) 30 Cal.App.3d 130, 136 [sex crimes].) Even so, "[t]he fact that both prosecutions involved the same killings does not by itself warrant a conclusion that the same course of conduct played a significant part in both." (*Linville*, *supra*, 27 Cal.App.5th at p. 932.)

> [Defendant's] conviction as an accessory to those two murders did not require proof, nor was it alleged, that she was involved in either killing. Since the accessory conviction did not require and, indeed, was not predicated on an allegation that she committed the murders, it did not involve the same course of conduct as her later murder prosecution.

(*Ibid*., italics omitted.)

In *People v. Hendrix* (2018) 20 Cal.App.5th 457, for example, the defendant was pulled over by a police officer for running a red light. The officer subsequently determined the defendant was under the influence of alcohol. The officer wrote the defendant a traffic citation and arrested him for driving under the influence (DUI). The defendant paid the fine associated with the infraction citation and then filed a motion to dismiss the separately filed misdemeanor DUI charge under *Kellett*. The appellate court upheld the denial of this motion. The court found the evidence necessary to prove the two offenses were sufficiently factually distinct to fall outside of the *Kellett* rule. (*Id*. at pp. 464-465.) "Because the same act or course of conduct did not play a significant part in both the red light infraction and the DUI offenses, we conclude section 654 does not bar prosecution of the latter offenses." (*Id*. at p. 466, fn. omitted.)

5900.3-*Kellett* applies to conviction and sentence, and not a grant of probation 4/20

The bar to multiple prosecutions under Penal Code section 654 applies only "if the initial proceedings culminate in *either acquittal or conviction and sentence*." (*Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827 (*Kellett*), italics added; see also *People v. Hartfield* (1970) 11 Cal.App.3d 1073, 1080; similarly see *In re R.L.* (2009) 170 Cal.App.4th 1339, 1343 [although *Kellett* applies to juvenile proceedings, it did not apply here because the dispositional hearing on the initial offense had not occurred when the new charges were added].) Thus, a conviction without imposition of sentence does not implicate the *Kellett* bar. (*Aslam v. Superior Court* (2019) 41 Cal.App.5th 1029, 1037.) And acquittal on one or more counts does not implicate the *Kellett* bar if there is conviction of factually related counts. (*Id*. at pp. 1037-1040.)

Punishment—the irrevocable pronouncement of sentence—is essential to the operation of the Penal Code section 654 bar. (*People v. Tideman* (1962) 57 Cal.2d 574, 587.) Thus, as a matter of law, the multiple prosecution bar of *Kellett* does not apply when the initial prosecution resulted in a grant of probation. It is well established that a grant of probation is not a "sentence." (Pen. Code, § 1203(a).) When the trial court suspends imposition of sentence and grants probation, no judgment is entered until such time as the probation is revoked and the defendant is *sentenced*." (*In re White* (1969) 1 Cal.3d 207, 212, italics added; see also *People v. Knight* (1961) 193 Cal.App.2d 248, 252.)

Suspending the imposition of sentence and granting probation is an act of clemency designed to allow rehabilitation and is not within the ambit of the double punishment proscription of Penal Code section 654. (*People v. King* (1963) 218 Cal.App.2d 602, 611; *People v. Johnson* (1955) 134 Cal.App.2d 140, 143.)

This result is not unfair to the defendant. Should the defendant be found guilty in a new prosecution, the court then would make the decision under Penal Code section 654, whether the defendant may be *punished* for the charges in both the new and the old case. If not, the solution is to grant the defendant credit on the sentenced case for any time served separately on the case for which sentence is stayed under Penal Code section 654. (*People v. Crowder* (2000) 79 Cal.App.4th 1365, 1371; *People v. Smith* (1977) 70 Cal.App.3d 306, 317; *People v. Hartfield*, *supra*, 11 Cal.App.3d at p. 1082; *People v. Breland* (1966) 243 Cal.App.2d 644, 651-652.)

5910.1-There are several exceptions to the *Kellett* bar 3/19

There are several recognized exceptions to the multiple prosecution bar of Penal Code section 654 as interpreted by the California Supreme Court in *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 827-828 (*Kellett*)

Multiple prosecutions are not barred when different prosecuting agencies, without the knowledge of the other's actions, are involved (*Kellett*, *supra*, 63 Cal.2d at p. 827; see, e.g., *People v. Eckley* (1973) 33 Cal.App.3d 91, 97-98) But this exception does not apply to different prosecutors within the same office. (*Barriga v. Superior Court* (2012) 206 Cal.App.4th 739, 749.)

The *Kellett* bar also should not be applied when the defendant quickly pleaded guilty to the lesser offense. (See, e.g., *People v. Hartfield* (1970) 11 Cal.App.3d 1073, 1080-1081).

> [E]xamining the totality of facts in light of section 654's legislative goals [citation], we are satisfied the policies of section 654 would not be served by prohibiting Linville's murder prosecution. One factor we may weigh, while not dispositive, is that Linville entered a quick guilty plea to the much less serious accessory charge, without a trial or even a preliminary hearing. In that circumstance, "the public's interest in avoiding the waste of resources through relitigation was minimal," whereas "the public's weighty interest in prosecuting and punishing [her] for the serious crime[ ]" of murder was great. [Citation.]

(*People v. Linville* (2018) 27 Cal.App.5th 919, 934 (*Linville*), fn. omitted.)

Kellett should not be applied when the risk of waste and harassment from a second prosecution is "outweighed by the risk that a defendant guilty of a felony may escape proper punishment." (*Kellett*, *supra*, 63 Cal.2d at p. 828; *Linville*, *supra*, 27 Cal.App.5th at p. 935.)

> And finally, it is obvious on the rather unique facts of this record, that Linville's murder prosecution did not in any real sense "harass" her, as might have been the case, for example, had she reasonably expected that the initial charges pressed against her would be the last. To put it bluntly, Linville knowingly tried to "get off on a technicality." She pled guilty to a far less serious charge, lied about her involvement to the probation department before sentencing on that charge, and then immediately turned around and began bragging openly that she had been involved in the killings but could not be recharged and had "got[ten] away with murder."

(*Linville*, *supra*, 27 Cal.App.5th at p. 935.)

Kellett does not apply if the prosecutor was justifiably ignorant of, or otherwise unable to proceed on, the more serious charge when the lesser charge was prosecuted. (See, e.g., *People v. Davis* (2005) 36 Cal.4th 510, 558; *People v. Turner* (1985) 171 Cal.App.3d 116, 129-130). "[T]he fact that the prosecution could have known of the multiple offenses does not necessarily lead to the conclusion that it did know or should have known." (*In re Dennis B.* (1976) 18 Cal.3d 687, 693; see also *People v. Britt* (2004) 32 Cal.4th 944, 955.)

Finally, even if the current offense was not charged with the factually related offense, *Kellett* is satisfied if the jury was instructed on the current offense as an included offense of the factually related charge. (*People v Goolsby* (2015) 62 Cal.4th 360, 365-367.)

5910.2-Prosecutor justifiably unable to proceed on related charges 5/18

The third *Kellett* exception applies when there is a justifiable lack of prosecutorial awareness of the more serious charge. "We have recognized an exception to the multiple-prosecution bar where the prosecutor 'is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence.' [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 558.) This has called the "unavailable evidence" exception to the *Kellett* rule. (*People v. Spicer* (2015) 235 Cal.App.4th 1359, 1373 (*Spicer*).)

The seriousness of the charges plays a role in this exception to the *Kellett* multiple prosecution bar.

> However, "[t]he *Kellett* rule applies only where 'the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part.' " [Citations.] The rule may apply even if multiple prosecutors act independently in charging the defendant, such that no single prosecutor is aware of the multiple prosecutions. The duty to join is particularly strong where the multiple offenses are serious in nature. "When both offenses are serious crimes, the potential for harassment and waste is sufficiently strong that section 654 imposes on prosecutors an administrative duty to insure that the charges are joined." [Citation.]

(*People v. Ochoa* (2016) 248 Cal.App.4th 15, 28.)

The prosecutorial awareness *Kellett* rule exception was explored in *In re Dennis B.* (1976) 18 Cal.3d 687 (*Dennis B.*), a case involving a single prosecutorial agency. According to the California Supreme Court, the *Kellett* reference to prosecutorial awareness of more than one offense arising from a course of conduct applies "only to intentional harassment, i.e., to cases in which a particular prosecutor has timely knowledge of two offenses but allows the multiple prosecutions to proceed." (*Id.* at p. 693; but see *Barriga v. Superior Court* (2012) 206 Cal.App.4th 739, 747-749 [no due diligence in failing to uncover additional evidence (text messages in cell phone seized by police) before entering into plea bargain, prosecutor charged with "constructive knowledge" of such evidence].)

In *Dennis B.*, the minor made an unsafe lane change and collided with a motorcycle, killing its driver. The minor was charged with the traffic infraction in municipal court. He was found guilty and fined $10.00. Three weeks later he was charged in juvenile court with vehicular manslaughter. The minor argued that the felony charge should have been dismissed under Penal Code section 654. The California Supreme Court acknowledged that the defendant's single act resulted in the two offenses and that the prosecution could have known both offenses were applicable since the cyclist

died before either trial began. (*Dennis B.*, *supra*, 18 Cal.3d at p. 693.) But, the court also found no evidence that a particular prosecutor had actual knowledge of both offenses in time to prevent the multiple proceedings. (*Ibid*.) "[T]he fact that the prosecution could have known of the multiple offense does not necessarily lead to the conclusion that it did know or should have known." (*Id*. at pp. 693-694; see also *People v. Britt* (2004) 32 Cal.4th 944, 955; distinguish *People v. Valli* (2010) 187 Cal.App.4th 786, 796.) "Our task then is to ascertain whether the prosecution should have known of the two offenses, a question distinct from that of actual knowledge." (*Dennis B.*, *supra*, 18 Cal.3d at p. 694.) The court evaluated several factors to determine whether the prosecutor should have known. These factors included the disparity in the gravity of the two offenses, the state's interest in maintaining the summary nature of traffic violation proceedings, and the equities of the state's position. (*Id.* at pp. 694-696.) Ultimately the court held the infraction conviction did not bar prosecution of the more serious offense. (*Id*. at p. 696.)

This reasoning partially guided the appellate court decision in *People v. Hendrix* (2018) 20 Cal.App.5th 457. In *Hendrix*, the defendant was pulled over by a police officer for running a red light. The officer subsequently determined the defendant was under the influence of alcohol. The officer wrote the defendant a traffic citation and arrested him for driving under the influence (DUI). The defendant paid the fine associated with the infraction citation and then filed a motion to dismiss the separately filed misdemeanor DUI charge under *Kellett*. The appellate court upheld the denial of this motion. In addition to finding evidence necessary to prove the two offenses were sufficiently factually distinct to fall outside of the *Kellett* rule (*Id*. at pp. 464-465), the court factored in that there was no evidence the prosecutor's office handled traffic infractions. (*Id*. at p. 465.)

> And given the summary nature of minor traffic violation proceedings, the risk of waste and harassment inherent in allowing the subsequent DUI prosecution in this case is substantially outweighed by the prospect defendant would otherwise escape proper punishment for a very serious misdemeanor simply because he paid a traffic ticket related to factually distinct conduct that led to his being pulled over and thereafter arrested for DUI.

(*Ibid*.)

The appellate court in *Spicer*, *supra*, 235 Cal.App.4th 1359 applied the "unavailable evidence" exception to a situation where there was probable cause to prosecute the defendant for an additional charge, but the prosecuting agency did not believe it possessed sufficient evidence to prove the charge beyond a reasonable doubt. The defendant was originally prosecuted in 1985 for possession of murder victim's stolen car, but the prosecutor did not believe there was sufficient evidence to prove beyond a reasonable doubt that defendant was the murderer. There was no evidence when or how the murder the occurred and what defendant's role was in the murder. In 2011, after a "cold case" investigator uncovered a new witness, a new forensic DNA method became available, and defendant made new admission captured by wiretap, was the defendant prosecuted for the murder. The appellate court in *Spicer* upheld the trial court denial of defendant's *Kellett* motion. (*Id*. at pp. 1375-1381.) "[W]e discern no error in the trial court's determination that the evidence supporting an objectively reasonable belief that appellant would be convicted of Jones's murder was not within the prosecution's possession in 1985 and could not have been obtained despite due diligence." (*Id*. at p. 1377.)

In *People v. Battle* (1975) 50 Cal.App.3d Supp. 1, three people were killed in an automobile collision. The defendant was initially charged only with an infraction "bad brakes" violation to which he pled guilty and was fined. It was clear to all parties that manslaughter charges were being investigated, but could not be filed until after an expert evaluated the evidence. Like the California

Supreme Court in *Dennis B.*, the appellate department ruled Penal Code section 654 did not prevent the subsequent manslaughter prosecution because the prosecutor was not truly "aware"—in the *Kellett* sense—of the greater offense until the investigation was complete. (*Id.* at p. 4.) A "suspicion" does not constitute "awareness" under *Kellett*. (*Ibid*.)

6000.1-Element of simple kidnapping under PC207(a) 11/16

Penal Code section 207, subdivision (a), provides: "Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, *or into another part of the same county*, is guilty of kidnapping." (Italics added.) "In order to establish a kidnapping under section 207, subdivision (a), the prosecution must prove ' "(1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance." [Citation.]' (*People v. Bell* (2009) 179 Cal.App.4th 428, 435.)" (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1434; see also *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1368; *People v. Byrd* (2011) 194 Cal.App.4th 88, 101.) "For purposes of kidnapping, one has not consented unless acting 'freely and voluntarily and not under the influence of threats, force or duress … .' (*People v. Davis* (1995) 10 Cal.4th 463, 517.) Thus, 'the concepts of consent and force or fear with regard to kidnapping are inextricably intertwined.' ([*People v.*] *Majors* [(2004)] 33 Cal.4th [321] at p. 331.)" (*People v. Alvarez* (2016) 246 Cal.App.4th 989, 1006.)

6000.2-Distance of kidnap victim movement (asportation) must be substantial 4/20

To constitute simple kidnapping under Penal Code section 207, subdivision (a), the defendant's movement of the victim must be more than slight or trivial. The movement must be "substantial in character." (*People v. Martinez* (1999) 20 Cal.4th 225, 235 (*Martinez*); *People v. Caudillo* (1978) 21 Cal.3d 562, 572 (*Caudillo*); *People v. Newman* (2019) 40 Cal.App.5th 68, 71 (*Newman*).) "A jury considers all the circumstances to determine whether the kidnapping movement was substantial rather than trivial." (*Newman*, *supra*, 40 Cal.App.5th at p. 71.)

Formerly, distance was the sole criteria for determining whether a movement was "substantial in character" under *Caudillo*. This aspect of *Caudillo* was expressly overruled by the California Supreme Court in *Martinez*. (*Martinez*, *supra*, 20 Cal.4th at pp. 235-238 & fn. 6.) *Martinez* held that whether the victim's movement was "substantial in character" allows consideration of the totality of the circumstances, not just the distance the victim was moved. (*Id*. at pp. 235, 237.) Thus, in addition to the actual distance the victim was moved, a jury may consider whether the movement increased the victim's risk of harm beyond that which existed before movement, decreased the likelihood of detection, or increased the danger inherent in the victim's foreseeable attempts to escape, and the defendant's improved opportunity to commit additional crimes. (*Id*. at p. 237.) The court emphasized that the jury does not have to find increased victim vulnerability or risk of harm, or any other contextual factor, in order to conclude that the victim was moved a distance that was substantial in character. (*Ibid*.) The opposite is equally true—the existence of these contextual factors is not enough to elevate movement for a very short distance into a substantial movement. (*Ibid*.; see generally, *People v. Singh* (2019) 42 Cal.App5th 175, 187-188 [sufficient evidence of asportation when two-year-old child taken from mother's side, moved over 10 feet and removed from bus]; *Newman*, *supra*, 40 Cal.App.5th at pp. 71-72 [sufficient evidence of asportation when defendant broke into the victim's locked bedroom, pointed a gun at

her and ordered her to go outside to his car, and at minimum the victim ran 190 feet before she broke free]; *People v. Perkins* (2016) 5 Cal.App.5th 454, 470-471 [insufficient evidence of asportation when child molest victim walked 10 to 30 feet inside apartment from only bathroom to only bedroom]; *People v. Arias* (2011) 193 Cal.App.4th 1428, 1435-1436 [sufficient evidence of asportation when victim walked 15 feet into his apartment by gun wielding defendant who was looking for rival gang members].)

Further, when an "associated crime" is involved, the victim's movement must be more than merely incidental to that crime in order to be substantial. (*Martinez*, *supra*, 20 Cal.4th. at pp. 237-238; *People v. Williams* (2017) 7 Cal.App.5th 644, 671.) "[F]or simple kidnapping 'an "associated crime," as that phrase was used by the *Martinez* court, 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.' [Citation.]" (*People v. Delacerda* (2015) 236 Cal.App.4th 282, 289 [error not to instruct jury to consider whether victim's movement was merely incident to defendant's domestic violence crimes]; see *People v. Bell* (2009) 179 Cal.App.4th 428 [error not to instruct jury to consider whether victim passenger's movement was merely incident to defendant's violation of Vehicle Code section 2800.2, evading a police officer].)

Even under *Caudillo*, no specific minimum distance was required by the cases or the statute. (*People v. Williams* (1990) 220 Cal.App.3d 1165, 1171 [840-foot-long city block at night sufficient].) Appellate courts applying *Caudillo* upheld kidnapping convictions under section 207, subdivision (a), involving movement of a victim of various lengths. (*People v. Morgan* (2007) 42 Cal.4th 593, 605-616 [245-foot movement sufficient, but 37 to 45 foot movement not]; *People v. Blackburn* (1976) 56 Cal.App.3d 685, 693 [500 foot movement sufficient].)

6010.1-Voluntary initial transport does not preclude kidnapping 7/21

"Even if the victim's initial cooperation is obtained without force or the threat of force, kidnaping occurs if the accused subsequently restrains his victim's liberty by force and compels the victim to accompany him further." (*People v. Morgan* (2007) 42 Cal.4th 593, 615, internal quotation marks and citations omitted.)

> [W]here the perpetrator tricks the victim into the asportation by fraud, deceit, enticement, or false promises, without application of the requisite force or fear, there is no kidnapping. ([*People v.*] *Majors* [(2004) 33 Cal.4th 321] at pp. 327-328.) [¶] Additionally, where a victim consents to the movement, meaning he or she exercises his or her free will in the absence of threats, force, or duress, there is no kidnapping. (See *People v. Sattiewhite* (2014) 59 Cal.4th 446, 476-477 (*Sattiewhite*).) However, even where a victim's initial cooperation is obtained without force or fear, a kidnapping occurs if the accused subsequently compels the victim to accompany him. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1017 [where victim voluntarily accepted ride with the defendant, that voluntariness is vitiated when the defendant does not let the victim out of the car]; accord, *People v. Thompson* (1967) 252 Cal.App.2d 76, 87-88 [movement is not consensual where victim agrees to follow robber upstairs, stops midway up the stairs to look at relatives below, and continues only after robber waves gun and says "Come on, come on"].)

(*People v. Alvarez* (2016) 246 Cal.App.4th 989, 1002 (*Alvarez*); see *People v. Nieto* (2021) 62 Cal.App.5th 188, 194-197 [general kidnapping per Pen. Code § 207, subd. (a) cannot be committed by deception or fraud alone].)

Thus, as noted, that a victim may have initially agreed to be transported by voluntarily entering a defendant's vehicle does not preclude a conviction for kidnapping. A defendant who restrains a victim from exiting a vehicle and compels the victim to accompany the defendant further is guilty of kidnapping. (*People v. Camden* (1976) 16 Cal.3d 808, 814; *People v. Galvan* (1986) 187 Cal.App.3d 1205, 1213.) The force employed need not be physical. (*People v. Majors*, *supra*, 33 Cal.4th at pp. 326-327.) If the victim expresses the desire to leave the vehicle, or not to accompany the defendant in the direction he or she is going, but the defendant ignores the plea and continues to drive so that the victim cannot escape, force or fear is established. (*Camden*, *supra*, 16 Cal.3d at p. 814; see also *Parnell v. Superior Court* (1981) 119 Cal.App.3d 392, 402.)

Similar principles apply when the victim has been lawfully arrested, which is excluded by statute from the scope of the crime of kidnapping. (*Alvarez*, *supra*, 246 Cal.App.4th at p. 1002.)

> [O]nce a person is no longer acting to effectuate a legal arrest, the protection from criminal liability otherwise afforded is lost. Just as the defense afforded by a victim's initial consent may be vitiated by a subsequent withdrawal of that consent (*People v. Hovarter*, *supra*, 44 Cal.4th at pp. 1017-1018), we conclude that changing circumstances may limit a defendant's ability to rely on a lawful arrest as a defense to a kidnapping charge. Thus, while an officer is transporting someone pursuant to a lawful arrest, he is not kidnapping the arrested person; however, once the transportation is no longer for lawful law enforcement objectives, it may transmute into a kidnapping.

(*Alvarez*, *supra*, 246 Cal.App.4th at p. 1003.)

6020.1-Force necessary to accomplish kidnapping depends on nature of victim 7/21

Penal Code section 207, subdivision (a), provides: "Every person who *forcibly*, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." (Italics added.)

> While the statute requires force as an operative act [citations] the force need not be physical. The movement is forcible where it is accomplished through the giving of orders which the victim feels compelled to obey because he or she fears harm or injury from the accused and such apprehension is not unreasonable under the circumstances. [Citation.]

(*People v. Stephenson* (1974) 10 Cal.3d 652, 660.) If the defendant uses physical force to kidnap the victim, there is no need to prove the defendant intended to instill fear in the victim as well. (*People v. Moya* (1992) 4 Cal.App.4th 912, 916-917.)

> [K]idnapping requires the asportation of the victim accomplished by force or instilling fear. (*People v. Majors* (2004) 33 Cal.4th 321, 326 (*Majors*).) This does not require physical compulsion. (*Id*. at pp. 326-327.) Rather, where the victim reasonably feels compelled under the circumstances to comply with the defendant's orders under fear of harm or injury from the defendant, the asportation is forcible. (*Id*. at p. 327.) Moreover, asportation accomplished by threat of arrest "carries with it the threat that one's compliance, if not otherwise forthcoming, will be physically forced." (*Id*. at p. 331.) Thus, the threat of arrest carries with it an implicit use of force necessary for a kidnapping conviction. (*Ibid*.) In contrast, where the perpetrator tricks the victim into the asportation by fraud, deceit, enticement, or false promises, without application of the requisite force or fear, there is no kidnapping. (*Majors*, at pp. 327-328.)

(*People v. Alvarez* (2016) 246 Cal.App.4th 989, 1002; see *People v. Nieto* (2021) 62 Cal.App.5th 188, 194-197 [general kidnapping per Pen. Code § 207, subd. (a) cannot be committed by deception or fraud alone].)

"[O]rdinarily the force element in section 207 requires something more than the quantum of physical force necessary to effect movement of the victim from one location to another." (*In re Michele D.* (2002) 29 Cal.4th 600, 606.) But since an infant has no ability to resist being taken and carried away, the "something more" that is "ordinarily" required is not necessary, and "the amount of force required to kidnap an unresisting infant or child is simply the amount of physical force required to take and carry the child away … with an illegal intent." (*Id*., at p. 610.)

This reasoning also applies in the context of kidnapping for rape or robbery under Penal Code section 209, subdivision (b)(1), when the victim is incapacitated, such as from excessive drinking. "When a perpetrator uses the force necessary to take and carry away an incapacitated person to commit rape, the perpetrator uses the amount of force required by Penal Code section 209, subdivision (b)(1)." (*People v. Daniels* (2009) 176 Cal.App.4th 304, 332.) "We hold that Penal Code section 209, subdivision (b)(1) is violated when a defendant takes and carries away an incapacitated person to commit rape even if the defendant uses only the force necessary to accomplish such a taking and carrying away." (*Ibid*.)

6050.1-Asportation element of aggravated kidnapping under PC209(b)(1) 4/20

Penal Code section 209, subdivision (b)(1), provides: "Any person who kidnaps or carries away any individual to commit robbery … shall be punished by imprisonment in the state prison for life with the possibility of parole." The statute also applies to kidnapping with the intent to commit rape, or other specified sex offenses.

Kidnapping for robbery under Penal Code section 209, subdivision (b), requires that the movement or asportation of the victim (1) be more than merely incidental to the commission of the robbery, and (2) increase the risk of harm to the victim over and above that necessarily present in the crime of robbery itself. This same test applies to other specified crimes, but not kidnapping for extortion. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1148.) The statute is essentially a codification of the test set forth previously by the California Supreme Court. (*People v. Daniels* (1969) 71 Cal.2d 1119, 1139.) The only statutory change from the *Daniels* test was deletion in 1997 of the requirement that the risk of harm be "substantially" increased by the movement. (*People v. Martinez* (1999) 20 Cal.4th 225, 232, fn. 4; *People v. Robertson* (2012) 208 Cal.App.4th 965, 979, 982; see also *People v. Dominguez* (2006) 39 Cal.4th 1141, 1150; *People v. Rayford* (1994) 9 Cal.4th 1, 20-22.)

The two aspects of the asportation element of section 209, subdivision (b)(1), are not mutually exclusive, but interrelated. (*People v. Williams* (2017) 7 Cal.App.5th 644, 667.) "[W]hether the victim's forced movement was merely incidental to the [underlying offense] is necessarily connected to whether it substantially increased the risk to the victim." (*People v. Dominguez*, *supra*, 39 Cal.4th at p. 1150 [offense occurred before the 1997 statutory change deleting the word "substantially"]; see also *People v. Robertson*, *supra*, 208 Cal.App.4th at p. 983.) "The two elements are interrelated but do not subsume each other." (*People v. Taylor* (2020) 43 Cal.App.5th 1102, 1112.) "[E]ach case must be considered in the context of the totality of its circumstances." (*People v. Dominguez*, *supra*, 39 Cal.4th at p. 1150.)

Note also that, unlike rape and other sex crimes covered by the statute, the crime of robbery continues until the perpetrator escapes to a location of temporary safety, any kidnapping that occurs during this time to effectuate the escape from the robbery falls within subdivision (b)(1) of section 209. (*People v. Laursen* (1972) 8 Cal.3d 192, 196; *People v. Stinson* (2019) 31 Cal.App.5th 464, 477.)

6050.2-There was sufficient movement of the victim 4/20

In determining the first prong of the "*Daniels* test" (*People v. Daniels* (1969) 71 Cal.2d 1119, 1139), "whether the movement is merely incidental to the [underlying] crime … the jury considers the 'scope and nature' of the movement. [Citation.] This includes the actual distance a victim is moved. However, we have observed that there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong." (*People v. Rayford* (1994) 9 Cal.4th 1, 12.)

"Most movements that have been found to be insubstantial or merely incidental to the underlying crime have been within a building." (*People v. Power* (2008) 159 Cal.App.4th 126, 139 [two to three minute drive to cemetery was sufficient].) But "[w]here movement changes the victim's environment, it does not have to be great in distance to be substantial." (*People v. Shadden* (2001) 93 Cal.App.4th 164, 169 [dragging a woman nine feet from the front of a store into a small back room in order to rape her was not incidental to the attempted rape or insubstantial]; see, e.g., *People v. Robertson* (2012) 208 Cal.App.4th 965, 986 ["movement of the [rape] victim deep into the interior of the garage near the tub full of water dramatically changed the victim's environment by reducing her ability to escape, decreasing the likelihood of detection, and elevating the risk of serious injury or death"].)

In contrast to kidnapping for rape, kidnapping for robbery generally requires more than movement of the victim from one part of a room to another or from one room to a nearby room. (See, e.g., *People v. Simmons* (2015) 233 Cal.App.4th 1458, 1473 ["By moving the victims indoors into homes filled with the victims' friends and family members, [the defendants] substantially increased the victims' harm and risk of being further harmed."]; but see, *People v. Taylor* (2020) 43 Cal.App.5th 1102, [4 foot movement of robbery victim to darkened area of alley insufficient]; *People v. Williams* (2017) 7 Cal.App.5th 644, 667-669, 690 [movements of between 40 and 60 feet within store insufficient]; *People v. Washington* (2005) 127 Cal.App.4th 290, 298-303 [movement of two tellers to vault of less than 45 feet insufficient because necessary only to carry out robbery] and *People v. Hoard* (2002) 103 Cal.App.4th 599 [sales clerks moved from front counter to back room].) In *People v. James* (2007) 148 Cal.App.4th 446, the defendant forced a maintenance worker, at gunpoint, from outside of bingo club to its interior in order to gain entrance to club. The appellate court held this was sufficient to establish the asportation element of kidnapping for robbery. (*Id*. at pp. 457-458.) The court reasoned the movement was not merely incidental to the underlying crime, inasmuch as the underlying crime was not the robbery of the victim but the robbery of the club. (*Id*. at p. 457.)

And "a movement unnecessary to a robbery is not incidental to it at all." (*People v. James*, *supra*, 148 Cal.App.4th at p. 455, fn. 6; see also *People v. Leavel* (2012) 203 Cal.App.4th 823, 835.) "Lack of necessity is a sufficient basis to conclude a movement is not merely incidental … ." (*People v. James*, *supra*, 148 Cal.App.4th at p. 455.) In *People v. Corcoran* (2006) 143 Cal.App.4th 272, the appellate court upheld an aggravated kidnapping conviction in which the victims were moved after an attempted robbery was aborted. The appellate court concluded "the movement of the

victims had nothing to do with facilitating taking cash from the [establishment]; defendant and his accomplice had aborted that aim, and their seclusion of the victims in the back office under threat of death was clearly 'excess and gratuitous.' " (*Id*. at pp. 279-280; see also *People v. Leavel*, *supra*, 203 Cal.App.4th at pp. 835-836 [although some of movement may have been "merely incidental" to robbery, additional movement was not supporting the conviction].)

6050.3-The risk of harm to the victim was increased by the movement 4/20

The second prong of the "*Daniels* test" (*People v. Daniels* (1969) 71 Cal.2d 1119, 1139) focusing on the "increased risk of harm" to the victim, includes not only risk of physical harm, but can also be satisfied by a risk of mental, emotional, or psychological harm. (*People v. Nguyen* (2000) 22 Cal.4th 872, 874, 877-886; *People v. Power* (2008) 159 Cal.App.4th 126, 138.) It includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.]" (*People v. Rayford* (1994) 9 Cal.4th 1, 13.) Evaluation of the risk of harm also includes such factors as the defendant's motivation to escape detection, and the possible enhancement of danger to the victim resulting from the movement. (*Id*. at p. 14.) "The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased. [Citations.]" (*Ibid*.)

Obviously, the "risk of harm" element is satisfied if a victim is forced to travel a significant distance under the immediate threat of injury by a deadly weapon. (*In re Earley* (1975) 14 Cal.3d 122, 131.) It is appropriate to consider whether "the method of transportation was so fraught with danger that it increased the risk of harm." (*In re Lokey* (1974) 41 Cal.App.3d 767, 771; see, e.g., *People v. Milan* (1973) 9 Cal.3d 185, 192-193 [defendant possessed gun and made threats during automobile ride]; *People v. Daniels* (1988) 202 Cal.App.3d 671, 682-684 [defendant jabbed driver in the face with unloaded pistol]; *People v. Cleveland* (1972) 27 Cal.App.3d 820, 825-826 [weapons and threats of violence].)

Of course, the age and vulnerability of the victim, as well as the size difference of the defendant, are factors. (See, e.g., *People v. Leavel* (2012) 203 Cal.App.4th 823, 836 [69-year-old robbery victim moved from inside to outside her home]; but see *People v. Perkins* (2016) 5 Cal.App.5th 454, 470-471 [10-30 feet child molest victim walked after sexual assault in only bathroom to only bedroom in apartment was not substantial and did not increase risk of harm to victim].)

6110.1-Knock-notice violations do not implicate exclusionary rule 4/17

The common-law knock-and-announce principle is an element of the reasonableness inquiry under the Fourth Amendment. (*Wilson v. Arkansas* (1995) 514 U.S. 927, 931; *People v. Martinez* (2005) 132 Cal.App.4th 233, 242.) This common-law principle is codified in Penal Code sections 844 and 1531. The purposes of these knock-notice rules are to protect the privacy of people in their homes, and to prevent violent confrontations between occupants and the police. (*People v. Peterson* (1973) 9 Cal.3d 717, 723.)

But, as the United States Supreme Court held in a recent landmark decision, violation of the knock-and-announce rules does not require suppression of any evidence seized within the premises. (*Hudson v. Michigan* (2006) 547 U.S. 586.) The High Court reasoned that if the entry and search,

whether with or without a warrant, otherwise comports with the Fourth Amendment, any violation of the knock-notice rule does not further the goals of the exclusionary rule.

> [E]xclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression. In this case, of course, the constitutional violation of an illegal manner of entry was not a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred or not, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house. But even if the illegal entry here could be characterized as a but-for cause of discovering what was inside, we have "never held that evidence is 'fruit of the poisonous tree' simply because 'it would not have come to light but for the illegal actions of the police.' " [Citation.]

(*Hudson*, *supra*, 547 U.S. at p. 592.) In other words, "[w]hat the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." (*Id*., 547 U.S. at p. 594, original italics.)

> In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* [*v. Ohio* (1961) 367 U.S. 643] was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

(*Hudson*, *supra*, 547 U.S. at p. 599.) California follows *Hudson*. (*People v. Byers* (2016) 6 Cal.App.5th 856, 863-864, 866-869; *In re Frank S.* (2006) 142 Cal.App.4th 145.)

6110.2-Knock-notice unnecessary at empty house 11/09

None of the policy considerations underlying knock-notice apply to an abandoned residence. Therefore, compliance with the knock-notice statutes is unnecessary, and entry without announcement is reasonable under the Fourth Amendment. (*Wilson v. Arkansas* (1995) 514 U.S. 927, 934-935; *People v. Sanchez* (1969) 2 Cal.App.3d 467, 473-474.) "Where no one is present on the premises, officers executing a search warrant under [Penal Code] section 1531 may make forcible entry without giving notice of their authority or purpose." (*People v. Ford* (1975) 54 Cal.App.3d 149, 154.)

The officers need not know that the residence is abandoned; they need only reasonably believe so, based on objective facts. (*People v. Medina* (1968) 265 Cal.App.2d 703, 708.) "[I]t is not necessary for the police to file a quiet title action to ascertain ownership …" as long as the officers "had no reason to believe that there would be any lawful occupant in the house it was also entirely reasonable for them to conclude that any person living inside the house was a trespasser." (*People v. Ortiz* (1969) 276 Cal.App.2d 1, 4-5.)

6110.3-"Refused admittance" not required for entry to arrest 11/09

When entry is being sought to execute a search warrant, Penal Code section 1531 requires an officer's demand for admittance must be "refused" before forcing entry. Thus, the occupants must be given ample time to respond to the officer's demand. (See, e.g., *People v. Abdon* (1973) 30 Cal.App.3d 972, 977-978.)

However, the Legislature did not attach the same "refused admittance" requirement to Penal Code section 844, which applies to entries to make an arrest. In *People v. Schmel* (1975) 54 Cal.App.3d 46, the appellate court held this difference in the two statutes was intentional and was based upon the logical conclusion that "the arrest of a person reasonably believed to be in a house may call for more instant action than the seizure of inert things, which … cannot move themselves … ." (*Id.* at p. 51; similarly, see *People v. Tacy* (1987) 195 Cal.App.3d 1402, 1411, fn. 2; *People v. Neer* (1986) 177 Cal.App.3d 991, 996, fn. 3.) Hence, an officer seeking entry to make an arrest need not give any opportunity for the occupants to refuse entry once the required demand has been made.

6110.4-No repeat knock-notice required at inner doors 11/09

Although some older California cases disagree, more recent decisions uniformly hold that officers do not need to repeat knock-notice procedures at closed interior doors after complying with the knock-notice statutes at the outer door of a residence. For example, in *People v. Howard* (1993) 18 Cal.App.4th 1544, the appellate court authoritatively examined the issue and concluded that Penal Code section 1531 does not require any additional notice before entering closed inner doors. The court held the wording of Penal Code section 1531 requires compliance with knock-notice procedures only at the front door. Any construction of the statute applying the same requirements to inner doors would lead to absurd consequences. (*Id.* at pp. 1549-1550.) The court considered federal decisions interpreting a nearly identical federal statute uniformly rejecting any knock-notice requirement beyond the front door. (*Id.* at pp. 1551-1554.) The court also concluded that requiring notice at inner doors would endanger officers, rather than serving any of the purposes behind section 1531. (*Ibid*.)

In holding knock-notice need not be repeated at interior doors, the *Howard* court followed a substantial line of cases. (See *People v. Pompa* (1989) 212 Cal.App.3d 1308, 1311-1312; *People v. Castenada* (1976) 58 Cal.App.3d 165, 170-171; *People v. Livermore* (1973) 30 Cal.App.3d 1073, 1076-1077.) And the *Howard* court rejected the reasoning of the older contrary cases. (*People v. Glasspole* (1975) 48 Cal.App.3d 668; *People v. Webb* (1973) 36 Cal.App.3d 460.) Appellate court decisions since *Howard* have adopted its holding that knock-notice need not be repeated at inner doors. (*People v. Mays* (1998) 67 Cal.App.4th 969, 974-976; *People v. Aguilar* (1996) 48 Cal.App.4th 632, 637-639.)

6110.5-Failure to respond in reasonable time is refusal under PC1531 5/20

Penal Code section 1531 states that when serving a search warrant, the officers must not break into the house until after they are "refused admittance" following knock and notice. But how long must officers wait for a response before the danger that evidence inside is being destroyed justifies breaking into the house? The answer under the Fourth Amendment comes from the United States Supreme Court decision in *United States v. Banks* (2003) 540 U.S. 31 (*Banks*). Rather than enact a bright-line rule, the High Court adopted a totality of circumstances test. (*Id*. at pp. 36, 41.) In addition, "the facts known to the police are what count in judging the reasonable waiting time. …"

(*Banks*, *supra*, 540 U.S. at p. 39.) The principles announced in *Banks* are not only fully compatible with previous California case law applying Penal Code section 1531, these principles now govern California criminal cases under Proposition 8 (Cal. Const., art. I, § 28). (*People v. Murphy* (2005) 37 Cal.4th 490, 498.)

Among the many facts that may be relevant under the *Banks* totality of the circumstances test, are the nature of the defendant's privacy interest in the premises, the size of the buildings entered, the seconds needed for the occupants to respond once the officers knocked and gave notice of their presence and purpose, the purpose of the search warrant, and the nature of the evidence being sought. (*People v. Martinez* (2005) 132 Cal.App.4th 233, 244.)

In *Banks*, the central question was how long it would take for a drug peddler, once alerted to the presence of police, to begin flushing his or her supply down a commode or to wash it down a drain. It does not matter how long an occupant would take to actually move to the entrance and respond to the police knock and announcement. (*Banks*, *supra*, 540 U.S. at p. 40.) Nor does the necessity of damaging the structure when entering generally affect the reasonableness analysis. (*Id.* at p. 37.) "[W]hat matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink. … And 15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine." (*Id.* at p. 40.) Applying the totality of the circumstances test, the High Court held that the delay of 15 to 20 seconds was reasonable. (*Id*. at p. 38.)

As noted, California cases follow *Banks*. The California Supreme Court in *People v. Murphy*, *supra*, 37 Cal.4th 490 applied the *Banks* test to a situation where the officers felt compelled to enter a drug dealing probationer's home without giving a formal knock and notice. (*Id*. at p. 500.) In *People v. Martinez*, *supra*, 132 Cal.App.4th 233, a 25 to 35 second wait before entering the detached garage and 30 second wait before entering the house of drug dealer was approved using the *Banks* analysis. (*Id*. at p. 245.)

California cases prior to *Banks* reached similar results. The appellate court in *People v. Trujillo* (1990) 217 Cal.App.3d 1219, for example, held an 18 second delay at 7:45 a.m. was reasonable. "While the case is a close one, we conclude, under all the circumstances, the police delayed long enough after knocking and announcing themselves and their purpose to protect defendant's reduced expectation of privacy, even though the delay was not long enough to amount to an implicit refusal of entry." (*Id.* at p. 1228.) In *People v. Drews* (1989) 208 Cal.App.3d 1317, a 30 second delay in responding was found ample time to be deemed a refused admittance. (*Id*. at p. 1328; similarly, see *People v. Gallo* (1981) 127 Cal.App.3d 828; distinguish *People v. Jeter* (1983) 138 Cal.App.3d 934, 937 [20 second delay inadequate under circumstances].) Even a five second delay was sufficient evidence of refused admittance when the occupant, seen through the screen door to be in the hallway, made no response to the officer's demand. (*People v. Hobbs* (1987) 192 Cal.App.3d 959, 964-966; distinguish *People v. Abdon* (1972) 30 Cal.App.3d 972, 977-978 [officers waited only five seconds even though occupant seen asleep inside residence]; accord *People v. Gonzalez* (1989) 211 Cal.App.3d 1043, 1051-1052.)

6140.1-Knock-notice substantial compliance standard 11/09

An officer's failure to comply strictly with the step-by-step directions of California's knock and announce statutes can be deemed "substantial compliance" when the purposes and policies of the statute are served. (*People v. Jacobs* (1987) 43 Cal.3d 472, 483; *People v. Peterson* (1973) 9 Cal.3d 717; see also *People v. Hoag* (2000) 83 Cal.App.4th 1198, 1208; *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1227; *People v. LaJocies* (1981) 119 Cal.App.3d 947, 953.) Thus, a demand for entry without an express statement of the officer's purpose can be held substantial compliance where, for example, the suspect, having just committed an offense, can reasonably be expected to know the purpose. (*People v. Hall* (1971) 3 Cal.3d 992, 997-998.) Similarly, an entry after announcement of purpose and demand for entry may constitute substantial compliance even though the officer has not been refused admittance if the underlying purposes of the statute have been satisfied. (*People v. Peterson*, *supra*; *People v. Uhler* (1989) 208 Cal.App.3d 766; *People v. Tacy* (1987) 195 Cal.App.3d 1402; *People v. LaJocies*, *supra*.) "The concept of substantial compliance, as reflected in the foregoing cases, is consistent with general principles of Fourth Amendment analysis." (*People v. Hoag*, *supra*, 83 Cal.App.4th at p. 1209.)

6140.2-Knock-notice excused compliance standard 11/09

The Fourth Amendment, as well as our knock-notice statutes, demands only that police act reasonably—not that every entry be preceded by knock-notice. Reasonableness is a flexible concept that recognizes law enforcement interests as well as citizen interests. (*Wilson v. Arkansas* (1995) 514 U.S. 927, 934; see also *Dalia v. United States* (1979) 441 U.S. 238.) The United States Supreme Court in *Wilson* recognized several common-law knock-notice exceptions but left development of a comprehensive list to the lower courts. (*Wilson v. Arkansas*, *supra*, at pp. 934-936.) "We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interest may also establish the reasonableness of an unannounced entry." (*Id.* at p. 936.)

The United States Supreme Court refused to approve a blanket exception to knock-notice for narcotics search warrants in *Richards v. Wisconsin* (1997) 520 U.S. 385. But *Richards,* like earlier California authority, holds that knock-notice compliance is *entirely excused* when the objective facts support a reasonable suspicion that compliance will increase officer peril, frustrate an arrest, or inhibit effective investigation of the crime by, for example, permitting the destruction of evidence. (*Id.* at p. 394; *People v. Tribble* (1971) 4 Cal.3d 826, 833.) Thus, an entry may be justified by various circumstances even though *none* of the statutory knock-notice requirements have been satisfied. Whether a reasonable suspicion exists does not depend on whether police must destroy property in order to enter. (*United States v. Ramirez* (1998) 523 U.S. 65.)

Compliance is excused, for example, when an officer believes the suspect might flee, based on the sound of retreating footsteps. (*People v. Temple* (1969) 276 Cal.App.2d 402, 413.) The sound of a flushing toilet also can lead an officer to conclude that evidence is being destroyed, excusing compliance. (*People v. Lopez* (1969) 269 Cal.App.2d 461, 468.) As another case example, compliance is excused when an officer is in hot pursuit of a suspect. (*In re Lavoyne M.* (1990) 221 Cal.App.3d 154, 160.) And, of course, indications that a suspect may be armed and dangerous may excuse compliance for officer safety. (*People v. Goldbach* (1972) 27 Cal.App.3d 563, 571; see also *People v. Zabelle* (1996) 50 Cal.App.4th 1282, 1286-1287.)

> [E]xigent circumstances excused compliance with the knock-notice rule in this case. The officers reasonably could assume, based on their knowledge of defendant's probationary status allowing warrantless searches and the apparent ongoing and contemporaneous drug sales on the premises, that some drugs were still present inside which could be readily destroyed once defendant became aware of the officers' identity and intent. The officers could also reasonably suspect that the commotion occurring immediately outside defendant's open door, including the officers' loud identification of themselves as members of the sheriff's department seeking to execute a probation search, and the sound of a barking dog inside the premises, together would alert defendant to destroy or conceal any drugs on the premise unless the officers entered without further delay. As the trial court found, the loud confrontation with Thomaselli was sufficient to put defendant on notice of the officers' identity and purpose.

(*People v. Murphy* (2005) 37 Cal.4th 490, 500.)

The officer, of course, must act on the situation from the perspective of the information available at the time of action. (*United States v. Banks* (2003) 540 U.S. 31, 39; *People v. Baldwin* (1976) 62 Cal.App.3d 727, 742.)

6150.1-Entry by ruse fulfills purpose of knock-notice 11/09

Case law is legion upholding the validity of using a ruse to obtain entry into a residence when the entry is otherwise permitted by law. (See, e.g., *People v. McCarter* (1981) 117 Cal.App.3d 894, 906.) "Officers who reasonably employ a ruse to obtain consent to enter a dwelling do not violate Penal Code sections 844 or 1531, even if they fail to announce their identity and purpose before entering. … 'Having the right to enter and search without permission it becomes immaterial that … [the opening of the door and the invitation to enter were] obtained by a ruse.' … " (*People v. Rudin* (1978) 77 Cal.App.3d 139, 142, footnote and internal citations omitted.)

In upholding the validity of an entry by ruse with a search warrant, the appellate court noted in *People v. Thompson* (1979) 89 Cal.App.3d 425: "The ruse employed here successfully avoided the various consequences that rule is designed to prevent. The officers were in full uniform and defendant was made aware of the officers' presence before any entry was attempted. There was no concealment of the officers' identity, only their purpose." (*Id*. at p. 432.)

6200.1-Mistrial must be denied without error and incurable prejudice 1/21

A motion for mistrial should not be granted unless there is both error and incurable prejudice. (*People v. Davis* (2005) 36 Cal.4th 510, 553-554.) "[A] court should grant a mistrial if it ' 'is apprised of prejudice that it judges incurable by admonition or instruction.' [Citation.]" (*People v. Williams* (2016) 1 Cal.5th 1166, 1185.) A motion for mistrial should be granted " 'only when a party's chances of receiving a fair trial have been irreparably damaged.' " (*People v. Clark* (2011) 52 Cal.4th 856, 990; see also *People v. Schultz* (2020) 10 Cal.5th 623, 673.) A mistrial motion may be properly denied by the trial court when it is satisfied that no miscarriage of justice has resulted or will result from the occurrences to which counsel objects. (*People v. Dominguez* (1981) 121 Cal.App.3d 481, 508.) "Whether a particular incident is so prejudicial that it warrants a mistrial 'requires a nuanced, fact-based analysis,' which is best performed by the trial court. (*People v. Chatman* (2006) 38 Cal.4th 344, 370.)" (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1094.)

A motion for a mistrial is addressed to the sound discretion of the trial court. (*People v. Dalton* (2019) 7 Cal.5th 166, 240; *People v. Jenkins* (2000) 22 Cal.4th 900, 985-986.) An appellate court reviews the denial of a motion for mistrial under the deferential abuse of discretion standard. (*People v. Sanchez* (2019) 7 Cal.5th 14, 64; *People v. Johnson* (2015) 61 Cal.4th 734, 764; *People v. Cox* (2003) 30 Cal.4th 916, 953.) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854; see also *People v. Williams*, *supra*, 1 Cal.5th at p. 1185; *People v. Johnson*, *supra*, 61 Cal.4th at p. 764.)

6200.2-Defendant's own behavior is not grounds for mistrial 8/19

"[W]e have long held that 'a defendant may not be heard to complain when, as here, such prejudice as he may have suffered resulted from his own voluntary act.' (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.)" (*People v. Bell* (2019) 7 Cal.5th 70, 121.) In *People v. Williams* (1988) 44 Cal.3d 1127, the California Supreme Court explained that, while it is misconduct for jurors to obtain evidence from outside the court, "[i]t is not clear … that such a rule applies to the jurors' perceptions of the defendant, particularly when the defendant engages in disruptive or otherwise improper conduct in court. As a matter of policy, a defendant is not permitted to profit from his own misconduct." (*Id*., at p, 1156; see also *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1030; *People v. Arias* (1996) 13 Cal.4th 92, 148.) "Denial of mistrial motions based on the defendant's own courtroom misbehavior have been repeatedly upheld. [Citations.]" (*People v. Bell*, *supra*, 7 Cal.5th at p. 121.) "A criminal defendant ' "should not be permitted to disrupt courtroom proceedings without justification [citation] and then urge that same disruption as grounds for a mistrial." ' (*Lewis and Oliver*, at p. 1030.)" (*People v. Bell¸ supra*, 7 Cal.5th at p. 121.)

6210.1-Mistrial on Court's own motion may create double jeopardy problem 7/20

A trial court should never grant a mistrial based on prejudicial error on its own motion without the consent of the defendant. Once jeopardy has attached, discharging the jury without a verdict is equivalent to an acquittal and bars retrial unless the defendant requests or consents to the mistrial, or mistrial is compelled by a legal necessity, such as a hung jury. (*People v. Hernandez* (2003) 30 Cal.4th 1, 5; *People v. Stone* (1982) 31 Cal.3d 503, 516; *Cardenas v. Superior Court* (1961) 56 Cal.2d 273, 276; see also *Carrillo v. Superior Court* (2006) 145 Cal.App.4th 1511, 1524.) Consent can be implied in some circumstances from the conduct of the defendant or defense counsel. (*Stanley v. Superior Court* (2012) 206 Cal.App.4th 265.)

6210.2-Mistrial for prosecutor error may create double jeopardy problem 7/20

"When the defendant requests and is granted a mistrial as the result of prosecutorial error, it is ordinarily assumed there is no barrier to retrial. [Citation.]" (*People v. Bell* (2015) 241 Cal.App.4th 315, 338-339 (*Bell I*).) "However, there is a narrow exception to this rule that arises when 'the prosecutor's actions giving rise to the motion for mistrial were done "in order to goad the [defendant] into requesting a mistrial." [Citation.]' [Citation.]" (*Id*. at p. 339.) Principles of double jeopardy may bar retrial of the case if the prosecutor in the previous trial acted with wrong intent by intentionally goading the defendant into requesting a mistrial (*Oregon v. Kennedy* (1982) 456 U.S. 667, 676) or intentionally committing misconduct that successfully thwarted a likely acquittal

(*People v. Batts* (2003) 30 Cal.4th 660, 666). (See, generally, *People v. Bell* (2020) 47 Cal.App.5th 153, 181 (*Bell II*).) And as to the second grounds listed above:

> If, despite a prosecutor's subjective belief that an acquittal was likely to occur in the absence of misconduct, the court determines that, *from an objective perspective*, an acquittal was not a realistic prospect, a bar of retrial, permanently relieving such a defendant of any criminal responsibility for his or her charged conduct, would constitute a windfall for the defendant. In our view, when such prosecutorial misconduct has not deprived a defendant of a reasonable prospect of an acquittal, double jeopardy interests are not unfairly compromised if a defendant who successfully moves for a mistrial remains subject to retrial.

(*People v. Batts*, *supra*, 30 Cal.4th at p. 696, italics in original.) Finally, no matter the grounds for the defense claim, it is not enough to show prosecutorial misconduct, no matter how egregious. The defense must produce separate evidence showing "the prosecutor's nonaccidental misconduct was *specifically intended* to provoke a mistrial." (*Bell II*, *supra*, 47 Cal.App.5th at p. 190, fn. 38, italics in original; see, e.g., *People v. Batts*, *supra*, 30 Cal.4th at pp. 696-697.)

In California, this issue is raised by a defendant's special plea of "once in jeopardy." (Pen. Code, § 1016, subd. 5.) The defense has the burden of proof. (*Bell II*, *supra*, 47 Cal.App.5th at p. 178.) The prosecutor can prevent the issue from reaching by making a motion to strike the once in jeopardy plea. (*Id*. at p. 179; *Bell I, supra*, 241 Cal.App.4th at p. 359.) "Defendants must do more than 'merely raise[ ] a possibility' [citation] the prosecutor had wrongful intent. Instead, defendants must produce evidence from which a deduction of wrongful prosecutorial intent can 'logically and reasonably be drawn.' (Evid. Code, § 600.)" (*Bell II*, 47 Cal.App.5th at p. 181.) If the defense cannot produce sufficient reasonable and credible evidence to support their claim, the court can strike the pleas and not submit the issue to the jury. (*Id*. at p. 179.)

> The ultimate question of the prosecutor's intent is usually a question of fact. However, whether particular evidence is *sufficient to raise an inference* of wrongful prosecutorial intent is a question of law. In other words, whether a particular inference *can* be drawn from certain evidence is a question of law, but which inference out of several *should* be drawn is a question of fact. [Citation.] A motion to strike in this context presents the former question to the court, not the latter.

(*Id*. at p. 179, fn. 22, italics in original.)

6470.1-DA entitled to participate in motions affecting People 10/20

The People are entitled to notice and an opportunity to participate in an adversarial proceeding at which the rights of the People might be affected. In several contexts, criminal defendants have sought ex parte relief from the court in matters affecting the rights of the People. Usually, these attempts to exclude the People from participation in the hearing have been made under the pretense that consideration of the request requires disclosure of privileged matters which might lighten the People's burden. Thus, in *People v. Huston* (1989) 210 Cal.App.3d 192 (*Huston*), the defendant sought to have a motion for sanctions for the alleged destruction of evidence heard in camera. In *Department of Corrections v. Superior Court (Ayala)* (1988) 199 Cal.App.3d 1087 (*Ayala*), the defendant obtained orders affecting the ability of governmental agencies to cooperate with the People. And, in *People v. Dennis* (1986) 177 Cal.App.3d 863 (*Dennis*), the defendant's

motion for new trial, based upon the alleged incompetence of his trial counsel, was heard and granted without any notice to or opportunity by the People to participate in the hearing.

In all three of these cases, the appellate courts upheld the People's right to due process. The opinion of the court in *Ayala* is typical. " ' "The fundamental requisite of due process of law is the opportunity to be heard" [citation], a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to … contest." [Citations.]' In the context of the opportunity to be heard, it is not just the defendant but also the People who are entitled to due process in a criminal proceeding." (*Ayala*, *supra*, 199 Cal.App.3d at p. 1092, citations omitted; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1094 [no right to ex parte release from custody hearing].) Obviously, the People cannot offer effective representation, present evidence, rebut defendant's evidence, or make legal argument without an opportunity to participate fully. So also, the court will be forced to base any decision it makes on a short sighted and one-sided view of the factual and legal issues raised. Finally, there is a danger that any order issued "may sweep 'more broadly than necessary.' [Citation.]" (*Ayala*, *supra*, 199 Cal.App.3d at pp. 1092-1093; see also, *Dennis*, *supra*, 177 Cal.App.3d at pp. 872-873.) "In contending these decisions could properly have been reached without the district attorney's presence and involvement, defendant essentially asserts the trial court had no need for adversary proceedings in its quest for the truth on these crucial issues. This assertion is inconsistent with the fundamental underpinnings of American jurisprudence." (*Huston*, *supra*, 210 Cal.App.3d at p. 212.)

Indeed, the People's right to due process has been specifically added to Article I, section 29, of the California Constitution. "[T]he prosecution's right to due process has been invoked to affirm its right to be heard in various preliminary or collateral proceedings and to oppose a defendant's claim of right to be heard ex parte and in camera. [Citations.]" (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 896; distinguish third party discovery requests such as *Alford v. Superior Court* (2003) 29 Cal.4th 1033 [*Pitchess*] and *Smith v. Superior Court* (2007) 152 Cal.App.4th 205 [SDT for records of jury commissioner].) But:

> To the extent *Smith* read *Alford* as not only declining to protect, but affirmatively prohibiting, opposition party involvement in a third party discovery proceeding, it misread our opinion; as discussed, in *Alford* we concluded that in the *Pitchess* context prosecutors had no *entitlement* to participate, but were nevertheless entitled to notice, to be present, and to participate if the trial court so desired. Thus, *Alford* does not support the conclusion that opposing parties are prohibited from involvement in third party discovery.

(*People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 750, italics in original.) Instead, the California Supreme Court has held the prosecution is entitled to notice of defense third party subpoenas and, thereafter, the trial court has discretion to allow the prosecution to participate in and argue at the motion to release the subpoenaed documents to the defense. (*Kling v. Superior Court* (2010) 50 Cal.4th 1068.) At a minimum the People's due process right to be heard requires the disclosure of the identity of the person to whom the records relate (i.e. a crime victim) and the nature of the documents sought. (*Id*. at p. 1072.) "It is difficult to see how the People can have a meaningful opportunity to be heard if they are categorically barred from learning the identity of the subpoenaed party or the nature of the documents requested." (*Id*. at p. 1078.)

Regarding defendant's alleged dilemma whether to disclose privileged information necessary to the motion or forgo making the motion, the proper solution is not to bar the prosecution from participation. Some appellate courts have held that the defendant's decision to waive the right against self-incrimination to obtain requested relief is *not* compelled, but may more properly be

considered voluntary. (*Huston*, *supra*, 210 Cal.App.3d at p. 211; *People v. Kelly* (1986) 183 Cal.App.3d 1235, 1243-1244.) Other appellate courts have approved in some cases an exclusionary rule that precludes the People from using disclosed privileged information at trial except for purposes of impeachment or rebuttal. (*Huston*, *supra,* 210 Cal.App.3d at p. 211; *Dennis*, *supra*, 177 Cal.App.3d at pp. 874-876.) The California Supreme Court has held "[t]he constitutional rights of the defendant can usually be protected by redacting those materials that disclose privileged information or attorney work product, by conducting portions of the in camera hearing ex parte, and by withholding disclosure to the prosecution of the records produced under the subpoena until the defense has determined that it intends to offer them in evidence at trial." (*Kling v. Superior Court*, *supra*, 50 Cal.4th at p. 1072.) "We have subsequently clarified that sealing the defense filings is appropriate only if there is 'a risk of revealing privileged information' and a showing 'that filing under seal is the only feasible way to protect that required information.' (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 73 [discussing sealing of '*Pitchess* motion' affidavits …]" (*Kling*, *supra*, at p. 1075.) Similarly, a court has discretion, but is not required, to allow a defense offer of proof to be made in camera. (*People v. Montes* (2014) 58 Cal.4th 809, 834.)

> Accordingly, … a trial court should "balance the People's right to due process and a meaningful opportunity to effectively challenge the discovery request against the defendant's constitutional rights and the need to protect defense counsel's work product." [Citation.] A trial court has discretion to balance these "competing interests" in determining how open proceedings concerning the subpoena should be. [Citation.]

(*Facebook, Inc. v. Superior Court* (2020) 10 Cal.5th 329, 357-358.)

6470.2-DA entitled to due process 7/13

It has long been recognized that the People, just as much as the defendant, are entitled to due process in a criminal proceeding. (*Stein v. New York* (1952) 346 U.S. 156, 197; *Department of Corrections v. Superior Court (Ayala)* (1988) 199 Cal.App.3d 1087, 1092.) Regarding the People's right to due process Justice Cardozo wrote: "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 122.)

In 1990 the voters of this state, through the initiative process, amended the California Constitution to guarantee the People have the right to due process of law. "In a criminal case, the people of the State of California have the right to due process of law … ." (Cal. Const. Article I, § 29, enacted as part of Proposition 115.) While the People's right to due process may not be coextensive with that of a criminal defendant, the right is not hollow.

> The Court of Appeal's holding appears to have been based on the assumption that the people's right to due process of law must be the exact equivalent to a criminal defendant's right to due process. … Nothing in the language or legislative history of article I, section 29 supports this view. Nor does anything in our case law. In some cases, the use of the term "due process of law" in connection with the prosecution was simply another way of formulating the truism that the state has a strong interest in prosecuting criminals, which must be weighed against the criminal defendant's assertion of due process rights. [Citations.] Elsewhere, particularly in California cases, the prosecution's right to due process has been invoked to affirm its right to be heard in various preliminary or collateral

proceedings and to oppose a defendant's claim of right to be heard ex parte and in camera. [Citations.]

(*Miller v. Superior Court* (1999) 21 Cal.4th 883, 896.) "Moreover, the prosecutions due process rights include the right to a full adversarial proceeding, in which it may present evidence, as well as argument. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1094.)" (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1298 ["the prosecution was denied due process by the trial court's order granting Kaulick's petition for resentencing without giving the prosecution notice and an opportunity to be heard"].)

6470.3-Unauthorized ex parte communications violate judicial ethics 11/11

The judge's function as presiding officer includes "the duty to see that each party (always of course within the law) has equal opportunity to advance his claims and to protect his interests." (*Cooper v. Superior Court* (1961) 55 Cal.2d 291, 301.)

> Unless expressly authorized by law, ex parte contacts between the court and counsel are always ill-advised and violate the State Bar Rules of Professional Conduct where such contacts deal with the merits of a pending, contested matter. … Moreover, unauthorized ex parte contacts of whatever nature erode public confidence in the fairness of the administration of justice, the very cement by which the system holds together.

(*In re Jonathan S.* (1979) 88 Cal.App.3d 468, 471.)

Canon 3, section B, subdivision (7), of the California Code of Judicial Ethics generally prohibits ex parte communications on substantive issues. The canon states in pertinent part:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law. … A judge shall not initiate, permit, or consider ex parte communications, that is, any communication to or from the judge outside the presence of the parties concerning a pending or impending proceeding, and shall make reasonable efforts to avoid such communications, except as follows: … (c) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so or when authorized to do so by stipulation of the parties.

The American Bar Association Standards for Criminal Justice are in accord: "The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with the judge ex parte, except after adequate notice to all other parties or when authorized by law or in accordance with approved practice." (A.B.A., Standards for Criminal Justice (3d ed., 2000) *Special Functions of the Trial Judge*, Standard 6-2.1, p. 43.)

The California Supreme Court has held it is misconduct for a judge to make a decision in a criminal case without giving the prosecutor adequate notice and an opportunity to be heard. (*Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 373-374; *Spruance v. Commission on Judicial Qualifications* (1975) 13 Cal.3d 778, 798.) Indeed, any action taken without the participation of the prosecutor may divest the court of jurisdiction to act. In *People v. Superior Court (Aquino)* (1988) 201 Cal.App.3d 1346, the magistrate refused to accord the District Attorney party status in a motion for the return of property seized by the police for a criminal case. The appellate court held that as a result of this refusal to permit the District Attorney to participate, the magistrate lacked jurisdiction to act on the motion. (*Id.* at pp. 1350-1351.)

6480.1-Courts have inherent power to change incorrect interim rulings 9/13

A court possesses an inherent authority to reconsider its interim ruling on its own motion. (*Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 106, fn. 17.)

> "In criminal cases there are few limits on a court's power to reconsider interim rulings. [Citations.]" (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1246 (*Castello*).) "The California Supreme Court has often recognized the 'inherent powers of the court … to insure the orderly administration of justice.' [Citations.]" (*Id*. at p. 1247.) "A court's inherent powers are wide. [Citations.] They include authority to rehear or reconsider rulings: '[T]he power to grant rehearings is inherent,—is an essential ingredient of jurisdiction, and ends only with the loss of jurisdiction.' [Citations.]" (*Id*. at p. 1248.) "A court could not operate successfully under the requirement of infallibility in its interim rulings. Miscarriage of justice results where a court is unable to correct its own perceived legal errors, particularly in criminal cases where life, liberty, and public protection are at stake. Such a rule would be ' "… a serious impediment to a fair and speedy disposition of causes … ." [Citations.]' [Citation.]" (*Id*. at p. 1249.)

(*Jackson v. Superior Court* (2010) 189 Cal.App.4th 1051, 1065; see also *People v. Nesbitt* (2010) 191 Cal.App.4th 227, 239.)

While some older appellate court decisions implied that a renewed motion in a criminal case must comply with Code of Civil Procedure section 1008 (*People v. Locklar* (1978) 84 Cal.App.3d 224, 230; *In re Kowalski* (1971) 21 Cal.App.3d 67, 70), more recent case decisions hold Code of Civil Procedure section 1008 does not apply to criminal cases. (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1246-1250.) The California Supreme Court has only discussed *Castello* in dicta. (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 729, fn. 12.) In any event, it has been determined that section 1008 does not limit the inherent authority of a court to reconsider interim rulings. (*Le Francois v. Goel* (2005) 35 Cal.4th 1049; accord *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92 [same rule applies to interim rulings in juvenile court].) Nor does section 1008 preclude a court from reconsidering a prior ruling any time there is a material change in the law. (*Farmers Ins. Exchange v. Superior Court*, *supra*, 218 Cal.App.4th at p. 102.) Of course, a court's ruling made "without prejudice impliedly invites the moving party to renew the motion at a later date … ." (*Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007, 1015.)

6480.2-Court should deny renewed motion without changed circumstances 7/20

"Generally speaking, courts may correct judicial error in the making of interim orders or in limine rulings until pronouncement or entry of a judgment. [Citations.]" (*People v. DeLouize* (2004) 32 Cal.4th 1223, 1231.) But there should be good reason for changing the initial ruling, such as recognition that it was indeed legal error or based upon an incomplete or incorrect understanding of the facts. (See, e.g., *People v. Nesbitt* (2010) 191 Cal.App.4th 227, 243 [wrong statute of limitations period applied].) In *In re Kowalski* (1971) 21 Cal.App.3d 67, for example, the appellate court pointed out that a motion under Penal Code section 995 ordinarily should not be renewed, even after a mistrial, unless changed circumstances exist bearing on whether the defendant was properly held to answer. In other words, reconsideration without changed circumstances is an abuse of discretion. (*Id*. at pp. 70-71; see also *People v. Sherwin* (2000) 82 Cal.App.4th 1404, 1411; *People v. Locklar* (1978) 84 Cal.App.3d 224, 230.)

The courts look upon repetitious motions seeking the same relief with disfavor. "[I]n the orderly administration of justice, and in support of a sound judicial policy, a court, in the absence of unusual or changed circumstances … is justified, in its discretion, in refusing to consider repetitive applications of the same petition." (*Hagen v. Superior Court* (1962) 57 Cal.2d 767, 770-771; similarly see *Griffin v. Municipal Court* (1977) 20 Cal.3d 300, 305, fn. 9.) A trial court can threaten a party or attorney with sanctions for making motions duplicative of others already denied. (See *People v. Price* (1991) 1 Cal.4th 324, 395.)

6480.3-Judges have limited authority to change rulings of other judges 4/11

Generally, one trial court judge should not reconsider and overrule a ruling on a motion by another superior court judge. (*People v. Garcia* (2006) 147 Cal.App.4th 913, 916-917; *Morite of California v. Superior Court* (1993) 19 Cal.App.4th 485, 493.)

> A superior court is but one tribunal, even if it be composed of numerous departments. … An order made in one department during the progress of the cause can neither be ignored nor overlooked in another department in which the cause falls by transfer. The order made by [the first judge] was as binding and effective in the department presided over by [the second judge] as if the latter judge made it himself.

(*People v. Grace* (1926) 77 Cal.App. 752, 759; see also *In re Alberto* (2002) 102 Cal.App.4th 421, 427-428; *People v. Madrigal* (1995) 37 Cal.App.4th 791, 796.) "It is often said as a general rule one trial judge cannot reconsider and overrule an order of another trial judge." (*People v. Riva* (2003) 112 Cal.App.4th 981, 991 (*Riva*); see also *People v. Garcia* (2006) 147 Cal.App.4th 913, 916 [unlawful change of previous sentence].) "[O]ne well-recognized exception to the rule is that the rule does not apply when the first judge has become unavailable." (*Alvarez v. Superior Court* (2004) 117 Cal.App.4th 1107, 1111; *In re Alberto*, *supra*, 102 Cal.App.4th at p. 430.)

Whenever one judge is contemplating changing a ruling by another judge, the second judge must be act in conformity with procedural due process of law—which means each side must be given notice and an opportunity to be heard, and the revised ruling cannot be arbitrary or made without reason. (*Riva*, *supra*, 112 Cal.App.4th at p. 992.)

Equally important is the requirement there be a persuasive reason for the contemplated change.

> [T]rial judges should decline to reverse or modify other trial judges' rulings unless there is a highly persuasive reason for doing so—mere disagreement with the result of the order is not a persuasive reason for reversing it. Factors to consider include whether the first judge specifically agreed to reconsider her ruling at a later date, whether the party seeking reconsideration of the order has sought relief by way of appeal or writ petition, whether there has been a change in circumstances since the previous order was made and whether the previous order is reasonably supportable under applicable statutory or case law regardless of whether the second judge agrees with the first judge's analysis of that law.

(*Riva*, *supra*, 112 Cal.App.4th at pp. 992-993.)

These principles have application even to interim or in limine rulings. (*Riva*, *supra*, 112 Cal.App.4th at pp. 991-992.) "In criminal cases there are few limits on a court's power to reconsider interim rulings." (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1246.) Pretrial in limine rulings on the admissibility of evidence are intermediate, interlocutory rulings subject to change or revision even after the commencement of trial by the judge who made the initial ruling. (*Riva*, *supra*, 112

Cal.App.4th at p. 992.) This includes in limine rulings on *Miranda* motions. (*Ibid*.; see also *People v. Mattson* (1990) 50 Cal.3d 826, 850; *People v. Superior Court (Zolney)* (1975) 15 Cal.3d 729, 734.) But even as to such interim rulings, the power to change the ruling is tempered by the general principles cited above supporting the rule against one judge overruling another, including following a mistrial or reversal on appeal. (*Riva*, *supra*, 112 Cal.App.4th at pp. 992-993.) In other words, when one judge contemplates changing another judge's in limine rulings, there should be both procedural due process and, substantively, a very persuasive reason for the change.

> Entitling the defendant to two separate evidentiary hearings before two superior court judges on the issue "would completely defeat the purpose behind pretrial *in limine* hearings on the admissibility of evidence." [Fn.] That purpose … "is to 'permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial.' " [Fn.]

(*Id*. at p. 990, citing *People v. Clark* (1992) 3 Cal.4th 41, 119.)

6670.1-Insufficiency of PE evidence may be cured by PC995a(b)(1) 12/19

Should the court find that the evidence presented the magistrate is insufficient in some fashion, the prosecution can request the case be remanded to the magistrate to correct the deficiency.

Penal Code section 995a, subdivision (b)(1), provides as follows:

> Without setting aside the information, the court may, upon motion of the prosecuting attorney, order further proceedings to correct errors alleged by the defendant if the court finds that such errors are minor errors of omission, ambiguity, or technical defect which can be expeditiously cured or corrected without a rehearing of a substantial portion of evidence. The court may remand the cause to the committing magistrate for further proceedings, or if the parties and the court agree, the court may itself sit as a magistrate and conduct further proceedings. When remanding the cause to the committing magistrate, the court shall state in its remand order which minor errors it finds could be expeditiously cured or corrected.

Determining whether an omission is minor under this provision must be done on a case by case basis. (*People v. Meza* (2011) 198 Cal.App.4th 468, 473 (*Meza*).)

> [W]e find that section 995a, subdivision (b)(1) is reasonably understood as giving the court discretion to order further proceedings instead of setting aside an information, but only if the following statutory prerequisites are met: (1) the prosecuting attorney requests corrective action; (2) the errors alleged by the defendant are minor ones of omission, ambiguity or technical defect; and (3) the errors can be expeditiously cured or corrected without the rehearing of a substantial portion of the evidence.

(*Garcia v. Superior Court* (2009) 177 Cal.App.4th 803, 814 (*Garcia*).) Thus, after the prosecution makes a Penal Code section 995a, subdivision (b)(1) request, a two-part test exists for determining whether an error committed at the preliminary hearing is one appropriate for remand. (*Caple v. Superior Court* (1987) 195 Cal.App.3d 594, 601 (*Caple*).)

First, the error must be one of "minor … omission, ambiguity, or technical defect." The *Caple* court construed a "minor omission" as "one that is comparatively unimportant. Thus, an evidentiary defect will trigger the remand provisions of section 995a, subdivision (b)(1), whenever the omission is minor when considered in relation to the balance of the evidence required in order to hold the accused to answer." (*Caple*, *supra*, 195 Cal.App.3d at p. 602; see also *Garcia*, *supra*, 177 Cal.App.4th at pp. 816-817.) The proffered testimony on remand error does not meet the

characterization of minor if it goes "to the very heart of the case." (*Loverde v. Superior Court* (1984) 162 Cal.App.3d 102, 105 (*Loverde*).) The omission of evidence that the statute of limitations had been tolled by a prior filing of the same charges satisfies this standard. (*Meza*, *supra*, 198 Cal.App.4th at pp. 476-477.) Similarly, the defect in *Caple* satisfied this test because it simply added evidentiary support to the circumstantial evidence already produced at the preliminary hearing. (*Caple*, *supra*, 198 Cal.App.3d at pp. 602-603.) In contrast, the omission in *Garcia* did not meet this test because there had been no evidence produced at the preliminary hearing on several key elements of the challenged felony count. (*Garcia*, *supra*, 177 Cal.App.4th at pp. 820-821.)

Second, the error must be susceptible of being corrected "expeditiously" without "a rehearing of a substantial portion of the evidence." (*Caple*, *supra*, 195 Cal.App.3d at p. 601.) This standard was met in *Meza* because the tolling of the statute of limitations could be proved by simply submitting court records of the prior prosecution into evidence without taking any testimony. (*Meza*, *supra*, 198 Cal.App.4th at pp. 477-478.) The appellate court in *Caple* found this prong satisfied because the omission required "only one additional question and answer, it did not involve a rehearing of any of the preliminary hearing evidence." (*Caple*, *supra*, at p. 603.) Again, in contrast, the appellate court in *Garcia* found this prong was not satisfied because it required "an almost total rehearing of [the officer's] preliminary hearing testimony regarding the [challenged] charge." (*Garcia*, *supra*, 177 Cal.App.4th at p. 821.)

Finally, while subdivision (b)(1) of section 995a covers a variety of evidentiary or procedural errors or omission during the preliminary hearing, it does not permit remand to have the magistrate correct or articulate new factual findings and legal reasoning. (*Loverde*, *supra*, 162 Cal.App.3d at p. 105.) Nor does it permit remand when the magistrate improperly denied the defense a substantial right. (See, e.g., *Tharp v. Superior Court* (1984) 154 Cal.App.3d 215, 220.) In addition, it cannot be used to cure a violation of defendant's statutory right to a speedy preliminary hearing. (*Del Castillo v. Superior Ct.* (2019) 38 Cal.App.5th 1117, 1122 [violation of 60-day time limit per Pen. Code, § 859b].)

6680.1-Prosecution can add new counts or refile counts dismissed at PE 12/19

The prosecution has the power under Penal Code section 739 to file an information charging an offense for which the defendant was not held to answer where the evidence presented the magistrate sufficiently supports the additional offense and it arose from the same transaction involved in the commitment order. (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 664-665; *People v. Calhoun* (2019) 38 Cal.App.5th 275, 303; see also Pen. Code, § 1009.) Under these circumstances, adding a count after the preliminary hearing does not deprive the defendant of due process. It is the totality of the evidence produced at the preliminary hearing that gives sufficient notice of the potential charges defendant may face in superior court—not the complaint. (*People v. Manning* (1982) 133 Cal.App.3d 159, 165; *People v. Brice* (1982) 130 Cal.App.3d 201, 207; *People v. Donnell* (1976) 65 Cal.App.3d 227, 233.) "Preliminary hearing transcripts have long been considered the touchstone of due process notice to the defendant." (*People v. Peyton* (2009) 176 Cal.App.4th 642, 656, internal quote marks omitted.)

This power under Penal Code section 739 exists even when the magistrate refused to hold the defendant to answer for a specific offense, in the absence of any contrary material findings of fact by the magistrate. But even such factual findings preclude recharging only where they are fatal to the conclusion the offense was committed and the factual findings are supported by substantial

evidence. (*People v. Slaughter* (1984) 35 Cal.3d 629, 633, 638; *Pizano v. Superior Court* (1978) 21 Cal.3d 128, 133; *Jones v. Superior Court*, *supra*, 4 Cal.3d at pp. 664-665; see also *People v. Bautista* (2014) 223 Cal.App.4th 1096, 1101.) "Absent controlling factual findings, if the magistrate dismisses a charge when the evidence provides a rational ground for believing that defendant is guilty of the offense, his ruling is erroneous *as a matter of law*, and will not be sustained by the reviewing court." (*People v. Slaughter*, *supra*, 35 Cal.3d at pp. 639-640, italics in original; see also *People v. Barba* (2012) 211 Cal.App.4th 214, 227-228.)

6680.2-Standard to test added/refiled count is same as PC995 7/21

The standard ordinarily employed in a motion to dismiss a charge for which a defendant was held to answer pursuant to Penal Code section 995 is also used under Penal Code sections 739 and 871.5 to test the sufficiency of the evidence supporting a new count added to the information or a count recharged after a magistrate's dismissal. (*People v. Slaughter* (1984) 35 Cal.3d 629, 633 (*Slaughter*).) Under the familiar Penal Code section 995 standard, an information should not be set aside if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. (*Slaughter*, *supra*, 35 Cal.3d at p. 637.) " '[W]hen a district attorney files an information in the superior court, containing an offense not included in the commitment order signed by the magistrate who conducted the preliminary examination on the initial complaint, the court must uphold the information if the evidence adduced at the preliminary hearing is sufficient to support the new or additional charge [citation].' (*People v. McKee* (1968) 267 Cal.App.2d 509, 514.)" (*People v. Barba* (2012) 211 Cal.App.4th 214, 227.)

"[T]he Legislature intended the same standard of review under both [Penal Code] sections 871.5 and 739: a decision of the magistrate dismissing charges, absent findings of fact, is erroneous as a matter of law if the evidentiary record discloses a rational basis for believing the defendant guilty of the charged crime." (*Slaughter*, *supra*, 35 Cal.3d at p. 642) Under Penal Code section 871.5 the prosecution may only seek reinstatement on the basis that "as a matter of law, the magistrate erroneously dismissed the action or a portion thereof." (See *People v. Abelino* (2021) 62 Cal.App.5th 563, 574.) "A dismissal unsupported by findings [of fact by the magistrate] therefore receives the independent scrutiny appropriate for review of questions of law." (*Slaughter*, *supra*, 35 Cal.3d at p. 638; see also *People v. Bautista* (2014) 233 Cal.App.4th 1096, 1101.) "The magistrate's order is reviewed to determine whether as a matter of law the evidentiary record discloses a rational basis for believing the defendant guilty of the charged offense." (*People v. Childs* (1991) 226 Cal.App.3d 1397, 1406-1407; see also *People v. Dawson* (2009) 172 Cal.App.4th 1073, 1088.)

Finally, in addition to demonstrating that the evidence presented at the preliminary hearing sufficiently supports the additional offense, it must be shown that this new offense arises from the same transaction as one or more of the offenses in the commitment order. (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 664-665; *People v. Calhoun* (2019) 38 Cal.App.5th 275, 303.)

6680.3-Magistrate's belief evidence insufficient no bar to refiling 7/21

A statement by the magistrate indicating his or her belief that the evidence is insufficient to support a count does not bar refiling that count in the information. "When … the magistrate either expressly or impliedly accepts the evidence and simply reaches the ultimate *legal conclusion* that it does not provide probable cause to believe the offense was committed, such conclusion is open to challenge by adding the offense to the information." (*Pizano v. Superior Court* (1978) 21 Cal.3d 128, 133, italics in original; see also, *People v. Farley* (1971) 19 Cal.App.3d 215, 221; similarly, see *People v. Slaughter* (1984) 35 Cal.3d 629, 639, 642 (*Slaughter*).) In other words, "[a]bsent controlling factual findings, if the magistrate dismisses a charge when the evidence provides a rational ground for believing that defendant is guilty of the offense, his ruling is erroneous as a matter of law, and will not be sustained by the reviewing court." (*Slaughter*, *supra*, 35 Cal.3d at pp. 639-640; see also *People v. McGlothen* (1987) 190 Cal.App.3d 1005, 1011-1012.) Thus, even the magistrate's statement that "there is no evidence from which the court may conclude malice existed" is not a specific finding of fact to the effect that a murder never occurred, but was only a conclusion that evidence presented was insufficient. (*Dudley v. Superior Court* (1974) 36 Cal.App.3d 977, 985; similarly, see *People v. Superior Court (Henderson)* (1986) 178 Cal.App.3d 516, 524 [magistrate's statement "this Court does find that the death … did occur during the heat of passion and/or sudden quarrel" was not factual finding]; see also *People v. Abelino* (2021) 62 Cal.App.5th 563, 574-578; *Zemek v. Superior Court* (2020) 44 Cal.App.5th 535, 545-548; *People v. Superior Court (Day)* (1985) 174 Cal.App.3d 1008, 1017.)

> In summary, cases arising under section 739 recognize a clear distinction: findings of fact must be sustained if supported by substantial evidence, but a finding of lack of probable cause, unsupported by any factual findings, is reviewed as an issue of law. Absent controlling factual findings, if the magistrate dismisses a charge when the evidence provides a rational ground for believing that defendant is guilty of the offense, his ruling is erroneous *as a matter of law*, and will not be sustained by the reviewing court.

(*Slaughter*, *supra*, 35 Cal.3d at pp. 639-640, italics in original.) "It follows that, if the prosecution witnesses' testimony 'was not inherently improbable, [they were] not significantly impeached, and the [magistrate] made no findings as to [their] demeanor,' we must conclude that the magistrate's remarks are legal conclusions that we review independently." (*Zemek v. Superior Court*, *supra*, 44 Cal.App.5th at p. 546, citing *People v. Bautista* (2014) 223 Cal.App.4th 1096, 1102 [magistrate's finding lack of probable cause not supported by substantial evidence].) Finally, a magistrate's finding of facts may be disregarded if they reflect the application of incorrect legal principles. (See, e.g., *People v. Dawson* (2009) 172 Cal.App.4th 1073, 1092-1093.)

6700.1-PC995 motion generally limited to transcript 5/20

In determining a motion to set aside an accusatory pleading under Penal Code section 995 (§ 995) for insufficiency of the evidence, the reviewing court is limited to the evidence contained in the grand jury or preliminary hearing transcript. (*Currie v. Superior Court* (1991) 230 Cal.App.3d 83, 90; *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, 269-270 (*Stanton*); *People v. Sahagun* (1979) 89 Cal.App.3d 1, 17.) "A motion under Penal Code section 995 cannot resolve problems not apparent from the transcript of the preliminary hearing; generally, its purpose is to review the sufficiency of the pleading based on the record before the magistrate at the preliminary hearing." (*Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586, 1596 (*Merrill*).) Similarly, "[d]eprivation of a substantial right [at the preliminary examination] is properly addressed by a section 995 motion when the error is visible from the 'four corners' of the preliminary hearing transcript." (*People v. Duncan* (2000) 78 Cal.App.4th 765, 772 (*Duncan*); see e.g., *Little v. Superior Court* (1980) 110 Cal.App.3d 667, 670-671 [defense lawyer refused to participate in preliminary hearing providing defendant with no representation].) Thus, generally the parties may not offer any evidence not before the magistrate or the grand jury to the court hearing a section 995 motion.

Case law does permit the defense to present evidence when necessary to establish a claim of the denial of a constitutional or other substantial right during the preliminary hearing (other than insufficiency of the evidence). (See, e.g., *People v. Coleman* (1988) 46 Cal.3d 749, 771-773 (*Coleman*) [ineffective assistance of counsel]; *Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1144-1145 [defense attorney with conflict of interest]; *Stanton*, *supra*, 193 Cal.App.3d 265, 270-271 [failure to provide discovery]; *Duncan*, *supra*, 78 Cal.App.4th at p. 772 [incompetency of defendant during preliminary hearing]; *Merrill*, *supra*, 27 Cal.App.4th at p. 1597 [same]; *Bayramoglu v. Superior Court* (1981) 124 Cal.App.3d 718, 729 (*Bayramoglu*) [same].)

Case law disagrees, however, whether such a claim should be made under section 995 or as a separate, nonstatutory motion. (*Coleman*, *supra*, 46 Cal.3d at pp. 772-773 [§ 995 proper vehicle to present evidence of ineffective assistance of counsel at preliminary hearing]; *Bayramoglu*, *supra*, 124 Cal.App.3d at p. 729 [§ 995 proper vehicle to present evidence that defendant incompetent during preliminary hearing]; but see *Duncan*, *supra*, 78 Cal.App.4th at p. 772 ["[A]n error that is not known or visible at the hearing itself (such as the competency issue in this case), may be called to the court's attention through a nonstatutory motion to dismiss."].) In *Stanton v. Superior Court*, *supra*, 193 Cal.App.3d 265, it was claimed the prosecution violated a duty to provide discovery of evidence favorable to the defense before and during the preliminary hearing. The appellate court in *Stanton* held the defense's attempt to litigate this claim under section 995 was properly rejected. "The court found the preliminary hearing transcript contained no evidence of the prosecution's dereliction. It ruled an evidentiary hearing was an improper adjunct to section 995 review and the section 995 motion was therefore an incorrect vehicle to challenge the alleged constitutional deprivation. The court was correct." (*Id*. at p. 269.) Instead, "[a]t the hearing on the nonstatutory motion to dismiss, Stanton was properly granted the opportunity to make an evidentiary showing she had been deprived of a substantial right at the preliminary hearing." (*Id*. at p. 270.)

> However, where, as here, the deprivation of a substantial right is not shown in the transcript of the preliminary hearing, the nonstatutory motion to dismiss is the proper device to raise the issue. Use of the nonstatutory or pretrial motion to dismiss has been sanctioned by our Supreme Court. "Although no clear California statutory authority provides for such a pretrial motion to dismiss, we have no doubt in light of the

constitutional nature of the issue as to the trial court's authority to entertain such a claim." (*Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 294, fn. 4.) A pretrial nonstatutory motion to dismiss is now accepted as an appropriate vehicle to raise a variety of defects. (*Stanton*, *supra*, 193 Cal.App.3d at p. 271.)

6700.2-PC995 motion does not lie to challenge prior allegations 10/07

Penal Code section 995 provides that the information must be set aside if the defendant has been "committed without reasonable or probable cause." Because the statute does not draw the distinction between offense and enhancement, the California Supreme Court in *People v. Superior Court (Mendella)* (1983) 33 Cal.3d 754, held that an enhancement may properly be challenged by a motion to dismiss under Penal Code section 995. But the court in *Mendella* recognized that section 995 may not be used to challenge prior prison term sentence enhancement allegations. Thus the People are not required to charge and prove such prior convictions allegations at the preliminary hearing stage. (*Id.* at p. 764, fn. 9.) The court noted that whenever prior convictions are discovered "[a] specific statutory provision … permits amendment of the information and rearraignment of the defendant," citing Penal Code section 969a. (*Ibid*.) This rationale also applies to prior serious or violent felony convictions, including "Three Strike Law" prior allegations. (*Thompson v. Superior Court* (2001) 91 Cal.App.4th 144; *Miranda v. Superior Court* (1995) 38 Cal.App.4th 902; *People v. Shaw* (1986) 182 Cal.App.3d 682; distinguish, e.g., *People v. Casillas* (2001) 92 Cal.App.4th 171 [DUI priors alleged to elevate current DUI offense from misdemeanor to felony must be proved]; but see *People v. Robinson* (2004) 122 Cal.App.4th 275 [Pen. Code § 666 prior theft allegations need not be proved at the preliminary hearing].)

6700.3-Evidentiary rulings of magistrate cannot be tested by PC995 motion 1/10

A Penal Code section 995 motion does not lie to contest evidentiary rulings by the magistrate, unless the defense can show that the commitment was based entirely upon incompetent evidence. (*People v. Sullivan* (1963) 214 Cal.App.2d 404, 409-410.) An indictment or information will not be set aside under Penal Code section 995 unless it is based *solely* upon incompetent evidence. (*People v. Backus* (1979) 23 Cal.3d 360, 387.)

"A full-scale review of the evidentiary rulings of the magistrate is not provided by [Penal Code] section 995." (*People v. Sullivan*, *supra*, 214 Cal.App.2d at p. 409.)

> To construe section 995 of the Penal Code as providing a full-scale review of the evidentiary rulings of the magistrate would be contrary to the purpose of the preliminary hearing. The scope of review is simply to determine whether the magistrate has held the defendant to answer without reasonable or probable cause to believe a public offense has been committed with which the defendant is connected and not whether the magistrate erred on questions of admissibility of evidence. The only qualification to this principle is that a defendant has been held to answer without reasonable or probable cause if his commitment is based entirely on incompetent evidence. [Citations.]

(*People v. Robinson* (1961) 196 Cal.App.2d 384, 387-388.)

6700.4-Must object at PE to complain about evidence on PC995 motion 10/07

Defendant's motion to set aside the information under Penal Code section 995 is predicated on the magistrate having considered evidence allegedly obtained in violation of the Fourth Amendment. But the defense did not object to the admissibility of any of this evidence at the preliminary hearing. Thus they have forfeited the power to attack the commitment order on that basis.

A prerequisite to any motion to set aside an information based upon the alleged improper receipt of evidence by the committing magistrate is that the defendant have lodged an objection to receipt of that evidence during the preliminary hearing. Unless objected to all evidence is competent and properly considered by the magistrate.

In *Robison v. Superior Court* (1957) 49 Cal.2d 186, items of evidence seized in patent violation of the defendant's Fourth Amendment rights were admitted into evidence at the preliminary hearing without objection. The California Supreme Court held that by failing to object the defendant lost the right to claim the items were improperly received for purposes of a motion to set aside the information. (*Id*. at p. 187; see also *People v. Hathcock* (1973) 8 Cal.3d 599, 620-621.)

Only when evidence is received by the magistrate over defendant's objection may its improper receipt be grounds for a motion to set aside the information. (See, e.g., *People v. Hall* (1971) 3 Cal.3d 992, 995-996; *People v. Scoma* (1969) 71 Cal.2d 332, 334, fn. 1; *Priestly v. Superior Court* (1958) 50 Cal.2d 812, 815; *People v. Minervina* (1971) 20 Cal.App.3d 832, 835.)

People v. Sherwin (2000) 82 Cal.App.4th 1404 does not demand otherwise. *Sherwin* involved a grand jury indictment rather than an information. Penal Code section 939.6, subdivision (b), requires that a grand jury consider only evidence that would be admissible over objection at trial. This limitation does not apply to a magistrate during a preliminary examination. The reason for this distinction is obvious—a grand jury proceeding provides no way for a defendant to move to suppress evidence at that proceeding. (*Id*. at p. 1408.) Indeed, the defendant may have no knowledge of proceeding before an indictment is rendered. Thus, when a court later suppresses evidence considered by the grand jury, it may also reevaluate probable cause for the indictment in light of the suppression order. (*Id*. at p. 1411.)

6720.1-PC995 standard for sufficiency of evidence at PE 4/19

"The purpose of the preliminary hearing is to determine whether there is probable cause to conclude that the defendant has committed the offense charged. (*People v. Wallace* (2004) 33 Cal.4th 738, 749; Pen. Code, § 872.)" (*Galindo v. Superior Court* (2010) 50 Cal.4th 1, 8.) Penal Code section 995 provides that an information "shall be set aside" if the defendant has been "committed without reasonable or probable cause." Probable cause exists if a person of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. (*Galindo v. Superior Court*, *supra*; *Rideout v. Superior Court* (1967) 67 Cal.2d 471, 474.) "The showing required at this stage 'is extremely low' [Citation] … ." (*People v. Garcia* (2018) 29 Cal.App.5th 864, 870.)

> A preliminary examination serves a limited function; it permits the determination whether probable cause exists to believe that the defendant has committed a felony and should be held for trial. [Citation.] A defendant will be bound over to superior court and held to answer if "it appears from the examination that a public offense has been committed and there is sufficient cause to believe that the defendant is guilty." (§ 872, subd. (a).)

> Conversely, the magistrate must order the complaint dismissed when "it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense." (§ 871.) "Sufficient cause" is generally equivalent to reasonable and probable cause, i.e., a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. [Citation.]

(*People v. Murillo* (2015) 238 Cal.App.4th 1122, 1127-1128.)

But, in determining a motion brought pursuant to Penal Code section 995, neither the superior court nor the appellate court may reweigh the evidence or substitute its judgment for that of the committing magistrate as to the weight of the evidence or credibility of witnesses. (*People v. Block* (1971) 6 Cal.3d 239, 245; *People v. Hall* (1971) 3 Cal.3d 992, 996; *People v. Plengsangtip* (2007) 148 Cal.App.4th 825, 835.) " 'And if there is some evidence in support of the information, the court will not inquire into the sufficiency thereof.' [Citation.]" (*People v. Block*, *supra*, at p. 245; *Rideout v. Superior Court*, *supra*, 67 Cal.2d at p. 474.) Thus, an information should be set aside only when there is a total absence of evidence to support a necessary element of the offense charged. (*People v. Superior Court (Jurado)* (1992) 4 Cal.App.4th 1217, 1226; *Somers v. Superior Court* (1973) 32 Cal.App.3d 961, 963.)

"[A]lthough there must be *some* showing as to the existence of each element of the charged crime [citation] such a showing may be made by means of circumstantial evidence supportive of reasonable inferences on the part of the magistrate." (*Williams v. Superior Court* (1969) 71 Cal.2d 1144, 1148.) "Every legitimate inference that may be drawn from the evidence must be drawn in favor of the information." (*Rideout v. Superior Court*, *supra*, 67 Cal.2d at p. 474; *Caughlin v. Superior Court* (1971) 4 Cal.3d 461, 464-465; *People v. Superior Court (Jurado)*, *supra*, 4 Cal.App.4th at p. 1226.) In short, an information should not be set aside pursuant to Penal Code section 995 if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. (*People v. Slaughter* (1984) 35 Cal.3d 629, 637; *People v. Hall*, *supra*, 3 Cal.3d at p. 996; *Rideout v. Superior Court*, *supra*, at p. 474.)

6720.2-Magistrate's ruling search proper binding if supported 1/10

A defendant may renew a search and seizure objection made during the preliminary hearing by way of a motion to dismiss the information under Penal Code section 995 when the only substantial evidence supporting the commitment was a fruit of the search or seizure. (*People v. Scoma* (1969) 71 Cal.2d 332, 335.) But the usual Penal Code section 995 standards of review apply. (*Lozoya v. Superior Court* (1987) 189 Cal.App.3d 1332, 1339; *People v. Mayer* (1987) 188 Cal.App.3d 1101, 1111-1112; *People v. Miles* (1969) 2 Cal.App.3d 324, 327; cf. Pen. Code § 1538.5, subd. (i) [alternative procedure for defense to obtain review of Pen. Code § 1538.5 denial at preliminary hearing].) Under Penal Code section 995, neither the superior court nor the appellate court may reweigh the evidence or substitute its judgment for that of the committing magistrate as to the weight of the evidence or credibility of witnesses. And every legitimate inference must be drawn in favor of the information. (*Lozoya v. Superior Court*, *supra*; *People v. Miles*, *supra.*) "The finding by the magistrate that no illegal search and seizure occurred, if supported by substantial evidence, must be accepted in determining the issue." (*People v. Miles*, *supra*.)

6720.3-PC995 standard for grand jury indictment 2/16

The grand jury—like a magistrate deciding whether to bind a felony criminal defendant over for trial—need only determine whether sufficient or probable cause exists to return an indictment. In other words, the grand jury need be convinced of merely such a state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. (*Stark v. Superior Court* (2011) 52 Cal.4th 368, 406; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1026-1027.)

A motion to dismiss under Penal Code section 995, whether directed to an indictment or an information, is governed by a single standard. The reviewing court may not reweigh the evidence or substitute its judgment as to the weight of the evidence or credibility of witnesses for that of the grand jury. Nor does the reviewing court resolve factual contentions. (*People v. Pic'l* (1982) 31 Cal.3d 731, 737; *Jackson v. Superior Court* (1965) 62 Cal.2d 521, 530; *Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 384.) "[I]f there is some evidence to support the indictment, the courts will not inquire into its sufficiency." (*Somers v. Superior Court* (1973) 32 Cal.App.3d 961, 963; see also *Jackson v. Superior Court*, *supra*, at p. 525.)

All reasonable inferences that may be drawn from the evidence must be drawn in favor of the indictment. (*Stark v. Superior Court*, *supra*, 52 Cal.4th at pp. 406-407; see also *Jackson v. Superior Court*, *supra*, 62 Cal.2d at p. 530; *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1289; *People v. Shirley* (1978) 78 Cal.App.3d 424, 431.) "An indictment may be justified even if the evidence leaves some room for doubt. [Citation.] As a result, an indictment should be set aside only if there is no evidence that a crime was committed or there is no evidence to connect the defendant with a crime shown to have been committed. [Citations.]" (*People v. Superior Court (Costa)* (2010) 183 Cal.App.4th 690, 698.) "And, while there must be *some* showing as to the existence of each element of the crime, such a showing may be made by means of circumstantial evidence supportive of reasonable inferences." (*Id*. at p. 699, italics in original; see also *Stark v. Superior Court*, *supra*, 52 Cal.4th at p. 407.)

In short, an indictment should not be set aside under Penal Code section 995 if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. (*Cummiskey v. Superior Court*, *supra*, 3 Cal.4th at p. 1027; *Mason v. Superior Court* (2015) 242 Cal.App.4th 773, 790.)

6720.4-Appellate review (by writ or appeal) standard of PC995 motion 2/21

In *People v. Laiwa* (1983) 34 Cal.3d 711, the California Supreme Court explained both the standard of review of a decision on a Penal Code section 995 (§ 995) motion and the relevant roles of the superior and appellate courts in reviewing such a decision.

> [I]n proceedings under section 995 it is the magistrate who is the finder of fact; the superior court has none of the foregoing powers, and sits merely as a reviewing court; it must draw every legitimate inference in favor of the information, and cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. [Citation.] On review by appeal or writ, moreover, the appellate court in effect disregards the ruling of the superior court and directly reviews the determination of the magistrate holding the defendant to answer. [Citations.]

(*Id*. at p. 718; see also *Hudson v. Superior Court* (2017) 7 Cal.App.5th 1165, 1170; *People v. Bautista* (2014) 223 Cal.App.4th 1096, 1101.) But, if the Penal Code section 995 motion rests on

issues of statutory interpretation, the standard of appellate review is de novo. (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141; *People v. Reyes* (2020) 56 Cal.App.5th 972, 982.)

Like the trial court hearing the section 995 motion, the appellate court reviewing the preliminary hearing magistrate's bindover decision will "conduct an independent review of the evidence, but will not substitute [its] judgment for that of the magistrate as to the credibility or weight of the evidence. [Citation.]" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 654.) "The nature of an appellate court's review of the lower court's probable cause determination also does not vary according to the type of evidence—whether it be lay or expert testimony." (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 258.) The appellate court should "not set aside an information 'if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.' [Citation.]" (*Ibid*.; see also *Zemek v. Superior Court* (2020) 44 Cal.App.5th 535, 545.)

A pretrial writ of prohibition is the appropriate way to challenge the validity of an information or indictment after the denial of a section 995 motion. (*Heidary v. Superior Court* (2018) 26 Cal.App.5th 110, 116; *Hudson v. Superior Court* (2017) 7 Cal.App.5th 999, 1006.) But if the appellate review is by way of post-conviction appeal rather than pre-trial writ petition, the defense also must establish prejudice.

> Henceforth irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination. The right to relief without any showing of prejudice will be limited to pretrial challenges of irregularities.

(*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529; see also *People v. Leitner and Tobin* (2010) 50 Cal.4th 99, 139; *People v. Stewart* (2004) 33 Cal.4th 425, 461-462; *People v. Anderson* (2015) 234 Cal.App.4th 1411, 1420-1421.) The same rule applies to posttrial claims of irregularities during grand jury proceedings leading to an indictment. (*People v. Booker* (2011) 51 Cal.4th 141, 156-158.) "Under federal and state law, irregularities in grand jury proceedings generally are reviewed for prejudice." (*Id*. at p. 156.)

6780.1-Renewed PC1538.5 motion limited to facts and issues raised at PE 1/10

Penal Code section 1538.5, subdivision (i), permits a defendant to renew a motion to suppress evidence in the superior court even though it was made during the preliminary hearing. The "special hearing" in the superior court under subdivision (i), however, contains some strict limitations.

First, the defendant is not entitled to raise issues or advance theories in the superior court that were not raised and litigated during the suppression hearing at the preliminary examination. (*People v. Bennett* (1998) 68 Cal.App.4th 396, 406-407.)

Second, the preliminary hearing transcript becomes the evidentiary basis for the special hearing. In fact, a defendant can only present additional evidence which "could not reasonably have been presented at the preliminary hearing." (Pen. Code, § 1538.5, subd. (i).) Thus, witnesses known to the defense at the time of the preliminary hearing but not subpoenaed cannot be presented over objection. (*People v. Drews* (1989) 208 Cal.App.3d 1317, 1326.) Even the defendant cannot testify in the special hearing since he or she was available to the defense at the preliminary examination.

(*Id.* at pp. 1325-1326.) And of course, evidence that would be irrelevant or merely cumulative may be barred even if unavailable earlier. (*Id.* at pp. 1326-1327.) In *People v. Thompson* (1990) 221 Cal.App.3d 923, the appellate court held that subdivision (i) also bars the defense from offering additional evidence of defendant's standing in the special hearing when they failed to offer such evidence during a motion to suppress at the preliminary examination. (*Id.* at pp. 932-933.)

Note, however, that subdivision (i) gives the People the unequivocal right to recall the witnesses who testified at the preliminary hearing to supplement and clarify the evidence. (*People v. Hansel* (1992) 1 Cal.4th 1211, 1216.) This slight procedural advantage allows the People to better meet a renewed, and perhaps better articulated and argued, attack on the admissibility of evidence in the superior court. (*Id.* at p. 1223.)

6780.2-PC1538.5(i) judge bound by magistrate's resolution of factual issues 1/10

A defendant who has previously made a motion to suppress evidence at the preliminary hearing is generally bound by the magistrate's resolution of factual issues. Penal Code section 1538.5, subdivision (i), provides, in part: "The court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and *the findings of the magistrate shall be binding on the court* as to evidence or property not *affected by* evidence presented at the special hearing." (Italics added.)

When the only evidence considered at the special hearing is the preliminary hearing transcript, the "special hearing" court is bound by the magistrate's express or implied factual findings. (*People v. Ramsey* (1988) 203 Cal.App.3d 671, 678-679; similarly, see *People v. Galindo* (1991) 229 Cal.App.3d 1529, 1534; *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223-1224; *Anderson v. Superior Court* (1988) 206 Cal.App.3d 533, 544.) Even when additional evidence is presented during the special hearing, the magistrate's factual findings are binding on the reviewing court, except to the extent that they are "affected by" the additional evidence. (*People v. Bishop* (1993) 14 Cal.App.4th 203, 209 (*Bishop*).) The court then measures the established facts against the constitutional standard of reasonableness.

Whenever the "special hearing" court is bound by the magistrate's findings, it "acts as a reviewing court. Respecting the magistrate's power to judge credibility, resolve conflicts, weigh evidence and draw inferences, the … judge draws all presumptions in favor of the magistrate's factual determinations, express or implied, and upholds them if they are supported by substantial evidence." (*Bishop*, *supra,* 14 Cal.App.4th at p. 214; see also *People v. Ramsey*, *supra,* 203 Cal.App.3d at pp. 678-679.)

The "special hearing" judge sits as a fact finder only in limited circumstances. "Where additional evidence is presented, the findings of the magistrate, to the extent they are *affected by* the additional evidence, are not binding on the superior court. This allows the superior court to exercise its independent judgment on issues on which additional evidence is introduced." (*People v. Ramsey*, *supra*, 203 Cal.App.3d at p. 679, fn. 2, italics added.) The phrase "affected by" in subdivision (i) means more than the new evidence is merely relevant to the magistrate's findings. (*Bishop, supra,* 14 Cal.App.4th at pp. 210-211.)

For example, in *Bishop*, the appellate court held the defendant was not entitled to a de novo factual findings even though he presented two additional witnesses whose testimony was cumulative of defense witnesses at the preliminary hearing and tended to impeach the prosecution's evidence only by inference. The court held that "affected by" calls for a probable material influence upon or

modification of the magistrate's finding. (*Bishop*, *supra*, 14 Cal.App.4th at p. 212.) The reviewing court must weigh the effect of the new evidence on the magistrate's finding. The court should apply an objective test, "weighing the probabilities of whether *a* trier of fact would have been materially influenced by the total evidence, new and old." (*Ibid.*, italics in original.) Thus, defense evidence that is cumulative, lacks credibility, or merely impeaches rather than attacks the key issue, has little force and will not affect the ruling of the magistrate. (*Id.* at pp. 211-213.)

6780.3-Any objection at PE on 4th Amend. is a PC1538.5 motion 10/07

Any form of motion or objection made at the preliminary hearing to the reception of evidence on Fourth Amendment grounds constitutes a motion to suppress under Penal Code section 1538.5, and limits a defendant's right under subdivision (i) of section 1538.5 to present evidence at a subsequent motion in the superior court. Thus, in *People v. Thompson* (1990) 221 Cal.App.3d 923, the appellate court ruled that defendant's motion to strike the officer's testimony because of an alleged illegal detention or pat-down constituted making a motion under section 1538.5. (*Id*. at pp. 931-932.) And in *Anderson v. Superior Court* (1988) 206 Cal.App.3d 533, the appellate court held the evidence offered by defendant at the preliminary hearing contesting compliance with knock and notice constituted a "de facto" motion under 1538.5 even though his counsel expressed a desire to "reserve" his motion for the superior court. (Similarly see, *People v. O'Brien* (1969) 71 Cal.2d 394, 403, fn. 5.)

Amendments to subdivision (f) of section 1538.5 have generally made it much easier to determine if the defendant "made" a motion to suppress at the preliminary hearing within the meaning of subdivision (i). Subdivision (f)(2) requires the defense to file a written suppression motion at least five days before the preliminary hearing. Subdivision (f)(2) also mandates that the notice of motion to suppress be accompanied by a memorandum of points and authorities.

If the defense does not make a proper motion to suppress at the preliminary hearing, the magistrate is justified in preventing the defense from cross-examining prosecution witnesses or exploring otherwise irrelevant lines of inquiry relating solely to search and seizure issues. (*People v. Barnes* (1990) 219 Cal.App.3d 1468; *People v. Williams* (1989) 213 Cal.App.3d 1186.)

6800.1-*Harvey-Madden* objection must be timely and specific 11/15

If, as part of a motion to suppress under Penal Code section 1538.5, the defense seeks to challenge the existence of the original source of information relied upon by law enforcement to perform a search or seizure, they must make a proper and specific objection on this ground. (*People v. Brown* (2015) 61 Cal.4th 968, 983.) The objection should be sufficient to put the court and the prosecution on notice that this issue is being raised. (*People v. Collins* (1997) 59 Cal.App.4th 988, 992.) Without such notice, often termed a *Harvey-Madden* objection (*People v. Harvey* (1958) 156 Cal.App.2d 516, *People v. Madden* (1970) 2 Cal.3d 1017), the prosecution does not need to present evidence confirming the existence of the original source of the information upon which the police relied. (*People v. Collin* (1973) 35 Cal.App.3d 416, 420-421.) Nor can this objection be made for the first time on appeal. (*People v. Rogers* (1978) 21 Cal.3d 542, 547-548.)

6800.2-*Harvey-Madden* rule applies in limited circumstances 11/15

The leading *Harvey-Madden* cases, *People v. Harvey* (1958) 156 Cal.App.2d 516, *People v. Madden* (1970) 2 Cal.3d 1017, and *People v. Remers* (1970) 2 Cal.3d 659, all involve probable cause arrests made by officers who relied upon information received through official channels by other officers whose original source for obtaining this information was not shown The appellate courts held that while the arresting officer's reliance on such hearsay was a proper basis for the arrest, "the People must prove that the source of the information is something other than the imagination of an officer who does not become a witness." (*People v. Remers*, *supra*, at p. 666; see also *In re Eskiel S.* (1993) 15 Cal.App.4th 1638, 1643.)

> The *Remers-Harvey-Madden* rule only requires prosecution proof that information justifying the arrest was actually given to the police officer who furnished it to the arresting officer, i.e., proof that the source of the information on which the arrest was based was " 'something other than the imagination of an officer, " who did not testify. (*Remers v. Superior Court*, *supra*, 2 Cal.3d at p. 666.) The prosecution must simply show that the officer furnishing the information generating the arrest had probable cause to believe the arrest was justified. [Citation.]

(*People v. Armstrong* (1991) 232 Cal.App.3d 228, 245-246.)

> As the *Remers* case itself says, the conduct of the officers on the scene is beyond criticism. They obviously have to act on the basis of what they are told by the dispatcher or their superiors. The whole point of the *Remers* rule is to negate the possibility that the facts which validate the conduct of the officers in the field are made up inside of the police department by somebody who is trying to frame a person whom he wants investigated.

(*People v. Orozco* (1981) 114 Cal.App.3d 435, 444.)

The *Harvey-Madden* rule applies equally to arrests based on warrants. (See *People v. Collins*, *supra*, 59 Cal.App.4th at pp. 993-994; *People v. Alcorn* (1993) 15 Cal.App.4th 652, 655-658.) "These rules undoubtedly apply to the requirement of a reasonable suspicion to detain and perform a cursory search for weapons." (*In re Richard C.* (2009) 173 Cal.App.4th 1252, 1259; see e.g., *People v. Brown* (2015) 61 Cal.4th 968, 983 [detention].)

But the *Harvey-Madden* rule is not applicable to cases where the source of the information is the direct observation of one officer, articulated to a second officer, even if the first does not testify. "The reasons for the rule do not apply where the information furnished the arresting officer by another officer related ' "specific and articulable facts" ' observed by the latter, is not hearsay based on hearsay, and is not a conclusionary statement based on unknown sources. Such a situation does not involve the 'phantom informer.' " (*People v. Poehner* (1971) 16 Cal.App.3d 481, 487, citations omitted; see also *People v. Gomez* (2004) 117 Cal.App.4th 531, 540-541 [probable cause based on collective knowledge gathered by testifying and non-testifying officers].)

6800.3-*Harvey-Madden* objection can be refuted a number of ways 12/15

Upon a proper *Harvey-Madden* objection (*People v. Harvey* (1958) 156 Cal.App.2d 516; *People v. Madden* (1970) 2 Cal.3d 1017) objection, the People must prove that the original civilian source of the information was not "the imagination of the officer." (*People v. Brown* (2015) 61 Cal.4th 968, 983; *People v. Remers* (1970) 2 Cal.3d 659, 666.) But a *Harvey-Madden* objection can be refuted in a variety of ways, including by presenting the source of the information, such as the citizen informant or the first officer or dispatcher to receive the information, or, when applicable, by

introducing a copy of the arrest warrant or its abstract. (*People v. Armstrong* (1991) 232 Cal.App.3d 228, 245; see, e.g., *People v. Coston* (1990) 221 Cal.App.3d 898, 907 [testifying witnesses personally observed the conduct justifying the detentions, arrests and searches].) Other means of satisfying the *Harvey-Madden* rule are also accepted by the courts. In *Sanderson v. Superior Court* (1980) 105 Cal.App.3d 264, for example, the first officer did not testify, but the second officer knew the informant's identity and overheard some of the conversation dealing with probable cause. The appellate court held *Harvey-Madden* was satisfied. (*Id*. at pp. 268-270.) When the source of the information is a 911 caller, the *Harvey-Madden* requirement "can be met by calling the police dispatcher as a witness at the suppression hearing or by introducing a recording of the 911 call. (*People v. Brown*, *supra*, 61 Cal.4th at p. 983.)

Circumstantial evidence verifying that probable cause had not been manufactured is also sufficient. (*People v. Armstrong*, *supra*, 232 Cal.App.4th at p. 245 ["Proof that the warrant information precipitating the arrest was not manufactured may be made by circumstantial evidence other than the warrant or a certified copy"]; *People v. Alcorn* (1993) 15 Cal.App.4th 652, 659-660 [abstract of arrest warrant sufficient to show existence of a facially valid warrant shifting burden of producing evidence to the contrary to the defense].) In *People v. Orozco* (1981) 114 Cal.App.3d 435, for example, a radio broadcast informed officers that shots had been fired from a car. Neither the source of the information nor the first officer in the chain of official information testified, but officers responding to the call found the car at the specified location and found bullet casings outside the car. *Harvey-Madden* was again held satisfied. (*Id*. at pp. 445-446; similarly, see *People v. Johnson* (1987) 189 Cal.App.3d 1315, 1319-1320.) "Where, as here, the evidence and the reasonable inferences flowing from it show that the police dispatcher actually received a telephone report creating a reasonable suspicion of criminal wrongdoing, it is not necessary to require strict compliance with the '*Harvey-Madden*' rule." (*In re Richard G*. (2009) 173 Cal.App.4th 1252, 1259; see also *People v. Romeo* (2015) 240 Cal.App.4th 931, 946-949 [Although neither court document showing search and seizure waiver condition of probation nor printout of computer database reflecting such, were produced, *Harvey-Madden* rule satisfied by officer's testimony of experience with such database and knowledge of criminal background of probationers].) In another case, the testimony of officers who collected information from a series of reported crimes was held sufficient to show such information was not the "imagination of an officer who [did] not become a witness." (*People v. Taylor* (1975) 46 Cal.App.3d 513, 523, internal citations omitted.)

6810.1-Motion must be in writing and meet other statutory requirements 9/20

Penal Code section 1538.5, subdivision (a)(1), states: "A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure [on specified grounds]." Subdivision (a)(2) of Penal Code section 1538.5 describes the statutory requirements for making such a motion:

> A motion pursuant to paragraph (1) shall be made in writing and accompanied by a memorandum of points and authorities and proof of service. The memorandum shall list the specific items of property or evidence sought to be returned or suppressed and shall set forth the factual basis and the legal authorities that demonstrate why the motion should be granted.

California appellate courts acknowledge the mandatory nature of these statutory requirements.

> A motion to suppress must be supported by points and authorities which set forth the factual basis and legal authorities which require suppression of the evidence. (§ 1538.5, subd. (a)(2) …; *People v. Williams* (1999) 20 Cal.4th 119, 135 [*Williams*].) Our Supreme Court has held that a defendant must specify in the moving papers the precise grounds for the suppression of evidence motion. (*Ibid*.; *People v. Smith* (2002) 95 Cal.App.4th 283, 295-296.)

(*People v. Reyes* (2009) 172 Cal.App.4th 671, 687.) "[A] defendant must state the grounds for the motion with sufficient particularity to give notice to the prosecution of the sort of evidence it will need to present in response." (*Williams*, *supra*, 20 Cal.4th at p. 123.) When there is but one search or seizure, these pleading requirements are easily met:

> [W]hen defendants move to suppress evidence, they must set forth the factual and legal basis for the motion, but they satisfy that obligation, at least in the first instance, by making a prima facie showing that the police acted without a warrant. The prosecution then has the burden of proving some justification for the warrantless search or seizure, after which, defendants can respond by pointing out any inadequacies in that justification.

(*Williams*, *supra*, 20 Cal.4th at p. 136.) In other words, "when the basis of a motion to suppress is a warrantless search or seizure, the requisite specificity is generally satisfied, in the first instance, if defendants simply assert the absence of a warrant and make a prima facie showing to support that assertion." (*Id*. at p. 130.)

"However, if the motion seeks to suppress evidence obtained as a result of police conduct involving a series of warrantless searches and seizures, the defendant must identify which of the searches or seizures he or she challenges as unlawful." (*Davis v. Appellate Division of Superior Ct.* (2018) 23 Cal.App.5th 387, 395 [*Davis*].) Moving papers which fail to satisfy this requirement or are otherwise so vague as to not provide the prosecution with fair notice of the police action it is required to justify may be summarily denied. (*Ibid*.)

Distinguishing the pleading requirements with the ultimate burden of proof, the California Supreme Court held "the circumstance that the prosecution has the burden of proof does not preclude our holding that, at least in this context, defendants must precisely pinpoint the subject matter of that proof." (*Williams*, *supra*, 20 Cal.4th at pp. 128-129.)

Finally, "[n]o statute or case authority requires the prosecution to file an opposition brief." (*People v. Cotsirilos* (2020) 50 Cal.App.5th 1023, 1028.) If the prosecution has filed pleadings or otherwise offers justification for the challenged searches and seizures, the defendant must present any arguments as to why that justification is inadequate. (*Davis*, *supra*, 23 Cal.App.5th at p. 392.) "Otherwise, defendants would not meet their burden under section 1538.5 of specifying why the search or seizure without a warrant was 'unreasonable.' " (*Williams*, *supra*, 20 Cal.4th at p. 130.)

6810.2-Motion must comply with local court rules 9/20

A court can adopt and enforce local rules of practice controlling motions to suppress so long as the rules are neither inconsistent with law nor with rules adopted by the Judicial Council. In *People v. Lewis* (1977) 71 Cal.App.3d 817, the Court of Appeal upheld the trial court's refusal to consider a motion to suppress that was not in the form required by local rules of court. The appellate court reiterated "it had no doubt that local rules would govern suppression motions under [Penal Code] section 1538.5, subdivision (g) [covering misdemeanor cases], since the section 'speaks with

reference to established motion practice, rather than providing a unique one of its own.' " (*Id.* at p. 820, citing *People v. Manning* (1973) 33 Cal.App.3d 586, 598.)

San Diego County Superior Court Rules, Division III "Criminal," Rule 3.2.2., for example, sets out rules for the efficient processing of motions. Subsection C specifically addresses motions made pursuant to Penal Code section 1538.5.

Rule 3.2.2, subdivision C, paragraph 3, states:

> The motion must include a list of specific items to be suppressed. A general request to suppress "all items seized" is not sufficient and may be deemed an abandonment of the motion. Only listed items will be considered by the court for suppression or return, unless any newly identified item could not reasonably be specified prior to the hearing.

In addition, Rule 3.2.2, subdivision C, paragraph 5a, covers so-called *Williams* (*People v. Williams* (1999) 20 Cal.4th 119, 130) motions:

> Defendant must specify the precise grounds for suppression of the evidence, including the inadequacy of any justification for the search and seizure. If defendant's motion alleges the lack of a warrant as the sole basis for suppression, any opposition filed by the People should specify the justification for the warrantless search. *The defendant should then file a reply specifying the inadequacies of the justification. The reply brief must be filed and personally served at least two court days prior to the hearing.* The raising of new issues in the reply may constitute good cause for continuance to permit the prosecution to prepare for the hearing.

(Italics added.)

This local rule is consistent with the *Williams* pleading requirements. It places the initial burden of justifying a warrantless search or seizure upon the prosecution. (*People v. Johnson* (2006) 38 Cal.4th 717, 723.) If that burden is met, the burden shifts to the defense. "[I]f defendants detect a critical gap in the prosecution's proof or a flaw in its legal authority, they must object on that basis to admission of the evidence or risk forfeiting the issue on appeal." (*People v. Williams*, *supra*, 20 Cal.4th at p. 130.) In other words: "Defendants who do not give the prosecution sufficient notice of these inadequacies cannot raise the issue on appeal." (*Id.* at p. 136; see also *People v. Oldham* (2000) 81 Cal.App.4th 1, 11-15.)

But the failure of either party to follow these sensible pleading rules neither waives the People's right to claim any justification for the warrantless search, nor the right of the defense to challenge the People's justification, nor does it alter the People's burden of proof to establish the justification. (*People v. Smith* (2002) 95 Cal.App.4th 283, 302.) Note, however, "[n]o statute or case authority requires the prosecution to file an opposition brief." (*People v. Cotsirilos* (2020) 50 Cal.App.5th 1023, 1028.) But the court retains the power to sanction noncompliance by granting the disadvantaged party a continuance or by imposing a fine or contempt citation on counsel. (*People v. Smith*, *supra*, 95 Cal.App.4th at p. 303.)

6840.1-No return of seized property that is evidence or contraband 6/18

Assuming proper subject matter jurisdiction over the property or *res*, a criminal court can order the return non-contraband property seized by law enforcement when no longer needed as evidence. (See, e.g., *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 714 ["the superior court possesses the inherent power to conduct proceedings and issue orders regarding property seized from a criminal suspect pursuant to a warrant issued by the court"]; *People v. Lamonte* (1997) 53 Cal.App.4th 544 [this includes items such as telephones or computers used to commit the crime].) "The court may not refuse to return legal property to a convicted person to deter possible future crime." (*Id*. at p. 553.) But there are several important exceptions to a criminal defendant's right to the return of property.

Certainly a defendant is never entitled to the return of seized contraband. (*Aday v. Superior Court* (1961) 55 Cal.2d 789, 800.) This includes property reasonably believed to be stolen (*Ensoniq Corp. v. Superior Court* (1998) 65 Cal.App.4th 1537, 1547; *People v. Superior Court (McGraw)* (1979) 100 Cal.App.3d 154, 157) and property with removed serial numbers (*People v. Superior Court (Shayan)* (1993) 21 Cal.App.4th 621). "Under Penal Code section 1422, ' "stolen property is not to be returned to the possession of the person from whom it was taken, even if that person was not charged with or convicted of any crime and even if a third party owner is not found." ' " (*Lawrence v. Superior Ct.* (2018) 21 Cal.App.5th 513, 521-522, internal citations omitted].) There is also a specific statute prohibiting the return of certain impounded vehicles or vehicle parts during the pendency of a criminal case. (Veh. Code § 10751, subd. (b); *People v. Cavanna* (1989) 214 Cal.App.3d 1054, 1058.)

In addition, property subject to a claim by the government need not be returned. (*Mason v. Superior Court* (1981) 121 Cal.App.3d 876; *People v. Freeny* (1974) 37 Cal.App.3d 20.) Similarly, property, including money, need not be returned where there is probable cause to believe it is the fruit of an illegal transaction, making it subject to forfeiture under California or federal law. (See, e.g., *People v. $48,715* (1997) 58 Cal.App.4th 1507; *People v. $497,590* (1997) 58 Cal.App.4th 145.)

6840.2-Presumption of ownership may be rebutted 6/18

Evidence Code section 637 provides: "The things which a person possesses are presumed to be owned by him." Such a presumption, however, is rebuttable and may be controverted. (*Thorne v. McKinley Brothers* (1936) 5 Cal.2d 704, 708.) This presumption "has been said to be the lowest species of evidence, which may be overcome by showing *the character of the possession*." (*Bohn v. Gruver* (1931) 111 Cal.App. 386, 392, italics added.) Certainly stolen property need not be returned to the person from who it was seized. (*Ensoniq Corp. v. Superior Court* (1998) 65 Cal.App.4th 1537, 1547.) "We find that due process requires the People to prove by a preponderance of the evidence that the seized property was stolen or embezzled, in a situation where no charges are pending and no conviction has been obtained. Although it may be suspected that the seized property was stolen, that fact must be proven by due process of law." (*Id*. at p. 1549; accord *Lawrence v. Superior Ct.* (2018) 21 Cal.App.5th 513, 520-523.)

In *People v. Superior Court (McGraw)* (1979) 100 Cal.App.3d 154 (*McGraw*), the appellate court considered whether the trial court erred in granting a motion for the return of seized property. The court noted that stolen property in the hands of the thief is contraband subject to retention by the police. (*Id*. at p. 158.) The court further observed that Penal Code section 1411, dealing with

disposition of unclaimed property, "assumes that stolen property is not to be returned to the possession of the person from whom it was taken, *even if that person was not charged with or convicted of any crime and even if a third party owner is not found*." (*Ibid*., italics added.)

Regarding the presumption of ownership in Evidence Code section 637, the appellate court in *McGraw* stated:

> Such a presumption assumes the existence of the presumed fact "unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption." (Evid. Code, § 604.) Thus, the subject property is presumed to be owned by the real parties in interest until the state has presented evidence which would support a finding that real parties did not in fact own the property. The People would be required to prove the property was stolen by a preponderance of the evidence, as in all determinations of ownership. All relevant evidence on the issue would be admissible.

(*McGraw*, *supra*, 100 Cal.App.3d at p. 159.)

6840.3-Motion for return only for property seized by search warrant & exhibits 6/18

For a criminal court to have jurisdiction to act upon a motion for return of property, whether under Penal Code section 1536 or a related statutory provision, the property or *res* must have been seized pursuant to the order of the court or have been marked as an exhibit. (*People v. Icenogle* (1985) 164 Cal.App.3d 620, 623-624; see also *Coy v. County of Los Angeles* (1991) 235 Cal.App.3d 1077, 1089.) "When property is seized pursuant to warrant, the property must be retained in the custody of the officer, subject to order of the court in which the warrant is returnable or the offense relating to the property is triable. (§ 1536.) An officer who seizes property under a search warrant does so on behalf of the court for use in a judicial proceeding." (*Ensoniq Corp. v. Superior Court* (1998) 65 Cal.App.4th 1537, 1546, fn. omitted.) In addition, "the superior court possesses the inherent power to conduct proceedings and issue orders regarding property seized from a criminal suspect pursuant to a warrant issued by the court." (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 714) Finally:

> A criminal defendant may move for return of property before trial on the ground the seizure was unreasonable. ([Pen. Code] § 1538.5.) A defendant may also bring a nonstatutory motion for return of property seized by warrant or incident to arrest which was not introduced into evidence but remained in possession of the seizing officer. (*Gershenhorn v. Superior Court* (1964) 227 Cal.App.2d 361, 364-365.)

(*People v. Lamonte* (1997) 53 Cal.App.4th 544, 549; see also *People v. Hopkins* (2009) 171 Cal.App.4th 305, 308.)

But, if the property, such as alleged drug money, has been seized pursuant to warrant and subsequently turned over to federal authorities, the court has no power to order its return. (*City of San Jose v. Superior Court* (1987) 195 Cal.App.3d 743, 748-750.) Similarly, if the property has been lost or destroyed, whether or not in accordance with law, it is impossible for the criminal court to grant any effectual relief. (*People v. Hopkins*, *supra*, 171 Cal.App.4th at p. 309 [noting availability of civil remedies].)

6850.1-Preponderance of evidence is burden of proof for PC1538.5 12/15

When a motion to suppress evidence pursuant to Penal Code section 1538.5 involves disputed facts regarding a warrantless arrest, search or seizure, the court may deny the motion when it believes that factual testimony on behalf of the People is more probably true than false. In other words, the burden of proof imposed on the People is proof by a preponderance of the evidence. (*United States v. Matlock* (1974) 415 U.S. 164, 177, fn. 14; *People v. James* (1977) 19 Cal.3d 99, 106, fn. 4; *People v. Superior Court (Bowman)* (1971) 18 Cal.App.3d 316 [grant of motion reversed because trial court erroneously applies beyond a reasonable doubt standard]; see, generally, Evid. Code § 115.) "When a defendant raises a challenge to the legality of a warrantless search or seizure, the People are obligated to produce proof sufficient to show, by a preponderance of the evidence, that the search fell within one of the recognized exceptions to the warrant requirement. [Citations.]" (*People v. Romeo* (2015) 240 Cal.App.4th 931, 939.) The burden of proof shifts to the defendant, however, when the motion to suppress involves an arrest, search or seizure with a warrant. (*Theodor v. Superior Court* (1972) 8 Cal.3d 77, 101; *People v. Ramirez* (1988) 202 Cal.App.3d 425, 428.) The prosecution need only produce the warrant, or an abstract showing the existence of a facially valid warrant, to shift the burden to the defendant. (*People v. Alcorn* (1993) 15 Cal.App.4th 652, 660.)

6850.2-Appellate review standard on PC1538.5 motion 12/19

In *People v. Williams* (1988) 45 Cal.3d 1268, the California Supreme Court recited the standard of review of a trial court's ruling on a motion to suppress evidence under Penal Code section 1538.5:

> In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. … [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, viz., the reasonableness of the challenged police conduct, is also subject to independent review.

(*Id*. at p. 1301; see also *Ornelas v. United States* (1996) 517 U.S. 690, 696-697; *People v. Lee* (2019) 40 Cal.App.5th 853, 860-861 [same principles apply to People' appeal of order granting a suppression motion].)

As to the first prong, "[i]n ruling on a motion under section 1538.5 the superior court sits as a finder of fact with the power to judge credibility, resolve conflicts, weigh evidence, and draw inferences, and hence [] on review of its ruling by appeal or writ all presumptions are drawn in favor of the factual determinations of the superior court and the appellate court must uphold the superior court's express or implied findings if they are supported by substantial evidence. [Citation.]" (*People v. Laiwa* (1983) 34 Cal.3d 711, 718; see also *People v. Chamagua* (2019) 33 Cal.App.5th 925, 928.)

As to the second and third prongs:

> Although it is a settled principle of appellate review that a correct decision of the trial court will be affirmed even if based on erroneous reasons, the Supreme Court has cautioned

that "appellate courts should not consider a Fourth Amendment theory for the first time on appeal when 'the People's new theory was not supported by the record made at the first hearing and would have necessitated the taking of considerably more evidence …' or when 'the defendant had no notice of the new theory and thus no opportunity to present evidence in opposition.' " [Citation.] However, when "the record fully establishes another basis for affirming the trial court's ruling and there does not appear to be any further evidence that could have been introduced to defeat the theory," a ruling denying a motion to suppress will be upheld on appeal. [Citations.]

(*People v. Johnson* (2018) 21 Cal.App.5th 1026, 1032 (*Johnson*).) In *Johnson*, the trial court used the automobile exception to uphold the search of a vehicle because the officers had probable cause to believe the automobile contained marijuana. The appellate court affirmed also relying on the automobile exception except finding the facts supported probable cause to believe the vehicle contained narcotics rather than marijuana. (*Johnson*, *supra*, 21 Cal.App.5th at pp. 1037-1039.)

6860.1-Defendant must establish expectation of privacy to object to search 8/20

"[A] defendant has no standing to complain of violations of another's Fourth Amendment rights." (*People v. Badgett* (1995) 10 Cal.4th 330, 343; see also *In re David C.* (2020) 47 Cal.App.5th 657, 673.) Fourth Amendment rights are personal rights which may be asserted only by a defendant who has a legitimate expectation of privacy in the invaded place or the thing searched. (*Rakas v. Illinois* (1978) 439 U.S. 128, 133-134, 143.) "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." (*Alderman v. United States* (1969) 394 U.S. 165, 171-172.) Thus, to succeed on a motion to exclude evidence based on a claim of unreasonable search and seizure, the defendant must establish a personal, reasonable, and legitimate expectation of privacy in the particular area searched or thing seized. (*United States v. Payner* (1980) 447 U.S. 727, 731; *People v. Roybal* (1998) 19 Cal.4th 481, 507.) The former California vicarious exclusionary rule was nullified by passage of Proposition 8 in June 1982. (*In re Lance W.* (1985) 37 Cal.3d 873; *People v. Daan* (1984) 161 Cal.App.3d 22.)

The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search … . Because Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine, it is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim.

(*Byrd v. United States* (2018) 584 U.S. ___, ___ [138 S.Ct. 1518, 1530, 200 L.Ed.2d 805, 818].)

"The legitimacy of the expectation of privacy is determined under the totality of the circumstances." (*People v. Tolliver* (2008) 160 Cal.App.4th 1231, 1239.) The defendant bears the burden of proving a legitimate expectation of privacy. (*Rawlings v. Kentucky* (1980) 448 U.S. 98, 104; *People v. Bryant et al.* (2014) 60 Cal.4th 335, 365; *People v. Roybal*, *supra*; 19 Cal.3d at p. 507.) "Whether the defendant had a legitimate expectation of privacy is subject to a two-part test: (1) did the defendant manifest a subjective expectation of privacy in the object of the search? and (2) is society willing to recognize the expectation of privacy as legitimate? (*California v. Ciraolo* (1986) 476 U.S. 207, 211.)" (*People v. Tolliver*, *supra*, 160 Cal.App.4th at p. 1239.) In other words,

the defendant's subjective expectation of privacy must be objectively reasonable under the circumstances. (*Smith v. Maryland* (1979) 442 U.S. 735, 740.) An expectation of privacy is reasonable if it " 'has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." ' [Citation.]" (*People v. Ayala* (2000) 23 Cal.4th 225, 255; see also *People v. Magee*, *supra*, 194 Cal.App.4th at p. 184.)

> [C]ourts look to the totality of the circumstances. Appropriate factors include " ' " 'whether the defendant has a [property or] possessory interest in the thing seized or the place searched; whether he has the right to exclude others from that place; whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises.' " ' [Citation.]" [Citation.]

(*People v. Bryant et al.*, *supra*, 60 Cal.4th at p. 365.)

The courts have specifically rejected several theories advanced to broaden the legitimate expectation of privacy of defendants whose personal rights have not been violated by police conduct. For example, mere presence at the search scene does not establish a defendant's legitimate expectation of privacy. (*Minnesota v. Carter* (1998) 525 U.S. 83, 90-91 [day visitor at house where narcotics being packaged]; *Rakas v. Illinois*, *supra*, 439 U.S. at pp. 140-142 [passengers in car].) Nor does the defendant gain an expectation of privacy simply because he or she is charged with possession of the property sought to be suppressed. (*United States v. Salvucci* (1980) 448 U.S. 83, 85; see also, *People v. Ooley* (1985) 169 Cal.App.3d 197, 202; *People v. Root* (1985) 172 Cal.App.3d 774, 778-779.) Even the defendant's ownership of the property itself is insufficient to create a legitimate expectation of privacy. (*United States v. Salvucci*, *supra*.)

Being the "target" of an investigation does not create a legitimate expectation of privacy for a defendant. (*Rakas v. Illinois*, *supra*, 439 U.S at p. 135; *People v. Root*, *supra*, 172 Cal.App.3d at p. 777.) Nor does conspiring with, or being married to, one whose property is searched. (*United States v. Padilla* (1993) 508 U.S. 77, 82; *People v. Madrid* (1992) 7 Cal.App.4th 1888, 1897-1898.) Even grossly unreasonable police conduct, as in secretly intercepting a briefcase belonging to a third party and copying its contents, cannot alter the defendant's need to show the conduct violated his or her personal, reasonable and legitimate expectation of privacy. (*United States v. Payner*, *supra*, 447 U.S. at pp. 731-734.)

6860.2-Casual visitor to residence has no expectation of privacy 7/11

The factor most likely to establish the legitimate expectation of privacy needed to challenge a search or seizure is residency in the place searched. This applies equally to owners, renters, family members, boarders, etc., within homes, apartments, hotel rooms, and other living quarters. These people have a reasonable expectation of privacy in their entire premises. (See *Bumper v. North Carolina* (1968) 391 U.S. 543, 548, fn. 11; *People v. Koury* (1989) 214 Cal.App.3d 676, 687-689.) "[A]ll family members who reside in a home have a reasonable expectation of privacy against governmental intrusion in all areas of the home, even if internal family rules restrict their use or access to certain areas." (*In re Rudy F.* (2004) 117 Cal.App.4th 1124, 1135.) But a transient who resides in a temporary cardboard and wood shelter erected on public property in violation of a local ordinance has no objectively reasonable expectation of privacy there. (*People v. Thomas* (1995) 38 Cal.App.4th 1331, 1334-1335.)

Among non-residents, overnight guests have a reasonable expectation of privacy in the premises, although their privacy interests are less than a resident's. (*Minnesota v. Olson* (1990) 495 U.S. 91, 99-100; *People v. Hamilton* (1985) 168 Cal.App.3d 1058, 1064-1066.) For example, an overnight guest cannot object to a search of the area beneath furniture in the host's living room. (*People v. Scott* (1993) 17 Cal.App.4th 405, 408-410.) And baby-sitters may exercise enough control over premises to have sufficient legitimate expectation of privacy to complain about a search occurring in their presence. (*People v. Moreno* (1992) 2 Cal.App.4th 577, 584-588.)

At the other extreme, "[b]eing legitimately on the premises, without more, is insufficient." (*People v. Rios* (2011) 193 Cal.App.4th 584, 591.) Thus, casual daytime guests have no reasonable expectation of privacy in the premises being visited and thus cannot complain about an entry and search, even when done in their presence. (*Minnesota v. Carter* (1998) 525 U.S. 83 [a visitor packaging cocaine with a resident does not have a reasonable expectation of privacy in the premises]; see also *People v. Cowan* (1994) 31 Cal.App.4th 795, 800-801; *People v. Koury*, *supra*, 214 Cal.App.3d at pp. 689-691; *People v. Ooley* (1985) 169 Cal.App.3d 197, 201-203; but see *People v. Magee* (2011) 194 Cal.App.4th 178, 186-187 [dicta].) Of course, even casual visitors retain a legitimate expectation of privacy over their persons and their property on the premises. (*People v. Koury*, *supra*, 214 Cal.App.3d at pp. 689-691.)

A casual visitor with permission to enter another person's home for legitimate purposes, such as to use the bathroom, does not necessarily make any subsequent entry subject to Fourth Amendment protection. "Although a regular guest such as defendant may well have a legitimate expectation of privacy during a social visit, that does not mean that society is prepared to recognize as reasonable the privacy expectation defendant claims here: an expectation that his ongoing social relationship with the residents of the Mark Avenue house meant that he could use the house as a sanctuary to escape contact with the police." (*People v. Magee*, *supra*, 194 Cal.App.4th at p. 187.)

> In this case, though defendant might have had a legitimate expectation of privacy had he been paying a social visit when the police entered, he did not have a legitimate expectation of privacy where he entered the house simply to escape their pursuit. The reasons supporting the legitimacy of a social guest's expectation of privacy do not support defendant's claimed expectation of privacy.

(*Id*. at p. 188.) That the defendant in *Magee* also retreated into a bathroom and locked the door (where the officer found him flushing narcotics down the toilet) did not give him a reasonable expectation of privacy under Fourth Amendment. "As we rejected defendant's claimed expectation of privacy as a social guest because there is no evidence of a nexus between his entry into the Mark Avenue house and a desire to socialize, we also reject defendant's claimed expectation of privacy as an occupant of the bathroom because there is no evidence of a nexus between his presence in the bathroom and the bathroom's intended use." (*Id*. at p. 190.)

6860.3-Passenger has no expectation of privacy in another's car 9/18

The owner/driver of a vehicle certainly has sufficient legitimate expectation of privacy to contest any stop or search of the vehicle. But a driver who is not the owner may contest a search of the vehicle only if the driver has the owner's permission to use the vehicle. (*People v. Carvajal* (1988) 202 Cal.App.3d 487, 495; *People v. Leonard* (1987) 197 Cal.App.3d 235, 239.) This may include a driver and sole occupant in lawful possession of a rental car even if the driver is not listed

on the rental agreement. (*Byrd v. United States* (2018) 584 U.S. ___, ___ [138 S.Ct. 1518, 1531, 200 L.Ed.2d 805, 818].)

A mere passenger in the car usually has no expectation of privacy in the search or seizure of the vehicle. (See, generally, *Brendlin v. California* (2007) 551 U.S. 249, 253-259 (*Brendlin*).) In the leading case of *Rakas v. Illinois* (1978) 439 U.S. 128, police stopped a vehicle driven by robbery suspects, searched their car, and found bullets in the glove compartment and a firearm under the front passenger seat. The United States Supreme Court held the passengers had no legitimate expectation of privacy in the car because they (1) neither owned nor leased the car, and (2) did not assert any interest (e.g., ownership) in the items seized. The High Court wrote:

> Judged by the foregoing analysis, petitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. And as we have previously indicated, the fact that they were "legitimately on [the] premises" in the sense that they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched.

(*Id.* at p. 148; see also *People v. Root* (1985) 172 Cal.App.3d 774, 778.)

A passenger, however, may contest the basis for a traffic stop of the vehicle in which he or she is riding. "Based on *Brendlin* and the other authority cited above, we hold that a defendant may challenge evidence found in a searched vehicle as the fruit of an unlawful detention, even if the defendant lacked a reasonable expectation of privacy in the searched vehicle." (*Brewer v. Superior Ct.* (2017) 16 Cal.App.5th 1019, 1024-1025.)

6860.4-Defendant's disclaimer of possessory interest surrenders privacy 8/16

It is well-established that Fourth Amendment rights are personal and may not be asserted vicariously. (*Alderman v. United States* (1969) 394 U.S. 165, 174.) A defendant's disclaimer of possessory interest in an area searched or item seized generally defeats any assertion of a legitimate expectation of privacy. "It is settled law that a disclaimer of proprietary or possessory interest in the area searched or the evidence discovered terminates the legitimate expectation of privacy over such area or items." (*People v. Stanislawski* (1986) 180 Cal.App.3d 748, 757.) Thus, any such disclaimer, whether at the time of the search or at the later suppression hearing, bars defendant from moving to suppress the fruits of such search.

The appellate court in *People v. Stanislawski*, *supra*, 180 Cal.App.3d 748, held the defendant's disclaimer to officers of possessory interest in the property searched barred his insistence upon an expectation of privacy. (*Id.* at p. 757.) Similarly, in *People v. Dasilva* (1989) 207 Cal.App.3d 43, the appellate court held: "We will not extend California law to permit a defendant who disclaims possession of an object to take a contrary position in an effort to attain standing to seek to exclude that object from evidence." (*Id.* at p. 49; similarly, see *People v. Mendoza* (1986) 176 Cal.App.3d 1127, 1133 [denial of ownership "virtually the equivalent of an implied consent to search"]; distinguish *People v. Casares* (2016) 62 Cal.4th 808, 835-836 [disclaimer of ownership in car searched does not necessarily mean defendant lacked legitimate possessory interest in the car]; *People v. Dachino* (2003) 111 Cal.App.4th 1429 [disclaimer of ownership of item found did not deprive defendant of expectation of privacy in place searched]; contra *People v. Allen* (1993) 17 Cal.App.4th 1214, 1222-1223 [error to rely on the disclaimer by defendant to the exclusion of all other evidence in determining if defendant had a reasonable expectation of privacy].)

The disclaimer need not be in the form of direct verbal denial of interest to the police or to the court. In *People v. Tolliver* (2008) 160 Cal.App.4th 1231, for example, defendant Villasenor sought to challenge the search of car in which narcotics were transported.

> Villasenor intended to disclaim an interest in the Concorde if it was searched and contraband found. He took all of the steps to prepare for such a disclaimer. He had someone else purchase the car. He avoided registering or insuring it in his name. He intended to have someone else drive the car when it was loaded with a controlled substance. Villasenor admitted that he took these steps to disassociate himself from the car because he intended to use the car to transport controlled substances. Therefore, Villasenor abandoned his privacy interest in the car and the privacy interest he asserted in his motion to suppress was illegitimate.

(*Id*. at pp. 1240-1241.) "Villasenor conspired to transport controlled substances, foresaw the possible search of the car, disassociated himself from the car, and now asserts that he had a constitutionally-protected privacy interest in the car. Because the Fourth Amendment was not intended to protect this type of illegitimate privacy interest, Villasenor's attempt to assert such an interest fails." (*Id*. at p. 1240.)

6860.5-Expectation of privacy must exist in poisonous tree for fruit to be suppressed 12/09

When a motion to exclude evidence is based on a "fruit of the poisonous tree" theory, the defendant must establish that the initial police conduct being challenged violated the defendant's Fourth Amendment rights. In other words, the defendant can prevail on a motion to exclude the poisonous fruit only if he or she has a personal, reasonable, and legitimate expectation of privacy regarding the violation that constitutes the poisonous tree. (*People v. Madrid* (1992) 7 Cal.App.4th 1888, 1896-1898 (*Madrid*); see also *People v. Llamas* (1991) 235 Cal.App.3d 441.)

In *Madrid*, for example, drugs were seized from a married couple's house under a search warrant based on an earlier unreasonable seizure of drugs from another person's vehicle. The husband had been in the vehicle. The wife claimed no ownership or possessory interest in the vehicle and was not present when it was searched. The wife moved to suppress drugs seized from her house as "fruit of the poisonous tree." The trial court suppressed the evidence, but the court of appeal reversed. The appellate court held that although the wife clearly had a legitimate expectation of privacy in the searched home, she could not challenge the legality of the search warrant on the ground its probable cause was the tainted fruit of the illegal search of another person's vehicle. In a "fruit of a poisonous tree" case the court's inquiry on the issue of a legitimate expectation of privacy is limited to "the initial police conduct which has been challenged … and whether that particular search or seizure violated the defendant's Fourth Amendment rights." (*Madrid*, *supra*, 7 Cal.App.4th at p.1898.)

6860.6-Defendant cannot assert 4th Amend. right of codefendant or co-conspirator 12/09

Some defendants have claimed they gain a legitimate expectation of privacy simply because of their relationships to other persons, such as codefendants or co-conspirators, whose Fourth Amendment rights were allegedly violated. This theory was rejected by the United States Supreme Court in *Alderman v. United States* (1969) 394 U.S. 165.

> At the very least, it is urged that if evidence is inadmissible against one defendant or conspirator … it is also inadmissible against his codefendant or coconspirator. [¶] This expansive reading of the Fourth Amendment and of the exclusionary rule fashioned to enforce it is admittedly inconsistent with prior cases, and we reject it. The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing.

(*Id*. at pp. 171-172.) That co-conspirators may not vicariously assert each other's Fourth Amendment rights was reiterated by the High Court in *United States v. Padilla* (1993) 508 U.S. 77.

6860.7-Burglar or car thief has no reasonable expectation of privacy 9/18

Obviously, a defendant in wrongful possession of property may not contest its search or seizure since he or she does not have any personal, reasonable and legitimate expectation of privacy in that property and may not vicariously invoke the owner's privacy rights. (See *Rakas v. Illinois* (1978) 439 U.S. 128, 141, fn. 9.) Thus, a car thief cannot invoke any privacy interest in the stolen car. (*People v. Carter* (2005) 36 Cal.4th 1114, 1141; *People v. Melnyk* (1992) 4 Cal.App.4th 1532, 1533-1534.) Nor does the thief retain any privacy interest in property left within the stolen car. (*People v. Shepherd* (1994) 23 Cal.App.4th 825, 828-829.) Whether the driver of rented car, who is not listed on the rental agreement, is in lawful possession of that car and has a reasonable expectation of privacy depends on the totality of the circumstances. (*Byrd v. United States* (2018) 584 U.S. ___, ___ [138 S.Ct. 1518, 1530-1531, 200 L.Ed.2d 805, 818].) Similarly, a burglar cannot invoke the homeowner's Fourth Amendment protection. (See *People v. Solario* (1977) 19 Cal.3d 760.) And a person who defrauds a hotel to obtain a room has no possessory interest in the room and thus has no legitimate expectation of privacy in it. (*People v. Satz* (1998) 61 Cal.App.4th 322, 326.)

6860.8-Internet subscriber has no reasonable expectation of privacy in IP information 12/15

An internet user has no reasonable expectation of privacy in their subscriber information possessed by their Internet provider. (*People v. Stipo* (2011) 195 Cal.App.4th 664, 668-669.)

> "[E]-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information. Like telephone numbers, which provide instructions to the 'switching equipment that processed those numbers,' e-mail to/from addresses and IP addresses are not merely passively conveyed through third party equipment, but rather are voluntarily turned over in order to direct the third party's servers." [Citation.]

(*Id*. at p. 669; but see California Electronic Communications Privacy Act, Pen. Code, §§ 1546-1546.4.)

6870.1-PC1538.5 motion should be heard before PC995 motion 9/19

It can be somewhat complicated if, following denial of a motion to suppress at the preliminary hearing, a defendant files motions under both Penal Code section 995 and 1538.5 again raising search and seizure issues. Statutory changes to Penal Code section 1538.5 have cleared up some of the procedural difficulties. (*People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223-1224.) But, as described by previous appellate decision, if additional evidence is to be taken on the motion to suppress, it remains preferable for the Penal Code section 1538.5 motion to be heard and determined before the motion to dismiss pursuant to Penal Code section 995. This is because if the motion to suppress is denied, any procedural error committed by the magistrate that otherwise might be subject to a Penal Code section 995 motion, could be cured. (*People v. Ciraco* (1986) 181 Cal.App.3d 1142, 1147; *Cuevas v. Superior Court* (1976) 58 Cal.App.3d 406, 411, fn. 1.) And even if another judge denies a renewed Penal Code section 1538.5, subdivision (i), motion, a subsequent judge can review the magistrate's ruling at the preliminary hearing suppression motion under Penal Code section 995, and come to a different conclusion. (*People v. Kidd* (2019) 36 Cal.App.5th 12, 17-20.)

In addition, in the event suppression is ordered pursuant to Penal Code section 1538.5, the People can request the trial court to defer ruling on the motion under Penal Code section 995. This procedure was authorized by the California Supreme Court. (*People v. Laiwa* (1983) 34 Cal.3d 711, 722.) If the court adopts this suggested procedure, expeditious ruling on any writ review of the suppression order may be obtained by the People, maintaining the present trial date in the matter.

6880.1-Only one pretrial PC1538.5 motion 12/18

A defendant is entitled to only one pretrial suppression motion under Penal Code section 1538.5 in the trial court. (*People v. Arebalos-Cabrera* (2018) 27 Cal.App.5th 179, 191) Once the motion is made, argued, and resolved, the court is thereafter without jurisdiction to rehear the matter. (*People v. Brooks* (1980) 26 Cal.3d 471, 475-478; *Madril v. Superior Court* (1975) 15 Cal.3d 73, 77-78; see also *People v. Sotelo* (1996) 47 Cal.App.4th 264, 269.)

> [A] second hearing flies directly in the face of a declared legislative purpose of preventing the unnecessary expenditure of time resulting from multiple suppression hearings. Allowing more than one hearing would invite abuse, since a defendant may prefer to "forum shop" by raising each ground separately and possibly before different judges.

(*People v. Nelson* (1981) 126 Cal.App.3d 978, 983.) The jurisdictional bar also prevents rehearing a suppression motion before a retrial when the first trial resulted in a mistrial or was reversed on appeal. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1162-1163; *People v. Williams* (1979) 93 Cal.App.3d 40, 59-60; see also *People v. Memro* (1995) 11 Cal.4th 786, 844.)

The only exception to this rule is when the defendant was denied an opportunity to fully and fairly litigate the issues presented in the original motion. (See, e.g., *People v. Brooks*, *supra,* 26 Cal.3d at pp. 475-478; *People v. Smith* (2002) 95 Cal.App.4th 283, 304-305; *People v. Ramirez* (1992) 6 Cal.App.4th 1583, 1589, fn. 4.) Under these circumstances "the defendant shall have the right to make [the] motion during the course of trial," but not pretrial. (Pen. Code, § 1538.5, subd. (h); see also *People v. Superior Ct. (Edmonds)* (1971) 4 Cal.3d 605, 611; *People v. Arebalos-Cabrera*, *supra*, 27 Cal.App.5th at pp. 192-193.)

6880.2-PC1538.5 allows motion at trial only on special showing 12/09

Penal Code section 1538.5 mandates pretrial litigation and resolution of suppression motions. (See subd. (g), governing misdemeanors ["the motion shall be made before trial and heard prior to trial"]; subd. (i), governing felonies [the motion "shall be heard prior to trial"].) "The procedural scheme established by Penal Code section 1538.5 displays a strong legislative preference for litigating prior to trial the legality of searches and seizures." (*People v. Burke* (1974) 38 Cal.App.3d 708, 713.) Thus, for example, a defendant cannot move to suppress evidence after entering a guilty plea, but before sentencing. (*People v. Parrott* (1986) 179 Cal.App.3d 1119, 1123-1124.)

A defendant has a very limited right to bring a suppression motion during trial—only when "opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion …" before trial. (Pen. Code, § 1538.5, subd. (h).) This subdivision allows a defendant to bring a new suppression motion at trial even after a pretrial motion has been denied, but only upon a showing of changed circumstances, for example, a change in applicable law or the discovery of new evidence in support of suppression. (*People v. Superior Court (Edmonds)* (1971) 4 Cal.3d 605, 609-611.) There is a "due diligence" requirement for a belated motion to suppress under subdivision (h). (*People v. Martinez* (1975) 14 Cal.3d 533, 537-538; *People v. Frazier* (2005) 128 Cal.App.4th 807, 828.) Thus, for example, defense counsel's delay in discovering the relevant facts, despite representing the defendant for two months, is an inadequate justification for allowing a motion to suppress at trial. (*People v. Burke*, *supra*, 38 Cal.App.3d at p. 713.) A late change of attorneys, when previous counsel could have discovered the relevant facts from the defendant personally, is also inadequate to satisfy subdivision (h). (*People v. Frazier*, *supra*, 128 Cal.App.4th at p. 829-830.)

6880.3-DA not bound by suppression order after refiling case 10/07

The People have several ways to redress an adverse ruling on a suppression motion in a felony case. If the ruling results in the case being dismissed the People may simply refile and then relitigate the suppression motion in the new case. The ruling at the prior hearing is not binding in the new proceedings. Penal Code section 1538.5, subdivision (j) allows this procedure when the initial motion is granted during a preliminary hearing and the defendant not held to answer or when the motion is granted at a special hearing pretrial and the case is then dismissed. The appellate court in *People v. Gallegos* (1997) 54 Cal.App.4th 252, upheld the constitutionality of subdivision (j) and affirmed the People's right to refile a dismissed case without being bound by an adverse ruling on a suppression motion already litigated at a special hearing in superior court. (*Id*. at pp. 262-268; see also *People v. Glenn* (1997) 56 Cal.App.4th 886.)

If a defendant is held to answer after evidence has been suppressed during a preliminary hearing, the People can abandon the case by not filing an information within 15 days. This would allow the filing of a new complaint and, thus, give the prosecution the opportunity to relitigate the motion should it be made again by the defense. (*People v. Jackson* (2002) 96 Cal.App.4th 1265, 1273; Pen. Code, § 1382, subd. (a)(1).) Rather than have the case dismissed, however, the People can also request a de novo special hearing in the trial court by following the procedures set forth in subdivision (j) of Penal Code section 1538.5. (*People v. Weaver* (1996) 44 Cal.App.4th 154.)

The People's right to refile and relitigate is subject to the general limitations on refiling found in Penal Code sections 1387 and 1387.1. In a felony case, for example, the right to refile generally does not exist when the defendant's motion to suppress evidence has been granted twice. (Pen. Code, § 1538.5, subd. (p).) And the relitigated motion should be heard by the same judge who

granted the motion at the first hearing, if that judge is available. (*Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 878-880.)

6950.1-General standard for new trial on insufficiency of evidence 9/18

A trial court has discretion, upon motion of the defendant, to order a new trial under Penal Code section 1181, subdivision 6, "[w]hen the verdict … is contrary to law or evidence. …" "In ruling on a motion pursuant to section 1181, subdivision[] 6 …, the court 'independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt.' (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.)" (*People v. Clark* (2011) 52 Cal.4th 856, 1002.)

In ruling on a motion for new trial on this ground, the trial court is not bound by the jury's resolution of conflicts in the evidence or inferences to be drawn. Rather, the court must independently weigh the evidence. (*People v. Seaton* (2001) 26 Cal.4th 598, 693; *People v. Price* (1992) 4 Cal.App.4th 1272, 1275.) "It is, however, guided by a presumption in favor of the correctness of the verdict and proceedings supporting it." (*People v. Davis* (1995) 10 Cal.4th 463, 524.)

> While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict.

(*People v. Robarge* (1953) 41 Cal.2d 628, 633.)

> The court extends no evidentiary deference in ruling on an 1181(6) motion for new trial. Instead, it independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a "13th juror." [Citations.] If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is "contrary to the … evidence." (§ 1181(6) … .) In doing so, the judge acts as a 13th juror who is a "holdout" for acquittal. Thus, the grant of a section 1181(6) motion is the equivalent of a mistrial caused by a hung jury. [Citation.]) We have repeatedly held that an order granting a new trial under section 1181(6) is not an acquittal and does not bar retrial on double jeopardy grounds.

(*Porter v. Superior Court*, *supra*, 47 Cal.4th at p. 133, italics in original; see also *People v. Watts* (2018) 22 Cal.App.5th 102, 112-115 [remanded because trial judge employed incorrect legal standard and refused to independently evaluate the evidence]; *People v. Carter* (2014) 227 Cal.App.4th 322, 327-328 [judge misunderstood scope of his power to grant new trial motion based upon his independent view of the evidence].)

Even so, the court should not ignore the verdict or decide the case as if there had been no jury. (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85.) The appellate courts have described the phrase "13th juror" as "unfortunate" and "misleading." (*People v. Robarge*, *supra*, 41 Cal.2d at p. 634; see generally, *People v. Veitch* (1982) 128 Cal.App.3d 460, 467-468.)

> It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. This does not mean, however, that the court should disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it should consider the

> proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.

(*People v. Robarge*, *supra*, 41 Cal.2d at p. 633; similarly, see *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1221.)

6960.1-General standard for new trial on newly discovered evidence 4/19

A trial court has discretion, upon motion of the defendant, to order a new trial under Penal Code section 1181, subdivision 8, "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial."

> In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: " '1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.' " [Citations.]

(*People v. Delgado* (1993) 5 Cal.4th 312, 328; similarly, see *People v. Martinez* (1984) 36 Cal.3d 816, 821; see also *People v. Verdugo* (2010) 50 Cal.4th 263, 308; *People v. Bonilla* (2018) 29 Cal.App.5th 649, 659;.) "[W]e hold that when a defendant makes a motion for a new trial based on newly discovered evidence, he has met his burden of establishing that a different result is probable on retrial of the case if he has established that it is probable that at least one juror would have voted to find him not guilty had the new evidence been presented." (*People v. Soojian* (2010) 190 Cal.App.4th 491, 521.)

Appellate courts "[r]eview the trial court's denial of a motion for new trial for abuse of discretion." (*People v. Bonilla*, *supra*, 29 Cal.App.5th at p. 659.) "A trial court has broad discretion in ruling on a motion for new trial, and there is a strong presumption that it properly exercised that discretion." (*People v. Davis* (1995) 10 Cal.4th 463, 524.) "A motion for a new trial on newly discovered evidence is looked upon with disfavor, and unless a clear abuse of discretion is shown, a denial of the motion will not be interfered with on appeal." (*People v. McDaniel* (1976) 16 Cal.3d 156, 179; see also *People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1151.)

6960.2-New evidence impeaching witness does not require new trial 6/19

One of the most fundamental requirements of a motion for new trial based upon "newly discovered evidence" is the materiality of the offered evidence. Evidence which simply creates a conflict with the *prima facie* case made out by the prosecution, rather than contradicting the strongest evidence against the defendant, does not support granting a new trial motion. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 488.) Thus, evidence which merely impeaches a witness is not material and, thus, not grounds for granting a new trial. (*People v. Hall* (2010) 187 Cal.App.4th 282, 299.) "Critically, '[a] new trial on the ground of newly discovered evidence is not granted where the only value of the newly discovered testimony is as impeaching evidence' or to contradict a witness of the opposing party." (*Ibid.*; see also *People v. Jimenez* (2019) 32 Cal.App.5th 409, 423.) "As a general rule, 'evidence which merely impeaches a witness is not significant enough to make a different result probable … .' [Citation.]" (*People v. Green* (1982) 130 Cal.App.3d 1, 11.)

Newly discovered impeachment evidence in the form of recanted testimony also is generally inadequate to justify a new trial. "While it is true, generally, that motions for new trial are looked upon with disfavor [citation] and that *the recantation of a witness should be given little credence* [citation], it is within the trial judge's discretion whether or not the showing merits the granting of a new trial. [Citation.]" (*People v. Minnick* (1989) 214 Cal.App.3d 1478, 1481, italics added.)

Finally, " '[i]t is not uncommon, after trial, for one not charged with a crime to attempt to absolve his fellow confederate who has been convicted. The trial court was not bound to accept the statement of [the witness] as true. It was entitled to regard it with distrust and disfavor." (*People v. Shoals*, *supra*, 8 Cal.App.4th at p. 488, internal citations omitted.)

6960.3-Lack of diligence bars new trial on new evidence 3/11

Regarding the showing the evidence must be newly discovered, the appellate courts have held the evidence, not just its materiality, must be newly discovered. (*People v. Martinez* (1984) 36 Cal.3d 816, 821.) That is, due diligence in discovering the evidence must be shown. (*Ibid*.) "The evidence *must* be newly discovered." (*People v. Dyer* (1988) 45 Cal.3d 26, 52, original italics.) The reason for this requirement is "founded upon a public policy which demands that a litigant exhaust every reasonable effort to produce at his trial all existing evidence in his own behalf, to the end that the litigation may be concluded." (*People v. Clauson* (1969) 275 Cal.App.2d 699, 704.) Thus, evidence that *could* have been brought out through diligent cross-examination is insufficient to support a motion for new trial. (*People v. Green* (1982) 130 Cal.App.3d 1, 10.)

There is a narrow exception permitting the court to consider evidence that could have been, but was not, discovered before trial. (*People v. Martinez* (1984) 36 Cal.3d 816, 821-827; see also *People v. Soojian* (2010) 190 Cal.App.4th 491, 513-518.) The focus of this exception is only the reasonable probability of a different result on retrial. (*People v. Soojian*, *supra*, at p. 518.) Among the factors triggering this exception are the weakness of the prosecution's case, whether the "new" evidence contradicts the strongest evidence introduced against the defendant, and the likelihood of later reversal because the failure to discover the evidence in a timely fashion was due to ineffective assistance of counsel. (*Ibid*.)

6960.4-Only credible evidence can support new trial motion 4/19

The defendant must discharge the burden of proof on a new trial motion based upon a claim of newly discovered evidence by the best evidence of which the case admits. (*People v. Martinez* (1984) 36 Cal.3d 816, 821.) Penal Code section 1181, subdivision 8, requires that the alleged new evidence be presented in the form of "affidavits of the witnesses by whom such evidence is expected to be given." Hearsay declarations of defense counsel or other third parties as to what new evidence a witness would produce do not comport with this statutory requirement. (*People v. Beeler* (1995) 9 Cal.4th 953, 1005.)

In ruling on a motion for new trial on this basis, the trial court may consider not only the materiality of the "newly discovered" evidence, but also the credibility of the offered evidence in order to determine whether introduction of the evidence would render a different result reasonably probable. (*People v. Howard* (2010) 51 Cal.4th 15, 43; *People v. Bonilla* (2018) 29 Cal.App.5th 649, 659; see, e.g., *People v. Beyea* (1974) 38 Cal.App.3d 176, 202 [denial of motion for new trial affirmed where the trial courts concluded the testimony offered, although highly material, was entitled to no credibility].) Certainly, a motion for a new trial based on newly discovered evidence is

properly denied when the evidence is "inherently untrustworthy … and not worthy of belief." (*People v. Earp* (1999) 20 Cal.4th 826, 890.) In addition, an affidavit or declaration that is "vague and general" does not support a motion for new trial. (*People v. Beeler*, *supra*, 9 Cal.4th at p. 1005.)

6960.5-New evidence that is cumulative to trial evidence inadequate 12/10

A fundamental requirement for granting a new trial motion based on "newly discovered evidence" is that the alleged new evidence not be merely cumulative of evidence produced at trial. (*People v. Martinez* (1984) 36 Cal.3d 816, 821; see also *People v. Hall* (2010 187 Cal.App.4th 282, 300.) In *People v. Musselwhite* (1998) 17 Cal.4th 1216, for example, the defense at a capital murder trial contended that a brain abnormality prevented defendant from premeditating and deliberating the killing. The defense presented expert testimony from two physicians that brain electrical activity mapping (BEAM) machine test results of defendant were accurate and reliable and supported the defense theory of an organic brain disorder. The prosecution presented conflicting expert testimony from a physician that the BEAM machine test results were not reliable. After trial, to counter this testimony, the defense presented expert testimony of another physician that BEAM test results were reliable. The trial court denied the new trial motion because this evidence did little more than reinforce the views of the two other defense experts given at trial, opinions the jury had already heard. The California Supreme Court upheld the trial court's denial of the new trial motion because the evidence was cumulative of the evidence produced during the trial. (*Id*. at pp. 1250-1252.)

6970.1-Court cannot grant new trial on own motion 8/10

Penal Code section 1181 states a court may order a new under certain circumstances, but only "upon … application" of the defendant. Thus, a trial court has no authority to grant a new trial under Penal Code section 1181 on its own motion or upon grounds not raised by the defendant.

In *People v. Rothrock* (1936) 8 Cal.2d 21, for example, the defense declined to make new trial motion. (*Id*. at p. 23.) The trial court granted a new trial nevertheless. As a result of a People's appeal, the new trial order was overturned by the California Supreme Court.

> In this case the defendant not only made no motion but declined and refused to submit the motion. The last-cited case [*People v. Skoff* (1933) 131 Cal.App. 235] declares, and rightly so, that the court may not grant a new trial of its own motion. This is also clear from a reading of section 1181 of the Penal Code, which provides that the court may make such order upon the "application" of the defendant.

(*Id*. at p. 24.)

Moreover, "[a] motion for new trial may be granted only upon a ground raised in the motion." (*People v. Masotti* (2008) 163 Cal.App.4th 504, 508.) "Allowing a court to grant a new trial on a ground not raised by the moving party would be the equivalent of allowing the court to grant a new trial on its own motion, an act which the court is without authority to do." (*Ibid*.)

6970.2-Defendant is entitled to only one new trial motion 1/10

A defendant generally is entitled to only one motion for a new trial. Once the motion is heard and denied, the trial court should not reconsider the motion or hear a second motion for new trial on the same or different grounds.

One line of cases holds that once a new trial motion is heard and denied, the trial court is without jurisdiction to entertain a second motion. (*In re Levi* (1952) 39 Cal.2d 41, 45, fn.; *People v.*

Martin (1926) 199 Cal. 240, 242; *People v. Taylor* (1993) 19 Cal.App.4th 836, 840-842.) Another line of cases rejects this jurisdictional bar in favor of a general rule prohibiting reconsideration or a second motion to avoid extended or interminable new trial proceedings where possible. (*People v. Wisely* (1990) 224 Cal.App.3d 939, 948; *People v. Stewart* (1988) 202 Cal.App.3d 759, 762-763; *People v. Risenhoover* (1966) 240 Cal.App.2d 233, 236.) On the other hand, the trial court may reconsider and correct an erroneous order granting a new trial. (*People v. DeLouize* (2004) 32 Cal.4th 1223.) An order granting a new trial is more like an interim order than a final resolution of the case. As an interim order, an order granting a new trial may be reconsidered, even after the time to take an appeal has expired. (*Id.* at pp. 1231-1233.)

Whether the prohibition against repetitive new trial motions is jurisdictional or merely a general directive to avoid them, there are several recognized exceptions to the prohibition. The trial court may revisit a previous ruling, or entertain a subsequent motion for new trial, (1) where the ruling is reconsidered even before it is entered in the minutes (*People v. Rose* (1996) 46 Cal.App.4th 257, 261, fn. 1); (2) where the first order was made inadvertently or prematurely (*People v. Martin*, *supra*, 199 Cal.App. at p. 242); (3) where an intervening change in the law would require reversal (*People v. Risenhoover*, *supra*, 240 Cal.App.2d at p. 236); (4) where the ruling on the motion was made in the absence of defendant's counsel (*Robson v. Superior Court* (1915) 171 Cal. 588, 590-592); (5) where an initial new trial motion was made by trial counsel, whose trial competence is challenged in a second motion for new trial made by a different lawyer (*People v. Stewart, supra*, 202 Cal.App.3d at pp. 762-763); or (6) where "the court is considering only issues of law" in reconsidering the ruling (*People v. Rose*, *supra*, 46 Cal.App.4th at p. 263).

6970.3-Court has discretion not to consider claim of IAC 9/18

Although not listed as one of the statutory grounds for granting a new trial in Penal Code section 1181, the California Supreme Court has held a trial court should, in appropriate cases, hear a motion for new trial based on a claim of ineffective assistance of counsel. (*People v. Fosselman* (1983) 33 Cal.3d 572, 1150.)

> It is undeniable that trial judges are particularly well suited to observe courtroom performance and to rule on the adequacy of counsel in criminal cases tried before them. [Citation.] Thus, in appropriate circumstances justice will be expedited by avoiding appellate review, or habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is able to determine the effectiveness issue on such motion, it should do so.

(*Ibid*.)

"But our assumption has been that courts would decide such claims in the context of a motion for new trial when the court's own observation of the trial would supply a basis for the court to act expeditiously on the motion." (*People v. Cornwell* (2005) 37 Cal.4th 50, 101.) If, however, the nature of the ineffective assistance claim is not based upon matters readily apparent to the trial judge from the courtroom proceedings, the judge need not consider such claim as grounds for a new trial. (*Ibid*.)

> It is evident in the present case that, after lengthy deliberation, the trial court concluded justice would *not* be expedited by entertaining defendant's claim in a motion for new trial. The basis for this conclusion is readily apparent; the matter would have been delayed for at least six months while substitute counsel examined trial counsel's case

records and performed additional investigation concerning witnesses who did not appear at trial and evidence that was not in the record, in order to decide whether to make a motion for new trial. This was *not* a case in which a motion readily could be resolved because of the circumstance that the trial judge was "particularly well suited to observe courtroom performance and to rule on the adequacy of counsel . …" [Citation.] Rather, in the present case the claim of ineffective assistance of counsel at the guilt phase of trial rested primarily upon matters other than what the trial court could have observed during trial, and the court acted within its discretion in concluding the claim should be litigated in a habeas corpus proceeding.

(*Ibid*., original italics.) Nothing in this ruling prevented the defendant from raising the ineffective assistance of counsel claim in a petition for writ of habeas corpus. (*Id*. at p. 102; see also *People v. Watts* (2018) 22 Cal.App.5th 102, 117-118.)

6970.4-Cannot raise juror misconduct if known before verdict rendered 5/13

Juror misconduct can be raised for the first time in a motion for new trial. But such a motion must be accompanied by proof, usually in the form of an affidavit, that neither the moving party nor their counsel knew of the misconduct prior to the jury rendering its verdict.

" 'It is … the controlling law of this state that even where affidavits can properly be received to impeach the verdict of a jury they must be accompanied by an affirmative showing that neither the moving party nor his counsel had knowledge of the misconduct relied on prior to the rendition of the verdict. The absence of such a showing in support of the motion for new trial is fatal.' " (*People v. Black* (1963) 216 Cal.App.2d 103, 115; see *People v. Sanchez* (1965) 232 Cal.App.2d 812, 819.)

(*People v. Butler* (2012) 212 Cal.App.4th 404, 429.) The new trial motion is properly denied when the moving party fails to satisfy this legal requirement. (*Ibid*.)

7000.1-Admission of expert witness testimony in sound discretion of court 10/20

"A lower court's ruling on the admissibility of expert testimony is reviewed for abuse of discretion." (*In re Branden O.* (2009) 174 Cal.App.4th 637, 644.)

"When expert opinion is offered, much must be left to the trial court's discretion." (*People v. Carpenter* (1997) 15 Cal.4th 312, 403.) The trial court has broad discretion in deciding whether to admit or exclude expert testimony (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1196), and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion. (*People v. Alcala* (1992) 4 Cal.4th 742, 788-789; see *People v. Lindberg* (2008) 45 Cal.4th 1, 45.)

(*People v. McDowell* (2012) 54 Cal.4th 395, 426 [no abuse of discretion finding expert's testimony and opinion not sufficiently beyond common experience to be helpful to jury]; see also *People v. Morales* (2020) 10 Cal.5th 76, 97; *People v. Tran* (2020) 50 Cal.App.5th 171, 185; *People v. Lowe* (2012) 211 Cal.App.4th 678, 683.)

For example, the question whether a witness is qualified to give expert testimony is ordinarily a matter addressed to the sound discretion of the trial court. (*People v. Brown* (2014) 59 Cal.4th 86, 100; see also *People v. Singleton* (2010) 182 Cal.App.4th 1, 21.) Such a ruling will not be disturbed without a showing of manifest abuse. (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1118.)

"The trial court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse." [Citations.]) "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness ' " '*clearly lacks* qualification as an expert.' " ' " [Citation.] " ' "Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility." ' [Citation.]" [Citation.]

(*People v. Tuggle* (2012) 203 Cal.App.4th 1071, 1079-1080, italics in original.)

Also, although an expert on the reliability of child witnesses may be permitted to testify to the factors that could affect a child's credibility, a judge has discretion to prohibit such expert witness from expressing an opinion on the credibility of the child witness in the case before the court. (*People v. Sanchez* (2019) 7 Cal.5th 14, 46-47 [trial court properly left it to the jury to apply the expert testimony to the actual facts].)

7000.2-Court must allow voir dire as to proffered expert's qualifications 4/11

According to Evidence Code section 720:

(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. *Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.*

(b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

(Italics added; see also *People v. Watson* (2008) 43 Cal.4th 652, 692.)

"Before a witness advanced as an expert is permitted to give his opinion, his qualifications must be passed on by the court. The party who produces the expert first examines him on his qualifications. Then the opposing party has the right to conduct a voir dire examination on his qualifications. After this the trial judge determines whether the witness is an expert and can testify. …" (Italics added.) [Citation.] [¶] "The qualifications of an expert witness are finally determined by the trial judge, without resubmission of the issue to the jury. (Evid. Code [§] 720, Comment; Evid. Code [§]405, Comment.) However, though the judge finds him qualified and admits his testimony, the jury may consider his qualifications in determining the weight to be given it. (See Evid. Code, [§] 406 … .)" [Citation.]

(*People v. King* (1968) 266 Cal.App.2d 437, 444.)

If there is no objection, however, the trial court is not required to rule whether a witness is qualified to give expert testimony. (*People v. Nazary* (2010) 191 Cal.App.4th 727, 749.)

Finally, "an expert's qualifications 'must be related to the particular subject upon which he is giving expert testimony. Qualifications on related subject matter are insufficient.' [Citation.]" (*People v. Chavez* (1985) 39 Cal.3d 823, 828.)

7000.3-Court may allow voir dire as to basis of expert's opinion 3/17

According to Evidence Code section 802:

> A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. *The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.*

(Italics added.) "[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or speculative." (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 771-772.)

The importance of conducting such voir dire is heightened by the California Supreme Court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665, which drew a distinction in the requirements for admitting expert opinion depending upon whether the matter relied on by the expert witness was "case-specific hearsay" or "general background information." (*Id*. at p. 678; see also *People v. Stamps* (2016) 3 Cal.App.5th 988, 995.) "If it is a case-specific fact and the witness has no personal knowledge of it, if no hearsay exception applies, and if the expert treats the fact as true, the expert simply may not testify about it. (*Sanchez*, *supra*, 63 Cal.4th at pp. 684-686.)" (*People v. Stamps*, *supra*, 3 Cal.App.5th at p. 996; see also *People v. Williams* (2016) 1 Cal.5th 1166, 1200 [same rule applied to prevent defense expert from stating he "relied in part on the testimonial hearsay of family members and defendant's foster mother to support his testimony"].)

After the voir dire permitted under section 802, "[t]he court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion." (Evid. Code, § 803.) Finally, "the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper." (*Ibid*.)

7000.4-Expert can testify to non-case-specific hearsay, background information 8/20

Evidence Code section 802 allows an expert witness giving opinion testimony to state on direct examination the matter upon which that opinion is based. (*People v. Veamatahau* (2020) 9 Cal.5th 16, 21) "Generally, an expert may rely on inadmissible hearsay to support his or her opinion if reliance on such hearsay is reasonable for that purpose." (*People v. Landau* (2016) 246 Cal.App.4th 850, 866.) "Since an expert's opinion ' "is no better than the facts on which it is based" ' [citation], experts should generally be allowed to testify to all facts upon which they base their opinions. [Citation.]" (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1324.) "In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." (*People v. Sanchez* (2016) 63 Cal.4th 665, 675 (*Sanchez*) [distinguishing between permissible hearsay in the form of background information and impermissible case-specific hearsay]; see also *People v. Andrews* (2019) 32 Cal.App.5th 1102, 1131, 1137-1138; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411.)

> [W]e do not see how expert witnesses are doing something other than making use of their expertise when they rely on their "special knowledge, skill, experience, training, and education" to (1) select a source to consult, (2) digest the information from that source, (3) form an opinion about the reliability of the source based on their experience in the field, and (4) apply the information garnered from the source to the (independently established) facts of a particular case. ([Evid. Code,] §§ 801, 802.) Without suggesting that this is (or needs to be) the process underlying every instance of expert testimony, we think that when experts engage in such an inquiry, they are drawing upon their "special knowledge, skill, experience, training, and education" to form an opinion about the case. (*Ibid*.) Under our evidentiary law, experts may make such use of their knowledge— and may tell the jury that they did so. (§§ 801, 802.)

(*People v. Veamatahau*, *supra*, 9 Cal.5th at p. 29; see also *People v. Thompkins* (2020) 50 Cal.App.5th 365,407.) If the hearsay relied upon by the expert is not case-specific the evidence can be admitted for its truth. (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686.)

For example, the California Supreme Court has held that it was proper for a criminalist to identify a pill as a controlled substance by comparing it to pictures and descriptions on an Internet website that was generally accepted method of testing under the circumstances. (*People v. Veamatahau*, *supra*, 9 Cal.5th at pp. 26-28; distinguish *People v. Espinoza* (2018) 23 Cal.App.5th 317, 321 [Ident-A-Drug website found to come within the published compilation exception to the hearsay rule per Evid. Code, § 1340]; *People v. Mooring* (2017) 15 Cal.App.5th 928, 941-943 [also holding the content of the Ident-A-Drug website were not testimonial].)

7000.5-Expert cannot testify to case-specific hearsay (*Sanchez*) 4/20

The California Supreme Court in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) drew a distinction in the requirements for allowing an expert witness to relate to the jury the facts upon his or her opinion was based depending upon whether these facts were "case-specific hearsay" or "general background information." (*Id*. at p. 678; see also *People v. Ochoa* (2017) 7 Cal.App.5th 575, 588)

> [A]n expert has traditionally been precluded from relating case-specific facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried. Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge.

(*Sanchez*, *supra*, 63 Cal.4th at p. 676; see also *People v. McVey* (2018) 24 Cal.App.5th 405, 416-417; distinguish *People v. Vega-Robles* (2017) 9 Cal.App.5th 383, 413 [not error for gang expert to testify to case-specific fact about which he had personal knowledge].)

"In [*Sanchez*], the California Supreme Court held that an expert witness cannot in conformity with the Evidence Code 'relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.' " (*People*

v. Burroughs (2016) 6 Cal.App.5th 378, 383; see also *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 509-510.) But:

> The Court emphasized that an expert "may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Sanchez*, *supra*, at p. 685, emphases in original.) "There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*Id*. at p. 686.)

(*People v. Burroughs*, *supra*, 6 Cal.App.5th at p. 407; accord *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1245; *People v. Roa* (2017) 11 Cal.App.5th 428, 452.)

As an example, case authority even before *Sanchez* acknowledged that doctors and mental health experts "routinely rely on interview reports and observations of nontestifying experts. (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747; *People v. Dodd* (2005) 133 Cal.App.4th 1564, 1569.)" (*People v. Nelson* (2012) 209 Cal.App.4th 698, 707; see also *People v. Miller* (2014) 231 Cal.App.4th 1301, 1310.) The appellate courts held:

> "On direct examination, the expert witness may state the reasons for his or her opinion, and testify that reports prepared by other experts were a basis for that opinion. [Citation.] [¶] An expert witness may not, on direct examination, reveal the *content of reports prepared* or opinions expressed *by nontestifying experts*. ' " 'The reason for this is obvious. The opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse.' " ' [Citations.] [¶] … [¶] '[D]octors can testify as to the basis for their opinion [citation], but this is not intended to be a channel by which testifying doctors can place the opinion of innumerable out-of-court doctors before the jury.' " ([*People v.*] *Campos* [(1995)] 32 Cal.App.4th [304,] at p. 308, italics added, quoting *Whitfield v. Roth* (1974) 10 Cal.3d 874, 894, 895 … .)

(*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1325-1326.) These principles appear to be consistent with the holding in *Sanchez*. (See, generally, *People v. Perez* (2018) 4 Cal.5th 421, 456-457; *People v. Hall* (2018) 23 Cal.App.5th 576, 602.)

The *Sanchez* rule applies to all parties, including criminal defendants. In *People v. Williams* (2016) 1 Cal.5th 1166, a defense expert testified that in his opinion the defendant was an alcohol dependent. The prosecutor objected when the expert stated his opinion was based in part on hearsay statements that defendant's mother was an alcoholic. The witness "relied in part on the testimonial hearsay of family members and defendant's foster mother to support his testimony about the effects of defendant's mother's alcoholism on his development." (*Id*. at p. 1200.) The California Supreme Court held the trial court properly sustained the prosecutor's objection. (*Ibid*.)

The holding in *Sanchez* applies only to the scope of *direct* examination of an expert witness. (*People v. Pearson* (2013) 56 Cal.4th 393, 449.) In contrast, "[o]n cross-examination, greater latitude can be afforded the experts and counsel to bring before the jury inadmissible hearsay to either support or attack the underlying opinions expressed on direct examination. (*People v. Coleman* [(1985)] 38 Cal.3d [69,] at p. 92; *People v. Campos*, *supra*, 32 Cal.App.4th at p. 308.)"(*People v. Dean* (2009) 174 Cal.App.4th 186, 201, fn. 9.)

7000.6-Hypothetical questions must be rooted in facts shown by evidence 6/20

Special rules govern the asking of hypothetical questions of an expert. Most importantly, hypothetical questions asked of experts must be rooted in facts shown by the evidence. (*People v. Pettie* (2017) 16 Cal.App.5th 23, 68.) "It is required, not prohibited, that hypothetical questions be based on the evidence. The questioner is not required to disguise the fact the questions are based on that evidence." (*People v. Vang* (2011) 52 Cal.4th 1038, 1041 (*Vang*).) "Hypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence." (*Id*. at p. 1051.)

> "Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.]" [Citation.] It is true that "it is not necessary that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question." [Citation.] On the other hand, the expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors … . [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?" [Citation.]

(*People v. Richardson* (2008) 43 Cal.4th 959, 1008; see also *People v. Moore* (2011) 51 Cal.4th 386, 405; *People v. Boyette* (2002) 29 Cal.4th 381, 449; *People v. Quintanilla* (2020) 45 Cal.App.5th 1039, 1055.)

There is a difference, however, between testifying about hypothetical persons or situations and the specific persons and the actual facts of the case. (*Vang*, *supra*, 52 Cal.4th at p. 1047; *People v. Ewing* (2016) 244 Cal.App.4th 359, 382.) It is error, for example, to ask a gang expert whether the defendant committed the charged crime for gang purposes. (*Vang*, *supra*, at p. 1048; *People v. Ewing*, *supra*.)

> Going back to the common law, this distinction between generally accepted background information and the supplying of case-specific facts is honored by the use of hypothetical questions. "Using this technique, other witnesses supplied admissible evidence of the facts, the attorney asked the expert witness to hypothetically assume the truth of those facts, and the expert testified to an opinion based on the assumed facts ... ." [Citations.] An examiner may ask an expert to assume a certain set of case-specific facts for which there is independent competent evidence, then ask the expert what conclusions the expert would draw from those assumed facts. If no competent evidence of a case-specific fact has been, or will be, admitted, the expert cannot be asked to assume it. The expert is permitted to give his opinion because the significance of certain facts may not be clear to a lay juror lacking the expert's specialized knowledge and experience.

(*People v. Sanchez* (2016) 63 Cal.4th 665, 676-677.)

7000.7-Scope of cross-examination of expert is broad 4/18

"The scope of cross-examination of an expert witness is especially broad. (*People v. Lancaster* (2007) 41 Cal.4th 50, 105.)" (*People v. Gonzales* (2011) 51 Cal.4th 894, 923; see also *People v. DeHoyos* (2013) 57 Cal.4th 79, 123.) "[A] witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion." (Evid. Code, § 721, subd. (a); see generally, *People v. Henriquez* (2017) 4 Cal.5th 1, 26.) "Evidence that is inadmissible on direct examination may be used to test an expert's credibility, though the court must exercise its discretion under Evidence Code section 352 to limit the evidence to its proper uses. (*People v. Stanley* (1995) 10 Cal.4th 764, 833.)" (*People v. Gonzales*, *supra* , 51 Cal.4th at p. 923.) Thus, for example, experts who testify regarding a mental condition may be questioned regarding their awareness of other inconsistent opinions by similar experts. (*Ibid*., *People v. Montiel* (1993) 5 Cal.4th 877, 923-924.)

> Under state law, an expert such as a psychiatrist may rely on various sources of information, including hearsay, in forming an opinion, and a party may question that expert about that information to test the expert's credibility. "A party 'may cross-examine an expert witness more extensively and searchingly than a lay witness, and the prosecution was entitled to attempt to discredit the expert's opinion. [Citation.] In cross-examining a psychiatric expert witness, the prosecutor's good faith questions are proper even when they are, of necessity, based on facts not in evidence.' " [Citations.]This court explained the reasons for this rule long ago. " ' "Once an expert offers his opinion, however, he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert invites investigation into the extent of his knowledge, the reasons for his opinion including facts and other matters upon which it is based [citation], and which he took into consideration; and he may be 'subjected to the most rigid cross-examination' concerning his qualifications, and his opinion and its sources [citation]." (Italics added.)' " [Citation.]

(*People v. Rodriguez* (2014) 58 Cal.4th 587, 646-647.)

> "[W]ide latitude is permitted in the cross-examination of an expert witness in all matters tending to test his credibility so that the jury may determine the weight to be given the testimony … ." [Citations.] [¶]"The scope of cross-examination permitted under [Evidence Code] section 721 is broad, and includes examination aimed at determining whether the expert sufficiently took into account matters arguably inconsistent with the expert's conclusion." [Citation.] "It is common practice to challenge an expert by inquiring in good faith about relevant information, including hearsay, which he may have overlooked or ignored." [Citation.]

(*People v. Townsel* (2016) 63 Cal.4th 25, 55-56.) "However, we have found no authority standing for the proposition that the breadth of permissible cross-examination extends to the admission of case-specific testimonial hearsay in violation of a defendant's right of confrontation." (*People v. Malik* (2017) 16 Cal.App.5th 587, 597, referring holding in *People v. Sanchez* (2016) 63 Cal.4th 665.)

The trial court's ruling regarding the scope of cross-examination of an expert under Evidence Code section 721, subdivision (a), is reviewed for abuse of discretion. (*People v. Henriquez*, *supra*, 4 Cal.5th at p. 26.)

7010.1-An expert's opinion is admissible only if helpful to jury 5/20

The Evidence Code authorizes the use of expert opinion testimony generally when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact … ." (Evid. Code, § 801, subd. (a); see generally, *People v. Sandoval* (2015) 62 Cal.4th 394, 414-415; *People v. Vang* (2011) 52 Cal.4th 1038, 1044; *People v. Prince* (2007) 40 Cal.4th 1179, 1222; see also *People v. Singleton* (2010) 182 Cal.App.4th 1, 20-21.) "Necessity … is not the measure for the admissibility of expert evidence. '… Rather, the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury.' [Citation.]" (*People v. Sibrian* (2016) 3 Cal.App.5th 127, 134 [expert opinion regarding excessive use of force by police office properly admitted]; see also *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 753-756 [effects of chronic homelessness sufficiently beyond common experience]; distinguish *People v. Brown* (2016) 245 Cal.App.4th 140, 163-165 [expert testimony regarding excessive use of force improperly admitted and exceeded bounds of proper expert opinion].)

If the expert's testimony would not materially assist the jury the court should exclude the expert testimony. (See, e.g., *People v. McDowell* (2012) 54 Cal.4th 395, 425-430; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1205-1207.) "Expert opinion is not admissible [in California] if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (*People v. Torres* (1995) 33 Cal.App.4th 37, 45; see also *People v. Daniels* (2009) 176 Cal.App.4th 304, 323.) Expert opinion testimony should be excluded when it would add nothing at all to the jury's common fund of information. (*People v. Dalton* (2019) 7 Cal.5th 166, 237; *People v. Brown* (2014) 59 Cal.4th 86, 101.)

> As a general rule expert opinion testimony is limited to an opinion that is "[r]elated to a subject that is sufficiently beyond common experience that the opinion … would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Because admissibility of expert opinion is a question of degree, and a jury need not be wholly ignorant of the subject matter under the statutory rule, exclusion is only necessary where the opinion would add nothing at all to the jury's common fund of information. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300.) For example, courts have repeatedly recognized the appropriate use of expert testimony when an alleged victim's actions during or following a crime seem to contradict the victim's claims in cases of alleged molestation or abuse. (See *People v. Riggs* (2008) 44 Cal.4th 248, 293 [expert testimony addressing battered woman's syndrome]; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744 [expert testimony concerning child sexual abuse accommodation syndrome].) "A trial court's decision as to whether a particular subject is a proper one for expert opinion is reviewed for abuse of discretion." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1118, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

(*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1110 [expert witness properly admitted to explain why developmentally disabled rape victim would not seek assistance when faced with threat]; see also *People v. Edwards* (2013) 57 Cal.4th 658, 709 ["Dr. Fukumoto's medical expertise

provided additional insight above and beyond the jury's general knowledge in the areas of whether the genital injuries occurred before death, and whether these and other injuries were painful"]; *People v. Jones* (2012) 54 Cal.4th 1, 60 [pathologist properly allowed to testify whether sexual assault of victim occurred before rather than after killing].)

7010.2-An expert must be qualified 12/13

A witness must be properly qualified to testify as an expert. According to Evidence Code section 720, subdivision (a): "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." (See, generally, *People v. Austin* (2013) 219 Cal.App.4th 731, 742.) " ' "The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement." ' " (*People v. Watson* (2008) 43 Cal.4th 652, 692.) Absent an objection on this ground, "a party offering expert testimony need not establish the witness's qualifications … ." (*People v. Dowl* (2013) 57 Cal.4th 1079, 1088.) "If there is an objection at trial to a proffered expert's qualifications, the determination of whether the witness is qualified to testify as an expert is a question *for the trial court*, not the jury." (*Id*. at p. 1089, italics in original.)

" 'Whether a person qualifies as an expert in a particular case depends on the facts of that case and the witness's qualifications. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited.' [Citations.]" (*People v. Singleton* (2010) 182 Cal.App.4th 1, 21.) Whether a witness is qualified to give expert testimony is ordinarily a matter addressed to the sound discretion of the trial court. (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1118 ; see also *People v. Page* (1991) 2 Cal.App.4th 161, 187; *People v.*

> A trial court's decision that a proposed witness qualifies as an expert under Evidence Code section 720 is a matter within the court's broad discretion and will not be disturbed on appeal unless the defendant demonstrates a manifest abuse of that discretion. [Citation.] When a preliminary showing is made that the proposed witness has sufficient knowledge to qualify as an expert under the Evidence Code, questions about the depth or scope of his or her knowledge or experience go to the weight, not the admissibility, of the witness's testimony. [Citation.]

(*People v. Jones* (2013) 57 Cal.4th 899, 949-950; see also *People v. Nelson* (2016) 1 Cal.5th 513, 536; *People v. Eubanks* (2011) 53 Cal.4th 110, 140.) A witness need not be "renowned expert" to be qualified as an expert witness under section 720. (*People v. Jones*, *supra*, 57 Cal.4th at p. 960.)

7010.3-An expert's testimony is limited to their area of expertise 12/14

"A trial court may exclude an expert's opinion testimony if that expert lacks an adequate basis in formulating it. [Citations.]" (*People v. Lucas* (2014) 60 Cal.4th 153, 227.) "[T]he courts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.) " ' "The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited." ' [Citations.]" (*People v. Williams* (1989) 48 Cal.3d 1112, 1136.) "It is not unusual that a person may be qualified as an

expert on one subject and yet be unqualified to render an opinion on matters beyond the scope of that subject." (*Id*. at p. 1334; see also *People v. Hill* (2011) 191 Cal.App.4th 1104, 1120.)

In *People v. Williams*, *supra*, 48 Cal.3d 1112, the defense raised the issue that no marks had been found on the defendant even though he was charged with forcible rape. A police detective gave his opinion, based on his 17 years of experience investigating about 100 rape cases, that it was not unusual for a rapist to be unmarked after the crime. The detective based his opinion on the emotional makeup of female victims. The California Supreme Court ruled the first part of his testimony was properly within the witness' expertise. (*Id*., at p. 1136.) But the court also ruled the detective should not have been permitted to express the second opinion. "Even assuming that expert testimony was admissible to show that rape victims react in a certain way based on their 'emotional make-up' … , there was no evidence that [the detective] had the requisite psychiatric training and experience to testify on such matters." (*Ibid*.)

7010.4-An expert's opinion must be based on properly considered information 4/18

Evidence Code section 801, subdivision (b) states an expert's testimony must be "[b]ased on matter … perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion … ." "[A]ny material that forms the basis of an expert's opinion testimony must be reliable. [Citation.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) This requirement was not abandoned by the California Supreme Court when it drew a distinction between "case-specific hearsay" and "general background information" in *People v. Sanchez* (2016) 63 Cal.4th 665, at pages 685-686 (overruling *Gardeley* on other grounds).

> The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

(Evid. Code, § 803; see, e.g., *People v. London* (2014) 228 Cal.App.4th 544, 558-562 [no facts supported proffered opinion except self-serving hearsay of defendant].)

> The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [Citations.] Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations]

(*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135; see also *People v. Wright* (2016) 4 Cal.App.5th 537, 545; *Borger v. DMV* (2011) 192 Cal.App.4th 1118, 1122.) An expert opinion based on such improper matters may be excluded from evidence. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) Thus, if the basis of an expert's opinion is unreliable hearsay or matter barred by law, the opinion has been uniformly rejected by the courts. (*People v. Parnell* (1993) 16 Cal.App.4th 862, 868-869 [opinion based on hypnosis inadmissible]; see, e.g., *Luque v. McLean* (1972) 8 Cal.3d 136, 148 ["the trial judge's exclusion of the articles from Reader's Digest, Today's Health and Consumer Bulletin was clearly proper, because none of those periodicals constitute the type of professional technical literature 'that reasonably may be relied upon by an expert in forming an opinion' (Evid. Code, § 801, subd. (b))"];

see also *People v. McWhorter* (2009) 47 Cal.4th 318, 364-367 [expert may not rely upon matter subject to *Kelly-Frye* test unless *Kelly-Frye* criteria met].)

In *People v. Ruiz* (1990) 222 Cal.App.3d 1241, for example, the defense sought to introduce the testimony of psychologist Dr. Berg, an expert with extensive experience examining and treating pedophiliac, that the defendant did not have the psychological characteristics of a person suffering from pedophilia. Acknowledging that such testimony may be admissible under the then recent opinion from the California Supreme Court in *People v. Stoll* (1989) 49 Cal.3d 1136, the appellate court nevertheless found there was an inadequate foundation to admit Dr. Berg's opinion. (*People v Ruiz*, *supra*, 22 Cal.App.3d at p. 1245.)

> Still, it is not enough to determine that certain material—here, profile evidence—might be admissible. Evidence Code section 801, subdivision (b) requires that the matter underlying an expert's opinion be "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." Thus there must be some showing that the material on which the expert bases his or her opinion—here the profiles of the primary types of pedophile—is reliable.
>
> [T]here was no such showing in the present case. There was no evidence that the scientific community had developed any standard profile of a pedophile. Indeed, Dr. Berg explained that the tests he used were not designed to elicit that information and had not been standardized against a population group of pedophiles. Dr. Berg said that the disorder usually manifests itself in persons who have become fixated on children or on persons who have experienced some recent stress, but there was no showing that Dr. Berg was stating anything other than his personal opinion, nor was there any showing that his personal opinion in such matters was reliable.

(*Id*. at pp. 1245-1246; see also *In re Mark C.* (1992) 7 Cal.App.4th 433, 444-445.)

7010.5-Court's role in determining if expert's opinion based on proper matters 4/21

"[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 771-772; see also *People v. Tran* (2020) 50 Cal.App.5th 171, 185.) "This means that a court may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning. 'A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.' " (*Id*. at p. 771; see also *People v. Azcona* (2020) 58 Cal.App.5th 504, 513.) "Expert opinion … must not be speculative. Expert opinion has no value if its basis is unsound. [Citation.] Expert opinion must have a logical basis. Experts declaring unsubstantiated beliefs do not assist the truth-seeking enterprise. [Citation.]" (*People v. Gonzalez* (2021) 59 Cal.App.5th 643, 649.)

> But courts must also be cautious in excluding expert testimony. The trial court's gatekeeping role does not involve choosing between competing expert opinions. The high court warned that the gatekeeper's focus "must be solely on principles and methodology, not on the conclusions that they generate." [Citation] … [¶] The trial court's preliminary determination whether the expert opinion is founded on sound logic is not a decision on its persuasiveness. The court must not weigh an opinion's probative value or substitute its own

> opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies. Rather, it conducts a "circumscribed inquiry" to "determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid." [Citation.] The goal of trial court gatekeeping is simply to exclude "clearly invalid and unreliable" expert opinion. [Citation.] In short, the gatekeeper's role "is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." [Citation.]

(*Id*. at p. 772.)

> Several factors that a trial court should take into account in ruling upon the propriety of particular foundational matters in expert testimony have been outlined by a noted commentator:
>
> "It is suggested that the factors of *necessity* and relative *reliability* be given strong consideration. If, for example, an expert is using hearsay to support his opinion, it should be considered an improper matter unless the elements of necessity and indications of reliability are present. If there is no necessity for the use of hearsay and there is little indication of trustworthiness, a finding against reasonable reliance by an expert is justified. Whether a matter used by an expert consists largely of conjecture or speculation is another important consideration. The factors of *necessity*, *reliability*, and *speculation* or *conjecture* at least provide some guideposts for the judge in determining whether a proffered expert opinion satisfies the requirements of [Evid. Code, § 801] … ." [Citation.]

(*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524, italics in original.)

7010.6-Proffered expert testimony may be excluded under EC352 9/13

The opinion testimony of a proffered expert may be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; see, e.g., *People v. Linton* (2013) 56 Cal.4th 1146, 1181-1183 [trial court properly excluded "false confession" expert because based only on speculation as no evidence produced supporting inference that defendant's confession was actually false]; see also *People v. Daniels* (2009) 176 Cal.App.4th at 304, 320-321 [trial court properly excluded defense expert witness' opinion that victim suffered "alcohol blackout," because the testimony was based on speculation, was lengthy and confusing, and likely to mislead the jury]; *People v. Spence* (2012) 212 Cal.App.4th 478, 507-510 [improper hypothetical question calling on expert to speculate on the ultimate issue, namely the strength of the prosecution's case].)

7010.7-Expert opinion can encompass ultimate issue in case 10/20

"Expert opinion testimony may not invade the province of the jury to decide a case. [Citations.] Thus, expert opinion testimony that merely expresses a general belief as to how the jury should decide the case is not permissible. [Citation.]" (*People v. Lowe* (2012) 211 Cal.App.4th 678, 684 (*Lowe*); see also *People v. Julian* (2019) 34 Cal.App.5th 878, 885-886 [error to admit statistic evidence of how often children alleging sexual abuse tell the truth]; *People v. Wilson* (2019) 33 Cal.App.5th 559, 570-571 [accord].) Nevertheless:

> Expert opinion testimony is not inadmissible merely "because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.) As the California Supreme Court explained, "There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case. 'We think the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved. … Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in.' " (*People v. Wilson* (1944) 25 Cal.2d 341, 349.)

(*Lowe*, *supra*, 211 Cal.App.4th at p. 684; see also *People v. Brown* (2014) 59 Cal.4th 86, 101.)

> The appellate court in *Lowe*, for example, held that in a sexually violent predator trial: [T]he People's experts focused their remarks on their individual assessments of Lowe's mental health and recidivism risk, the assessment methods they used, the research underlying the assessment methods, and the facts they believed were most probative of Lowe's mental health and recidivism risk. They did not compare or critique the other experts' opinions or otherwise attempt to weigh the evidence before the jury. Consequently, unlike the expert in *Summers* [*v. A.L. Gilbert Co.* (1999)] 69 Cal.App.4th 1155, the People's experts did not cross the line from testifying to advocating for a specific outcome, and the trial court did not err by allowing them to testify why they believed Lowe was "likely" to engage in "predatory" sexually violent offenses in the future.

(*Lowe*, *supra*, 211 Cal.App.4th at p. 686.)

In contrast, the defense pathologist in *People v. Duong* (2020) 10 Cal.5th 36 was properly precluded from testifying that some gunshot wounds were from the purposeful fired but other were not. " '[O]pinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact.' [Citation.]" (*Id* at p. 60.) The proffered expert testimony was " 'tantamount to expressing an opinion as to defendant's guilt' [citation] because it proposed to dispose of an essential element of the crime." (*Id*. at p. 61.) And because the opinion was not based on any medical evidence, but on the same facts and circumstances regarding the crime that the jury had already received, it could not reasonably assist them in their decision making. (*Ibid*.)

7010.8-An expert cannot give an opinion on credibility 5/20

Evidence Code section 801, subdivision (a), does not permit an expert to give an opinion regarding credibility. "The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful. (Evid. Code, § 801, subd. (a); see *People v. Cole* (1956) 47 Cal.2d 99.)" (*People v. Coffman* (2004) 34 Cal.4th 1, 82; see also *People v. Curl* (2009) 46 Cal.4th 339, 359-360.)

7020.1-Eyewitness expert testimony admissible only if ID uncorroborated 3/19

The California Supreme Court addressed the issue of the admissibility of eyewitness expert identification testimony for the first time in *People v. McDonald* (1984) 37 Cal.3d 351 (*McDonald*). The court in *McDonald* held:

> *When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability*, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.

(*Id.* 37 Cal.3d at p. 377, italics added; accord, *People v. Sanders* (1995) 11 Cal.4th 475, 508-509.) The court expressed concern that its decision would be misinterpreted as "opening the flood gates" to a flood of expert evidence on the subject since such evidence "will not often be needed." (*People v. McDonald*, *supra*, 37 Cal.3d at p. 377; see also, *People v. Sanders*, *supra*, 11 Cal.4th at pp. 508-509.) Thus, *McDonald* left the decision regarding admissibility to the discretion of the trial court. (*People v. Sanders*, *supra*, 11 Cal.4th at pp. 508-509.)

In *McDonald*, the defendant was linked solely to the crime by equivocal and uncorroborated eyewitness identifications. One eyewitness to the crime even insisted defendant was not the perpetrator. Defendant also presented a strong alibi defense. Hence the court found exclusion of the defense's proffered eyewitness identification expert was an abuse of discretion. (*McDonald*, *supra*, 37 Cal.3d at pp. 375-376; see also, *People v. Jackson* (1985) 164 Cal.App.3d 224, 241-247 [error in excluding eyewitness identification expert held harmless].)

Cases since *McDonald* have emphasized the circumstances under which such testimony would be admissible and the wide scope of the trial court's discretion.

In *People v. Lucas* (2014) 60 Cal.4th 153, the trial court's exclusion of proffered defense experts on eyewitness identification was upheld because there was substantial corroboration of the victim's photographic and in court identification of the defendant as her attacker. (*Id*. at p. 277.) The victim was able to identify defendant's house, as well as the make and model of his car, and accurately sketched the interior of his house. (*Ibid*.; similarly, see *People v. Garcia* (2018) 28 Cal.App.5th 961, 970-971.)

In *People v. Jones* (2003) 30 Cal.4th 1084, rather than rely on eyewitness identification, the prosecution presented testimony from five witnesses regarding defendant's admissions. The California Supreme Court held there was no abuse of discretion in excluding the defense's eyewitness identification expert. (*Id*. at pp. 1111-1112; see also, *People v. Snow* (2003) 30 Cal.4th 43, 87-88 [no eyewitness evidence offered to tie the defendant to the crime].)

In *People v. Sanders* (1990) 51 Cal.3d 471, the court found no error in excluding such testimony where other evidence supplied a motive for defendant, the description given by the eyewitness matched the description given by a confederate, and some circumstantial evidence tied defendant to a related crime. (*Id*. at pp. 503-507; see also, *People v. Walker* (1988) 47 Cal.3d 605, 627-628; similarly, see *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 724-730.)

And in *People v. Plasencia* (1985) 168 Cal.App.3d 546, the victim of a gang attack positively identified defendant as one of the assailants. The appellate court found the admissibility of expert eyewitness testimony was sufficiently defeated by corroboration in the form of the prior inconsistent statements of two other gang members identifying defendant as a participant. The court also found the purposes of the offered expert testimony had been met.

> Moreover, the vehicles of cross-examination, argument and instructions relating to the facts of this case, highlighted the psychological factors and unreliability of eyewitness identifications and focused the jury's attention on the issues. These vehicles, particularly cross-examination, could swiftly disabuse the jury of misconceptions it had about the reliability of eyewitness identification.

(*Id.* at p. 556.)

Finally, "to the extent that [expert testimony] may refer to the particular circumstances of the identification before the jury, such testimony is limited to explaining the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness." (*McDonald*, *supra*, 37 Cal.3d at pp. 370-371.) "Accordingly, a trial court may exclude expert testimony 'that any particular witness is or is not truthful or accurate in his [or her] identification of the defendant.' (*Id*. at p. 370.)" (*People v. Chavez* (2018) 22 Cal.App.5th 663, 680 [proper to preclude defense identification expert to "comment hypothetically or otherwise on specific witness's testimony"].)

7020.2-Expert cannot testify whether defendant had criminal state of mind 2/14

At the guilt phase of a trial an expert witness cannot testify as to whether a criminal defendant did or did not have the requisite state of mind to commit the charged crime. (*People v. Pearson* (2013) 56 Cal.4th 393, 451.)

> [Penal Code] Section 28, subdivision(a) provides that evidence of mental illness "shall not be admitted to show or negate the capacity to form any mental state." Subdivision (b) of section 28 states that as a "matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action … ." Section 29 prohibits expert witnesses from directly stating their conclusions regarding whether a defendant possessed a required mental state. It provides, "[i]n the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states … . The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

(*People v. San Nicolas* (2004) 34 Cal.4th 614, 662; see also *People v. Pearson*, *supra*,56 Cal.4th at pp. 443.)

"Ordinarily, the opinion of a gang expert alone may provide substantial evidence to sustain the elements of a gang enhancement. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048-1049.)" (*People v. Soriano* (2021) 65 Cal.App.5th 278, 286.) "But the gang expert's opinion must be 'of ponderable legal significance or of solid value.' [Citation.]" (*Ibid*., citing *People v. Wright* (2016) 4 Cal.App.5th 537, 546; distinguish *People v. Huynh* (2021) 65 Cal.App.5th 969, 983-985 [improper use of guilt by association to pose hypothetical to expert regarding gangs when no evidence of defendant membership or affiliation with any criminal street gang].)

The California Supreme Court in *People v. Sanchez* (2016) 63 Cal.4th 665 drew a distinction in the requirements for allowing an expert witness to relate to the jury the facts upon his or her opinion was based under Evidence Code section 801, subdivision (b), depending upon whether these facts were "case-specific hearsay" or "general background information." (*Id.* at p. 678.) Subject to this limitation, however, "California law permits gang experts to rely on reliable hearsay evidence to form an opinion, even if the evidence would otherwise be inadmissible. [Citations.]" (*People v. Valadez* (2013) 220 Cal.App.4th 16, 29 (*Valadez*); see also *People v. Gonzalez* (2006) 38 Cal.4th 932, 944-946 (*Gonzalez*); *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618 (*Gardeley*).) Sources can include written material and conversations with gang members and other officers. (*Gonzalez*, *supra*, 38 Cal.4th at p. 949; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *Gardeley*, *supra*, 14 Cal.4th at p. 620; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1122-1126 (*Hill*); *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-1210; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9.) "But, 'even where gang membership is relevant, because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it.' " (*People v. Williams* [(1997)] 16 Cal.4th [153] at p. 193.)" (*People v. Gomez* (2018) 6 Cal.5th 243, 294.)

> In distinguishing between case-specific facts, which an expert may not relay, and background information as to which she may, the court gave as an example of the latter testimony that a "diamond is a symbol adopted by a given street gang." (*Sanchez*, *supra*, 63 Cal.4th at p. at p. 677.) The court indicated it could be established that a person has a diamond tattoo through testimony of a witness who saw the tattoo or an authenticated photograph, and the expert could opine that the presence of a diamond tattoo shows the person belongs to the gang. (*Ibid*.) The *Sanchez* court also stated that the expert in the case before it could testify "based on well-recognized sources in [the expert's] area of expertise" "about general gang behavior or … the Delhi gang's conduct and its territory," which was "relevant and admissible evidence as to the Delhi gang's history and general operations." (*Id*. at p. 698.) Since *Sanchez*, California appellate courts have held that expert testimony about "the general attributes of the … gang, such as the gang's culture, the importance placed on reputation and guns, … the gang's rivals and claimed turf, the use of monikers and identifying symbols, and the like, [are] permissible as expert background testimony." (*People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1247; *People v. Meraz* (2017) 6 Cal.App.5th 1162, 1175 [expert may provide general background testimony about gang's operations, primary activities and pattern of criminal activities].)

(*People v. Andrews* (2019) 32 Cal.App.5th 1102, 1138.) A gang expert can testify regarding predicate offenses because this is generally considered background, not case-specific, facts. (*People*

v. Bermudez (2020) 45 Cal.App.5th 358, 376-377; but see *People v. Thompkins* (2020) 50 Cal.App.5th 365, 410-411; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 588-589.)

An appellate court reviews the trial court's admission of gang expert testimony for abuse of discretion. (*Valadez*, *supra*, 220 Cal.App.4th at p. 29; *Hill*, *supra*, 191 Cal.App.4th at p. 1122.)

7020.4-Crime scene analysis and "profile" evidence 5/20

Crime scene analysis that is "relevant, probative, and not unduly prejudicial" is admissible in a criminal action. (*People v. Eubanks* (2011) 53 Cal.4th 110, 148; *People v. Robinson* (2005) 37 Cal.4th 592, 643-644.) "Expert opinion testimony on crime scene analysis is not prohibited on the ground the jurors may have some understanding of the sequence of events as a matter of common sense, because "[e]xpert opinion on crime scene reconstruction generally is admissible" (*People v. Farnam* (2002) 28 Cal.4th 107, 162), and the jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300 …)." (*People v. Jackson* (2013) 221 Cal.App.4th 1222, 1237 (*Jackson*).) This is consistent with Evidence Code section 801, subdivision (a), which permits a witness to testify as an expert, in the form of an opinion, on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."

> Notwithstanding the ability of jurors to review the evidence before them and draw commonsense inferences, it may aid them to learn from a person with extensive training in crime scene analysis, who has examined not only the evidence in the particular case but has in mind his or her experience in analyzing hundreds of other cases, whether certain features that appear in all the charged crimes are comparatively rare, and therefore suggest in the expert's opinion that the crimes were committed by the same person.

(*People v. Prince* (2007) 40 Cal.4th 1179, 1223 (*Prince*).)

> Crime scene analysis, which is generally admissible, is distinguishable from profile evidence. A profile ordinarily constitutes a set of circumstances—some innocuous—characteristic of certain crimes or criminals, said to comprise a typical pattern of behavior. In profile testimony, the expert compares the behavior of the defendant to the pattern or profile and concludes the defendant fits the profile. (See *People v. Robbi*e (2001) 92 Cal.App.4th 1075, 1084; see also *People v. Smith* (2005) 35 Cal.4th 334, 357, 358 [(*Smith*)].)"

(*Prince*, *supra*, 40 Cal.4th at p. 1226.) "Profile evidence is generally inadmissible to prove guilt." (*People v. Robbie*, *supra*, 92 Cal.App.4th at p. 1084.)

The California Supreme Court in *Prince* held that the expert testimony of FBI Special Agent Ankrom did not constitute inadmissible profile evidence "because, unlike profile evidence, Ankrom's testimony did not refer to defendant at all." (*Prince*, *supra*, 40 Cal.4th at p. 1226.)

> Significantly, Ankrom's testimony did not evaluate *defendant*'s behavior against a pattern or profile. Ankrom did not offer an opinion that he believed defendant was the culprit, nor did he relate his findings to defendant at all. Instead, he compared documentary evidence of the crime scenes in the present case and, based upon his observation of common marks and his experience, concluded the crimes had been committed by a single person. In any event, profile evidence does not describe a category of always-excluded evidence; rather, the evidence ordinarily is inadmissible "only if it is either irrelevant, lacks a foundation, or is more prejudicial than probative.' (*People v. Smith*, *supra*, 35 Cal.4th at p. 357.) In sum, "[p]rofile evidence is objectionable when it is insufficiently probative

because the conduct or matter that fits the profile is as consistent with innocence as guilt." (*Id*. at p. 358.)

(*Prince*, *supra*, 40 Cal.4th at p. 1226, italics in original; accord *Jackson*, *supra*, 221 Cal.App.4th at p. 1240.)

7020.5-Child sexual abuse accommodation syndrome (CSAAS) 10/20

Expert testimony on "the common reactions of child molestation victims," known as Child Sexual Abuse Accommodation Syndrome [CSAAS] theory evidence, "is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident – e.g., a delay in reporting – is inconsistent with his or her testimony claiming molestation." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300.) " 'Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior.' " (*Id*. at p. 1301; see also *People v. Munch* (2020) 52 Cal.App.5th 464, 468.) But CSAAS evidence "is not admissible to prove that the complaining witness has in fact been sexually abused." (*People v. McAlpin*, *supra*, 53 Cal.3d at p. 1300.) "The expert is not allowed to give an opinion on whether a witness is telling the truth … ." (*People v. Long* (2005) 126 Cal.App.4th 865, 871.)

Thus, the expert providing CSAAS testimony may not give " 'general' testimony describing the components of the syndrome in such a way as to allow the jury to apply the syndrome to the facts of the case and conclude the child was sexually abused." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 393.) Nor is it proper for a CSAAS expert to present "predictive conclusions," such as alleged child abuse victims "should be believed" or "abused children give inconsistent accounts and are credible nonetheless." (*Id*. at p. 394.) "[T]he jurors' education and training may not have sensitized them to the dangers of drawing predictive conclusions." (*Id*. at p. 393.) "Such predictive conclusions go beyond the scope of CSAAS evidence and may confuse the jury." (*People v. Julian* (2019) 34 Cal.App.5th 878, 886.) This includes statistical probability testimony. (*Id*. at pp. 885-886; *People v. Wilson* (2019) 33 Cal.App.5th 559, 570-571.) "Where expert opinions on the statistical probability of guilt are admitted, the jury may be 'distracted' from its 'requisite function of weighing the evidence on the issue of guilt,' and may rely instead on this 'irrelevant' evidence. (*People v. Collins* (1968) 68 Cal.2d 319, 327.)" (*People v. Julian*, *supra*, 34 Cal.App.5th at p. 886.)

7020.6-Intimate partner violence 10/19

The Evidence Code authorizes the use of expert opinion testimony generally when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact … ." (Evid. Code, § 801, subd. (a) "[C]ourts have repeatedly recognized the appropriate use of expert testimony when an alleged victim's actions during or following a crime seem to contradict the victim's claims in cases of alleged molestation or abuse. (See *People v. Riggs* (2008) 44 Cal.4th 248, 293 [expert testimony addressing battered woman's syndrome].)" (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1110.) In domestic abuse case this testimony typically consists of an expert explaining "that it is not unusual for victims of intimate partner battering to cycle between periods of seeking assistance from law enforcement and of supporting their battering partners, including by making false statements to the police." (*People v. Sexton* (2019) 37 Cal.App.5th 457, 460.)

A special statute governs crimes of violence involving spouse and intimate partner.

> In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.

(Evid. Code, § 1107, subd. (a).) This statute does not limit expert testimony that might also be admissible under Evidence Code section 801, subdivision (a). (*People v. Brown* (2004) 33 Cal.4th 892, 907.)

> We reject th[e] premise … expert testimony that may be used by the jury to assist it in evaluating the credibility of an alleged abuse victim is prohibited evidence of whether the abuse occurred. If the expert testimony was not related in some way to whether the abuse occurred, it would be irrelevant. Expert testimony may not be improperly used to *directly* determine whether the abuse occurred. But like much of the other evidence that comes in at a trial, it may be used *indirectly* to assist the jury in evaluating whether the alleged victim's statements are believable.

(*People v. Brackins* (2019) 37 Cal.App.5th 56, 71; see also *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087 [battered woman syndrome evidence properly relevant to credibility].) The use of a standardized jury instruction explaining the proper use of such testimony has been upheld by the appellate courts. (*People v. Sexton*, *supra*, 37 Cal.App.5th at pp. 465-468; *People v. Brackens*, *supra*, 37 Cal.App.5th at pp. 70-72.)

7020.7-Sexually violent predator hearings 10/21

The California Supreme Court in *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) held an expert witness cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686.) There is such a statutory hearsay exception applicable to Sexually Violent Predator [SVP] hearings. Welfare and Institutions Code section 6600, subdivision (a)(3), allows admission of "documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of State Hospitals" to prove the existence of a prior qualifying offense as well as the details underlying the commission of the offense. (See *People v. Roa* (2017) 11 Cal.App.5th 428, 450; *People v. Burroughs* (2016) 6 Cal.App.5th 378, 403; distinguish *People v. Superior Court (Couthren)* (2019) 41 Cal.App.5th 1001, 1019-1022 [case-specific hearsay not admissible to prove "diagnosed mental disorder" or "likely to reoffend" SVP elements]; *Bennett v. Superior Court* (2019) 39 Cal.App.5th 862, 877-881 [accord]; *People v. Yates* (2018) 25 Cal.App.5th 474, 484-486 [prosecutor never introduced the subpoenaed SVP hospital records into evidence meaning the expert witness testimony based on the hearsay contained therein should not have been admitted under the *Sanchez* rule].)

7050.1-Test for admission of non-expert opinion testimony 8/19

"A lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony. (Evid. Code, § 800.)" (*People v. Farnam* (2002) 28 Cal.4th 107, 153; see also *People v. Becerrada* (2017) 2 Cal.5th 1009, 1032; *People v. Virgil* (2011) 51 Cal.4th 1210, 1254.) "The decision whether to permit lay opinion rests in the sound discretion of the trial court. (*People v. Medina* (1990) 51 Cal.3d 870, 887.)" (*People v. Bradley* (2012) 208 Cal.App.4th 64, 83.)

> Lay opinion is … admissible, but it plays a very different role than expert opinion and is subject to different rules of admissibility. " 'Lay opinion testimony is admissible where no particular scientific knowledge is required, or as "a matter of practical necessity when the matters … observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner." [Citations.]' [Citation.]" [Citation.] It must be rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony. [Citation.] For example, testimony that another person was intoxicated (*People v. Garcia* (1972) 27 Cal.App.3d 639, 643) or angry (*People v. Deacon* (1953) 117 Cal.App.2d 206, 210) or driving a motor vehicle at an excessive speed (*Jordan v. Great Western Motorways* (1931) 213 Cal. 606, 612) conveys information to the jury more conveniently and more accurately than would a detailed recital of the underlying facts. But unlike an expert opinion, the subject matter of lay opinion is "one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness," and requires no specialized background. [Citation.]

(*People v. Chapple* (2006) 138 Cal.App.4th 540, 547; see also *People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1609 [permitting police officers to testify regarding the similarities of shoeprints or footprints].) "By contrast, when a lay witness offers an opinion that goes beyond the facts the witness personally observed, it is held inadmissible." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1308; see also *People v. Dalton* (2019) 7 Cal.5th 166, 231.) In addition, as with opinion evidence from an expert, proffered opinion evidence from a lay person may be excluded under Evidence Code section 803 if it "is based in whole or in significant part on matter that is not a proper basis for such an opinion." (*People v. Jones* (2017) 3 Cal.5th 583, 602 [defense witness properly precluded from testifying defendant was no longer a gang member at the time of the crime because it was based primarily on hearsay statements from defendant and others].)

"Lay opinion testimony may rest only on common experience." (*People v. Chapple*, *supra*, 138 Cal.App.4th at p. 548.) There is no category of admissibility for the opinion testimony of "highly experienced, nonexpert, lay witnesses." (*Ibid*.) In other words, "[m]atters beyond common experience are not proper subjects of lay opinion testimony." (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1333.)

> Where a lay opinion is otherwise admissible, the witness's experience may affect the weight of the testimony. " 'A person having the opportunity to observe the speed of a moving vehicle is qualified to give his opinion as to such speed, and his previous experience or lack of experience goes to the weight rather than to the competency of the testimony.' " (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1307.)

(*People v. Chapple*, *supra*, 138 Cal.App.4th at p. 548, fn. 5.) Of course, a lay person with no experience in the subject matter is not qualified to give an opinion. (See, e.g., *People v. Navarette*

(2003) 30 Cal.4th 458, 493-494 [witnesses properly precluded from giving opinion as to drug intoxication because they had never seen person on drugs before].)

Although, in general, "a lay witness may not give an opinion about another's state of mind[,] … a witness may testify about objective behavior and describe behavior as being consistent with a state of mind." (*People v. Chatman* (2006) 38 Cal.4th 344, 397 [witness testified defendant seemed to enjoy kicking the victim]; see also *People v. Sanchez* (2016) 63 Cal.4th 411, 456 [witness testimony that defendant's gesture indicated he wanted to change clip in empty gun was admissible lay opinion, not inadmissible speculation]; *People v. Weaver* (2012) 53 Cal.4th 1056, 1086 [witness testified defendant was more hostile and angry towards one of the victims].)

> "[A]ll relevant evidence of mental condition affecting the formation of a specific intent, is admissible on the trial of the 'not guilty' plea" [citation], including the opinion of lay witnesses, provided the opinion is rationally based on the witness's perception and helpful to a clear understanding of his or her testimony (Evid. Code § 800). We have recognized " 'there is no logical reason why qualified lay witnesses cannot give an opinion as to mental condition less than sanity' [citation] or to similar cognitive difficulties." [Citation.]

(*People v. Townsel* (2016) 63 Cal.4th 25, 51.)

As another example, " 'the identity of a person is a proper subject of nonexpert opinion … .' [Citations.]" (*People v. Leon* (2015) 61 Cal.4th 569, 601.) "Court of Appeal decisions have long upheld admission of testimony identifying defendants in surveillance footage or photographs." (*Ibid*.)

7150.1-General standard for patdown search 5/20

In *Terry v. Ohio* (1968) 392 U.S. 1 (*Terry*), the United States Supreme Court held that a police officer may conduct a patdown search for weapons when the officer has reason to believe, based on the totality of the circumstances, that the suspect is armed and dangerous, regardless of whether probable cause to arrest exists. (*Id*. at p. 30; *People v. Fews* (2018) 27 Cal.App.5th 553, 559-560.) To conduct a patdown search under *Terry* the officer need not be absolutely certain that the individual is armed, but must be able to articulate specific facts that, along with any rational inferences, lead to a reasonable suspicion the suspect is armed and dangerous. (*People v. Parrott* (2017) 10 Cal.App.5th 485, 495; *People v. Rios* (2011) 193 Cal.App.4th 584, 599; *People v. Lindsey* (2007) 148 Cal.App.4th 1390, 1395-1396.) These basic principles apply even during ordinary traffic stops. "To justify a patdown of the driver or a passenger during a traffic stop …, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." (*Arizona v. Johnson* (2009) 555 U.S. 323, 327.)

The issue is whether a reasonably prudent person in the same circumstances would be justified in the belief that his or her safety or that of others was in danger. (*Terry*, *supra*, 392 U.S. at pp. 21, 27.) "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence … ." (*Adams v. Williams* (1972) 407 U.S. 143, 146.) "So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." (*Ibid*., fn. omitted; accord *Minnesota v. Dickerson* (1993) 508 U.S. 366, 373.)

The officer's reasonable suspicion justifying a patdown searches does not require specific information relating to a weapon. In *People v. Clayton* (1970) 13 Cal.App.3d 335, for example, a patdown search of a passenger in an automobile stopped for a traffic violation was upheld merely because the passenger was rapidly moving his arms up and down as the officer approached. (*Id*. at p. 337.) Conversely, an uneventful traffic stop late at night in a gang neighborhood does not justify a patdown search of the motorist. (*People v. Medina* (2003) 110 Cal.App.4th 171; similarly, see *In re H.H*. (2009) 174 Cal.App.4th 653.) But the additional factor of the motorist putting his hands in the pockets of a heavy jacket after once removing them at the officer's request does justify a patdown search. (*In re Frank V.* (1991) 233 Cal.App.3d 1232; similarly, see *People v. Parrott*, *supra*, 10 Cal.App.5th at pp. 495-496.)

The appellate court in *In re H.M.* (2008) 167 Cal.App.4th 136, upheld a patdown search of a juvenile because the totality of the circumstances justified the officers' fear he might be armed. The juvenile was seen dashing frantically through traffic in an area of gang activity near the scene of a shooting the day before. (*Id*. at p. 144.) The appellate court also found significant that the suspect's "facial expression and his repeated glances behind as he ran suggested he was frightened and fleeing from a dangerous situation. The fact he was sweating profusely and appeared confused and nervous reinforced this impression. Nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." (*Ibid*.)

A court reviewing a patdown search should not second-guess an officer's on-the-spot decision to frisk a suspect for officer safety. (*People v. Wilson* (1997) 59 Cal.App.4th 1053, 1063; distinguish *People v. Garcia* (2006) 145 Cal.App.4th 782 [patdown for identification improper].) "The lives and safety of police officers weigh heavily in the balance of competing Fourth Amendment considerations. [Citations.]" (*People v. Dickey* (1994) 21 Cal.App.4th 952, 957.) "The Fourth Amendment has never been interpreted to ' "require that police officers take unnecessary risks in the performance of their duties." [Citation.]' (*Pennsylvania v. Mimms* (1977) 434 U.S. 106, 110.)" (*People v. Collier* (2008) 166 Cal.App.4th 1374, 1378.) "Nor should we overlook the fact that 'American criminals have a long tradition of armed violence,' and that a significant number of assassinations of officers occur when they are engaged in making routine traffic stops and investigations." (*People v. Hill* (1974) 12 Cal.3d 731, 745, citations omitted.)

7150.2-Patdown search proper on criminal activity suspected 12/19

A police officer may conduct a patdown search of a detained person when the criminal activity suspected suggests the possible presence of a weapon. "Courts have consistently recognized that certain crimes carry with them the propensity for violence, and individuals being investigated for those crimes may be patsearched without further justification." (*People v. Osborne* (2009) 175 Cal.App.4th 1052, 1059.) A patdown search also may be justified for other types of suspected "non-violent" criminal activities, such as theft and narcotics related crimes.

In *People v. Osborne*, *supra*, 175 Cal.App.4th 1052 one officer detained the defendant for what appeared to be an auto burglary in progress. The officer was alone with the defendant who was larger than the officer. The defendant had previously fled at the sight of the officer and when contacted acted "real nervous." The defendant was in proximity to a variety of tools, including screwdrivers, which could be used to assault the officer. The appellate court held that a patdown search was justified for the officer's safety. (*Id*. at pp. 1060-1061; accord *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1230; *People v. Myles* (1975) 50 Cal.App.3d 423, 430; *In re Jeremiah*

(2019) 41 Cal.App.5th 299 [detention of juvenile as suspect in recent street robbery, but with no report of weapons and no other evidence he might be armed and dangerous, insufficient to support patdown search].)

In *People v. Lee* (1987) 194 Cal.App.3d 975 the appellate court upheld a patdown search on the officer's reasonable belief that narcotics dealers frequently carry firearms to protect themselves from robbers. (*Id*. at p. 983; accord *People v. Limon* (1993) 17 Cal.App.4th 524, 534-535.) And, in *People v. Thurman* (1989) 209 Cal.App.3d 817, the patdown search of a visitor to a residence being searched for drugs pursuant to warrant was upheld by the appellate court because of the common association of weapons and violence to drugs. (See also *People v. Samples* (1996) 48 Cal.App.4th 1197.)

The appellate court in *People v. Collier* (2008) 166 Cal.App.4th 1374 held an officer properly conducted a limited patdown search of the passenger in a car based on officer safety and the presence of drugs following a traffic stop, even though there were no furtive gestures, there was no gang evidence, and the traffic stop was not in a high crime area. The officer had asked the passenger and driver to step out of car to conduct a search of car's interior due to the strong smell of marijuana, and passenger was wearing baggy clothing that officer suspected might be used to conceal a weapon. (*Id*. at pp. 1377-1378.)

Indeed, the connection between drugs and weapons is so strong that it caused one appellate court to comment: "Illegal drugs and guns are a lot like sharks and remoras. And just as a diver who spots a remora is well-advised to be on the lookout for sharks, an officer investigating cocaine and marijuana sales would be foolish not to worry about weapons." (*People v. Simpson* (1998) 65 Cal.App.4th 854, 862; distinguish *People v. Sandoval* (2008) 163 Cal.App.4th 205 [no cause to patdown non-probationer sitting on porch outside residence searched pursuant to Fourth waiver probation condition].)

These legal principles remain sound when officers are investigating whether a person possesses marijuana despite the partial legalization of possession of small quantities of marijuana under Proposition 64, effective November 9, 2016.

> Because marijuana possession and use is still highly circumscribed by law even after the passage of Proposition 64, the odor and presence of marijuana in a vehicle being driven in a high-crime area, combined with the evasive and unusual conduct displayed [the suspects], were still reasonably suggestive of unlawful drug possession and transport to support the *Terry* frisk.

(*People v. Fews* (2018) 27 Cal.App.5th 553, 561.)

7160.1-Patdown search proper when transporting arrestee 9/09

It has long been clear that when an officer is required to transport a subject or travel in close proximity to an arrestee, a limited search for weapons is permissible for the safety of the officer. (*People v. Tobin* (1990) 219 Cal.App.3d 634, 637-641.) "The appellate courts of this state have long recognized that the need to transport a person in a police vehicle in itself is an exigency which justifies a pat-search for weapons." (*Id*. at p. 641; see also *People v. Mack* (1977) 66 Cal.App.3d 839, 848.)

7160.2-All potential weapons felt on patdown may be removed 9/09

The scope of a patdown search is limited to that which is necessary to determine whether a person is armed. (*Terry v. Ohio* (1968) 392 U.S. 1, 26.) A proper patdown search should not go beyond that which is required to make that determination. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 373-374.) But this does not preclude the officer from taking reasonable steps to determine if an object felt is a potential weapon.

> We hold that where an outside clothing pat search reveals the presence of an object of a size and density that reasonably suggests the object might be a weapon, the searching officer is entitled to continue the search to the inner garments where the object is located in order to determine whether the object is in fact a weapon. Weapon verification is essential if safety is to be preserved and a potentially volatile situation neutralized. We cannot impose a condition of certainty that the object is a weapon before allowing an officer to continue the pat search to the inner clothing site where the object is located. To do so would frustrate the objective of the pat search.

(*People v. Thurman* (1989) 209 Cal.App.3d 817, 825-826.) Alternatively, an officer feeling a bulky and somewhat hard but ambiguous object during a patdown search, may ask the suspect what the object is without removing it. (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1075-1076.)

Certainly, "[w]hen a police officer's frisk of a detainee reveals a hard object that might be a weapon, the officer is justified in removing the object … ." (*People v. Limon* (1993) 17 Cal.App.4th 524, 535; see also *People v. Brown* (1989) 213 Cal.App.3d 187, 192.) But, "absent unusual circumstances," an officer cannot retrieve a soft object felt inside a suspect's pocket during a patdown search. (*People v. Collins* (1970) 1 Cal.3d 658, 664; *People v. Dickey* (1994) 21 Cal.App.4th 952, 957.) Having found a loaded magazine to a gun, however, the officer in *People v. Castenada* (1995) 35 Cal.App.4th 1222 was justified in open a package found under the suspect's belt which was feared to contain bullets. [O]nce the magazine was found, the fear of further weapons and ammunition was increased; opening the container under Castaneda's belt was likewise warranted." (*Id*. at p. 1230.)

Appellate cases have upheld officers removing a variety of hard items that have the size and shape of potential weapons. (See, e.g., *People v. Limon* (1993) 17 Cal.App.4th 524, 535-536 [hard rectangular object feared to be a knife].) In *People v. Snyder* (1992) 11 Cal.App.4th 389, the appellate court upheld the removal from defendant's waistband of an object the officer recognized to be a liquor bottle since it could easily be used as a weapon. One appellate court approved seizure of a cylindrical object suspected to be a shotgun shell, but which was actually a lipstick container. (*People v. Atmore* (1970) 13 Cal.App.3d 244.)

Finally, "if contraband is found while performing a permissible [patdown] search, the officer cannot be expected to ignore that contraband." (*People v. Avila*, *supra*, 58 Cal.App.4th at p. 1075.) If, for example, during the patdown search the officer feels an object which he has probable cause to believe is contraband or contains contraband rather than a weapon, the "plain feel" doctrine applies. This doctrine permits the officer to remove the item incident to arrest regardless whether the person has been formally arrested prior to the search. (*People v. Limon*, *supra*, 17 Cal.App.4th at p. 538; *People v. Thurman*, *supra*, 209 Cal.App.3d at p. 826.)

7200.1-General standard for plain view search 5/20

"Under the plain view doctrine, an officer may seize an item without a warrant if (1) the officer was lawfully in a place where the object could be viewed; (2) the officer had a lawful right of access to the seized item; and (3) the item's evidentiary value was immediately apparent. [Citations.]" (*People v. Caro* (2019) 7 Cal.5th 463, 489.) "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to [search and] seizure and may be introduced in evidence." (*Harris v. United States* (1968) 390 U.S. 234, 236; *People v. Camacho* (2000) 23 Cal.4th 824, 831-838; *North v. Superior Court* (1972) 8 Cal.3d 301, 306.) "Under the Fourth Amendment, the law is clear that any incriminating evidence observed in plain view may be seized. [Citations.]" (*Quezada v. Superior Court* (2014) 222 Cal.App.4th 993, 1006.) " 'A search implies a prying into hidden places for something that has been intentionally put out of the way.' … 'Things that are openly visible do not require a search for their discovery.' … The Fourth Amendment does not prohibit the seizure of evidence 'which is readily visible' and 'accessible' to the police." (*People v. Superior Court (Aslan)* (1969) 2 Cal.App.3d 131, 135, citations omitted.) "Intrinsic to the concept of 'plain view' seizures is the proposition that such seizures, unlike searches, are not presumptively invalid whenever effected without the authority of a warrant." (*Guidi v. Superior Court* (1973) 10 Cal.3d 1, 15.)

An item in plain view does not need to be "inadvertently" discovered before it may be seized. (*Horton v. California* (1990) 496 U.S. 128, 130; *North v. Superior Court*, *supra*, 8 Cal.3d at pp. 307-308.) "Items in plain view … may be seized when their incriminating character is immediately apparent" to the officer. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1119.) When evidence is seen in plain view, only probable cause is required to seize it. (*Texas v. Brown* (1983) 460 U.S. 730, 742.) The right of officers to seize items in plain view extends to objects that officers have probable cause to believe will aid in the defendant's apprehension or conviction—as well as to contraband and stolen property. (*Guidi v. Superior Court*, *supra*, 10 Cal.3d at pp. 11-14; see also *People v. Lomax* (2010) 49 Cal.4th 530, 564 [gun in car].)

"The doctrine does not amount to a full exception to the warrant requirement, but merely allows a warrantless seizure where an officer lawfully views, and can lawfully access, contraband or incriminating evidence." (*People v. Caro*, *supra*, 7 Cal.5th at p. 489.) For example, even if incriminating evidence is in plain view in a suspect's home, an officer cannot enter the home and seize the contraband without a warrant, absent exigent circumstances or other warrant exception. (*Horton v. California*, *supra*, 496 U.S. at p. 137, fn. 7; *People v. Bradford* (1997) 15 Cal.4th 1229, 1295.) In *People v. LeBlanc* (1997) 60 Cal.App.4th 157 officers with an arrest warrant were handcuffing the defendant in the threshold to a motel room while standing in the doorway. They saw two cocaine pipes in plain view inside the room. The appellate court held the officers were entitled to intrude further into the room to seize the two pipes. (*Id*. at pp. 163-166.) But they were not entitled to search the remainder of the room on probable cause alone. (*Id*. at pp. 166-167.)

Finally, if officers have the right to seize items in plain view, they also have the right to inspect and photograph those items subject to seizure. (*People v. Roberts* (1956) 47 Cal.2d 374, 380; *People v. Williams* (1988) 198 Cal.App.3d 873, 888-892; *People v. Superior Court (Aslan)*, *supra*, 2 Cal.App.3d at p. 134.)

7200.2-Officers need not seize items of evidence in plain view immediately 6/12

Officers do not lose the right to seize evidence in plain view merely because they wait for two or three hours to take physical possession of it, or because they temporarily leave the location at which they made their observation. (*People v. Hamilton* (1980) 105 Cal.App.3d 113, 118; *People v. Superior Court (Quinn)* (1978) 83 Cal.App.3d 609, 617; *People v. Superior Court (Irwin)* (1973) 33 Cal.App.3d 475, 480.) "Generally an independent justification is required for every warrantless entry by police, including those instances when the officers initially enter a residence lawfully but depart the premises and reenter later." (*People v. Superior Court (Chapman)* (2012) 204 Cal.App.4th 1004, 1014 (*Chapman*).) "But California decisions uphold an officer's reentry to seize evidence observed in plain view during a lawful entry but not seized initially because the officer was performing a duty that took priority over the seizure of evidence." (*Ibid*; see also *People v. McDowell* (1988) 46 Cal.3d 551, 564 (*McDowell*); *People v. Ngaue* (1992) 8 Cal.App.4th 896, 905; *People v. Justin* (1983) 140 Cal.App.3d 729, 740.)

In *Chapman*, police arrived at defendant Chapman's house in response to call of shots fired. Chapman was ordered out of the house, handcuffed and pat-searched, revealing a loaded pistol magazine. Asked about other weapons, Chapman kept saying, "Help him," referring to his son, Brian, inside the house. Police went inside the house, conducted a protective sweep, and located the son who had died from gunshot wounds. An officer was left inside the house to watch the scene as other officers, detective and crime scene personnel went in and out of the house during the next few hours. The appellate court rejected the defense argument that a search warrant was needed for the "second wave" of police responders.

> [T]he uninterrupted stream of second wave responders—which began with Detectives Porche and Phillips (led by one of the officers who was part of the protective sweep) just 25 minutes after the officers finished their protective sweep—were entitled to enter Chapman's residence to process and seize the evidence observed in plain view just minutes earlier. The concern of the first wave responders that gave rise to the protective sweep—the search for shooting victims and suspects, and to give aid to any victim—took priority over seizure of evidence observed in plain view during the course of that sweep. Requiring the first wave responders to seize evidence found in plain view during their search would have hampered their primary duty and could have made what appeared to be a dangerous situation even more dangerous.
>
> Just as in *McDowell*, there is no indication of any intent by the first wave responders to abandon their right to seize the incriminating plain-view evidence by leaving the residence. To the contrary, these officers immediately secured the residence after completing the sweep by leaving Officer Lopez inside next to the body the entire time. Detectives then promptly entered to confirm the evidence that had been observed, followed by a photographer and criminalists who processed and seized it.
>
> Even more so than in *McDowell*, in this case there was an *actual* uninterrupted police presence in the residence justifying the warrantless seizure of plain-view evidence by the second wave responders begun shortly after the initial entry.

(*Chapman*, *supra*, 204 Cal.App.4th at p.1016, italics in original.)

7220.1-Aerial observations from navigable airspace are proper 12/09

In *Oliver v. United States* (1984) 466 U.S. 170, the United States Supreme Court sustained the continuing vitality of the "open fields" doctrine first announced in *Hester v. United States* (1924) 265 U.S. 57. The High Court held that the Fourth Amendment to the United States Constitution specifically provides no protection to open fields—it protects only persons, houses, papers, and effects. One has no reasonable expectation of privacy in open areas beyond the curtilage of a dwelling. Thus, any area outside the house and beyond curtilage may lawfully be viewed by police officers even if they trespass on fenced or posted property. The Court also noted such lands could lawfully be surveyed from the air by police. (*Oliver v. United States*, *supra*, at p. 179, fn. 9.)

The United States Supreme Court elaborated on the lawfulness of aerial observations in *California v. Ciraolo* (1986) 476 U.S. 207. The High Court pointed out that a view by officers into the curtilage, and even into a suspect's home, was proper if obtained from a location the officers have a right to occupy. (*Id*. at p. 213.) *Ciraolo* involved the aerial observation of growing marijuana from public navigable airspace at an altitude of 1000 feet. In approving the aerial observation, the Court held it was immaterial that the flight was for the purpose of identifying marijuana or that it was "focused" upon the defendant's property. (*Ibid*.) "The Fourth Amendment simply does not require the police traveling in the public airways at this altitude obtain a warrant in order to observe what is visible to the naked eye." (*Id*. at p. 215.) In short, there can be no reasonable expectation of privacy in an area open to the view of any member of the public flying in navigable public airspace. (*Id*. at pp. 213-215; similarly, see *People v. Venghiattis* (1986) 185 Cal.App.3d 326 [1000 feet].)

Nearly all California cases, even those published before the passage of the Victim's Bill of Rights in June of 1982, have approved of aerial observations by officers in similar circumstances, whether in an urban or rural environment. Repeatedly, the cases have held a property holder has no reasonable expectation of privacy from airplanes and helicopters flying at legal and reasonable altitudes. In *Dean v. Superior Court* (1973) 35 Cal.App.3d 112 (*Dean*), officers viewed defendant's rural marijuana fields from a helicopter flying at an altitude of only 300 feet. In finding no Fourth Amendment violation, the appellate court explained:

> When the police have a plain view of contraband from a portion of the premises as to which the occupant has exhibited no reasonable expectation of privacy, there is no search in a constitutional sense; the evidence so displayed is admissible. [Citations.] … Aside from an uncommunicated need to hide his clandestine activity, the occupant exhibits no reasonable expectation of privacy consistent with the common habits of persons engaged in agriculture. The aerial overflights which revealed petitioner's open marijuana field did not violate Fourth Amendment restrictions.

(*Id.* at pp. 117-118.)

Subsequent cases have uniformly followed and applied the holding of *Dean*. In *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, the appellate court approved similar observations from an aircraft flying at an altitude of 1,500 to 2,000 feet. The appellate court in *People v. St. Amour* (1980) 104 Cal.App.3d 886 approved an aircraft overflight of a mountain slope in a deserted area at 1,000 to 1,500 feet. And in *People v. Joubert* (1981) 118 Cal.App.3d 637 overflight of a rural parcel of land by airplane at 800 to 1,100 feet was approved by the appellate court. (*Id*. at p. 647.)

As noted in *Dean* the analysis is the same for helicopters, although the minimum approved altitudes may be different. In *Florida v. Riley* (1989) 488 U.S. 445, and *People v. McKim* (1989) 214 Cal.App.3d 766, for example, each court approved helicopter overflights at 400 feet, despite the

500 foot minimum altitude for fixed-wing aircraft. And in *People v. Romo* (1988) 198 Cal.App.3d 581, the appellate court upheld observations made from a helicopter flying 500 feet over a residential backyard.

7260.1-No right of privacy in open fields 9/21

The Fourth Amendment expressly recognizes that individuals have a legitimate expectation of privacy in their own homes. The zone of Fourth Amendment protection afforded to a person's home extends only to the "curtilage" defined as "the land immediately surrounding and associated with the home." (*Florida v. Jardines* (2013) 569 U.S. 1, 6 (*Jardines*)] [porch]; see also *Oliver v. United States* (1984) 466 U.S. 170, 180 & fn. 11 (*Oliver*).) It includes "an area adjacent to the home and 'to which the activity of home life extends … .' " (*Collins v. Virginia* (2018) 584 U.S. ___, ___ [138 S.Ct. 1663, 1671, 201 L.Ed.2d 9, 19].) "The close connection between the curtilage and the home means that the curtilage is entitled to the same degree of privacy protection as the home itself." (*People v. Nunes* (2021) 64 Cal.App.5th 1, 6 [closed shed in backyard].)

What lies beyond the boundary of the curtilage is defined as "open fields" that government agents may enter without regard to the constraints imposed by the Fourth Amendment. (*Jardines*, *supra*, 569 U.S. at p. 6; *Oliver*, *supra*, 466 U.S. at pp. 179-180 [secluded farm land growing marijuana]; *Hester v. United States* (1924) 265 U.S. 57; see also *Littlefield v. County of Humboldt* (2013) 218 Cal.App.4th 243, 253.)

The "open fields" doctrine is broader than the term suggests. The area need be neither a "field" nor "open." It includes unoccupied or undeveloped area outside the curtilage. (*Oliver*, *supra*, 466 U.S. at p. 180, fn. 11; *People v. Freeman* (1990) 219 Cal.App.3d 894, 901.) It can also encompass developed areas on the property.

> A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy in regard to observations made there. The officer who walks upon such property so used by the public does not wear a blindfold; the property owner must reasonably expect him to observe all that is visible. In substance the owner has invited the public and the officer to look and to see.

(*Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 629; see also *People v. Williams* (2017) 15 Cal.App.5th 111, 121.)

Finally, it is also important to distinguish that an officer can lawfully look into any area protected by the Fourth Amendment, such as a suspect's home or curtilage, if these observations are made from a location the officer has a right to occupy. (*United States v. Dunn* (1987) 480 U.S. 294, 304; *People v. Channing* (2000) 81 Cal.App.4th 985, 992-994; *People v. Freeman*, *supra*, 219 Cal.App.3d at pp. 901-902.) "In other words, it is not a Fourth Amendment search for a police officer to see an item that is exposed to public view, though the item is within the curtilage of a residence." (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 954.) It is a search under the Fourth Amendment, however, for police officers to enter the curtilage and conduct a physically intrusive search that is beyond the implied customary invitation or license granted by social norms. (*Jardines*, *supra*, 569 U.S. at pp. 8-10 [detectives brought narcotics dog to sniff around porch and front door].)

7260.2-Factors relevant to whether area is curtilage or open field 5/20

"There is no fixed formula for drawing the line between the curtilage and open fields. (*People v. Lieng* (2010) 190 Cal.App.4th 1213, 1222 (*Lieng*).)

> Nonetheless, in *United States v. Dunn* (1987) 480 U.S. 294, 301, the Supreme Court identified four factors (the *Dunn* factors) that are relevant to this determination: (1) "the proximity of the area claimed to be curtilage to the home"; (2) "whether the area is included within an enclosure surrounding the home"; (3) "the nature of the uses to which the area is put"; and (4) "the steps taken by the resident to protect the area from observation by people passing by." The *Dunn* court cautioned that "these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." (*Ibid*.)

(*Lieng*, *supra*, at pp. 1222-1223.)

Application of the first *Dunn* factor, the proximity of the area to the actual dwelling structure, requires a case-by-case inquiry into the nature of the property searched. (*Lieng, supra,* 190 Cal.App.4th at p.1223.) As a general rule, the extent of curtilage on rural properties will be greater than that in a densely populated urban setting. (*Id*. at pp. 1223-1224.) "However, even in rural areas, it is rare for curtilage to extend more than 100 feet beyond the home." (*Id*. at p. 1224.)

Under the second *Dunn* factor, the court considers whether the area searched is included within any enclosure surrounding the home. The boundaries of the curtilage will typically be clearly marked and easily understood. (*Dunn*, *supra*, 480 U.S. at p. 302.) The most commonly encountered lines of demarcation are gates and fences, which are important factors in defining the curtilage. (*Id*. at p. 301, fn. 4; *Lieng*, *supra*, 190 Cal.App.4th at p. 1225.) Even in rural areas, where fences may be absent, natural boundaries such as thick trees or shrubberies may also indicate an area to which the activity of home life extends. (*Lieng*, *supra*.)

The third *Dunn* factor is the nature of the uses to which the area searched, or from which the police observations were made, was put. (*Dunn*, *supra*, 480 U.S. at p. 301.) The question is whether this area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection. (*Ibid*.) Driveways, for example, are generally not part of the curtilage. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1015; *Lieng*, *supra*, 190 Cal.App.4th at p. 1225.)

The fourth and final *Dunn* factor requires the court to consider the steps taken by the resident to protect the area from observation by people passing by. (*Dunn*, *supra*, 480 U.S. at p. 3011; *Lieng*, *supra*, 190 Cal.App.4th at p. 1226.) Depending on the facts, however, a homeowner's reasonable expectation of privacy is not necessarily established simply by the erection of fences. (*Oliver v. United States* (1984) 466 U.S. 170, 182-183 (*Oliver*); *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1501 [six foot fence that office could peer over by standing on tippy toes].) Even an act of trespass by an officer does not necessarily defeat application of the "open fields" doctrine. Thus, any area outside the house and the immediate surrounding area may lawfully be viewed by police officers even if they trespass on fenced or posted property. (*Oliver*, *supra*, 466 U.S. at p. 179, fn. 9.) The "existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated … ." (*United States v. Karo* (1984) 468 U.S. 705, 712-713.) "Rather, the relevant inquiry is whether entry is made into an area impliedly open to the public." (*People v. Chavez*, *supra*, 161 Cal.App.4th at p. 1500.)

7270.1-Use of flashlight is of no constitutional significance 12/09

An officer's use of a flashlight to illuminate the interior of a vehicle or a residence otherwise within the officer's plain view has uniformly been upheld as proper. That the illumination is provided by the officer's flashlight is of no constitutional significance. (*Texas v. Brown* (1983) 460 U.S. 730, 739-740; *People v. Rogers* (1978) 21 Cal.3d 542, 549; see also *People v. Chavez* (2008) 161 Cal.App.4th 1493, 1501; *People v. Capps* (1989) 215 Cal.App.3d 1112, 1123.)

7270.2-Use of binoculars violates no constitutional protection 12/09

In a long series of cases, the California courts have approved of the use of binoculars to enhance an officer's view of activity in an area where there is no reasonable expectation of privacy. (*People v. Cooper* (1981) 118 Cal.App.3d 499, 509; *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, 426; *People v. Vermouth* (1974) 42 Cal.App.3d 353, 361-362.) The appellate court in *People v. Arno* (1979) 90 Cal.App.3d 505, analyzed the constitutional issues raised by this activity and concluded: "So long as that which is viewed … is perceptible to the naked eye …. , the person seen … has no reasonable expectation of privacy in what occurs. Because he has no expectation of privacy, governmental authority may use technological aids to visual … enhancement of whatever type available." (*Id.* at p. 511; similarly, see *People v. Mayoff* (1986) 42 Cal.3d 1302, 1316, and fn. 6 [photographs taken with telephoto lens depicted scale of items as they appeared to the naked eye].)

7270.3-Use of night vision goggles not a "search" under Fourth Amendment 4/11

Law enforcement's use of night vision goggles to enhance their ability to see in the dark does not constitute a "search" in violation of the Fourth Amendment. (*People v. Lieng* (2010) 190 Cal.App.4th 1213,1228.) The use of such night vision technology is not comparable under the Fourth Amendment to using thermal imaging devices. (*Ibid*.; distinguish *Kyllo v. United States* (2001) 533 U.S. 27.)

> First, night goggles are commonly used by the military, police and border patrol, and they are available to the general public via Internet sales. [Citation.] More economical night vision goggles are available at sporting goods stores. [Citation.] Therefore, unlike thermal imaging devices, night vision goggles are available for general public use. [¶] Second, state and federal courts addressing the use of night vision goggles since *Kyllo* have discussed the significant technological differences between the thermal imaging device used in *Kyllo*, and night vision goggles. [Citations.] Night vision goggles do not penetrate walls, detect something that would otherwise be invisible, or provide information that would otherwise require physical intrusion. [Citation.] The goggles merely amplify ambient light to see something that is already exposed to public view. [Citation.] This type of technology is no more "intrusive" than binoculars or flashlights, and courts have routinely approved the use of flashlights and binoculars by law enforcement officials.

(*People v. Lieng*, *supra*, at pp. 1227-1228.)

7280.1-Odor of unlawful substance may supply probable cause 10/21

It is well established that an observation of contraband in plain view provides probable cause. There is no logical distinction between something apparent to the sense of smell and something apparent to the sense of sight or the sense of hearing. (*People v. Mayberry* (1982) 31 Cal.3d 335, 342.) The plain smell of contraband by an experienced officer can supply reasonable cause for a detention and/or probable cause to search. (*People v. Duncan* (1986) 42 Cal.3d 91, 101-104 [probable cause to search]; *People v. Shandloff* (1985) 170 Cal.App.3d 372, 381 [reasonable cause to detain]; *People v. Divito* (1984) 152 Cal.App.3d 11, 14 [probable cause to detain and search].) "If the presence of odors is testified to before [the court and it] finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character." (*Johnson v. United States* (1948) 333 U.S. 10, 13; see also *People v. Benjamin* (1999) 77 Cal.App.4th 264, 273.) But whether or not a closed item can be opened and searched based upon a "plain smell" theory similar to the plain view doctrine remains unsettled in California. (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1241-1243, see also concurring opn. of Justice Liu at pp. 1243-1254.)

7280.2-Odor of cannabis may supply probable cause depending on facts 10/21

Prior to the passage of Proposition 64, effective November 9, 2016, the appellate courts have held the strong odor of marijuana was sufficient to establish probable cause to search. (*United States v. Johns* (1985) 469 U.S. 478, 482; *People v. Cook* (1975) 13 Cal.3d 663, 668-670; *People v. Gale* (1973) 9 Cal.3d 788, 794; *People v. Benjamin* (1999) 77 Cal.App.4th 264, 273-274.) Based upon this odor alone, for example, an officer had probable cause to conduct an immediate warrantless search of the vehicle from which the odor was emitting under the automobile exception. (*People v. Cook*, *supra*, 13 Cal.3d 663; but see *People v. Temple* (1995) 36 Cal.App.4th 1219 [probable cause to search vehicle based on odor of marijuana did not permit search of passenger's pocket].) Proposition 64 partially legalized the possession of small quantities of marijuana. Proposition 64 included Health and Safety Code section 11362.1, subdivision (c) which provides "[c]annabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest." Given other statutory regulations placed on cannabis possession, however, "section 11362.1, subdivision (c) does not apply when the totality of the circumstances gives rise to a fair probability that an existing marijuana regulation was violated … ." (*People v. Johnson* (2020) 50 Cal.App.5th 620, 626, citing *People v. Fews* (2018) 27 Cal.App.5th 553, 563 (*Fews*).) Again drawing from cases involving whether an officer had probable cause to conduct immediate warrantless search of a vehicle from which the odor was emitting under the automobile exception, the test is now whether there is additional evidence which would support probable cause for the officer to believe there exists an unlawful quantity of cannabis or similar crime. (*People v. Moore* (2021) 64 Cal.App.5th 291, 300; *People v. McGee* (2020) 53 Cal.App.5th 796, 804; *People v. Lee* (2019) 40 Cal.App.5th 853, 862.)

7300.1-Plea bargaining requires People's agreement 1/17

Plea bargaining is an acceptable practice, but it relies upon the mutual agreement of the parties and the consent of the court. " '[P]lea negotiations and agreements are an accepted and "integral component of the criminal justice system and essential to the expeditious and fair administration of our courts." [Citations.] Plea agreements benefit that system by promoting speed, economy, and the finality of judgments. [Citations.]' " (*People v. Feyrer* (2010) 48 Cal.4th 426, 436-437.)

> The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. [Citation.] This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment [citation], by the People's acceptance of a plea to a lesser offense than that charged, either in degree [citations] or kind [citation], or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the "bargain" worked out by the defense and prosecution. [Citations.] But implicit in all of this is a process of "bargaining" between the adverse parties to the case—the People represented by the prosecutor on one side, the defendant represented by his counsel on the other—which bargaining results in an agreement between them.

(People v. Orin (1975) 13 Cal.3d 937, 942-943 (*Orin*).)

A prosecutor is not obligated to make a plea bargain offer. (*People v. Trejo* (2011) 199 Cal.App.4th 646, 655.) There is no constitutional right to a plea bargain. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 561.)

> Moreover, plea bargaining is governed by principles of contract law (*Mabry v. Johnson* (1984) 467 U.S. 504, 507, abrogated on other grounds in *Puckett v. United States* (2009) 556 U.S. 129), and under contract law, an offer may be revoked by the offeror any time prior to acceptance. (*T.M. Cobb Co. v. Superior Court* (1984) 36 Cal.3d 273, 278.) Thus, a prosecutor may withdraw from a plea bargain, or revoke or withdraw the offer, before the defendant pleads guilty or otherwise detrimentally relies on the bargain. (*People v. Rhoden* (1999) 75 Cal.App.4th 1346, 1352; see also *People v. McClaurin* (2006) 137 Cal.App.4th 241, 248.)

(*People v. Trejo*, *supra*, at pp. 655-656; *Harris v. Superior Ct.* (2016) 1 Cal.5th 984 [prosecution generally cannot have plea bargain set aside due to post-sentencing changes to law favoring the defendant].)

7300.2-Court cannot arbitrarily reject negotiated plea agreement 9/21

"A plea bargain is an agreement negotiated between the defendant and the People and approved by the trial court." (*People v. Superior Court (Sanchez)* (2014) 233 Cal.App.4th 567, 572 (*Sanchez*), citing *People v. Segura* (2008) 44 Cal.4th 921, 931; 929-930 (*Segura*).) "Each party benefits—the People by obtaining a guilty or no contest plea and often an agreed term of imprisonment, and the defendant by obtaining less severe punishment, including in some cases through the dismissal of one or more counts." (*Sanchez*, *supra*, 223 Cal.App.4th at p. 572, citing *Segura*, *supra*, 44 Cal.4th at p. 930.)

The judge, however, retains discretion to not approve a plea agreement negotiated by the parties. (*People v. Loya* (2016) 1 Cal.App.5th 932, 947.) "The trial court's authority to withdraw approval or otherwise reject a plea bargain under Penal Code section 1192.5 is ' "near-plenary." ' [Citations.] " (*People v. Mora-Duran* (2020) 45 Cal.App.5th 589, 595.) "Our Supreme Court has stated that trial courts, when exercising discretion to approve or reject proposed plea bargains, are charged to protect and promote the public's interest in protecting victims of crimes, vigorous prosecution of the accused, and imposing an appropriate punishment." (*People v. Loya*, *supra*, 1 Cal.App.5th at p. 948, citing *In re Alvarnez* (1992) 2 Cal.4th 924, 941.)

> Generally, a trial court may exercise its discretion to withdraw approval of a plea bargain because: (1) it believes the agreement is "unfair" [Citation.]; (2) new facts have come to light; (3) the court has become more fully informed about the case; or (4) when, after further consideration, the court concludes that the agreement is "not in the best interests of society." [Citation.] But this list is not exhaustive. A trial court may, for example, reject a plea bargain when the victim's family protests the agreement. [Citation.]

(*People v. Mora-Duran*, *supra*, 45 Cal.App.5th at pp. 597-598 [punishment for crime lessened after guilty plea depriving the prosecution of the benefit of the bargain].) But a judge's unexplained, arbitrary rejection of a proposed plea agreement is an abuse of discretion. (*People v. Loya*, *supra*, 1 Cal.App.5th at pp. 948-949 [remedy, however, was not specific performance].)

Finally, under no circumstances should the court approve a negotiated plea agreement calling for defendant to be convicted of a crime that is factually impossible. (*People v. Richardson* (2021) 65 Cal.App.5th 360, 371-374 [defendant should not have allowed to plead no contest to human trafficking of a minor for a sex act when the victim was an adult well over the age of 18].)

7300.3-Illegal judicial plea bargain distinguished from proper "indicated sentence" 5/20

"Because the charging function is entrusted to the executive, 'the court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of "plea bargaining" to "agree" to a disposition of the case over prosecutorial objection.' …" (*People v. Clancey* (2013) 56 Cal.4th 562, 570 (*Clancy*), citing *People v. Orin* (1975) 13 Cal.3d 937, 943 (*Orin*).) Instead, all the court can do if a defendant offers to plead guilty to all counts and allegation, is to give an "indicated sentence." (*Clancy*, *supra*, 56 Cal.4th at p. 570.) "In that circumstance, the court may indicate 'what sentence [it] will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea.' [Citation.]" (*People v. Turner* (2004) 34 Cal.4th 406, 418-419.) But "[t]he indicated-sentence procedure is not to be used as a means of indiscriminately disposing of cases at an early stage, even in the face of a crowded court calendar." (*Clancy*, *supra*, 56 Cal.4th at p. 581.)

> Accordingly, a trial court that intends to offer an indicated sentence should not only identify it as such, but should also ensure that the record makes clear the indicated sentence represents the court's best judgment as to the appropriate punishment for this defendant and this offense, regardless of whether guilt is established by plea or at trial. A clear statement that the indicated sentence is no more than the trial court's considered judgment as to the appropriate punishment in the case, regardless of whether defendant is convicted by plea or at trial, will not only clarify the trial court's role in the process but will also aid in appellate review.

(*Id*. at p. 576.)

"The distinction between an unlawful plea bargain and an indicated sentence is not merely a matter of form, however." (*Clancy*, *supra*, 56 Cal.4th at p. 574.) "In examining whether the trial court improperly induced a defendant's plea to what would otherwise be a lawful sentence, the key factual inquiries are whether the indicated sentence was more lenient than the sentence the court would have imposed following a trial and whether the court induced the defendant's plea by bargaining over the punishment to be imposed." (*Id*. at p. 578.)

Finally, the California Supreme Court made clear the limited effect of an indicated sentence:

> To be sure, an indicated sentence is not a promise that a particular sentence *will* ultimately be imposed at sentencing. Nor does it divest a trial court of its ability to exercise its discretion at the sentencing hearing, whether based on the evidence and argument presented by the parties or on a more careful and refined judgment as to the appropriate sentence. As stated above, the utility of the indicated-sentence procedure in promoting fairness and efficiency depends to a great extent on whether the record then before the court contains the information about the defendant and the defendant's offenses that is relevant to sentencing. The development of new information at sentencing may persuade the trial court that the sentence previously indicated is no longer appropriate for this defendant or these offenses. Or, after considering the available information more carefully, the trial court may likewise conclude that the indicated sentence is not appropriate. Thus, even when the trial court has indicated its sentence, the court retains its full discretion at the sentencing hearing to select a fair and just punishment. An indicated sentence does not shift the burden to the People at sentencing to argue against its imposition.

(*Clancy*, *supra*, 56 Cal.4th at pp. 576-577, original italics.)

7300.4-Guidelines to avoid improper indicated sentence 5/20

The California Supreme Court in *People v. Clancy* (2013) 56 Cal.4th 562 (*Clancy*) set forth a number of guidelines to prevent a trial court from engaging in illegal plea bargaining.

> First, in order to preserve the executive's prerogative to conduct plea negotiations, a trial court generally should refrain from announcing an indicated sentence while the parties are still negotiating a potential plea bargain. The " 'horse trading' " between the prosecutor and defense counsel is the process by which the vast majority of criminal cases are disposed. [Citation]" Absent unusual circumstances (see, e.g., *Orin*, *supra*, 13 Cal.3d at p. 949), there is little need for a court to articulate its view of the case until the parties are satisfied that further negotiations are unlikely to be productive. Even then, a trial court may prudently refrain unless the court is convinced the punishment proposed by the People is not an appropriate sanction for the particular defendant and the specific offense or offenses.

Second, a trial court should consider whether the existing record concerning the defendant and the defendant's offense or offenses is adequate to make a reasoned and informed judgment as to the appropriate penalty. The utility of an indicated sentence necessarily depends on the quality of the information available to the court at an early stage concerning the offense and the defendant's criminal history.

Third, "[a] court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right." [Citations.] Because an indicated sentence is merely an instance of "sentencing discretion wisely and properly exercised" (*Orin*, *supra*, 13 Cal.3d at p. 949), the indicated sentence must be the same punishment the court would be prepared to impose if the defendant were convicted at trial. An indicated sentence, properly understood, is not an attempt to induce a plea by offering the defendant a more lenient sentence than what could be obtained through plea negotiations with the prosecuting authority. When a trial court properly indicates a sentence, it has made no *promise* that the sentence will be imposed. Rather, the court has merely disclosed to the parties at an early stage—and to the extent possible—what the court views, on the record then available, as the appropriate sentence so that each party may make an informed decision. …

Fourth, a trial court may not *bargain* with a defendant over the sentence to be imposed. (*People v. Labora* (2010) 190 Cal.App.4th 907, 915-916.) …

(*Clancy*, *supra*, 56 Cal.4th at pp. 574-575, original italics; see also *People v. Avignone* (2017) 16 Cal.App.5th 1233, 1243-1244 [unclear whether court gave proper indicated sentence or engaged in improper plea bargaining but, in any event, court lacked authority to grant the discussed form of leniency]; *People v. Superior Court (Jalalipour)* (2015) 232 Cal.App.4th 1199, 1209 [reversed because judge improperly promised to reduce charge to misdemeanor if the defendant would agree to plead guilty].)

7300.5-Proper remedy if court withdraws approval of plea bargain 1/21

"A plea bargain agreement is in the nature of a contract, and subject to the same rules of construction as other contracts. (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1360 … .)" (*In re Ricardo C.* (2013) 220 Cal.App.4th 688, 696 (*Ricardo C.*); see also *People v. Wright* (2019) 31 Cal.App.5th 749, 754.)

A plea bargain is a contract between the accused and the prosecutor. [Citation.] Both these parties are bound to the terms of the agreement; when the court approves the bargain, it also agrees to be bound by its terms. [Citation.] Both the accused and the People are entitled to the benefit of the plea bargain. (See *People v. Panizzon* (1996) 13 Cal.4th 68, 80 [" 'When a guilty … plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties … must abide by the terms of the agreement.' "].) "When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made." [Citation.]

(*Ricardo C.*, *supra*, 220 Cal.App.4th at p. 698.) Nevertheless:

"[T]he court, upon sentencing, has broad discretion to withdraw its prior approval of a negotiated plea." [Citation.] "Such withdrawal is permitted, for example, in those instances where the court becomes more fully informed about the case [citation], or where, after

> further consideration, the court concludes that the bargain is not in the best interests of society." [Citation.] In deciding whether or not to withdraw approval of a plea bargain, the court may of course "be expected to consult the probation report. …" [Citation.]

(*Id*. at p. 699.) But if the court does withdraw approval of a plea bargain, "the court could not proceed to apply and enforce certain parts of the plea bargain, while ignoring the provision that had been material to the People's agreement to the bargain. The court was therefore constrained to reject the plea bargain, and to restore the parties to their former positions." (*Ibid*.) "In other words, the court should have set aside the plea and reinstated all the [charges and] allegations … ." (*Ibid*.; see, e.g., *People v. Woods* (2017) 12 Cal.App.5th 623, 630-632.) "A trial court exceeds its jurisdiction when it alters the terms of a negotiated plea without the People's consent to make the bargain more favorable to the defendant." (*People v. Superior Court (Sanchez)* (2014) 233 Cal.App.4th 567, 572, citing *People v. Segura* (2008) 44 Cal.4th 921, 931.)

> " 'While no bargain or agreement can divest the court of the sentencing discretion it inherently possesses [citation], a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain. [Citation.] "A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound." [Citations.] Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly. [Citation.] Once the court has accepted the terms of the negotiated plea, "[it] lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree." ' "

(*People v. Stamps* (2020) 9 Cal.5th 685, 701 [despite plea bargain defendant allowed to seek relief based on subsequent ameliorative change in law, but if granted either prosecutor or judge can then set aside the plea bargain]; see also *People v. Barton* (2020) 52 Cal.App.5th 1145, 1159; *People v. King* (2020) 52 Cal.App.5th 783, 791 [plea bargain called for specific sentence]; distinguish *Harris v. Superior Court* (2016) 1 Cal.5th 984, 992 [Proposition 47 changes specifically intended to include plea bargained cases so prosecution could not set aside plea bargain after defendant's felony conviction reduced to misdemeanor].) In *In re K.W.* (2020) 54 Cal.App.5th 467, at the end of the probation term the juvenile court reduced the minor's adjudicated crime from robbery to grand theft from the person. The appellate court reversed because this violated the original negotiated plea agreement.

> The People specifically bargained for the minor to admit one count of robbery. In return, counts alleging kidnapping, brandishing, and vandalism were dismissed, and the People gave up their right to charge two additional robberies. Thus, the minor's admission of robbery was a material term of the plea bargain. Indeed, it was the *only* benefit the People obtained (other than avoiding a trial, which benefited both sides).

(*Id*. at p. 475.)

7300.6-Remedy if later determined negotiated plea was to illegal sentence 5/20

The negotiated plea should be set aside if it is later determined that the parties have negotiated for a sentence unauthorized by law.

> That raises the question of what the trial court should have done under the circumstances, having been apprised that the agreed upon term of 25 years to life is not the statutory punishment for attempted murder. The answer comes from "general contract principles." (See [*People v.*] *Segura* [(2008)] 44 Cal.4th [921] at p. 930.) Because the parties were subject to a mistake of law, the People were entitled to rescind the agreement, which means that the trial court should have granted the prosecution's request to vacate the plea bargain. Expressed another way, the trial court should have withdrawn its approval of the agreement when it recognized the illegality. (See Pen. Code, § 1192.5.)

(*People v. Superior Court (Sanchez)* (2014) 233 Cal.App.4th 567, 573 (*Sanchez*); similarly see *People v. Silva* (2016) 247 Cal.App.4th 578, 591-592 [specific performance barred because legally authorized sentence could not be reached under the circumstances]; but see *People v. Velasquez* (1999) 69 Cal.App.4th 503, 505-507 [sentence reduced to legally authorized prison term because prosecutor blamed for plea bargaining error], decision heavily criticized for not considering contract principles in *Sanchez*, *supra*, 233 Cal.App.4that pp. 574-576.)

7300.7-Unnecessary to advise defendant of collateral consequences of plea 6/17

For a plea of guilty to be valid, the defendant must first be advised of the *primary* and *direct* consequences of the imminent conviction. (*In re Birch* (1973) 10 Cal.3d 314; *People v. Dillard* (2017) 8 Cal.App.5th 657, 664.) This advice is limited to consequences that are directly involved in the ongoing criminal case—it does not include indirect or collateral consequences. (*People v. Dillard*, *supra*, 8 Cal.App.5th at pp. 664-666 [does not include mandatory conditions of probation when plea agreement does not guarantee probation will be granted]; *Ganyo v. Municipal Court* (1978) 80 Cal.App.3d 522, 527, fn. 1; *People v. Searcie* (1974) 37 Cal.App.3d 204, 211.)

Cases have repeatedly held that the potential use of the immediate conviction to enhance a sentence imposed on some possible future conviction is a collateral consequence. The court taking a guilty plea is not required to advise the defendant of this potential collateral consequence. (*People v. Bernal* (1994) 22 Cal.App.4th 1445, 1457; *People v. Wohl* (1990) 226 Cal.App.3d 270, 275; *Carter v. Municipal Court* (1983) 149 Cal.App.3d 184, 190; *Hartman v. Municipal Court* (1973) 35 Cal.App.3d 891.) Nor must a defendant be advised that the plea may result in parole revocation in another case. (*People v. Searcie*, *supra*, 37 Cal.App.3d at p. 211.)

While punishment is a direct consequence, the defendant need not be informed of the possible range of penalties for the admitted charge when the sentence to be imposed has been agreed upon as part of a plea bargain and the stipulated sentence is known to the defendant. (*Scroggins v. Superior Court* (1977) 65 Cal.App.3d 873.)

The court's obligation to advise the defendant of the direct consequences of a guilty plea is not constitutionally compelled. It flows from a judicially declared rule of criminal procedure. (*People v. Walker* (1991) 54 Cal.3d 1013, 1022.) Two things follow. First, "any error in accepting a plea without such advisements may be set aside only if it is reasonably probable that appellant would have entered a different plea had he been properly advised." (*People v. McMillion* (1992) 2 Cal.App.4th 1363, 1370; see *People v. McClellan* (1993) 6 Cal.4th 367, 378-381; *In re Moser* (1993) 6 Cal.4th 342, 351-352; *People v. Walker*, *supra*, 54 Cal.3d at pp. 1022-1023; see also

People v. Avila (1994) 24 Cal.App.4th 1455, 1459-1460.) And second, any error is waived absent a timely objection. (*People v. McClellan*, *supra*, at pp. 377-378; *People v. Walker*, *supra*, at p. 1023; *People v. Wrice* (1995) 38 Cal.App.4th 767, 770-771.)

7300.8-Plea to misdemeanor entered through counsel is valid 12/09

In *Mills v. Municipal Court* (1973) 10 Cal.3d 288, the defendant had completed and signed a change-of-plea document in a misdemeanor driving under the influence case and sought to enter the plea through counsel. The trial court refused to accept the plea. The California Supreme Court held that the trial court should have accepted the guilty plea tendered by counsel. The court examined the change-of-plea form and found it to be understandable to the average layperson. Further, it required "personal 'participation' by the defendant so as to insure that he actually read the form." (*Id.* at p. 305.) The form listed the defendant's *Boykin-Tahl* rights and the consequences of a guilty plea. And the defendant's attorney signed the bottom of the form attesting that the defendant had personally completed the form and had knowingly and voluntarily waived his *Boykin-Tahl* rights. The court held: "Our conclusion that a guilty plea entered through counsel is valid so long as it is accompanied by an adequately documented showing that the defendant was aware of his constitutional rights and knowingly and intelligently waived them harmonized the interests underlying the *Boykin-Tahl* rule, on the one hand, and the defendant's statutory right to appear through counsel, on the other." (*Ibid*.; see also *People v. Matthews* (1983) 139 Cal.App.3d 537, 541.)

7370.1-General standard for motion to withdraw plea of guilty 5/20

A defendant may move to withdraw a previously entered guilty plea at any time before judgment only for good cause. (Pen. Code, § 1018.) Under Penal Code section 1018 the defendant can also bring the motion within six months of the date sentence is suspended and probation is granted. (*People v. Superior Court (Rodas)* (2017) 10 Cal.App.5th 1316, 1324-1326 [trial court lacks jurisdiction to grant motion brought more than six months after order suspending imposition of judgment and granting probation]; distinguish *People v. Williams* (2011) 199 Cal.App.4th 1285 [but not if probation is granted after sentence is imposed and its execution stayed].)

The defendant must show such good cause under Penal Code section 1018 by a strong showing of clear and convincing evidence. (*People v. Patterson* (2017) 2 Cal.5th 885, 894; *People v. Cruz* (1974) 12 Cal.3d 562, 566; see also *People v. Nocelotl* (2012) 211 Cal.App.4th 1091, 1096 (*Nocelotl*); *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456-1457.) "When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors necessary to bring about a just result." (*People v. Shaw* (1998) 64 Cal.App.4th 492, 495-496; see also *Nocelotl*, *supra*, 211 Cal.App.4th at p. 1096; *People v. Sandoval* (2006) 140 Cal.App.4th 111, 123; *People v. Weaver* (2004) 118 Cal.App.4th 131, 146 (*Weaver*).)

In determining whether its ruling will "promote justice," the court is required to also consider the rights of the People. (*People v. Waters* (1975) 52 Cal.App.3d 323, 331.) Withdrawal of a guilty plea results in inconvenience as well as expense to the state and should not be granted lightly. (*Ibid*.) "Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged." (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103; see also *Weaver*, *supra*, 118 Cal.App.4th at p. 146.)

The court is not bound to give full credence to the statements of a defendant in support of a motion to withdraw a plea, even if not contradicted, in view of the defendant's obvious interest in the outcome of the proceeding. (*People v. Hunt*, *supra*, 174 Cal.App.3d at p. 103; *People v. Beck* (1961) 188 Cal.App.2d 549, 553.) In addition, the court can take into account its own recollection as to defendant's mental and physical state at the time of the guilty plea in assessing defendant's later claim the plea was involuntary due to a medical condition. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254; *People v. Ravaux* (2006) 142 Cal.App.4th 914, 918.)

A motion under Penal Code section 1018 is addressed to sound judicial discretion, and the trial court's decision will not be an abuse of discretion unless it exceeds the bounds of reason. (*Mendieta v. Municipal Court* (1980) 109 Cal.App.3d 290, 294; *People v. Waters*, *supra*, 52 Cal.App.3d at p. 328; *People v. McDonough* (1961) 198 Cal.App.2d 84, 90.) The failure to state reasons for denying a motion to withdraw a guilty plea may be an abuse of discretion. (*People v. Perez* (2015) 233 Cal.App.4th 736, 742.) "A denial without any statement of a reason provides no reasonable basis for the denial." (*Id*. at p. 739.) On appeal, the trial court's decision will be upheld unless there is a clear showing of abuse of discretion. (*People v. Patterson*, *supra*, 2 Cal.5th at p. 894; see also *Nocelotl*, *supra*, 211 Cal.App.4th at p. 1096, *Weaver*, *supra*, 188 Cal.App.4th at pp. 146.)

7370.2-Good cause to withdraw guilty plea defined 5/20

Good cause for withdrawing a guilty plea exists when the defendant acted under mistake, ignorance, or any other factor (e.g., duress, fraud, or inadvertence) overcoming the exercise of free judgment. (*People v. Patterson* (2017) 2 Cal.5th 885, 894; *People v. Cruz* (1974) 12 Cal.3d 562, 566; see also *People v. Nocelotl* (2012) 211 Cal.App.4th 1091, 1096 (*Nocelotl*).) "The defendant must also show prejudice in that he or she would not have accepted the plea bargain had it not been for the mistake. (*In re Moser* (1993) 6 Cal.4th 342, 352.)" (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416; see also *People v. Archer* (2014) 230 Cal.App.4th 693, 706; *Nocelotl*, *supra*, 211 Cal.App.4th at pp. 1097-1098.)

Good cause does not exist just because the defendant's mind has changed. (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208; *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.) Nor is a guilty plea considered involuntary simply because the defendant was persuaded, perhaps reluctantly, by his attorney or others, to do so. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919; *People v. Urfer* (1979) 94 Cal.App.3d 887, 892.) Even bad advice by an attorney, absent an allegation of state involvement, does not necessarily establish good cause. (*Nocelotl*, *supra*, 211 Cal.App.4th at p. 1096) Finally, good cause does not exist if the defendant refuses to uphold his portion of the bargain, such as refusing to enter deferred entry of program (i.e., drug court). (*People v. Alexander* (2015) 233 Cal.App.4th 313, 317-318.) "A defendant gets the benefit of a plea bargain once, and once spent, it is gone forever." (*Ibid*.) "A defendant's manipulative conduct does not constitute good cause to withdraw a plea." (*Id*. at p. 318.)

An example of good cause is when evidence favorable to the defense (*Brady v. Maryland* (1963) 373 U.S. 83) is not timely provided *before* the guilty plea. (*People v. Ramirez* (2006) 141 Cal.App.4th 1501, 1506 ["supplemental report identified new defense witnesses, potentially reduced appellant's custody exposure, and provided possible defenses to several charges, thereby casting the case against him in an entirely different light"].) But if the favorable evidence does not exist or is

not discovered until *after* the defendant enters the guilty plea, the court may find no good cause exists to withdraw the pleas. (See, e.g., *People v. Breslin*, *supra*, 205 Cal.App.4th at p. 1416-1417 [victim's recantation came to light after guilty plea].)

7370.3-*Arbuckle* not applicable to every plea bargain 10/20

In *People v. Arbuckle* (1978) 22 Cal.3d 749 (*Arbuckle*), the California Supreme Court held that it is an implied term of a plea bargain involving sentencing discretion that the judge who accepts the plea bargain will be the judge to impose sentence. (*Id*. at pp. 756-757.)

> As a general principle, moreover, whenever a judge accepts a plea bargain and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge. Because of the range of dispositions available to a sentencing judge, the propensity in sentencing demonstrated by a particular judge is an inherently significant factor in the defendant's decision to enter a guilty plea.

(*Ibid*.; see also *K.R. v. Superior Court* (2017) 3 Cal.5th 295 [*Arbuckle* applies to juvenile disposition hearings].) Thus, generally a defendant is entitled either to be sentenced by that same judge or, if that is not possible, to withdraw his or her guilty plea. (*Id*. at p. 757; see also *People v. Dunn* (1986) 176 Cal.App.3d 572, 574-575.)

The *Arbuckle* right is not absolute. "Even after *Arbuckle*, however, parties to a plea agreement—i.e., the pleading defendant and the prosecuting attorney—remained free to chart a different course by making explicit on the record that the defendant did not care if the same judge pronounced sentence. To do so, the prosecutor need only secure, at the time the plea is accepted, what has come to be known as an '*Arbuckle* waiver.' [Citations.]" (*K.R. v. Superior Court*, *supra*, 3 Cal.5th at p. 306.) "Should the People wish to allow a different judge to preside at sentencing (or, in juvenile cases, disposition), they should seek to obtain a waiver from the pleading defendant or juvenile." (*Id*. at p. 312.)

Another recognized exception to *Arbuckle* is when the original judge is unavailable. (*K.R. v. Superior Court*, *supra*, 3 Cal.5th at p. 311 ["a showing of more than mere inconvenience is necessary before a judge can be deemed unavailable"]; see *People v. Dunn*, *supra*, 176 Cal.App.3d at p. 575 [retirement].) "*Arbuckle* and the cases applying it [citations] involve situations where the original judge was unavailable for sentencing due to internal administrative scheduling problems. *Arbuckle* speaks only of such situations and it is doubtful whether its mandate would apply when, as here, the judge is unavailable due to his death." (*People v. Watson* (1982) 129 Cal.App.3d 5, 7 [dicta]; see also *People v. Jackson* (1987) 193 Cal.App.3d 393, 403 [dicta, judge had become disabled and was unlikely to return to court]; but see *People v. Letteer* (2002) 103 Cal.App.4th 1308, 1315-1318.)

> Given these principles and the fact that sentencing by the original judge is an implied term of the plea bargain and represents an inherently important factor in the decision to enter a plea bargain, we conclude that sentencing by a different judge constitutes a significant deviation *regardless* of whether unavailability is due to matters within or outside the court's control. Certainly from the defendant's point of view, sentencing by a different judge does not become an insignificant deviation simply because unavailability is due to retirement rather than an administrative transfer.

(*People v. Letteer*, *supra*, 103 Cal.App.4th at p. 1317.)

Another exception is when by the terms of the plea agreement, there is essentially no discretion left to the sentencing judge. (Distinguish *Arbuckle*, *supra*, 22 Cal.3d at p. 756 ["whenever a judge accepts a plea bargain *and retains sentencing discretion* under the agreement, an implied term of the bargain is that sentence will be imposed by that judge" (italics added)].)

Finally, there is a split of authority whether the *Arbuckle* right can be forfeited by the defendant's failure to assert it at the time of sentencing. (*People v. Cardenas* (2020) 53 Cal.App.5th 102, 124-127 [forfeited]; *People v. Bueno* (2019) 32 Cal.App.5th 342, 347-350 [not forfeited].)

7380.1-PC1016.5 relief can only be granted upon proper showing 8/20

Penal Code section 1016.5, subdivision (a), provides:

> Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

The required advisement must be given at the time of guilty plea. (*People v. Akhile* (2008) 167 Cal.App.4th 558, 564.) But, other than the three major immigration consequences specified above, there is no need to specifically warn a defendant about other potential negative consequences such as the ability to seek asylum or request cancellation of removal. (*People v. Arendtsz* (2016) 247 Cal.App.4th 613, 619.)

"To prevail on a section 1016.5 motion, a defendant must establish (1) that the advisements were not given; (2) that the conviction may result in adverse immigration consequences; and (3) that the defendant would not have pled guilty or no contest had proper advisements been given. (*People v. Martinez* (2013) 57 Cal.4th 555, 558-559.)" (*People v. Arriaga* (2014) 58 Cal.4th 950, 957-958; see also *People v. Totari* (2002) 28 Cal.4th 876, 884; *People v. Superior Court* (*Zamudio)* (2000) 23 Cal.4th 183, 192, 199-200.)

Finally, "[t]he defendant also bears the burden of proving reasonable diligence in bringing the motion." (*People v. Asghedom* (2015) 243 Cal.App.4th 718, 724.) A motion to vacate under Penal Code section 1016.5 should be denied if the defendant delayed too long in bringing the motion. (*People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th at p. 204; *People v. Akhile*, *supra*, 167 Cal.App.4th at p. 565; *People v. Totari* (2003) 111 Cal.App.4th 1202, 1208-1209.) But even if timely, the motion under Penal Code section 1016.5 may be denied under the doctrine of laches if, as a result of the passage of time, the People are prejudiced in their ability to respond on the merits. (*People v. Superior Court (Zamudio)*, *supra*, 23 Cal.4th at p. 204.) And a defendant who is not eligible for relief under Penal Code section 1016.5 may still be entitled to withdraw his or her plea by making a timely motion under Penal Code section 1018. (*People v. Patterson* (2017) 2 Cal.5th 885, 895-899.)

7380.1a-PC1016.5 nonadvisement requirement 5/20

As to the first element required to obtain Penal Code section 1016.5 relief—nonadvisement—the defendant can establish a rebuttal presumption of nonadvisement if a proper advisement is not shown in the court record. (Pen. Code, § 1016.5, subd. (b); *People v. Arriaga* (2014) 58 Cal.4th 950, 961.) The burden then shifts to the prosecution to establish by a preponderance of evidence that the proper advisement was given. (*Id*. at p. 962.) "The advisement need not be in the exact language of section 1016.5 and can be in writing. Substantial compliance is all that is required." (*People v. Araujo* (2016) 243 Cal.App.4th 759, 762 [rejecting argument advisement inadequate because not given verbally by judge and change of plea form was misleading by including surplus language regarding aggravated felonies"].) But even if it is not proved that a proper advisement was given, a defendant's knowledge from other sources that some negative deportation consequences may flow from conviction remains relevant to the question of prejudice. (*People v. Akhile* (2008) 167 Cal.App.4th 558, 565.) Thus, a proper advisement given at an earlier hearing, such at an earlier arraignment, "may be a significant factor" negating the prejudice of the court's failure to give the required advisement at the time of the guilty pleas. (*Ibid*.)

7380.1b-PC1016.5 adverse immigration consequence requirement 5/20

As to the second element required to obtain Penal Code section 1016.5 relief, it must be shown that "there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences … ." (*People v. Totari* (2002) 28 Cal.4th 876, 884; see also *People v. Asghedom* (2015) 243 Cal.App.4th 718, 724; *People v. Dubon* (2001) 90 Cal.App.4th 944, 951-952.) The only "specified adverse immigration consequences" are "deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (Pen. Code, § 1016.1, subd. (a).)

7380.1c-PC1016.5 prejudice test 5/20

The third element justifying Penal Code section 1016.5 relief—the prejudice test—requires the defendant to show it is "reasonably probable he would not have pleaded guilty or nolo contendere if properly advised." (*People v. Totari* (2002) 28 Cal.4th 876, 884; see also *People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244.) Prejudice is also shown if the defendant establishes he or she would have "would have rejected the existing plea bargain to attempt to negotiate a bargain that would not result in deportation, a denial of naturalization, or exclusion from admission to the United States." (*People v. Martinez* (2013) 57 Cal.4th 555, 559.) "To establish prejudice, defendant must show that he would not have entered into the plea bargain if properly advised—a decision that might be based either on the desire to go to trial or on the hope or expectation of negotiating a different bargain without immigration consequences." (*Id*. at p. 567.)

> [T]he defendant bears the burden of establishing prejudice. [Citation.] To that end, the defendant must provide a declaration or testimony stating that he or she would not have entered into the plea bargain if properly advised. It is up to the trial court to determine whether the defendant's assertion is credible, and the court may reject an assertion that is not supported by an explanation or other corroborating circumstances.

(*Id*. at p. 565.) "In sum, we hold that section 1016.5 relief may be granted if the court is convinced the defendant, if properly advised, would have rejected an existing plea offer in the hope or

expectation that he or she might thereby negotiate a different bargain or, failing in that, go to trial." (*Id*. at p. 567.)

It is not relevant to the question of prejudice under Penal Code section 1016.5 whether the defendant would have likely obtained a more favorable outcome had he or she refused to plead guilty. (*People v. Martinez, supra*, 57 Cal.4th at pp. 559, 564.) "The test for prejudice thus considers what the defendant would have done, not whether the defendant's decision would have led to a more favorable result." (*Id*. at p. 562.)

> This is not to suggest the probability of obtaining a more favorable outcome is irrelevant. To the contrary, a defendant's assessment of the strength of the prosecution's case in relation to his or her own case is often a factor, and undoubtedly sometimes the determinative factor, in the decision to accept or reject a plea offer. … [T]he test for prejudice considers what the defendant would have done, that a more favorable result was not reasonably probable is only one factor for the trial court to consider when assessing the credibility of a defendant's claim that he or she would have rejected the plea bargain if properly advised.

(*Id*. at p. 564.)

> [I]n determining the credibility of a defendant's claim, the court in its discretion may consider factors presented to it by the parties, such as the presence or absence of other plea offers, the seriousness of the charges in relation to the plea bargain, the defendant's criminal record, the defendant's priorities in plea bargaining, the defendant's aversion to immigration consequences, and whether the defendant had reason to believe that the charges would allow an immigration-neutral bargain that a court would accept.

(*Id*. at p. 568; see also *People v. Asghedom* (2015) 243 Cal.App.4th 718, 725-726.)

7380.2-PC1016.5 relief cannot be grounded on improper advice by lawyer 7/19

A motion to vacate a conviction and set aside a guilty plea under Penal Code section 1016.5 may not be granted on the grounds that the defendant's lawyer gave improper advice regarding the immigration consequences of the plea. (*People v. Kim* (2009) 45 Cal.4th 1078, 1107, fn. 20; *People v. Limon* (2009) 179 Cal.App.4th 1514, 1519; *People v. Chien* (2008) 159 Cal.App.4th 1283, 1285.) By its terms Penal Code section 1016.5 provides a remedy only for the trial court's failure to provide the defendant with the required statutory advisements regarding the potential immigration consequences of a guilty plea. (*People v. Chien*, *supra*, 159 Cal.App.4th at p. 1288.)

> We find no basis to conclude that the statute grants the trial court broad authority to vacate a conviction based on any error or deficiency of counsel related to advisement of adverse immigration consequences. We therefore agree that the court lacked jurisdiction to address a claim of ineffective assistance of counsel in the context of a section 1016.5 motion. This ruling is likely to leave defendant without a remedy; a claim of ineffective assistance of counsel generally is not a proper basis for a petition for writ of error *coram nobis,* the time for appeal of the judgment has long since passed, and defendant is no longer in custody for purposes of a writ of habeas corpus. [Citations.] Although unfortunate, the lack of an available remedy is not a sufficient basis to extend the applicability of an express, statutory remedy.

(*Id*. at pp. 1290-1291, fn. omitted; see also, *People v. Limon*, *supra*, 179 Cal.App.4th at p. 1519.)

> Section 1016.5 addresses only the duty of trial courts to advise the defendant of the immigration consequences of the plea, and it empowers the court to vacate a conviction and set aside a plea only for the *court's* failure to fulfill that duty. It does not address any duty that defense counsel may have to provide such advice, nor does it empower the court to vacate a conviction or set aside a plea for counsel's failure to fulfill his or her duty in that regard. For that reason, section 1016.5 does not provide the trial court with jurisdiction to address a claim that a defendant was deprived of the effective assistance of counsel by counsel's failure to fully advise him or her of the immigration consequences of a guilty plea.

(*People v. Aguilar* (2014) 227 Cal.App.4th 60, 71, italics in original.)

To prevail on a claim of improper advice of counsel regarding the immigration consequences of pleading guilty versus going to trial, a defendant must seek other forms of applicable relief. (See, e.g., Pen. Code, § 1473.7; *Lee v. United States* (2017) 582 U.S. ___ [137 S.Ct. 1958, 198 L.Ed.2d 476]; *Padilla v. Kentucky* (2010) 559 U.S. 356; *People v. Patterson* (2017) 2 Cal.5th 885; *In re Hernandez* (2019) 33 Cal.App.5th 530; *People v. Aguilar* (2014) 227 Cal.App.4th 60.)

7380.3-PC1473.7(a)(1) motion to vacate re: immigration consequences requirements 7/21

Penal Code section 1473.7, subdivision (a)(1) (§ 1473.7(a)(1)) allows a defendant to make a motion to vacate a conviction and set aside a guilty or no contest plea "due to prejudicial error damaging the [defendant's] ability to meaningfully understand, defend against, or knowingly accept the actual or potential consequences of [the plea]" whether or not based on faulty legal advice regarding the immigration consequences of the plea. (See also *People v. Mejia* (2019) 36 Cal.App.5th 859, 871.)

Section 1473.7(a)(1) relief is available to defendants facing a variety of immigration consequences in addition to removal. (*People v. Morales* (2018) 25 Cal.App.5th 502.) Relief is available retroactively to include defendants who pled guilty before the effective date of section 1473.7. (*People v. Espinoza* (2018) 27 Cal.App.5th 908, 912-913; *People v. Tapia* (2018) 26 Cal.App.5th 942, 949 (*Tapia*); *People v. Perez* (2018) 19 Cal.App.5th 818, 824-828.) Defendants whose motion was denied under the older version of section 1437.7(a)(1), may be entitled to renew their motion under the more lenient current version of the statute. (*People v. Ruiz* (2020) 49 Cal.App.5th 1061.) The statute only applies to guilty or no contest pleas, it is inapplicable to probation violation admissions. (*People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 221.)

The motion to vacate a conviction can only be made by a criminal defendant "who is no longer in criminal custody." (Subd. (a) of § 1473.7.) Thus, a person on parole cannot make a motion under section 1473.7(a)(1). (*People v. DeJesus* (2019) 37 Cal.App.5th 1124, 1131-1132.) Also a person still on probation cannot make a motion under section 1473.7(a)(1). (*People v. Cruz-Lopez*, *supra*, 27 Cal.App.5th at p. 221.) "The statute seems applicable after other and more traditional collateral relief measures are not available. Generally, a petition for writ of habeas corpus or section 1016.5 relief are the means available to an appellant who is in custody or restrained and wishes to withdraw his plea because he was not advised of immigration consequences of his plea." (*Id*. at p. 220, fn. omitted.)

A section 1473(a)(1) motion has a due diligence requirement.

> The motion must be made with "reasonable diligence" after the party receives notice of pending immigration proceedings or a removal order. (§ 1473.7, subd. (b).) The court must hold a hearing on the motion, and if the moving party establishes by a preponderance of the evidence that he or she is entitled to relief, the court must allow the person to withdraw his or her plea. (§ 1473.7, subd. (e).)

(*People v. Perez*, *supra*, 19 Cal.App.5th at p. 824; see *People v. Rodriguez* (2019) 38 Cal.App.5th 971, 978-980 [petition filed 7 months after § 1473.7 became effective was timely].)

The defendant has the right to be present, and under certain circumstances be appointed counsel, at a section 1473.7(a)(1) hearing. (*People v. Rodriguez*, *supra*, 38 Cal.App.5th at pp. 980-984; *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 983.)

7380.4-PC1473.7(a)(1) requires prejudicial error re: immigration consequences 7/21

A motion to vacate a conviction pursuant to Penal Code section 1473.7, subdivision (a)(1) (§ 1473.7(a)(1)) may be granted on the ground: "The conviction or sentence is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere."

> [S]howing prejudicial error under section 1473.7, subdivision (a)(1) means demonstrating a reasonable probability that the defendant would have rejected the plea if the defendant had correctly understood its actual or potential immigration consequences. When courts assess whether a petitioner has shown that reasonable probability, they consider the totality of the circumstances. [Citation.] Factors particularly relevant to this inquiry include the defendant's ties to the United States, the importance the defendant placed on avoiding deportation, the defendant's priorities in seeking a plea bargain, and whether the defendant had reason to believe an immigration-neutral negotiated disposition was possible.

(*People v. Vivar* (2021) 11 Cal.5th 510, 529-530 [objective evidence supported defendant's claim he would not have entered guilty plea if he knew it would lead to his deportation].)

To establish "prejudicial error" based on a claim of inadequate advice of defense counsel, the defendant need not meet the *Strickland* criteria. (*People v. Mejia* (2019) 36 Cal.App.5th 859, 870-871; *People v. Camacho* (2019) 32 Cal.App.5th 998, 1005-1009 (*Camacho*).)

> [W]e agree with the *Camacho* court's analysis that the focus of the inquiry in a section 1473.7 motion is on the "*defendant's own error* in … not knowing that his plea would subject him to mandatory deportation and permanent exclusion from the United States." (See *Camacho*, *supra*, 32 Cal.App.5th at p. 1009, italics added.) [¶] We also agree with the *Camacho* court as to the prejudice component of the amended statute. That is, a "prejudicial error" occurs under section 1473.7 when there is a *reasonable probability* that the person would not have pleaded guilty—and would have risked going to trial (even if only to figuratively throw a "Hail Mary")—had the person known that the guilty plea would result in mandatory and dire immigration consequences.

(*People v. Mejia*, *supra*, 36 Cal.App.5th at p. 871, italics in original.) In short, "[t]o show prejudice, a person must show 'by a preponderance of evidence that he would never have entered the plea if he had known that it would render him deportable.' [Citations.]" (*People v. DeJesus* (2019) 37 Cal.App.5th 1124, 1133 (*DeJesus*).) The appellate court in *DeJesus* denied section 1473.7(a)(1)

relief because, among other things, the evidence showed defendant's reluctance to plead guilty based on belief he was not guilty rather than upon his deportability. (*Id*. at p. 1137.)

Courts should look to contemporaneous evidence to substantiate a defendant's claim of improper advice by counsel. (*DeJesus*, *supra*, 37 Cal.App.5th at p. 1134.) Bare allegations of improper advice or inadequate understanding of the immigration consequences of a guilty plea do not meet the "preponderance of the evidence" standard of relief when the record of conviction refutes such claims.

> Simply put, the record belies Perez's contention that he did not meaningfully understand the immigration consequences of his plea. Although Perez did not speak English, a Spanish interpreter was provided for him. That interpreter stated that she translated the entire plea form for Perez. The plea form translated for Perez, initialed and signed on Perez's behalf, indicated that his guilty plea could result in his deportation. It also indicated that if he pled guilty to certain enumerated crimes (such as felony possession of any controlled substance), he would be deported. In other words, the plea form, translated by an interpreter for Perez and explained to Perez by his attorney and the interpreter, informed him that he would be deported if he pled guilty. Further, and more importantly, the superior court explicitly informed Perez that if he were to plead guilty, he would be deported from the United States. The court was unequivocal about the immigration consequences of a guilty plea, reiterating that the federal government would not allow Perez to become a citizen of the United States. This was not a situation where the court informed a defendant that there was "a high likelihood" that he would face deportation. [Citation.] The court below left no doubt. Perez would be deported if he pled guilty. This is the only evidence in the record that is contemporaneous to Perez's guilty plea.

(*People v. Perez* (2018) 19 Cal.App.5th 818, 829-830; accord *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1117; but see *People v. Espinoza* (2018) 27 Cal.App.5th 908, 914-918 [requirements of § 1473.7(a)(1) met because neither the judge nor defense counsel informed the defendant that deportation was mandatory for the offense he admitted]; accord *Camacho*, *supra*, 32 Cal.App.5th at pp. 1011-1012 ["We conclude that as defendant showed by a preponderance of evidence that he would never have entered the plea if he had known that it would render him deportable, the errors which damaged his ability to meaningfully understand, defend against, or knowingly accept the adverse immigration consequences of a plea were prejudicial."]; see also *People v. Rodriguez* (2021) 60 Cal.App.5th 995, 1003-1005.)

7380.5-PC1473.7(a)(1) failure to seek immigration-neutral disposition theory 5/20

A motion to vacate a conviction under Penal Code section 1473.7 may be grounded on defense counsel's failure to seek an "immigration-neutral disposition," but for relief to be considered the motion must identify a disposition "to which the prosecutor was reasonably likely to agree." (*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1118 [not shown]; but see *People v. Bautista* (2004) 115 Cal.App.4th 229, 238-242 [sufficient showing made in a habeas petition to justify issuing an order to show cause].)

> Substantial evidence supports the trial court's finding Tapia was advised of the immigration consequences of his plea. Tapia's self-serving claim to the contrary has no support in the record. Furthermore, there is no evidence, only speculation, that an "immigration safe" plea could have been negotiated and the trial court found there was no

> evidence the People would have agreed to a plea with lesser immigration consequences. Also, there was no factual basis for a plea to an offense with lesser immigration consequences. Finally, [trial counsel's] declaration states he considered Tapia's immigration status in negotiating a plea.

(*People v. Tapia* (2018) 26 Cal.App.5th 942, 955; accord *People v. DeJesus* (2019) 37 Cal.App.5th 1124, 1136.)

7380.6-PC1473.7(a)(2) motion to vacate for actual innocence requirements7/20

Penal Code section 1473.7, subdivision (a)(2), provides in pertinent part that "[a] person who is no longer in criminal custody may file a motion to vacate a conviction" on the basis that "[n]ewly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matter of law or in the interests of justice."

"Newly discovered evidence" is defined "as testimony, writings and similar things described in Evidence Code section 140 (which defines 'evidence'), discovered after trial or judgment, and that with reasonable diligence could not have been discovered earlier." (*People v. Perez* (2020) 47 Cal.App.5th 994, 999.) "The publication of a new appellate opinion is not newly discovered evidence as that term is used in section 1473.7, subdivision (a)(2)." (*People v. Perez* (2020) 47 Cal.App.5th 994, 999.)

A motion based on newly discovered evidence must be filed "without undue delay from the date the moving party discovered, or could have discovered with the exercise of due diligence, the evidence that provides a basis for relief under this section." (Pen. Code, § 1473.7, subd. (c).)

Penal Code section 1473.7, subdivision (e)(1), provides in part that "[t]he court shall grant the motion to vacate the conviction ... if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)." Thus, the defendant has the burden to demonstrate entitlement to relief under Penal Code section 1473.7, subdivision (a)(2). (*People v. Perez* (2018) 19 Cal.App.5th 818, 829.)

7380.7-PC1473.7 appellate review standard 7/21

Rulings on motions made pursuant to Penal Code section 1473.7 are subject to independent review on appeal. (*People v. Vivar* (2021) 11 Cal.5th 510, 523-528.) The appellate court accords deference to the trial court's factual findings if based on the judge's own observation after taking evidence or determining credibility. (*Id*. at p. 527; see also *People v. Tapia* (2018) 26 Cal.App.5th 942, 948-951.)

> Where, as here, the facts derive entirely from written declarations and other documents, however, there is no reason to conclude the trial court has the same special purchase on the question at issue; as a practical matter, "[t]he trial court and this court are in the same position in interpreting written declarations" when reviewing a cold record in a section 1473.7 proceeding. [Citation.] Ultimately it is for the appellate court to decide, based on its independent judgment, whether the facts establish prejudice under section 1473.7.

(People v. Vivar, *supra*, 11 Cal.5th at p. 528, fn. omitted.)

7400.1-Magistrate's bindover standard at preliminary hearing is probable cause 4/20

The standard of proof at a preliminary hearing is "probable cause, i.e., a '*reasonable suspicion* that a public offense [has] been committed in which the defendant [has] participated.' (*People v. Jablon* (1957) 153 Cal.App.2d 456, 459, italics added.)" (*People v. Bautista* (2014) 223 Cal.App.4th 1096, 1103.) "All a magistrate needs to find to hold a defendant to answer is probable cause, or ' "such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." ' [Citation.]" (*Hudson v. Superior Court* (2017) 7 Cal.App.5th 999, 1006; see also *People v. McCann* (2019) 41 Cal.App.5th 149, 154-155.) In addition, a superior court judge sitting as a magistrate during a preliminary hearing has a "limited role in making credibility determinations." (*People v. Bautista*, *supra*, 223 Cal.App.4th at p. 1102; see also *Zemek v. Superior Court* (2020) 44 Cal.App.5th 535, 546.)

> In performing its role at the probable cause hearing, … the superior court may evaluate the validity of any evidence presented by an expert, as well as judge the credibility of any expert witness who testifies at the hearing. Any credibility determination to be made at the probable cause stage, however, whether in a civil or criminal proceeding, is a gross and unrefined one. The superior court should not find an absence of probable cause simply because it finds the defense witnesses slightly more persuasive than the prosecution witnesses. Rather, to reject the prosecution evidence at the probable cause stage, either the evidence presented must be inherently implausible, the witnesses must be conclusively impeached, or the demeanor of the witnesses must be so poor that no reasonable person would find them credible. Thus, if the prosecution presents evidence a reasonable person could accept over that presented by the defense, probable cause should be found. The superior court may not substitute its own personal belief as to the ultimate determination to be made at trial for that of a reasonable person evaluating the evidence.

(*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 257-258.)

7410.1-10-court day limit of PC859b can be extended for good cause 9/20

Penal Code section 859b (§ 859b) "provides that a criminal defendant has a right to a preliminary hearing within 10 court days of the arraignment or plea, unless the parties waive this right or the court finds good cause to continue the preliminary hearing under [Pen. Code] section 1050." (*People v. Clark* (2016) 63 Cal.4th 522, 551 (*Clark*).) "Under section 859b, when a defendant is in custody only on that felony complaint and the preliminary hearing is set or continued beyond the 10-court-day timeframe, 'the magistrate shall dismiss the complaint' unless the defendant waives the requirement or the prosecution shows good cause for a continuance." (*Bullock v. Superior Court* (2020) 51 Cal.App.5th 134, 146.) Section 859b also provides for release of an in-custody defendant on his or her own recognizance under Penal Code section 1318, subject to exceptions, "[i]f the preliminary examination is set or continued [for good cause] beyond the 10-court-day period." But if a codefendant's preliminary hearing is continued for good cause beyond 10-court days an in-custody defendant is not automatically entitled to be released from custody. (*In re Samano* (1995) 31 Cal.App.4th 984, 992-993.) Of course, if the defendant is not in custody at the time of his or her preliminary examination "the provision of section 859b that a complaint be dismissed if the preliminary examination is continued beyond the 10-court-day period is inapplicable." (*In re Alvarez* (1989) 208 Cal.App.3d 567, 574.)

The 10-court-day rule in section 859b " 'manifest[s] a legislative policy to eliminate the possibility that persons charged with felonies might suffer prolonged incarceration without a judicial determination of probable cause merely because they are unable to post bond in order to gain their freedom.' " (*Landrum v. Superior Court* (1981) 30 Cal.3d 1, 11-12; accord *People v. Standish* (2006) 38 Cal.4th 858, 870; *Garcia v. Superior Court* (2020) 47 Cal.App.5th 631, 648.) "The language of section 859b is 'plain and mandatory' and creates an 'absolute right in favor of persons in custody charged with felonies to have the preliminary examination commenced within 10 court days … .'" (*Landrum v. Superior Court*, *supra*, 30 Cal.3d at p. 6.) "Accordingly, 'the magistrate is required to dismiss the complaint if the court fails to adhere to the mandatory 10-court-day rule for incarcerated defendants … .' " (*Garcia v. Superior Court*, *supra*, 47 Cal.App.5th at p. 645.)

The 10-court-day rule in section 859b applies only if the defendant's custody is solely attributable to the charges which are the subject of the preliminary hearing and the does not apply if the defendant is in custody for any other reason. (*People v. Williams* (1987) 194 Cal.App.3d 124, 131-132 [serving out-of-state sentence]; *Blake v. Superior Court* (1980) 108 Cal.App.3d 244, 249 [defendant serving state prison sentence].)

7410.2-60-day limit of PC859b is strict, but not without exceptions 4/21

Penal Code section 859b (§ 859b) states, in part:

> Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in [Pen. Code] Section 1050, the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later. … [¶] …The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment, plea, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2, unless the defendant personally waives his or her right to a preliminary examination within the 60 days.

A defendant's waiver may take the form of a general time waiver eliminating the 60-day time limit or a conditional time waiver, such as to a date specific. (*Favor v. Superior Court* (2021) 59 Cal.App.5th 984, 990-992.) A violation of the conditional time waiver requires dismissal under section 859b. (*Ibid*.; *People v. Superior Court (Arnold)* (2021) 59 Cal.App.5th 923, 933-939 (*Arnold*).)

Although there are certain statutory exceptions to the 10-court day rule, including a finding of good cause per Penal Code section 1050, there is no such good cause exception to the 60-day rule. (*Lacayo v. Superior Court* (2020) 56 Cal.App.5th 396, 399.) Nor does Penal Code section 1050.1, permitting continuances to maintain joinder of defendants, provide an exception to the 60-day rule. (*Arnold*, *supra*, 59 Cal.App.54th at p. 940; *Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 731-732.) Nevertheless, section 859b expressly permits tolling of the 60-day time limit when competency proceedings are in progress under Penal Code section 1367, et. seq. (Distinguish *Del Castillo v. Superior Court* (2019) 38 Cal.App.5th 1117, 1120-1122 [§ 859b's 60-day time period not automatically tolled for defendants receiving a mental health evaluation under Pen. Code, § 4011.6].)

There is also at least one nonstatutory exception to section 859b's 60-day time period. "The clearly stated legislative purpose of section 859b is not served if the 60-day mandate is construed in a manner that permits a defendant to divest the court of jurisdiction to hold a preliminary hearing and at the same time complain that his or her preliminary hearing was not held 'at the earliest possible time.' " (*People v. Lind* (2014) 230 Cal.App.4th 709, 714 [defendant filed challenge for cause against assigned magistrate judge].)

> A defendant's constitutional right to a speedy preliminary hearing is not infringed by the suspension of the 60-day rule for the time it takes to resolve that defendant's challenge to the impartiality of the judge assigned to his or her case. The efficient administration of criminal justice is not served by the construction urged by Respondents because it would empower defendants to delay filing a disqualification motion until shortly before the 60-day period is scheduled to expire. If the remaining time were insufficient to permit the magistrate to answer and to have the matter heard by another judge, the magistrate would be forced to consent to disqualification or allow the case to be dismissed.

(*Id*. at p. 715; distinguish *Arnold*, *supra*, 59 Cal.App.5th at p. 941 [60-day time limit not tolled while motion to disqualify prosecution per Pen. Code, § 1424 pending].)

7410.3-Per PC861(c) the magistrate may recess PE for brief court matters 9/20

Penal Code section 861, subdivision (a), requires that a preliminary hearing be completed in one session. "[T]he statutory requirement that a preliminary examination, once begun, should be completed in one session appears aimed, like the rule for prompt commencement of the preliminary examination, at ensuring that one does not languish unnecessarily in custody, or under the cloud of a criminal complaint, without a judicial finding of probable cause. [Citations.]" (*Stroud v. Superior Court* (2000) 23 Cal.4th 952, 965 (*Stroud*), fn. omitted.) The one session requirement does not require the hearing to be completed in one day or uninterrupted by scheduled breaks, weekends or holidays. (*In re Karpf* (1970) 10 Cal.App.3d 355, 365-366.) In addition, the hearing may be interrupted with the consent of the defendant. (Pen. Code § 861, subd. (a)(1); see *Stroud*, *supra*, 23 Cal.4th at p. 967; but see *Kruse v. Superior Court* (2008) 162 Cal.App.4th 1364, 1372 (*Kruse*) [defendant's waiver to specified date did not extend to subsequent eight day postponement].) Finally, the hearing may be postponed "for good cause shown." (Pen. Code, § 861, subd. (a)(2); see, e.g., *Stroud*, *supra*, 23 Cal.4th at pp. 967-975 [good cause for one day delay of preliminary hearing that extended far beyond original estimate so judge could attend prescheduled meeting of Judicial Council]; but see *Kruse*, *supra*, 162 Cal.App.4th at pp. 1373-1374 [no good cause for postponement of eight days despite illness of original prosecutor, failure of reporter to produce transcript of first portion of preliminary hearing, and transportation foul up with defendant from jail].)

A 1981 amendment added subdivision (c) to Penal Code section 861 providing that "[n]othing in this section shall preclude the magistrate from interrupting the preliminary examination to conduct brief court matters so long as a substantial majority of the court's time is devoted to the preliminary examination." In *People v. Guevara* (1982) 132 Cal.App.3d 193, the appellate court interpreted the amendment as overturning prior court decisions holding that the preliminary hearing could not be interrupted by any intervening judicial business. (*Id.* at p. 201.) The court in *Guevara* stated that Penal Code section 861 must be given an interpretation " 'which is consistent with sound common sense which will not be productive of absurd consequences.' " (*Ibid.*) The court reasoned: "In this era of overcrowded courts and fiscal restraints, efficient use of

meager judicial resources is essential. Inability of courts to start new matters while juries are deliberating or when a recess in a prior proceeding is found necessary, would seriously diminish the productivity of the court system." (*Ibid.*)

Whenever reviewing a Penal Code section 861 issue by way of a motion to set aside the information under Penal Code section 995, the court must decide "simply whether the magistrate abused the sound discretion accorded him by section 861's good-cause provision, and thus violated that statute. …" (*Stroud*, *supra*, 23 Cal.4th at p. 968; see also *Kruse*, *supra*, 162 Cal.App.4th at p. 1371.) In other words, the court should exercise "its sound discretion in light of all the circumstances of a specific interruption to determine whether the magistrate has denied the defendant a 'substantial right during the course of the preliminary examination.' " (*People v. Guevara*, *supra*, 132 Cal.App.3d at p. 201; see also *Stroud*, *supra*, 23 Cal.4th at p. 957.)

7420.1-Defense burden to show prejudice to close PE 1/10

A preliminary examination is fundamentally an open and public hearing. (Pen. Code, § 868.) The preliminary hearing can be closed on the defendant's request only upon "a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial … ." (Pen. Code, § 868.)

A qualified First Amendment right of access by the public and the press attaches to the preliminary examination. (*Press-Enterprise Company v. Superior Court* (1986) 478 U.S. 1, 10-13.) The United States Supreme Court subsequently set forth a specific test that a preliminary hearing may be closed to the public only if the magistrate makes specific findings demonstrating (1) a substantial probability exists that defendant's right to a fair trial will be prejudiced by publicity that closure could prevent, and (2) reasonable alternatives to closure cannot adequately protect the defendant's right to a fair trial. (*Id.* at p. 14; see also *KFMB-TV Channel 8 v. Municipal Court* (1990) 221 Cal.App.3d 1362, 1365.)

A defendant cannot prevail on the motion to close the preliminary hearing simply by showing there has been, and will continue to be, publicity about this case. " '[P]retrial publicity—even pervasive, adverse publicity—does not invariably lead to an unfair trial … .' " (*San Jose Mercury-News v. Municipal Court* (1982) 30 Cal.3d 498, 513.) A defendant can receive a fair trial notwithstanding the fact prospective jurors have preconceived opinions about the case.

> "It is not required . … that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion of the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

(*People v. Harris* (1981) 28 Cal.3d 935, 949-950, citing *Irvin v. Dowd* (1961) 366 U.S. 717, 722-723.)

7430.1-Magistrate's denial of disclosure OK if no defense at PE 10/07

Even if one assumes the magistrate's denial of the motion to disclose the informant was somehow erroneous, the present motion to dismiss should still be denied. Because the defense gave no indication that disclosure was necessary to the presentation of a defense *at that hearing*, there was no denial of a substantial right by the magistrate. Keep in mind that the purpose of the preliminary hearing is to determine whether there is probable cause to believe the defendant has committed a felon—it is not to be used for the purpose of discovery. (Pen. Code, § 866, subd. (b).)

In *People v. Flemmings* (1973) 34 Cal.App.3d 63, a case preceding the enactment of subdivision (b) of section 866, the appellate court ruled that the defendant was not prejudiced or deprived of any substantial right even though the magistrate's ruling denying discovery was improper. The court concluded that the defendant's demand for disclosure was for discovery purposes for possible use at trial. (*Id*. at p. 69.) The court pointed out that the defendant presented no evidence at the preliminary hearing even though the "hypothetical defense mentioned by counsel in this appeal would have been known to the defendant, and to his counsel, before the preliminary examination if it had any basis in fact. They were, of course, under no obligation to disclose what they knew, but what is significant is that nothing in the record of the preliminary gives any indication that they were thinking of putting on such a defense *at that time*." (*Ibid*., italics added; similarly, see *Mitchell v. Superior Court* (1958) 50 Cal.2d 827.)

7440.1-PC872(b) permits hearsay from qualifying law enforcement officer 5/20

The purpose of a preliminary hearing is to establish whether there is probable cause to believe the defendant has committed a felony. (Pen. Code, § 866, subd. (b).) To streamline the preliminary hearing process, the voters enacted Proposition 115 in 1990. Proposition 115 amended the California Constitution and the Penal Code to allow hearsay evidence at preliminary hearings. (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1072-1073 (*Whitman*).) Although hearsay evidence is generally inadmissible at trial, Penal Code section 872 (§ 872) states that a finding of probable cause at a preliminary hearing "may be based in whole or in part upon the sworn testimony of a law enforcement officer … relating the statements of declarants made out of court offered for the truth of the matter asserted." (§ 872, subd. (b).) Section 872 requires the testifying officer either have five years of law enforcement experience or have completed a training course on the investigation and reporting of cases. (§ 872, subd. (b).)

"[C]ourts have interpreted section 872 broadly to include not only the extrajudicial statements of crime victims and percipient witnesses, but law enforcement officers and expert witnesses alike. (*Whitman*, *supra*, 54 Cal.3d at p. 1073; *Hosek v. Superior Court* (1992) 10 Cal.App.4th 605, 608-609 (*Hosek*).)" (*Curry v. Superior Court* (2013) 217 Cal.App.4th 580, 588-589 (*Curry*).)

In *Whitman*, the California Supreme Court made clear, however, that Proposition 115 "does not authorize a finding of probable cause based on the testimony of a noninvestigating officer or 'reader' merely reciting the police report of an investigating officer. … The testifying officer … must not be a mere reader but must have sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement." (*Whitman*, *supra*, 54 Cal.3d at pp. 1072-1073.) The testifying officer in *Whitman* lacked such knowledge. The testifying officers connection to the case was so attenuated there was no way for the magistrate to ensure the information conveyed from the

arrest report was reliable. (*Whitman*, *supra*, 54 Cal.3d at pp. 1074-1075.) The Supreme Court determined the hearsay evidence presented at the preliminary hearing lacked sufficient indicia of reliability to support the defendant's bindover. (*Id*. at p. 1075.) As a warning for future cases, the court also cautioned that "[s]imilar uncertainties are inherent in any procedure in which the testifying officer acts as no more than a 'reader' of another officer's investigative report" and simply "parrot[s]" what is in that report. (*Id*. at pp. 1075, 1073.)

The appellate court in *Hosek*, interpreting *Whitman*, described three situations in which there may not be sufficient indicia of reliability to permit the introduction of an expert's extrajudicial statements: (1) If the testifying officer says the expert expressed doubts about a test result; (2) if the officer failed to ask the expert whether the test results appeared valid and unexceptional; or (3) the officer does not understand enough about the test results to meaningfully convey the expert's conclusions to the court. (*Hosek*, *supra*, 10 Cal.App.4th at p. 610.) "[T]hose circumstances are merely factors that bear on the ultimate question of reliability. [¶] And they are not the only factors." (*Curry*, *supra*, 217 Cal.App.4th at p. 592.)

In *Curry*, the appellate court affirmed a bindover based on the testifying investigator's hearsay testimony about the murder victim's cause of death by nicotine poisoning derived from both the pathologist who conducted the victim's autopsy and a medical expert specializing in the effects of nicotine whose laboratory conducted tests on the victim's blood and urine samples. "Whereas virtually nothing was known about the out-of-court declarant in *Whitman*, [Investigator] Hoffman was able to explain in considerable detail both the qualifications of Dr. Halka and Dr. Benowitz and the basis for their opinions as to the cause of Linda's death." (*Curry*, *supra*, 217 Cal.App.4th at p. 590.) The appellate court rejected the defense argument that the testifying investigator "did not know enough about the substance of his testimony to meaningfully assist the court in assessing the reliability of the information he conveyed." (*Id*. at p. 590; see also *Hosek*, *supra*, 10 Cal.App.4th at p. 610-611 [arresting officer testifying as to criminalist's blood alcohol test result sufficient for bindover].)

7450.1-Dismissal for restriction of cross-examination requires prejudice 10/07

In *Jennings v. Superior Court* (1967) 66 Cal.2d 867, the magistrate precluded all cross-examination of a police officer regarding possible relations with a key witness. The magistrate also denied defendant a reasonable request for a continuance to obtain that witness. In ruling for the defendant, the California Supreme Court emphasized the defendant made clear the intention to present an affirmative defense at the preliminary hearing. The magistrate's ruling precluded this defense. The court noted, however: " 'Not [in] every instance in which a cross-examiner's question is disallowed will defendant's right to a fair hearing be abridged, since the matter may be too unimportant, or there may be no prejudice, or the question may involve issues which can be brought up at a more appropriate time.' …" (*Id.* at p. 879, citations omitted.)

Clearly, the *Jennings* case requires a showing of prejudice before an erroneous evidentiary ruling will be the basis of a dismissal. Therefore, unless there is a significant and erroneous denial of cross-examination on a vital issue at the preliminary hearing, the defense cannot establish the requisite denial of a "substantial right" such as to justify the granting of a motion to set aside the information under Penal Code section 995. (See also *People v. Stone* (1983) 139 Cal.App.3d 216.)

7450.2-Magistrate can restrict cross-examination intended for impeachment 1/10

The courts have long held that a magistrate's restriction of a defendant's right of cross-examination during a preliminary examination does not deny the defendant a substantial right if the intended cross-examination did not concern the actual crime charged. In *People v. Wilson* (1960) 183 Cal.App.2d 149, the magistrate precluded cross-examination of the prosecution's witness intended to show bias. The appellate court held the restriction did not warrant dismissal since the evidence went only to the weight of the direct evidence. (*Id.* at pp. 152-153.) In *Jennings v. Superior Court* (1967) 66 Cal.2d 867, the California Supreme Court distinguished *Wilson*, noting, "the excluded testimony was directed to impeachment rather than to establish an affirmative defense." (*Id.* at p. 879, fn. 4.)

In *People v. Stone* (1983) 139 Cal.App.3d 216, the magistrate precluded questions directed to the police officers who conducted the seizure of the defendant's methamphetamine laboratory about other searches they had conducted. The defendant asserted the purpose was to impeach the officers' testimony regarding exigent circumstances and to test the officers' credibility. In denying relief, the appellate court said:

> *Jennings* … thus demonstrate[s] that denial of cross-examination concerning events which were part of the actual criminal transaction itself denies the defense a substantial right. By contrast, case law also reveals that … a magistrate conducting a preliminary hearing, is within his discretion in denying cross-examination of a prosecution witness as to matters not relating to the criminal event itself and which only affect the weight of the direct testimony.

(*Id.* at p. 222.) "Exclusion of cross-examination which 'only go[es] to the weight of the direct evidence' does not deny the defendant a fair hearing. [Citations.]" (*Id*. at p. 224; see also *People v. Konow* (2004) 32 Cal.4th 995, 1024; similarly, see, *Farrell L. v. Superior Court* (1988) 203 Cal.App.3d 521, 528.)

The common law authority of the magistrate to restrict cross-examination was bolstered by the provisions of Proposition 115. Penal Code section 866, subdivision (b), for instance, limits the purpose of the preliminary hearing to establishing whether there is probable cause to believe the defendant has committed a felony. "The examination shall not be used for purposes of discovery." (*Ibid*.) Thus, the magistrate is mandated not to allow cross-examination that appears only to be for purpose of discovery by the defense.

7450.3-Magistrate can restrict cumulative evidence 1/10

It is well established that a defendant at a preliminary examination must be permitted to introduce evidence tending to overcome the prosecution's case or establish an affirmative defense. (*Jennings v. Superior Court* (1967) 66 Cal.2d 867, 880.) *Jennings*, however, involved a situation where the defense-offered evidence would not have been cumulative or obtainable from another source. (*Id.* at p. 876.) The rule in *Jennings*, therefore, is "[s]ubject to the court's inherent power to exercise control over the presentation of evidence and to the rules governing admissibility of evidence . …" (*McDaniel v. Superior Court* (1976) 55 Cal.App.3d 803, 805.)

The magistrate's power to exclude evidence of low probative value, that is time-consuming, or cumulative is both inherent and provided for by statute. (See Evid. Code, §§ 350, 352, 723, 765; *Weller v. Chavarria* (1965) 233 Cal.App.2d 234, 247.) In addition:

> Upon the request of the prosecuting attorney, the magistrate shall require an offer of proof from the defense as to the testimony expected from the witness. The magistrate shall not permit the testimony of any defense witness unless the offer of proof discloses to the satisfaction of the magistrate, in his or her sound discretion, that the testimony of that witness, if believed, would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness.

(Pen. Code § 866, subd. (a); see *People v. Eid* (1994) 31 Cal.App.4th 114, 125-127 [prosecutor's objection properly sustained]; but see *People v. Erwin* (1993) 20 Cal.App.4th 1542, 1151 [defense improperly prohibited from calling witness].)

7460.1-Standard for PC871.5 review of charges dismissed by magistrate 10/15

Penal Code section 871.5 permits the prosecution to make a motion in superior court to reinstate felony charges dismissed by a magistrate. It is the exclusive method by which the People may obtain review of a magistrate's order dismissing all the pending felony charges. (*People v. Shrier* (2010) 190 Cal.App.4th 400, 409 (*Shrier*); *People v. Mimms* (1988) 204 Cal.App.3d 471, 481.)

> "When an action has been dismissed by the magistrate, Penal Code section 871.5 allows the prosecution to seek review in the superior court and request reinstatement of the charges 'under the same terms and conditions as when the defendant last appeared before the magistrate.' [Citation.] However, the prosecution may only seek reinstatement on the basis that 'as a matter of law, the magistrate erroneously dismissed the action or a portion thereof.' [Citation.]" (*People v. Dawson* (2009) 172 Cal.App.4th 1073, 1087.) Section 871.5, subdivision (c), provides: "The superior court shall hear and determine the motion on the basis of the record of the proceedings before the magistrate." "Thus, … a motion brought by the prosecution under section 871.5 is not a relitigation of the [issues before the magistrate]. Instead, it is simply a means to have the superior court determine the legal propriety of the magistrate's dismissal of the complaint … ." (*People v. Toney* (2004) 32 Cal.4th 228, 233.)

(*Shrier*, *supra*, 190 Cal.App.4th at p. 409; see also *People v. Murillo* (2015) 238 Cal.App.4th 1122, 1128.)

The magistrate's dismissal must be pursuant to one or more of the statutes enumerated in section 871.5. (*People v. Williams* (2005) 35 Cal.4th 817, 827.) But the failure of the magistrate to specifically cite one of these statutes as the basis for dismissal is not dispositive if one of them is necessarily implicated. (*Shrier*, *supra*, 190 Cal.App.4th at pp. 410-410.) Thus, for example, "[t]he magistrate's failure to expressly specify section 1385 as the statutory authority for the dismissal does not deprive the People of their right to seek review under section 871.5." (*Id*. at p. 411; see also *People v. Mackey* (1985) 176 Cal.App.3d 177, 186-187; *Chism v. Superior Court* (1981) 123 Cal.App.3d 1053, 1061-1062.)

The People may also appeal the superior court's denial of the Penal Code section 871.5 motion to reinstate. (Pen. Code, § 1238(a)(9)

> "On appeal from an order denying a motion to reinstate a criminal complaint under section 871.5, *we disregard the superior court's ruling and directly examine the magistrate's ruling to determine if the dismissal of the complaint was erroneous as a matter*

of law. To the extent the magistrate's decision rests upon factual findings, '[w]e, like the superior court, must draw every legitimate inference in favor of the magistrate's ruling and cannot substitute our judgment, on the credibility or weight of the evidence, for that of the magistrate.' [Citation.]" (*People v. Massey* (2000) 79 Cal.App.4th 204, 210, italics added.) "We review the magistrate's legal conclusions de novo, but are bound by any factual findings the magistrate made if they are supported by substantial evidence." (*People v. Plumlee* (2008) 166 Cal.App.4th 935, 939.)

(*Shrier*, *supra*, 190 Cal.App.4th at pp. 409-410.)

7600.1-Felony conviction of crime of moral turpitude can be used to impeach 12/19

Evidence of a prior felony conviction is admissible in a criminal case, subject to the limitations of Evidence Code section 352, so long as the conviction involves "moral turpitude." (*People v. Castro* (1985) 38 Cal.3d 301, 314 (*Castro*).) "Evidence of prior felony convictions offered for this purpose is restricted to the name or type of crime and the date and place of conviction. [Citations.]" (*People v. Allen* (1986) 42 Cal.3d 1222, 1270; see also *People v. Gutierrez* (2018) 28 Cal.App.5th 85, 88-89.)

"In considering whether to admit evidence of a prior felony conviction of a witness subject to impeachment concerning his or her credibility, the prominent factors in determining the probative value of the prior conviction include 'whether the conviction (1) reflects on honesty and (2) is near in time.' [Citation.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 52; see also *People v. Anderson* (2018) 5 Cal.5th 372, 407.) However, the concept of "moral turpitude" is not limited to dishonesty, but extends to crimes that involve other sorts of moral depravity and a " 'readiness to do evil,' " such as child molestation and crimes of violence, torture, or brutality. (*Castro*, *supra*, 38 Cal.3d at p. 315.) "Such crimes involve an act of baseness, vileness, or depravity in the private and social duties which a person owes to others or to society in general, contrary to the accepted and customary rule of right and duty between people. (*People v. Brooks* (1992) 3 Cal.App.4th 669, 671.)" (*People v. Gabriel* (2012) 206 Cal.App.4th 450, 456.) "Whether a particular conviction involves moral turpitude is a question for the court to resolve." (*People v. Aguilar* (2016) 245 Cal.App.4th 101, 1017.)

In determining whether a particular offense involves moral turpitude the court looks to the statutory elements of the crime. (*Castro*, *supra*, 38 Cal.3d at pp. 316-317; see also *People v. Burton* (2015) 243 Cal.app.4th 129, 133-134.) The court may not consider the specific facts giving rise to the conviction, but must conclude that each element of the crime, including the minimum statutory elements, involves moral turpitude. (*Castro*, *supra*, 38 Cal.3d at pp. 316-317.) *Castro* requires "that from the elements of the offense alone—without regard to the facts of the particular violation—one can reasonably infer the presence of moral turpitude." (*People v. Thomas* (1988) 206 Cal.App.3d 689, 698.) "This aspect of the holding in *Castro* has come to be referred to as the 'least adjudicated elements test.' " (*People v. Robinson* (2011) 199 Cal.App.4th 707, 712.)

7600.2-Prior felony conviction to impeach subject to EC352 12/12

Evidence Code section 352 vests the court with discretion to preclude impeachment with a prior conviction involving moral turpitude otherwise admissible under *People v. Castro* (1985) 38 Cal.3d 301 (*Castro*), where the probative value of the evidence is outweighed by a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. Admissibility of such impeachment evidence under the Evidence Code section 352 balancing test may involve an inquiry into (1) whether the prior conviction reflects on honesty, (2) whether it is remote in time, (3) whether it is similar to the conduct for which the witness-accused is on trial, and (4) what effect admission would have on the defendant's decision to testify. (*Castro*, *supra*, 38 Cal.3d at p. 307.) These factors are not rigid standards, but rather are suggested considerations. (*Ibid*.; see also *People v. Robinson* (2011) 199 Cal.App.4th 707, 716.)

"The fact that the witness had so many convictions did not compel the court to exclude any of them." (*People v. Anderson* (2018) 5 Cal.5th 372, 408.) "[A] series of crimes may be more probative of credibility than a single crime." (*People v. Clark* (2011) 52 Cal.4th 856, 932.)

As to the remoteness factor, "[t]here is no consensus among courts as to how remote a conviction must be before it is too remote. [Citation.] … [A] conviction that is twenty years old … certainly meets any reasonable threshold test of remoteness." (*People v. Burns* (1987) 189 Cal.App.3d 734, 738; see also *People v. Mireles* (2018) 21 Cal.App.5th 237, 246-247.) Whether or not there were convictions for other crimes of moral turpitude during the intervening years is also a consideration in the remoteness analysis. (See, e.g., *People v. Beagle* (1972) 6 Cal.3d 441, 453 [a conviction from " 'long before' " should generally be excluded on the ground of remoteness if followed by a legally blameless life]; *People v. Mireles*, *supra*, 21 Cal.App.5th at p. 246 [witness suffered no conviction for a crime of moral turpitude during the intervening 24 years between the date of the most recent convictions and the trial"; distinguish *People v. Burns*, *supra*, 189 Cal.App.3d at pp. 738-739 [remoteness of a conviction "loses most of its impact" if the witness has served a lengthy prison sentence and has spent limited time out of prison].)

A trial court's decision whether or not to permit impeachment with a prior conviction in light of an Evidence Code section 352 objection is reviewed for abuse of discretion. (*People v. Robinson*, *supra*, 199 Cal.App.4th at p. 716; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65-66.)

7600.3-Criminal conduct may be relevant and admissible to impeach 5/20

"[T]he law provides that any criminal act or other misconduct involving moral turpitude suggests a willingness to lie and is not necessarily irrelevant or inadmissible for impeachment purposes. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296 (*Wheeler*); see *id*. at pp. 297-299, [misdemeanor conviction itself is inadmissible over a hearsay objection to prove misconduct bearing on credibility]; see also Cal. Const., art. I, § 28, subd. (f)(2) (Truth–in–Evidence provision).)" (*People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24 (*Contreras*).)

Initially, case law applying *Wheeler* focused on misdemeanor or non-criminal conduct. "Misdemeanor convictions ... are not admissible for impeachment, although evidence of the underlying conduct may be admissible subject to the court's exercise of discretion." (*People v. Chatman* (2006) 38 Cal.4th 344, 373.) Thus, "[m]isdemeanor misconduct involving moral turpitude may suggest a willingness to lie, which is relevant to the credibility of a witness or hearsay declarant (Evid. Code, § 210; *Wheeler*, at p. 295.)" (*People v. Hall* (2018) 23 Cal.App.5th 576, 589; see also *People v. Bedolla* (2018) 28 Cal.App.5th 535, 550 [same principle applies to prior misconduct that

was the subject of a juvenile adjudication].) For example, evidence of a misdemeanor conviction for possession of a concealed handgun reflects a crime of moral turpitude. (*People v. Robinson* (2005) 37 Cal.4th 592, 624, 626; see also, *People v. Bedolla*, *supra*, 28 Cal.App.5th at pp. 550-555 [juvenile adjudication for possession of loaded firearm in public place].) "However, to the extent such misconduct amounts to a misdemeanor or is not criminal in nature, it carries less weight in proving lax moral character and dishonesty than does either an act or conviction involving a felony. (*Wheeler*, *supra*, 4 Cal.4th at p. 296; distinguish Evid. Code, § 788 [authorizing prior felony convictions for impeachment].)" (*Contreras*, *supra*, 58 Cal.4th at p. 157, fn. 24.)

> Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.

(*Wheeler*, *supra*, 4 Cal.4th at pp. 296-297.) "Hence, trial courts have broad discretion to exclude impeachment evidence other than felony convictions where such evidence might involve undue time, confusion, or prejudice. (*Wheeler*, *supra*, 4 Cal.4th at pp. 296-297; accord, *People v. Lightsey* (2012) 54 Cal.4th 668, 714; *People v. Clark* (2011) 52 Cal.4th 856, 931-932.)" (*Contreras*, *supra*, 58 Cal.4th at p. 157, fn. 24; see *People v. Hall*, *supra*, 23 Cal.App.5th at pp. 590-594 [error to admit prior stabbing incident for impeachment].)

The *Wheeler* holding also applies to felony conduct even if such conduct also resulted in a felony conviction admissible under Evidence Code section 788. "Evidence of circumstances underlying a conviction is admissible to impeach credibility if the proponent demonstrates that the evidence has 'any tendency in reason' to disprove credibility." (*People v. Dalton* (2019) 7 Cal.5th 166, 214.) "The inescapable conclusion is that now, the conduct underlying a felony conviction is admissible when it is relevant to impeach a witness, unless the trial court finds that it is more prejudicial than probative." (*People v. Gutierrez* (2018) 28 Cal.App.5th 85, 89.) Nevertheless, "when a prior felony conviction has been introduced to impeach, ordinarily the trial court should exclude evidence of the underlying conduct." (*Id*. at p. 90.)

These principles apply to witnesses as well as to criminal defendants.

> "[I]f past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion … ." (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) "When the witness subject to impeachment is not the defendant, those factors [guiding the court's discretion] prominently include whether the conviction (1) reflects on honesty and (2) is near in time." (*People v. Clair* (1992) 2 Cal.4th 629, 654.) However, "the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad. This statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Wheeler*, at p. 296.) " '[C]ourts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.' " (*People v. Clark* (2011) 52 Cal.4th 856, 932.)

(*People v. Leonard* (2014) 228 Cal.App.4th 465, 497; see also *People v. Pettie* (2017) 16 Cal.App.5th 23, 72-73.)

7610.1-Prior conviction allegation as enhancements generally should be bifurcated 6/17

In *People v. Calderon* (1994) 9 Cal.4th 69 (*Calderon*) the California Supreme Court addressed bifurcation of prior convictions that are alleged as sentencing enhancements. The Court held that "a trial court has the discretion, in a jury trial, to bifurcate the determination of the truth of an alleged prior conviction from the determination of the defendant's guilt of the charged offense, but is not required to do so if the defendant will not be unduly prejudiced by having the truth of the alleged prior conviction determined in a unitary trial." (*Calderon*, *supr*a, 9 Cal.4th at p. 72.) Penal Code section 1025 provides that, when a defendant pleads not guilty and denies having suffered an alleged prior conviction, "the question whether or not he has suffered such previous conviction must be tried by the jury which tries the issue upon the plea of not guilty. …" But:

> [S]ection 1025 does not require that the truth of a prior conviction allegation be determined by the jury at the same time it decides whether the defendant is guilty of the charged offense. Nothing in the language of section 1025 prohibits a trial court from bifurcating the determination of the truth of a prior conviction allegation from the determination of the defendant's guilt or innocence of the charged offense.

(*Calderon*, *supra*, at p. 74.) "General authority to bifurcate trial issues may be found … in [Penal Code] section 1044, which vests the trial court with broad discretion to control the conduct of a criminal trial: 'It shall be the duty of the judge to control all proceedings during the trial … with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.' " (*Id*. at pp. 74-75.)

"The *Calderon* court then observed that a unitary trial on charged offenses and prior conviction allegations would often unduly prejudice a defendant." (*People v. Profitt* (2017) 8 Cal.App.5th 1255, 1266.) "We conclude, therefore that the denial of a defendant's timely request to bifurcate the determination of the truth of a prior conviction allegation from the determination of the defendant's guilt is an abuse of discretion where admitting, *for purposes of sentence enhancement*, evidence of an alleged prior conviction during the trial of the currently charged offense would pose a substantial risk of undue prejudice to the defendant." (*Calderon*, *supr*a, 9 Cal.4th at pp 77-78, italics added.)

Nevertheless, "bifurcation is *not* required in *every instance*." (*Calderon*, *supr*a, 9 Cal.4th at p. 78.)

> In some cases, a trial court properly may determine, prior to trial, that a unitary trial of the defendant's guilt or innocence of the charged offense and of the truth of a prior conviction allegation will not unduly prejudice the defendant. Perhaps the most common situation in which bifurcation of the determination of the truth of a prior conviction allegation is not required arises when, even if bifurcation were ordered, the jury still would learn of the existence of the prior conviction before returning a verdict of guilty.

(*Ibid*.)

7610.2-Prior conviction allegation as elements need not be bifurcated 6/17

In *People v. Calderon* (1994) 9 Cal.4th 69 (*Calderon*) the California Supreme Court held "that the denial of a defendant's timely request to bifurcate the determination of the truth of a prior conviction allegation from the determination of the defendant's guilt is an abuse of discretion where admitting, *for purposes of sentence enhancement*, evidence of an alleged prior conviction during the trial of the currently charged offense would pose a substantial risk of undue prejudice to the defendant." (*Id*. at pp 77-78, italics added.) But: "When a prior conviction is an *element* of a charged offense, however, the Supreme Court has not required or condoned bifurcation." (*People v. Profitt* (2017) 8 Cal.App.5th 1255, 1267, italics in original.) The distinction derives from Article I, section 28, subdivision (f)(4), of the California Constitution which provides: "When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court."

In *People v. Valentine* (1986) 42 Cal.3d 170 (*Valentine*), the California Supreme Court held that this state constitutional provision required proof "in open court" of the fact of ex-felon status because that status was a substantive element of the charge. (Id. at pp. 181-182.) Subsequently, in *People v. Sap*p (2003) 31 Cal.4th 240 (*Sapp*), the Supreme Court specifically rejected a contention that *Valentine* authorized bifurcation of related charges where a prior conviction was an element of only one of the charges. (*Id*. at pp. 260-262 [proposed bifurcation of felon in possession of concealable firearms count from multiple murder charges].) The *Sapp* court held that *Valentine* "allow[ed] the trial court only two options when a prior conviction is a substantive element of a [properly joined] current charge: Either the prosecution proves each element of the offense to the jury, or the defendant stipulates to the conviction and the court 'sanitizes' the prior by telling the jury that the defendant has a prior felony conviction, without specifying the nature of the felony committed." (*Id*. at p. 262.)

Whether a proffered stipulation requires admission of the nature of prior depends on whether such is relevant to the charge. (See *People v. Profitt*, *supra*, 8 Cal.App.5th at p. 1268, fn. 12 [prior driving under the influence convictions were elements of the offense]; *People v. Cajina* (2005) 127 Cal.App.4th 929, 934 [sex offender status was element of crime]; distinguish *Sapp* , *supra*, 31 Cal.4th at p. 262 [ex-felon with a firearm charge did not require proof of nature of prior felony conviction.]; *Valentine*, *supra*, 42 Cal.3d at pp. 181-182 [accord].)

7660.1-Limited scope of a motion to invalidate a prior conviction 12/17

A constitutionally invalid prior conviction may not be used to enhance the punishment for a subsequent offense. (*Garcia v. Superior Court* (1997) 14 Cal.4th 953, 959.) Initially, defendants could only challenge prior convictions for constitutional defects by way of post-judgment petition for habeas corpus, entitling them to be resentenced if they were successful. (*People v. Allen* (1999) 21 Cal.4th 424, 429 (*Allen*); *In re Woods* (1966) 64 Cal.2d 3; *In re Luce* (1966) 64 Cal.2d 11.) But in the interest of "efficient judicial administration," the California Supreme Court developed a rule of criminal procedure, often called a *Coffey-Sumstine* motion, allowing defendants to collaterally attack prior convictions by a motion to strike during or before trial in their current case. (*People v. Sumstine* (1984) 36 Cal.3d 909 (*Sumstine*); *People v. Coffey* (1967) 67 Cal.2d 204 (*Coffey*); *Allen*, *supra*, at pp. 429-430.) This procedure means defendants no longer have to seek post judgment relief by way of habeas corpus in the court that rendered judgment in the prior case. (*Allen*, *supra*, at pp. 429, 442.) *Coffey-Sumstine* motions can be used to challenge both misdemeanor and felony prior

convictions. (*Thomas v. Dept. of Motor Vehicles* (1970) 3 Cal.3d 335, 338; *People v. Duarte* (1984) 161 Cal.App.3d 438, 444.)

Coffey involved only a collateral attack on a prior conviction for *Gideon* error—a denial of the right to counsel. (*Coffey*, *supra*, 67 Cal.2d at p. 215; *Gideon v. Wainright* (1963) 372 U.S. 335.) But in 1969, the courts recognized that other constitutional rights could affect the validity of a guilty plea. In *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*), the United States Supreme Court held that a court may not accept a defendant's guilty plea until it determines the defendant is aware of and has knowingly and voluntarily chosen to waive the federal constitutional rights to jury trial, to confrontation, and against self-incrimination. These requirements were expressly incorporated into California law by *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*). And in *Sumstine*, *supra*, 36 Cal.3d 909, the California Supreme Court expanded *Coffey's* scope to allow collateral attack on the validity of a prior conviction for a violation of *Boykin-Tahl*.

Since *Custis v. United States* (1994) 511 U.S. 485 (*Custis*), however, California courts have grappled with the limits of *Coffey-Sumstine* motions not based on *Gideon* error. Now the scope of the motion varies, depending on when and where the prior conviction occurred, whether or not the current case is a capital proceeding, and the legal basis of the alleged constitutional infirmity.

In *Custis,* a non-capital case, the United States Supreme Court held the federal constitution guarantees a criminal defendant the right to collaterally attack a prior conviction gained through a guilty plea only for *Gideon* error. The High Court characterized the right to counsel as a unique and fundamental right, the deprivation of which is akin to jurisdictional error. The court expressly declined to expand the right to collaterally attack a prior conviction for the alleged denial of the effective assistance of counsel, voluntariness, or for *Boykin* defects. It did so for policy reasons, including the anticipated complexity of resolving these issues and the government's interest in the finality of judgments. (*Custis*, *supra*, 511 U.S. at pp. 496-497.)

In *People v. Horton* (1995) 11 Cal.4th 1068, the California Supreme Court declined to apply the *Custis* limitation to the collateral challenge to a prior conviction alleged as a special circumstance in a capital proceeding. (*Id*. at p. 1134.) And in *Curl v. Superior Court* (1990) 51 Cal.3d 1292, also a capital case, the defendant was allowed to challenge a prior conviction special circumstance on the grounds his *Boykin-Tahl* rights had been infringed and his prior guilty plea was involuntary due to intoxication at the entry of the plea. (*Id*. at p. 1296; reaffirmed in *Allen*, *supra*, 21 Cal.4th at p. 442.)

Allen, a non-capital case, involved a motion to strike a June 1969 California prior for failure to comply with *Boykin-Tahl*. The California Supreme Court held the defendant could *not* collaterally attack the voluntariness of the plea because it was entered *before Tahl* was decided—November 7, 1969. (*Allen*, *supra*, 21 Cal.4th at pp. 426-427, 443.) The court found challenges to pre-*Tahl* convictions would be "judicially inefficient." (*Ibid.*) Only after *Tahl* were trial courts on notice that the record of the change-of-plea hearing must clearly demonstrate "on its face" that the defendant was told of the constitutional rights to jury trial, to confront and cross-examine witnesses, and against self-incrimination, and that the defendant affirmatively waived them. (*Id*. at pp. 442-443.)

For California convictions occurring post-*Tahl*, in non-capital cases, the majority of the California Supreme Court in *Allen* indicated defendants may still move to strike such prior convictions on *Boykin-Tahl* grounds. (*Allen*, *supra*, 21 Cal.4th at pp. 434-436, 443.) Because the primary evidence of a *Boykin-Tahl* violation should appear on the face of the record after *Tahl*, a "quick review of the transcript … may be all that is necessary." (*Id*. at pp. 441-442.)

Whether in capital or non-capital proceedings, *Coffey*-*Sumstine* motions involve only challenges alleging the defendant's prior conviction is devoid of *constitutional* support. (*Sumstine*, *supra*, 36 Cal.3d at pp. 917, 922; *Coffey*, *supra*, 67 Cal.2d at p. 215.) A prior conviction carries a "strong presumption of constitutional regularity," and a defendant must establish a violation of rights which "so departed from constitutional requirements" as to justify striking the prior conviction. (*People v. Horton*, *supra*, 11 Cal.4th at p. 1136.) This issue is separate and distinct from whether a defendant actually suffered the conviction. (*Curl v. Superior Court*, *supra*, 51 Cal.3d at p. 1303.)

7660.2-Grounds to invalidate prior outside *Gideon* and *Boykin-Tahl* limited 12/17

The California Supreme Court in *People v. Coffey* (1967) 67 Cal.2d 204, allowed defendants to collaterally attack the constitutionality of a prior conviction alleged in a pending case for *Gideon* error—denial of the right to counsel—by a pretrial motion to strike the prior. (*Id*. at p. 215; see *Gideon v. Wainright* (1963) 372 U.S. 335.) In *People v. Sumstine* (1984) 36 Cal.3d 909, the court expanded the scope of the challenge to violations of *Boykin-Tahl*. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.) In non-capital cases, however, *Coffey*-*Sumstine* motions cannot be used to raise other legal challenges to the validity of a prior conviction.

In *Custis v. United States* (1994) 511 U.S. 485 (*Custis*), the United States Supreme Court expressly declined to expand the right to collaterally attack a prior conviction for the alleged denial of the effective assistance of counsel, voluntariness, or for *Boykin* defects. It did so for policy reasons, including the anticipated complexity of resolving these issues and the government's interest in the finality of judgments. (*Custis*, *supra*, 511 U.S. at pp. 496-497.) As a result of *Custis,* California courts have limited the type of alleged constitutional errors in a prior conviction, other than *Gideon* error, that may be reached through a *Coffey*-*Sumstine* motion in non-capital proceedings.

In *Garcia v. Superior Court* (1997) 14 Cal.4th 953, the California Supreme Court followed *Custis* and held defendants could *not* use *Coffey*-*Sumstine* motions to attack a prior conviction on the constitutional ground that counsel in the previous case had provided ineffective assistance, citing concerns for judicial efficiency. (*Id.* at pp. 959, 964, 966; see also *People v. Allen* (1999) 21 Cal.4th 424, 434 (*Allen*); *People v. Bechtol* (2017) 10 Cal.App.5th 950, 957.) *Garcia* also expressly overruled an earlier Supreme Court decision and two appellate court decisions that allowed this form of challenge. (*Garcia v. Superior Court*, *supra*, at pp. 960-961, fn. 4, 966, fn. 6; see also *Allen*, *supra*, at p. 434, fn. 2.)

If a defendant seeks to invalidate a prior conviction for an error in the previous proceeding that has no constitutional dimension, the motion must be denied summarily. For example, the constitution does not require that the court take a factual basis for a guilty plea. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1183-1185.) Thus, a motion to strike a prior conviction for this non-constitutional error would be improper. (See *Ganyo v. Municipal Court* (1978) 80 Cal.App.3d 522, 530-531.) Nor does the constitution require that a defendant be advised of the nature of the charges or the direct consequences of his plea. (*People v. Barella* (1999) 20 Cal.4th 261, 266; *Tahl*, *supra*, 1 Cal.3d at p. 132.) Rather, these advisals are required by a "judicially declared rule of criminal procedure." (*People v. Barella*, *supra*; *People v. Walker* (1991) 54 Cal.3d 1013, 1022.) Thus, any mistakes in these advisals should not be the basis for invalidating a prior conviction for constitutional infirmity.

Lastly, the constitution does not require that the defendant be advised of the collateral consequences of a guilty plea. The "courts need not inform the defendant of all the contingencies and possibilities that may ensue from a plea of guilty … ." (*People v. Barella*, *supra*, 20 Cal.4th at p. 271.) Collateral consequences include limitations on good-time or work-time credits under the strike laws (*Id*. at p. 272), or the possible use of the conviction in the future to enhance punishment for a new offense (*People v. Guerrero* (1988) 44 Cal.3d 343, 355; *People v. Sipe* (1995) 36 Cal.App.4th 468, 479; *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457; *People v. Crosby* (1992) 3 Cal.App.4th 1352, 1356). Thus, any motion brought to strike a prior conviction for failure to advise a defendant about these collateral matters should be summarily denied.

7660.3-Grounds to invalidate a foreign prior are limited 12/17

Special rules apply to motions to invalidate prior convictions from outside California. The California Supreme Court in *People v. Coffey* (1967) 67 Cal.2d 204, allowed defendants to collaterally attack the constitutionality of a prior conviction alleged in a pending case for *Gideon* error—denial of the right to counsel—by a pretrial motion to strike the prior. (*Id*. at p. 215; see *Gideon v. Wainright* (1963) 372 U.S. 335.) In *People v. Sumstine* (1984) 36 Cal.3d 909, the court expanded the scope of such challenge to violations of *Boykin-Tahl*. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.) A majority of the California Supreme Court in *People v. Allen* (1999) 21 Cal.4th 424 specifically declined to address whether a motion to strike on *Boykin-Tahl* grounds could be brought to prior convictions from other jurisdictions that do not have *Tahl*-like requirements, or should otherwise be limited as suggested in Justice Baxter's concurring opinion. (*Allen*, *supra*, 21 Cal.4th at pp. 443-444, fn. 7.) The *Allen* majority found *Coffey-Sumstine* motions "tolerable only insofar as we can expect the record of the prior guilty plea readily to show, on its face, that the defendant knew and waived his rights." (*Allen*, *supra*, 21 Cal.4th at p. 447, conc. opn. of Baxter, J.) That being so, Justice Baxter would eliminate "*Boykin-Tahl* challenges to *non*-California priors … except where it appears beyond doubt that the guilty pleas underlying such convictions were subject, under the law of the convicting jurisdictions, to *Tahl*-like procedural formalities." (*Ibid*.) Justice Baxter's position has been adopted in subsequent court of appeal decisions. (*People v. Green* (2000) 81 Cal.App.4th 463, 470-471; see also *People v. Gandy* (2017) 13 Cal.App.5th 1288, 1296-1297.) The appellate court in *Green* held that a defendant may not challenge an out-of-state prior felony conviction on *Boykin* grounds, unless the defendant shows "beyond doubt" that the state in which the plea was entered followed *Tahl*-like procedures. (*People v. Green*, *supra*, 81 Cal.App.4th at pp. 470-471.)

7660.4-Test for *Boykin-Tahl* challenge to prior conviction 12/17

If claiming *Boykin-Tahl* error, the defense must allege and prove which right or rights were not waived, that the defendant was unaware of those rights, and would not have pled guilty had the defendant known of those rights. (*People v. Allen, supra,* 21 Cal.4th at p. 436, fn. 3 (*Allen*); *Curl v. Superior Court*, *supra*, 51 Cal.3d at p. 1306; *People v. Cooper* (1992) 7 Cal.App.4th 593, 596-601.) In such a claim, the court must employ the totality-of-the-circumstances approach outlined in *People v. Howard* (1992) 1 Cal.4th 1132 (*Howard*), at pages 1177-1178, with the advantage that neither side is limited to the face of the record, as they were in *Howard*, a direct appeal case. (*Allen*, *supra*, 21 Cal.4th at p. 439.)

Originally, *Tahl* required that the record show an explicit and express waiver of rights for a valid plea. (*In re Tahl* (1969) 1 Cal.3d 122, 132.) But in *Howard*, the California Supreme Court retreated from *Tahl* and held that an explicit and express waiver of rights is not required for a constitutionally valid guilty plea under federal law. (*Howard*, *supra*, 1 Cal.4th at pp. 1174-1179.) Under federal law, a plea is valid if the record affirmatively shows it was voluntary and intelligent under the totality of the circumstances. (*Id.* at pp. 1175, 1178; *Allen*, *supra*, 21 Cal.4th at pp. 437-438.)

> In adopting the federal test, *Howard* acknowledged that the United States Supreme Court "has never read *Boykin* as requiring explicit admonitions on each of the three constitutional rights. Instead, the court has said that the standard for determining the validity of a guilty plea 'was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' [Citations.] 'The new element added in *Boykin*' was not a requirement of explicit admonitions and waivers but rather 'the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.' [Citation.]" (*Howard*, at p. 1177,

(*People v. Gandy* (2017) 13 Cal.App.5th 1288, 1299.)

Thus, under *Howard*, a trial court hearing a *Coffey-Sumstine* motion based upon *Boykin-Tahl* grounds simply examines the totality of the circumstances to determine whether the plea was voluntary and intelligent. (*Allen*, *supra*, 21 Cal.4th at p. 440.)

7660.5-Sufficiency of evidence necessary to defeat *Boykin-Tahl* challenge 12/17

Several appellate cases have explored the sufficiency of the record of a prior conviction obtained by guilty plea in the context of a motion to strike based on *Boykin-Tahl* error.

In *People v. Gandy* (2017) 13 Cal.app.5th 1288, involving an Oregon prior, the appellate court held a validly executed change of plea form satisfied the *Boykin-Tahl* requirements applicable to a comparable California conviction. (*Id*. at p. 1229.)

> We find the language of the plea petition to be sufficiently clear to inform defendant that in pleading no contest he would be waiving his *Boykin* rights. Defendant does not claim that he did not or could not read or understand the plea petition. In fact, he confirmed to the trial judge that he had read the document carefully and had discussed it with defense counsel before signing it. Based on the plea petition and defendant's colloquy with the judge, a knowing and voluntary waiver is fairly implied.

(*Id*. at p. 1300.) The court rejected defendant's declaration that counsel told him to sign the form without reading it. (*Ibid*.) "Similar conclusory declarations have been rejected as a basis for collateral attack of a prior conviction on *Boykin-Tahl* grounds. [Citations.]" (*Ibid*.) The court also cited several cases upholding "a defendant's plea or admission to prior convictions during trial as constitutionally valid under the totality of the circumstances even in the absence of an express advisement and waiver. [Citations]" (*Id*. a tp. 1300, fn. 3.)

Even without a change of plea form, court minute entries may be sufficient to rebut a defendant's claim that his guilty plea was not knowing and intelligent within the meaning of *Boykin-Tahl*. In *Worsley v. Municipal Court* (1981) 122 Cal.App.3d 409, for example, a combination of rubber-stamped entries contemporaneously made, handwritten remarks, and the judge's signature were held sufficient proof of the defendant's knowingly and voluntary waiver of his constitutional rights. The appellate court stated:

> Whether the docket is filled out with a rubber stamp, typewriter, or quill pen should make no difference so long as it can be determined that the advisements and waivers were placed in the docket by one authorized and qualified to do so, and the memorializations reflect the true nature of the recitals. [¶] Since this particular docket provides a reviewing court with more than a silent record, the municipal court docket entry is some indication of what occurred. "[T]here [remains] a presumption that in preparing the docket entry official duty [judge's and clerk's] was regularly performed (Evid. Code, § 664)." Therefore, " '… such an entry must ordinarily be deemed to speak the truth.' "

(*Id.* at p. 415, citations omitted.) The court also noted, "there is, and remains a presumption that a court was correct in its advisement unless proven otherwise." (*Id.* at p. 416.) "[T]hat the docket sheet fails to specifically recite that defendant expressly and explicitly waived his rights does not as a matter of law preclude a finding that defendant's waiver was constitutionally valid." (*People v. Anderson* (1991) 1 Cal.App.4th 318, 325.)

7660.6-Procedure and burden of proof in motion to invalidate prior 12/17

Except for certain Vehicle Code violations, the Legislature has not enacted a uniform procedure for challenging the constitutional validity of a prior conviction. (*Garcia v. Superior Court* (1997) 14 Cal.4th 953, 960; distinguish Veh. Code, § 41403.) Instead, the appellate courts have done so.

Whether the defense is entitled to an evidentiary hearing on a *Coffey-Sumstine* motion depends on the sufficiency of their written pleadings. (*People v. Allen* (1999) 21 Cal.4th 424, 435 (*Allen*); *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1306 (*Curl*); *People v. Sumstine* (1984) 36 Cal.3d 909, 922-924 (*Sumstine*); *People v. Coffey* (1967) 67 Cal.2d 204, 215-217 (*Coffey*); *People v. Walker* (2001) 89 Cal.App.4th 380, 387.) The defense must allege an actual denial of the constitutional rights. (*Sumstine*, *supra*; *Coffey*, *supra*.) If claiming *Boykin-Tahl* error, the defense must allege—and later prove—which right or rights were not waived, that the defendant was unaware of those rights, and would not have pled guilty had the defendant known of those rights. (*Allen*, *supra*, 21 Cal.4th at p. 436, fn. 3; *Curl*, *supra*, 51 Cal.3d at p. 1306; *People v. Cooper* (1992) 7 Cal.App.4th 593, 596-601.) Conclusory or incomplete allegations do not justify a hearing. (*People v. Soto* (1996) 46 Cal.App.4th 1596, 1606; *People v. Cooper*, *supra*, 7 Cal.App.4th at p. 597; see also *People v. Hayes* (1990) 52 Cal.3d 577, 637.) And allegations that the record is silent, or does not show an advisal of rights, are simply insufficient to justify a hearing. (*Sumstine*, *supra*, 36 Cal.3d at pp. 921-924.)

Should an evidentiary hearing be justified by the pleadings, it is the defendant's burden to show the constitutional invalidity of the prior by a preponderance of the evidence. (*People v. Curl* (2009) 46 Cal.4th 339, 349-352; *Curl*, *supra*, 51 Cal.3d at pp. 1304, fn. 7, 1306-1307.) The People must first produce prima facie evidence of the existence of the conviction. The burden then shifts to and remains with the defendant to produce evidence to establish the constitutional invalidity of the prior conviction, and any necessary prejudice. (*Allen*, *supra*, 21 Cal.4th at pp. 435-436.) A defendant's failure to obtain and present a transcript of the change-of-plea hearing, where one is available, is fatal to a motion claiming *Boykin-Tahl* errors. (*People v. Johnson* (1990) 217 Cal.App.3d 978, 983; *People v. Zavala* (1983) 147 Cal.App.3d 429, 439.)

The People have the right to present rebuttal evidence. (*Curl*, *supra*, 51 Cal.3d at p. 1307; *Coffey*, *supra*, 67 Cal.2d at p. 217.) For *Boykin-Tahl* challenges, this can include evidence of the trial judge's habit and custom in taking proper waivers, or witnesses to the events in question. (*People v. Pride* (1992) 3 Cal.4th 195, 255-256, *Curl*, *supra*, 51 Cal.3d at p. 1297, fn. 1; Evid. Code, § 1105.)

Finally, the motion to invalidate should be heard by the trial court at the earliest opportunity prior to trial. (*Curl*, *supra*, 51 Cal.3d at p. 1302; *Coffey*, *supra*, 67 Cal.2d at p. 217.)

7660.7-Requirements for challenging certain Vehicle Code priors 12/17

For certain Vehicle Code violations the legislature has enacted a uniform procedure for collateral challenges to the constitutional validity of a prior conviction. (Veh. Code, § 41403; see *People v. Bechtol* (2017) 10 Cal.App.5th 950, 960 [holding Veh. Code, § 41403 only prescribes the procedure for challenging a prior conviction without extending the substantive grounds upon which such a challenge can be made].)

Defendants seeking to have convictions under Vehicle Code sections 14601, 14601.1, 14601.2, 23152, 23153, or 23103 declared constitutionally infirm, they must comply with the requirements of Vehicle Code section 41403. Section 41403 requires their motion be "in writing" and be specific. It must "state in writing and with specificity wherein the defendant was deprived of the defendant's constitutional rights … ." (Veh. Code, § 41403, subd. (a); *People v. Duarte*, *supra*, 161 Cal.App.3d at p. 444.)

The motion must be filed with the clerk of the court and a copy must be served on the court that rendered the judgment under attack as well as on the prosecuting attorney in the present proceedings at least five court days before the hearing. (Veh. Code, § 41403, subd. (a).) The hearing on the motion should be held before the trial, unless the defendant has failed to comply with the notice requirement or to present the necessary evidence. In such cases the court should generally hear the matter at sentencing, unless good cause is shown to continue the trial. (Veh. Code, § 41403, subd. (c).)

The requirement of serving the motion on the original court rendering judgment is important because the current court's ruling on the constitutional validity of the challenged prior is *res judicata* for future purposes. (*Hasson v. Cozens* (1970) 1 Cal.3d 576; Veh. Code, § 23624.) It is essential, therefore, that defendant's challenge be recorded in the rendering court so as to provide any future litigants notice that the statutory right under section 23624 has been exhausted and subsequent attacks are precluded. At least one appellate court has held that the rendering court is an indispensable party to an attack on its judgment. (*Thomas v. Department of Motor Vehicles* (1970) 3 Cal.3d 335.) If the defendant fails to prove compliance with this requirement, the court should deny the motion.

7700.1-Similar act evidence admissible per EC1101(b) 6/21

"The rules governing the admissibility of evidence under Evidence Code section 1101(b) are well settled. Evidence of defendant's commission of other crimes, civil wrongs or bad acts is not admissible to show bad character or predisposition to criminality, but may be admitted to prove some material fact at issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. [Citations.]" (*People v. Cage* (2015) 62 Cal.4th 256, 273; see also *People v. Chhoun* (2021) 11 Cal.5th 1, 25.) "The trial court has the discretion to admit evidence of crimes committed by a defendant other than the one for which he is charged, if such evidence is relevant to prove some fact at issue, and if the probative value of the evidence outweighs its prejudicial effect. [Citation.]" (*People v. Hawkins* (1995) 10 Cal.4th 920, 951, disapproved on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 110; see also *People v. Spector* (2011) 194 Cal.App.4th 1335, 1372.)

Evidence of an uncharged act is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident …) … ." (Evid. Code, § 1101, subd. (b).) "The categories listed in section 1101, subdivision (b), are examples of facts that legitimately may be proved by other-crimes evidence, but … the list is not exclusive. [Citations.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 146.)

> For reasons of policy, the general rule has evolved that evidence that the defendant has committed other crimes is inadmissible if offered solely to prove criminal disposition on his part. (Evid. Code, § 1101, subd. (a).) However, the exceptions (Evid. Code, § 1101, subd. (b)) have become so numerous that … the suggestion has been made that the true rule could be more realistically stated in an affirmative form: "That evidence of other crimes is admissible whenever it is relevant to a material issue, and that it should be excluded *only* where its sole purpose and effect is to show the defendant's bad moral character (disposition to commit crime)." [Citation.]

(*People v. Haslouer* (1978) 79 Cal.App.3d 818, 824-825, italics added.)

Evidence Code section 1101, subdivision (b), only bars evidence of other uncharged acts "when relevant to prove" a person's "disposition to commit such … act[s]." It does not bar such evidence when it is "relevant to prove some [other] fact," such as "identity" or "intent," without reliance on disposition as "any link in the chain of logic." (*People v. Thompson* (1980) 27 Cal.3d 303, 317 (*Thompson*), disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260 [defendant's not guilty plea puts all elements of crime at issue].)

> Under the Evidence Code, the truth of the prior uncharged act and defendant's connection to it are preliminary factual issues which must be decided before the prior misconduct can be deemed admissible; if the prior and defendant's connection to it are not established by a preponderance of the evidence, the prior is irrelevant to prove the Evidence Code section 1101(b) fact for which it is being offered. (*People v. Simon* (1986) 184 Cal.App.3d 125, 129-130 …; see Evid. Code, § 403, subd. (a).)

(*People v. Garelick* (2008) 161 Cal.App.4th 1107, 1115; cited with approval in *People v. Lucas* (2014) 60 Cal.4th 153, 218.)

Appellate courts "review a trial court's ruling [admitting evidence] under Evidence Code section 1101 for abuse of discretion." (*People v. Gray* (2005) 37 Cal.4th 168, 202; see also *People v. Cage*, *supra*, 62 Cal.4th at p. 274.)

7700.2-Three factors determine admissibility of EC1101(b) evidence 10/15

There are three factors a court must consider in determining the admissibility of evidence otherwise meeting the basic Evidence Code section 1101, subdivision (b) criteria. "As with other types of circumstantial evidence, its admissibility depends upon three principal factors: (1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence." (*People v. Thompson* (1980) 27 Cal.3d 303, 315 (*Thompson*), italics in original.)

"In order to satisfy the requirement of *materiality*, the fact sought to be proved may be either an ultimate fact in the proceeding or an intermediate fact 'from which such ultimate fact may be presumed or inferred.'…" (*Thompson*, *supra*, 27 Cal.3d at p. 315, original italics; see also *People v. Hendrix* (2013) 214 Cal.App.4th 216, 239.) The materiality factor is generally met because a defendant's plea of not guilty placed the intent element of the offense at issue for the purpose of Evidence Code section 1101, subdivision (b). (*People v. Daniels* (1991) 52 Cal.3d 815, 858; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4.) "A defendant's plea of not guilty puts the elements of the crime in issue for purposes of Evidence Code section 1101, 'unless the defendant has taken some action to narrow the prosecution's burden of proof.' [Citations.]" (*People v. Myers* (2014) 227 Cal.App.4th 1219, 1225.) In addition, "[s]eldom will evidence of a defendant's prior criminal conduct be ruled inadmissible when it is the primary basis for establishing a crucial element of the charged offense." (*People v. Garrett* (1994) 30 Cal.App.4th 962, 967.)

Whether evidence tends to prove or disprove a fact governs its *relevancy* within the meaning of Evidence Code section 210. (*Thompson*, *supra*, 27 Cal.3d at p. 315, fn. 15; see also, Evid. Code §§ 350-351.) For example, "[e]vidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*People v. Kipp* (1998)18 Cal.4th 349, 369.)

Uncharged acts evidence which is admissible under Evidence Code section 1101, subdivision (b), may still be inadmissible under another *rule* or *policy*. The most commonly cited rule or policy is that contained in Evidence Code section 352. "Under Evidence Code section 352, the probative value of a defendant's prior acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Ewoldt*, *supra*, [7 Cal.4th] at p. 404; Evid. Code, § 352.)" (*People v. Davis* (2009) 46 Cal.4th 539, 602; see also *People v. Rogers* (2013) 57 Cal.4th 296, 326; *People v. Tran* (2011) 51 Cal.4th 1040, 1047.) Nevertheless:

> There is also no rule or policy requiring exclusion. As the trial court recognized when it concluded that the probative value of the evidence outweighed its prejudicial effect, evidence of other crimes is inherently prejudicial. [Citation.] But this circumstance means the court must exercise its discretion, not that it must always exclude the evidence.

(*People v. Steele* (2002) 27 Cal.4th 1230, 1245.)

7700.3-EC352 impacts the admissibility of EC1101(b) evidence 7/21

When uncharged crime evidence otherwise meets the criteria for admission under Evidence Code section 1101, subdivision (b), the court is also required to considered the impact of Evidence Code section 352 (§ 352).

> But Evidence Code section 352 requires the exclusion of evidence only when its probative value is substantially outweighed by its prejudicial effect. "Evidence is substantially more prejudicial than probative [citation] [only] if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

(*People v. Tran* (2011) 51 Cal.4th 1040, 1047 (*Tran*).) " 'In applying section 352, "prejudicial" is not synonymous with "damaging." ' " (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) " ' "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case." ' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) "The 'prejudice' which section 352 seeks to avoid is that which " ' "uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*." ' " (*People v. Gionis*, *supra*, at p. 1214.)" (*People v. Cage* (2015) 62 Cal.4th 256, 275, italics in original.)

Among the factors to be considered under section 352 is remoteness of the uncharged crime evidence. "The close proximity in time of the uncharged offenses to the charged offenses increases the probative value of this evidence." (*People v. Balcom* (1994) 7 Cal.4th 414, 427.) "No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible." (*People v. Branch* (2001) 91 Cal.App.4th 274, 284.) Instead, the remoteness of other crimes evidence generally goes to its weight and not to its reliability. (*People v. Douglas* (1990) 50 Cal.3d 468, 511.) In *People v. Spector* (2011) 194 Cal.App.4th 1335, for example, the defendant was accused of shooting a female acquaintance at his home in 2003. The appellate court affirmed the admission of seven prior similar acts between 1975 and 1995, rejecting the defense contention they were remote. (*Id*. at pp. 1388-1339; see also *People v. Ing* (1967) 65 Cal.2d 603, 612, questioned on other grounds in *People v. Tassell* (1984) 36 Cal.3d 77, 89 [15 years before charged offenses]; *People v. Washington* (2021) 61 Cal.App.5th 776, 787 [15-year-old cocaine possession charge admissible to prove defendant knew nature of same substance in current prosecution]; *People v. Culbert* (2013) 218 Cal.App.4th 184, 192-193 [11 years between criminal threats]; *People v. Branch*, *supra*, 91 Cal.App.4th at pp. 284-285 [more than 30 years]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [18 to 25 years].)

Another consideration is whether the uncharged criminal conduct is unduly prejudicial compared to the charged crime. (*People v. Spector*, *supra*, 194 Cal.App.4th at p. 1389 [series of prior assaults not "too inflammatory" compared to charged murder]; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [potential for prejudice was decreased where evidence "describing defendant's uncharged acts … was no stronger and no more inflammatory than the testimony concerning the charged offenses"]; *People v. Kipp* (1988) 18 Cal.4th 349, 372 [risk of prejudice "was not unusually grave" where the prior "crimes were not significantly more inflammatory than the [current] crimes"]; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 406 [evidence of prior child molestations was not highly inflammatory where "the evidence concerning the charged offenses was equally graphic"]; but see *People v. Perry* (1985) 166 Cal.App.3d 924 [unduly prejudicial to introduce evidence of attempted murder and aggravated robbery to prove robbery, assault with deadly weapon and auto theft charges].)

There are additional section 352 factors to consider when other crimes evidence is proffered under Evidence Code section 1101, subdivision (b). For example:

> The probative value of the evidence is enhanced if it emanates from a source independent of evidence of the charged offense because the risk that the witness's account was influenced by knowledge of the charged offense is thereby eliminated. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) On the other hand, the prejudicial effect of the evidence is increased if the uncharged acts did not result in a criminal conviction. This is because the jury might be inclined to punish the defendant for the uncharged acts regardless of whether it considers the defendant guilty of the charged offense and because the absence of a conviction increases the likelihood of confusing the issues, in that the jury will have to determine whether the uncharged acts occurred. (*Id*. at p. 405.)

(*Tran*, *supra*, 51 Cal.4th at p. 1047.) The probative value of the evidence is greater when relevant to prove an ultimate rather than an intermediate fact necessary to a conviction. (*Id*. at p. 1048.)

Finally, if the "evidence is 'merely cumulative with respect to other evidence which the People may use to prove the same issue,' it is excluded under a rule of necessity. [Citations.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 318.) "The prejudicial effect of evidence defendant committed a separate offense may, of course, outweigh its probative value if it is merely cumulative regarding an issue not reasonably subject to dispute." (*Tran*, *supra*, 51 Cal.4th at p. 1049; see also *People v. Lopez* (2011) 198 Cal.App.4th 698, 715-716.) But, the prosecution cannot be compelled to " 'present its case in the sanitized fashion suggested by the defense.' " (*People v. Salcido* (2008) 44 Cal.4th 93, 147.) "When the evidence has probative value, and the potential for prejudice resulting from its admission is within tolerable limits, it is not *unduly* prejudicial and its admission is not an abuse of discretion." (*Tran*, *supra*, 51 Cal.4th at p. 1049, italics in original.)

> Further, although the court need not limit the prosecution's evidence to one or two separate offenses lest the jury find a failure of proof as to at least one of them, the probative value of the evidence inevitably decreases with each additional offense, while its prejudicial effect increases, tilting the balance towards exclusion. And the trial court of course retains discretion to exclude details of offenses or related conduct that might tend to inflame without furthering the purpose for admitting the evidence.

(*Ibid*.)

7700.4-Scope of admissible similar act evidence under EC1101(b) is broad 6/17

The scope of what qualifies as an admissible "bad act" under Evidence Code section 1101 is broad. "A prior act need not be a crime to be admissible under Evidence Code section 1101." (*People v. Wills-Watkins* (1979) 99 Cal.App.3d 451, 456, fn. 1.)

> Cases sometimes describe Evidence Code section 1101(b) evidence as "prior offenses" or "prior bad acts." Both shorthand formulations are imprecise. Evidence Code section 1101(b) authorizes the admission of "a crime, civil wrong, *or other act* " to prove something other than the defendant's character. (Italics added.) The conduct admitted under Evidence Code section 1101(b) need not have been prosecuted as a crime, nor is a conviction required. (See, e.g., *People v. Garcia* (1995) 41 Cal.App.4th 1832, 1849, disapproved on another ground in *People v. Sanchez* (2001) 24 Cal.4th 983, 991, fn. 3.) The conduct may also have occurred after the charged events, so long as the other requirements for admissibility are met. (See *People v. Balcom* (1994) 7 Cal.4th 414, 425.)

7700.5-EC1101(b) evidence need only be proved by preponderance of evidence 2/21

If evidence of a defendant's uncharged conduct is admitted under Evidence Code section 1101, subdivision (b), a jury may consider that evidence if the jury "finds 'by a preponderance of the evidence' that the defendant committed" the uncharged acts. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1224, fn. 14; *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1177.) Proof by a "preponderance of the evidence" for an uncharged offense is a considerably lower burden of proof than the due process requirement of proof beyond a reasonable doubt for a charged offense. (*People v. Nicolas*, *supra*, 8 Cal.App.5th at p. 1177; see also *People v. Johnson* (2004) 119 Cal.App.4th 976, 985; distinguish *People v. Jones* (2018) 28 Cal.App.5th 316, 331-334 [error to give preponderance of evidence and limited use instructions as to charged crimes also being used to bolster proof in other charged crimes per Evid. Code, § 1101, subd. (b)].)

Preliminarily, the court has a "gatekeeping function" under Evidence Code section 403, subdivision (a), to "determine by a preponderance of the evidence the existence of the prior uncharged act and defendant's connection to it as preliminary factual issues before the prior misconduct can be deemed admissible. [Citations.]" (*People v. Winkler* (2020) 56 Cal.App.5th 1102, 1144.) "The connection between an uncharged act and the charged crime cannot be clear unless there is clarity that the defendant committed the asserted act underlying the uncharged crime." (*Id*. at p. 1153 [error to admit evidence because of lack of sufficient evidence proving defendant committed the prior crime].)

7700.6-Jury instruction requirements 2/21

Upon request, the trial court also has an obligation to instruct the jury concerning the "limited purpose" of considering evidence admitted under Evidence Code section 1101, subdivision (b). (*People v. Carpenter* (1997) 15 Cal.4th 312, 382.) Further, the court must instruct the jury on precisely what issue or issues that evidence has been admitted to prove (e.g., intent, knowledge, lack of mistake or accident, etc.). (*People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1177; *People v. Swearington* (1977) 71 Cal.App.3d 935, 949.)

7710.1-Other crimes with common distinctive marks admissible to show identity 8/14

"To be admissible on the issue of identity, an uncharged crime must be highly similar to the charged offenses, so similar as to serve as a signature or fingerprint. [Citations.]" (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056; see also *People v. Chism* (2014) 58 Cal.4th 1266, 1306.)

> The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." [Citation.]

(*People v. Ewoldt* (1994) 7 Cal.4th 380, 403; see also *People v. Hovarter* (2008) 44 Cal.4th 983, 1002.) " 'The strength of the inference in any case depends upon two factors: (1) the degree of distinctiveness of individual shared marks, and (2) the number of minimally distinctive shared marks.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 370; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1148.) "To be highly distinctive, the charged and uncharged crimes need not be mirror images of each other." (*People v. Carter*, *supra*, at p. 1148.) Differences in highly distinctive

crimes go to the weight of the evidence not its admissibility. (*Ibid*.) "The highly unusual and distinctive nature of both the charged and [prior] offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense." (*People v. Balcom* (1994) 7 Cal.4th 414, 425; see also *People v. Hovarter*, *supra*, at p. 1003.)

> The inference of identity, however, "need not depend on one or more unique or nearly unique common features; features of substantial but lesser distinctiveness may yield a distinctive combination when considered together." (*People v. Miller* (1990) 50 Cal.3d 954, 987 … .) Moreover, "the likelihood of a particular group of geographically proximate crimes being unrelated diminishes as those crimes are found to share more and more common characteristics." (*Id*. at p. 989.)

(*People v. Lynch* (2010) 50 Cal.4th 693, 736.)

Despite the high level of similarity required to admit uncharged criminal act evidence to prove a defendant's identity, such similarity has been found by the appellate courts in a variety of fact patterns. (*People v. Jones* (2013) 57 Cal.4th 899, 925-927, 930-933 [distinctively similar attacks on prostitutes on particular street in San Diego]; *People v. Edwards* (2013) 57 Cal.4th 658, 710-713 [characteristics of the victim and the manner of the crime, including the nature of the victim's sexual assault, made defendant's Hawaii murder sufficiently similar to permit admission to prove defendant's identity in charged California murder]; *People v. Vines* (2011) 51 Cal.4th 830, 856-858 [joinder for trial of two McDonald robbery cases proper because sufficient similarities to make them cross-admissible]; *People v. Hovarter*, *supra*, 44 Cal.4th at pp. 1001-1005 [subsequent kidnap, rape and attempted murder admissible in kidnap-rape murder case]; *People v. Carter*, *supra*, 36 Cal.4th at p. 1148 ["Although defendant notes certain differences in the circumstances surrounding the victims' deaths, the combination of fatal strangulation and placement of a young woman's body in a closed bedroom closet is both highly distinctive and suggestive that the same person perpetrated the crimes … ."]; *People v. Kipp*, *supra*, 18 Cal.4th at p. 370 [charged and uncharged offenses in which defendant strangled 19-year-old women in one location, carried victims' bodies to another location and covered bodies with bedding and victims both had bruises on legs and were similarly disrobed had common features sufficient to support inference of identity]; *People v. Sully* (1991) 53 Cal.3d 1195, 1224-1225 [common characteristics of illicit sex, use of cocaine and abuse of prostitutes sufficient to support admission of other-crimes evidence on issues of identity and intent of perpetrator]; *People v. Walker* (2006) 139 Cal.App.4th 782, 804 [prior assaults on prostitutes admissible to prove defendant murdered prostitute]; *People v. Erving* (1998) 63 Cal.App.4th 652 [prior arson fires]; but see *People v. Barnwell*, *supra*, 41 Cal.4th at pp. 1056-1057 [possession of different weapon not admissible in murder case]; *People v. Felix* (1993) 14 Cal.App.4th 997, 1005-1007 [prior robbery in concert by same two defendants not sufficiently similar].)

7720.1-Only substantial similarity needed to use uncharged crimes to prove intent 4/20

The introduction of other-crimes evidence frequently is relevant under Evidence Code section 1101, subdivision (b), to prove intent because of the rational inference that people act with a similar intent in similar circumstances. The California Supreme Court explained in *People v. Robbins* (1988) 45 Cal.3d 867 (*Robbins*):

We have long recognized "that if a person acts similarly in similar situations, he probably harbors the same intent in each instance" [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.
(*Id*. at p. 879, original italics; see also *People v. Scott* (2015) 61 Cal.4th 363, 398.)

"To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1194, quoting *People v. Yeoman* (2003) 31 Cal.4th 93, 121, accord *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*); see also *People v. Jackson* (2016) 1 Cal.5th 269, 301; *People v. Rogers* (2013) 57 Cal.4th 296, 326; *People v. Davis* (2009) 46 Cal.4th 539, 602.) "However, the least degree of similarity between the uncharged and charged acts is sufficient to prove intent because the recurrence of a similar result tends to negative accident, inadvertence, good faith, or other innocent mental state. (*Ewoldt*, *supra*, 7 Cal.4th at p. 402.)" (*People v. Garelick* (2009) 161 Cal.App.4th 1107, 1115; see also *People v. Jones* (2011) 51 Cal.4th 346, 371; *People v. Escudero* (2010) 183 Cal.App.4th 302, 313-314.)

> [W]hen the other crime evidence is admitted solely for its relevance to the defendant's intent, a *distinctive* similarity between the two crimes is often unnecessary for the other crime to be relevant. Rather, if the other crime sheds great light on the defendant's intent at the time he committed that offense it may lead to a logical inference of his intent at the time he committed the charged offense if the circumstances of the two crimes are substantially similar even though not distinctive.

(*People v. Nible* (1988) 200 Cal.App.3d 838, 848-849 (*Nible*), italics in original; similarly, see *People v. Lindberg* (2008) 45 Cal.4th 1, 25; *People v. Anderson* (2019) 42 Cal.App.5th 780, 783-784; *People v. Daniels* (2009) 176 Cal.App.4th 304, 315-316; but see *People v. Williams* (2018) 23 Cal.App.4th 396, 418-423 [improper to admit 23-year-old shooting of former mother-in-law to prove premeditation and deliberation element of first-degree stabbing murder of current wife].)

Drawing from a respected treatise on California evidence, at least one California appellate court has used a three-part test to determine if prior similar act evidence is admissible under Evidence Code section 1101 to prove a defendant's criminal intent.

> Professor Imwinkelried, upon whose treatise the Supreme Court relied in *Robbins*, *supra*, 45 Cal.3d at pages 879-880, has suggested that the intermediate inference justifying proof of intent by evidence of uncharged misconduct is "the objective improbability of the accused's innocent involvement in so many similar incidents." [Citation.] In his view, such an inference is supportable only if three threshold criteria are satisfied: (1) each uncharged incident must be "roughly similar to the charged crime" [citation]; (2) counting both charged and uncharged incidents, the accused must have been "involved in such events more frequently than the typical person" [citation]; and (3) the existence of mens rea "must be in bona fide dispute," such that the prosecution has "a legitimate need to resort to the uncharged misconduct evidence to prove intent" [citation].

(*People v. Rocha* (2013) 221 Cal.App.4th 1385, 1395 [defendant's prior entry into open garage to steal items properly admitted to prove his larcenous intent in current case in which he entered open garage and was seen looking in drawers before taking an impact wrench].)

7730.1-Motive can be proved by similar criminal acts 9/21

Evidence of a defendant's commission of an uncharged criminal act is admissible under Evidence Code section 1101, subdivision (b), to establish motive to commit a charged act. (*People v. Thompson* (1980) 27 Cal.3d 303, 315, fns. 13, 14 (*Thompson*).) Motive is always subject to proof, is material, and wide latitude is permitted in admitting evidence of its existence. (*People v. Pertsoni* (1985) 172 Cal.App.3d 369, 375; *People v. Daniels* (1971) 16 Cal.App.3d 36, 46.) For example, "[m]otive, though it was not an ultimate fact put at issue by the charges or the defense in this case, [may be] probative of the material issues of identity and intent, as well as premeditation and deliberation." (*People v. Cage* (2015) 62 Cal.4th 256, 274.) Even if motive is not an element of any of the charged crimes, "the absence of apparent motive may make proof of the essential elements less persuasive." (*People v. Phillips* (1981) 122 Cal.App.3d 69, 84; accord, *People v. Davis* (2009) 46 Cal.4th 539, 604.) " '[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.' (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.)" (*People v. Garcia* (2008) 168 Cal.App.4th 261, 275.)

> Other crimes evidence is admissible to establish two different types or categories of motive evidence. In the first category, "the uncharged act supplies the motive for the charged crime; the uncharged act is cause, and the charged crime is effect." [Citation.] "In the second category, the uncharged act evidences the existence of a motive, but the act does not supply the motive. … [T]he motive is the cause, and both the charged and uncharged acts are effects. Both crimes are explainable as a result of the same motive." [Citation.]

(*People v. Spector* (2011) 194 Cal.App.4th 1335, 1381; distinguish *People v. Clark* (2021) 62 Cal.App.5th 939, 960-962 [§ 1101, subd. (b) does not permit introduction of prior acts to establish motive to do act subsequent to charged crime such as discard evidence to avoid punishment].)

Under the first category, motive may be established by evidence of prior dissimilar crimes. (*Thompson*, *supra*, 27 Cal.3d at p. 319, fn. 23; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018.) "Similarity of offenses [is] not necessary to establish this theory of relevance" if the motive for the charged crime arises simply from the commission of the prior offense. (*Thompson*, *supra*, at p. 319, fn. 23.) "The existence of a motive requires a nexus between the prior crime and the current one, but such linkage is not dependent on comparison and weighing of the similar and dissimilar characteristics of the past and present crimes." (*People v. Scheer*, *supra*, 68 Cal.App.4th at p. 1018; see also *People v. Thompson* (2016) 1 Cal.5th 1043, 1115.) In *People v. Daniels* (1991) 52 Cal.3d 815, for example, the defendant was rendered a paraplegic during a shoot out with police in a prior bank robbery incident. This evidence was properly admitted against defendant to prove his motive for shooting two police officers was retaliation. (*Id*. at pp. 856-858; see also *People v Fuiava* (2012) 53 Cal.4th 622, 666-670 [defendant's ex-felon and parole status properly admitted to prove motive for shooting sheriff's deputy]; *People v. Casillas* (2021) 65 Cal.App.5th 135, 147-152 [defendant's immigration status as undocumented resident, twice deported and facing up to 20 years in prison if found in the United States, admissible to establish motive for shooting deputy during routine traffic stop].)

"California case law allows the admission of other crimes evidence to prove [the] second kind of motive." (*People v. Spector*, *supra*, 194 Cal.App.4th at p. 1381.) Under the second category, no requirement exists that for purposes of establishing defendant's motive, both the charged and uncharged acts be identical or nearly identical. (*Thompson*, *supra*, 27 Cal.3d at p. 319; *People v.*

Harvey (1984) 163 Cal.App.3d 90, 104-105.) Rather, only substantial similarity is necessary to provide the required "link" in the inference-drawing process. (*Thompson*, *supra*, 27 Cal.3d at pp. 319-320, fn. 23; *People v. Nible* (1988) 200 Cal.App.3d 838, 848-850; see, e.g., *People v. Davis*, *supra*, 46 Cal.4th at p. 604 [evidence of two prior sexual assaults on children involving bondage tended to show defendant had motive for sexually assaulting murder victim]; *People v. Demetrulias* (2006) 39 Cal.4th 1, 15 [evidence of prior assault and robbery of different victim tended to show defendant had motive to rob victim killed in current case].)

7740.1-Similar criminal acts may be used to prove common scheme or plan 6/21

"[A] common scheme or plan focuses on the manner in which the prior misconduct and the current crimes were committed, i.e., whether the defendant committed similar distinctive acts of misconduct against similar victims under similar circumstances." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1020; see also *People v. Walker* (2006) 139 Cal.App.4th 782, 803.) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403 (*Ewoldt*); see also *People v. Rhodes* (2019) 8 Cal.5th 393, 414; *People v. Anderson* (2018) 5 Cal.5th 372, 389.) "Evidence of a common design or plan … is not used to prove the defendant's intent or identity but rather to prove that the defendant engaged in the conduct alleged to constitute the charged offense." (*Ewoldt*, *supra*, 7 Cal.4th at p. 394; see also *People v. Chhoun* (2021) 11 Cal.5th 1, 28.)

"Evidence tending to establish a common plan or design should demonstrate ' "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." ' (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402.)" (*People v. Catlin* (2001) 26 Cal.4th 81, 120; see also *People v. Landry* (2016) 2 Cal.5th 52, 78.)

> [E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense.

(*Ewoldt*, *supra*, at p. 403; see also *People v. Vargas* (2020) 9 Cal.5th 793, 819; *People v. Kelly* (2007) 42 Cal.4th 763, 784.) But in contrast to the use of uncharged criminal acts to prove intent or motive, "a greater degree of similarity is required in order to prove the existence of a common design or plan." (*Ewoldt*, *supra*, at p. 402.)

In some instances, the commission of the prior offense is itself not the incentive for commission of the charged crime but the "[t]he presence of the same motive in both instances may be a contributing factor in finding a common plan or design." (*People v. Scheer*, *supra*, 68 Cal.App.4th at pp. 1020-1021.) In such cases, the offenses must "share common features." (*People v. McDermott* (2002) 28 Cal.4th 946, 999; *People v. Walker*, *supra*, 139 Cal.App.4th at p. 804.)

The most obvious example of this concept is direct evidence the defendant planned the type of crime he or she ultimately committed.

It long has been established that evidence that a defendant was planning to commit a crime is admissible to prove that the defendant later committed that crime: "The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done. A plan is not always carried out, but it is more or less likely to be carried out. … There is no question about the relevancy in general of such evidence … ." ([Citation.] "There is no situation in which a design to do an act would be irrelevant to show the doing of the act." [Citation.] "Evidence that the defendant possessed a plan to commit the type of crime with which he or she is charged is relevant to prove the defendant employed that plan and committed the charged offense." (*People v. Balcom* (1994) 7 Cal.4th 414, 424.)
(*People v. Case* (2018) 5 Cal.5th 1, 39 [several months before committing robbery-murder, defendant attempted to recruit friends to participate in similar robbery].)

7750.1-Prior similar experiences can be used to prove knowledge 07/21

Evidence of an uncharged criminal act is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident …) … ." (Evid. Code, § 1101, subd. (b).) "Evidence of a prior uncharged offense may be offered to prove a disputed fact relevant to the offense charged, such as knowledge, but not to prove the defendant's disposition to commit the offense." (*People v. Eagles* (1982) 133 Cal.App.3d 330, 339.) "People learn from their experiences. Even when those experiences occurred long ago, the knowledge gained from such experiences can be retained and recalled in the future." (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 242 (*Hendrix*).) "Whether similarity is required to prove knowledge and the degree of similarity required depends on the specific knowledge at issue and whether the prior experience tends to prove the knowledge defendant is said to have had in mind at the time of the crime." (*Id*. at p. 241.)

For example, knowledge of the dangers of driving while under the influence can be obtained through the general experience of having suffered a driving under the influence (DUI) conviction (*People v. Brogna* (1988) 202 Cal.App.3d 700, 709) or from the knowledge obtained in DUI classes (*People v. Garcia* (1995) 41 Cal.App.4th 1832, 1848-1850, disapproved on other grounds in *People v. Sanchez* (2001) 24 Cal.4th 983, 991, fn. 3; *People v. Murray* (1990) 225 Cal.App.3d 734, 746; *People v. McCarnes* (1986) 179 Cal.App.3d 525, 532).

> While prior similar driving conduct and other similar circumstances would enhance the probative value, other crimes evidence may be admissible even though similar only in a general way, i.e., the prior events involve prior DUI offenses. This is so because in any of these examples, the evidence supports an inference that the defendant was aware of the dangers of driving while under the influence at later times when he or she drove.

(*Hendrix*, *supra*, 214 Cal.App.4th at p. 241.)

"In narcotics prosecutions, evidence of prior drug convictions is relevant to prove knowledge of the narcotic nature of the substance. (*People v. Williams* (2009) 170 Cal.App.4th 587, 607; *People v. Thornton* (2000) 85 Cal.App.4th 44, 49-50.)" (*Hendrix*, *supra*, 214 Cal.App.4th at p. 241; see also *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 754.) "On this theory, the only necessary similarity is that the controlled substance be the same." (*Hendrix*, *supra*, 214 Cal.App.4th at p. 241; see also *People v. Washington* (2021) 61 Cal.App.5th 776, 787.)

But when the a prior incident is used to prove criminal intent or absence of mistake, an inference that defendant learned from his experiences and obtained information that establishes the requisite knowledge requires that the previous experiences be similar to the circumstances presented in the charged case. (*Hendrix*, *supra*, 214 Cal.App.4th at p. 242.) "[T]o establish knowledge when that element is akin to absence of mistake, the uncharged events must be sufficiently similar to the circumstances of the charged offense to support the inference that what defendant learned from the prior experience provided the relevant knowledge in the current offense." (*Id*. at pp. 242-243; see, e.g., *People v. Felix* (2019) 41 Cal.App.5th 177, 186-187 [evidence of 19-year-old robbery committed with same accomplice admissible to prove defendant's prior knowledge of accomplice's violent tendencies during charged attempted murder based in part on an aiding and abetting theory].) In contrast, defendant's prior possession of illegal weapons was not relevant to contested issue whether defendant actually and knowingly possessed illegal weapons found in backpack in car in which he was riding as passenger. (*People v. Reyes* (2019) 35 Cal.App.5th 538, 549-552; similarly, see *People v. Clark* (2021) 62 Cal.App.5th 939, 962-965 [prior gun possession had insufficient probative value to prove whether object displayed during current crime was a real or fake gun].)

7760.1-Similar act evidence may be used to disprove claim of mistake or accident 5/20

Evidence of an uncharged criminal act is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident …) … ." (Evid. Code, § 1101, subd. (b).) "[S]ection 1101, subdivision (b), expressly allows other crimes evidence to be admitted 'when relevant to prove some fact … such as … absence of mistake or accident. …' " (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1374 (*Spector*).)

> Certainly, when a defendant admits committing an act but denies the necessary intent for the charged crime because of mistake or accident, other-crimes evidence is admissible to show absence of accident. (*People v. Robbins* (1988) 45 Cal.3d 867, 879.) But we have never limited evidence of absence of accident to such instances. Rather, a defendant's plea of not guilty puts in issue all the elements of the charged offense.

(*People v. Whisenhunt* (2008) 44 Cal.4th 174, 204 [prior child abuse by defendant admissible to prove child's fatal injuries were not accidental]; see also, e.g., *People v. Molano* (2019) 7 Cal.5th 620, 664-666 [prior strangulations of wife admissible to refute defendant's claim homicide victim's death by strangulation during sex was accident]; *People v. Catlin* (2001) 26 Cal.4th 81, 146 ["Evidence that defendant previously had murdered his [fifth] wife Glenna by poisoning her with paraquat was relevant to the issue of the cause of death in the charged crimes, because it tended to corroborate the other evidence establishing that [defendant's fourth wife] Joyce and [his mother] Martha died of paraquat poisoning."]; *People v. Evers* (1992) 10 Cal.App.4th 588, 598 ["We conclude the evidence of Evers's prior acts of abuse was properly admitted to show Evers's knowledge and that Michael's injuries arose from nonaccidental means."]; *People v. Lisenba* (1939) 14 Cal.2d 403 [evidence defendant's previous wife died by drowning admissible to prove defendant's current wife's death by drowning was not accidental].)

Similar reasoning was used by the appellate court in *People v. New* (2008) 163 Cal.App.4th 442, to find two charged murders, over 30 years apart, were cross-admissible and thus, properly joined for trial:

> The circumstances surrounding Phyllis's and Somsri's deaths were similar. Perhaps most significant is the fact that both victims were married to New at the time they were killed. In addition, both Phyllis and Somsri were shot a single time, in the back of the head, from a relatively close distance. Both victims appeared to have been asleep at the time they were shot. At the time each of the victims was killed, New was the beneficiary of the victim's life insurance policy. These facts are sufficient to support an inference that New did not accidentally shoot Somsri, but instead, that he shot her intending to kill her. The trial court's conclusion that the probative value of this evidence as to New's intent outweighed its prejudicial effect was reasonable.

(*Id*. at pp. 469-470.)

The defendant in *Spector* was accused of killing a woman he met working at a bar. He took her to his home where she was shot by a gun placed in her mouth. The prosecution presented other women to testify how defendant had threatened and assaulted them, including with firearms, under similar circumstances. The appellate court affirmed. "Here, Spector expressly tried to prove Clarkson had committed suicide, and implicitly raised the alternative defense that she might have shot herself accidentally. … [T]he other crimes evidence was relevant to disprove these theories about how Clarkson died." (*Spector*, *supra*, 194 Cal.App.4th at pp. 1375-1376.) The appellate court in *Spector* also relied upon the "doctrine of chances" to support its ruling.

> "There is broad consensus that similar acts evidence may be introduced on a doctrine of chances rationale to prove the defendant committed an actus reus when the defendant asserts that he did not cause the … harm … . This type of evidence is admitted under several of the familiar category labels—absence of mistake or accident, modus operandi, or plan or scheme—but probability based reasoning underlies its relevance." [Citation.]

(*Id*. at p. 1379.) "California cases have recognized the value of this probability-based calculation that arises from a history of prior similar acts." (*Ibid*., citing *People v. Kelly* (2007) 42 Cal.4th 763, 786 ["It would have been a remarkable coincidence if, shortly after defendant violently assaulted two women he befriended at the fitness center, some different person happened to use that same apartment to assault another woman defendant had befriended at the fitness center."]; *People v. Steele* (2002) 27 Cal.4th 1230, 1244 ["[T]he doctrine of chances is based on a combination of similar events" and it "teaches that the more often one does something, the more likely that something was intended, and even premeditated, rather than accidental or spontaneous. Specifically, the more often one kills, especially under similar circumstances, the more reasonable the inference the killing was intended and premeditated."]; and *Matthews v. Superior Court* (1988) 201 Cal.App.3d 385, 396 [where victim's skeletal remains were insufficient to prove sexual assault, evidence of two prior rapes was properly admitted to establish corpus delicti at preliminary hearing on charge of murder during commission of rape].)

7770.1-The victim's character may be admissible to prove conduct under EC1103(a) 11/20

Character or disposition evidence is generally inadmissible to prove a person's conduct on a specified occasion. (Evid. Code, § 1101, subds. (a).) Evidence Code section 1103, subdivision (a) (§ 1103(a)) creates an exception for victims of crime:

> In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by

> Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [] (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).
>
> This has been referred to as the "violent victim rule." (*People v. DelRio* (2020) 54 Cal.App.5th 47, 54.)
>
> This rule allows a defendant like DelRio to try to prove the conduct of a victim like Prieto conformed to his character. Specifically, this exception allows what is usually forbidden: it permits DelRio to introduce evidence Prieto had a propensity for violent aggression. This evidence would aid DelRio's effort to prove that, at the crime scene, Prieto was violently aggressive, which forced DelRio to resort to deadly self-defense.

(*Ibid*.) It is not necessary that the defendant be aware of the victim's propensity for violence. (*Id*. at pp. 55-56.)

> "It has long been recognized that where self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim is admissible." [Citations.] Under Evidence Code section 1103, such character traits can be shown by evidence of specific acts of the victim on third persons as well as by general reputation evidence. [Citation.] … The admission of such character evidence, however, is not without bounds, but is subject to the dictates of Evidence Code section 352.

(*People v. Wright* (1985) 39 Cal.3d 576, 587.)

Such evidence may be excluded if there is no evidence the victim acted violently at the time of the defendant's attack and, thus, no basis for the defendant to claim self-defense. (*People v. Hoyos* (2007) 41 Cal.4th 872, 912-913 ["even if the murder victim were the most violent person in the world, that fact would not be relevant if the evidence made it clear that the victim was taken by surprise and shot in the back of the head"].)

Subdivision (a)(2) of section 1103allows the prosecution to product character evidence regarding the victim's non-violent nature to rebut contrary evidence proffered by the defense under subdivision (a)(1). In addition, under subdivision (b) of section 1103 the prosecution can rebut such evidence with evidence of the defendant's character for violent conduct. (*People v. Fuiava* (2012) 53 Cal.4th 622, 681-682; *People v. Koontz* (2002) 27 Cal.4th 1041, 1082-1084; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173-1176.)

7780.1-Uncharged sexual offenses admissible to prove disposition under EC1108 9/18

Character or disposition evidence is generally inadmissible to prove a defendant's conduct on a specified occasion. (Evid. Code, § 1101, subds. (a), (b).) Evidence Code section 1108 (§ 1108) creates an exception: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (§ 1108, subd. (a); see also *People v. Soto* (1998) 64 Cal.App.4th 966, 982-983; *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1115-1116.)

In enacting section 1108 the Legislature recognized the " 'serious and secretive nature of sex crimes and the often resulting credibility contest at trial,' " and intended in sex offense cases to relax the evidentiary restraints imposed by section 1101 "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911; see also *People v. Jones* (2012) 54

Cal.4th 1, 49.) "By its terms, section 1108 requires a trial court to engage in a section 352 analysis before admitting evidence of prior sex offenses." (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 965; see also *People v. Christensen* (2014) 229 Cal.App.4th 781, 796, 800-801.) "It follows that if evidence satisfies the requirements of section 1108, including that it is not inadmissible under section 352, then the admission of that evidence does not violate section 1101." (*People v. Daveggio & Michaud* (2018) 4 Cal.5th 790, 823.)

"Nearly every published opinion interpreting section 1108 (including some from this court) has recognized that this provision allows, when proper, evidence of prior uncharged sexual offenses to prove propensity. [Citations.]" (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1160.) "[I]n authorizing the jury's use of propensity evidence in sex offense cases, section 1108 necessarily extends to evidence of *both* charged and uncharged sex offenses, affirming that such evidence is not 'made inadmissible by Section 1101.' " (*Id*. at p. 1162, italics in original.) "In short, we conclude nothing in the language of section 1108 restricts its application to uncharged offenses." (*Id*. at p. 1164.) "[E]vidence of charged sex offenses, like evidence of uncharged sex offenses, may give rise to an inference of propensity to commit similar crimes, but the trial court's decision to permit the jury to consider the evidence for that purpose is properly guided by a section 352 weighing analysis." (*People v. Daveggio & Michaud*, *supra*, 4 Cal.5th at p. 829.)

Similarly, the admission of uncharged sexual offenses under section 1108 can come from any sources, including the victim of the charged sexual offense or offenses. (*People v. Gonzalez* (2017) 16 Cal.App.5th 494, 502.) "Nothing in section 1108 limits its effect to the testimony of third parties. Instead, the statute allows the admission of evidence of uncharged sexual offenses from any witness subject to section 352. (See *People v. Ennis* (2010) 190 Cal.App.4th 721, 733 [upholding trial court's ruling under section 352 that evidence of uncharged crimes from same witness who testified to charged crimes is admissible].)" (*People v. Gonzalez*, *supra*, 16 Cal.App.5th at p. 502.)

"A trial court's rulings admitting evidence under Evidence Code sections 1101 and 1108 are reviewed for abuse of discretion." (*People v. Daveggio & Michaud*, *supra*, 4 Cal.5th at p. 824.)

7780.2-Factors relevant to admission of EC1108 evidence 4/21

In *People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*) the California Supreme Court upheld the constitutionality of Evidence Code section 1108 against a due process challenge, concluding that the weighing process of Evidence Code section 352 would be a sufficient safeguard against undue prejudice from such propensity evidence. (*Id*. at pp. 916-917; see also *People v. Williams* (2016) 1 Cal.5th 1166, 1196.) In reaching this conclusion, the court established the criteria for trial courts to consider when ruling on the admissibility of evidence of prior sexual offenses. (*Falsetta*, *supra*, 21 Cal.4th at pp. 916-917.) The factors to be considered in conducting the analysis depend on the unique facts and issues of each case. (*Ibid*.; see also *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116.)

> Among the factors to consider are the " 'nature, relevance, and possible remoteness [of the evidence], the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses.' " [Citations.]

(*People v. Erskine* (2019) 7 Cal.5th 279, 296.) Stated another way:

> These factors are (1) whether the propensity evidence has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to tend to show the defendant did in fact commit the charged offense; (2) whether the propensity evidence is stronger and more inflammatory than evidence of the defendant's charged acts; (3) whether the uncharged conduct is remote or stale; (4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time. [Citation.] A trial court balances this first factor, i.e., the propensity evidence's probative value, against the evidence's prejudicial and time-consuming effects, as measured by the second through fifth factors.

(*People v. Nguyen*, *supra*, 184 Cal.App.4th at p. 1117; see also *People v. Avila* (2014) 59 Cal.4th 496, 515; *People v. Branch* (2001) 91 Cal.App.4th 274, 282 (*Branch*).)

"[T]here is no requirement that the charged and uncharged offenses be so similar that evidence of the prior acts would be admissible under section 1101." (*People v. Hernandez* (2011) 200 Cal.App.4th 953, 966 (*Hernandez*); see also *People v. Jones* (2012) 54 Cal.4th 1, 50.) If such strict similarities were required, "section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41, fn. omitted.) "Nevertheless, it follows that uncharged prior offenses that are very similar in nature to the charged crime logically will have more probative value in proving propensity to commit the charged offense. (*Branch*, *supra*, 91 Cal.App.4th at p. 285.)" (*Hernandez*, *supra*, 200 Cal.App.4th at p. 966.) "In any event, any dissimilarities in the alleged incidents relate only to the weight of the evidence, not its admissibility. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 660.)" (*Hernandez*, *supra*, 200 Cal.App.4th at p. 967; but see *People v. Jandres* (2014) 226 Cal.App.4th 340, 356 [trial court erred by not using Evid. Code § 352, to exclude prior conduct that was so dissimilar to current offense that its probative value did not substantially outweigh its prejudicial effect].)

Similarly, "the passage of time generally goes to the weight of the evidence, not its admissibility. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1173.)" (*Hernandez*, *supra*, 200 Cal.App.4th at p. 968.)

> Moreover, as the court explained in affirming the conviction in *Branch*, "significant similarities between the prior and the charged offenses may 'balance[] out the remoteness.' [Citation.]" (*Branch*, *supra*, 91 Cal.App.4th at p. 285 [30-year gap between offenses not too remote where prior and current offenses were 'remarkably similar'].) In other words, if the uncharged crimes "are very similar in nature to the charged offenses, the prior offenses have greater probative value in proving propensity to commit the charged offenses." (*Ibid*.; see also *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [gap of up to 20 years not too remote given similarity of prior and current acts]; [*People v.*] *Soto* [(1998)] 64 Cal.App.4th [966] at pp. 977-978, 992 [passage of 20 to 30 years does not automatically render prior incidents prejudicial when uncharged and charged sexual offenses are similar].)

(*Hernandez*, *supra*, 200 Cal.App.4th at p. 968; see also *People v. Robertson* (2012) 208 Cal.App.4th 965, 989-994 [admission of 1974 kidnapping and rape did not violate Evid. Code § 352].) "Defendant does not point to any evidence that his character changed over the relevant time period or offer any reason that such a change might have occurred. Moreover, evidence of subsequent

crimes may bear on a defendant's character at the time of the charged offense." (*People v. Cordova* (2015) 62 Cal.4th 104, 132-133 [sex crimes against children committed 13 and 18 years after charged rape-murder of child properly admitted].)

Finally, "the case for admission of propensity evidence 'is especially compelling' where, as here, '[a] sexual assault victim was killed and cannot testify.' " (*People v. Daveggio & Michaud* (2018) 4 Cal.5th 790, 824.) "That principle applies with additional force in this case: the extensive decomposition of [the victim's] body inhibited the search for physical evidence of sexual assault and cause of death." (*People v. Baker* (2021) 10 Cal.5th 1044, 1100.)

7780.3-Foundational requirements for admitting EC1108 evidence 3/17

Procedurally, "the admissibility of uncharged conduct pursuant to [Evidence Code] section 1108 turns on the existence of a preliminary fact—namely, that the uncharged conduct constitutes a statutorily-enumerated 'sexual offense.' (See *People v. Lucas* (1995) 12 Cal.4th 415, 466 ["Sometimes the relevance of evidence depends on the existence of a preliminary fact."].)" (*People v. Jandres* (2014) 226 Cal.App.4th 340, 353.) "The trial court must make a preliminary determination of whether the proffered evidence is sufficient for the jury to find, by a preponderance of the evidence, that the defendant committed an enumerated offense." (*Ibid*.) However, there need not be "independent evidence" that the currently charged sex crime actually involves a sex crime, as opposed to an attempted sex crime. (*People v. Spicer* (2015) 235 Cal.App.4th 1359, 1384.)

> In laying the foundation for admissibility, the prosecution must demonstrate that previously unadjudicated conduct amounts to a crime. That showing presents a mixed question of law and fact. The trial court rules on the legal issues relating to admissibility and resolves the preliminary factual question of capacity under [Evidence Code] section 405, subdivision (a). Once the evidence is admitted, the jury does not reassess these determinations. The jury does determine if the act occurred, as well as the weight and significance of the evidence. To that end, the jury may take into account the defendant's age in considering whether the evidence demonstrates his propensity to commit the charged offenses. The trial court, however, need not instruct the jury on that point absent a request.

(*People v. Cottone* (2013) 57 Cal.4th 269, 276.)

The burden of proof for a jury considering uncharged sexual offense is by a preponderance of evidence. (*People v. Cruz* (2016) 2 Cal.App.5th 1178, 1185.) But when instructing a jury they can use currently charged crimes to determine a defendant's propensity to commit other charged crimes in the same case, the burden of proof is beyond a reasonable doubt. (*Id*. at pp. 1185-1186.)

7780.4-Victim's prior sexual history may be admissible under EC782 5/20

"Generally, a defendant may not question a witness who claims to be the victim of sexual assault about the victim's prior sexual activity. (Evid. Code, § 1103, subd. (c)(1); *People v. Woodward* (2004) 116 Cal.App.4th 821, 831.)" (*People v. Mestas* (2013) 217 Cal.App.4th 1509, 1513 (*Mestas*).)

> Evidence of the sexual conduct of a complaining witness is admissible in a prosecution for a sex-related offense only under very strict conditions. A defendant may not introduce evidence of specific instances of the complaining witness's sexual conduct, for example, in order to prove consent by the complaining witness. (Evid. Code, § 1103, subd. (c)(1).) Such evidence may be admissible, though, when offered to attack the

credibility of the complaining witness and when presented in accordance with the following procedures under [Evid. Code] section 782

(*People v. Fontana* (2010) 49 Cal.4th 351, 362.)

Evidence Code section 782 provides in part:

> (a) [I]f evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under [Evid. Code] Section 780, the following procedure shall be followed:
>
> (1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.
>
> (2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. The affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (3). After that determination, the affidavit shall be resealed by the court.
>
> (3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.
>
> (4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to [Evid. Code] Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.
>
> …

Evidence Code section 782 also applies when the defense seeks to introduce relevant evidence of prior sexual conduct by a child. (*Mestas*, *supra*, 217 Cal.App.4th at p. 1514; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757 (*Daggett*).) "[S]exual conduct, as that term is used in section[] 782 … encompasses any behavior that reflects the actor's or speaker's willingness to engage in sexual activity. The term should not be narrowly construed." (*People v. Franklin* (1994) 25 Cal.App.4th 328, 334; see also *People v. Casas* (1986) 181 Cal.App.3d 889, 895.)

The trial court is vested with broad discretion to weigh a defendant's proffered evidence, prior to its submission to the jury, "and to resolve the conflicting interests of the complaining witness and the defendant." (*People v. Rioz* (1984) 161 Cal.App.3d 905, 916.) "[T]he trial court need not even hold a hearing unless it first determines that the defendant's sworn offer of proof is sufficient." (*Ibid*.) "We … conclude that the trial court did not abuse its discretion by refusing to hold an evidentiary hearing on the proffered evidence. The alleged conduct was not sufficiently similar to the conduct charged in this case and therefore was not sufficiently probative of the victims' credibility to require an evidentiary hearing." (*Mestas*, *supra*, 217 Cal.App.4th at p. 1517; see also *People v. Woodward*, *supra*, 116 Cal.App.4th at p. 832.) In contrast, the appellate court in *Daggett* found a child victim's prior sexual molestation to be sufficiently relevant to justify a hearing. (*Daggett*, *supra*, 225 Cal.App.4th 754-755.) "[I]t is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant." (*Id*. at p. 757.)

If the defense's offer of proof is sufficient, the court must conduct a hearing outside the presence of the jury and allow defense counsel to question the complaining witness regarding the offer of proof. (*People v. Fontana* (2010) 49 Cal.4th 351, 365-368.) "The defense may offer evidence of the victim's sexual conduct to attack the victim's credibility if the trial judge concludes following the hearing that the prejudicial and other effects enumerated in Evidence Code section 352 are substantially outweighed by the probative value of the impeaching evidence." (*People v. Chandler* (1997) 56 Cal.App.4th 703, 708.) Evidence Code section 352 is properly used, for example, to exclude proffered defense evidence that the victim made a prior complaint of sexual assault against a third person to attack the victim's credibility if there is no evidence that the prior complaint was untrue. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201; *People v. Waldie* (2009) 173 Cal.App.4th 358, 363-364; *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1456-1458.)

7790.1-The scope of the EC1109 exception to EC1101(a) is wide 8/21

Character or disposition evidence is generally inadmissible to prove a defendant's conduct on a specified occasion. (Evid. Code, § 1101, subds. (a), (b).) Evidence Code section 1109 creates an exception for certain crimes. (*People v. Megown* (2018) 28 Cal.App.5th 157, 163-164.) Evidence Code section 1109, subdivision (a)(1) provides in pertinent part: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to [Evid. Code] Section 352." Similarly, subdivision (a)(2) of section 1109, provides in pertinent part: "[I]n a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by [Evid. Code] Section 1101 if the evidence is not inadmissible pursuant to [Evid. Code] Section 352." "[I]n enacting Evidence Code section 1109, subdivision (a)(2), the Legislature has essentially transferred propensity from the undue prejudice side of the balance to the probative value side." (*People v. Fruits* (2016) 247 Cal.App.4th 188, 206 (*Fruits*).)

> In discussing the admissibility of evidence under the uncharged domestic violence evidence provision in subdivision (a)(1) of Evidence Code section 1109, it has been recognized that " ' "[t]he principal factor affecting the probative value of an uncharged act is its similarity to the charged offense." ' [Citation.] Section 1109 was intended to make admissible a prior incident 'similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person.' [Citation.] Thus, the statute reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are 'uniquely probative' of guilt in a later accusation. [Citation.] …" [Citation.]

(*Fruits*, *supra*, 247 Cal.App.4th at p. 202, citing *People v. Johnson* (2010) 185 Cal.App.4th 520, 531-532.)

Section 1109 applies whether the evidence is offered by the prosecution to prove the defendant's guilt or presented by a codefendant as part of a third party culpability defense. (*People v. Thomas* (2021) 63 Cal.App.5th 612, 626-628.)

7790.2-EC1109's domestic violence exception applies to a variety of criminal acts 6/20

Evidence Code section 1109 applies to "any criminal action in which the defendant is accused of an offense involving domestic violence." (Subd. (a)(1).) "Section 1109 is triggered by the nature of the accusation, not by the sufficiency of the evidence presented to prove that accusation." (*People v. Kerley* (2018) 23 Cal.App.5th 513, 533.) "Being 'accused of an offense involving domestic violence' is broader than domestic violence which is defined as abuse committed against one of certain defined individuals." (*People v. Mcgown* (2018) 28 Cal.App.5th 157, 166.) And the same broad scope of section 1109 applies to both the prior and current charged act involving domestic violence. (*People v.* Wang (2020) 46 Cal.App.5th 1055, 1077.) Thus, depending on the facts, section 1109 can apply to a variety of current charges as well as prior uncharged conduct, including murder (*People v. Kerley*, *supra*, at p. 533; *People v. Brown* (2011) 192 Cal.App.4th 1222, 1233-1237), burglary (*People v. James* (2010) 191 Cal.App.4th 478, 482-484), child abuse (*People v. Dallas* (2008) 165 Cal.App.4th 940, 951-957), rape (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138-1139), animal cruelty (*People v. Kovacich* (2001) 201 Cal.App.4th 863, 892-895), but not necessarily stalking (*People v. Zavala* (2005) 130 Cal.App.4th 758, 770-771). Section 1109 can also apply to crimes committed against persons not covered by the domestic violence statutes if these crimes are committed in the presence of a person who is covered. (*People v. Mcgown*, *supra*, 28 Cal.App.5th at p. 166 [defendant pointed gun and threatened to kill both his cohabitant and his cohabitant's mother].)

7790.3-EC1109 evidence is subject to EC352 analysis 8/21

"Evidence Code section 1109 allows a jury to draw propensity inferences from prior acts. [Citation.] However, as clearly set forth in Evidence Code section 1109, the admissibility of such evidence also depends upon the balancing of the factors set forth in Evidence Code section 352 against the probative value of the evidence." (*People v. Fruits* (2016) 247 Cal.App.4th 188, 202 (*Fruits*).); see also *People v. Kerley* (2018) 23 Cal.App.5th 513, 532 (*Kerley*).) "Evidence Code section 352 serves as a safety valve for section 1109 that prohibits the admission of uncharged elder abuse evidence whenever its prejudicial impact substantially outweighs its probative value. (Cf. *People v. Johnson* (2010) 185 Cal.App.4th 520, 529 (*Johnson*) [prior acts of domestic violence held admissible under Evidence Code section 1109, subd. (a)(1)])." (*Fruits*, *supra*, 247 Cal.App.4th at p. 201.)

When determining the admissibility of section 1109 evidence under section 352: " ' "The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense." ' " (*Johnson*, *supra*, 185 Cal.App.4th at p. 531.) In addition, the "frequency, regularity and severity" of the domestic violence increases its probative value. (*Kerley*, *supra*, 23 Cal.App.5th at p. 536.) "The prior instances are not sufficient by themselves to prove the charged crime, but the fact that defendant regularly assaulted the victim is evidence the jury can use to conclude, along with other evidence, that the defendant assaulted the victim in committing the charged crime." (*Id*. at p. 539.) But "[w]hile multiple incidents may create a stronger showing of propensity, nothing in the language of section 1109 or related case law suggests evidence of a defendant's prior act of child abuse is only admissible if there is a pattern of child abuse consisting of multiple incidents." (*People v. Thomas* (2021) 63 Cal.App.5th 612, 628-629.) "Another factor in the section 352 analysis is the degree of certainty with which the prior instances of domestic violence occurred." (*Kerley*, *supra*,

23 Cal.App.5th at p. 537.) And that the defendant engaged in domestic violence against different victims strengthens its probative value on propensity. (*People v. Merchant* (2019) 40 Cal.App.5th 1179, 1194.)

> The probative value of the section 1109 evidence is weighed against other factors. Section 352, which section 1109 "expressly incorporates" [citation], gives the trial court discretion to exclude or admit evidence of past domestic violence after the court weighs the probative value of the evidence against "the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" (§ 352). The law requires " 'the probative value of the evidence must be balanced against four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses.' " ([Citation.]

(*People v. Thomas*, *supra*, 63 Cal.App.5th at p. 630.)

Finally, even when past acts are admissible under section 1109, "the weighing process of section 352 requires the trial court to consider 'the availability of less prejudicial alternatives' such as 'excluding irrelevant though inflammatory details surrounding the offense.' " (*People v. Disa* (2016) 1 Cal.App.5th 654, 672-673, citing *People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

7790.4-Conduct more than 10 years old may be admissible under EC1109(e) 3/19

Evidence Code section 1109, subdivision (e) states: "Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." The statute "clearly anticipates that some remote prior incidents will be deemed admissible and vests the courts with substantial discretion in setting an 'interest of justice' standard." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 539.) "[T]he 'interest of justice' exception is met where the trial court engages in a balancing of factors for and against admission under section 352 and concludes ... that the evidence was 'more probative than prejudicial.' " (*Id*. at pp. 539-540.)

> The trial court, which allowed [the victim] Michelle to state that the abuse started 16 years earlier and was continuous, recognized the unique "probative value" of such evidence to establish a "pattern of ... violence" and found the evidence "highly relevant." We agree; this evidence created a strong inference that Megown had a propensity to commit the acts that Michelle described. This history of abuse was also relevant to Michelle's fear and her earlier refusals to seek help or call the police. Moreover, Michelle's generalized statements and the brief details provided about the 1999 incident were less aggravated or inflammatory than the charged offenses. There is no reasonable likelihood that the result would have been more favorable to Megown had the trial court excluded the 1999 incident and the testimony that Megown regularly became physically violent with Michelle thereafter. The trial court acted well within its discretion in admitting the remote evidence in the interests of justice.

(*People v. Mcgown* (2018) 28 Cal.App.5th 157, 168.)

7800.1-Test for valid claim of privilege against self-incrimination 10/20

The Fifth Amendment to the United States Constitution guarantees that "[n]o person … shall be compelled in any criminal case to be a witness against himself." "Likewise, Evidence Code section 940 provides that 'a person has a privilege to refuse to disclose any matter that may tend to incriminate him' to the extent that such a privilege exists under the state or federal Constitution." (*People v. Silveria* (2020) 10 Cal.5th 195, 296.) "In an oft-cited case, the high court stated that this privilege 'must be accorded liberal construction in favor of the right it was intended to secure.' " (*People v. Seijas* (2005) 36 Cal.4th 291, 304 (*Seijas*), quoting *Hoffman v. United States* (1951) 341 U.S. 479, 486 (*Hoffman*).) The test from *Hoffman* provides that "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (*Id*. 341 U.S. at pp. 486-487; see also *People v. Capers* (2019) 7 Cal.5th 989, 1011.) "In that regard, a witness's answers need not in themselves support a conviction under a criminal statute, but may 'furnish a link in the chain of evidence' needed to prosecute the witness for a crime." (*People v. Trujeque* (2015) 61 Cal.4th 227, 267 (*Trujeque*), citing *Hoffman*, *supra*, 341 U.S. at p. 486.) Ultimately, a trial court may reject an assertion of the privilege only when it appears to the court " 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." (*Hoffman*, *supra*, 341 U.S. at p. 488; see also *Seijas*, *supra*, 36 Cal.4th at p. 305 [Evid. Code, § 404 incorporates the *Hoffman* test and is construed "broadly in favor of the privilege"].)

A witness, however, may not make a blanket assertion of the privilege against self-incrimination. (*Trujeque*, *supra*, 61 Cal.4th at p. 267.) A witness's "say-so does not itself establish the hazard of incrimination. It is for the court to say whether his silence is justified … ." (*Hoffman*, *supra*, 341 U.S. at p. 486.)

> In other words, a trial court "must make 'a particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded.' [Citation.] Although the witness may have a valid claim to the privilege with respect to some questions, the scope of that privilege may not extend to all relevant questions. The witness may be totally excused only if the court finds that he could 'legitimately refuse to answer essentially all relevant questions.' [Citation.]" [Citation.]

(*Trujeque*, *supra*, 61 Cal.4th at p. 268.)

7800.2-Does not apply to pre-arrest police questioning unless privilege asserted 9/13

The Fifth Amendment to the United States Constitution guarantees that "[n]o person … shall be compelled in any criminal case to be a witness against himself." "It has long been settled that the privilege 'generally is not self-executing' and that a witness who desires its protection ' "must claim it." ' [Citations.]" (*Salinas v. Texas* (2013) 570 U.S. 178, 181 (*Salinas*) 181 (plur. opn. of Alito, J.).) "Although 'no ritualistic formula is necessary in order to invoke the privilege,' [citation], a witness does not do so by simply standing mute." (*Ibid*.)

In *Salinas*, petitioner Salinas, who was not under arrest or otherwise restrained (i.e., *Miranda* inapplicable), agreed to be interviewed by police about a double murder. After answering some questions, he remained silent about when asked if the shells at the scene would match his shotgun. "Instead, petitioner '[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his

hands in his lap, [and] began to tighten up.'…" (*Salinas*, *supra*, 570 U.S. at p. 182.) This reaction, including his silence, were introduced at trial as evidence of Salinas's guilt. The United States Supreme Court upheld admission of this evidence ruling the privilege against self-incrimination inapplicable. "Petitioner's Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question." (*Id*. at p. 181.) "To prevent the privilege from shielding information not properly within its scope, we have long held that a witness who ' "desires the protection of the privilege … must claim it" ' at the time he relies on it. [Citations.]" (*Id*. at p. 183.)

> We have before us no allegation that petitioner's failure to assert the privilege was involuntary, and it would have been a simple matter for him to say that he was not answering the officer's question on Fifth Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment.

(*Id*. at p. 186.)

7800.3-Corporations & other organizations cannot claim self-incrimination privilege 12/16

Whether the claim is made upon constitutional (i.e., Fifth Amendment of United States Constitution) or statutory (i.e., Evid. Code § 940) grounds, a corporation or other organization lacks the privilege against self-incrimination. Thus business records, including those of corporate criminal defendants, are not protected by the privilege against self-incrimination. (*United States v. White* (1944) 322 U.S. 694, 699; *People v. Appellate Division (World Wide Rush, Inc.)* (2011) 197 Cal.App.4th 985, 990 (*World Wide Rush*); *People v. Superior Ct. (Keuffel & Esser Co.)* (1986) 181 Cal.App.3d 785, 788.)

> Finally, we note that real parties in interest's return denies that they are corporations. This is of no consequence to our analysis, as organizations of any sort, corporate or otherwise, as well as individuals acting as representatives of the organization, lack the privilege against self-incrimination. (*United States v. White*, *supra*, 322 U.S. at p. 699.) Accordingly, all references to "corporate" documents or records and "corporate defendants" are fully applicable to real parties in interest, whatever their organizational structure may be.

(*World Wide Rush*, *supra*, 197 Cal.App.4th at p. 994.) This is known as the "collective entity" doctrine.

> The underlying principle of this doctrine, as repeatedly explained by the United States Supreme Court, is that a corporate officer may not rely on the Fifth Amendment when required to produce the records of the corporation. For example, in *Hale* [*v. Henkel* (1906) 201 U.S. [43] at 76, the United States Supreme Court rejected a corporate officer's reliance on the Fifth Amendment when, though given personal immunity, he was required by a grand jury to answer questions and produce material demanded in a subpoena. In *Wilson v. United States* (1911) 221 U.S. 361 the president of a corporation unsuccessfully challenged a contempt order after he refused to produce subpoenaed corporate records. The president "could assert no *personal* right to retain the corporate books against any demand of government which the corporation was bound to recognize." (*Id*. at p. 385, italics added; see also *Dreier v. United States* (1911) 221 U.S. 394, 400 [corporate secretary properly found in contempt for refusing demand for corporate documents, notwithstanding his claim that those papers would tend to incriminate him].)

As the high court subsequently made clear, "representatives of a collective entity act as agents, and the official records of the organization that are held by them in a representative rather than a personal capacity cannot be the subject of their personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally ... . Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation, which possesses no such privilege." (*Braswell* [*v. United States* (1988)] 487 U.S. [99] at pp. 99-100.) Thus, while business records of a sole proprietor or practitioner may be protected from release by the Fifth Amendment, an individual "cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." (*Bellis v. United States* (1974) 417 U.S. 85, 93-101.)

(*City of San Jose v. MediMarts, Inc.* (2016) 1 Cal.App.5th 842, 851-852.)

7800.4-Defense cannot assert a third party's self-incrimination rights 10/20

A criminal defendant has no standing to raise a claim involving an alleged violation of a third party's Fifth Amendment privilege against self-incrimination. (*People v. Silveria* (2020) 10 Cal.5th 195, 264; *People v. Clark* (2016) 63 Cal.4th 522, 559; *People v. Jenkins* (2000) 22 Cal.4th 900, 965; see also *People v. Garcia* (2020) 46 Cal.App.5th 123, 177.) Instead, the defense must demonstrate that the alleged violation of the third party's privilege against self-incrimination impacted the defendant's constitutional rights. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 965.) For example, the defense can raise a claim that the admission of a witness's allegedly coerced testimony rendered the defendant's trial fundamentally unfair. (*Id*. at p. 966) But this claim can succeed only if the defense demonstrates "fundamental unfairness at trial," usually by establishing that the evidence was made unreliable by coercion. (*Ibid*.)

Although a defendant lacks standing to complain about a violation of a third party's Fifth Amendment privilege against self-incrimination, a defendant does have standing to assert that a violation occurred of his or her own due process right to a fair trial because of an asserted violation of a third party's Fifth Amendment right. (*People v. Badgett* (1995) 10 Cal.4th 330, 343.) "[D]efendant can prevail on his suppression claim only if he can show that the trial testimony given by [the third party] was involuntary at the time it was given." (*Id*. at 347.) "The purpose of exclusion of evidence pursuant to a due process claim such as defendants' is adequately served by focusing on the evidence to be presented at trial, and asking whether that evidence is made unreliable by ongoing coercion, rather than assuming that pressures that may have been brought to bear at an earlier point ordinarily will taint the witness's testimony." (*Id*. at pp. 347-348.) "Thus, it is not enough for a defendant who seeks to exclude trial testimony of a third party to allege that coercion was applied against the third party, producing an involuntary statement before trial. In order to state a claim of violation of his own due process rights, a defendant must also allege that the pretrial coercion was such that it would actually affect the reliability of the evidence to be presented at trial." (*Id*. at p. 348, fn. omitted.)

(*People v. Clark*, *supra*, 63 Cal.4th at p. 580.)

7820.1-Attorney-client privilege defined 6/17

"California's attorney-client privilege is embodied in [Evidence Code] section 950 et seq. and protects confidential communications between a client and his or her attorney made in the course of an attorney-client relationship." (*Edwards Wildman Palmer LLP v. Superior Court* (2014) 231 Cal.App.4th 1214, 1224.) The attorney-client privilege authorizes a client to refuse to disclose, and prevents others from disclosing, confidential communications between a client and his or her attorney. (Evid. Code, § 954.) "Absent actual disclosure, or a demand for disclosure, [the attorney-client privilege contained in Evidence Code section 954] is simply not implicated." (*People v. Delgado* (2017) 2 Cal.5th 544, 560; see also *People v. Alexander* (2010) 49 Cal.4th 846, 887.)

A "client" is defined as "a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity … ." (Evid. Code, § 951.) A "lawyer" is defined as "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." (Evid. Code, § 950.)

An attorney-client relationship exists for purposes of the privilege whenever a person consults an attorney for the purpose of obtaining the attorney's legal service or advice, even if the attorney is never hired. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1208, 1210; *People v. Canfield* (1974) 12 Cal.3d 699, 705; *Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 116-117 (*Kerner*).) No formal agreement or compensation is necessary to create an attorney-client relationship for purposes of the privilege. (*Kerner*, *supra*, 206 Cal.App.4th at p. 117.) "In contrast, no attorney-client relationship arises for purposes of the privilege if a person consults an attorney for nonlegal services or advice in the attorney's capacity as a friend rather than in his or her professional capacity as an attorney. (*People v. Gionis*, *supra*, 9 Cal.4th at p. 1212.)" (*Kerner*, *supra*, at p. 117; see also *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 227 [attorney-client privilege does not apply to providing business advice].) "[A] client cannot protect unprivileged information from discovery by transmitting it to an attorney." (*Costco Wholesale Corp. v. Superior Ct.* (2009) 47 Cal.4th 725, 735; see also *Los Angeles Bd. of Supervisors v. Superior Ct.* (2016) 2 Cal.5th 282, 296.)

7820.2-Only certain persons can claim attorney-client privilege 2/16

The attorney-client privilege may be claimed only by the holder of the privilege, a person who is authorized by the holder to claim the privilege or the person who was the lawyer at the time of the confidential communication. (Evid. Code, § 954; *Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1096.) In most cases the "holder of the privilege" is defined as the "client." (Evid. Code, § 953; *Bank of America, N.A. v. Superior Court*, *supra*, 212 Cal.App.4th at p. 1096.) A "client" is defined as "a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity … ." (Evid. Code, § 951.) The lawyer who received or made a privileged communication is obligated to "claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege" under Evidence Code section 954. (Evid. Code, § 955; see also *Edwards Wildman Palmer LLP v. Superior Court* (2014) 231 Cal.App.4th 1214, 1226; *Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 111-112.) "Additionally, the holder of the attorney-client privilege has standing to assert the privilege in a proceeding to prevent disclosure and there is no need to intervene to become an actual party to the

lawsuit in order to be able to assert the privilege." (*League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 985.)

7820.3-Attorney-client privilege applies only to confidential communications 8/20

The attorney-client privilege encompasses "a confidential communication between client and lawyer" (Evid. Code, § 954), which is defined as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons … ." (Evid. Code, § 952; see *People v. Shrier* (2010) 190 Cal.App.4th 400, 411; but see *People v. Miles* (2020) 9 Cal.5th 513, 589-590 [questioning of attorney on general legal principles and publically available facts did not involve confidential communications with defendant].) "The privilege is that of the client and not the attorney, and the client must intend that communications be confidential." (*Insurance Co. of North America v. Superior Court* (1980) 108 Cal.App.3d 758, 765.)

> The privilege authorizes a client to refuse to disclose, and to prevent others from disclosing, confidential communications between attorney and client. (Evid. Code, § 950 et seq.) [T]he fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. [Citation.]

(*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, fn. omitted; see also *Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389, 396 (*Zimmerman*); *Fireman's Fund Ins. Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1272-1273 (*Fireman's Fund*).)

"[T]he privilege does not apply to every single communication transmitted confidentially between lawyer and client. Rather, the heartland of the privilege protects those communications that bear some relationship to the attorney's provision of legal consultation." (*Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 294 [billing invoices generally not communicated for purpose of legal consultation]; distinguish *County of Los Angeles Bd. of Supervisors v. Superior Court* (2017) 12 Cal.App.5th 1264, 1273-1274 [billing invoices in pending litigation are privileged].) "[T]he privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371; *League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 988.) The privilege includes legal opinions formed by counsel, even if it is not communicated to the client. (*Fireman's Fund, supra*, 196 Cal.App.4th at p. 1273.)

> The privilege protects communications between legal professionals within the law firm representing the client (*Fireman's Fund* [*supra*, at pp.] 1273-1274), communications between a business entity and its in-house counsel acting in a legal capacity (*Alpha Beta Co. v. Superior Court* (1984) 157 Cal.App.3d 818, 825), and communications made during preliminary consultation, regardless whether the attorney is ultimately retained (*Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1003). The privilege protects communications made by electronic means, such as e-mail. (Evid. Code, § 917, subd. (b).)

(*Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1099.)

Other forms of third party communications are also covered by the attorney-client privilege. Evidence Code section 912, subdivision (d), provides: "A disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege) … , when disclosure is reasonably necessary for the accomplishment of the purpose for which the

lawyer … was consulted, is not a waiver of the privilege." "Thus, for example, the 'privilege extends to communications which are intended to be confidential, if they are made to attorneys, to family members, business associates, or agents of the party or his attorneys on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interest of the litigant.' [Citation.]" (*OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 890.) "The privilege protects the disclosure of communications between attorney and client. It does not protect disclosure of the underlying facts which were communicated [citations], and it does not extend to independent witnesses [citation]." (*Zimmerman*, *supra*, 220 Cal.App.4th at p. 396.)

Whether the privilege applies as to communications and observations of third parties may depend on if there is an agency relationship that can be established by the holder of the privilege. (*Zimmerman*, *supra*, 220 Cal.App.4th at pp. 397-403.) However, "the party claiming the privilege must prove the existence of agency." (*Id*. at p. 403 [attorney presented insufficient evidence to establish such relationship].) "[T]he privilege does not protect information coming to an attorney from a third person who is not a client unless such a person is acting as the client's agent." (*People v. Lee* (1970) 3 Cal.App.3d 514, 527 ["There is no evidence of an attorney-client relationship between the defendant's wife and the public defender's office, nor any evidence that in delivering the shoes to the public defender the wife was acting as defendant's agent or under his direction."].)

Finally, when the client communicates with his or her lawyer in the presence of third parties who have no interest in the manner the privilege is waived. (*People v. Rhodes* (2019) 8 Cal.5th 393, 410.) "California courts have applied these principles to hold that clients' oral communications to their lawyers during court proceedings or recesses were unprivileged because they were made so loudly as to be overheard by others who were openly and permissibly present. [Citations.]" (*Ibid*.)

7820.4-Attorney-client privilege does not apply to independent facts 10/19

The attorney-client privilege encompasses "a confidential communication between client and lawyer" (Evid. Code, § 954), which is defined as "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons … ." (Evid. Code, § 952.) The attorney-client privilege "does not shield from disclosure underlying facts that may be set out in the communication." (*Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 227.) The privilege also does not protect the disclosure of "independent facts related to a communication; that a communication took place, and the time, date and participants in the communication." (*State Farm Fire and Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 640 (*State Farm*).) In addition, "[w]here the privilege applies, it may not be used to shield facts, as opposed to communications, from discovery." (*Edwards Wildman Palmer LLP v. Superior Court* (2014) 231 Cal.App.4th 1214, 1224.)

In *State Farm*, there was an attorney-client claim raised as to whether certain meetings with an attorney took place, the subject matter of the meetings, and who was present. The appellate court stated that the attorney-client privilege "protects disclosure of communications between the attorney and the client; it does not protect disclosure of underlying facts which may be referenced within a qualifying communication." (*State Farm*, *supra*, 54 Cal.App.4th at p. 639.) Therefore, the statements regarding the attorney-client meeting were determined to be not privileged. (*Id*. at p. 641.)

In *Coy v. Superior Court* (1962) 58 Cal.2d 210, an interrogatory sought to determine the date on which a civil defendant first conferred with his attorney "in regard to the very matter which is the gravamen of the present case." The appellate court found that this question did not attempt to elicit any communication between a client and his attorney. (*Id*. at p.214.) Rather, the court held that the date of a meeting between an attorney and his client is not a matter that is "communicated" by the client to his attorney in the course of the professional relationship and is therefore not within the scope of the attorney-client privilege. (*Id*. at pp. 219-220.)

> "[T]hose data which would have come to the attorney's notice in any event, by mere observation, without any action on the client's part—such as the color of his hat or the pattern of his shoe—and those data which become known by such acts as the client would ordinarily have done in any event, without any purpose of communicating them to the attorney as his adviser … these are not any part of the communication of the client … ." [Citation.]

(*Grand Lake Drive In, Inc. v. Superior Court* (1960) 179 Cal.App.2d 122, 126.)

Finally, "[a] disclosure that a communication did occur that does not disclose the specific content of the communication may not waive the privilege. [Citation.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1265, fn. 14.) Similarly, "revealing that a particular communication did not occur would not necessarily result in a waiver of the privilege." (*Dickinson v. Cosby* (2019) 37 Cal.App.5th 1138, 1158.)

7820.5-Physical evidence in defense attorney's hands not protected by privilege 2/15

A criminal defendant does not have the right to withhold evidence from the state by asserting the attorney-client privilege or the defendant's privilege against self-incrimination. It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the instrumentalities of the crime. (*People v. Lee* (1970) 3 Cal.App.3d 514, 326 (*Lee*); see also Pen. Code, § 135.) "'The attorney should not be a depository for criminal evidence … .' " (*Lee*, *supra*; 3 Cal.App.3d at p. 326)

The attorney-client privilege does not allow withholding evidence from the state. (*Lee*, *supra*, 3 Cal.App.3d at p. 326; see also *Andresen v. Maryland* (1976) 427 U.S. 463, 472; *Fisher v. United States* (1976) 425 U.S. 391, 396-398; *Crouch v. United States* (1973) 409 U.S. 322, 327; *People v. Superior Court (Fairbank)* (1987) 192 Cal.App.3d 32.) "[T]he fact that the client delivered such evidence to his attorney may be privileged, the physical object itself does not become privileged merely by reason of its transmission to the attorney." (*Lee*, *supra*, 3 Cal.App.3d at p. 526.) "[T]he attorney-client privilege does not permit attorneys to disturb evidence without disclosing its original location and condition, nor may they turn over physical evidence to their clients rather than to the police or prosecution." (*Alhambra Police Officers Ass'n v. City of Alhambra Police Dept.* (2003)113 Cal.App.4th 1413, 1423.) Nor does a defense attorney's compliance with this responsibility violate the defendant's privilege against self-incrimination. (*People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1019-1025.)

The California Supreme Court clarified the consequences of a defense attorney's handling physical evidence in *People v. Meredith* (1981) 29 Cal.3d 682 (*Meredith*). In *Meredith* the victim was robbed and murdered. One of the defendants (Scott) told his lawyer he took "the victim's wallet, divided the money with Meredith, attempted to burn the wallet, and finally put it in the trash

can." (*Id*. at p. 686.) The lawyer had his investigator retrieve the wallet from the trash can. "Counsel examined the wallet and then turned it over to the police." (*Ibid*.) The admissibility of the wallet was not in dispute but the testimony of the investigator who retrieved it was contested. Defendant (Scott) claimed the attorney-client privilege prevented the prosecution from calling the investigator and eliciting the location of the retrieved wallet. The California supreme Court rejected this claim.

> We therefore conclude that whenever defense counsel removes or alters evidence, the statutory privilege does not bar revelation of the original location or condition of the evidence in question. We thus view the defense decision to remove evidence as a tactical choice. If defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation. If, however, counsel chooses to remove evidence to examine or test it, the original location and condition of that evidence loses the protection of the privilege. Applying this analysis to the present case, we hold that the trial court did not err in admitting the investigator's testimony concerning the location of the wallet.

(*Id*. at p. 695, fn. omitted; see also *Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389, 397.)

7820.6-Attorney-client privilege can be waived 2/15

A waiver of the attorney-client privilege occurs "if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (Evid. Code, § 912, subd. (a).) "Failure to claim the attorney-client privilege constitutes consent to disclosure and a waiver of the privilege only if the holder, in a proceeding in which he or she has the legal standing and opportunity to claim the privilege, fails to claim the privilege knowing that the disclosure of privileged information is sought. [Citations.]" (*Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 112.) "If these conditions are satisfied, the holder's failure to assert the privilege through his or her attorney constitutes a waiver if the holder had an opportunity to consult with the attorney. [Citation.]" (*Ibid*.) "[E]ven an 'equivocal statement' by the holder's attorney may support a finding of waiver if the holder, through his or her attorney, fails to claim the privilege knowing that privileged information is sought and the holder is provided an opportunity to object. [Citation.]" (*Id*. at p. 114.)

7820.7-Party claiming attorney-client privilege has initial burden 8/19

In *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725(*Costco*), the California Supreme Court explained that when a trial court examines a claim that a communication is protected by the attorney-client privilege:

> The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. [Citations.] Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply.

(*Id*. at p. 733; see also *Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 596; *League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 988-989; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 49.

> [T]o determine whether a communication is privileged, the focus of the inquiry is the dominant purpose of the relationship between the parties to the communication. Under that approach, when the party claiming the privilege shows the dominant purpose of the relationship between the parties to the communication was one of attorney-client, the communication is protected by the privilege.

(*Id*. at p. 51.)

"The involvement of a third party changes the burden of proof in litigating attorney-client privilege issues." (*Behunin v. Superior Ct.* (2017) 9 Cal.App.5th 833, 844.) " 'Where a third party is present, no presumption of confidentiality obtains, and the usual allocation of burden of proof, resting with the proponent of the privilege, applies in determining whether confidentiality was preserved under [Evid. Code] § 952." [Citations.]" (*Id*. at pp. 844-845.)

Under Evidence Code section 915, with few exceptions, a court may not require disclosure, including in camera, of information claimed to be privileged to rule on the claim of privilege. (*People v. Bell* (2019) 7 Cal.5th 70, 97 *Costco*, *supra*, 47 Cal.4th at pp. 731-732; see also *County of Los Angeles Bd. of Supervisors v. Superior Ct.* (2017) 12 Cal.App.5th 1264, 1275-1276.) But in camera review of the communication, if requested by the holder of the privilege, may be conducted by the court under the appropriate circumstances. (*Clark v. Superior Court*, *supra*, 196 Cal.App.4th at pp. 50-51.) "Thus, while a trial court may not *order* disclosure of a communication claimed to be privileged to allow a ruling on the claim of privilege, the holder of the privilege may *request* an in camera review of alleged privileged communications to aid the trial court in making the preliminary fact determination that a communication was made during the course of an attorney-client relationship or to attempt to prevent disclosure of the communication." (*League of California Cities v. Superior Court*, *supra*, 241 Cal.App.4th at p. 990, italics in original.)

7830.1-When applicable, doctor-patient privilege is broad 5/14

"The physician-patient privilege protects from disclosure confidential communications between a patient and his or her physician. (Evid. Code, § 994.)" (*Snibbe v. Superior Court* (2014) 224 Cal.App.4th 184, 191 (*Snibbe*).) Evidence Code section 994 provides: "[T]he patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician… ." "The privilege serves two purposes: (1) to prevent humiliation that might follow disclosure of the patient's ailments, and (2) to encourage the patient's full disclosure to his or her physician. [Citation.]" (*Los Angeles Gay & Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 309; see also *Snibbe*, *supra*, 224 Cal.App.4th at pp. 191-192.)

> Real parties interpret the physician-patient privilege as excluding physician orders. This narrow interpretation is contrary to the plain language of Evidence Code section 992, which defines "confidential communication" to include not only information disclosed by the patient but also "a diagnosis made and the advice given by the physician." (See *Carlton v. Superior Court* (1968) 261 Cal.App.2d 282, 288-289 [physician orders within scope of privilege].)

(*Snibbe*, *supra*, 224 Cal.App.4th at p. 192.)

The privilege is waived if the patient or a party "claiming through or under the patient" tenders an issue concerning the patient's medical condition. (Evid. Code, § 996, subds. (a) & (b); see also *Karen P. v. Superior Court* (2011) 200 Cal.App.4th 908, 913.) "While a physician may claim the physician-patient privilege, only the holder of the privilege may waive it, and the physician is not its holder. [Citations.]" (*Snibbe*, *supra*, 224 Cal.App.4th at p. 192.)

" 'The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too.' " (*In re Lifschutz* (1970) 2 Cal.3d 415, 434, quoting *City & County of S. F. v. Superior Court* (1951) 37 Cal.2d 227, 232.) "A court must look to what issues have been raised by the litigant who seeks to assert the privilege, including potential defenses to the litigant's cause of action." (*Patterson v. Superior Court* (1983) 147 Cal.App.3d 927, 930.) The "most frequent" application of this exception is in a case where the patient files an action seeking damages for personal injuries. (*Koshman v. Superior Court* (1980) 111 Cal.App.3d 294, 298.)

7830.2-Doctor-patient privilege does not apply in criminal cases 5/14

Evidence Code section 994 provides: "[T]he patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician… ." Under an express provision of the Evidence Code, however, the physician-patient privilege does not apply in criminal cases. (Evid. Code, § 998; *People v. Bennett* (1976) 60 Cal.App.3d 112, 118.)

7840.1-Person seeking to invoke psychotherapist-patient privilege has initial burden 4/20

"Generally, a patient's communications with a psychotherapist are privileged, and the patient may refuse to disclose them and can prevent others from doing so. (Evid. Code, § 1010, et seq.)" (*People v. Cannata* (2015) 233 Cal.App.4th 1113, 1123.) Evidence Code section 1014 provides, subject to a number of exceptions, that a "patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist … ." (See *Fish v. Superior Court* (2019) 42 Cal.5th 811, 817.)

> "[C]onfidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

(Evid. Code, § 1012; see also *N.S. v. Superior Court* (2017 7 Cal.App.5th 713, 719; *People v. Cannata*, *supra*, 233 Cal.App.4th at p. 1123.) The terms "psychotherapist" and "patient" are defined in Evidence Code sections 1010 and 1011, respectively.

" 'Where the psychotherapist-patient privilege is claimed as a bar to disclosure, the claimant has the initial burden of proving the preliminary facts to show the privilege applies.' (*Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1014.)" (*In re A.C.* (2019) 37 Cal.App.5th 262, 266.)

" ' "Preliminary facts" means the existence of a psychotherapist-patient relationship' and, once established, is proof that the claimant was a patient who consulted a psychotherapist." (*Ibid*.)

> [A] person seeking to invoke the psychotherapist-patient privilege has the initial burden of establishing the basic facts to show that the privilege is presumptively applicable—in general, that the person consulted constitutes a "psychotherapist" and that the communication in question constitutes a " 'confidential communication between patient and psychotherapist,' " within the meaning of the privilege. (Evid. Code, §§ 1010, 1012.) Once the patient has met that burden, the burden shifts to the party who contends that the privilege is inapplicable because one or more of the statutory exceptions applies. (See, e.g., *People v. Wharton* (1991) 53 Cal.3d 522, 551-552.)

(*People v. Gonzales* (2013) 56 Cal.4th 353, 372.)

7840.2-Exceptions to psychotherapist-patient privilege 4/20

"Exceptions to the psychotherapist-patient privilege are narrow, and we must construe them liberally in favor of the patient." (*N.S. v. Superior Court* (2017) 7 Cal.App.5th 713, 722.)

One exception is the "patient-litigant" exception.

> "There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by," inter alia, the patient. (Evid. Code, § 1016.) This exception to the privilege applies when the patient's *own* factual allegations raise an issue, not when the patient does no more than joining an issue by denying allegations. [Citation.] That is, "the patient-litigant exception of section 1016 of the Evidence Code compels disclosure of only those matters which the patient himself has chosen to reveal by tendering them in litigation." [Citations.]

(*N.S. v. Superior Court*, *supra*, 7 Cal.App.5th at p. 719, italics in original.)

Another exception applies to a dangerous patient. "A therapist has a duty to provide a warning to others when he or she reasonably believes a patient 'is dangerous to another person.' (*People v. Felix* (2001) 92 Cal.App.4th 905, 911.)" (*In re A.C.* (2019) 37 Cal.App.5th 262, 266.) "In California, as in all other states, statements made by a patient to a psychotherapist during therapy are generally treated as confidential and enjoy the protection of a psychotherapist-patient privilege." (*People v. Gonzales* (2013) 56 Cal.4th 353, 371.) But "when a therapist who is providing treatment to a patient concludes that the patient is a danger to himself or herself or to others and that disclosure of the contents of a therapy session is necessary to prevent the threatened danger, the therapist is free to testify about those statements … ." (*Id*. at p. 380.)

Finally, as with other privileges, the psychotherapist-patient privilege can be waived if any holder of the privilege, without coercion, consents to the disclosure or discloses a significant part of the communication under Evidence Code section 912. (*Fish v. Superior Court* (2019) 42 Cal.App.5th 811, 818-819.)

> "The waiver of an important right must be a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences." [Citation.] "Thus, any waiver must be narrowly construed and limited to matters 'as to which, based on [the patient's] disclosures, it can be reasonably be said [the [patient] no longer retains a privacy interest." [Citation.]

(*Id*. at p. 819 [defendant's disclosure to police that therapist prescribed certain drugs did not constitute waive of privilege permitting prosecution to subpoena the therapist's records]; see also

Roberts v. Superior Court (1973) 9 Cal.3d 330, 340-343 [disclosure of the existence and object of the psychotherapist-patient relationship does not constitute waiver of the psychotherapist-patient privilege]; *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 820 [accord].)

7860.1-General rules regarding official information privilege 4/17

A public entity, including a law enforcement agency, has a privilege to refuse to disclose "official information." (Evid. Code, § 1040, subd. (b).) "Official information" is defined as "information acquired in confidence by a public employee [such a police officer] in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (Evid. Code, § 1040, subd. (a).) This privilege applies if, among other reasons, "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." (Evid. Code, § 1040, subd. (b)(2); see also *People v. Landry* (2016) 2 Cal.5th 52, 73.)

Evidence Code section 915, subdivision (b), provides for in camera review prior to disclosure of information subject to a claim under the official information privilege:

> When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) … and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is privileged, neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

7860.2-Secret surveillance location subject to official information privilege 5/20

A public entity, including a law enforcement agency, has a privilege to refuse to disclose "official information." (Evid. Code, § 1040, subd. (b).) Official information" is defined as "information acquired in confidence by a public employee [such a police officer] in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (Evid. Code, § 1040, subd. (a).) This privilege applies if, among other reasons, "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." (Evid. Code, § 1040, subd. (b)(2).)

The location of a secret police surveillance post falls within the ambit of the official information privilege. (*People v. Lewis* (2009) 172 Cal.App.4th 1426, 1431; *Hines v. Superior Court* (1988) 203 Cal.App.3d 1231, 1234.) It is incumbent on the person or agency claiming the privilege to establish, in camera if necessary, specifically why the exact location needs to remain confidential. (*In re Marcos B.* (2013) 214 Cal.App.4th 299, 308-310.) The justification for declaring a surveillance location privileged are outlined in *People v. Walker* (1991) 230 Cal.App.3d 230:

> "Just as the disclosure of an informer's identity may destroy his … usefulness in criminal investigations, the identification of a hidden observation post will likely destroy the future value of the location for police surveillance. The revelation of a surveillance location might also threaten the safety of police officers using the observation post, or lead to adversity for cooperative owners or occupants of the building. Finally, the assurance of nondisclosure of a surveillance location may be necessary to encourage property owners or occupants to allow the police to make such use of their property." Furthermore, in most cases a surveillance location and consequently the people who have permitted the use of their property deserve more protection than the informant who has mobility as a protection against reprisal since "a person whose address is revealed has no place to hide." …

(*Id*. at pp. 235-236.)

When the official information privilege is invoked to prevent disclosure of such a location, however, the court must decide if it is necessary to make an order or adverse finding of fact against the prosecution. (Evid. Code, § 1042, subd. (a).) This question focuses on whether the exact location is truly material to the rights of the defendant. Certainly, the surveillance location is not material if there is sufficient evidence to prove the crime even disregarding the testimony of the officer in that location. (*People v. Garza* (1995) 32 Cal.App.4th 148, 155.)

> [T]he location from which the surveillance was performed is not material, for the purpose of section 1042's adverse finding requirement, if the accuracy of the testifying officer's testimony about the surveillance observations is unquestioned, or at least is sufficiently corroborated by independent evidence such that there is no realistic possibility that disclosing the surveillance location would create a reasonable doubt in the minds of a reasonable jury about the officer's veracity.

(*People v. Lewis* (2009) 172 Cal.App.4th 1426, 1438.)

The requisite corroboration may be that other officers are able to identify the suspect simply from the surveillance officer's description. (*People v. Lewis*, *supra*, 172 Cal.App.4th at p. 1440; *People v. Garza*, *supra*, 32 Cal.App.4th at pp. 154-155;.) That contraband is found by other officers in the exact location relayed by the surveillance officer is also sufficient corroboration. (See, e.g., *In re Sergio M.* (1993) 13 Cal.App.4th 809, 814-815.)

Finally, the exact surveillance location may not be material if the defense is given sufficient information in discovery or through cross-examination to test the accuracy and credibility of the officer's testimony. For example:

> [T]he section 1040 privilege does not prevent a defendant from cross-examining the testifying officer about the distance and angle of view from which the officer made the observations. In this case, for example, the trial court properly permitted appellant's trial counsel to examine [the officer] freely with respect to all aspects of his observations, with the sole exception of the exact location from which they were taken. The information derived from such cross-examination should be sufficient to permit the defendant to determine whether any of the potential surveillance locations—i.e., those meeting the officer's description in terms of distance and angle—are in fact subject to obstructions making it difficult or impossible to obtain a clear view of the defendant's position at the time of the events described in the officer's testimony.

(*People v. Lewis*, *supra*, 172 Cal.App.4th at p. 1438; see also *People v. Haider* (1995) 34 Cal.App.4th 661, 669; but see *In re Marcos B.*, *supra*, 214 Cal.App.4th at pp. 312-315 [officer's observations were sole direct evidence linking juvenile to drug dealing].)

7870.1-The marital testimonial privilege 5/20

The spousal privilege is has two components: (1) the testimonial privilege not to be called as a witness against a spouse, and (2) the privilege not to disclose confidential marital communications. As to the first component: "The medieval origin of the spousal testimonial privilege was premised on the ' "long-abandoned doctrine[ ]" ' that a wife had no separate legal existence from her husband, but the privilege persists on the belief it ' " 'preserve[s] marital harmony,' " " 'protect[s] marital privacy,' " and " 'promote[s] the socially beneficial institution of marriage.' " ' [Citation.]" (*People v. Petrilli* (2014) 226 Cal.App.4th 814, 823 (*Petrilli*), citing *People v. Sinohui* (2002) 28 Cal.4th 205, 211.)

The spousal testimonial privilege derives from Evidence Code section 970, which states that a married person has a privilege "not to testify against" his or her spouse "in any proceeding." Similarly, Evidence Code section 971 provides a privilege against being called as a witness in any proceeding to which one's spouse is a party. Under subdivision (a) of section 973, "[u]nless erroneously compelled to do so, a married person who testifies in a proceeding to which his spouse is a party, or who testifies against his spouse in any proceeding, does not have a privilege under this article in the proceeding in which such testimony is given." Unlike the confidential marital communication privilege of Evidence Code section 980, the testimonial privilege is personal to the testifying spouse (*People v. McWhorter* (2009) 47 Cal.4th 318, 374), but the other spouse has standing to raise as error a trial court's refusal to recognize an assertion of the privilege under Evidence Code section 918.

Waiver of the spousal testimonial privilege is governed by its own statute, Evidence Code section 973, rather than the more general statute governing waiver of privileges, Evidence Code section 912. Evidence Code section 973, subdivision (a), provides two ways in which the spousal testimonial privilege may be waived. The nonparty spouse may "testif[y] in a proceeding to which his spouse is a party" or may "testif[y] against his spouse in any proceeding." Importantly, however, the waiver applies only "in the proceeding in which such testimony is given." (*Petrilli¸ supra*, 226 Cal.App.4th at p. 824 [holding husband's criminal trial was not "same proceeding" as prior grand jury hearing where wife testified]; but see *People v. Resendez* (1993) 12 Cal.App.4th 98, 107 [preliminary hearing is "same proceeding" as criminal trial].)

7870.2-The confidential marital privilege 5/20

The spousal privilege is has two components: (1) the testimonial privilege not to be called as a witness against a spouse, and (2) the privilege not to disclose confidential marital communications. The second component of marital privilege, the privilege not to reveal confidential marital communications, derives from Evidence Code section 980 which states in pertinent part: "Subject to Section 912 and except as otherwise provided in this article, a spouse …, whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife." To make a marital communication " 'in confidence,' one must intend nondisclosure [citations] and have a reasonable expectation of privacy." (*People v. Mickey* (1991) 54 Cal.3d 612, 654.) "[T]the claimant of the confidential marital communication privilege has the burden to prove, by a preponderance of evidence, the facts necessary to sustain the claim." (*Id*. at p. 655.) But, upon a preliminary showing that the communication was between spouses, the claimant is aided by the

statutory presumption of Evidence Code section 917. (*Id*. at p. 655; but see *People v. Von Villas* (1992) 11 Cal.App.4th 175, 223 [privilege waived because conversation was in public place and loud enough for third parties to hear].)

> Bryant presented no evidence that he actually intended nondisclosure. Given that the statement was a threat to murder the current lover of his estranged wife, any expectation of confidentiality would have been unreasonable. Moreover, the circumstances give rise to a reasonable inference that Bryant affirmatively intended Tannis to convey the threat to Curry to extinguish the relationship.

(*People v. Bryant et al.* (2014) 60 Cal.4th 335, 420.)

The marital communication privilege " 'applies only to oral or written verbal expression from one spouse to the other, and acts of the spouses committed in each other's presence do not constitute communications between them, within the meaning of the privilege for confidential marital communications.' [Citations.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 743; see also *People v. Bradford* (1969) 70 Cal.2d 333, 342, fn. 2 [acts of placing cans in garage and giving wife the victim's jewelry "are not 'communications' within the meaning of the privilege"]; *People v. Dorsey* (1975) 46 Cal.App.3d 706, 717 ["[T]he privilege encompasses only communications between husband and wife during marriage. It does not extend to physical facts which are observed, which do not constitute 'communications' "].)

7890.1-Defense cannot obtain discovery of privileged material before trial 9/19

In *People v. Hammon* (1997) 15 Cal.4th 1117 (*Hammon*) the California Supreme Court held no discovery of potentially privileged information should be ordered from a third party *prior to trial*. The defendant in *Hammon* was charged with sexually molesting his foster child. Before trial commenced the defense served subpoenas duces tecum on psychotherapists who had treated the victim. The defense claimed the records would be necessary to challenge the victim's credibility. Without reviewing the records in camera, the trial court quashed the subpoenas on the basis of the psychotherapist-patient privilege. The defense request for these records was not renewed at trial. The California Supreme Court found no error.

> [T]he trial court was not required, at the pretrial stage of the proceedings, to review or grant discovery of privileged information in the hands of third party psychotherapy providers. We reject defendant's claim that pretrial access to such information was necessary to vindicate his federal constitutional right to confront and cross-examine the complaining witness at trial or to receive a fair trial.

(*Id*. at p. 1119.) Disapproving contrary language in *People v. Reber* (1986) 177 Cal.App.4th 523, the Supreme Court in *Hammon* found there was no constitutional requirement that a criminal defendant being given *pre-trial* discovery of potentially privileged information that may necessary to ensure the defendant receive a fair trial under the United States Supreme Court decision in *Davis v. Alaska* (1974) 415 U.S. 308 (*Davis*). (*Hammon*, *supra*, 15 Cal.4th at pp. 1123-1126; see also *People v. Petronella* (2013) 218 Cal.App.4th 945, 958-960; *People v. Gurule* (2002) 28 Cal.App.4th 557, 592-593.) The Supreme Court has refused to reconsider its holding in *Hammon*. (*People v. Caro* (2019) 7 Cal.5th 463, 501.)

> Nevertheless, defendant asks us to hold that the Sixth Amendment confers a right to discover privileged psychiatric information before trial. We do not, however, see an adequate justification for taking such a long step in a direction the United States Supreme

> Court has not gone. Indeed, a persuasive reason exists not to do so. When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon, as in *Davis*, to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. (See *Davis*, *supra*, 415 U.S. at p. 319.) Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily.

(*Hammon*, *supra*, 15 Cal.4th at p. 1127.) This rationale was illustrated by the trial in *Hammon*, when the defendant at trial admitted engaging in sexual conduct with his foster daughter. (*Ibid*.) "Pretrial disclosure under these circumstances, therefore, would have represented not only a serious, but an *unnecessary*, invasion of the patient's statutory privilege (Evid. Code, § 1014) and constitutional right of privacy [citations]." (*Ibid*., italics in original)

7890.2-Defense discovery of and cross-examine with privileged material is limited 5/12

The California Supreme Court has recognized that "[w]hen a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon … to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve." (*People v. Hammon* (1997) 15 Cal.4th 1117, 1127.) "In this context, the records should be disclosed if they are 'material'." (*People v. Abel* (2012) 53 Cal.4th 891, 931, citing *People v. Martinez* (2009) 47 Cal.4th 399, 453.) " ' "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." ' " (*Ibid*.) "We also consider any adverse effect nondisclosure might have had on counsel's investigations and trial strategy. (*In re Brown* (1998) 17 Cal.4th 873, 887.)" (*People v. Abel*, *supra*, 53 Cal.4th at p. 931.)

8000.1-General standards for parole or PRCS search 8/20

"Under California statutory law, every inmate eligible for release on parole 'is subject to search or seizure by a … parole officer or other peace officer at any time of the day or night, with or without a search warrant or with or without cause.' (Pen. Code, § 3067, subd. (b)(3).)" (*People v. Schmitz* (2012) 55 Cal.4th 909, 916 (*Schmitz*); see also Cal. Code Regs., tit. 15, § 2511, subd. (b)4; *People v. Lewis* (1999) 74 Cal.App.4th 662, 668; *People v. Williams* (1992) 3 Cal.App.4th 1100, 1105.) And all parolees are informed of this condition. (Cal. Code Regs., tit. 15, § 2511.) These principles also apply to those on Post-Release Community Supervision (PRCS). (*People v. Douglas* (2015) 240 Cal.App.4th 855, 864-865; *People v. Jones* (2014) 231 Cal.App.4th 1257, 1266-1267.)

Any search or seizure conducted pursuant the terms of such a parole condition is reasonable under the Fourth Amendment because it does not infringe upon any legitimate or reasonable expectation of privacy the parolee retained over his or her person or property. (*People v. Reyes* (1998) 19 Cal.4th 743, 750-754; *People v. Bravo* (1987) 43 Cal.3d 600, 607; *People v. Perkins* (2016) 5 Cal.App.5th 454, 473.) Thus, a warrantless and suspicionless search of a parolee does not intrude on any expectation of privacy that society is willing to recognize as legitimate. (*Schmitz*, *supra*, 55 Cal.4th at p. 917; *People v. Reyes*, *supra*, at pp. 750-751; see also *People v. Sanders* (2003) 31 Cal.4th 318, 333.)

"Indeed, a police officer may conduct a parole search without a reasonable suspicion of wrongdoing as long as he is aware that the suspect is subject to a search condition." (*People v. Smith* (2009) 172 Cal.App.4th 1354, 1360.) "When involuntary search conditions are properly imposed, reasonable suspicion is no longer a prerequisite to conducting a search of the subject's person or property. Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing." (*People v. Reyes*, *supra*, 19 Cal.4th at p. 752; see also *Schmitz*, *supra*, 55 Cal.4th at p. 916; see also *People v. Jones*, *supra*, 231 Cal.app.4th at p. 1267 [PRCS].)

> " '[A] parole search could become constitutionally "unreasonable" if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer.' [Citations;] see *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004 [a search is arbitrary and capricious when the motivation for the search is unrelated to rehabilitative, reformative or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee]; *People v. Bremmer* (1973) 30 Cal.App.3d 1058, 1062 [unrestricted search of a probationer or parolee by law enforcement officers at their whim or caprice is a form of harassment].)

(*People v. Perkins*, *supra*, 5 Cal.App.5th at p. 473 [investigators properly obtained penile swab from parolee upon learning child molest victim identified him as perpetrator].)

To rely upon the search condition, the officers must "know" the person is a parolee prior to conducting the search or seizure. (*People v. Sanders*, *supra*, 31 Cal.4th 335; see also *People v. Middleton* (2005) 131 Cal.App.4th 732, 739-740 [knowledge of parolee's specific parole conditions not required].) An officer "knows" a person is on parole or PRCS with a search condition if the officer has actual knowledge or an objectively reasonable basis for believing such. (*People v. Douglas*, *supra*, 240 Cal.App.4th 865-868 [officer had objectively reasonable belief defendant on PRCS prior to detention and search even though he did not first run records check to confirm].)

In *People v. Lewis*, *supra*, 74 Cal.App.4th 662, the appellate court held that the standard parole search condition not only covers searches and seizures, it also permits officers to arrest the parolee in his or her home without a warrant. "Courts across the country … have concluded that a parolee who has no legitimate expectation of privacy against warrantless search is similarly divested of protection against warrantless arrests, even in the home. [Citations.] … [W]e believe the conclusion reached by these courts is sound." (*Id.* at p. 671.)

In *People v. Delrio* (2020) 45 Cal.App.5th 965, the appellate court upheld an officer's demand that the parolee, suspected if burglary, turn over his cell phone and reveal his password. "[D]espite any perceived expectation of privacy that defendant may have had in his cell phone due to the lack of clarity in the written search conditions, consideration of the totality of the circumstances presented leads us to conclude that the balance ultimately tilts in favor of the government's substantial interests in supervising defendant and protecting the public." (*Id*. at p. 978.)

The authority to act upon the parole search conditions applies even if the defendant is in custody unless and until parole is formally revoked. (*People v. Hunter* (2006) 140 Cal.App.4th 1147, 1152-1155.)

8000.2-Parole search by police valid if condition permits 8/13

Penal Code section 3067, subdivision (b)(3), states: "Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer *or other peace officer* at any time of the day or night, with or without a search warrant and with or without cause." (Emphasis added; see generally *People v. Schmitz* (2012) 55 Cal.4th 909, 916.) According to Title 15, section 2511, subdivision (b)(4), of the California Code or Regulations, every person released on parole in California is automatically subject to the condition that "[y]ou and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections *or any law enforcement officer*." (Emphasis added.) Hence, a police officer's search of a parolee without any particularized suspicion does not offend the parolee's reasonable expectation of privacy, even without the involvement of a parole agent. (See *People v. Reyes* (1998) 19 Cal.4th 743; *People v. Brown* (1989) 213 Cal.App.3d 187, 192; *People v. Icenogle* (1977) 71 Cal.App.3d 576, 583-585.) "To require the police to seek permission to search from a parole officer would be a meaningless formality, for any parole officer who refused to authorize a search given reasonable suspicion of criminal activity 'would have been derelict in his duties.' (*People v. Montenegro* (1985) 173 Cal.App.3d 983, 988 … .)" (*People v. Brown*, *supra*, at p. 192.)

8010.1-General standards for probation search 5/20

"In California, a person may validly consent in advance to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term. [Citations.] Warrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer and in monitoring compliance with the terms of probation." (*People v. Robles* (2000) 23 Cal.4th 789, 795.) Thus, a search or seizure conducted pursuant to the terms of a known probationer's advance consent is reasonable under the Fourth Amendment because it does not infringe upon any legitimate or reasonable expectation of privacy the probationer retains over his or her person or property. (*People v. Bravo* (1987) 43 Cal.3d 600, 607 (*Bravo*); *People v. Mathews* (2018) 21 Cal.App.5th 130, 138.)

A defendant who accepts probation conditioned on a waiver of Fourth Amendment rights has consented to search in advance. By this advance search waiver, a probationer has "voluntarily waived whatever claim of privacy he might otherwise have had." (*People v. Mason* (1971) 5 Cal.3d 759, 766.) In other words, "a probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection." (*Id.* at p. 765; see also *People v. Cruz* (2019) 34 Cal.App.5th 764, 770 [warrantless blood draw permitted pursuant to probation order agreed to by defendant stating, "[i]f arrested for driving under the influence of alcohol in violation of Section 23152 or 23153 of the Vehicle Code, [defendant] shall not refuse to submit to a chemical test of your blood, breath or urine"].)

The United States Supreme Court has rejected the view that a probation search condition may be exercised only for probationary purposes, not investigatory ones. (*United States v. Knights* (2001) 534 U.S. 112.) The High Court recognized that the search condition promotes two primary goals—rehabilitation and protecting society from future criminal conduct. (*Id.* at pp. 119-120.) The court also concluded that a valid probation search requires no more than reasonable suspicion. It

expressly did not decide whether a suspicionless search would be constitutional. (*Id.* at pp. 120-121 & fn. 6.)

California courts have clearly held that a probationer subject to a search condition may be searched by a law enforcement officer without a warrant and without reasonable cause to believe the search will disclose any evidence. (*Bravo*, *supra,* 43 Cal.3d at pp. 607-609.) But the probationer retains protection from searches or seizures undertaken for harassment or for arbitrary or capricious reasons. (*Bravo*, *supra*, 43 Cal.3d at pp. 607, 610; see also *People v. Reyes* (1998) 19 Cal.4th 743, 749) In other words, the searching officer's conduct must serve some legitimate law enforcement purpose or be related to the rehabilitative and reformative purposes of probation. (*Bravo*, *supra*, 43 Cal.3d at pp. 607, 610; *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004.) "In summary, under California law, a search conducted pursuant to a known probation search condition, even if conducted without reasonable suspicion of criminal activity, does not violate the Fourth Amendment as long as the search is not undertaken for harassment or for arbitrary or capricious reasons or in an unreasonable manner." (*People v. Medina* (2007)158 Cal.App.4th 1571, 1577.)

The typical search condition requires the probationer to submit person, property, and place of residence to search at any time with or without a search warrant, and with or without reasonable cause, when required by a probation officer or any law enforcement officer. The condition applies to seizures of the person through detention or arrest, as well as to searches. (*In re Binh L.* (1992) 5 Cal.App.4th 194 [traffic stop and weapons search]; *In re Marcellus L.* (1991) 229 Cal.App.3d 134, 139 [home].)

A search or seizure pursuant to a search condition of probation need not be performed by or under the supervision of a probation officer. (*People v. Ramos* (2004) 34 Cal.4th 494, 506, fn. 4.) But the officer initiating the search must know the person is on probation subject to the search condition, and have knowledge of the scope of the search conditions, prior to conducting the search. (*People v. Romeo* (2015) 240 Cal.App.4th 931, 949-952; see generally, *People v. Sanders* (2003) 31 Cal.4th 318 [parolee]; see also *In re Jaime P.* (2006) 40 Cal.4th 128 [juvenile].)

The permissive scope of a probation search encompasses all areas to which the probationer has consented. And "the proper inquiry focuses on what a reasonable, objective person would understand the search condition to mean at the time of the search." (*People v. Sandee* (2017) 15 Cal.App.5th 294, 301 [officer not expected to anticipate future legal development that might have invalidated search which was reasonable at the time it was conducted].)

The probation search condition survives summary revocation of probation. (*People v. Lewis* (1992) 7 Cal.App.4th 1949, 1955; *People v. Barkins* (1978) 81 Cal.App.3d 30, 33; *People v. Pipitone* (1984) 152 Cal.App.3d 1112, 1117-1118.) Thus, this condition remains in effect even though the summary revocation tolls the running of the probationary period. (Pen. Code, § 1203.2, subd. (a).)

8010.2-General standards for probation search (short) 8/09

A search or seizure conducted pursuant to the terms of a known probationer's advance consent through acceptance of a search and seizure waiver condition of probation is reasonable under the Fourth Amendment because it does not infringe upon any legitimate or reasonable expectation of privacy the probationer retains over his or her person or property. (*People v. Bravo* (1987) 43 Cal.3d 600, 607.) A search or seizure conducted pursuant to the terms of the probation search condition is objectively reasonable whether or not the police officer had probable or

reasonable cause to believe the search might disclose any evidence. (*People v. Bravo*, *supra*, 43 Cal.3d at p. 607.) The only privacy interest retained by the probationer is to be free from harassment and arbitrary or capricious police conduct. (*People v. Bravo*, *supra*, at pp. 607, 610; see also *People v. Reyes* (1998) 19 Cal.4th 743, 749.) "In summary, under California law, a search conducted pursuant to a known probation search condition, even if conducted without reasonable suspicion of criminal activity, does not violate the Fourth Amendment as long as the search is not undertaken for harassment or for arbitrary or capricious reasons or in an unreasonable manner." (*People v. Medina* (2007)158 Cal.App.4th 1571, 1577.)

8010.3-No need to inform probationer of search if not required 12/09

Where the probation order search and seizure condition does not contain the words "upon request," officers are not required to inform the probationer of their intent to invoke the search condition. (*People v. Byrd* (1974) 38 Cal.App.3d 941, 949; see also *People v. Lilienthal* (1978) 22 Cal.3d 891, 899-900.)

8010.4-Probationer cannot belatedly contest search condition 3/21

The defendant's objection to the validity of the search and seizure waiver accepted as a condition of probation cannot be heard after a search pursuant to that condition has revealed incriminating evidence. A defendant may contest the search and seizure waiver as a condition of probation by either refusing probation, or by challenging its legality on appeal or by petition for writ of habeas corpus. (*In re Bushman* (1970) 1 Cal.3d 767, 776, disapproved on other grounds in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.) "If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence." (*In re Bushman*, *supra*.) Moreover, in *People v. Welch* (1993) 5 Cal.4th 228, the California Supreme Court held that a defendant may not appeal the imposition of a condition of probation unless the defendant objected to it at sentencing. (*Id*. at p. 237; see also *People v. Ramos* (2004) 34 Cal.4th 494, 505.) It would be ludicrous to permit a probationer to indirectly test the validity of an accepted probation condition, including a search and seizure condition, when a failure to object at sentencing bars directly raising the same issue on appeal.

Even if we assumed the search and seizure condition accepted by defendant was invalid, the officer's "good faith" reliance on this judicially imposed authority requires denial of the motion to suppress the fruits of any search made pursuant to the terms of the condition. (*People v. Rios* (2011) 193 Cal.App.4th 585, 598 ["any illegality in the probation condition itself would be attributable to the court that imposed the condition and not to the probation officers"]; *People v. Barbarick* (1985) 168 Cal.App.3d 731, 737-740; and see *United States v. Leon* (1984) 468 U.S. 897; see also *People v. Maxwell* (2020) 58 Cal.App.5th 546, 559-560 [search term of bail invalidated after officer acted upon it].) This good faith rule applies even if the entire conviction from which the search and seizure condition flowed is subsequently invalidated. (*People v. Miller* (2004) 124 Cal.App.4th 216, 224-226.)

8010.5-Probation search saved by good faith rule 8/20

In the landmark case of *United States v. Leon* (1984) 468 U.S. 897, 922, the United States Supreme Court held that evidence will not be suppressed when the People establish that it was seized in objective good faith reliance on a search warrant, even if the warrant is later determined to have been issued without probable cause or to be otherwise defective. Where the officer serving a warrant acts with objective good faith, no purpose is served by excluding the evidence seized. (*Id.* at pp. 918-920.)

The United States Supreme Court has extended the *Leon* rationale to situations when officers rely on mistaken information from other law enforcement sources. The officers in *Herring v. United States* (2009) 555 U.S. 135 were told by a police clerk in a neighboring county that the defendant's arrest warrant was still outstanding. A search incident to arrest yielded drugs and a gun. It was later learned the warrant had been recalled but the police had failed to update their computer database. The High Court found no basis to apply the exclusionary rule. "In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, *e.g*., *Leon* [*supra*] 468 U.S., at [pp.] 909-910, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not 'pay its way.' *Id.,* at [pp.] 907-908, n. 6, (internal quotation marks omitted)." (*Herring v. United States*, *supra*, 555 U.S. at pp. 147-148.)

Even before the *Herring* decision, California appellate court applied the *Leon* reasoning to these situations. In *People v. Downing* (1995) 33 Cal.App.4th 1641, for example, an officer investigating a narcotics violation searched defendant's home in the belief defendant was subject to warrantless search as a probation condition. Defendant's name was listed on a court-maintained, computer-generated search and seizure index of probationers with search waivers. In fact, defendant's probation had expired a year before the search. The search and seizure index was incorrect because a superior court clerk entered the wrong date into the computer system when probation was originally granted. The appellate court held the evidence should not be suppressed because the officer acted in objectively reasonable, good faith reliance on facially valid computer information produced by the superior court. (*Id*. at p. 1644; see also *People v. Miller* (2004) 124 Cal.App.4th 216, 222-223.)

Similarly, evidence was not suppressed when a police officer relied in good faith on incorrect computer information from a juvenile probation officer that a minor was still on probation and subject to a search condition in *In re Arron C.* (1997) 59 Cal.App.4th 1365. The appellate court found the juvenile probation officer was an arm of the juvenile court rather than an adjunct to the law enforcement team. "[W]e see no reason to subject probation officers to a rule designed to deter illegal police activity." (*Id.* at p. 1371; see also *Arizona v. Evans* (1995) 514 U.S. 1 [arrest valid based on quashed warrant still listed in computer because of court clerk's error]; *People v. Barbarick* (1985) 168 Cal.App.3d 731 [good faith reliance on search condition improperly attached to O.R. release]; but see *People v. Rosas* (2020) 50 Cal.App.5th 17, 24-27 [officer could not in good faith believe detainee subject to search condition of probation simply from dispatcher relaying incorrect information that detainee on probation].)

Finally, an officer can reasonably rely on the probationer's statement that he or she is "searchable," even if the probationer is mistaken. (*In re Jeremy G.* (1998) 65 Cal.App.4th 553.)

8010.6-Officer's subjective intent irrelevant if probation search otherwise proper 5/20

So long as the search is confined to within the scope of the probation condition and is otherwise objectively reasonable (i.e., not arbitrary, capricious or harassing), the searching officer's subjective intent is irrelevant. (*People v. Gomez* (2005) 130 Cal.App.4th 1008, 1014.) The officer in *Gomez* had information the defendant had stolen property in his garage. He also learned that the defendant's probation conditions allowed a search of his residence for narcotics, firearms or weapons. The officer searched the garage finding the stolen property. Despite the officer's subjective motivation to search for stolen property rather than for narcotics, firearms or weapons, the appellate court upheld the search. "[W]e hold the search was lawful since defendant cannot be said to have had a reasonable expectation of privacy in the area of the garage in which the stolen items were found." (*Ibid*.)

> [I]n order for a search to be limited in scope to the terms of the search clause, it is only necessary that the search not exceed the areas that could be searched pursuant to the clause. For example, a probation condition permitting a search for firearms would only permit a search of areas under the probationer's control where firearms might be found. Even where the officers are searching for something else, as long as the search is confined to areas where firearms might be found, the scope of the search condition has not been exceeded.

(*Id*. at p. 1017.)

> In sum, it is apparent that the circumstances known to [the officer], viewed objectively, showed a possible violation of that condition of defendant's probation that required him to obey all laws. Armed with that knowledge, Walters could lawfully search in any area of the house or shed that might contain narcotics, firearms, or weapons because defendant no longer possessed a reasonable expectation of privacy in those areas.

(*Id*. at p. 1016.)

8020.1-Probation/parole search not arbitrary or harassing 8/09

A parolee or probationer subject to a search condition lives under the Sword of Damocles. (*In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1002, fn. 1.) A parolee or probationer with a search condition must "assume every law enforcement officer might stop and search him at any moment." (*In re Tyrell J.* (1994) 8 Cal.4th 68, 87 (*Tyrell J.*).) "Whether a search is arbitrary, capricious, or harassing turns on its purpose." (*People v. Smith* (2009) 172 Cal.App.4th 1354, 1362.) "The purpose of an unexpected, unprovoked search of defendant is to ascertain whether he is complying with the terms of probation; to determine not only whether he disobeys the law, but whether he obeys the law." (*People v. Bravo* (1987) 43 Cal.3d 600, 610; *People v. Reyes* (1998) 19 Cal.4th 743, 752 (*Reyes*).)

The California Supreme Court in *Reyes* provided examples of how a parolee or probationer might show that a search was constitutionally flawed despite a valid search condition. (*Reyes*, *supra*, 19 Cal.4th at pp. 753-754.) A search motivated by personal animosity towards the parolee or probationer, or motivated by reasons unrelated to rehabilitation, reformation, or other legitimate law enforcement purpose can be arbitrary or capricious. (*Id*. at p. 754; *In re Anthony S.* (1992) 4 Cal.App.4th 1000, 1004 [finding terms "arbitrary" and "capricious" to be synonymous]; see also *People v. Sardinas* (2009) 170 Cal.App.4th 488, 496.)

"The scope and manner of a parole search may also render it unreasonable." (*People v. Smith*, *supra*, 172 Cal.App.4th at p. 1362 [pulling back waistband of parolee's pants to check for secreted narcotics not unreasonable].) Thus, a search may be unreasonable if it is made too often, or at an unreasonable hour, or if unreasonably prolonged. (*People v. Reyes*, *supra*, 19 Cal.4th at pp. 753-754; see also *People v. Smith*, *supra*, 172 Cal.App.4th at p. 1362; *People v. Clower* (1993) 16 Cal.App.4th 1737, 1741.)

The California Supreme Court in *Tyrell J.* observed: "Of course, we not do suggest that [the officer] was harassing the minor merely because he lacked probable cause to search him." (*Tyrell J.*, *supra,* 8 Cal.4th at p. 87.) And the appellate court in *People v. Velasquez* (1993) 21 Cal.App.4th 555 expressly rejected the defense argument that an arrest made without probable cause is necessarily without a legitimate law enforcement purpose. The court held that a simple detention and search at the scene of an observed narcotics transaction is not harassment with no legitimate law enforcement purpose, even when unsupported by cause. (*Id.* at p. 559.)

8020.2-Probation/parole search not defeated by co-tenant rights 8/13

It is well established that the right of privacy of a person who chooses to live with a parolee or probationer subject to a search condition is correspondingly reduced, except as to containers or belongings owned wholly by that person. As pointed out in *People v. Burgener* (1986) 41 Cal.3d 505: "Inasmuch as authority to search the residence of a parolee extends to areas which are jointly controlled with other occupants of the residence [citations omitted], the authority to search these premises necessarily portends a massive intrusion on the privacy interests of third persons solely because they reside with a parolee." (*Id*. at p. 533.)

In the leading case of *Russi v. Superior Court* (1973) 33 Cal.App.3d 160, the appellate court held that if a probation search is reasonable and lawful as to the probationer, the cotenant's consent or lack of consent is irrelevant to the admissibility of any evidence seized, and the cotenant has no basis upon which to attack the search. (*Id.* at p. 168-170; similarly, see *People v. Icenogle* (1977) 71 Cal.App.3d 576, 586-587; *People v. Thomas* (1975) 45 Cal.App.3d 749, 756-757.) This is so whether or not the cotenant is even aware of the search condition. (*Russi v. Superior Court*, *supra*, at pp. 170-171.)

The California Supreme Court solidified this rule in *People v. Woods* (1999) 21 Cal.4th 668. The court held that a probation search of a shared residence is proper even when undertaken to discover incriminating evidence against a nonprobationer cotenant. A probationer's advance consent to search has the same scope as an on-the-scene consent to search. (*Id.* at pp. 675-676.) And as with other Fourth Amendment issues, the subjective intent of the searching officer is irrelevant—an objective standard governs. (*Id.* at pp. 678-681, disapproving *People v. Pipitone* (1978) 86 Cal.App.3d 681.)

The existence of a probation or parole search condition does not give officers a license to unreasonably search the nonprobationer/nonparolee cotenant. (*People v. Woods*, *supra*¸ 21 Cal.4th at pp. 681-682.) The search cannot exceed the scope of the search condition relied upon. (*Id*. at p. 682. It may not be undertaken in a harassing or unreasonable manner. (*Ibid*.) And, officers are generally limited to areas of the residence over which they reasonably believe the probationer or parolee has complete or joint control. (*Ibid*; see also *People v. Schmitz* (2012) 55 Cal.4th 909, 919-920.)

But "joint control" is a broad concept, extending even to a locked room occupied by the nonprobationer, if the probationer has normal access to that room. For example, in *People v. Pleasant* (2004) 123 Cal.App.4th 194 the appellate court upheld a probation search of an adult son's locked bedroom within the probationer's residence because the probationer (the mother) had a key and access to the locked room. The son "could not reasonably expect privacy in the room" to which his mother had keys and normal access. (*Id.* at p. 198.)

In areas of shared premises over which the probationer has no authority, "unless the circumstances are such as to otherwise justify a warrantless search of a room or area under the sole control of a nonprobationer (e.g., exigent circumstances), officers wishing to search such a room or area must obtain a search warrant to do so." (*People v. Woods, supra,* 21 Cal.4th at p. 682.) But, if warranted by the circumstances, the officers conducting the parole or probation search may enter areas not controlled by the probationer or parolee as part of a protective sweep for their safety. (*People v. Ledesma* (2003) 106 Cal.App.4th 857.)

8020.3-Residence search OK on reasonable belief probationer/parolee lives there 12/16

" 'It is settled that where probation officers or law enforcement officials are justified in conducting a warrantless search of a probationer's residence, they may search a residence reasonably believed to be the probationer's.' …" (*People v. Downey* (2011) 198 Cal.App.4th 652, 658 (*Downey*).) "California case law is clear that the appropriate test is whether the facts known to the officers, taken as a whole, gave them *objectively reasonable grounds to believe* that [the probationer] lived at the apartment. [Citations.]" (*Id*. at p. 661, italics in original.) In contrast, "a search of a particular residence cannot be 'reasonably related' to a probationary purpose when the officers involved do not even know of a probationer who is sufficiently connected to the residence." (*People v. Robles* (2000) 23 Cal.4th 789, 795.)

> In the instant case, after the officers checked multiple sources to discover [probationer] Roussell's address, they had a reasonable belief that Roussell resided at the apartment. That the officers could have taken additional steps to verify Roussell's residence does not undermine our conclusion that the officers acted reasonably based on the information they already had when they acted. (Cf. *People v. Fuller* (1983) 148 Cal.App.3d 257, 263-264 [there was no substantial evidence to support a reasonable belief by police that a hotel room occupied by several persons was the defendant's residence, and it was incumbent upon investigating officers to ascertain ownership and occupancy to protect privacy interest of both the probationer and nonprobationer].)

(*Downey*, *supra*, 198 Cal.App.4th at p. 660.) "[T]he question of whether police officers reasonably believe an address to be a probationer's residence is one of fact, and we are bound by the finding of the trial court, be it express or implied, if substantial evidence supports it." [Citations.]" (*Id*. at p. 658; contra *People v. Carreon* (2016) 248 Cal.App.4th 866, 876.)

8020.4-Search OK on reasonable belief probationer/parolee controls item or area 5/20

Under certain circumstances the private spaces or possessions of a third party may be searched pursuant to a probationer's or parolee's search condition. If the circumstances place officers on notice they are intruding into the sole property of some third person, that property cannot be searched in good faith. (*Russi v. Superior Court* (1973) 33 Cal.App.3d 160, 167.) But the property may be searched under the search condition when there is reason to believe the area or property in question belongs to the parolee or probationer, is shared or used jointly by the parolee or probationer with the third party, or is an item to which the probationer or parolee has access. (*People v. Smith* (2002) 95 Cal.App.4th 912, 917-920.) The test is simply whether there is a reasonable suspicion to believe from the totality of the circumstances that the probationer or parolee has access or control over property. (*People v. Ermi* (2013) 216 Cal.App.4th 277, 280; *People v. Smith*, *supra*, 95 Cal.App.4th at p. 918; *People v. Boyd* (1990) 224 Cal.App.3d 736, 745-746, 750.)

> "The 'common authority' theory of consent rests 'on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.' " [Citations.] A person may assume the risk of search by associating with a probationer without knowing his or her associate is on probation. What is relevant is the searching officer's state of mind. [Citation.] Officers who are aware of a probation search condition [citation] "generally may only search those portions of the residence they reasonably believe the probationer has complete or joint control over." [Citation.] "The sanctity of the home demands recognition that persons living with a probationer or parolee 'retain valid privacy expectations in residential areas subject to their exclusive access or control, so long as there is no basis for officers to reasonably believe the probationer has authority over those areas.' " [Citations.]
>
> What is, or reasonably appears to be, within a probationer's common authority will depend on the specific factual setting of each search. Searching officers are entitled to rely on appearances. In searching a probationer's residence, officers are not required either to inquire about the ownership of or access rights to each item on the premises or to believe the probationer's statements on this topic. [Citations.]

(*People v. Carreon* (2016) 248 Cal.App.4th 866, 877-878.)

Applying these standards, the appellate courts have approved searches of containers, including purses, or clothing which the police have reason to believe, based on the totality of the circumstances, are accessible to or jointly controlled by a parolee or probationer with a search condition. (*People v. Ermi*, *supra*, 216 Cal.App.4th at pp. 281-282 [purse on chair in middle of bedroom the female defendant shared with a male probationer with a search condition]; *People v. Smith*, *supra*, 95 Cal.App.4th at pp. 918-920 [purse found in room defendant shared with her boyfriend, a probationer with search condition]; *People v. Boyd*, *supra*, 224 Cal.App.3d at pp. 746-749 [gender neutral brown leather bag found in trailer home defendant shared with husband, a parolee]; *People v. Britton* (1984) 156 Cal.App.3d 689, 701-703 [paper bag in closet shared by parolee and his girlfriend]; distinguish *People v. Carreon*, *supra*, 248 Cal.App.4th at pp. 878-881 [officers' belief probationer had access to defendant's room and property within a converted garage was not reasonable]; *People v. Veronica* (1980) 107 Cal.App.3d 906, 909 [there was no evidence parolee jointly shared access to wife's purse].)

8020.5-Search condition extends to vehicle with probationer/parolee passenger 3/21

A third party owner or driver of a vehicle who takes on a probationer or parolee as a passenger has a lesser expectation of privacy. Thus, under some circumstances, a vehicle owned or driven by a third party may be searched when a passenger is determined by officers to be a probationer or parolee with a search condition.

> [W]e hold that a vehicle search based on a passenger's parole status may extend beyond the parolee's person and the seat he or she occupies. Such a search is not without limits, however. The scope of the search is confined to those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity. Within these limits, the officer need not articulate specific facts indicating that the parolee has actually placed property or contraband in a particular location in the passenger compartment before searching that area. Such facts are not required because the parole search clause explicitly authorizes a search "without cause."

(*People v. Schmitz* (2012) 55 Cal.4th 909, 926 (*Schmitz*), italics omitted [parolee status of the front seat passenger justified a warrantless search of the backseat area]; see also *People v. Maxwell* (2020) 58 Cal.App.5th 546, 555-557 [extending holding in *Schmitz* to probationer passengers]; *People v. Cervantes* (2017) 11 Cal.App.5th 860, 870-871 [same].) The permissible area of search is not limited to the parolee's or probationer's immediate grasping area. (*Schmitz*, *supra*, 55 Cal.4th at pp. 927-928.) Instead, "an officer may search only those areas where he or she reasonably expects, in light of all the circumstances, that the parolee *could* have placed personal items or discarded contraband." (*Id*. at p. 930, italics in original.) This includes closed containers. "[W]e hold that an officer conducting a search of a vehicle's passenger compartment based on a passenger's parole status may search items of personal property if the officer reasonably believes that the parolee owns the items or has the ability to exert control over them." (*Id*. at p. 930.) "[O]ur holding is that an officer may search those areas of a car's passenger compartment where the officer reasonably expects the probationer could have stowed or discarded items after noticing police activity." (*People v. Maxwell*, *supra*, 58 Cal.App.5th at p. 557.) Finally, it is irrelevant whether the third party is aware of the person's parole or probation status. (*Schmitz*, *supra*, 55 Cal.4th at p. 923.)

In *Schmitz*, the officer recovered drugs and drug paraphernalia from a bag of chips and a pair of shoes in the backseat of defendant's car in which a parolee was in the front passenger seat.

> Considering the layout of a standard five-passenger car, it was objectively reasonable for the officer to expect that this parolee could have stowed his personal property in the backseat, tossed items behind him, or reached back to place them in accessible areas upon encountering the police. Accordingly, under these circumstances, the parolee status of the front seat passenger justified a warrantless search of the backseat area where the chips bag and shoes were located.

(*Schmitz*, *supra*, 55 Cal.4th at pp. 926-927; distinguish *People v. Baker* (2008) 164 Cal.App.4th. 1152, 1159-1160 [no reason to believe male driver on probation with a Fourth waiver was connected to purse at feet of female passenger].)

8020.6-Pre-search knowledge of condition by LE excused if defendant lies about ID 5/20

To rely upon a search and seizure condition of a suspect's parole or probation, the officers must know of such condition before conducting the search or seizure. (*People v. Bravo* (1987) 43 Cal.3d 600, 607 [probation]; *People v. Sanders* (2003) 31 Cal.4th 318, 335 [parole].) But a suspect is estopped from relying on this advance knowledge requirement if he or she gave a false name or other incorrect identifying information precluding the officer from learning of their true probation or parole status. (*People v. Watkins* (2009) 170 Cal.App.4th 1403, 1409-1410 (*Watkins)*.) The appellate court in *Watkins* held that even though the officer was not aware of the search condition when he performed the search, the defendant was estopped from challenged the legality of the search as a probation search because he had concealed that he was subject to the condition by lying about his identity. (*Id*. at p. 1409.) Under such circumstances, "where the evidence inevitably would have been lawfully obtained but for the defendant's dishonesty, the exclusionary rule should not be applied to bar it." (*People v. Mathews* (2018) 21 Cal.App.5th 130, 139 (*Mathews*).) The appellate court in *Mathews* found that the event which triggers the estoppel principle announced in *Watkins* was when the officer receives the negative results of a record check based on the false name given by the defendant. (*Id.* at p. 140.)

Watkins and *Mathews* are distinguishable from *Myers v. Superior Ct.* (2004) 124 Cal.App.4th 1247 (*Myers*). In *Myers*, a police officer stopped the defendant and asked him whether he was on parole or probation. Although the defendant was on informal probation, he falsely told the officer that he had been discharged from parole and was not on probation. The officer did no record check and instead simply searched the defendant "without a warrant, probable cause, reasonable suspicion, or knowledge [the defendant] was on probation and subject to a search condition" and discovered contraband. (*Id*. at pp. 1251.) The Court of Appeal rejected the argument that the defendant's lie was significant, observing that the defendant's "response should have prompted [the officer] to conduct a record check where he would have discovered [the defendant] was on probation and subject to a search condition." (*Id*. at p. 1256; see also *People v. Thomas* (2018) 29 Cal.App.5th 1107, 1113-1114 [left open question whether equitable estoppel principle applies when suspect falsely denies he or she is on probation].)

8050.1-General standard for proof of robbery 9/21

Penal Code section 211 defines the crime of robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (*People v. McKinnon* (2011) 52 Cal.4th 610, 686.) "To elevate larceny to robbery, the taking must be accomplished by force or fear and the property must be taken from the victim or in his presence." (*People v. Gomez* (2008) 43 Cal.4th 249, 254.) " '[A] conviction of robbery cannot be sustained in the absence of evidence that the defendant conceived his intent to steal either before committing the act of force against the victim, or during the commission of that act; if the intent arose only after the use of force against the victim, the taking will at most constitute a theft.' [Citations.]" (*People v. Potts* (2019) 6 Cal.5th 1012, 1030.)

Robbery need not be accomplished by means of both fear and force, as proof of either one is sufficient. (*People v. Montalvo* (2019) 36 Cal.App.5th 597, 611; *People v. James* (1963) 218 Cal.App.2d 166, 170.) The defendant need not intend to cause the victim to experience force or fear. (*People v. Anderson* (2011) 51 Cal.4th 989, 995[rejecting as defense that defendant ran over car

theft victim by accident while trying to escape].) The fear theory of robbery is not an objective standard, but requires the victim actually and subjectively experience fear. (*People v. Collins* (2021) 65 Cal.App.5th 333, 340-341.) As to the force theory of robbery, so long as the defendant intends to steal, the law only requires that he or she exert some quantum of force in excess of that necessary to accomplish the mere seizing of the property. (*Ibid*; see also *People v. Mullins* (2018) 19 Cal.App.5th 594, 604 (*Mullins*).) As to the fear theory of robbery, the jury may consider factors such as the relative size of the defendant and the victim. (*Mullins*, *supra*, 19 Cal.App.5th at p. 604.)

A robbery is committed when force or fear causes a victim to part with property and the victim perceives any overt act connected with the offense. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325.) Indeed, so long as force or fear is used, the victim need not know that a robbery has taken place. (*People v. Davis* (2009) 45 Cal.4th 539, 609; *People v. Jackson* (2005) 128 Cal.App.4th 1326, 1331.)

> " 'It has been settled law for nearly a century that an essential element of the crime of robbery is that property be taken from the possession of the victim.' [Citation.] … [¶] … [N]either ownership nor physical possession is required to establish the element of possession for purposes of the robbery statute. …" (*People v. Scott* (2009) 45 Cal.4th 743.)

(*Mullins*, *supra*, 19 Cal.App.5th at p. 602 [victims' bank cards gave them constructive possession of ATM money taken by robber].)

" ' "[A] thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." ' " (*People v. Hayes* (1990) 52 Cal.3d 577, 626-627.) "The zone of immediate presence includes the area 'within which the victim could reasonably be expected to exercise some physical control over his property.' [Citations.]" (*People v. Webster* (1991) 54 Cal.3d 411, 440; see also *People v. Mullins*, *supra*, 19 Cal.App.5th at p. 603.) Similarly, a "taking" has begun in the victim's presence when the victim is forced to flee property through force or fear. (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1347-1349.)

8050.2-Momentary dominion over victim's property is asportation 9/18

The "taking" aspect of robbery consists of two parts – " 'gaining possession of the victim's property and asporting or carrying away the loot.' " (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 130; see also *People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) The taking or "asportation" element of robbery, like larceny, requires movement of the victim's property, although even a "very slight movement is sufficient for asportation. (*People v. Pham* (1993) 15 Cal.App.4th 61, 65.)

"Asportation" may be satisfied by wrongfully removing property from the control of its owner even though the property is retained by the thief for only a moment. (*People v. Pham*, *supra*, 15 Cal.App.4th at p. 67; *People v. Pruitt* (1969) 269 Cal.App.2d 501, 506.) The momentary exercise of dominion over the property is sufficient asportation for robbery. (*In re Aaron J.* (2018) 22 Cal.App.5th 1038, 1058-1059 [defendant hit victim in face, removed the victim's cell phone from his pocket and only returned it shortly thereafter when the police arrived]; *People v. Pruitt*, *supra*, 269 Cal.App.2d at p. 505 [defendant forcibly took victim's wallet, but promptly handed it back when victim said there was no money inside].) No extended asportation is required for the offense to pass from the attempt stage to the consummated offense. (*People v. Green* (1979) 95 Cal.App.3d 991, 1000.)

The California Supreme Court in *People v. Anderson* (1966) 64 Cal.2d 633 recognized that a successful removal of the articles taken is not necessary once the robber has them in his possession. "[I]f one who has stolen property from … another uses force or fear in removing, or *attempting to remove*, the property …the crime of robbery has been committed." (*Id.* at p. 638, italics added.)

Furthermore, the robber personally need not move the property. Indeed, the property does not have to leave the exclusive possession of the victim. " 'Robbery does not necessarily entail the robber's manual possession of the loot. It is sufficient if he acquired dominion over it, though the distance of movement is very small and the property is moved by a person acting under the robber's control, including the victim.' " (*People v. Price* (1972) 25 Cal.App.3d 576, 578.)

8050.3-All persons in possession of property can be robbery victims 12/16

California follows "the traditional approach that limits victims of robbery to those persons in either actual or constructive possession of the property taken." (*People v. Nguyen* (2000) 24 Cal.4th 756, 764.) Robbery is a crime against possession not ownership. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 876.) Thus, a robbery victim can be any person who shares "some type of 'special relationship' with the owner of the property sufficient to demonstrate that the victim had authority or responsibility to protect the stolen property on behalf of the owner." (*People v. Scott* (2009) 45 Cal.4th 743, 753.) "Persons with just such a special relationship include business employees and parents living with their adult children. [Citations.]" (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1065; see also *People v. McKinnon* (2011) 52 Cal.4th 610, 687.) As the California Supreme Court has explained:

> When two or more persons are in joint possession of a single item of personal property, the person attempting to unlawfully take such property must deal with all such individuals. All must be placed in fear or forced to unwillingly give up possession. To the extent that any threat may provoke resistance, and thus increase the possibility of actual physical injury, a threat accompanied by a taking of property from two victims' possession is even more likely to provoke resistance. [¶] We view the central element of the crime of robbery as the force or fear applied to the individual victim in order to deprive him of his property. Accordingly, if force or fear is applied to two victims in joint possession of property, two convictions of robbery are proper.

(*People v. Ramos* (1982) 30 Cal.3d 553, 589; similarly, see *People v. Carrera* (1990) 49 Cal.3d 291, 311-312; *People v. Jones* (1996) 42 Cal.App.4th 1047, 1053-1055; see also *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1370-1371 [victim visiting brother's apartment when home invasion occurred]; *People v. DeFrance* (2008) 167 Cal.App.4th 486, 498-499 [parent with "loose custody" of their son's car can be a robbery victim]; cf. *People v. Hamilton* (1995) 40 Cal.App.4th 1137 [carjacking]; but see *People v. Ugalino*, *supra*, 174 Cal.App.4th at pp. 1065 [victim of attempted robbery had no possessory interest in roommate's property].)

A robbery victim's possession of the property taken may be either actual or constructive. In the robbery of a business, all on duty employees have constructive possession of their employer's property. (*People v. Scott*, *supra*, 45 Cal.4th 743 [after seeing gun wielding perpetrator at counter, one kitchen worker at McDonald's restaurant hid under table for duration of robbery].) Thus, commercial robbery victims can include cashiers, security guards, janitors, stock clerks, sales associates, and managers. (*People v. Gilbeaux* (2003) 111 Cal.App.4th 515, 520-523; see also *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1350-1352 [mall security guards]; but see *People*

v. Nguyen (2000) 24 Cal.4th 756, 759-760 [husband of employee visiting for birthday party not victim of robbery of business].) In *People v. Neely* (2009) 176 Cal.App.4th 787, the defendant argued that the murder victim, Johnny King, was not an employee of the cellular phone store owned by Mr. Awoleye. The appellate court disagreed:

> King was not an "official" or "formal" employee, did not have regular hours, and was not paid on an hourly or weekly basis. But, King worked in the store and his services benefited the store's business. King came to the store almost every day during the two-month period preceding his murder and had a special relationship to Awoleye similar to that of an apprentice. [Citations.] In particular, King had responsibility to assist customers buying ringtones and received profits from the sale of ringtones as compensation.

(*Id*. at p. 794.)

In the same way, an attempted robbery of two employees can support multiple counts of attempted robbery. (*People v. Bonner* (2000) 80 Cal.App.4th 759, 765-767 [defendant intended to rob manager and assistant manager of hotel receipts].)

Finally, the felonious taking element of robbery is satisfied when property is stolen by force or fear from a person with possession (such as a store employee) who is unaware that another person with the right of possession, such a store owner, has consented to the taking. (*People v. Smith* (2009) 177 Cal.App.4th 1478 [jewelry store owner conspired with thieves to have his store robbed so he could collect the insurance].)

> [W]e hold that when the owner of a store consents to an "inside job" robbery that occurs while the store is under the control of employees who are unaware of the owner's plan, the owner's consent does not vitiate the "felonious taking" element of robbery. If the property that is taken was in the possession of the owner's innocent employees or agents, that is sufficient to make the taking felonious, even if the owner himself or herself is secretly in league with the perpetrators.

(*Id*. at p. 1492, fn. omitted.)

8050.4-Robbery continues until perpetrator reaches position of temporary safety 5/20

Robbery, like theft by larceny, is a continuing offense ending only when the perpetrator has reaches a position of temporary safety with the stolen property. (*People v. Debose* (2014) 59 Cal.4th 177, 205; *People v. Gomez* (2008) 43 Cal.4th 249, 255.)

> Robbery is a crime which is frequently spread over distance and varying periods of time. It is generally committed in three phases, which are assault of the victim, seizure of the victim's property, and the robber's escape to a location of temporary safety. [Citation omitted.] The crime of robbery is not confined to the taking of property from the victim, and the crime is not completed until the robber has won his way to a place of temporary safety.

(*People v. Irwin* (1991) 230 Cal.App.3d 180, 185; similarly, see *People v. Carter* (1992) 19 Cal.App.4th 1236, 1251; see also *People v. Cummins* (2005) 127 Cal.App.4th 667, 679-780.)

And a robber has not reached a place of temporary safety so long as the robber's continued control over the victim places the robber's safety in jeopardy. (*People v. Carter*, *supra*, 19 Cal.App.4th at pp. 1251-1253.) Thus, when the victim is forced to flee the scene of the robbery, the crime is not over until the victim reaches a place of temporary safety. (*People v. Ramirez* (1995) 39

Cal.App.4th 1369, 1375.) It is also irrelevant whether the robber thought he or she had reached a place of temporary safety. (*Ibid*.)

8050.5-Carjacking elements are similar to elements of robbery 8/17

Carjacking essentially is a specialized form of robbery. The statutory language in Penal Code section 215 mirrors Penal Code section 211 while reducing the perpetrator's specific intent and focusing on the motor vehicle as the object of theft.

Penal Code section 215, subdivision (a) states:

> "Carjacking" is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.

(See *People v. Magallanes* (2009) 173 Cal.App.4th 529, 534.) By using the language of the existing robbery statute, the Legislature intended that it be interpreted the same in both robbery and carjacking. (*People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1142; *People v. Medina* (1995) 39 Cal.App.4th 643, 650.) Indeed, a defendant can be charged and convicted of both carjacking and robbery based on the same conduct. (*People v. Ortega* (1998) 19 Cal.4th 686, 700.)

"The requisite intent—to deprive the possessor of possession—must exist before or during the use of force or fear." (*People v. Gomez* (2011) 192 Cal.App.4th 609, 618; see also *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1365.) But carjacking does not require any intent to permanently deprive the owner of the vehicle. (*People v. Hamilton*, *supra*, 40 Cal.App.4th at p. 1142.)

Both robbery and carjacking require the property be taken from someone's person or immediate presence. " ' "A] thing is in the [immediate] presence of a person … which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." ' " (*People v. Hayes* (1990) 52 Cal.3d 577, 626-627; similarly, see *People v. Webster* (1991) 54 Cal.3d 411, 440.) Thus, these crimes are committed when force or fear causes a victim to part with property and the victim perceives any overt act connected with the offense. (*People v. Brito* (1991) 232 Cal.App.3d 316, 325.) Similarly, a "taking" has begun in the victim's presence when the victim is forced to flee from the property through force or fear. (*People v. Dominguez* (1992) 11 Cal.App.4th 1342, 1347-1349.) "No express threat is necessary to establish the victim's fear." (*People v. Magallanes*, *supra*, 173 Cal.App.4th at p. 534.) "The use of fear may be inferred from the circumstances." (*People v. Gomez*, *supra*, 192 Cal.App.4th at p. 623.)

As in the crime of robbery, the property need not be removed from the physical presence of the victim for a taking to be complete. "We acknowledge that a carjacking may occur where neither the possessor nor the passenger is inside or adjacent to the vehicle. (See, e.g., *People v. Coryell* (2003) 110 Cal.App.4th 1299, 1302-1303 [evidence supported carjacking conviction where the driver was in a phone booth next to the vehicle and the knife-wielding defendant chased him away, and the passenger who witnessed the confrontation then ran from the vehicle].)" (*People v. Coleman* (2007) 146 Cal.App.4th1363 1373; see also *People v. Gomez*, *supra*, 192 Cal.App.4th at p. 623.)

The owner or possessor of a vehicle is deprived of possession not only when the perpetrator physically forces the victim out of the vehicle, but also when the victim remains in the car and the defendant exercises dominion and control over the car by force or fear. (See *People v. Gray* (1998)

66 Cal.App.4th 973, 985; see also *People* v. *Duran* (2001) 88 Cal.App.4th 1371, 1376-1377.) In addition, "a perpetrator accomplishes the taking of a motor vehicle by means of force, as defined under section 215, when the perpetrator drives the vehicle while a victim holds on or otherwise physically attempts to prevent the theft." (*People v. Lopez* (2017) 8 Cal.App.5th 1230, 1237; see also *People v. Hudson* (2017) 11 Cal.App.5th 831, 835-840.) While the car need only be moved slightly for there to be a taking, there must be some movement of the car for the crime to be complete. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1055-1063; *People v. Vargas* (2002) 96 Cal.App.4th 456, 463.)

Finally, the defendant's liability for carjacking extends to situations when the victim is forced to relinquish his or her car keys at an inside location although the vehicle is then taken from an outside location. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 608-609; see also *People v. Medina*, *supra*, 39 Cal.App.4th at p. 651 [20 feet away]; but see *People v. Coleman*, *supra*,146 Cal.App.4th at p. 1373 [carjacking not proved when the keys taken from an employee who was inside the business with no evidence the employee ever drove the company vehicle].) In upholding a carjacking conviction, one appellate court reasoned:

> Here, although Estrada was inside his apartment at the time the Zamoras took his truck, the truck was only approximately 10 feet away from him. He watched the men through his window and made eye contact with them. Under the circumstances described above, the jury could reasonably find that Estrada was fearful of a further assault and would have acted to stop the Zamoras and retain possession of his truck if not prevented by such fear. The fact that 10 or 20 minutes had elapsed between the physical assault and the taking of the keys is insignificant. Regardless of the passage of time, fear was being used against Estrada at the time the vehicle was taken.

(*People v. Gomez*, *supra*, 192 Cal.App.4th at p. 625.)

And as with robbery, the taking of a single vehicle from both the driver and a passenger supports two carjacking convictions. (*People v. Hamilton*, *supra*, 40 Cal.App.4th at p. 1144; see also *People v. Duran*, *supra*, 88 Cal.App.4th at pp. 1377-1379.)

8060.1-Fear can be inferred even if robbery victim disclaims it 9/21

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) "The fear mentioned in Section 211 may be either: [¶] 1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or, [¶] 2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." (Pen. Code, § 212.) The term "fear" has not technical meaning peculiar to the law, although the fear must be both actual and reasonable. (*People v. Morehead* (2011) 191 Cal.App.4th 772-774.) " 'The element of fear for purposes of robbery is satisfied when there is sufficient fear to cause the victim to comply with the unlawful demand for his property.' [Citation.]" (*Id*. at p. 774.) In addition, "[i]ntimidation of the victim equates with fear. [Citation.]" (*Id*. at p. 775.)

"Actual fear may be inferred from the circumstances, and need not be testified to explicitly by the victim." (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 698; see also *People v. Davison* (1995) 32 Cal.App.4th 206, 214-217 [victim approached at ATM stepped back on defendants' order

because she felt she "was in big trouble" and that they "meant business"]; *People v. James* (1963) 218 Cal.App.2d 166, 170 [victim testified that the robber shouted at her not to try anything or she would get hurt and that she thought he had a gun]; *People v. Franklin* (1962) 200 Cal.App.2d 797, 798 [although no testimony by checker that she handed over money because she was afraid, evidence sufficient to show that taking was by means of force or fear].)

Indeed, the fear element of robbery may be established by "[t]he circumstances attending the transaction" despite a victim's disclaimer of fear. (*People v. Renteria* (1964) 61 Cal.2d 497, 499 [in robbery prosecution, People not bound by store clerk's testimony that he was not in fear, since there was other evidence to support conclusion "that he acted in fear and would not have disgorged the contents of his employer's till except in fear of the harm which might come to him or his employer if he failed to comply with defendant's demands"]; see also *People v. Mullins* (2018) 19 Cal.App.5th 594, 605 ["we, and the jury, may infer fear from the circumstances even if the victim superficially claims he did not feel fear or intimidation"]; *People v. Borra* (1932) 123 Cal.App. 482, 484-485 [fear may be presumed where there is just cause for it, and thus "[i]n spite of the bravado of the merchant in declaring that he was not much afraid, we are inclined to believe he meant he was not afraid of receiving bodily harm so long as he complied with the demands of the robber"]; compare *People v. Collins* (2021) 65 Cal.App.5th 333, 344-345 [victim said afraid at preliminary hearing but testified not afraid at trial]; but see *People v. Montalvo* (2019) 36 Cal.App.5th 597, 612-617 [no evidence victim was afraid].)

8060.2-Force used in robbery is a relative term for trier of fact 10/19

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211.) "The force or fear required by [Penal Code] section 211 is not synonymous with a physical corporeal assault. 'The terms "force" and "fear" as used in the definition of the crime of robbery have no technical meaning peculiar to the law and must be presumed to be within the understanding of jurors.' " (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708.) Determination of "force" is a factual question for the trier of fact using its own common sense. (*Id*. at p. 1709.) The jury may consider not only the absolute force used, but also the relative physical characteristics of the defendant and the victim. (*Ibid*.; see also *People v. Brew* (1991) 2 Cal.App.4th 99, 104 [cashier in retail store robbed when defendant, considerably larger than she, with alcohol on his breath, stood close to her, without barrier or counter between them, causing cashier to step back from cash register drawer in fear].)

> "In terms of the amount of force required to elevate a taking to a robbery, 'something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property.' [Citation.] But the force need not be great: ' " '[a]ll the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance … .' " ' [Citations.]" [Citation.] "[W]here a person wrests away personal property from another person, who resists the effort to do so, the crime is robbery, not merely theft." [Citations.]

(*People v. Joseph* (2019) 33 Cal.App.5th 943, 951 [thief reached in car and after "a struggle" grabbed victim's cellphone from her hand]; see also *People v. Montalvo* (2019) 36 Cal.App.5th 597, 618; *People v. Lopez* (2017) 8 Cal.App.5th 1230, 1235.) Thus, even a purse snatching can involve sufficient force to support a jury's verdict of robbery rather than simply the lesser offense of grand

theft from the person. (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1257-1259; *People v. Mungia*, *supra*, 234 Cal.App.3d at p. 1709; *People v. Lescallett* (1981) 123 Cal.App.3d 487, 491.)

8060.3-Force or fear to escape with property turns theft into robbery (*Estes*) 7/18

Theft by larceny is a continuing offense ending only when the perpetrator has reaches a position of temporary safety with the stolen property. (*People v. Gomez* (2008) 43 Cal.4th 249, 255.) Accordingly, when a thief uses force or fear against a possessor of the property while escaping with their freshly stolen property, the theft escalates into robbery. (*Id*. at pp. 256-257.) Thus, even a thief who peacefully steals the victim's property becomes a robber by using force or fear upon the victim to retain or escape with it. (*Ibid*.; see also *People v. McKinnon* (2011) 52 Cal.4th 610, 686; *People v. Flynn* (2000) 77 Cal.App.4th 766, 772; *People v. Pham* (1993) 15 Cal.App.4th 61, 65-66.) This is commonly referred to as an *Estes* robbery after the initial appellate case approving this form of robbery. (*People v. Estes* (1983) 147 Cal.App.3d 23.) "[A] robbery occurs when defendant uses force or fear in resisting attempts to regain the property or in attempting to remove the property from the owner's immediate presence regardless of the means by which defendant originally acquired the property." (*Id*. at pp. 27-28.) "What sets an *Estes* robbery apart from standard robbery is that force or fear is used not in the acquisition of the property, but in the escape." (*People v. Robins* (2020) 44 Cal.App.5th 413, 419, fn. omitted.)

> In this state, it is settled that a robbery is not completed at the moment the robber obtains possession of the stolen property and that the crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property. [Citations.] [¶] [I]f one who has stolen property from the person of another uses force or fear in removing, or attempting to remove, the property from the owner's immediate presence … the crime of robbery has been committed.

(*People v. Anderson* (1966) 64 Cal.2d 633, 638; see also *People v. Cooper* (1991) 53 Cal.3d 1158, 1165, fn. 8.)

The *Estes* form of robbery applies even if the property was not taken originally from the victim's immediate presence, but the use of force or fear occurred in the victim's immediate presence at any time during the defendant's escape with or "asportation" of the victim's property. (*People Gomez*, *supra*, 43 Cal.4th at pp. 258-259.) In other words, the defendant's use of force or fear to retain the stolen property in the victim's presence, such as when the victim attempts to regain possession, renders the defendant's action a robbery. (*Id*. at pp. 259-260, approving the holding in *People v. Estes*, *supra*, 147 Cal.App.3d at p. 28.) "The force or fear element of robbery can be satisfied during either the caption or the asportation phase of the taking. [Citations.] By the same logic, the immediate presence element can be satisfied at any point during the taking." (*People v. Gomez*, *supra*, 43 Cal.4th at p. 261.)

As with any crime there must be a concurrent of criminal act and intent. Thus, for there to be an *Estes* robbery, the defendant must still harbor the intent to permanently deprive the owner of the property at the time the force or fear is used upon the victim. (*People v. Hodges* (2013) 213 Cal.App.4th 531, 543 [defendant tossed stolen items at store's loss prevention officer causing him to fall back while defendant tried to get in his car and drive away].)

For the transformation from theft to robbery to take place under *Estes*, the force or fear must be applied to a person in actual or constructive possession of the stolen property. Force or fear directed towards a neighbor or good citizen trying to catch the thief is insufficient. (*People v. Galoia* (1994) 31 Cal.App.4th 595, 597-599; *Sykes v. Superior Court* (1994) 30 Cal.App.4th 479, 484.)

Finally, an *Estes* robbery arises only when the underlying crime is theft by larceny, not theft by false pretenses. (*People v. Williams* (2013) 57 Cal.4th 776, 789 [defendant use of credit card re-encoded with third party information to purchase items was theft by false pretense]; but see *People v. Davis* (1998) 19 Cal.4th 301, 306 [taking item off rack and telling cashier it was being returned for refund not theft by false pretense]; *People v. Mireles* (2018) 21 Cal.App.5th 237, 244-245 [putting UPC sticker from cheaper item on more expensive merchandise and paying lower price was theft by larceny].)

8160.1-Admissibility of new scientific technique is subject to the *Kelly* test 8/17

The admissibility of expert testimony based on a new or novel scientific technique is governed by rules adopted in the leading cases of *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013 (*Frye*) and *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*) (abrogated by statute on another point as explained in *People v. Wilkinson* (2004) 33 Cal.4th 821, 845-848). Federal courts have since abandoned *Frye*. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 (*Daubert*); *People v. Cowan* (2010) 50 Cal.4th 401, 469, fn. 22.) But California has retained the *Kelly* test despite *Daubert*. (*People v. Leahy* (1994) 8 Cal.4th 587, 598-604, 612; see also *People v. Cooley* (2002) 29 Cal.4th 228, 242, fn. 3.)

Under the *Kelly* rule, the proponent of the evidence must establish (1) the reliability of the method—that it is " 'sufficiently established to have gained general acceptance in the particular field in which it belongs,' " (2) that the witness is an expert qualified to give an opinion on the subject, and (3) that correct scientific procedures were used. (*Kelly*, *supra*, at p. 30; see also *People v. McWhorter* (2009) 47 Cal.4th 318, 364; compare *In re Jordan R.* (2012) 205 Cal.App.4th 111, 122 [polygraph evidence does not meet *Kelly* test].) "The first and third prongs can be confused; the *Kelly* first-prong analysis applies only to a new technique or procedure, whereas the third prong is case specific. [Citation.]" (*People v. Stevey* (2012) 209 Cal.App.4th 1400, 1410.) "In determining whether there has been 'general acceptance,' '[t]he goal is not to decide the actual reliability of the new technique, but simply to determine whether the technique is generally accepted in the relevant scientific community.' [Citation.]" (*People v. Morganti* (1996) 43 Cal.App.4th 643, 656.)

> Establishing reliability is the overriding factor when a party seeks to admit evidence based on a new scientific technique. [Citation.] The courts look to see whether a new technique is " 'sufficiently established to have gained general acceptance in the particular field in which it belongs.' " [Citations.] To be "new"—both to science and to the law—"a technique must be meaningfully distinct from existing techniques. [Citation.]" [Citation.] The concern is that an unproven technique may appear " 'in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury.' [Citation.]" [Citation.]

(*People v. Fortin* (2017) 12 Cal.App.5th 524, 531-532.)

"Appellate courts review de novo the determination that a technique is subject to *Kelly*." (*People v. Jackson* (2016) 1 Cal.5th 269, 316.)

8160.2-*Kelly* applies only to new scientific instruments and tests 9/21

Not all new scientific testing procedures or instruments are subject to the *Kelly* (*People v. Kelly* (1976) 17 Cal.3d 24) test. "The *Kelly* rule is frequently inapplicable to expert testimony because the testimony is often neither based on a new scientific technique nor likely to convey an aura of certainty. '[A]bsent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly*.' " (*In re O.D.* (2013) 221 Cal.App.4th 1001, 1006-1007, citing *People v. Stoll* (1989) 49 Cal.3d 1136, 1157.) The *Kelly* rule only applies to scientific instruments, machines and testing devices, not to other forms or types of tests or analyses normally performed by experts. (See, e.g., *People v. Hardy* (20210) 65 Cal.App.5th 312, 324-328 [remanded to hold *Kelly* hearing on Spotspotter acoustic gunfire detection and location system].)

> California distinguishes between expert medical opinion and scientific evidence; the former is not subject to the special admissibility rule of *Kelly-Frye*. [Citation.] *Kelly-Frye* applies to cases involving novel devices or processes, not to expert medical testimony, such as a psychiatrist's prediction of future dangerousness or a diagnosis of mental illness. [Citations.] [¶] Similarly, the testimony of a psychologist who assesses whether a criminal defendant displays signs of deviance or abnormality is not subject to *Kelly-Frye*. [Citation.]

(*People v. Ward* (1999) 71 Cal.App.4th 368, 373; similarly, see *People v. Munch* (2020) 52 Cal.App.5th 464, 473 [*Kelly-Frye* does not apply to expert testimony regarding Child Sexual Abuse Accommodation Syndrome].)

Thus, the *Kelly* test has not been applied to psychological testing methods used by expert witnesses. (See, e.g., *People v. Jones* (2013) 57 Cal.4th 899, 952-954 [psychological testimony regarding thoughts and motivations unique to perpetrators of sexual homicides]; *People v. Eubanks* (2011) 53 Cal.4th 110, 141 ["We agree with the People that Dr. Spiehler 'simply observed and relied upon comparative alcohol values in a series of cases where samples were available both before and after blood transfusions,' and that her medical observations did not involve a new scientific technique"]; *People v. Stoll*, *supra*, 49 Cal.3d 1136 [expert opinion on sexual deviancy, based upon standardized psychological tests]; *People v. MacDonald* (1984) 37 Cal.3d 351, 372-373 [identification expert testimony], overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914; *People v. Ward*, *supra*, 71 Cal.App.4th at p. 373 [*Kelly* rule not applicable expert opinion re: likelihood person would engage in acts of sexual violence]; *People v. Cegers* (1992) 7 Cal.App.4th 988, 999-1000 [diagnosis of sleep disorder]; but see *People v. Fortin* (2017) 12 Cal.App.5th 524, 532-534 [Abel Assessment for sexual interest test, widely rejected by appellate courts, properly excluded].)

Nor has the *Kelly* test been applied to the examination or comparison of physical evidence by expert witnesses. "Where, as here, a procedure isolates physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson, the reliability of the process in producing that result is equally apparent and need not be debated under the standards of *Kelly* … ." (*People v. Webb* (1993) 6 Cal.4th 494, 524 [latent fingerprints]; see also *People v. Lucas* (2014) 60 Cal.4th 153, 223-225 [expert handwriting analysis]; *People v. Cowan* (2010) 50 Cal.4th 401, 470-471 [method of isolating lands and groves in barrel of gun]; *People v. DePriest* (2007) 42 Cal.4th 1, 40 ["overlay" method of shoe print comparison]; *People v. Hoyos* (2007) 41 Cal.4th 872, 910, fn. 21 [blood spatter analysis]; *People v. Farnam* (2002).) 28 Cal.4th 107, 160 [CAL-ID fingerprint "hit"]; *People v. Ayala* (2000) 24 Cal.4th 243, 281 [bullet comparison]; *People v. Rivas*

(2015) 238 Cal.App.4th 967, 975-980 [ACE-V method of palm print comparison]; *In re O.D.* , *supra*, 221 Cal.App.4th at pp. 1007-1009 [ACE-V method of fingerprint comparison]; *People v. Marx* (1975) 54 Cal.App.3d 100, 110-111 [bite mark evidence].)

Since radio technology is not a new scientific technique, evidence based upon tracing cell phone signals is not subject to the *Kelly* test. (*People v. Garlinger* (2016) 247 Cal.App.4th 1185, 1195-1196.)

Dog tracking evidence is also not subject to *Kelly*. (*People v. Peterson* (2020) 10 Cal.5th 409; *People v. Jackson* (2016) 1 Cal.5th 269, 316-320.) "Scent trailing evidence is not so foreign to everyday experience that it would be unusually difficult for jurors to evaluate." (*People v. Jackson*, *supra*, 1 Cal.5th at p. 317.) "It is also unlikely that a juror would believe that dogs are scientifically infallible, a risk that *Kelly* was intended to address." (*Ibid*.)

Finally, the *Kelly* test does not apply to opinion testimony based upon a witness' specialized knowledge and expertise. (See, e.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1123-1124 [gang expert].)

8160.3-Case law approving a scientific technique can negate need for *Kelly* hearing 3/19

Published case precedent can eliminate the need to show general acceptance under *Kelly* of a scientific technique or to qualify the expert witness to testify about its general acceptance. Once a published appellate opinion has affirmed the admission of evidence based upon a new scientific technique, that precedent is controlling on the first prong of the *Kelly* test, unless the opponent can produce new evidence to establish a change in the attitude of the scientific community. (*People v. Cordova* (2015) 62 Cal.4th 104, 127; *People v. Kelly* (1976) 17 Cal.3d. 24, 32; see, e.g., *People v. Daveggio & Michaud* (2018) 4 Cal.5th 790, 831 [fingerprint comparison]; *People v. Dooley* (2009) 45 Cal.4th 390, 447-448 [PCR DQ-Alpha DNA analysis]; *People v. Nelson* (2008) 43 Cal.4th 1242, 1259 ["product rule" to calculate statistical odds of DNA match]; see also *People v. Pride* (1992) 3 Cal.4th 195, 238-239 [hair sample comparisons]; *People v. Randolph* (2018) 28 Cal.App.5th 602, 611-612 [horizontal gaze nystagmus (HGN) as indicator person is under the influence]; *People v. Morganti* (1996) 43 Cal.App.4th 643, 658 [agglutination inhibition test]; *People v. Yorba* (1989) 209 Cal.App.3d 1017, 1023-1024 [electrophoresis evidence].)

California trial courts can properly rely on published decisions from other states in finding a challenged scientific technique to be generally accepted as reliable in the scientific community. (*People v. Buell* (2017) 16 Cal.App.5th 682, 690-691 [ankle bracelet monitoring].) Conversely, "[a] new theory that has been repeatedly rejected by courts nationwide cannot be given the imprimatur of a 'routine' or accepted method of testing defendants facing criminal charges. [Citation.]" (*People v. Fortin* (2017) 12 Cal.App.5th 524, 534 [Abel Assessment of sexual interest].)

Of course, even if the scientific technique has gained general acceptance in the appellate courts, the expert witness called to testify about its results in the particular case must still be qualified. And the proponent of the evidence still must make a case-specific foundational showing that correct scientific procedures were used. (*People v. Morganti*, *supra*, 43 Cal.App.4th at pp. 660-662.)

8160.4-Established scientific procedures not subject to *Kelly* test 8/17

The *Kelly* rule applies only to "new" scientific testing procedures. As use of a scientific practice or instrument becomes widespread, it is no longer new or novel. Consequently, in such situations a *Kelly* hearing is unnecessary even though no appellate opinion specifically establishes its general acceptance. (*People v. Municipal Court (Sansone)* (1986) 184 Cal.App.3d 199, 201 [blood alcohol content of urine]; *People v. Palmer* (1978) 80 Cal.App.3d 239, 251-254 [scanning electron microscopes].)

Similarly, a new method of doing an established scientific test generally does not implicate the *Kelly* rule. (*People v. Cowan* (2010) 50 Cal.4th 401, 470 [ballistics testing using elastomeric material]; *People v. Webb*(1993) 6 Cal.4th 494, 523-524 [fingerprint comparison of laser-derived image of latent print]; *People v. Stevey* (2012) 209 Cal.App.4th 1400, 1411-1419 ["mere tweaking of existing methodologies and calculations" of DNA analysis].) In other words: "To be 'new'—both to science and to the law—'a technique must be meaningfully distinct from existing techniques. [Citation.]' (*People v. Jackson* (2016) 1 Cal.5th 269, 316.)" (*People v. Fortin* (2017) 12 Cal.App.5th 524, 531-532.)

> Where, as here, the issue is the novelty of a change in the method of analyzing DNA, courts have recognized that "[w]hat was once considered revolutionary has now become rather mundane," and the threshold issue is "whether the improvement or refinement in DNA methodology qualifies as another breakthrough innovation within the meaning of *Kelly*, or whether the change represents a mere evolution of a generally accepted scientific technique." (*People v. Stevey*, *supra*, 209 Cal.App.4th at p. 1411.) As discussed, the PCR-STR method of analyzing DNA has been found to be generally accepted by many, many courts. [Citations.] When a new kit utilizing the PCR-STR methodology comes onto the market, the issue is not whether there are differences between it and prior kits, but whether it significantly changes the methodology. [Citations.]

(*People v. Lazarus* (2015) 238 Cal.App.4th 734, 783-784 [Profiler Plus testing kit not novel innovation in DNA testing]; see also *People v. Cordova* (2015) 62 Cal.4th 104, 127-128 [Identifiler is more sophisticated, but not novel, form of DNA testing].) Finally, the *Kelly* test does not apply to the use of common medical instruments of unquestioned reliability. (*People v. Cegers* (1992) 7 Cal.App.4th 988, 999 [oximeter]; *People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1292-1294 [use of colposcope to determine cause of injury]; *People v. Pitts* (1990) 223 Cal.App.3d 606, 864-865 [same].)

8160.5-General acceptance of scientific test under *Kelly* can be proved several ways 6/12

"The *Kelly* requirement of 'general acceptance' of a scientific technique means proof of *scientific consensus* drawn from a typical cross-section of the relevant, qualified scientific community. [Citations.]" (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 122 (*Jordan*), italics in original.) The first prong of the *Kelly* test is met if use of the technique is supported by a clear majority of the members of the relevant scientific community. (*People v. Guerra* (1984) 37 Cal.3d 385, 418.) "In determining the general acceptance issue, courts must consider the quality, as well as the quantity, of the evidence supporting or opposing the scientific technique. [Citations.]" (*Jordan*, *supra*, 205 Cal.App.4th at p. 122; see also *People v. Venegas* (1998) 18 Cal.4th 47, 85.)

One way of determining "general acceptance" under *Kelly* is by examining scientific literature.

> Considerations of judicial economy make it impractical to require that the views of a cross-section of the relevant scientific community be presented personally by each scientist testifying in open court. [Citation.] "Accordingly, for this limited purpose scientists have long been permitted to speak to the courts through their published writings in scholarly treatises and journals." [Citations.] " '[I]f a fair overview of the literature discloses that scientists significant either in number or expertise publicly oppose [the technique] as unreliable, the court may safely conclude there is no such consensus at the present time.' " [Citations.]

(*Jordan*, *supra*, 204 Cal.App.4th at p. 123.)

"In addition to considering published writings in scholarly treatises and journals, the court may receive the testimony of *disinterested and qualified* experts on the issue of the technique's general acceptance in the relevant scientific community. [Citations.]" (*Jordan*, *supra*, 204 Cal.App.4th at p. 123, italics in original.)

> A witness qualifying as an expert is *disinterested* if he is not "so personally invested in establishing the technique's acceptance that he might not be objective about disagreements within the relevant scientific community." [Citations.] Factors such as being a leading proponent of the scientific technique, having a long association with its development and/or promotion, or having a vested career interest in its acceptance in the scientific community are among those that show a lack of impartiality by the expert. …
>
> A witness is *qualified* to testify as an expert "if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) To testify on the general acceptance prong of the *Kelly* test, an expert must have the necessary academic or other qualifications which would enable him to "express a competent opinion on the issue of the general acceptance of [the technique] in the [relevant] scientific community." [Citation.] This requirement is not fulfilled by mere evidence that would enable the expert to testify that he personally believes that the challenged procedure is reliable; the court must be able to find from the testimony that the procedure is generally accepted as reliable by the larger, relevant scientific community.

(*Jordan*, *supra*, 204 Cal.App.4th at pp. 123-124, italics in original.)

8160.6-Computer animation versus computer simulation distinguished 8/20

In *People v. Duenas* (2012) 55 Cal.4th 1 (*Duenas*), the California Supreme Court explained that the admissibility of any evidence altered, generated, or otherwise analyzed by computer software depends on whether such evidence constitutes a "computer animation" or a "computer simulation." (*Id*. at pp. 20-21.) The court explained the difference between the two:

> "Animation is merely used to illustrate an expert's testimony while simulations contain scientific or physical principles requiring validation. [Citation.] Animations do not draw conclusions; they attempt to recreate a scene or process, thus they are treated like demonstrative aids. [Citation.] Computer simulations are created by entering data into computer models which analyze the data and reach a conclusion.' [Citations.] In other words, a computer animation is demonstrative evidence offered to help a jury understand expert testimony or other substantive evidence …; a computer simulation, by contrast, is itself substantive evidence. [Citations.]

(*Id*. at p. 20.) The court determined that a computer animation is admissible if " 'it is a fair and accurate representation of the evidence to which it relates. …' " (*Ibid*.) In contrast, a computer simulation is only admissible if it complies with the *Kelly-Frye* test. (*Id*., at pp. 20-21.)

Following the holding in *Duenas*, the appellate court in *People v. Tran* (2020) 50 Cal.App.5th 171 held *Kelly-Frye* did not apply to an expert's compilation, enhancing and editing together of multiple video sources regarding the events surrounding an aggravated assault in a public street. (*Id*. at p. 187-188.) The witness' "expertise was provided as an aid to help others understand the raw surveillance footage, which the jury was also provided." (*Id*. at p. 188.) Thus, the trial court did not abuse its discretion in admitting the expert's animation. (*Id*. at pp. 188-189.)

> Although jurors ordinarily may be capable of watching a surveillance video and understanding what they see without expert help, the scene captured by the multiple videos was especially challenging. As such, [the expert's] assistance in this case was critical because multiple surveillance videos depicted a moving melee, at night, with at least a dozen bodies interacting on a crowded street. [The expert's] testimony and sequenced videos were necessary to aid the jury's understanding of how the different videos captured the same action from different angles, thus minimizing confusion that can result from contrasting video perspectives, contradictory descriptions, or unreliable eyewitnesses. Indeed, [the expert's] synchronization demonstratives and tracking videos were critical for the jury to make sense of the various videos that differed by way of time stamps, camera angles, dimensions, lighting, resolution, pixel ratios, and quality. Further, as the crime occurred at night and the lighting of the streets and in the videos was not uniform, [the expert's] testimony and enhancement of the videos aided the jury in identifying the various participants in the melee.

(*Id*. at p. 189.)

8160.7-Opponent has burden to prove scientific test no longer meets *Kelly* test 3/21

After a scientific technique has been established as generally accepted in the scientific community under the *Kelly* test, a different standard applies if it is alleged the technique has lost such acceptance. "When the continuing admissibility of scientific evidence is at issue, rather than it being the proponent's burden to show the technique is generally accepted by the scientific community, the burden shifts to the opposing party to produce new evidence showing it no longer is." (*People v. Azcona* (2020) 58 Cal.App.5th 504, 511, citing *People v. Bolden* (2002) 29 Cal.4th 515, 546.) Appellate review of a trial court's determination regarding a scientific technique's general acceptance is de novo. (*People v. Doolin* (2009) 45 Cal.4th 390, 447.)

8180.1-Objections to DNA evidence go to weight, not admissibility 2/21

"A genetic profile is much like a physical profile or composite sketch—it is a compilation of traits to describe the perpetrator. … [T]he more traits described, the more specific the sketch of the perpetrator and the more limited the pool of possible perpetrators." (*People v. Pizarro* (2003) 110 Cal.App.4th 530, 562, disapproved on other grounds in *People v. Wilson* (2006) 38 Cal.4th 1237, 1250-1251.) "Forensic DNA [(deoxyribonucleic acid)] analysis is a comparison of a person's genetic structure with crime scene samples to determine whether [that] person's structure matches that of the crime scene sample such that the person could have donated the sample." (*People v. Nelson* (2008) 43 Cal.4th 1242, 1257-1258.) "In general, criticisms about the quality of DNA testing

go to the weight of the evidence and are proper subjects for cross-examination. (*People v. Wright* (1998) 62 Cal.App.4th 31, 41-42.)" (*People v. Cua* (2011) 191 Cal.App.4th 582, 591.) The common scientific methods of comparing DNA [RFLP and PCR, including the three sub-types of PCR testing] have all acquired general acceptance in the scientific community. (*Id.* at pp. 593-594; see also *People v. Cordova* (2015) 62 Cal.4th 104, 125-130 [PCR-STR].)

Once there is a DNA comparison, "[i]t is relevant for the jury to know that most persons of at least major portions of the general population could not have left the evidence samples." (*People v. Wilson*, *supra*, 38 Cal.4th at p. 1245 [non-cold hit case]; see also *People v. Nelson, supra*, 43 Cal.4th at pp. 1266-1267 [cold hit case].)

> A match between a suspect's traits and the perpetrator's traits directly incriminates the suspect by demonstrating that he resembles the perpetrator and therefore could be the perpetrator. But the match alone does not establish the weight of the evidence. Anyone with the same profile could be the perpetrator, and if a large number of people share the profile, the match does not carry much evidentiary weight. Thus, the match requires a second piece of evidence—the statistical frequency of the profile. "The statistical evidence gives the match evidence its weight. It is an expression of the rarity of the perpetrator's profile, the size of the pool of possible perpetrators, and the likelihood of a random match with the perpetrator' s profile." [Citation.] "The determination of what is often called the 'significance of the match' is a statistical assessment of how incriminating it is that the defendant's profile matches the perpetrator's." [Citation.] The rarer the profile in the population, the more likely the defendant is in fact the perpetrator. [Citations.]

(*People v. Xiong* (2013) 215 Cal.App.4th 1259, 1269.) "We adhere to the view that admissibility of the random match statistic in these cases presents an issue of relevance, not scientific reliability." (*People v. Turner* (2020) 10 Cal.5th 786, 806 [random-match statistics in cold cases not subject to *Kelly*].) "[W]e reaffirm, that the statistic generated by the product rule provides relevant and admissible evidence in cold hit as well as confirmatory match cases." (*Id*. at p. 810.)

Among the statistical methods for determining the significance of a person's DNA match, "it is 'settled that the product rule reliably shows the rarity of the profile in the relevant population.' [Citations.]" (*People v. Cua*, *supra*, 191 Cal.App.4th at pp. 595-596; see *People v. Xiong*, *supra*, 215 Cal.App.4th at p. 1270 [describing "product rule"].) "[T]he product rule generates relevant evidence even in a cold hit case." (*People v. Nelson*, *supra*, 43 Cal.4th at p. 1266; see also *People v. Xiong*, *supra*, 215 Cal.App.4th at p. 1271.) "As the science underlying DNA comparisons continues to improve, the practical significance of the different racial frequencies diminishes.' " (*People v. Wilson*, *supra*, 38 Cal.4th at p. 1248.)

Such statistical information is generally supplied by an expert witness. "We know of no categorical prohibition, at least in this state, on source attribution—expression by an otherwise qualified expert of an opinion that the quantitative and qualitative correspondence between an evidentiary sample and a known sample from a defendant establishes identity to a reasonable scientific certainty." (*People v. Cua*, *supra*, 191 Cal.App.4th at p. 600; accord *People v. Cordova*, *supra*, 62 Cal.4th at pp. 130-131.)

But, "DNA testimony need not be accompanied by statistical analysis." (*People v. Her* (2013) 216 Cal.App.4th 977, 981-982; see also *People v. Cua*, *supra*, 191 Cal.App.4th at pp. 596-600 [upheld admission of testimony that DNA evidence at the scene "belonged to" the defendant, where the People did not provide statistical support for that conclusion].) "Here, the trial court ruled that the People's expert could testify the partial DNA profile detected in both mixed-source samples

was consistent with defendant's DNA because it was relevant circumstantial evidence of the perpetrator's identity in the context of other DNA evidence. This ruling was well within the court's discretion." (*People v. Her*, *supra*, 216 Cal.App.4th at pp. 981-982.)

8190.1-Nystagmus test shows probable cause for drugs or alcohol 3/19

"Nystagmus is an involuntary rapid movement of the eyeball, which may be horizontal, vertical, or rotatory." (*People v. Ojeda* (1990) 225 Cal.App.3d 404, 406.) "An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus, or HGN." (*Ibid*.)

Evaluation of HGN is part of field sobriety testing of people suspected of being under the influence of alcohol or various drugs, and often serves as partial basis for on officer's opinion concerning the suspect's intoxication. In California, testimony about gaze nystagmus as a symptom of drug or alcohol ingestion has been received and relied upon to support probable cause findings in many cases. (See, e.g., *People v. Mendoza* (1986) 183 Cal.App.3d 390, 395 [alcohol and PCP]; *People v. Abes* (1985) 174 Cal.App.3d 796, 801, fn. 1 [PCP]; *People v. Olivas* (1985) 172 Cal.App.3d 984, 986 [PCP]; *People v. Milham* (1984) 159 Cal.App.3d 487, 494 [alcohol]; *People v. Lewis* (1983) 147 Cal.App.3d 1135, 1138 [alcohol].)

The California Supreme Court in *People v. Leahy* (1994) 8 Cal.4th 587, held that HGN is a new scientific technique requiring a *Kelly/Frye* foundational showing of general acceptance of the test within the relevant scientific community. (*Id*. at pp. 604-610; *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F.2d 1013.) Thereafter, the appellate court in *People v. Joehnk* (1995) 35 Cal.App.4th 1488, held that HGN satisfied *Kelly/Frye*. (*Id*. at pp. 1507-1508.) The court found that the relevant, scientific community accepts HGN testing as a useful tool for an officer reaching an opinion concerning intoxication when combined with other tests and observations. (*Ibid*.; see also *People v. Randolph* (2018) 28 Cal.App.5th 602, 611-612.)

> Under *Joehnk* … and because HGN testing now satisfies the *Kelly* formulation, a police officer can use findings from HGN testing as a basis for an opinion that the defendant was driving under the influence of alcohol. [Citation.] *Joehnk* and *Leahy* make clear that the prosecution is not " 'required to submit expert testimony to confirm a police officer's evaluation of an HGN test.

(*Id*., at p. 615, disapproving contrary language in *People v. Williams* (1992) 3 Cal.App.4th 1326, 1333-1335 [officer not qualified to give expert opinion defendant's nystagmus caused by alcohol].) Similarly, the appellate court in *People v. Ojeda*, *supra*, 225 Cal.App.3d 404, held that officers may rely upon their experience with the relationship between gaze nystagmus and alcohol intoxication to support an opinion that a subject is under the influence of alcohol. (*Id*. at pp. 408-409.) "We hold only that an officer with sufficient experience may testify, based on his or her own experience with the relationship between HGN and alcohol intoxication, to an opinion that a subject was or was not under the influence." (*Id*. at p. 409.)

8190.2-Failure to comply w/admin. reg. goes only to weight of test results 10/07

"Breath tests to determine blood alcohol concentration have long been recognized by decisional law as scientifically valid in this state and elsewhere. In general, the foundational prerequisites for admissibility of testing results are that (1) the particular apparatus utilized was in proper working order, (2) the test used was properly administered, and (3) the operator was competent and qualified." (*People v. Adams* (1976) 59 Cal.App.3d 559, 561, citation deleted; similarly, see *Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, 140.) "To meet these requirements, the evidence would be admitted upon either a showing of compliance with the title 17 regulations or independent proof of the three elements." (*People v. Williams* (2002) 28 Cal.4th 408, 418, citing *Adams*, *supra*, 59 Cal.App.3d at p. 567.)

Regulations found in Title 17 of the California Code of Regulations, adopted pursuant to statute, establish procedures for forensic blood alcohol testing. But, failure to adhere to these administrative requirements does not automatically render test results inadmissible. "Noncompliance with the Administrative Code regulations goes only to the weight of the blood alcohol concentration evidence." (*People v. Adams*, *supra*, 59 Cal.App.3d at p. 567; similarly, see *People v. French* (1978) 77 Cal.App.3d 511, 522.) Thus, admission of test results was upheld in *Adams*, despite the failure to comply with regulations mandating the periodic testing of the breath alcohol testing instrument, because there was independent proof of there foundational requirements. (*People v. Adams*, *supra*, 59 Cal.App.3d at p. 567.) The appellate court in *French* upheld the admission of breath alcohol test results even though the operator failed to follow the DOJ checklist for properly purging the test instrument. (*People v. French*, *supra*, 77 Cal.App.4th at pp. 521-522.) Similarly, an operator's failure to comply with the Code of Regulations when using a preliminary alcohol screening (PAS) device goes to weight not admissibility. (*People v. Hallquist* (2005) 133 Cal.App.4th 291, 297.) Finally, as another example of this rule, the use of unlicensed phlebotomists to draw blood samples for forensic alcohol testing in violation of statutory requirements, does not preclude the admission of the resulting blood alcohol test results. (See *People v. Mateljan* (2005) 129 Cal.App.4th 367; *People v. McHugh* (2004) 119 Cal.App.4th 202, 212-214; *People v. Esayian* (2003) 112 Cal.App.4th 1031.)

The trial court's decision to admit blood alcohol test results despite evidence of non-compliance with either statutory requirements or the Code of Regulations is reviewed for abuse of discretion. (*People v. Williams*, *supra*, 28 Cal.4th at p. 417.)

8300.1-Police may search abandoned property, including trash, without warrant 5/20

"It has long been settled … that a warrantless search and seizure involving abandoned property is not unlawful, because a person has no reasonable expectation of privacy in such property. [Citations.]" (*People v. Parson* (2009) 44 Cal.4th 332, 345 (*Parson*); see also *People v. Gallego* (2010) 190 Cal.App.4th 388, 396 (*Gallego*); *People v. Pereira* (2007) 150 Cal.App.4th 1106, 1112 (*Pereira*); *People v. Daggs* (2005) 133 Cal.App.4th 361, 365 (*Daggs*.) "[C]ase law establishes that abandonment is primarily a question of the defendant's intent, as determined by objective factors such as the defendant's words and actions. [Citation.]" (*Parson*, s*upra*, 44 Cal.4th at p. 347 [evidence supported finding that defendant abandoned property inside motel room when he fled out back window and never returned].) "The appropriate test is whether defendant's words or actions would cause a reasonable person in the searching officer's position to believe that the

property was abandoned." (*Pereira*, *supra*, 150 Cal.App.4th at p. 1113, citing *Daggs*, *supra*, 133 Cal.App.4th at pp. 365-366.)

Certainly there is no reasonable expectation of privacy in items voluntarily discarded. (*California v. Greenwood* (1988) 486 U.S. 35, 37-41 [trash bags left on curb]; *Gallego*, *supra*, 190 Cal.App.4th at pp. 395-398 [discarded cigarette butt].) Such items can be seized and searched without a warrant including for DNA.

> By voluntarily discarding his cigarette butt on the public sidewalk, defendant actively demonstrated an intent to abandon the item and, necessarily, any of his DNA that may have been contained thereon. The facts here show the DNA testing of the abandoned cigarette butt was carried out only to identify defendant as a suspect in an ongoing criminal investigation. On these facts, we conclude that a reasonable expectation of privacy did not arise in the DNA test of the cigarette butt, and consequently neither did a search for Fourth Amendment purposes.

(*Gallego*, *supra*, at p. 397.) "By the same token, defendant in this case had no privacy right in the mouthpiece of the PAS device, which was provided by the police, and he abandoned any expectation of privacy in the saliva he deposited on this device when he failed to wipe it off." (*People v. Thomas* (2011) 200 Cal.App.4th 338, 342.) "It is, of course, well established that property is abandoned when a defendant voluntarily discards it in the face of police observation, or imminent lawful detention or arrest, to avoid incrimination." (*Daggs¸ supra*, 133 Cal.App.4th at p. 365.) Thus, for example, in *People v. Brown* (1990) 216 Cal.App.3d 1442 (*Brown*), the appellate court held "defendant's act of dropping the bag before making a last-ditch effort to evade the police supports the trial court's finding that defendant indeed abandoned the paper bag and lost any reasonable expectation of privacy in its contents." (*Id*. at p. 1451.)

Property can also be treated as abandoned by police even if the defendant did not intentionally or voluntarily abandon it. (*Daggs*, *supra*, 133 Cal.App.4th at pp. 365-367 [defendant accidentally dropped cell phone during robbery attempt].) " ' "Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search." ' (*Brown*, *supra*, 216 Cal.App.3d at p. 1451 …; see also *In re Baraka H*. (1992) 6 Cal.App.4th 1039, 1048.)" (*Daggs*, *supra*, 133 Cal.App.4th at pp. 365-366 ["It was inferable that the telephone belonged to, or had been in his possession of, the robber who had fled the scene, thereby evincing his intent not to reclaim it."].) Moreover:

> Abandonment may be found even when the defendant does not intend "to permanently relinquish control over the object." (*In re Baraka H.*, *supra*, 6 Cal.App.4th at p. 1048.) This is so because abandonment is not defined strictly in terms of property rights. Instead, " ' "what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein." ' [Citation.] If the defendant has so treated the object as to relinquish a reasonable expectation of privacy, it does not matter whether formal property rights have also been relinquished." (*Ibid*.)

(*Daggs*, *supra*, 133 Cal.App.4th at p. 367; but see *People v. Baker* (2008) 164 Cal.App.4th 1152, 1161 [passenger getting out of car and leaving purse on floorboard during parole search of driver not abandonment]; *Pereira*, *supra*, 150 Cal.App.4th at pp. 1114-1115 [use of fictitious name to send package does not constitute abandonment].)

The question whether property is abandoned is an issue of fact, and the court's finding must be upheld if supported by substantial evidence. (*People v. Ayala* (2000) 24 Cal.4th 243, 279; *Daggs*, *supra*, 133 Cal.App.4th at p. 365.)

8300.2-Seizing discarded drugs OK despite bad detention 12/09

Independent of the validity of a detention or arrest, property abandoned on a public street and in plain view may be properly seized by police. (*People v. Siegenthaler* (1972) 7 Cal.3d 465, 470 (*Siegenthaler*).) In *Siegenthaler*, defendant was observed by police late at night in a high crime area. Defendant ran from police and discarded evidence as police pursued. The only inducement to flee was the appearance of the marked police car and police officers who took notice of the defendant and his companion. The California Supreme Court in *Siegenthaler* held that the property defendant abandoned on a public street and in plain view was legally seized by police independent of the validity of the defendant's arrest. (*Id*. at pp. 469-470.)

The same rule applies to an alleged illegal detention. Even if the defendant is subjected to an actual or threatened illegal detention, there is no basis for "his subjective assumption that an illegal search would follow his detention." (*People v. Patrick* (1982) 135 Cal.App.3d 290, 294 (*Patrick*).)

> The appearance of a police officer, even when unexpected, would not lead an innocent citizen, by whose standards the propriety of all official conduct is to be measured [citation], to attempt to hurl his personal property into the night. It is only when a person has reasonable cause to believe his private possessions will inevitably be exposed to view by improper police practices, that their attempted abandonment will be deemed the fruit of that conduct.

(*People v. Holloway* (1985) 176 Cal.App.3d 150, 156, fn. omitted.) When an individual flees an approaching police officer, the United States Supreme Court has rejected the notion that any "investigatory pursuit" amounts to a seizure under the Fourth Amendment and has held mere police surveillance or approach does not constitute a detention. (*Michigan v. Chesternut* (1988) 486 U.S. 567, 575-576; *In re Christopher B.* (1990) 219 Cal.App.3d 455, 461.)

In *Patrick*, officers approached a group of people in an area known to host many drug transactions. The defendant, one of the group, stared at the officer and then fled. An officer pursued, and just as he got to within a few feet of the defendant, saw the defendant discard several items. The defendant was then detained. The discarded items were recovered and found to contain contraband. The appellate court found there was no detention until after the defendant discarded the contraband. (*Patrick*, *supra*, 135 Cal.App.3d at p. 293.) The court held, therefore, that the contraband was "not an indispensable product of a detention, but an abandonment, and was properly seized." (*Ibid*.) The court added that even if defendant had been under the threat of an illegal detention, it was not established that an illegal search would have followed. "A defendant cannot immunize himself from damning evidence by discarding that evidence on his subjective assumption that an illegal search would follow his detention." (*Id.* at p. 294; similarly see, *People v. Holloway*, *supra*, 176 Cal.App.3d at pp. 155-157.)

In *In re Christopher B.*, *supra*, 219 Cal.App.3d 455, several officers from the gang task force approached large group wearing gang colors in public park to monitor possible gang activity. One officer was carrying semi-automatic rifle at low ready position. They never singled out defendant or any other member of group, or physically restrained any member of group, until defendant threw down bag of cocaine. At no point before retrieving the cocaine did officers pursue any member of

group, even though all of group began to walk away from officers as they approached. The appellate court held there was no detention of the defendant and rejected the argument that the defendant's discarding of the cocaine was the fruit of a threatened illegal detention by the officers. (*Id*. at pp. 461-465.)

In *People v. King* (1977) 72 Cal.App.3d 346, a suspect looked at an approaching police car and walked away from a group of several others. The approaching officer spoke to the defendant by name and said, "Stop. I want to talk to you." Defendant fled and abandoned contraband. Denial of his suppression motion was affirmed. The appellate court noted a suspect's reaction to the officer's call did not tend to establish an unlawful detention existed. "We are concerned only with the reasonableness of the officer's conduct, not with the subsequent response of King motivated by a consciousness of guilt." (*Id.* at p. 350.)

8300.3-Evidence abandoned on threatened detention not suppressed 12/09

Before 1991 there was a split of authority on the admissibility of contraband evidence abandoned by a suspect fleeing a threatened illegal detention. (Compare *People v. Patrick* (1982) 135 Cal.App.3d 290 and *People v. Holloway* (1985) 176 Cal.App.3d 150 [upholding the seizure] with *People v. Menifee* (1979) 100 Cal.App.3d 235 and *People v. Washington* (1987) 192 Cal.App.3d 1120 [suppressing evidence].) This conflict was settled by the United States Supreme Court in *California v. Hodari D.* (1991) 499 U.S. 621 (*Hodari D.*).

In *Hodari D.*, officers approached several youths huddled around a car. The youths ran. Officers pursued Hodari on foot and, as an officer was nearly upon him, Hodari threw a rock of cocaine. He was arrested and searched. The United States Supreme Court held a show of authority does *not* constitute a "seizure," even if it manifests an officer's intent to detain or arrest. Until there is an actual submission to the officer's authority, or the suspect is physically restrained, any abandoned contraband cannot be a fruit of the seizure. Hence, the legality of any *threatened* detention or arrest is outside the Fourth Amendment's prohibition against unreasonable seizures, and the abandonment of contraband before actual physical restraint or submission to authority cannot be its product. (*Hodari D.*, *supra*, 499 U.S. at pp. 624-629.) "In sum, assuming that [the officer's] pursuit in the present case constituted a 'show of authority' enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied." (*Id.* at p. 629.)

The earlier holdings in *Menifee* and *Washington* are no longer valid following the decision in *Hodari D.* (See *People v. Arangure* (1991) 230 Cal.App.3d 1302, 1307-1308; see also *People v. Green* (1994) 25 Cal.App.4th 1107, 1110-1111; *In re Christopher B.* (1990) 219 Cal.App.3d 455, 461-462, and fn. 3.)

8300.4-Dealer's apparent abandonment of drugs negates expectation of privacy 12/09

Street drug dealers often conceal their merchandise at a distance to avoid being associated with it should the police arrive. This may be done by placing the drugs in a crumpled paper bag that appears to have been abandoned, or even burying the container in a public area. The appellate court in *In re Baraka H.* (1992) 6 Cal.App.4th 1039, addressed this practice in the context of the dealer's standing to contest the seizure and search of the container. The court held that while the dealer might entertain a subjective expectation of privacy in the container's contents, the circumstances,

suggesting abandonment, make that expectation objectively unreasonable. The test is not what the dealer secretly intends, but whether society is willing to recognize the expectation of privacy as reasonable. (*Id.* at pp. 1046-1048.) "One who buries incriminating evidence in a public park may reasonably *believe* that it will escape discovery, but has no socially recognized entitlement to avoid detection." (*Id.* at p. 1046, fn. 5, italics in original; see also, *People v. Roybal* (1998) 19 Cal.4th 481, 507-508 [no reasonable expectation of privacy in jewelry wrapped in plastic produce bag hidden in cinder block wall in mother's back yard].)

The appellate court went on:

> " 'In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein.' " [Citations.] If the defendant has so treated the object as to relinquish a reasonable expectation of privacy, it does not matter whether formal property rights have also been relinquished. … Appellant is therefore mistaken in contending that abandonment does not occur unless the actor intends to permanently relinquish control over the object.

(*In re Baraka H.*, *supra*, 6 Cal.App.4th at p. 1048.)

8310.1-Protective sweep proper for officer safety 10/12

Officers making an arrest in a home may, without a warrant, cursorily search areas of the home in which people might be hiding to ensure officer safety until they can complete the arrest and depart. This protective sweep is limited to a quick visual inspection of spaces where a person might be found. (*Maryland v. Buie* (1990) 494 U.S. 325, 327, 334-336 (*Buie*).)

A protective sweep does not require probable cause to believe that officer safety is threatened—a reasonable suspicion is sufficient.

> We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonable prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

(*Id.* at p. 334; see also *People v. Celis* (2004) 33 Cal.4th 667, 678.) "[W]hen the police seek to justify the warrantless entry into a home as a protective sweep for the purpose of allaying officer safety concerns, the facts known to the police must rise to a reasonable suspicion that the area to be swept harbors an individual or individuals posing a danger to those on the arrest scene." (*People v. Ormonde* (2006) 143 Cal.App.4th 282, 295 [officer's generalized apprehension based only on past experiences with similar crimes insufficient].) "The test under *Buie* therefore requires a reasonable suspicion both that another person is in the premises and that that person is dangerous." (*People v. Werner* (2012) 207 Cal.App.4th 1195, 1206.)

California appellate courts have long permitted this sort of cursory search for persons who might be a danger to officers making an arrest in the home. The courts also have approved the seizure of contraband or evidence observed in plain view while inspecting locations in which a person might be found. (*Tamborino v. Superior Court* (1986) 41 Cal.3d 919, 923-925; *People v. Block* (1971) 6 Cal.3d 239, 243-245; *People v. Dyke* (1990) 224 Cal.App.3d 648, 661-662.)

"A protective sweep is not limited to situations immediately following an arrest … ." (*People v. Werner*, *supra*, 207 Cal.App.4th at p. 1206.) The need for a protective sweep is just as compelling when officers are lawfully on the premises making a lawful detention, executing a search warrant, conducting a probation or parole search, or performing a consent search. (*People v. Celis*, *supra*, 33 Cal.4th at p. 679 [detention]; *People v. Ledesma* (2003) 106 Cal.App.4th 857, 864 [probation search].) And the sweep may include areas of the premises that are not within the scope of the warrant, search condition, or consent. (*People v. Ledesma*, *supra*, 106 Cal.App.4th at pp. 864-865.)

Note also, that the protective sweep approved in *Buie* occurred *after* the suspect was outside the house in handcuffs. (*Maryland v. Buie*, *supra*, 494 U.S. at p. 338 (conc. opn. of Stevens, J.).) Indeed, California appellate courts have approved officers entering a residence to search for other possible suspects who might pose a danger even where the suspects sought were arrested outside the residence. (*People v. Maier* (1991) 226 Cal.App.3d 1670, 1674-1675; *People v. Coffee* (1980) 107 Cal.App.3d 28; but see *People v. Werner*, *supra*, 207 Cal.App.4th at pp. 1206-1210; *People v. Ormonde*, *supra*, 143 Cal.App.4th at p. 295.) " '[I]n some circumstances, an arrest taking place just outside a home may pose an equally serious threat to the arresting officers' as one conducted inside the house.' [Citation.]" (*People v. Celis*, *supra*, 33 Cal.4th at p. 679, emphasis deleted.)

8320.1-No reasonable expectation of privacy in illegal campsite 10/12

"A 'person can have no reasonable expectation of privacy in premises on which they are wrongfully present … .' [Citations.]" (*People v. Nishi* (2012) 207 Cal.App.4th 954, 961.) Thus, a person who knowingly sets up a campsite, including a tent, illegally in a prohibited area cannot claim a reasonable expectation of privacy.

> Here, … defendant was a trespasser on public land, and occupied the campsite without authority in bad faith. "Where, as here, an individual 'resides' in a temporary shelter on public property without a permit or permission and in violation of a law which expressly prohibits what he is doing, he does not have an objectively reasonable expectation of privacy. [Citations.]" [Citation.] We therefore conclude that the warrantless search of defendant's campsite did not violate the Fourth Amendment.

(*People v. Nishi*, *supra*, 207 Cal.App.4th at p. 963, citing *People v. Thomas* (1995) 38 Cal.App.4th 1331, 1334-1335 [no reasonable expectation of privacy in cardboard box shelter on public property].)

8330.1-Sobriety checkpoints are permissible 5/20

The California Supreme Court has held that "within certain limitations," sobriety checkpoints may be operated without violating the Fourth Amendment to the federal Constitution or article I, section 13, of the state Constitution. (*Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, 1325 (*Ingersoll*).) In *Ingersoll*, the court rejected the argument that the validity of sobriety checkpoints should be analyzed under the criminal detention standard requiring an individualized suspicion of wrongdoing. (*Id*. at p. 1327.) The *Ingersoll* court explained the primary purpose of a sobriety checkpoint is not to detect evidence of crime or arrest drunk drivers, but to "promote public safety by deterring intoxicated persons from driving on the public streets and highways." (*Id*. at p. 1328.) The court concluded the validity of sobriety checkpoints "is to be determined not by the standard pertinent to traditional criminal investigative stops, but rather by the standard applicable to investigative

detentions and inspections conducted as part of a regulatory scheme in furtherance of an administrative purpose." (*Ibid*.)

The court in *Ingersoll* held that "stops and inspections for regulatory purposes are permitted if undertaken pursuant to predetermined specified neutral criteria." (*Ingersoll*, *supra*, 43 Cal.3d at p. 1335.) The court assessed the constitutionality of a sobriety checkpoint by "weighing the gravity of the governmental interest or public concern served and the degree to which the program advances that concern against the intrusiveness of the interference with individual liberty." (*Id*. at p. 1338.) The court explained that "[d]eterring drunk driving and identifying and removing drunk drivers from the roadways undeniably serves a highly important governmental interest" (*ibid*.), and there is evidence sobriety checkpoints "do advance this important public goal" (*id*. at p. 1339).

> In examining the intrusiveness of such checkpoints, the *Ingersoll* court identified eight factors to 'provide functional guidelines for minimizing the intrusiveness of the sobriety checkpoint stop." [Citation.] These factors are: (1) decisionmaking at the supervisory level; (2) limits on discretion of field officers as to who is to be stopped; (3) maintenance of safety conditions; (4) reasonable location of the checkpoint; (5) a reasonable time and duration of the checkpoint; (6) indicia of the official nature of the roadblock; (7) the length and nature of the detention; and (8) advance publicity regarding each checkpoint. [Citation.]

(*Roelfsema v. Department of Motor Vehicles* (1995) 41 Cal.App.4th 871, 876 (*Roelfsema*).) "The eight factors identified in *Ingersoll* provide 'functional guidelines' to assess the intrusiveness of a checkpoint.' " (*Id*. at p. 877; see also *Arthur v. Department of Motor Vehicles* (2010) 184 Cal.App.4th 1199, 1206 (*Arthur*).)

"It is established, however, that the absence of a single *Ingersoll* factor, 'such as the failure to provide advance publicity, does not necessarily mean the checkpoint is unconstitutional.' (*Roelfsema*, *supra*, 41 Cal.App.4th at p. 877; see *People v. Banks* [(1993)] 6 Cal.4th [926] at p. 949].)" (*Arthur*, *supra*, 184 Cal.App.4th at p. 1208.)

> In *People v. Banks*, the California Supreme Court held that in light of United States Supreme Court precedent, *Michigan Dept. of State Police v. Sitz* (1990) 496 U.S. 444, and "consistent with the weight of authority," the "operation of a sobriety checkpoint conducted in the absence of advance publicity, but otherwise in conformance with the guidelines we established in *Ingersoll* …, does not result in an unreasonable seizure within the meaning of the Fourth Amendment to the United States Constitution." (*People v. Banks*, at pp. 948-949.)

(*Arthur*, *supra*, 184 Cal.App.4th at p. 1208.) But the failure to present evidence establishing several of the *Ingersoll* factors is grounds for granting a motion to suppress evidence. (See *People v. Alvarado* (2011) 193 Cal.App.4th Supp. 13, 20 [no evidence on four of eight factors].)

8330.2-Sobriety checkpoint factors explained 5/20

As to the first *Ingersoll* factor, the "decision to establish a sobriety checkpoint, the selection of the site and the procedures for the checkpoint operation should be made and established by supervisory law enforcement personnel, and not by an officer in the field. This requirement is important to reduce the potential for arbitrary and capricious enforcement." (*Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, 1341-1342; see also *People v. Alvarado* (2011) 193 Cal.App.4th Supp. 13, 17 (*Alvarado*) [although police captain ordered checkpoint, operational procedures handled only by

sergeant who was not established to be "command level personnel"].)

As to the second factor, the California Supreme Court explained "that motorists should not be subject to the unbridled discretion of the officer in the field as to who is to be stopped. Instead, a neutral formula such as every driver or every third, fifth or tenth driver should be employed." (*Ingersoll*, *supra*, 43 Cal.3d at p. 1342.) "Screening procedures may at times be altered consistent with traffic volume, such that, for example, every car might be stopped when traffic is light … ." (*Id*. at p. 1343; see also *Alvarado*, *supra*, 193 Cal.App.4th Supp. at pp. 17-18.)

As to the third factor, "[s]afety factors must also be considered in choosing an appropriate location." (*Ingersoll*, *supra*, 43 Cal.3d at p. 1343.) "Primary consideration must be given to maintaining safety for motorists and officers. Proper lighting, warning signs and signals, and clearly identifiable official vehicles and personnel are necessary to minimize the risk of danger to motorists and police." (*Id*. at pp. 1342-1343.)

As to the fourth factor, "sites chosen should be those which will be most effective in achieving the governmental interest; i.e., on roads having a high incidence of alcohol related accidents and/or arrests. [Citation.]" (*Ingersoll*, *supra*, 43 Cal.3d at p. 1343.) "[A] sobriety checkpoint would be improper at a location without any significant traffic or incidence of drunk driving." (*Id*. at p. 1344.) "This factor is significant, because without it the essential deterrent effect of the sobriety checkpoint is not served." (*Alvarado*, *supra*, 193 Cal.App.4th Supp. at p. 18, citing *People v. Banks* (1993) 6 Cal.4th 926, 944.)

As to the seventh factor, the length and nature of detention should be minimized. (*Ingersoll*, *supra*, 43 Cal.3d at p. 1345.) "[N]o hard and fast rules as to timing or duration can be laid down, but law enforcement officials will be expected to exercise good judgment in setting times and durations, with an eye to effectiveness of the operation, and with the safety of motorists a coordinate consideration." (*Ibid*. [28 seconds for average detention, six minutes for those given field sobriety tests].)

As to the final factor, "[a]dvance publicity is important to the maintenance of a constitutionally permissible sobriety checkpoint. Publicity both reduces the intrusiveness of the stop and increases the deterrent effect of the roadblock. [¶] … [¶] Publicity also serves to establish the legitimacy of sobriety checkpoints in the minds of motorists." (*Ingersoll*, *supra*, 43 Cal.3d at p. 1346.)

8340.1-No reasonable expectation of privacy in shared files or on social media 5/20

"Computer users generally have an objectively reasonable expectation of privacy in the contents of their personal computers." (*People v. Evensen* (2016) 4 Cal.App.5th 1020, 1026 (*Evensen*).)." But there are exceptions to this general rule, and one of them is that computer users have no reasonable expectation of privacy in the contents of a file that has been downloaded to a publicly accessible folder through file-sharing software." (*Id*. at p. 1026, fn. omitted.) "Computer users also have no reasonable expectation of privacy in electronic data that is not itself content." (*Id*. at p. 1026, fn. 4.)

In *Evensen*, law enforcement uncovered evidence of various sex crimes committed by defendant by using a software program on website that targeted peer-to-peer file-sharing networks to identify IP addresses associated with known digital files of child pornography.

> By using a set of software tools known as RoundUp, police learned that an IP address, later determined to be assigned to Evensen's mother, had downloaded child pornography. RoundUp enables law enforcement officials to detect child pornography on peer-to-peer file-sharing networks. Peer-to-peer networks allow users to share digital files over the Internet. To access these networks, users need only download onto their computers a free software program. The program allows a network user to upload a file onto his or her computer, and it then allows other users to access and download the file onto their own devices. … [¶] When a network user uploads a file, it is placed in a "shared folder" on the user's computer. Other users can find files in shared folders by using a keyword search.

(*Evensen*, *supra*, 4 Cal.App.5th at pp. 1022-1023, fn. omitted.) The appellate court rejected defendant's argument that he had a reasonable expectation of privacy because he took several measures to keep the contents of his computer private.

> But substantial evidence was presented from which the trial court could properly find that, notwithstanding these measures, Evensen had no reasonable expectation of privacy. As we have mentioned, Evensen testified that he did not always immediately move files out of his shared folder and that another network user once partially downloaded one of his pornographic files. He cannot claim that his shared folder was private at all times or that he believed it to be. Moreover, RoundUp would not have even detected Evensen's files if they had never been publicly accessible. According to [a police witness], RoundUp compiles information from files stored in network users' shared folders and cannot search files stored elsewhere on users' computers

(*Id*. at p. 1028.) In short, the court held in *Evensen*, that a person does not have a reasonable expectation of privacy as to data intentionally shared on a public peer-to-peer network. (*Id*. at. p. 1029.)

Similarly, a person has no reasonable expectation of privacy in information shared on social media. This includes information obtained by law enforcement posing a "friend" of the person. (*People v. Pride* (2019) 31 Cal.App.5th 133, 139-141 (*Pride*).) In *Pride*, a gang detective, posing as a "friend" of the defendant on his social media account, viewed and saved a video posted by the defendant showing him wearing a chain taken in a recent robbery. The victim identified the chain as his and the jury was shown a copy of the video. The appellate court rejected the defense argument that the detective's actions violated his right to privacy. The court relied on established precedent "holding the Fourth Amendment affords no protection for voluntary communications with individuals who are secret government informers or agents." (*Id*. at p. 140.)

> We conclude the same principles apply in this case. Pride voluntarily shared with his social media "friends" a video of himself wearing the chain stolen from D.C. The fact he chose a social media platform where posts disappear after a period of time did not raise his expectation of privacy. Rather, in posting the video message, Pride assumed the risk that the account for one of his "friends" could be an undercover profile for a police detective or that any other "friend" could save and share the information with government officials. As such, there is no Fourth Amendment violation.

(*Id*. at p. 141.)

8340.2-No reasonable expectation of privacy in data routed through third party 5/20

"What a person knowingly exposes to the public, even in his [or her] own home or office, is not a subject of Fourth Amendment protection. [Citations.] But what he [or she] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (*Katz v. United States* (1967) 389 U.S. 347, 351.)

As to telephone subscriber information, for example, the United States Supreme Court in *Smith v. Maryland* (1979) 442 U.S. 735, 743-744 (*Smith*), held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." In *Smith*, the High Court concluded that subscriber information falls outside the Fourth Amendment's privacy protection. "When he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed." (*Id*. at p. 744.)

The United States Supreme Court in *Carpenter v. United States* (2018) 585 U.S. ___ [138 S.Ct. 2206, 201 L.Ed.2d 507], distinguished *Smith*, and held a search warrant was needed (absent a warrant exception) to access historical cell phone records in order to track a cell phone users movements (equated to GPS tracking) even though these records were generated and possessed by the third party carrier and not the cell phone user. (*Id*. at p. ___ [138 S.Ct. at p. 2221, 201 L.Ed.2d at p. 525].)

The *Smith* decision guided the California appellate court's holding in *People v. Stipo* (2011) 195 Cal.App.4th 64 (*Stipo*). The police in *Stipo* were given the Internet Protocol (IP) address of someone who hacked into a school computer system. They obtained a search warrant to identify the subscriber of that address from the Internet provider. The appellate court held that a person does not have a reasonable expectation of privacy in subscriber information provided to an Internet provider. (*Id*. at pp. 668-669.)

8350.1-Dog sniff can provide probable cause 6/13

A positive reaction, or "alert," by a trained and reliable narcotics detection dog constitutes probable cause. (*People v. Bautista* (2004) 115 Cal.App.4th 229, 236; *People v. Salih* (1985) 173 Cal.App.3d 1009, 1015; see also *Estes v. Rowland* (1993) 14 Cal.App.4th 508, 531-533.) Indeed, "[a] dog alert can provide the probable cause needed for a search warrant. [Citations.]" (*People v. Bautista*, *supra*, 115 Cal.App.4th at p. 236.) If the alert is to a vehicle or an object in a vehicle, the automobile exception to the warrant requirement may apply. (*People v. Stillwell* (201) 197 Cal.App.4th 996, 1006 [backpack in bed of pickup].) "California cases … have not required evidence of a dog's success rate to establish probable cause." (*Id*. at p. 1005.) "California authority does not support the notion that more than an alert from a trained narcotics detection dog is needed to establish probable cause for a search." (*Id*. at p. 1006.)

The United States Supreme Court agrees. (*Florida v. Harris* (2013) 568 U.S. 237.) Rather than require a strict list of requirements to prove a police dog's reliability, the High Court held all the Fourth Amendment requires is that, under the totality of the circumstances, there is sufficient evidence that the dog performs reliably in detecting illegal drugs or other contraband. (*Id*. 568 U.S. at pp. 247-248.)

> [E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs. After all, law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources.

(*Id*. 568 U.S. at pp. 246-247.)

8350.2-Dog sniff is not search 6/13

Allowing a trained narcotics detector dog to sniff objects in a public place is not a search within the meaning of the Fourth Amendment. (*United States v. Place* (1983) 462 U.S. 696, 707; *People v. Mayberry* (1982) 31 Cal.3d 335, 342; *People v. Stillwell* (2011) 197 Cal.App.4th 996, 1004 (*Stillwell*); distinguish *Florida v. Jardines* (2013) 569 U.S. 1 [it is search for police to bring narcotics dog to porch of house (inside the curtilage) with the purpose of detecting odor of illegal substances].)

> The Supreme Court has also specifically held that "the use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view,' [citation]—during a lawful traffic stop, generally does not implicate legitimate privacy interests" and therefore does not violate the Fourth Amendment. (*Illinois v. Caballes* (2005) 543 U.S. 405, 409-410.)

(*Stillwell*, *supra*, 197 Cal.App.4th at p. 1004) "Even if they lack any reason to believe that the dog will alert, police officers may conduct a dog sniff without implicating the Fourth Amendment, because a dog sniff is not a search at all." (*People v. Vera* (2018) 28 Cal.App.5th 1081, 1086.)

> The United States Supreme Court reasoned in the context of a drug sniffing dog at an airport: A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which the information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item.

(*United States v. Place*, *supra*, 462 U.S. at p. 707.) Of course, detaining or seizing the object so that it may be exposed to the dog, or taking the dog into a private place, requires justification. (*Id.* at pp. 707-709; see also *People v. Bell* (1996) 43 Cal.App.4th 754, 769-770.) But simply because a dog puts its paws on a vehicle upon detecting a smell inside the bed of a pickup or from an open window does not create a search under the Fourth Amendment. (*Stillwell*, *supra*, 197 Cal.App.4th at p. 1007.)

8360.1-Routine border searches proper without any cause 12/09

The balance of Fourth Amendment "reasonableness" has always been qualitatively different at our international borders than in the interior. What constitutes the "border" is seldom at issue, although the question was discussed in *People v. Laborde* (2008) 163 Cal.App.4th 870 (*Laborde*). "The first port where a vessel docks on arrival from a foreign country is the functional equivalent of an international border, so that the search of Laborde's cabin was a border search for Fourth Amendment purposes." (*Id*. at p 874.)

For most customs searches at the border, no level of justification is required under the Fourth Amendment.

> [T]he current state of the law is that there are two categories of border searches: routine searches that require no suspicion at all and nonroutine searches that require reasonable suspicion. Border searches found to be routine, requiring no suspicion, include vehicle searches entailing the removal, dismantling and reassembling of the vehicle's fuel tank [citation], and patdown searches. [Citation])

(*Laborde*, *supra*, 163 Cal.App.4th at p. 875.)

For routine searches no individualized suspicion is required by customs officers at the border or fixed checkpoints near the border. (*United States v. Montoya de Hernandez* (1985) 473 U.S. 531, 537-538.) Customs officers are specifically empowered to conduct such searches pursuant to 19 U.S.C. section 1582. (*United States v. Taghizadeh* (9th Cir. 1994) 41 F.3d 1263 [customs officers have unlimited discretion to search in coming international packages and mail].) Therefore, no level of justification is needed to search the contents of a person's computer at the border. (*People v. Endacott* (2008) 164 Cal.App.4th 1346, 1350 ["A computer is entitled to no more protection than any other container."].) These principles also apply to a person's room on a cruise ship when it first arrives at a port in the United States from a foreign county. (*Laborde*, *supra*, 163 Cal.App.4th at pp. 877-879.) Even the extensive search of a vehicle at the border does not require "reasonable suspicion." (*United States v. Flores-Montano* (2004) 541 U.S. 149 [removal and disassembly of fuel tank permitted]; see also, *United States v. Flores-Montano* (2005) 424 F.3d 1044.)

As to "nonroutine" customs searches, such as a strip or bodily cavity search, it appears some low level of reasonable suspicion applies even at the border. (*Laborde*, *supra*, 163 Cal.App.4th 874-875 [dicta].)

Similarly, customs searches conducted after an item has entered the United States require a low level of justification.

> [United States Code] Section 482, on the other hand, authorizes inspectors to search trunks and envelopes, "wherever found," provided there is reasonable cause to suspect they may contain "merchandise which was imported contrary to law." 19 U.S.C. § 482. It thus applies not to searches of arriving baggage or mail, but rather to baggage or mail or other items which have already "arrived" but which are suspected of having been imported contrary to law.

(*United States v. Taghizadeh*, *supra*, 41 F.3d at p. 1266.)

8360.2-Border agent may hold state violators for local police 10/07

The authority of customs agents to conduct detentions, inspect vehicles and effects, and question persons at the border or at inland checkpoints is of the broadest possible character. Such activities require neither probable cause nor even an individualized suspicion. A more intrusive search can be conducted on mere suspicion. (*United States v. Martinez-Fuerte* (1976) 428 U.S. 543, 562; *People v. Matthews* (1980) 112 Cal.App.3d 11, 18-19.) Although customs agents focus upon potential violations of customs or immigration laws, there is nothing improper in detaining and handing over to local authorities persons suspected of violation of state laws. Such action is "but a legitimate act of cooperation with local enforcement authorities." (*People v. Clark* (1969) 2 Cal.App.3d 510, 518.)

8360.3-Border officer's police summons is valid citizen arrest 10/07

A federal border agent acts as a private citizen when detaining a person suspected of violating state law for local authorities. The subsequent arrest of the suspect for a misdemeanor is a citizen's arrest premised upon the request of the border agent as a private citizen to the local officer to perform the physical act of taking the suspect into custody. Such request may be implied by the citizen's conduct in summoning police, reporting the offense, and pointing out the offender. (*People v. Johnson* (1981) 123 Cal.App.3d 495, 499; see also *Johanson v. Department of Motor Vehicles* (1995) 36 Cal.App.4th 1209, 1216-1217; *Green v. Department of Motor Vehicles* (1977) 68 Cal.App.3d 536, 541.)

In *Padilla v. Meese* (1986) 184 Cal.App.3d 1022, an inspector for the Department of Food and Agriculture conducting a routine vehicle inspection at the border noticed that a motorist's breath smelled of alcohol and his speech was slurred. The inspector summoned the California Highway Patrol, and ordered the motorist to pull over and park. A Highway Patrol officer responded, contacted the motorist, and formed the opinion that the motorist was intoxicated. Based upon the information the officer received from both the inspector and the motorist, the officer arrested the motorist for driving while being under the influence of alcohol. Upholding the arrest, the appellate court held that, although the officer arrested the motorist without having seen him drive, the actions commenced by the inspector and completed by the officer conformed "in all significant respect to a standard citizen's arrest with delegation of the physical arrest to the highway patrol officer." (*Id.* at p. 1031.) The court went on to state:

> In this case we need not, and therefore do not, consider whether [the inspector's] authority as an agricultural inspector permitted him to detain plaintiff. Where an officer acts outside the scope of his statutory authority an arrest is not necessarily rendered unlawful. Such an officer is to be regarded as a private citizen and the arrest may be lawful as a citizen's arrest. [Citations & footnote omitted.] As we have noted above, from start to finish this case fits squarely within the procedures, established by authorities, for a lawful citizen's arrest.

(*Ibid.*; see also *People v. Crusilla* (1999) 77 Cal.App.4th 141, 150.)

8370.1-Blood draw of convicted felon for DNA not unreasonable 5/19

A blood sample taken from a convicted felon for identification, including for inclusion in a DNA database, does not violate the Fourth Amendment. "With regard to any privacy interest in identifying information, it is established that individuals in lawful custody cannot claim privacy in their identification." (*People v. Robinson* (2010) 47 Cal.4th 1104, 1121.) Thus, the California Supreme Court reasoned:

> [S]everal state appellate courts have concluded that "the extraction of biological samples from an adult felon is not an unreasonable search and seizure within the meaning of the Fourth Amendment." (*In re Calvin S.* (2007) 150 Cal.App.4th 443, 447; see also *People v. Travis* (2006) 139 Cal.App.4th 1271, 1281-1290; *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1168; *Alfaro* [*v. Terhune* (2002)] 98 Cal.App.4th [492] 505-506; [*People v.*] *King* [(2000)] 82 Cal.App.4th [1363] 1371-1378.) We agree with our state appellate courts that "the nonconsensual extraction of biological samples for identification purposes does implicate federal constitutional interests" (*Alfaro, supra,* 98 Cal.App.4th at p. 505), but that such nonconsensual extraction of biological samples from adult felons is reasonable because "those convicted of serious crimes have a diminished expectation of privacy and the intrusions authorized by the Act are minimal" while "the Act serves compelling governmental interests," including " 'the overwhelming public interest in prosecuting crimes *accurately.*' [Citation.] A minimally intrusive methodology that can serve to avoid erroneous convictions and to bring to light and rectify erroneous convictions that have occurred manifestly serves a compelling state interest." (*Id.* at p. 506; see also *In re Calvin S.*, *supra,* 150 Cal.App.4th at p. 449 [nonconsensual extraction of biological samples from juveniles conducted pursuant to section 296 is not unreasonable within the meaning of the Fourth Amendment].)

(*People v. Robinson*, *supra*, 47 Cal.4th at p. 1121-1122 [also holding that taking of sample when not authorized by statute did not establish Fourth Amendment violation]; see also *Maryland v. King* (2013) 569 U.S. 435, 465-466 [Fourth Amendment does not prohibit taking buccal swab from any custodial arrestee as part of routine police booking procedure]; but see *People v. Marquez* (2019) 31 Cal.App.5th 402, 408-411 [prosecution failed to prove there was probable cause for arrest or that sample was taken during "routine booking procedure"].)

8375.1-Police can use GPS to track stolen items, such as cell phones 9/13

A person does not have a reasonable expectation in privacy in a cell phone which he or she has stolen. (*People v. Barnes* (2013) 216 Cal.App.4th 1508, 1518.) With the owner's permission, therefore, it does not violate the Fourth Amendment for police to use the phone's Global Position System (GPS) capability to track the stolen phone's current location. (*Id*. at pp. 1518-1519.) This information, coupled with the surrounding facts, such as the amount of time elapsed since the theft, the suspect's description, and the officer's training and experience, can lead to reasonable cause to detain a suspect and recover the stolen phone. (*Id*. at pp. 1519-1520.)

> [T]he officers could certainly infer a reasonable possibility that if they could locate the phone they would also locate the robber. The question for the officers was if they went to the scene reported by [the cell phone provider], would they find a male resembling the description provided by the victims? Correlating defendant's observed movements with

both the GPS location and the victims' description provided Officers Tannenbaum and Clifford with ample reasonable suspicion for a detention.

(*Id*. at p. 1520.)

8375.2-Attachment of GPS device to vehicle is search 4/17

Law enforcement's use of Global-Positioning-System (GPS) devices can implicate a person's Fourth Amendment rights.

> The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment. [Citation.] We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search."

(*United States v. Jones* (2012) 565 U.S. 400, 404, fn. omitted.) The High Court only held in *Jones* that the attachment of a GPS monitor to the undercarriage of the defendant's car was a "search" of the car. (*Ibid*.) The Court did not address the issue whether this "search" was supported by probable cause and, therefore, reasonable under the Fourth Amendment. (*Id*. 565 U.S. at p. 413.)

Warrantless use of GPB tracking devices by law enforcement officers in California before the decision in *Jones* were conducted in good faith reliance on prior contrary appellate decisions and, thus, the exclusionary rule does not apply. (*People v. Mackey* (2015) 233 Cal.App.4th 32, 93-97.)

8377.1-Police can enter hospital rooms 7/19

In general a patient has no reasonable expectation of privacy in a hospital room. A hospital room in generally an area within the joint control of the hospital and the patient. (*In re M.S.* (2019) 32 Cal.App.5th 1177, 1187.) Thus, "no Fourth Amendment violation occurs when a nurse permits an officer to enter a sentient patient's hospital room for purposes unrelated to a search, [and] the patient does not object to the visit." (*People v. Brown* (1979) 88 Cal.App.3d 283, 292; see also *In re M.S.*, *supra*, 32 Cal.App.5th at p. 1187 ["At the time the officers entered M.S.'s hospital room, they were attempting to determine whether "a medical event" [still birth] or a crime had occurred. M.S. also did not object to the officers' presence."].)

8380.1-Inventory search of arrestee's personal effects at booking permitted 12/17

One exception to the Fourth Amendment's warrant requirement is an inventory search after a lawful arrest. (*Illinois v. Lafayette* (1983) 462 U.S. 640, 643.) This exception permits "police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station house incident to booking and jailing the suspect." (*Ibid*.) Such a search would be unreasonable if it was the fruit of an unlawful arrest. (*People v. Turner* (2017) 13 Cal.App.5th 397, 404.)

The scope of an inventory search includes personal items such an arrestee's wallet including the documents and papers with in it. (*People v. Clark* (1992) 3 Cal.4th 41, 143; *People v. Hovey* (1988) 44 Cal.3d 543, 570-571; see also *People v. Decker* (1986) 176 Cal.App.3d 1247, 1251-1253 [women's purse].) "[W]hen the inventory is not conducted solely for investigative purposes but is

part of the customary booking procedure, it is deemed reasonable under the Fourth Amendment." (*People v. Dominguez* (1988) 201 Cal.App.3d 345, 352.) So long as this standard is met, an inventory search may be conducted each time an arrestee and his or her property is transferred from one facility to another. (*Id*. at pp. 351-352.)

A belated, post-booking seizure of impounded property may be permissible if it is to retrieve items already known to have been inventoried. (*People v. Davis* (2000) 84 Cal.App.4th 390, 396 [analogized to plain view seizure].) But a belated search of inventoried property may be unlawful if it was undertaken, not for administrative purposes, but as part of a criminal investigation to look for something "whose evidentiary value had not been previously appreciated". (*People v. Smith* (1980) 103 Cal.App.3d 840, 845.)

8380.2-Prisoner has no expectation of privacy in jail mail 10/07

Jail and prison inmates do not forfeit all Fourth Amendment rights. But the protections afforded persons in a free society are not applied in the same manner to imprisoned persons. Searches of prisoners must only be reasonable under all the facts and circumstances under which they were performed and neither a search warrant nor probable cause is required. (*People v. West* (1985) 170 Cal.App.3d 326, 331.)

In *Hudson v. Palmer* (1984) 468 U.S. 517 the United States Supreme Court held that a prisoner's Fourth Amendment right of privacy was incompatible with and yields to the paramount need for institutional security. (*Id*. at pp. 527-528.) A "close and continual surveillance of inmates and their cells [is] required to ensure institutional security and internal order." (*Ibid.*) The need for institutional security limits the constitutional rights of both convicted and pretrial detainees. (*Bell v. Wolfish* (1979) 441 U.S. 520, 546.)

As a necessary part of institutional security, appellate courts routinely have upheld the inspection of an inmate's incoming and outgoing mail, without notice, to look for items of contraband, plans for escape, or other material that might pose a security risk. (*People v. Phillips* (1985) 41 Cal.3d 29, 80-81; *People v. McCaslin* (1986) 178 Cal.App.3d 1, 5-7; *People v. Garvey* (1979) 99 Cal.App.3d 320, 323; *People v. Manson* (1976) 61 Cal.App.3d 102, 152.) " ' "Officials in charge of prisoners awaiting trial may censor their mail, regulate communications between them and outsiders and under certain circumstances forbid communications between such prisoners and certain classes of visitors." ' " (*People v. Manson*, *supra* 61 Cal.App.3d at p. 152.) "Except where the communication is a confidential one addressed to an attorney, court or public official, a prisoner has no expectation of privacy with respect to letters posted by him." (*People v. Garvey*, *supra*, 99 Cal.App.3d at p. 323; see also *People v. Harris* (2000) 83 Cal.App.4th 371, 375.) Nor do such practices violate an inmate's First Amendment protection. (*People v. McCaslin*, *supra*, 178 Cal.App.3d at p. 7.)

Finally, Proposition 8 has limited the exclusionary rule to a remedy for violation of the United States Constitution. Hence, *DeLancie v. Superior Court* (1982) 31 Cal.3d 865, which was a civil case, and Penal Code section 2600 et seq., upon which *DeLancie* was based, are irrelevant. (*Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 536; *People v. Burns* (1987) 196 Cal.App.3d 1440, 1454; *People v. McCaslin*, *supra*, 178 Cal.App.3d at p. 5.)

8380.3-Prisoners have no privacy in jail conversations 12/09

Federal constitutional law has long held that persons detained in jails or police stations have no reasonable expectation of privacy in non-privileged conversations. (*Lanza v. New York* (1962) 370 U.S. 139; *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 30.) Reviewing relevant state and federal authorities, the appellate court in *People v. Von Villas* (1992) 11 Cal.App.4th 175, concluded there is no constitutionally cognizable expectation of privacy in conversations surreptitiously intercepted in a detention facility. (*Id*. at pp. 212-216; distinguish *People v. Hammons* (1991) 235 Cal.App.3d 1710 [inmates told conversation would be private].)

The California Supreme Court in *DeLancie v. Superior Court* (1982) 31 Cal.3d 865, held that California statutes gave prisoners greater rights than under federal law. The California Supreme Court has abandoned *DeLancie* in light of statutory changes. (*People v. Loyd* (2002) 27 Cal.4th 997.) But even under *DeLancie,* the adoption of Article I, section 28(d) of the California Constitution by the electorate in 1982 eliminated suppression of evidence as a remedy for monitoring unprivileged jail conversations in violation of the former statutory provisions. (*People v. Riel* (2000) 22 Cal.4th 1153, 1183-1184; *People v. Von Villas*, *supra*, 11 Cal.App.4th at pp. 219-220; *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 533-536.) Thus, evidence obtained by monitoring unprivileged conversations in jails and police stations may be suppressed only if suppression is federally compelled. This rule applies equally to pretrial detainees and includes eavesdropping for the purpose of gather evidence rather than for jail security. (*People v. Davis* (2005) 36 Cal.4th 510, 527-528.) "We agree … that persons held pretrial in a jail—as defendant was when the police recorded his conversations with Redmond and Bennett—have no expectation of privacy … ." (*Id*. at p. 527.)

The issue is sometimes treated as one of implied consent. "So long as a prisoner is given meaningful notice that his telephone calls over prison telephones are subject to monitoring, his decision to engage in conversations over those telephones constitutes implied consent to that monitoring and takes any wiretap outside the prohibitions of [federal wiretapping statute]." (*People v. Kelley* (2002) 103 Cal.App.4th 853, 858; see also, *People v. Windham* (2006) 145 Cal.App.4th 881, 886-887.) The same is true under California law. (*Windham*, *supra*, at pp. 889-891.)

8380.4-Visual body cavity search enhances prison security 4/17

A jail inmate's already diminished expectation of privacy must be balanced against the state's undeniable interest in keeping detention facilities free of contraband. The internal security of a jail is a compelling interest justifying the routine, visual body cavity search of an established or incoming jail inmate without reasonable cause. (*Bell v. Wolfish* (1979) 441 U.S. 520, 558; see also *People v. Collins* (2004) 115 Cal.App.4th 137, 152-155; *People v. Pifer* (1989) 216 Cal.App.3d 956, 961-962; *People v. Wade* (1989) 208 Cal.App.3d 304, 308; *In re Alan R.* (1982) 132 Cal.App.3d 601, 604-605.) Thus, for example, the Fourth Amendment does not preclude correctional authorities from conducting close visual inspection while undressed of person arrested for minor offenses who will be admitted to the general population of the facility. (*Florence v. Bd. Of Chosen Freeholders* (2012) 566 U.S. 318.)

8380.5-OK to fingerprint, photograph and take DNA sample from custodial arrestee 5/19

In *Maryland v. King* (2013) 569 U.S. 435 (*King*), the United States Supreme Court held:

> … DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

(*Id*. at pp. 465-466; see also *People v. Robinson* (2010) 47 Cal.4th 1104, 1121-1122 [Fourth Amendment does not prohibit collecting blood samples for submission to DNA database of all convicted felons in California].)

The California Supreme Court followed *King* in upholding the provisions of Proposition 69 (the DNA Act) requiring a person arrested for a felony at booking to submit a check swab for DNA analysis. (*People v. Buza* (2018) 4 Cal.5th 658 (*Buza*).) The defendant in *Buza* was arrested for arson but refused to submit to DNA testing as required by Proposition 69. His conviction for refusing to comply with this requirement was affirmed under both the federal and state constitution.

> In short, although the DNA Act differs in some ways from the Maryland law at issue in *King*, none of those differences affects the Fourth Amendment analysis in the specific case before us. *King* holds that a cheek swab is a reasonable booking procedure for individuals who are arrested for serious offenses, and defendant was asked to provide a cheek swab upon being booked after a valid arrest for a serious offense. Defendant's conviction for failing to submit a sample of his DNA therefore did not violate the Fourth Amendment to the federal Constitution.

(*Id*. at p. 683.)

> Finally, defendant argues that even if the differences between the DNA Act and the law at issue in *King* do not alter the Fourth Amendment analysis, they should alter the state constitutional analysis. For reasons already given, these differences do not change our assessment of the constitutionality of the DNA Act as applied in defendant's case. Officials asked defendant for a DNA sample upon booking, after he was arrested on probable cause for a serious offense, and as he was entering pretrial detention. Under the circumstances before us, the requirement was not unreasonable.

(*Id*. at p. 691; but see *People v. Marquez* (2019) 31 Cal.App.5th 402, 408-411 [prosecution failed to prove there was probable cause for arrest or that sample was taken during "routine booking procedure"].)

8380.6-Jail/prison visitors have decreased expectation of privacy 2/12

"Because of the nature of a jail or prison, a visitor to those institutions should have a reduced expectancy of privacy." (*People v. Boulter* (2011) 199 Cal.App.4th 761, 769 (*Boulter*).) [T]he searches with which we are here concerned are not taking place in airports or on public streets, but on the premises of a maximum security prison. As the United States Supreme Court has recognized, "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." [Citation.]" (*Estes v. Rowland* (1993) 14 Cal.App.4th 508, 537.) " ' "Prison authorities have both the right and the duty by all reasonable means to see to it that visitors are not smuggling weapons or other objects which could be used in an effort to escape or to harm

other prisoners." [Citation.]' [Citation.]" (*Boulter*, *supra*, 199 Cal.App.4th at p. 770.) Thus, as a result of the obvious need for a jail or prison to maintain security visitors are presumed to know that upon entering jail property their person and their belongings are subject to search. (*Ibid*.) For example, a "pat-down" search of a prison visitor may be proper. (*Id*. at p. 771) A prison visitor's private vehicle also may be searched without requiring a reasonable suspicion that the visitor was carrying contraband. (*Ibid*.; *Mathis v. Appellate Department* (1972) 28 Cal.App.3d 1038, 1040.)

> Because such searches are permissible, defendant could not exclude from detection items otherwise subject to discovery during such routine and valid searches by placing those items in lockers provided to defendant by the jail on jail property. The purpose of the locked lockers was to secure items from others, including jail visitors, not to insulate such items from searches by jail personnel.

(*Boulter*, *supra*, at p. 771.)

Additional justification, moreover, may justify a more extensive intrusion into the person or belongings of a jail or prison visitor. (*Boulter*, *supra*, 199 Cal.App.4th at pp. 771-772 [visitor's violation of rule prohibiting bringing camera into jail provided additional justification to search his person and the items he stored in a visitor's locker].) "The search of the lockers also was not as invasive as a strip search of prison visitors, which has been deemed justified based on a reasonable suspicion of the existence of contraband. (*Estes v. Rowland*, *supra*, 14 Cal.App.4th at p. 532.)" (*Boulter*, *supra*, at p. 772.)

Finally, "[a] warrantless administrative search may not … be a 'pretext' for obtaining evidence of the violation of the penal laws. [Citations.]" (*Boulter*, *supra*, 199 Cal.App.4th at p. 772.)

8385.1-No expectation of privacy in outside of mail and packages 2/10

Because the information is seen by numerous people in the course of a letter or package reaching its destination, neither the sender nor the recipient generally has a reasonable expectation of privacy as to the outside of that letter or package. (*People v. Reyes* (2009) 178 Cal.App.4th 1183, 1190 (*Reyes*).) In *Reyes*, an employee at a private mail facility displayed to investigating officers the exterior envelope of a bill addressed to the defendant by a cell phone carrier. Based on learning the name of the defendant's cell phone carrier, the officers were able to retrieve cell phone records tying defendant to the crime. The appellate court found no Fourth Amendment violation in the employee either retrieving the mail from the back of defendant's mail box or in displaying the outside of the mail to the officers. "First, because the information is foreseeably visible to countless people in the course of a letter reaching its destination, 'an addressee or addressor generally has no expectation of privacy as to the outside of mail.' [Citation.]" (*Ibid*.) "Second, … the Fourth Amendment does not apply to an employee's removal of mail from a postal box at a private mail facility because … '[t]he back of the box was open and the manager had complete and unfettered access to its contents.' " (*Ibid*.)

> "[A] party has no reasonable expectation of privacy as to the outsides of items stored in a common area …; such items are exposed both to those who have access to that area and to those, including law enforcement officers, who may be given permission to enter that area." [Citation.] Similarly, there can be no reasonable expectation of privacy in the outside surface of items that may be held or handled in a common area.

(*Id*. at p. 1191.)

> [G]iven the manner in which mail facilities operate. In particular, those operations include ready employee access, at the employee's discretion, to the open side of the box to retrieve mail, during which time the employee may, whether purposefully or inadvertently, expose the outside of the mail to any number of persons. These circumstances preclude any reasonable expectation of privacy in any markings displayed on the outside of the envelope … .

(*Id*. at p. 1192.)

8385.2-Search warrant requirement and its exceptions apply to mail and packages 9/13

A letter or package, including a package delivered to a private shipping company, may be seized by law enforcement without a warrant when there is probable cause to believe it contains contraband and there are exigent circumstances based upon the item's mobility. (*Robey v. Superior Court* (2013) 56 Cal.4th 1218, 1222 (*Robey*).) Once seized by law enforcement, however, separate justification is needed to open a letter or package without a search warrant. (*Id*. at p. 1224.) "[As] a general rule … moveable containers, once lawfully seized, may not be searched without a warrant … ." (*Id*. at p. 1229.) Thus, "a warrant is required to search a package consigned for shipment once it has been lawfully seized." (*Id*. at p. 1236.)

> Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable. Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package.

(*United States v. Jacobsen* (1984) 466 U.S. 109, 114 (*Jacobsen*).)

Among the exceptions to the warrant requirement that may apply are a general loss of an expectation of privacy due to a prior private party search, such as by an employee of the shipping company. In *Jacobsen*, FedEx employees opened a damaged package and found what appeared to be narcotics. A federal agent was called to the scene who then examined the contents further, including performing a field test identifying the substance as cocaine. The high court held that the initial opening of the package by the FedEx employees "did not violate the Fourth Amendment because of their private character." (*Jacobsen*, *supra*, 466 U.S. at p. 115.) The court then held that because the private search had eliminated any privacy interest in the contents of the package, the agent's handling of the package and its contents was lawful insofar as it did not exceed the scope of the private search. (*Id*. at p. 119.) Finally, the court held that "[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy." (*Id*. at p. 123.)

Other exceptions to the warrant requirement permitting law enforcement to open a letter or package without a search warrant would include exigent circumstances, consent, plain view. (*Robey*, *supra*, 56 Cal.4th at p. 1238 [court refused to consider "plain smell" as justification for the warrant search because this theory was not raised by the prosecution in the trial court].)

8390.1-Exclusionary rule inapplicable to private citizen searches 9/19

It is well established that the exclusionary rule does not apply to searches made by private citizens. (*People v. Warren* (1990) 219 Cal.App.3d 619, 622 (*Warren*).) "The Fourth Amendment limits only governmental activity." (*People v. Caro* (2019) 7 Cal.5th 463, 498.) This is true even if the private search is unreasonable or unwarranted. (*People v. McKinnon* (1972) 7 Cal.3d 899, 911-912.) In *Coolidge v. New Hampshire* (1971) 403 U.S. 443, the United States Supreme Court stated:"[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." (*Id*. at p. 488.)

> It is well-settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information. … The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated. In such a case the authorities have not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant.

(*United States v. Jacobsen* (1984) 466 U.S. 109, 117-118, fn. omitted; see also *People v. Michael E.* (2014) 230 Cal.App.4th 261, 272.)

8390.2-Police can examine evidence supplied by private party search without warrant 1/21

"It is well-settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information." (*United States v. Jacobsen* (1984) 466 U.S. 109, 117-118, fn. omitted; see also *People v. Michael E.* (2014) 230 Cal.App.4th 261, 272; *People v. Warren* (1990) 219 Cal.App.3d 619, 622.) "A government agent's viewing of what a private party has freely made available for his inspection does not violate the Fourth Amendment. [Citation.]" (*People v. Wilkinson* (2008) 163 Cal.App.4th 1554, 1569 (*Wilkinson*).)

Under certain circumstances, moreover, law enforcement, can conduct a more extensive examination of the area or items than was already revealed to them by the private party without obtaining a warrant. The test, based upon reasonable expectation of privacy analysis, is whether the police are "substantially certain" what they would find.

> "[Police] confirmation of prior knowledge does not constitute exceeding the scope of a private search. In the context of a search involving a number of closed containers, this suggests that opening a container that was not opened by private searchers would not necessarily be problematic if the police knew with substantial certainty, based on the statements of the private searchers, their replication of the private search, and their expertise, what they would find inside. Such an "expansion" of the private search provides the police with no additional knowledge they did not already obtain from the underlying private search and frustrates no expectation of privacy that has not already been frustrated." [Citation.]

(Wilkinson, *supra*, 163 Cal.App.4th at pp. 1570-1571.)

Wilkinson illustrates the scope and restrictions on whether officers can examine an object or an area after a search of such by a private party. Victim Sadler seized numerous CDs from defendant's bedroom, and after watching several, confirmed that they were videos of Sadler and his girlfriend Schultze recorded secretly by defendant after he illegally gained access to a webcam in Schultze's bedroom. Sadler showed some of these images to Officer Walker. The CDs were seized as evidence and many were later viewed by Officer Walker and Detective Vigon without a warrant. The appellate court held "as to the extent Officer Walker viewed images on the compact discs that Sadler had already viewed, his search was within the scope of the private search and did not implicate the Fourth Amendment." (*Id*. at p. 1572.) As to images that the officers viewed independently, the appellate court reasoned, "the Fourth Amendment's protections do apply to a government search conducted after a private search to the extent the government's inquiry is more intrusive or extensive than the private search. (*Walter v. United States* (1980) 447 U.S. 649, 657 (plur. opn. of Stevens, J.)" (*Wilkinson*, *supra*, 163 Cal.App.4th at p. 1570.) "The *Wilkinson* court "held that police officers exceed the scope of a private search when they fail to confine their examination of the contents of computer discs to the discs the private searcher examined." (*Id*. at p. 1570; accord *People v. Michael E.*, *supra*, 230 Cal.App.4th at p. 268-279 [police exceeded scope of private search by computer repairman when they downloaded entire hard drive of defendant's computer and viewed contents at police station without warrant].)

In *People v. Wilson* (2020) 56 Cal.Appp.5th 128, Google used a computer program and determined the defendant was posing inappropriate content, specifically child pornography. This information was forwarded to law enforcement with no Google employee actually viewing the photographs. The investigator receiving this report did view the images and confirm their content, eventually leading to the issuance of search warrants and the subsequent arrest of the defendant. The appellate court found no Fourth Amendment violation.

> [T]he government's warrantless search of Wilson's four images was permissible under the private search doctrine. Google's private search frustrated Wilson's expectation of privacy in the files before they were viewed by the government. Google had already identified Wilson's files as having matching hash values to images that had previously been viewed and identified by a Google employee as apparent child pornography. The government's subsequent opening and viewing of the four photographs did not significantly expand on the search that had previously been conducted by Google. The agent's actions in opening the files and viewing the images merely confirmed that the flagged files were child pornography, as reflected in Google's Cybertip report.

(*Id*. at p. 147.)

8390.3-Prior police contact with citizen does not transform private into public search 6/20

It is well established that the exclusionary rule does not apply to searches made by private citizens. (*People v. Warren* (1990) 219 Cal.App.3d 619, 622 (*Warren*).) A private party search does not become a public search, subject to the Fourth Amendment, unless there is significant governmental participation prompting such search. (*Ibid*.)

> "While a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, *de minimis* or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to fourth amendment scrutiny." [Citation.] The relevant factors used

in determining whether the governmental participation is significant, or *de minimis*, are "(1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search.' [Citation.]"

(*Id*. at p. 622.)

The first factor requires evidence of more than mere knowledge and passive acquiescence by the police before finding an agency relationship. (*People v. Wilkinson* (2008) 163 Cal.App.4th 1554, 1566 (*Wilkinson*).) "As to the second factor-the intent of the private party performing the search—a dual motive will not necessarily bring the search within the Fourth Amendment." (*Id*. at p. 1568.)

The *Wilkinson* case illustrates the distinction between private and police searches conducted by a citizen. Victim Sadler suspected the defendant, who shared an apartment with Sadler's girlfriend, Schultze, was using a webcam in his girlfriend's room to illegally record visits between Sadler and Schultze. Sadler called the police and expressed his suspicions to Officer Walker. During the investigation defendant refused to give the officers consent to search his separate bedroom. Sadler asked if he could go into defendant's bedroom. Officer Walker told him of defendant's refused consent and advised: "Well, you can do whatever you want. It's your apartment. … But keep in mind, you cannot act as an agent of my authority. I cannot ask you to go into the room, nor can you go into the room believing that you're doing so for myself." (*Wilkinson*, *supra*, 163 Cal.App.4th at pp. 1559-1560.) Later Sadler seized numerous CD from defendant's bedroom, and after watching several, confirmed that they were videos of Sadler and Schultze recorded secretly by the webcam. When Officer Walker returned, Sadler showed some of these images to him. Focusing on whether Sadler's retrieval of the CDs was a private party search, the appellate court in *Wilkinson* reasoned:

> Here, the evidence-viewed in the light most favorable to the trial court's decision—demonstrates that the police did not affirmatively encourage, instigate, or initiate Sadler's search of defendant's room, his seizure of the compact discs he found there, or his viewing of some of those discs during the time the officers had defendant out of the apartment. We reject defendant's argument that Officer Walker actively encouraged the search merely by telling Sadler (rightly or wrongly) he had the right to search. Moreover, as to Sadler's intent, there is substantial evidence that he and Schultze had the dual intent of helping the police investigation *and* getting the stolen images back from defendant. As we have noted, Sadler testified that after the officers left with defendant, he and Schultze talked about what they should do before he (and Schultze) entered defendant's room. In addition, Schultze testified that she would have gone into defendant's room even if Officer Walker had told her it was not okay because she wanted to get back any images of herself and Sadler that defendant had taken. This evidence supports the conclusion that Sadler intended to help the police *and* take the stolen images back from defendant.

(*Wilkinson*, *supra*, 163 Cal.App.4th at pp. 1568-1569, original italics.)

8400.1-No suppression for private search-*Zelinski* now invalid 10/07

In *People v. Zelinski* (1979) 24 Cal.3d 357, the California Supreme Court held the remedy of suppression could be applied to searches conducted by private security guards. That case, however, is no longer controlling. The court in *Zelinski* built its holding solely around article I, section 13 of the California Constitution, and held that the exclusionary rule is not limited to state action, but applied to security personnel who exceeded the authority then given them under Penal Code section 490.5. That search involved a search beyond the "plain view" search authorized by Penal Code section 490.5. (*Id.* at p. 364.)

With the adoption of article I, section 28, subdivision (f)(2) [formerly subd. (d)] of the California Constitution, the "Victim's Bill of Rights," by the voters, however, evidence may be excluded only when suppression is mandated by the federal constitution. (See *In re Lance W.* (1985) 37 Cal.3d 873, 888.) There is no longer such a thing as "independent state grounds" for exclusion. If the evidence is admissible under the Fourth Amendment, California courts lack the authority to suppress it in a criminal case. (*Ibid*.; *People v. Brouillette* (1989) 210 Cal.App.3d 842, 846.)

It has long been held that the Fourth Amendment protects the citizenry only against state action. The amendment is a restraint against the sovereign and not against the conduct of private citizens. (*Burdeau v. McDowell* (1921) 256 U.S. 465.)

In *People v. Taylor* (1990) 222 Cal.App.3d 612, the appellate court found *Zelinski* no longer controlling after Proposition 8. The court held that actions of private security guards are not state actions and that their actions should not be imputed to the state. (*Id*. at p. 625; see also *In re Christopher H.* (1991) 227 Cal.App.3d 1567, 1573-1576; cf. *Jones v. Kmart Corp.* (1998) 17 Cal.4th 329.)

8400.2-PC490.5 permits merchant to search and recapture property 10/07

Penal Code section 490.5, subdivision (f) specifically permits a merchant to detain a person believed to be stealing merchandise, to demand return of property believed to be stolen, and even to conduct a search of packages, handbags, shopping bags, and other property in the person's possession to recover stolen property. It is noteworthy, however, that subdivision (f) of section 490.5 does not purport to exclude any form of evidence which may have been seized in violation of that section. Even more importantly, nothing in the wording or legislative history of section 490.5 suggests the Legislature intended it to abrogate the common law principle of recapturing stolen chattels. (*People v. Carter* (1982) 130 Cal.App.3d 690, 692.)

8410.1-School official's searches and seizures of students must be reasonable 5/20

The United States Supreme Court has held that searches of students by school officials are justified if "reasonable," though no warrant had been obtained and the "probable cause" required for a police search does not exist. (*New Jersey v. T.L.O.* (1985) 469 U.S. 325, 341 (*T.L.O.*).) The High Court in *T.L.O.* concluded the Fourth Amendment to the United States Constitution applies to searches of students conducted by public school officials. (*Id*. at pp. 333-337.) The High Court determined that, under the Fourth and Fourteenth Amendments, students have legitimate expectations of privacy in the personal belongings they carry to school. (*Id*. at p. 339.) In balancing the competing interests of the school and the student, the court held that teachers and school officials need not obtain a warrant or have probable cause to search a student. "Rather, the legality

of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." (*Id*. at p. 341.) The reasonableness of a student search must be " 'justified at its inception' " and " '… reasonably related in scope to the circumstances which justified the interference in the first place' [citation]. Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." (*Id*. at pp. 341-342, fns. omitted.)

In light of the *T.L.O.* decision, the California Supreme Court concluded "searches of students by public school officials must be based on a reasonable suspicion that the student or students to be searched have engaged, or are engaging, in a proscribed activity (that is, a violation of a school rule or regulation, or a criminal statute)." (*In re William G.* (1985) 40 Cal.3d 550, 564)

> To properly employ the balance between the privacy interests of public school children with the important need to maintain order and discipline in schools today, the accommodation does not require rigid adherence to the requirement that searches be based on probable cause to believe the subject of the search has violated or is violating the law. Instead, the validity of a search on school property should depend on the reasonableness of the official conduct to deal with the particular school problem. (*T.L.O.*, *supra*, 469 U.S. at p. 341.) "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." (*Goss v. Lopez* (1975) 419 U.S. 565, 580.) Therefore, school administrators and security personnel need to have "a certain degree of flexibility in school disciplinary procedures… ." (*T.L.O.*, *supra*, 469 U.S. at pp. 582-583.)

(*In re J.D.* (2014) 225 Cal.App.4th 709, 715 [locker search based on possible connection to student involved in off campus shooting].) "Indeed, completely random searches of students who enter school grounds are authorized for the purpose of determining whether a weapon is being brought on campus. (*In re Latasha W.* (1998) 60 Cal.App.4th 1524, 1526-1527.)" (*In re Jose Y*. (2006) 141 Cal.App.4th 748, 752.)

"A correlation between the wrongful behavior of the student and the intended findings of the search is essential for a valid search of the student under the Fourth Amendment." (*In re Lisa G.* (2004) 125 Cal.App.4th 801, 807 [teacher's search of student's purse for identification after disruptive behavior in class unreasonable]; see also *In re William G.* (1985) 40 Cal.3d 550, 556 [search for being tardy not reasonable]; but see *In re Sean A.* (2010) 191 Cal.App.4th 182, 188-190 [search for weapons or other contraband in pockets and backpack of high school student who left campus and returned in violation of school rules was reasonable].)

A similar standard applies to the detention of a student. School officials have the power to detain a student for investigation of misconduct in the absence of reasonable suspicion so long as their authority is not exercised in an arbitrary, capricious, or harassing manner. (*In re Randy G*. (2001) 26 Cal.4th 556, 565; see also *In re K.J.* (2018) 18 Cal.App.5th 1123, 1129 *In re J.D.*, *supra*, 225 Cal.App.4th at p. 716.)

A student from another school found on school grounds "has a lesser right of privacy than a student who is properly on school grounds." (*In re Jose Y*., *supra*, 114 Cal.App.4th at p. 752.)

> In the instant case, while [School Security] Officer Chung had ample cause to believe minor and his companions did not belong on school grounds, he did not know *why* they were there. We are also mindful of the fact that the officer was alone as he prepared to escort the three young men to the office. Given his unauthorized and unexplained presence

> on campus, minor should not be heard to complain that an officer conducted a nonintrusive patdown of minor's clothing to determine whether he had a weapon which presented a danger to the officer or anyone else on campus. The governmental interest in preventing violence on campus outweighs the minimal invasion of minor's privacy rights which occurred here.

(*Ibid*., italics in original, fn. omitted.) "The mere fact he had no legitimate business on campus created a reasonable need to determine whether or not he posed a danger." (*Id*. at p. 753.)

8410.2-Reasonableness test applies even if school officials involve police 4/18

The United States Supreme Court has held that searches of students by school officials are justified if " 'reasonable,' " though no warrant had been obtained and the "probable cause" required for a police search does not exist. (*New Jersey v. T.L.O.* (1985) 469 U.S. 325, 341 (*T.L.O.*).) The High Court declined, however, to determine the applicable standard when the school officials conduct the search "in conjunction with or at the behest of law enforcement agencies." (*Id*. at p. 341, fn. 7.) California appellate courts have tackled this issue.

"A certain level of cooperation between school and police officials is likely when violations of the criminal law, as well as the student code of conduct, are the basis for discipline." (*In re K.S.* (2010) 183 Cal.App 4th 72, 80.) "Certainly, the extent of the police role in a student search at a school will govern whether the *T.L.O.* standard applies. In making this determination, the totality of the circumstances must be examined." (*Id*. at p. 83.) "[W]e conclude that when a school official independently decides to search a student and then conducts that search, the *T.L.O.* standard applies, even if the police provide the information justifying the search and are present when it occurs." (*Id*. at p. 75.) "It is noteworthy that the police role in the search of appellant was at all times clearly subordinate to the role of the vice-principal, who made the decision to search and conducted the search. For that reason, the *T.L.O.* standard applies." (*Id*. at p. 80.) As to the presence of the police during the search, the appellate court reasoned: "So long as the school official independently decides to search and invites law enforcement personnel to attend the search to help ensure the safety and security of the school, it would be unwise to discourage the school official from doing so, at least where it is reasonable to suspect that contraband inimical to a secure learning environment is present." (*Id*. at p. 81; accord *In re J.D.* (2014) 225 Cal.App.4th 709, 720.)

"For purposes of Fourth Amendment analysis, 'school officials' include police officers … who are assigned to … schools as resource officers …, as well as the backup officers who are called to assist them." (*In re K.J.* (2018) 18 Cal.App.5th 1123, 1131.) In *In re William V.* (2003) 111 Cal.App.4th 1464, for example, a police officer was assigned to a school as a school resource officer (SRO). The SRO observed a student with a colored bandanna hanging from his pocket, a violation of school rules and an indication of possible imminent gang activity. After the student refused the SRO's request to remove the bandanna, the SRO removed it and decided to take the student to the principal's office for discipline. Before doing so, the SRO performed a patdown search on the student for weapons because of the student's nervous demeanor and out of concern for school safety. The patdown search turned up a knife. The defendant argued that the SRO was not a school official and, therefore, the *T.L.O.* standard should not apply. (*Id*. at p. 1468.) The appellate court disagreed, reasoning there should be no distinction between a non-law-enforcement security officer employed by a school district and a police officer assigned to a school as an SRO. (*Id*. at p. 1471 ["This distinction focuses on the insignificant factor of who pays the officer's salary, rather than on

the officer's function at the school and the special nature of a public school."].) Thus, the search by the SRO, conducted on school grounds was subject to the reasonable suspicion standard of *T.L.O.* (*Id*. at pp. 1469-1472.)

8450.1-Burden on defendant to establish search warrant's invalidity 2/16

A search conducted pursuant to a search warrant is presumed lawful. Thus, the burden of establishing the invalidity of the search warrant rests upon the defendant. (*Theodor v. Superior Court* (1972) 8 Cal.3d 77, 101.) This burden extends to both a motion to quash and to a motion to traverse a search warrant. (*People v. Amador* (2000) 24 Cal.4th 387, 393.)

Both the magistrate and reviewing courts are to interpret an affidavit for a search warrant in a common sense and realistic fashion. (*Illinois v. Gates* (1983) 462 U.S. 213, 238; *United States v. Ventresca* (1965) 380 U.S. 102, 108.) The issuing magistrate's task was to make a practical and common-sense decision whether, given all the information contained in the affidavit, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates*, *supra*, at p. 238; see also *People v. Lee* (2015) 242 Cal.App.4th 161, 175.) "Because they are often written by nonlawyers in the midst of an investigation, technical requirements for elaborate specificity have no place in the review of search warrant affidavits." (*People v. Varghese* (2008) 162 Cal.App.4th 1084, 1103.)

A court reviewing issuance of the warrant does not determine probable cause de novo. Its task is simply to insure the magistrate had a substantial basis for concluding that probable cause existed. (*Massachusetts v. Upton* (1984) 466 U.S. 727, 733; *Illinois v. Gates*, *supra*, 462 U.S. at p. 238; *People v. Varghese*, *supra*, 162 Cal.App.4th at p. 1104.) The reviewing court must pay great deference to the magistrate's decision. (*Illinois v. Gates*, *supra*; *People v. Glenos* (1992) 7 Cal.App.4th 1201, 1206.) And, doubtful or marginal cases should be resolved by a preference for the warrant. (*United States v. Ventresca*, *supra,* 380 U.S. at p. 108; *People v. Weiss* (1999) 20 Cal.4th 1073, 108-1083; *People v. Superior Court (Corona)* (1981) 30 Cal.3d 193, 203.) "A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." (*United States v. Ventresca*, *supra*, at p. 108.) The duty of the reviewing court is to save the warrant if it can do so in good conscience. (*People v. Hochanadel* (2009) 176 Cal.App.4th 997, 1015; *Caligari v. Superior Court* (1979) 98 Cal.App.3d 725, 729.)

8470.1-Timeliness presumed if search warrant executed in 10 days 10/07

Penal Code section 1534 provides that a warrant executed within 10 days of its issuance "shall be deemed to have been timely executed and no further showing of timeliness need be made." This provision to shift to the defendant the burden of showing that execution of a warrant within the provided time limit is unreasonable. (*People v. Clayton* (1993) 18 Cal.App.4th 440, 447; *People v. Hernandez* (1974) 43 Cal.App.3d 581, 590; similarly, see *People v. Cleland* (1990) 225 Cal.App.3d 388, 394; *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1299.) In *Hernandez*, the appellate court upheld as reasonable a delay which included 15 days between the determination of probable cause and issuance of the warrant, followed by eight days between issuance and execution of the warrant—a total of 23 days between determination of probable cause and the search based thereon. (*People v. Hernandez*, *supra*, 43 Cal.App.3d at pp. 590-591.) In calculating the 10 day period the date of issuance is not counted. (*People v. Clayton*, *supra*, 18 Cal.App.4th at pp. 444-445.)

8470.2-Officers investigating another crime may participate 10/09

"Officers from another jurisdiction may accompany officers conducting a search pursuant to a warrant without tainting the evidence (pertaining to crimes that are the subject of their own investigation) uncovered in the process, even when the officers lack probable cause to support issuance of their own search warrant. [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 167.) "Additionally, the discovery of evidence unrelated to the evidence sought in a warrant need not be inadvertent. 'If a police officer has a valid warrant for one item, and "fully expects" to find another, based upon a "suspicion … whether or not it amounts to probable cause," the suspicion or expectation does not defeat the lawfulness of the seizure.' [Citations.]" (*Ibid*.)

8470.3-Plain view rules apply during the execution of a warrant 6/20

The United States Supreme Court in *Horton v. California* (1990) 496 U.S. 128 reaffirmed the right of officers to seize items of incriminating evidence that come into their plain view while conducting a search authorized by warrant even though the items are not listed in the warrant because the seizure of such items does not involve any additional intrusion on the occupant's privacy. (*Id.* at pp. 141-142; similarly, see *Skelton v. Superior Court* (1969) 1 Cal.3d 144, 157 (*Skelton*).) And it makes no difference whether the officers suspected or knew about the unlisted items so long as they are found during a lawful search for items listed in the warrant. (*Horton v. California*, *supra*, 496 U.S. at pp. 138-139.) In other words, discovery need not be inadvertent. (*Id*. at p. 130.)

"The plain-view doctrine permits, in the course of a search authorized by a search warrant, the seizure of an item not listed in the warrant, if the police lawfully are in a position from which they view the item, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1293-1294; see also *People v. Eubanks* (2011) 53 Cal.4th 110, 135.) For the incriminating character of items to be immediately apparent means only that the officers have probable cause to believe they are contraband or evidence of crime. (*People v. Gallegos* (2002) 96 Cal.App.4th 612, 622-623.)

"Where an officer has a valid warrant to search for one item but merely a suspicion, not amounting to probable cause, concerning a second item, that second item is not immunized from seizure if found during a lawful search for the first item." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1294.)

> Even assuming the officers who conducted the initial search hoped to find evidence of other offenses, their subjective state of mind would not render their conduct unlawful. Courts must examine the lawfulness of a search under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved. (*Scott v. United States* (1978) 436 U.S. 128, 137-138.) The existence of an ulterior motivation does not invalidate an officer's legal justification to conduct a search. (*Whren v. United States* (1996) 517 U.S. 806, 813 … .) "That the … officer may have hoped to find evidence [not listed in the warrant] is irrelevant to the Fourth Amendment analysis under *Whren*, because once probable cause exists, and a valid warrant has been issued, the officer's subjective intent in conducting the search is irrelevant." [Citation.] The court simply asks "whether the police confined their search to what was permitted by the search warrant." [Citation.]

(*People v. Carrington* (2009) 47 Cal.4th 145, 168.)

In *Skelton*, the warrant was issued for stolen property, including rings, dominoes, and engraved silverware. The California Supreme Court held that undescribed stolen property and drugs were validly seized during a thorough search. The court recognized that officers who brought unrelated burglary reports along during the search were also "hoping" to discover stolen property from these other cases. But that did not matter. The court reasoned:

> Since the warrant mandated a search for and the seizure of several small and easily secreted items, the officers had the authority to conduct an intensive search of the entire house, looking into any places where they might reasonably expect such items to be hidden. With the issuance of this warrant, the judgment had already been made by a judicial officer to permit a serious invasion of petitioner's privacy. No legitimate interest is enhanced by imposing artificial restrictions on the reasonable conduct of officers executing the warrant. No purpose is subserved, other than that of an exquisite formalism, by requiring that when the officers discovered contraband in the course of this search they return to the issuing magistrate and obtain a second warrant directing the seizure of the additional contraband.

(*Skelton*, *supra*, 1 Cal.3d. at p. 158, fn. omitted.)

8470.4-Search warrant extends to all places where named item can be found 8/17

"When the claim is that a search during the execution of a search warrant was beyond the scope of the warrant, the claimant bears the burden of proof. (*People v. Reyes* (1990) 223 Cal.App.3d 1218, 1224.)" (*People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 105.)

> The scope of a warrant is determined by its language, reviewed under an objective standard without regard to the subjective intent of the issuing magistrate or the officers who secured or executed the warrant. [Citations.] Phrased differently, "the scope of the officer's authority is determined from the face of the warrant … ." [Citation.] As many courts have observed, "officers executing a search warrant are 'required to interpret it,' and they are 'not obliged to interpret it narrowly." [Citations.] To satisfy the objective standard, the officer's interpretation must be reasonable.

(*People v. Balint* (2006) 138 Cal.App.4th 200, 207; see also *People v. Nguyen* (2017) 12 Cal.App.5th 574, 581-582.)

A warrant permitting a search of a house may include detached outbuildings, sheds and garages. (*People v Nguyen*, *supra*, 12 Cal.App.5th at p. 583.) But separate residences or apartment units on the same property cannot be searched by police "absent a showing of probable cause for searching each unit or believing that the entire building is a single living unit." (*Ibid*. [officers could see that garage had been converted to separate living area for someone other than people in main house described in warrant].)

"In determining whether seizure of particular items exceeds the scope of the warrant, courts examine whether the items 'are similar to, or the "functional equivalent" of, items enumerated in the warrant, as well as containers in which they are reasonably likely to be found.' " (*People v. Balint*, *supra*, 138 Cal.App.4th at p. 208 [laptop computer]; see also *People v. Rangel* (2012) 206 Cal.App.4th 1310, 1316 [smart phone]; *People v. Varghese* (2008) 162 Cal.App.4th 1084, 1101 [computer].)

> A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an

> officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marihuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

(*United States v. Ross* (1982) 456 U.S. 798, 820-821, fns. omitted.)

8470.5-Property of all occupants may be searched for items named in warrant 12/09

"During a residential search authorized by warrant, officers may lawfully search all of the residents' personal effects which are plausible repositories of the contraband described in the warrant. [Citations.]" (*People v. Berry* (1990) 224 Cal.App.3d 162, 167.)

> The rationale for this rule recognizes the protections afforded by the warrant requirement. A neutral magistrate has already determined probable cause supports searching the residence for which the warrant has issued. Connection to and control over the residence is an identifiable and sufficient link to the criminal activities to justify the intrusion of a search of personal effects located within the premises. (See *Michigan v. Summers* (1981) 452 U.S. 692, 704-705.)

(*People v. Berry*, *supra*, 224 Cal.App.3d at pp. 167-168.)

This rule applies to the belongings of all persons connected to the residence except mere casual visitors. "Under certain circumstances, police officers may search the personal effects of a person who is more than a casual visitor, but not a resident of the premises." (*People v. Frederick* (2006) 142 Cal.App.4th 400, 411.)

> The rule we glean from these decisions is that if the circumstances apparent to the executing officers show indicia of only a casual, temporary presence at the place being searched, the person is a "mere visitor" whose property cannot be searched solely because it happens to be temporarily located on premises named in the warrant. If the circumstances suggest a relationship between the person and place sufficient to connect the individual to the illegal activities giving rise to the warrant, search of the person's property on the premises is permitted.

(*People v. Berry*, *supra*, 224 Cal.App.3d at p. 169; see also *People v. Howard* (1993) 18 Cal.App.4th 1544, 1555 [defendant's purse legally searched where she was found in bed with another defendant during execution of warrant].)

But, "[i]f the police have actual knowledge that the property which is searched belongs to a nonresident, … they may not, as a general rule, rely on the authority conferred by a search warrant to conduct a warrantless search of the nonresident's property, even though it is a plausible repository of contraband." (*People v. McCabe* (1983) 144 Cal.App.3d 827, 830.)

> Defendant offered no evidence showing he was not a resident of the searched premises. Even if the facts support an inference of Reyes's nonresidence, there is simply no basis for concluding that the officers had actual knowledge of defendant's status. On the contrary, his use of the shower leads one to suspect he lived at the house. The trial court expressly

noted this fact in its ruling denying the suppression motion. Thus, defendant failed to meet his burden of proving facts bringing him within the exception noted by the *McCabe* court. If the case turns solely on defendant's apparent status as a resident of the house, the lower court's ruling should be sustained.

(*People v. Reyes* (1990) 223 Cal.App.3d 1218, 1224 (*Reyes*).)

The appellate court in *Reyes* suppressed the evidence because the general rules regarding searching property of all occupants during the execution of a search warrant do not permit a personal search of an occupant not named in the warrant. (*Reyes*, *supra*, 223 Cal.App.3d at p. 1227 [clothing within reach of defendant who was taking a shower].) "A warrant to search premises 'cannot normally be construed to authorize a search of each individual in that place.' (*Ybarra v. Illinois* (1979) 444 U.S. 85, 92, fn. 4.)" (*People v. Reyes*, *supra*, 223 Cal.App.3d at p. 1224.)

8480.1-Good faith reliance on bad search warrant negates suppression 6/20

Evidence seized by an officer during a search in objectively reasonable reliance on the validity of a search warrant will not be excluded even if the warrant is later determined to have been issued without probable cause. (*United States v. Leon* (1984) 468 U.S. 897, 922 (*Leon*); *People v. Lopez* (1985) 173 Cal.App.3d 125, 139-142; *People v. MacAvoy* (1984) 162 Cal.App.3d 746, 759-765.)

In the seminal *Leon* decision, the United States Supreme Court held evidence seized pursuant to a search warrant should be suppressed only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. The purpose of the exclusionary rule, namely, a deterrent effect on police conduct, is not well served where "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and [has] acted within its scope," even though later review of the warrant found it legally insufficient. (*Leon*, *supra*, 468 U.S. at p. 920.) The Court further noted that the very fact that the officer is acting on a warrant issued by a neutral and detached magistrate normally suffices to establish that the officer is acting in good faith. (*Id.* at p. 922; see also *Messerschmidt v. Millender* (2012) 565 U.S. 535, 546; *United States v. Ross* (1982) 456 U.S. 798, 823, fn. 32.)

The High Court in *Leon* found suppression of evidence seized pursuant to a warrant lacking probable cause is appropriate in only limited circumstances; for example, when officers mislead a magistrate by dishonest or reckless statements in the affidavit; or when the issuing magistrate wholly abandoned its judicial role; or where the affidavit is " 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;' " or where a warrant is so facially deficient in describing the place to be searched or items to be seized an executing officer could not presume it to be valid. (*Leon*, *supra*, 468 U.S. at p. 923; see also *Messerschmidt v. Millender*, *supra*, 565 U.S. at p. 547.)

When a warrant is challenged on the grounds of lack of probable cause, the "good faith" test becomes "whether a reasonable and well-trained officer 'would have *known* that his affidavit failed to establish probable cause and that he should not have applied for the warrant.' [Citation.]" (*People v. Camarella* (1991) 54 Cal.3d 592, 605-606, italics in original.) When the affidavit presents only a close or debatable question on the issue of probable cause, however, an officer can reasonably rely on the magistrate's warrant. (*Id.* at p. 606; *People v. French* (2011) 201 Cal.App.4th 1307, 1323-1325; *People v. Romero* (1996) 43 Cal.App.4th 440, 447; but see, e.g., *People v. Hulland* (2003)

110 Cal.App.4th 1646, 1653-1656 [good faith did not apply because officer should have known the warrant was issued based upon stale information]; *People v. Gotfried* (2003) 107 Cal.App.4th 254, 265 [officer should have known affidavit lacked sufficient corroboration].) In addition, "the fact that the officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause." (*Messerschmidt v. Millender*, *supra*, 565 U.S. at p. 553.)

The People have the burden of proving objectively reasonable reliance to support application of the good faith exception to the exclusionary rule. (*People v. Willis* (2002) 28 Cal.4th 22, 36-37; *People v. Camarella*, *supra*, 54 Cal.3d at p. 596.) Nevertheless, the good faith exception has found frequent application in California. (See, e.g., *People v. Garcia* (2003) 111 Cal.App.4th 715, 723-725 [lack of probable cause to search business where customer selling narcotics]; *People v. Pressey* (2002) 102 Cal.App.4th 1178, 1190-1191 [lack of probable cause to search home of drug user]; *People v. Leonard* (1996) 50 Cal.App.4th 878, 885-886 [defective oath]; *Bay v. Superior Court* (1992) 7 Cal.App.4th 1022, 1028-1031 [description of property to be seized overbroad]; *People v. Galvan* (1992) 5 Cal.App.4th 866, 871-872 [warrant directed to officers from wrong county]; see also *People v. Rodriguez-Fernandez* (1991) 235 Cal.App.3d 543, 551-553 [description of property to be seized omitted]; *People v. Ruiz* (1990) 217 Cal.App.3d 574, 580-583 [failure of affidavit to show crime occurred in county of issuance]; *People v. Mayo* (1986) 185 Cal.App.3d 389, 396-397 [affidavit had incorrect dates of controlled buy]; *People v. Lopez*, *supra*, 173 Cal.App.3d at pp. 139-142 [authorization for nighttime service unsupported]; *People v. MacAvoy*, *supra*, 162 Cal.App.3d at pp. 759-765 [warrant mistakenly authorized search of entire fraternity building rather than defendant's room].)

The good faith exception will not save a search warrant issued solely on probable cause information gained in violation of the defendant's Fourth Amendment rights. (*People v. Machupa* (1994) 7 Cal.4th 614.)

8500.1-Good cause for night service defined-but no suppression after Prop. 8 10/07

A search warrant may be served only between 7 a.m. and 10 p.m. unless the magistrate authorizes nighttime service on a showing of "good cause." (Pen. Code, § 1533.) The magistrate must consider the safety of both the police and public in determining good cause.

> "[T]he Rule requires only *some factual basis for a prudent conclusion that the greater intrusiveness of a nighttime search is justified by the exigencies of the situation.* The procedural requirements of the Rule ensure that the fact that nighttime search is contemplated by the police is brought to the attention of a magistrate and that he or she consciously decide[s] whether such a particularly abrasive intrusion is called for in a given situation." [Citation.]

(*People v. Kimble* (1988) 44 Cal.3d 480, 494, italics added by court.)

In determining whether good cause for nighttime service exists, the affidavit must be read as a whole. Section 1533 does not require a separate and specific statement of good cause. (*People v. Lopez* (1985) 173 Cal.App.3d 125, 138.) If the showing of good cause for nighttime service is inadequate, however, suppression will still be denied if the officers relied in good faith upon the warrant and nighttime authorization. (*Id.* at pp. 139-142.)

The appellate court in *Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, addressed the continuing validity of suppression for violation of section 1533 in the face of article I, section 28, subdivision (d), of the California Constitution, added by Proposition 8. The court agreed with federal case authorities that nighttime service provisions were wholly statutory in origin rather than constitutionally mandated. The court concluded, "[i]f exclusion of evidence seized in searches violative of nighttime service requirements is not compelled under current federal law, evidence seized in violation of section 1533 should not be excluded if the search is otherwise reasonable in a constitutional sense." (*Id.* at p. 1470.)

8510.1-Probable cause to search definition 5/19

Probable cause to search exists when based on the totality of the circumstances "there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238; see also *United States v. Grubbs* (2006) 547 U.S. 90, 95; *People v. Farley* (2009) 46 Cal.4th 1053, 1098; *People v. Evensen* (2016) 4 Cal.App.5th 1020, 1028.) Stated alternatively, "[a] police officer has probable cause to conduct a search when 'the facts available to [him] would "warrant a [person] of reasonable caution in the belief" ' that contraband or evidence of a crime is present. …" (*Florida v. Harris* (2013) 568 U.S. 237, 243.) "Probable cause sufficient for issuance of a warrant requires a showing in the supporting affidavit that makes it substantially probable that there is specific property lawfully subject to seizure presently located in the particular place for which the warrant is sought." (*People v. Scott* (2011) 52 Cal.4th 452, 483.)

Probable cause to search, "while by nature a fluid concept incapable of ' "finely-tuned standards," ' is said to exist 'where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found' … ." (*People v. Hunter* (2005) 133 Cal.App.4th 371, 378, citing *Ornelas v. United States* (1996) 517 U.S. 690, 696.) In other words, "[p]robable cause for a search exists where an officer is aware of facts that would lead a man of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched. [Citations.]" (*People v. Dumas* (1973) 9 Cal.3d 871, 885.) Probable cause refers to "evidence which inclines the mind to believe, but leaves room for doubt." (*People v. Ingle* (1960) 53 Cal.2d 407, 413.) "The showing required in order to establish probable cause is less than a preponderance of the evidence or even a prima facie case." (*People v. Carrington* (2009) 47 Cal.4th 145, 163; see also *People v. Williams* (2017) 15 Cal.App.5th 111, 124.)

When reviewing a search warrant application, the issuing magistrate must "make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates*, *supra*, 462 U.S. at p. 238; see also *People v. Camarella* (1991) 54 Cal.3d 592, 600-601.) "The magistrate's determination of probable cause is entitled to deferential review." (*People v. Kraft* (2000) 23 Cal.4th 978, 1041; see also *People v. Westerfield* (2019) 6 Cal.5th 632, 659.) "In reviewing a search conducted pursuant to a warrant, an appellate court inquires 'whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing.' [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 161; see also *People v. Westerfield*, *supra*, 6 Cal.5th at p. 659; *People v. Scott*, *supra*, 52 Cal.4th at p. 483.)

> Whether an affidavit provided the magistrate " 'substantial basis' " for concluding there was probable cause is an issue of law "subject to our independent review." [Citation.] But, because "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause," we accord deference to the magistrate's determination and " 'doubtful or marginal' " cases are to be resolved with a preference for upholding a search under a warrant. [Citations.] Ultimately, "the magistrate's determination will not be overturned unless the supporting affidavit fails as a matter of law to support the finding of probable cause. [Citations.]" [Citation.]

(*People v. French* (2011) 201 Cal.App.4th 1307, 1315.)

8510.2-Magistrate may consider expertise of affiant officer 10/07

The issuing magistrate may rely upon relevant opinions and conclusions drawn by an experienced affiant-officer on the issue of probable cause. (*People v. Sandlin* (1991) 230 Cal.App.3d 1310, 1315; *People v. Cleland* (1990) 225 Cal.App.3d 388, 393; *People v. Johnson* (1971) 21 Cal.App.3d 235, 243, 245.) Probable cause "must be viewed through the lens of an officer's experience and expertise … ." (*People v. Hunter* (2005) 133 Cal.App.4th 371, 378, citing *Ornelas v. United States* (1996) 517 U.S. 690, 699.) In a narcotics case, for example, " '[t]he rule should not be understood as placing the ordinary man of ordinary care and prudence and the officer experienced in the detection of narcotics offenders in the same class. Circumstances and conduct which would not excite the suspicion of the man on the street might be highly significant to an officer who had had extensive training and experience in the devious and cunning devices used by narcotics offenders to conceal their crimes.' [Citations.]" (*People v. Superior Court (Kiefer)* (1970) 3 Cal.3d 807, 827; see also *People v. Rich* (1977) 72 Cal.App.3d 115, 121.)

8510.3-Stolen property likely to be found in suspect's home 10/09

The California Supreme Court has noted " '[a] number of California cases have recognized that from the nature of the crimes and the items sought, a magistrate can reasonably conclude that a suspect's residence is a logical place to look for specific incriminating items. [Citations.]' (*People v. Miller* (1978) 85 Cal.App.3d 194, 204; see also *People v. Superior Court (Brown)* (1975) 49 Cal.App.3d 160, 167-168.)." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1206.) Thus, "[w]hen property has been stolen by a defendant and has not yet been recovered, a fair probability exists that the property will be found at the defendant's home. (See *People v. Stout* (1967) 66 Cal.2d 184, 192-193.)" (*People v. Carrington* (2009) 47 Cal.4th 145, 163.)

8510.4-Single controlled buy may establish probable cause 10/09

A single, controlled purchase of a controlled substance establishes probable cause to search the premises from which the controlled substance was purchased. As stated by the appellate court in *People v. Watson* (1979) 89 Cal.App.3d 376:

> It is irrelevant that the affidavit did not directly implicate appellant in the sale of heroin. It is enough that it showed probable cause that heroin would be found in the apartment. Additionally, certainty is not required. Probable cause requires merely a 'strong suspicion' of the existence of contraband. [Citation.] *The fact that Henry, under the surveillance of the police officers, obtained heroin from the apartment was sufficient for probable cause to*

believe that more heroin could be found therein.
(*Id*. at p. 385, italics added; similarly, see *People v. Hall* (1971) 3 Cal.3d 992, 996-997.)

8510.5-Computers and cell phones, as repositories of evidence, may be searched 3/19

A computer or "smart" cell phone may be seized and searched when there is probable cause that it contains evidence of criminal activity. (*People v. Rangel* (2012) 206 Cal.App.4th 1310, 1316-1317; *People v. Varghese* (2008) 162 Cal.App.4th 1084, 1102-1105 [computer].) "The search warrant, supported by probable cause, authorized the police to search appellant's house and seize gang indicia of any sort. Such indicia could logically be found in appellant's cell phone. A search of that phone to extract such information was contemplated by the warrant. [Citations.]" (*People v. Rangel*, *supra*, 206 Cal.App.4th at p. 1317.)

> Of greater importance was the information concerning the e-mail correspondence between appellant and Vilia. It was reasonable to believe appellant used the computer found in his car to conduct that correspondence. The correspondence was important in two possible ways. First, if appellant was jealous of Vilia's relationship with Ravin, it provided a motive for the murder of [Ravin]. The correspondence might contain evidence of appellant's state of mind. Second, as the affidavit noted, Vilia was a suspect. Again, an exchange of messages between her and appellant might provide evidence of her complicity in the crime.

(*People v. Varghese*, *supra*, 162 Cal.App.4th at p. 1105.)

The search and seizure of a computer, cell phone or other electronic device under a valid search warrant also may be justified to establish dominion and control over the location where such device is located.

> Many people use laptops as their primary computers and, in any event, a willingness to leave a mobile-and often expensive-device unattended in a residence suggests occupancy. Additionally, as the Attorney General points out, laptop computers are commonly used for personal correspondence, electronic payment of bills, and storing other information analogous to the examples listed in the warrant that are responsive to the dominion and control principle. Under the functional equivalency test, the fact these documents are in digital form does not bar officers from seizing the evidence. … In sum, under the circumstances present here, we conclude an open laptop computer is likely to serve as a container of information tending to establish dominion and control of the residence in which it is found.

(*People v. Balint* (2006) 138 Cal.App.4th 200, 210.)

Recent United States Supreme Court case law suggests, however, that the search of the anything other than the hard drive of an electronic device (password protected internet sites or cloud stored information) may require a warrant specifically justifying such search. (*Riley v. California* (2014) 573 U.S. 373; see also California Electronic Communications Privacy Act, Pen. Code, §§ 1546-1546.4.)

8520.1-Search warrant property description valid if meaningful restriction 7/20

The warrant clause of the Fourth Amendment provides that no warrant may issue except those "particularly describing the place to be searched, and the persons or things to be seized." (See generally, *Walter v. Untied States* (1980) 447 U.S. 649, 656-657, fn. 8.) This particularity requirement is designed to prevent general exploratory searches. (*Burrows v. Superior Court* (1974) 13 Cal.3d 238, 249; *People v. Smith* (1994) 21 Cal.App.4th 942, 947-950 (*Smith*); *People v. Murray* (1978) 77 Cal.App.3d 305, 308.) Particularity is satisfied if the warrant imposes a "meaningful restriction" on the place to be searched and the objects to be seized. (*Burrows v. Superior Court*, *supra*, 13 Cal.3d at p. 249; *Smith*, *supra*, 21 Cal.App.4th at p. 949.) Like probable cause information in a search warrant affidavit generally, the warrant's description of the place to be searched should be viewed in a common-sense and realistic fashion. (*Smith*, *supra*, 21 Cal.App.4th at p. 949; accord, *People v. Minder* (1996) 46 Cal.App.4th 1784, 1788.)

The "reasonable particularity" requirement for the description of property to be seized, "is a flexible concept, reflecting the degree of detail available from the facts known to the affiant and presented to the issuing magistrate." (*People v. Tockgo* (1983) 145 Cal.App.3d 635, 640) "Thus, while a generic description of illicit objects will be held sufficient where probable cause is shown and no more specific identification is possible [citation], greater 'specificity [is] required for seizure of goods whose identity is known, such as stolen goods … .' [Citation.]" (*Ibid*.; similarly, see *People v. Hepner* (1994) 21 Cal.App.4th 771, 774; *People v. Schilling* (1987) 188 Cal.App.3d 1021, 1031.) "The constitutional requirement of particularity protects against ' "general, exploratory rummaging in a person's belongings," ' but in a complex case resting on the piecing together of 'many bits of evidence,' the warrant properly may be more generalized than in a simpler investigation resting on more direct evidence. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1041.)

> In considering whether a warrant is sufficiently particular, courts consider the purpose of the warrant, the nature of the items sought, and "the total circumstances surrounding the case." (*People v. Rogers* (1986) 187 Cal. App. 3d 1001, 1008 (*Rogers*).) A warrant that permits a search broad in scope may be appropriate under some circumstances, and the warrant's language must be read in context and with common sense. (*Andresen v. Maryland* (1976) 427 U.S. 463, 480-481.)

(*People v. Eubanks* (2011) 53 Cal.4th 110, 133-134; see also *People v. Fayed* (2020) 9 Cal.5th 147, 186; *People v. Bryant* (2014) 60 Cal.4th 335, 370.)

The California Supreme Court addressed the particularity requirement in *People v. Amador* (2000) 24 Cal.4th 387. A search warrant described the target house as a two-story building located at 10817 Leland. In fact, it was a one-story building at 10811 Leland. Despite these errors, the warrant described the house to be searched with sufficient particularity. The court observed: "Complete precision in describing the place to be searched is not required. 'It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended.' [Citation.]" (*Id.* at p. 392.) After all, the exclusionary rule is designed "… to deter illegal police conduct, not deficient police draftsmanship … ." (*Ibid.*)

In the *Smith* case, a warrant commanded the search for cocaine on premises located at and described as a mobile home with a specific street address, including all outbuildings and storage areas. In fact, the mobile home was located on a 40-acre parcel and drugs were found in a barn almost one-half mile away from the mobile home. The appellate court found that the barn had been

particularly described within the terms premises, outbuildings and storage areas. (*People v. Smith*, *supra*, 21 Cal.App.4th at pp. 949-950.)

Finally, deficiencies in the description of the place to be search or the items to be seized are also subject to the good faith exception of the exclusionary rule. (*People v. Rodriguez-Fernandez* (1991) 235 Cal.App.3d 543; *People v. Alvarez* (1989) 209 Cal.App.3d 660; see generally, *United States v. Leon* (1984) 468 U.S. 897; but see, *Groh v. Ramirez* (2004) 540 U.S. 551.)

8520.2-"Together with other fruits" property description in search warrant OK 12/09

The United States Supreme Court in *Andresen v. Maryland* (1976) 427 U.S. 463 determined that language following a specific set of listed documents sought by warrant consisting of " 'together with other fruits, instrumentalities and evidence of crime at this [time] unknown' " was lawful. (*Id*. at p. 479.) Contrary to the defendant's assertion that such language rendered the search warrant general and thus illegal, the High Court determined that a simple reading of the language compelled the conclusion that, when limited to evidence of the crimes set forth in the warrant, the concluding phrase placed a meaningful restriction upon items properly subject to seizure by executing officers. (*Id*. at pp. 479-482; similarly, see *People v. Barnum* (1980) 113 Cal.App.3d 340, 347.) Part of the rationale of these cases, is that "in a complex case resting upon the piecing together of 'many bits of evidence,' the warrant properly may be more generalized than would be the case in a more simplified case resting upon more direct evidence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1291, quoting *Andresen v. Maryland*, *supra*, 427 U.S. at p. 481, fn. 10; see also *People v. Carpenter* (1999) 21 Cal.4th 1016, 1043.)

8520.3-"Documents of dominion and control" valid search warrant description 4/20

Evidence seized from a searched residence will have no meaning unless the searching officers can also establish in court *who* had control over such evidence. (*People v. Beck & Cruz* (2019) 8 Cal.5th 548, 593.) For that reason, search warrants frequently direct officers to seize documents and other items showing "dominion and control" of the premises. Routinely, the appellate courts have approved such "boilerplate" clauses typically authorizing a search for " '[a]ny articles of personal property tending to establish the identity of persons in control of the premises, … including but not limited to … rent receipts, canceled mail envelopes, and keys.' " (*People v. Alcala* (1992) 4 Cal.4th 742, 799-800; similarly, see *People v. Nicolaus* (1991) 54 Cal.3d 551, 574-575; *People v. Rogers* (1986) 187 Cal.App.3d 1001, 1004-1009; *People v. Howard* (1976) 55 Cal.App.3d 373, 376; distinguish *People v. Holmsen* (1985) 173 Cal.App.3d 1045, 1047-1048.) On the basis of this language, officers are permitted to search into any location on the premises in which such evidence might be found, and to read any papers found in order to determine their evidentiary value for the purpose of establishing who has dominion and control over the contraband or other evidence seized. (*People v. Alcala*, *supra*, 4 Cal.4th at pp. 799-800; *People v. Nicolaus*, *supra*, 54 Cal.3d at p. 575.) Such a clause can justify the seizure of a computer found on the premises which may contain such information. (*People v. Varghese* (2008) 162 Cal.App.4th 1084, 1101-1103; *People v. Balint* (2006) 138 Cal.App.4th 200, 207-210.)

8520.4-One bad property description or seizure does not affect remainder 12/09

Even if the court concludes that some of the property listed in the warrant is not described with adequate particularity, the entire warrant should not be invalidated. Nor should all the evidence seized under the warrant be suppressed. It is well settled that the described items for seizure are severable, and the seizure of particularly described property is unaffected by overbreadth elsewhere in the warrant. (*Aday v. Superior Court* (1961) 55 Cal.2d 789, 797; *People v. Smith* (1986) 180 Cal.App.3d 72, 89.)

Similarly, if officers search for and seize property beyond that described in the warrant, but still within the place authorized to be searched, only items seized without probable cause need be suppressed. Other lawfully seized property need not be suppressed. (*Waller v. Georgia* (1984) 467 U.S. 39, 43-44, fn. 3; *People v. Bradford* (1997) 15 Cal.4th 1229, 1296.)

And, of course, officers may also seize contraband or items having a reasonable nexus to the criminal behavior under investigation that comes into plain view during execution of the search warrant even though the items are not named in the warrant. (*Horton v. California* (1990) 496 U.S. 128, 141-142; *Skelton v. Superior Court* (1969) 1 Cal.3d 144, 157; *People v. Atkins* (1982) 128 Cal.App.3d 564, 570.)

8520.5-Search warrant for residence includes vehicles 6/17

A search warrant for a residence and/or for a garage generally encompasses any vehicles found within. Certainly, a search warrant authorizing the police to search a garage and all its contents, encompasses any car found there, even if the car was not specifically described in the warrant. (*People v. Elliott* (1978) 77 Cal.App.3d 673, 688-689 [car in attached garage]; see *People v. Childress* (1979) 99 Cal.App.3d 36, 42 [inoperable car parked in back yard]; distinguish *People v. Dumas* (1973) 9 Cal.3d 871, 880-881 [neither the car nor the place where it was found were named in the warrant].) Similarly, a warrant authorizing a search of a residence and "any vehicles" found on premises is not overbroad when it the items sought to be seized could be found in such a vehicle. (*People v. Camel* (2017) 8 Cal.App.5th 989, 999.) Any such vehicle is nothing more than one container within the searched premises in which an object sought by the warrant could reasonably be expected to be found.

8530.1-Securing residence to obtain search warrant valid 10/07

In *Segura v. United States* (1984) 468 U.S. 796, the United States Supreme Court held that evidence seized under a valid search warrant should not be suppressed as a fruit of a prior unlawful entry to secure the residence when the search warrant affidavit was based on information unrelated to the entry. In addition, two justices agreed that it was reasonable to enter and secure a residence, based on probable cause to search, to prevent the destruction or removal of evidence while seeking a search warrant. (*Id.* at p. 810.)

Subsequently, the United States Supreme Court upheld the more limited intrusion of seizing a residence from the outside and barring entry for the time necessary to diligently seek a search warrant in *Illinois v. McArthur* (2001) 531 U.S. 326. The officers had probable cause to believe unlawful drugs were in the residence. They also had good reason to fear an occupant, unless retrained, would destroy the drugs before they returned with a warrant. And the warrantless seizure was for a limited time. (*Id*. at pp. 332-333.) The California Supreme Court has also approving officers seizing a residence from the outside and barring entry while they investigated their

reasonable suspicion that contraband or evidence of a crime was inside. (*People v. Bennett* (1998) 17 Cal.4th 373, 386-388 [action followed arrest of sole occupant away from the residence].)

California appellate courts have permitted entry to secure premises under exigent circumstances until a search warrant could be obtained. For example, in both *People v. Freeny* (1974) 37 Cal.App.3d 20 and *Ferdin v. Superior Court* (1974) 36 Cal.App.3d 774, suspects in the process of delivering drugs were arrested away from residences from which the drugs were apparently obtained. The appellate courts in both cases held that entering and securing those residences was proper since it was reasonable to assume that suspects within the residences would learn of the arrests or the failure of drugs to be delivered and destroy the evidence there before search warrants could be obtained. In *Ferdin*, the court noted that even the time it took police to obtain a search warrant might alert a suspect inside the residence and lead to the destruction of the contraband. Police could not know what security arrangements existed between suspects inside the residence and other persons involved in the drug transaction interrupted by the arrest. (*Id.* at pp. 781-782.) The holdings of these cases were followed by subsequent appellate courts. (*People v. Gentry* (1992) 7 Cal.App.4th 1255, 1261; *People v. Camilleri* (1990) 220 Cal.App.3d 1199, 1208-1209.)

While the *Ferdin* and *Freeny* cases involved exigent circumstances along with probable cause to arrest suspects inside the residences, similar exigent circumstances coupled with probable cause to believe the residence contains contraband or evidence can justify officers entering and securing the residence while seeking a search warrant. (*People v. Elizabeth G.* (2001) 88 Cal.App.4th 496, 506-507; *People v. Daughhetee* (1985) 165 Cal.App.3d 574, 580-581.)

The Court of Appeal in *People* v. *Elizabeth G*, *supra*, 88 Cal.App.4th 496, reaffirmed in light of in *Illinois v. McArthur*, *supra*, 531 U.S. 326, the California rule that it is reasonable, in appropriate circumstances, for police to enter and secure a residence from the inside to prevent evidence destruction while a search warrant is being sought. The officers had probable cause to believe evidence of a murder was inside the house. They had reason to fear the evidence would be destroyed before they could obtain a search warrant. Their intrusion was limited to seizing the house and preventing unaccompanied movement inside—they did not search the house or detain occupants. And the seizure lasted only about 5 and 1/2 hours. (*Id.* 88 Cal.App.4th at pp. 505-506.)

8530.2-Illegal entry to secure does not taint later search warrant 12/09

Even if the police unlawfully enter premises to secure it or simply to confirm the presence of the items for which they intend to seek a search warrant, evidence obtained from the subsequent execution of the search warrant need not be excluded as fruit of the illegal entry. Evidence seized during a search under a valid warrant, obtained with information wholly unrelated to the entry to secure, is sufficiently attenuated from the entry to dissipate any taint. In other words, when the search warrant affidavit is based upon information independent of the illegally obtained evidence, the search warrant constitutes an independent source for the subsequent seizure. This purges the evidence seized of any taint from the unlawful entry. (Compare *Segura v. United States* (1984) 468 U.S. 796, 813-816, and *People v. Gesner* (1988) 202 Cal.App.3d 581, 587-591, with *People v. Machupa* (1994) 7 Cal.4th 614, 621 [warrant based on observations during prior warrantless entry].)

Application of this rule requires that the warrant be a genuinely independent source. The officer's decision to seek the search warrant must not have been prompted by anything seen during the entry. (*Murray v. United States* (1988) 487 U.S. 533, 537-542; *People v. Weiss* (1999) 20

Cal.4th 1073.) But when the independent source rule applies, even evidence actually discovered or seized during the earlier illegal entry is admissible because this evidence would inevitably have been discovered when the warrant was served. (*Ibid.*; *People v. Lamas* (1991) 229 Cal.App.3d 560, 568-571.)

8530.3-Illegal evidence in search warrant affidavit is removed & probable cause retested 12/09

Even when observations made during an unlawful entry to secure are included in a search warrant affidavit, the warrant is not automatically invalidated. Rather, the reviewing court must excise any observations and information derived from the unlawful entry from the affidavit and determine whether the remaining information, standing alone, is sufficient to establish probable cause. (*Murray v. United States* (1988) 487 U.S. 533, 537-542 (*Murray*).) The United States Supreme Court in *Murray* used the long-standing "excise-and-retest" approach approved in *Franks v. Delaware* (1978) 438 U.S. 154. If probable cause remains from the untainted information, and the officers would have applied for the warrant even if the unlawful entry had not occurred, then the court must uphold the warrant. And the warrant remains an independent source for the seizure of evidence, notwithstanding the initial illegality. (*Murray*, *supra*; see also *People v. Weiss* (1999) 20 Cal.4th 1073.)

The trial court does not have to separately consider the effect the illegally obtained information had on the magistrate who issued the warrant. It is sufficient that the redacted affidavit show a "fair probability that contraband or evidence of a crime will be found in a particular place." (*People v. Weiss*, *supra*, 20 Cal.4th at pp. 1081-1083; see, generally, *Illinois v. Gates* (1983) 462 U.S. 213, 238.)

8550.1-Staleness of search warrant affidavit depends on particular facts 12/17

The information presented to a magistrate providing probable cause to issue a search warrant must consist of "facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case." (*Sgro v. United States* (1932) 287 U.S. 206, 210-211; see also *People v. Mesa* (1975) 14 Cal.3d 466, 470; *People v. McDaniel* (1994) 21 Cal.App.4th 1560, 1564.) "If circumstances would justify a person of ordinary prudence to conclude that [a criminal] activity has continued to the present time, then the passage of time will not render the information stale." (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652; see also *People v. Williams* (2017) 15 Cal.App.5th 111, 125.)

"No bright-line rule defines the point at which information is considered stale." (*People v. Carrington* (2009) 47 Cal.4th 145, 163; see also *People v. Lazarus* (2015) 238 Cal.App.4th 734, 764 [over 20 years since murder of defendant's ex-lover].) "[T]he question of staleness depends on the facts of each case." (*People v. Gibson* (2001) 90 Cal.App.4th 371, 380.) "Courts have upheld warrants despite delays between evidence of criminal activity and the issuance of a warrant, when there is reason to believe that criminal activity is ongoing or that evidence of criminality remains on the premises." (*People v. Carrington*, *supra*, 47 Cal.4th at p. 164; quote followed by case examples.) "[E]ven a brief delay may preclude an inference of probable cause in some circumstances while in others a relatively long delay may not do so." (*Alexander v. Superior Court* (1973) 9 Cal.3d 387, 393.) "Substantial delays do not render warrants stale where the defendant is not likely to dispose of the items the police seek to seize." (*People v. Stipo* (2011) 195 Cal.App.4th

664, 672 [computer hacker unaware of police investigation unlikely to destroy the equipment, the information stolen or the hard drive history]. For example, "[c]ourts have recognized that firearms are likely to be retained by a suspect long after the crime is committed." (*People v. Lazarus*, *supra*, 238 Cal.App.4th at p. 765; see also *People v. Lee* (2015) 242 Cal.App.4th 161, 173-174.)

> "The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: The character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed."

(*People v. Wilson* (1986) 182 Cal.App.3d 742, 754; citing *Andresen v. State* (1975) 24 Md.App. 128, 172 [331 A.2d 78, 106]; see, e.g., *People v. Jones* (2013) 217 Cal.App.4th 735, 741-742 [four week gap in information in ongoing identity theft case not stale].)

8550.2-Staleness of search warrant affidavit in drug cases 10/09

It has been held that the information presented to a magistrate supporting probable cause to issue a search warrant must consist of "facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case." (*Sgro v. United States* (1932) 287 U.S. 206, 210-211; see also *People v. McDaniel* (1994) 21 Cal.App.4th 1560, 1564; *People v. Mesa* (1975) 14 Cal.3d 466, 470.)

There is no bright line between fresh and stale information. In evaluating the time between a controlled buy and issuance of a search warrant for the premises, however, "delays of more than four weeks are generally considered insufficient to demonstrate present probable cause." (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652.) For example, a marijuana buy 15 days earlier was held fresh enough to support a search warrant. (*People v. Wilson* (1968) 268 Cal.App.2d 581, 588-589.) And the passage of 18 days between the time marijuana was seen at the search location and the time the search warrant did not make the information stale in a similar case. (*People v. Scott* (1968) 259 Cal.App.2d 268, 277.) The finding of probable cause in *Scott* was supported by the suggestion in the affidavit that the drug activity described had been conducted as a "regular business." (*Ibid.*)

In *People v. Thompson* (1979) 89 Cal.App.3d 425, the court of appeal upheld the magistrate's conclusion that it was probable that contraband would be on the premises described even though there had been a lapse of from 10 to 16 days between the officer's receipt of information upon which the affidavit was based and the application for the warrant. Again, the evidence indicated that the defendant was engaged in a "continuing and ongoing activity." (*Id.* at pp. 429-430; see also *Brown v. Superior Court* (1973) 34 Cal.App.3d 539, 544 [9 days not too old]; *People v. Wilson* (1986) 182 Cal.App.3d 742, 754-755 [40 day old information re: ongoing methamphetamine manufacturing not stale]; but see, *People v. Hirata* (2009) 175 Cal.App.4th 1499, 1504 [82 day delay rendered probable cause stale]; *People v. Hulland*, *supra*, 110 Cal.App.4th 1646, 1652-1653 [52-day-old information was stale].)

8660.1-Defense must make substantial showing to traverse search warrant 8/20

In the leading case of *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*), the United States Supreme Court held a defendant has a limited Fourth Amendment right to challenge the validity of a search warrant by controverting the factual allegations made in the supporting affidavit. But the court should not hold a *Franks* hearing unless the defendant makes several important preliminary showings. A defendant is entitled to a *Franks* evidentiary hearing on a search warrant's affidavit's veracity *only after* making a *substantial preliminary showing* that (1) the affidavit includes a false statement made "knowingly and intentionally, or with reckless disregard for the truth," and (2) "the allegedly false statement is necessary to the finding of probable cause." (*Id.* at pp. 155-156; see also *People v. Miles* (2020) 9 Cal.5th 513, 576; *People v. Hobbs* (1994) 7 Cal.4th 948, 974; *People v. Luttenberger* (1990) 50 Cal.3d 1, 9-11.) "Because of the difficulty of meeting the 'substantial preliminary showing' standard, *Franks* hearings are rarely held." (*People v. Estrada* (2003) 105 Cal.App.4th 783, 790.)

Because there is a presumption of validity in favor of the affidavit supporting a search warrant, a challenger's attack:

> [M]ust be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

(*Franks*, *supra*, 438 U.S. at p. 171; see also *People v. Sandoval* (2015) 62 Cal.4th 394, 409.)

In addition to this substantial preliminary showing that a false statement knowingly and intentionally, or recklessly was included in the affidavit, a defendant must also show that when this misstatement is set to one side, the remaining content of the affidavit is insufficient to support a finding of probable cause. (*Franks*, *supra*, 438 U.S. at pp. 171-172.) Only then is the defense entitled to an evidentiary hearing. If sufficient unchallenged information remains to support a finding of probable cause, the motion to traverse must be denied without a hearing. (See, e.g., *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1581-1582.)

A conclusory and uncorroborated defense declaration, which simply denies the acts alleged in the affidavit, or which appears to be unreliable because it is contradicted by established facts, is wholly insufficient to require a hearing. (*People v. Panah* (2005) 35 Cal.4th 395, 457; *People v. Box* (1993) 14 Cal.App.4th 177, 184-186; *People v. Sandlin* (1991) 230 Cal.App.3d 1310, 1318.) Even a tape recorded statement of a witness disavowing information attributed to him in the search warrant affidavit has been held insufficient because it was unsworn. (*People v. Box*, *supra*, 14 Cal.App.4th at pp. 183-184.)

> In short, the message delivered by the highest judicial authority is plain. The discharge, unpunished, of guilty defendants exacts an enormous price from society. Consequently, the sanction of suppressing relevant evidence should be reserved for cases of the most serious misconduct committed by agents of the commonwealth. With specific reference to facially sufficient warrants issued by neutral magistrates, it is a rare day indeed when they can be successfully challenged. One who ventures upon that effort better have

his facts and figures, and they should be compelling. A fishing expedition will not be entertained.

(*People v. Wilson* (1986) 182 Cal.App.3d 742, 750; see also *People v. Acevedo* (2012) 209 Cal.App.4th 1040, 1052-1057 [same principles, privileges and procedures apply to confidential informants supplying information used to support a wiretap authorization affidavits and orders].)

8660.2-Only deliberate falsehoods affecting probable cause can be traversed 8/20

The United States Supreme Court in *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*) greatly narrowed the scope of a motion to traverse and the remedies a court may impose. Earlier California cases allowed much broader attack on a search warrant affidavit and more harsh sanctions, based wholly upon the California Constitution. These cases were overruled by the voters' adoption of article I, section 28, subdivision (f)(2) [formerly subd. (d)], commonly called the "Victim's Bill of Rights." (*People v. Truer* (1985) 168 Cal.App.3d 437, 440-443; *People v. Luevano* (1985) 167 Cal.App.3d 1123, 1128-1129; and see generally, *In re Lance W.* (1985) 37 Cal.3d 873, 884-890.)

In *Franks*, the United States Supreme Court held that a negligent or innocent misstatement of fact by the affiant has no effect upon the validity of a search warrant. Only a knowingly and intentionally false statement or a statement made with reckless disregard for the truth can be the basis for a traversal. And even if the defense can demonstrate such a misstatement, the remedy is not to automatically quash the warrant. Instead, the court must retest the affidavit for probable cause without the misstatement. (*Franks*, *supra*, 438 U.S. at pp. 170-172.)

The *Franks* "correct-and-retest" approach is remedial rather than punitive. Simply striking a misstatement can leave the remaining facts out of context and unintelligible. Thus, the court should substitute the true facts known to the affiant in place of the misstated facts—make the affidavit read as it should have—before retesting for probable cause. (*People v. Costello* (1988) 204 Cal.App.3d 431, 443-444.) It is not necessary in such a case, however, that the court make some additional finding regarding the effect the incorrect or illegal obtained information had on the magistrate who issued the warrant. (*People v. Weiss* (1999) 20 Cal.4th 1073.)

The defense carries the burden of proof during any evidentiary hearing on a *Franks* motion. Their burden of proof is by a preponderance of the evidence. (*Frank*, *supra*, 438 U.S. at p. 156.) And in deciding the affiant's credibility, the court may consider the results of the search. "[W]hile probable cause for a search cannot be supported by the results of the search, there is no reason why the results of the search cannot support the truthfulness of the statements made in a search warrant affidavit by an affiant whose credibility is under attack." (*People v. Benjamin* (1999) 77 Cal.App.4th 264, 275-276 [significant indoor marijuana cultivation corroborated affiant's allegation that marijuana odor was coming from a residence].)

An appellate court defers to the express and implied findings of the trial court on the factual issues related to the *Franks* hearing if supported by substantial evidence, but independently determine the legality of the search in light of those facts. (*People v. Miles* (2020) 9 Cal.5th 513, 577.)

8660.3-Only deliberate omission of material fact traversable 4/20

The procedural and substantive rules established in *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*), apply equally to alleged omissions from affidavits. (*People v. Huston* (1989) 210 Cal.App.3d 192, 219; see also *People v. Truer* (1985) 168 Cal.App.3d 437, 440-443; *People v. Luevano* (1985) 167 Cal.App.3d 1123, 1128-1129.) "A defendant who challenges a search warrant based on *omissions* in the affidavit bears the burden of showing an intentional or reckless omission of material information that, when added to the affidavit, renders it insufficient to support a finding of probable cause." (*People v. Scott* (2011) 52 Cal.4th 452, 484, italics in original; see also *People v. Lee* (2015) 242 Cal.App.4th 161, 171-172.) Because the defense bears the burden of proof by a preponderance of the evidence, the defendant must establish that an omission was made knowingly or intentionally, or with reckless disregard for the truth, and that the omission was of a material fact distorting the probable cause analysis. (*Franks*, *supra*, 438 U.S. at pp. 155-156; *People v. Huston*, *supra*, 210 Cal.App.3d at p. 220; *People v. Berkoff* (1985) 174 Cal.App.3d 305, 310.) Hence, negligent or innocent omissions have no effect upon the validity of the warrant.

> We have recognized that a claim that material facts were omitted from an affidavit differs from a claim that the affidavit contains falsehoods: "Though similar for many purposes, omissions and misstatements analytically are distinct in important ways. Every falsehood makes an affidavit inaccurate, but not all omissions do so. An affidavit need not disclose every imaginable fact however irrelevant. It need only furnish the magistrate with information, favorable and adverse, sufficient to permit a reasonable, common sense determination whether circumstances which justify a search are probably present. [Citations.]" (*People v. Kurland* (1980) 28 Cal.3d 376, 384.) "[A]n affiant's duty of disclosure extends only to 'material' or 'relevant' adverse facts." (*Ibid*.) "[F]acts are 'material' and hence must be disclosed if their omission would make the affidavit *substantially misleading*. On review under section 1538.5, facts must be deemed material for this purpose if, because of their inherent probative force, there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination." (*Id*. at p. 385.)

(*People v. Sandoval* (2015) 62 Cal.4th 394, 410; see also *People v. Beck & Cruz* (2019) 8 Cal.5th 548, 593-594.)

But even where an intentional omission of a material fact is shown, the remedy simply is to add the omitted information to the affidavit and test it again for probable cause. (*People v. Mayer* (1987) 188 Cal.App.3d 1101, 1120-1121.)

Franks analysis does not apply to the omission of material dealing with whether the facts supporting probable cause for the warrant were lawfully obtained. The California Supreme Court in *People v. Cook* (1978) 22 Cal.3d 67 recognized that the sole duty of a magistrate presented with a search warrant affidavit is to determine whether the facts alleged therein constitute probable cause. (*Id*. at pp. 93-94.) "By negative implication, it is not the magistrate's function also to determine whether the facts alleged in the affidavit were lawfully obtained." (*Ibid.*; accord, *People v. Machupa* (1994) 7 Cal.4th 614, 630-631.) If defendant believes the facts supporting probable cause were unlawfully obtained, defendant may move to suppress under general Fourth Amendment principles, but not by traversal of the warrant. (*People v. Cook*, *supra*; see also *People v. Torres* (1992) 6 Cal.App.4th 1324, 1334-1335.)

8660.4-Discovery for search warrant traversal motion requires factual allegations 12/09

A defendant seeking discovery of privileged confidential-informant material to prepare to traverse a search warrant need not first make the substantial preliminary showing of material falsity that is required for a *Franks* hearing. (*Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*).) On the other hand, general conclusory assertions are insufficient to compel disclosure to defendant or the court. (*People v. Luttenberger* (1990) 50 Cal.3d 1, 20-25 (*Luttenberger*).) "To justify in camera review and discovery, preliminary to a subfacial challenge to a search warrant, a defendant must *offer evidence casting some reasonable doubt* on the veracity of material statements made by the affiant." (*Luttenberger*, *supra*, at p. 21, italics added.)

> As with a request for a *Franks* hearing, the [pre-*Franks* hearing] motion for … discovery should include affidavits supporting defendant's assertions of misstatements or omissions in the warrant affidavit. Further, a defendant should, if possible, specify the information he seeks, the basis for his belief the information exists, and the purpose for which he seeks it. Although it is true that in cases involving confidential informants the defendant may be hindered in providing such specifics, we emphasize that a "conclusionary" statement that he needs the information will not suffice to entitle him to obtain an in camera hearing and portions of the police background materials on the confidential informant.

(*Id.* at p. 22, citations omitted.) To satisfy this standard, a defendant does not need to show the alleged inaccuracies resulted from the affiant's bad faith. But the defendant still must raise a substantial possibility that the claimed misstatements were material to probable cause. Hence, cumulative matter, or information relating to an informant's reliability, are not material where detailed corroborative facts are provided in the affidavit. (*Id.* at p. 23.)

In *People v. Estrada* (2003) 105 Cal.App.4th 783 the defense filed a pre-*Franks* hearing *Luttenberger* discovery motion to reveal the identity of a confidential informant described in the unsealed portion of the search warrant affidavit as performing a controlled buy with the defendant. The appellate court also reiterated that "before an in camera review may be ordered, the defendant must raise some reasonable doubt regarding either the existence of the informant or the truthfulness of the affiant's report concerning the informant's prior reliability or the information he furnished." (*Id*. at p. 792.) In this case, the appellate court held the defendant's sworn declaration that this drug transaction did not occur was sufficient to cast some reasonable doubt of the veracity of a material statement in the affidavit and to require the in camera hearing. (*Id.* at pp. 792-794.) The appellate court pointed out that the trial court had discretion to require the defendant to be cross-examined on matters discussed in the declarant and to strike the declaration if the defendant refused to testify. (*Id.* at pp. 794-795.)

Whether to examine the information in camera, or to order discovery, is addressed to the court's discretion. (*Luttenberger*, *supra*, 50 Cal.3d at p. 21.) If defendant makes the required preliminary showing, the court should first review the requested information in camera. If the information does not support defendant's allegation of material misrepresentations or omissions, the court should report that conclusion and deny discovery. On the other hand, if the court finds the information contains evidence of material misrepresentation or omission, the court should order discovery after carefully deleting all matter that might reveal the informant's identity. Informant identity may not be disclosed to contest probable cause. The court should preserve and seal any

excised material for potential appellate review. (*Id.* at p. 24; Evid. Code, § 1042; see also *People v. Navarro* (2006) 138 Cal.App.4th 146, 166-171.)

8670.1-Procedure to quash or traverse sealed affidavit 7/21

At times, part or all of a search warrant affidavit are sealed to protect the identity of a confidential informant or other confidential information. (*People v. Hobbs* (1994) 7 Cal.4th 948, 957-971 (*Hobbs*).)

> It is settled that "all or any part of a search warrant affidavit may be sealed if necessary to implement the privilege [under Evidence Code section 1041] and protect the identity of a confidential informant." (*Hobbs*, *supra*, 7 Cal.4th at p. 971; Evid. Code, § 1042, subd. (b).) Consequently, courts are not required to disclose "the identity of an informant who has supplied probable cause for the issuance of a search warrant … where such disclosure is sought merely to aid in attacking probable cause. [Citations.]" (*Hobbs*, *supra*, 7 Cal.4th at p. 959, italics omitted.) Courts may further refuse to disclose the content of an informant's statements to the extent such " 'disclosure … would tend to disclose the identity of the informer. …' " (*Id*. at p. 962.)

(*People v. Martinez* (2005) 132 Cal.App.4th 233, 240.)

A sealed affidavit complicates the procedure for resolving a motion to suppress evidence. A defendant can no longer be expected to make the preliminary showings required by *Franks v. Delaware* (1978) 438 U.S. 154 or *People v. Luttenberger* (1990) 50 Cal.3d 1, or to explain in detail why the warrant ought to be quashed or traversed. (*Hobbs*, *supra*, 7 Cal. 4th at pp. 971-972.) The California Supreme Court in *Hobbs* set forth the procedures when a defendant challenges a warrant based upon a sealed affidavit. (See, generally, *People v. Galland* (2008) 45 Cal.4th 354, 364 [summarizing *Hobbs*]; see also *People v. Washington* (2021) 61 Cal.App.5th 776, 794; *People v. Heslington* (2011) 195 Cal.App.4th 947, 955-959.) The same principles, privileges and procedures apply to confidential informants supplying information used to support a wiretap authorization affidavits and orders. (*People v. Acevedo* (2012) 209 Cal.App.4th 1040, 1052-1057.)

8670.1a-In camera hearing to determine if sealing necessary 7/21

When a defendant moves to quash or traverse a search warrant based on a sealed affidavit, the court first must hold an in camera hearing. (*Hobbs*, *supra*, 7 Cal.4th at pp. 972-973; see *People v. Galland* (2004) 116 Cal.App.4th 489, 493-494 [remand for failure to hold required in camera hearing].) The purpose of this initial in camera hearing is simply to determine whether the original sealing order should be maintained in whole or in part. (*Hobbs*, *supra*, 7 Cal.4th at p. 972.) In the case of a confidential informant, the court should examine whether sufficient grounds exist for maintaining the informant's confidentiality, and whether the degree of sealing is necessary to avoid revealing the informant's identity. (*Ibid*.)

"Absent a waiver by the prosecutor, the defendant and his or her attorney may not attend the in camera proceeding." (*People v. Martinez*, *supra*, 132 Cal.App.4th at p. 241, citing *Hobbs*, *supra*, 7 Cal.4th at p. 973.) But the defense should be allowed to submit written questions for the judge to ask during any in camera testimony. (*Hobbs*, *supra*.)

During this initial in camera hearing the court may review the entire affidavit, examine related police reports, and hear testimony from the affiant, any informant, or other witnesses. (*Hobbs*, *supra*, 7 Cal.4th at p. 973.) "If [an] informant is called as a witness, precautions may be

taken to protect his or her identity, including the holding of the in camera hearing at a place other than the courthouse if deemed necessary to guarantee the informant's anonymity." (*Ibid*.)

The court should preserve and seal all the material reviewed in camera during the *Hobbs* hearing for potential appellate review. (*Hobbs*, *supra*, 7 Cal.4th at p. 975; Evid. Code, § 1042; see *People v. Galland*, *supra*, 45 Cal.4th at pp. 368-369 [describing limited circumstances when magistrate can order law enforcement agency to maintain custody of sealed portions of search warrant affidavit]; see also *People v. Martinez*, *supra*, 132 Cal.App.4th at p. 240 [court should have maintained custody of sealed material when originally submitted with warrant application].)

Appellate courts review the trial court ruling on a motion to unseal a search warrant affidavit for abuse of discretion. (*Hobbs*, *supra*, 7 Cal.4th at p. 976; *People v. Washington* (2021) 61 Cal.App.5th 776, 794.)

8670.1b-Determining merits of motion if sealing maintained 6/20

"In the event the trial court finds the affidavit 'to have been properly sealed,' it must then consider in camera the motions to traverse and quash. (*Hobbs*, *supra*, 7 Cal.4th at p. 974.)" (*People v. Galland*, *supra*, 116 Cal.App.4th at p. 493.)

If the defense motion is simply to quash, and the court concludes the affidavit established probable cause for the warrant, the court should report its conclusion to the defendant and deny the motion to quash. (*Hobbs*, *supra*, 7 Cal.4th at p. 975.)

A motion to traverse a search warrant based upon confidential information, triggers further procedural requirements involving the two-part test from *Franks v. Delaware* (1978) 438 U.S. 154. "If the affidavit is found to have been properly sealed, and the defendant has moved to traverse the warrant, the court should then proceed to determine whether the defendant's general allegations of material misrepresentations or omissions are supported by the public and sealed portions of the search warrant affidavit, including any testimony offered at the in camera hearing." (*Hobbs*, *supra*, 7 Cal.4th at p. 974.) If the reviewed material does not support the defendant's general allegations of material misrepresentation or omission, the court should report that conclusion and deny the motion to traverse. (*Ibid*.)

But if, after reviewing the sealed information in camera, the court finds there is a reasonable probability the defendant would prevail on either the motion to quash or the motion to traverse, the court must allow the prosecutor the option of either consenting to disclosure of the sealed material to the defense and litigating the motion to conclusion, or suffering the entry of an order adverse to the People on the motion. (*Hobbs*, *supra*, 7 Cal.4th at pp. 974-975.) This critical juncture in the *Hobbs* procedure is not reached, however, if the court unseals significant portions of the sealed material. (*People v. Heslington*, *supra*, 195 Cal.App.4th at pp. 958-959.) "When the critical parts of the sealed affidavit have been disclosed to the defense, there is no further unsealing of confidential material or for the court to act on the defendant's behalf. … Instead, the suppression motion should proceed to decision with further evidentiary hearing if necessary." (*Ibid*.)

8770.1-Offenses of same class or connected factually properly joined 5/19

"The law favors the joinder of counts because such a course of action promotes efficiency." (*People v. Merriman* (2014) 60 Cal.4th 1, 37; see also *People v. O'Malley* (2016) 62 Cal.4th 944, 967.) Penal Code section 954 expresses a legislative preference for joint trials of similar offenses against a single defendant.

> Although our courts work diligently to ensure due process in all proceedings, their resources are limited. California's trial courts in particular face ever-increasing civil and criminal dockets without any guarantee of corresponding, additional funds for court services—judges, judicial staff, and clerk's office personnel—to meet the demand. Today, no less than in the past, the opportunity for joinder and its attendant efficiencies provided by section 954 is integral to the operation of our public court system. Manifestly, severance of properly joined charges denies the state the substantial benefits of efficiency and conservation of resources otherwise afforded by section 954.

(*People v. Soper* (2009) 45 Cal.4th 759, 782.)

The statute sets forth two *separate* statutory bases for joinder. (*People v. Soper*, *supra*, 45 Cal.4th at p. 771; *People v. Miller* (1990) 50 Cal.3d 954, 987.) Proper joinder only requires that the offenses either be "offenses of the same class of crimes" or "different offenses connected together in their commission." (Pen. Code, § 954.)

The appellate courts have consistently interpreted "of the same class" to mean possessing common characteristics or attributes. (*People v. Landry* (2016) 2 Cal.5th 52, 76; *Aydelott v. Superior Court* (1970) 7 Cal.App.3d 718, 722.) For example, charges of attempted murder, robbery, and possession of a weapon by an ex-felon may be joined since they all involve "assaultive" crimes. (*People v. Thomas* (1990) 219 Cal.App.3d 134, 140.)

Offenses are "connected together in their commission" where there is a common element of substantial importance in their commission. (*People v. Landry*, *supra*, 2 Cal.5th at p. 76; *Aydelott v. Superior Court*, *supra*, 7 Cal.App.3d at p. 722.) Offenses may be connected together even though they relate to different transactions committed at different times and places and against different victims. (*People v. Miller*, *supra*, 50 Cal.3d 954, 988-989; *People v. Leney* (1989) 213 Cal.App.3d 265, 269.) Examples include defendant's use of his home in each offense, or common characteristics shared by the victims. (*People v. Leney*, *supra*, 213 Cal.App.3d at p. 269; *Aydelott v. Superior Court*, *supra*, 7 Cal.App.3d at pp. 722-723.)

> Defendant appears to assume that intent or motivation cannot constitute evidence connecting crimes for purposes of joinder and, instead, that such connection can be made only through physical evidence or objectively measurable factors. But we have previously rejected the argument that the lack of physical evidence or other objectively measurable factors is necessary to establish the appropriateness of joinder. Instead, we have expressly held that a connected intent or motivation, including a sexual motive, is sufficient in and of itself to establish the appropriateness of joinder.

(*People v. Westerfield* (2019) 6 Cal.5th 632, 687-688.)

" 'Where the statutory requirements for joinder are met, the defendant must make a clear showing of prejudice to demonstrate that the trial court abused its discretion.' [Citation.]" (*People v. Lynch* (2010) 50 Cal.4th 693, 735; see also *People v. Scott* (2011) 52 Cal.4th 452, 469; *People v. Thomas* (2011) 52 Cal.4th 336, 350.) "An appellate court evaluates such claims in light of the showings made and the facts known by the trial court at the time of the court's ruling." (*People v. Merriman*, *supra*, 60 Cal.4th at p. 37.)

8770.2-Defendant must show prejudice for severance of counts 6/20

"The party seeking severance has the burden to establish a substantial danger of prejudice requiring the charges to be separately tried." (*People v. Gonzales & Solis* (2011) 52 Cal.4th 254, 281.) "Because it ordinarily promotes efficiency, joinder is the preferred course of action. When the statutory requirements are met, joinder is error only if prejudice is clearly shown. [Citations.]" (*People v. Scott* (2011) 52 Cal.4th 452, 469.)

> The benefits to the state of joinder, on the other hand, [are] significant. Foremost among these benefits is the conservation of judicial resources and public funds. A unitary trial requires a single courtroom, judge, and court attaches. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process.

(*People v. Bean* (1988) 46 Cal.3d 919, 939-940; see also *People v. Soper* (2009) 45 Cal.4th 759, 782.) "Even when the requirements for joinder are satisfied, however, the court 'in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately … .' ([Pen. Code] § 954.)" (*People v. Thomas* (2012) 53 Cal.4th 771, 798; see also *People v. Westerfield* (2019) 6 Cal.5th 632, 689.)

> "In determining whether a trial court abused its discretion under [Penal Code] section 954 in declining to sever properly joined charges, 'we consider the record before the trial court when it made its ruling.' " [Citations.] "The relevant factors are whether (1) the evidence would be cross-admissible in separate trials, (2) some charges are unusually likely to inflame the jury against the defendant, (3) a weak case has been joined with a strong case, or with another weak case, so that the total evidence may unfairly alter the outcome on some or all charges, and (4) one of the charges is a capital offense, or joinder of the charges converts the matter into a capital case." [Citation.] "[I]f evidence underlying the offenses in question would be 'cross-admissible' in separate trials of other charges, that circumstance normally is sufficient, standing alone, to dispel any prejudice and justify a trial court's refusal to sever the charged offenses." [Citations.]

(*People v. Lynch* (2010) 50 Cal.4th 693, 735-736; see also *People v. Anderson* (2018) 5 Cal.5th 372, 388-389; *People v. Landry* (2016) 2 Cal.5th 52, 77.)

On appeal, defendant must show that the trial court's ruling was an abuse of discretion. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774.) In order to establish an abuse of discretion, defendant must make a "clear showing of prejudice." (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.) But, even when the information of record fails to show that the trial court abused its discretion in denying a motion for separate trials, the appellate court will reverse if the joinder of counts for trial resulted in gross unfairness depriving the defendant of due process of law. (*People v. Landry*, *supra*, 2 Cal.5th at p. 77; *People v. Soper*, *supra*, 45 Cal.4th at p. 783; *People v. Earle* (2009) 172 Cal.App.4th 372, 409.) " 'The statutory policy favoring joint trials has been so consistently applied that cases holding it an abuse of discretion to deny a severance are virtually nonexistent … .' " (*People v. Rhoden* (1972) 6 Cal.3d 519, 525, fn. 2; but see *People v. Earle*, *supra*, 172 Cal.App.4th at p. 411 [reversal for failure to sever misdemeanor indecent exposure charge from unrelated felony sexual assault].)

8780.1-Denial of count severance proper even without cross-admissibility 6/20

The starting place in considering a severance motion is the "cross-admissibility" of evidence "[s]ince cross-admissibility would ordinarily dispel any possibility of prejudice … ." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 448 (*Williams*).) But even where evidence of one charged crime would not be admissible in a separate trial of another charged crime, severance is not necessarily required. (*Id*. at p. 451.) "Although cross-admissibility of evidence is often an independently sufficient condition justifying a trial court's denial of severance, it is not a necessary one." (*People v. Simon* (2016) 1 Cal.5th 98, 123.) In other words, "a 'lack of cross-admissibility is not, by itself, sufficient to show prejudice and bar joinder' [Citation.]" (*People v. Johnson* (2015) 61 Cal.4th 734, 751; see also *People v. Osband* (1996) 13 Cal.4th 622, 667; *People v. Sandoval* (1994) 4 Cal.4th 155, 173.) In *People v. Crosby* (1988) 197 Cal.App.3d 853 the appellate court observed that cases decided after *Williams* almost uniformly upheld denial of severance motions despite the absence of cross-admissibility of evidence. (*Id*. at p. 859.)

Penal Code section 954.1, adopted by the voters as a part of Proposition 115 in 1990, codified *Williams* by stating that "evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact." (See also *People v. Geier* (2007) 41 Cal.4th 555, 575.) Absence of cross-admissibility is only one factor for consideration. "We emphasize, … that, even if cross-admissibility did not support consolidation of the cases, the absence of cross-admissibility alone would not sufficient to establish prejudice where (1) the offenses were properly joinable under [Penal Code] section 954, and (2) no other factor relevant to the assessment of prejudice demonstrates an abuse of discretion." (*Id*. at p. 577; see also *People v. Vines* (2011) 51 Cal.4th 830, 856; *People v. Ybarra* (2016) 245 Cal.App.4th 1420, 1435.)

Even without cross-admissibility the burden remains on the defendant "to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citations.]" (*People v. Bean* (1988) 46 Cal.3d 919, 938-939; see also *Frank v. Superior Court* (1989) 48 Cal.3d 632, 640.)

> When the offenses are joined for trial the defendant's guilt of all the offenses is at issue and the problem of confusing the jury with collateral matters does not arise. The other-crimes evidence does not relate to an offense for which the defendant may have escaped punishment. That the evidence would otherwise be inadmissible may be considered as a factor suggesting possible prejudice, but countervailing considerations that are not present when evidence of uncharged offense is offered must be weighed in ruling on a severance motion. The burden is on the defendant therefore to persuade the court that these countervailing considerations are outweighed by a substantial danger of undue prejudice.

(*People v. Bean*, *supra*, 46 Cal.3d at pp. 938-939.)

The California Supreme Court in *People v. Balderas* (1985) 41 Cal.3d 144 noted that even if evidence is not cross-admissible, the defendant must still make a stronger showing of prejudicial effect than would be required in determining whether to admit other crimes evidence. (*Id*. at p. 173; see also *People v. Matson* (1974) 13 Cal.3d 35, 41.) The court stated: "[T]he 'substantial' or 'clear' prejudice necessary to show abuse of discretion does not depend on the lack of cross-admissibility and the existence of capital charges alone. Determination of a severance issue is 'a highly individualized exercise, necessarily dependent upon the particular circumstances of each individual case.' " (*People v. Balderas*, *supra*, 41 Cal.3d at p. 173.)

8800.1-General test for joinder & severance of defendants 11/18

While the granting of separate trials for codefendants is a matter of discretion for the trial judge, the Legislature has expressed a clear preference for joint trials. (*People v. Winbush* (2017) 2 Cal.5th 402, 455; *People v. Homick* (2012) 55 Cal.4th 816, 848.) Penal Code section 1098 provides, in pertinent part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they *must* be tried jointly, unless the court orders separate trials." (Italics added.) "When defendants are charged with having committed 'common crimes involving common events and victims,'… the court is presented with a 'classic case' for a joint trial. [Citation.]" (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 40 (*Marlow*); see also *People v. Anderson* (2018) 5 Cal.5th 372, 387; *People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1173.) "[J]oint trials are eminently proper when the underlying charges depend on mutual action, common facts or common evidence." (*People v. Sanchez* (1982) 131 Cal.App.3d 323, 335.)

As a general rule, Penal Code section 1098 requires "that a defendant may not be tried with others who are charged with different crimes than those of which he is accused unless he is included in at least one count of the accusatory pleading with all other defendants with whom he is tried." (*People v. Ortiz* (1978) 22 Cal.3d 38, 43.) But an exception has been carved out, consistent with the purpose of Penal Code section 1098, permitting joint trials for offenses committed at the same time and location as part of the same transaction even though no defendant is jointly charged with another on any count. (*People v. Wickliffe* (1986) 183 Cal.App.3d 37, 40-41; *People v. Hernandez* (1983) 143 Cal.App.3d 936, 940.)

Under Penal Code section 1098, "the trial court exercises discretion in deciding whether to order separate trials or not." (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 938.)

> The court's discretion in ruling on a severance motion is guided by the nonexclusive factors enumerated in *People v. Massie* (1967) 66 Cal.2d 899, such that severance may be appropriate "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (Fns. omitted.) Another helpful mode of analysis of severance claims appears in *Zafiro v. United States* [(1993)] 506 U.S. 534 … . There, the high court, ruling on a claim of improper denial of severance under rule 14 of the Federal Rules of Criminal Procedure, observed that severance may be called for when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro*, *supra*, at p. 539 … .) The high court noted that less drastic measures than severance, such as limiting instructions, often will suffice to cure any risk of prejudice.

(*Coffman*, *supra*, 34 Cal.4th at p. 40.) But "the possibility that a codefendant might later plead guilty—a possibility that always exists when multiple defendants are charged together—is not one of the factors a court must consider in ruling on a severance motion." (*People v. Anderson*, *supra*, 5 Cal.5th at p. 387.)

Finally, it is the defense's burden to establish the trial court abuse its discretion in denying a defense request for separate trials. (*People v. Zendejas* (2016) 247 Cal.App.4th 1098, 1107.) "A court's denial of a motion for severance is reviewed for abuse of discretion, judged on the facts as they appeared at the time of the ruling. [Citation.]" (*Coffman*, *supra*, 34 Cal.4th at p. 41.) "Even if a trial court abuses its discretion in failing to grant severance, reversal is required only upon a

showing that, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. [Citation.]" (*Ibid*.)

8840.1-*Aranda/Bruton* severance motion should be reserved to trial court 12/18

A motion to sever based on *Aranda/Bruton* grounds should not be decided pretrial. Instead, it should be reserved to the trial court for decision before the jury is empanelled. In San Diego County this procedure is mandated by the local rules of court. (See San Diego County Superior Court Rules, Division III, "Criminal," rule 3.2.1.F. ["severance motions resting on evidentiary consideration"].) There are several reasons for deferring an *Aranda*/*Bruton*-based severance motion to the trial court.

First, the admissibility and usage of one defendant's statements against another defendant necessarily depends on rulings yet to be made by the trial judge. And any pretrial ruling on the admissibility of an admission or confession is not binding on the trial court or either party. (See, generally, *People v. Riva* (2003) 112 Cal.App.4th 981, 992; *People v. Superior Court (Zolnay)* (1975) 15 Cal.3d 729, 734; *Saidi-Tabatabai v. Superior Court* (1967) 253 Cal.App.2d 257, 266-267.) Statements made by one defendant are often admissible against a codefendant in a joint trial, notwithstanding *Aranda*.

> The [*Aranda*] rule thus presumes the statement is an admissible admission by the declarant and inadmissible hearsay against the codefendant. [Citation.] On the other hand, if the statement is admissible against the codefendant under a hearsay exception, and its admission otherwise survives confrontation analysis, then the jury may consider it against the codefendant; no reason exists for severance or redaction. [Citation.]

(*People v. Smith* (2005) 135 Cal.App.4th 914, 922.) Statements made in furtherance of a conspiracy, adoptive admissions, and declarations against penal interest are often sufficiently trustworthy to support their admission against the non-declarant in a joint trial. (See, e.g., *People v. Greenberger* (1997) 58 Cal.App.4th 298, 326-334; Evid. Code, §§ 1221, 1223, 1230.) The principles announced in *Aranda* have no application to such statements. (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1402; *People v. Morales* (1968) 263 Cal.App.2d 368, 374-376; *People v. Gant* (1967) 252 Cal.App.2d 101, 111.) In addition, *Aranda/Bruton* does not apply to the admission of nontestimonial statements of a codefendant within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36. (*People v. Washington* (2017) 15 Cal.App.5th 19, 27-29.)

Second, the prosecution has the option to edit the declarant defendant's statement to avoid *Aranda/Bruton* problems and further the goal of maintaining joint trial of codefendants. (*People v. Aranda* (1965) 63 Cal.2d 518, 530; similarly, see *Richardson v. Marsh* (1987) 481 U.S. 200.) "The sufficiency of this form of editing must be determined on a case-by-case basis in light of the statement as a whole and the other evidence presented at the trial." (*People v. Fletcher* (1996) 13 Cal.4th 451, 468; see also *People v. Lewis* (2008) 43 Cal.4th 415, 454.) Clearly the trial judge is in the best position to make these determinations.

Finally, the trial court is also the appropriate place to consider other alternatives such as the use of multiple juries. (See, e.g., *People v. Jackson* (1996) 13 Cal.4th 1164, 1207-1208; *People v. Harris* (1989) 47 Cal.3d 1047, 1072-1076.) "Whether the court abused its discretion by denying complete severance and impaneling separate juries is decided on the basis of the facts known at the time of the ruling on the severance motion." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1287; see also *People v. Powell* (2018) 6 Cal.5th 136, 145-146.)

8840.2-*Aranda/Bruton* only applies to testimonial statements of codefendants 4/18

The *Aranda/Bruton* rule generally prohibits a joint trial when the prosecution seeks to admit a hearsay confession against the declarant codefendant when such confession also implicates the defendant. (*Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*).) "As a result, a trial court faced with a prosecutor's request to admit a codefendant's confession at a joint trial must resort to other options beyond a limiting instruction, such as (1) redacting the codefendant's confession in a way that both omits the defendant but does not prejudice the codefendant [citations]; (2) severing the trial or using separate juries for each defendant [citation]; or (3) excluding the evidence altogether [citation]." (*People v. Washington* (2017) 15 Cal.App.5th 19, 27.)

But the *Aranda/Bruton* rule only applies to the admission of "testimonial" statements of a codefendant within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36. (*People v. Cortez* (2016) 63 Cal.4th 101, 129; see also *People v. Gallardo* (2017) 18 Cal.App.5th 51, 68-69; *People v. Washington* (2017) 15 Cal.App.5th 19, 27-29.)

In addition, the *Aranda/Bruton* rule does not apply where:

> … the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial. … [¶] Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind...."

(*Richardson v. Marsh* (1987) 481 U.S. 200, 208.) Under *Richardson v. Marsh*, "[t]he class of inferentially incriminating statements [that are subject to the *Bruton* rule] is limited to 'obvious[ ]' ones, 'inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.' [Citation.]" (*People v. Montes* (2014) 58 Cal.4th 809, 867; see also *People v. Gallardo*, *supra*, 18 Cal.App.5th at p. 80-81.)

8840.3-Statement redacted to omit mention of co-defendant is admissible 4/18

Even when the *Aranda/Bruton* applies, admission of a codefendant's confession is proper during a joint trial if the confession can be edited to delete references to the nondeclarant codefendant even if there is other evidence linking the defendants together in the commission of the crime. (*Richardson v. Marsh* (1987) 481 U.S. 200 (*Richardson*).) In *Richardson* "the [edited] confession was not incriminating on its face, and became so only when linked with evidence introduced at trial." (*Id.* at p. 208.) Under the circumstances, the High Court found no error under *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*). (*Richardson*, *supra*, 481 U.S. at pp. 209-210.) "We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Richardson*, *supra*, at p. 211.)

The California Supreme Court had already adopted a judicially declared rule of practice similar to *Bruton*'s constitutional protection in *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*). *Aranda* was abrogated by Proposition 8 to the extent that it required the exclusion of evidence where it was not required by the federal constitution. (*People v. Boyd* (1990) 222 Cal.App.3d 541; similarly, see *People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1407-1408.) But even the California Supreme Court in *Aranda* approved the use of a codefendant's edited statement that said simply, "I

was one of the persons who robbed the store but I will tell you nothing more." (*Aranda*, *supra*, 63 Cal.2d at pp. 530-531, fn. 10; see also *People v. Johnson* (1989) 47 Cal.3d 1194, 1231; *People v. Manson* (1976) 61 Cal.App.3d 102, 152.) There was no *Aranda* problem in *Manson* "[b]ecause each admission was edited to delete any explicit reference to anyone other than the declarant, none was made inadmissible by reason of circumstantial implications that might be drawn by the jury." (*Id*. 61 Cal.App.3d at p. 151.) Redactions meeting these *Aranda* standards obviously also satisfy the current federal test under *Bruton* and its progeny. (See, e.g., *People v. Hampton* (1999) 73 Cal.App.4th 710, 717-721; see also *People v. Garcia* (2008) 168 Cal.App.4th 261, 281-282.)

The United States Supreme Court in *Richardson* did not address whether merely replacing the nondeclarant's name with a symbol or neutral pronoun was sufficient to avoid violating the Confrontation Clause. (*Richardson*, *supra*, 481 U.S. at p. 211, fn. 5.) This issue was addressed in *Gray v. Maryland* (1998) 523 U.S. 185. The High Court held that a statement redacted by simply replacing the nondeclarant's name with an obvious blank space, or a word like "deleted," or a symbol is not admissible in a joint trial under *Bruton*. This form of edited statement refers directly to the existence of the nonconfessing defendant. And, by showing obvious indications of alteration, the statement draws the jury's attention to the removed name, generates a realization that the statement refers specifically to the nonconfessing defendant, and is directly accusatory. (*Id*. at pp. 192-195.) When, despite redaction, the codefendant's statement "obviously refer[s] directly to someone, often obviously the defendant, and … involve[s] inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial" the *Bruton* rule applied and introduction of the statement at a joint trial violated the defendant's rights under the confrontation clause. (*Id*. at pp. 196-197; see also *People v. Lewis* (2008) 43 Cal.4th 415, 454.)

Similarly, the California Supreme Court held redaction with neutral pronouns may still incriminate the nondeclarant defendant if a reasonable juror could not avoid drawing the inference that the nondeclarant was the person designated in the confession by the symbol or neutral pronoun and the confession is powerfully incriminating on the issue of the nondeclarant's guilt. The effectiveness of this form of editing must be decided on a case-by-case basis in light of all the other evidence. (*People v. Fletcher* (1996) 13 Cal.4th 451, 468-469; see also *People v. Burney* (2009) 47 Cal.4th 203, 231; *People v. Lewis*, *supra*, 43 Cal.4th at p. 454; see, generally, *People v. Ardoin* (2011) 196 Cal.App.4th 102, 134-138.)

In *People v. Vasquez-Diaz* (1991) 229 Cal.App.3d 1310, for example, the appellate court held it was acceptable to redact the codefendant's confession to say, "I and *another person* robbed the liquor store," when there was no question that more than one person committed the crime. (*Id.* at p. 1315.) "The reference to the 'second person' in the statement did not either by itself identify Torres or link Torres as the second person by corroborating other evidence at trial." (*Id.* at p. 1316.) This type of redaction was approved in dicta by the United States Supreme Court. (*Gray v. Maryland*, *supra*, 523 U.S. at p. 196.)

8840.4-Redacted statement should not prejudice declarant defendant 12/17

If redaction of a defendant's confession to necessary to protect a codefendant's *Aranda/Bruton* rights, such redactions must not be so severe that the remaining statement is prejudicial to the declarant defendant. (*People v. Lewis* (2008) 43 Cal.4th 145, 457.)

> Severance may be necessary when a defendant's confession cannot be redacted to protect a codefendant's rights without prejudicing the defendant. [Citation.] A defendant is prejudiced in this context when the editing of his statement distorts his role or makes an exculpatory statement inculpatory. [Citation.] [¶] Ordinarily, in ruling on a severance motion, a trial court should review both the unredacted and the redacted statements to determine whether the redactions so distort the original statement as to result in prejudice to the defendant.

(*Ibid*.; see also *People v. Rountree* (2013) 56 Cal.4th 823, 849; *People v. Gamache* (2010) 48 Cal.4th 347, 379.) "For a redacted statement to make it appear that the declarant is evasive or lying in a way that the original statement did not seems to us to be the very definition of prejudice … ." (*People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1097; see also *People v. Douglas* (1991) 234 Cal.App.3d 273, 285-287.)

8840.5-*Aranda/Bruton* inapplicable if co-defendant testifies 8/13

Severance of codefendants is not necessarily required under *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) simply because the prosecution seeks to introduce statements made by one defendant which incriminated another. No constitutional (*Aranda/Bruton*) or other prohibition applies to the use of one defendant's statement in full for impeachment should he take the stand in his or her own defense even though the statement incriminates a codefendant in a joint trial. In that situation, the testifying defendant's availability for cross-examination by the other defendants satisfies their rights under the Sixth and Fourteenth Amendments. (*Nelson v. O'Neill* (1971) 402 U.S. 622, 629-630; *In re Rosoto* (1974) 10 Cal.3d 939, 951-952.)

This issue was authoritatively addressed in *People v. Boyd* (1990) 222 Cal.App.3d 541 (*Boyd*). When each of the defendants in that case testified in his own defense, each was impeached with extrajudicial statements which incriminated the other defendant. The appellate court showed that the *Aranda* case acquired a constitutional basis with the decision by the United States Supreme Court in *Bruton*. (*Boyd*, *supra*, 222 Cal.App.3d at pp. 562-563; see *People v. Anderson* (1987) 43 Cal.3d 1104.) Under *Bruton* and its progeny, the Sixth and Fourteenth Amendment rights of a defendant were violated only if the incriminating statements of a *nontestifying* codefendant were introduced against the defendant. (*Boyd*, *supra*, at p. 561-562.) The *Bruton* rule did not apply where the codefendant who made the statement testified, making him subject to cross-examination by the defendant who is incriminated by the codefendant's statement. (*Id*. at pp. 562-563; see also *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1197.) The appellate court in *Boyd* went on to explain that any extension of *Aranda* beyond the federal rule was abrogated by Proposition 8:

> "[I]t seems very likely that Proposition 8 was crafted for the very purpose, among others, of abrogating cases … which had elevated the procedural rights of the criminal defendant above the level required by the federal Constitution, as interpreted by the United States Supreme Court. [Citation.]" Thus, to the extent *Aranda* required exclusion of inculpatory extrajudicial statements of codefendants, even when the codefendant testified and was

available for cross-examination at trial, *Aranda* was abrogated by Proposition 8. There is no federal constitutional basis for requiring exclusion of a codefendant's statements when the codefendant testifies at trial and is subject to cross-examination.

(*Boyd*, *supra*, 222 Cal.App.3d at p. 562; similarly, see *People v. Walkkein* (1993) 14 Cal.App.4th 1401, 1407-1408.)

8850.1-Conflicting defenses do not require severance 4/20

Codefendants do not have to be tried separately simply because they intend to present inconsistent defenses and each may each try to shift responsibility to the other. (*People v. Souza* (2012) 54 Cal.4th 90, 110-111; *People v. Cummings* (1993) 4 Cal.4th 1233, 1286-1288.) "Severance is not required simply because one defendant in a joint trial points the finger of blame at another." (*People v. Homick* (2012) 55 Cal.4th 816, 850; see also *People v. Thompson* (2016) 1 Cal.5th 1043, 1080-1081.) "Their common motivation to shift blame to each other did not by itself compel severance." (*People v. Winbush* (2017) 2 Cal.5th 402, 456.) "Mutually antagonistic defenses are not prejudicial *per se*." (*Zafiro v. United States* (1993) 506 U.S. 534, 538, original italics.) "Although several California cases have stated that the existence of conflicting defenses may compel severance of codefendants' trials, none has found an abuse of discretion or reversed a conviction on this basis." (*People v. Boyde* (1988) 46 Cal.3d 212, 232; similarly, see *People v. Wallace* (1992) 9 Cal.App.4th 1515, 1519, fn. 2.) " 'That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than *against* a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together.' [Citation.]" (*People v. Hardy* (1992) 2 Cal.4th 86, 169, fn. 19, italics added by court.)

"Accordingly, we have concluded that a trial court, in denying severance, abuses its discretion only when the conflict between the defendants *alone* will demonstrate to the jury that they are guilty." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150, italics in original; see also *People v. Daveggio & Michaud* (2018) 4 Cal.5th 790, 819-820.) In other words, "[a]ntagonistic defenses do not warrant severance unless the acceptance of one party's defense would preclude acquittal of the other." (*People v. Burney* (2009) 47 Cal.4th 203, 239; see also *People v. Winbush*, *supra*, 2 Cal.5th at p. 456; *People v. Carasi* (2008) 44 Cal.4th 1362, 1296.) " '[T]o obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' [Citations.]" (*People v. Hardy*, *supra*, 2 Cal.4th at p. 168; see also *People v. Gomez* (2018) 6 Cal.5th 243, 275.) "[T]his was not a case in which only one defendant could be guilty. The prosecution did not charge both and leave it to defendants to convince the jury that the other was that person." (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1287; see also *People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1174.) Additionally, "[w]hen … there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance." (*People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 41; see also *People v. Beck & Cruz* (2019) 8 Cal.5th 548, 598; *People v. Tafoya* (2007) 42 Cal.4th 147, 162-163.)

8870.1-Strong showing required to sever for co-defendant's testimony 10/09

"A court has the discretion to order separate trials when it appears that one codefendant may give exonerating testimony with respect to another codefendant." (*People v. Conerly* (2009) 176 Cal.App.4th 240, 250 (*Conerly*).) In the leading case of *People v. Isenor* (1971) 17 Cal.App.3d 324 (*Isenor*), the appellate court established specific criteria that must be met before the court should grant a motion to sever based on the alleged willingness of a codefendant to testify at a separate trial. Those criteria are:

> When faced with a motion to sever on the ground that there is a possibility that at a separate trial there may be exonerating testimony by a codefendant, there are several areas of inquiry which, to some extent, overlap: (1) Does the movant desire the testimony of the codefendant; (2) will the testimony be exculpatory; (3) how significant is the testimony; (4) is the court satisfied that the testimony itself is bona fide; (5) on the basis of the showing at the time of the motion, how strong is the likelihood that, if the motion were granted, the codefendant will testify; and (6) what is the effect of the granting in terms of judicial administration and economy?

(*Id.* at p. 332.)

"The absence of substantial proof that a codefendant would be willing to testify for the defendant at a later date is, in itself, grounds for denying a motion for severance." (*Isenor*, *supra*, 17 Cal.App.3d at p. 334.)

> The court in *Isenor* did not set out a fixed rule for determining when the moving party's showing is adequate. However, the court recognized that in cases in which an appellate court has held that severance should have been granted, the codefendant exculpated the defendant in an affidavit, in open court or in statements to the police, or there was an otherwise reliable indication the codefendant would testify in a way that actually exonerates the defendant. (See *Isenor*, *supra*, 17 Cal.App.3d at pp. 332-334.) Absence of corroboration weighs against severance. [Citations.]

(*Conerly*, *supra*, 176 Cal.App.4th at p. 251.)

In one of the few cases in which a severance on this ground was found to be appropriate, the showing by the defendant seeking severance consisted of the open court testimony of the codefendant whose testimony was sought. (*United States v. Echeles* (7th Cir. 1965) 352 F.2d 893.) By way of contrast, in the *Isenor* case, the defendant's affidavit of what he had been told by the codefendant was held inadequate. (*Isenor*, *supra*, 17 Cal.App.3d at p. 33.) Similarly, at the time of the severance motion in *Conerly*, the basis for determining what the codefendant would say were representations by the defendant's lawyer. (*Conerly*, *supra*, 176 Cal.App.4th at pp. 245-247.)

In addition, severance should be denied when the likelihood the codefendant will actually testify is uncertain. Such uncertainty is manifest, for example, when the codefendant offers to testify only under certain conditions, such as the order of trial or on assurances as to a particular sentence. (*Conerly*, *supra*, 176 Cal.App.3d at pp. 251-252.)

A strong factor against severance on this ground is the negative effect upon judicial administration and economy. As the appellate court in *Isenor* said: "In order for appellants' motion to gain them anything, it would have been necessary not only that [the codefendant] be tried separately, but that his trial be completed before theirs and culminate in a final judgment." (*People v. Isenor*, *supra*, 17 Cal.App.3d at p. 334.) The trials must be scheduled at widely differing dates to accommodate the assumed desire of the codefendant to avoid having his judicial statements at the

trial of the defendant from being used against him should his case be subsequently retried. (See *People v. Mendoza* (1992) 8 Cal.App.4th 504, 515; see also *Conerly*, *supra*, 176 Cal.App.4th at p. 252.)

8880.1-Prejudicial association claim inapplicable to joint crimes 11/14

A severance of defendants is proper where, due to the sheer bulk of the evidence, a jury might become confused and convict one defendant merely because of his association with others. (*People v. Biehler* (1961) 198 Cal.App.2d 290, 298.) "To justify severance the characteristics or culpability of one or more defendants must be such that the jury will find the remaining defendants guilty simply because of their association with a reprehensible person, rather than assessing each defendant's individual guilt of the crimes at issue." (*People v. Bryant et al.* (2014) 60 Cal.4th 335, 383.) "A prejudicial association justifying severance will involve circumstances in which the evidence regarding one defendant might make it likely the jury would convict that defendant of the charges and, further, more likely find a codefendant guilty based upon the relationship between the two rather than upon the evidence separately implicating the codefendant." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152; see also *People v. Homick* (2012) 55 Cal.4th 816, 854.)

A leading example is *People v. Chambers* (1964) 231 Cal.App.2d 23 (*Chambers*). There, the prosecution built an overwhelming case against a codefendant for numerous violent and inflammatory assaults upon elderly patients. In contrast, the case against the defendant was meager, and involved only unrelated minor offenses. Yet the evidence, which was not accompanied by limiting instructions, tended to place joint moral responsibility upon the defendant despite the lack of concerted or conspiratorial action. In short, the defendant's conviction rested upon guilt by association. (*Id*. at p. 29.)

Situations similar to *Chambers* have been exceedingly rare. Typically, later cases have distinguished *Chambers* upon its peculiar facts, the failure of the court to give limiting instructions on the evidence, the fact evidence showed a joint enterprise, and the distinctiveness of the charges which reduces the likelihood that a jury's finding on one would have influenced their deliberations on others. (See, e.g., *People v. Wickliffe* (1986) 183 Cal.App.3d 37, 42; *People v. Goodall* (1982) 131 Cal.App.3d 129, 141; *People v. Burns* (1969) 270 Cal.App.2d 238, 252.) And, so long as there is a count in which defendants are jointly charged, severance is not warranted merely because a defendant is not charged in all counts. (*People v. Chapman* (1959) 52 Cal.2d 95, 97; see also *People v. Hernandez* (1983) 143 Cal.App.3d 936, 939-941.)

> Moreover, it is also quite likely that different defendants participating together in a crime will have different levels of involvement and different personal backgrounds. These circumstances alone do not compel severance or render a joint trial grossly unfair. Individuals who choose to commit crimes together are not generally entitled to shield the true extent of their association by the expedient of demanding separate trials.

(*People v. Bryant et al.*, *supra*, 60 Cal.4th at p. 383.)

8900.1-Elements of rape 8/19

"Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator … [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (Pen. Code, § 261, subd. (a)(2); see also, *People v. Lee* (2011) 51 Cal.4th 620, 633.)

" 'Force' for purposes of forcible rape or sodomy is the degree of physical force sufficient to support a finding the sexual activity was against the victim's will. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023-1024; *People v. Hale* (2012) 204 Cal.App.4th 961, 978.)" (*People v. Rowe* (2014) 225 Cal.App.4th 310, 321.) "It need not be substantially different or substantially greater than the force inherent in consensual sexual activity." (*People v. Rowe*, *supra*, 225 Cal.App.4th at p. 321, citing *People v. Griffin*, *supra* 33 Cal.4th at p. 1023.) " ' " 'The kind of physical force is immaterial ; … it may consist in the taking of indecent liberties with a woman, or laying hold of and kissing her against her will.' " ' " (*People v. Griffin*, *supra*, 33 Cal.4th. at p. 1024.) "The ultimate question is whether the force accomplished the sexual activity against the victim's will, not whether the force overcame the victim's physical strength or ability to resist." (*People v. Rowe*, *supra*, 225 Cal.App.4th at p. 324, citing *People v. Griffin*, *supra* 33 Cal.4th at p. 1028; see e.g., *People v. Dearborne* (2019) 34 Cal.App.5th 250-259 [defendant used his entire body to pin the victim down in a cramped area in the backseat of a car].)

8900.2-Elements of attempted rape 2/12

"Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator … [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (Pen. Code, § 261, subd. (a)(2).)

> "An attempt to commit rape has two elements: the specific intent to commit rape and a direct but ineffectual act done toward its commission." [Citation.] Intent to commit forcible rape requires (1) the intent to commit the act of sexual intercourse; (2) against the will of the victim … ; (3) by any of the means described in section 261, subdivision (a)(2). [Citation.] "The act must be a direct movement beyond preparation that would have accomplished the crime of rape if not frustrated by extraneous circumstances." [Citation.]

(*People v. Lee* (2011) 51 Cal.4th 620, 633; see also Pen. Code, § 21(a); *People v. Sojka* (2011) 196 Cal.App.4th 733, 739.) "A defendant's specific intent to commit rape may be inferred from the facts and circumstances shown by the evidence." (*People v. Clark* (2011) 52 Cal.4th 856, 948.) The prosecution need not prove the defendant actually attempted to penetrate the victim to prove attempted rape. (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1418.)

8900.3-Rape requires victim's lack of consent, but not resistance 8/19

"Lack of consent is an element of the crime of rape. Consent is defined in [Pen. Code] section 261.6 as 'positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.' [Citation.]" (*People v. Ireland* (2010) 188 Cal.App.4th 328, 336.) Thus, it is proper to instruct a jury that " 'against one's will' means 'without the consent of the alleged victim.' " (*People v. Lee* (2011) 51 Cal.4th 620, 634, fn. 10.)

In 1981 the Legislature eliminated proof of resistance as a prerequisite to a forcible rape conviction to "release rape complainants from the potentially dangerous burden of resisting an assailant in order to substantiate allegations of forcible rape." (*People v. Barnes* (1986) 42 Cal.3d 284, 302; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1024-1025.) Now evidence of force or fear is directly linked to the overbearing of the victim's will—the act of sexual intercourse must have been accomplished against the victim's will by means of force, violence or fear of immediate and unlawful injury. (*People v. Iniguez* (1994) 7 Cal.4th 847, 855-856; *People v. Dearborne* (2019) 34 Cal.App.5th 250, 258.)

> Although resistance is no longer the touchstone of the element of force, the reviewing court still looks to the circumstances of the case, including the presence of verbal or nonverbal threats, or the kind of force that might reasonably induce fear in the mind of the victim, to ascertain sufficiency of the evidence of a conviction under section 261, subdivision (a)(2). Additionally, the complainant's conduct must be measured against the degree of force manifested or in light of whether her fears were genuine and reasonably grounded.

(*People v. Barnes*, *supra*, 42 Cal.3d at p. 304, citations omitted.)

Finally, it not necessary that the victim expressly state that the sexual intercourse was against her will. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) The same evidence establishing the force or fear element can establish the victim's non-consent. (*Ibid*.)

> The essence of consent is that it is given out of free will. That is why it can be withdrawn. While there exists a defense to rape based on the defendant's actual and reasonable belief that the victim does consent [citations], we do not require that victims communicate their lack of consent. [Citation.] We certainly do not require that victims resist. [Citation.] … At the time of the offenses, appellant told his victims to cooperate or be hurt. Now he contends they were required to express to him their lack of cooperation. That cannot be the law. When appellant used the knife and expressly or impliedly threatened his victims, and in the absence of any conduct by the victims indicating that they continued to consent, the previously given consent no longer existed, either in fact or in law.

(*People v. Ireland*, *supra*, 188 Cal.App.4th at p. 338, fn. omitted.)

8900.4-Elements of rape of unconscious person 5/13

Rape of an unconscious person is punishable under Penal Code section 261, subdivision (a)(4).

> To prove that crime, the prosecution must prove that "(1) the defendant had sexual intercourse with the victim; (2) the defendant was not married to the victim at the time; (3) the victim was unable to resist because she was unconscious of the nature of the act; and (4) the defendant knew the victim was unable to resist because she was unconscious of the nature of the act." (*People v. Hernandez* (2011) 200 Cal.App.4th 1000, 1006.) The defendant's belief as to the victim's consent is not relevant; it is the defendant's knowledge that the victim was unconscious and his intent to engage in an act of sexual intercourse with an unconscious person that makes that act a crime under section 261, subdivision (a)(4). (See *People v. Dancy* (2002) 102 Cal.App.4th 21, 36-37.)

(*People v. Morales* (2013) 212 Cal.App.4th 583, 596.)

8930.1-General standard for proof of child annoying 12/09

Penal Code section 647.6 (formerly 647a) punishes one who annoys or molests a child under the age of 18. The primary purpose of section 647.6 is to protect children from interference by sexual offenders, and the statute should be construed to effect this objective and to promote justice. (*People v. Carskaddon* (1957) 49 Cal.2d 423, 425.) Conduct annoys and molests under the statute when it is " 'so lewd or obscene that the normal person would unhesitatingly be irritated by it … .' " (*Id.* at p. 426; see also *People v. Lopez* (1998) 19 Cal.4th 282, 289.) "We have observed that the words 'annoy' and 'molest' in former section 647a (now section 647.6, subd. (a)) are synonymous and generally refer to conduct designed to disturb, irritate, offend, injure, or at least tend to injure, another person." (*People v. Lopez*, *supra*.)

> Section 647a has been construed as follows: "When the words annoy or molest are used in reference to offenses against children, there is a connotation of abnormal sexual motivation on the part of the offender. Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole in the light of the evident purpose of this and similar legislation enacted in this state indicates that the acts forbidden are those motivated by an unnatural or abnormal sexual interest or intent with respect to children." [Citations.]

(*People v. Tate* (1985) 164 Cal.App.3d 133, 139; similarly, see *In re DeBeque* (1989) 212 Cal.App.3d 241, 251.) "Accordingly, to determine whether the defendant's conduct would unhesitatingly irritate or disturb a normal person, we employ an *objective* test not dependent on whether the child was in fact irritated or disturbed." (*People v. Lopez*, *supra*, 19 Cal.4th at p. 290, italics in original.)

Although the acts prohibited by section 647.6 involve an abnormal sexual motivation, they need not be lewd or obscene. In *People v. Thompson* (1988) 206 Cal.App.3d 459, the defendant continuously followed and drove by a young girl on her bicycle. He stopped many times and required her to go around him. t one point, he made facial and hand gestures toward her, but the gestures were not lewd. After she fled into a neighbor's house, he continued to drive by. Affirming the conviction, the appellate court held, "… the section only requires proof of articulable, objective acts which would cause a normal person to be unhesitatingly irritated, provided the acts are motivated by an abnormal or unnatural sexual interest in the child victim." (*Id.* at p. 465.)

There need not be an actual contact by a defendant with any part of the body of the victim in order for defendant's acts to constitute the crime of an annoyance or a molestation of a child under 18 as required by section 647.6. (*People v. Thompson* (1959) 167 Cal.App.2d 727, 734.) "Words alone may constitute the annoyance or molestation proscribed by Penal Code section 647a." (*People v. Carskaddon* (1959)170 Cal.App.2d 45, 47-48.)

8960.1-General standard for proof of lewd act on child 12/19

Penal Code section 288, subdivision (a) forbids any lewd or lascivious act upon the body of a child under the age of 14 years with the intent of arousing the perpetrator's or the child's lust or passions. The specific intent "element requires the People to prove the defendant's intent to arouse, appeal to or gratify the lust, passions or sexual desires of herself or the child. Put differently, there is no separate intent to sexually exploit the minor element." (*People v. Sanchez* (2019) 38 Cal.App.5th 907, 916.) The specific intent with which the act is done is manifested by all the surrounding circumstances. (*People v. Martinez* (1995) 11 Cal.4th 434, 445.) These circumstances include the

charged act, other charged or admitted lewd acts, the relationship between the defendant and the victim, any coercion, bribery or deceit used to avoid detection or to obtain the victim's cooperation, and the defendant's extrajudicial statements. (*Id*. at p. 445; *People v. Morales* (2018) 29 Cal.App.5th 471, 478.)

The statute requires an underage child be touched. But any touching is lewd or lascivious when done with the requisite specific intent. (*People v. Martinez, supra,* 11 Cal.4th at p. 445.) The touching may be punishable by another statute, including a general intent crime such as oral copulation with a child under age 14. (*People v. Murphy* (2001) 25 Cal.4th 136, 147-148; see also *People v. Fox* (2001) 93 Cal.App.4th 394 [unlawful sexual intercourse with child under age 14].) Under Penal Code section 288, however, so long as the defendant has the requisite criminal intent the touching need not be sexual in character. (*People v. Panah* (2005) 35 Cal.4th 395, 488; *People v. Martinez*, *supra*, at pp. 444-445.)

The statute expressly proscribes lewd or lascivious touching "upon or with the body, or any part or member thereof, of a child under the age of 14 years … ." (Pen. Code, § 288, subd. (a).) Thus it does not matter whether the touching was on the outside of the clothing, was reaching into the clothing, or was with the clothing removed. (*People v. Meacham* (1984) 152 Cal.App.3d 142, 152-153; *People v. Austin* (1980) 111 Cal.App.3d 110.) Even touching done by the child victim upon its own person at the instigation of the defendant satisfies the statute. (*People v. Villagran* (2016) 5 Cal.App.5th 880, 890-891; *People v. Imler* (1992) 9 Cal.App.4th 1178, 1182.)

There is no requirement that the child's private parts be touched. In *People v. Dontanville* (1970) 10 Cal.App.3d 783, for example, proof that defendant rubbed the stomach of a seven-year-old girl was sufficient to sustain his conviction. The appellate court in *Dontanville* held that Penal Code section 288, subdivision (a) "is violated … whenever a lewd or lascivious act is committed on the body *or any part thereof* of a child under 14. … It is not necessary that the private parts of the body be touched to sustain a conviction under the section." (*Id.* at pp. 795-796, italics in original; similarly, see *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1427-1428; *People v. O'Connor* (1992) 8 Cal.App.4th 941, 947.)

Separate touchings on the same occasion can result in multiple violations of Penal Code section 288. (*People v. Jimenez* (2002) 99 Cal.App.4th 450, 456 [upholding conviction of three separate violations of same child molestation statute based on single incident during which defendant fondled three separate portions of victim's body].)

Neither consent nor reasonable mistake about the child's age is a defense to a charge under this section. (*People v. Soto* (2011) 51 Cal.4th 229, 248 [consent]; *People v. Olsen* (1984) 36 Cal.3d 638, 647 [age].)

8960.2-Force and duress as used in PC288(b) defined 2/21

Penal Code section 288, subdivision (b), prohibits a lewd act upon a child under the age of 14 "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury … ." (See *People v. Poletti* (2015) 240 Cal.App.4th 1191, 1207.) The force contemplated by subdivision (b) is " 'physical force substantially different from or substantially in excess of that required for the lewd act.' " (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1200; see also *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1004; *People v. Babcock* (1993) 14 Cal.App.4th 383, 385.)

> "A defendant uses 'force' if the prohibited act is facilitated by the defendant's use of physical violence, compulsion or constraint against the victim other than, or in addition to, the physical contact which is inherent in the prohibited act." [Citation.] "The evidentiary key to whether an act was forcible is not whether the distinction between the 'force' used to accomplish the prohibited act and the physical contact inherent in that act can be termed 'substantial.' Instead, an act is forcible if force facilitated the act rather than being merely incidental to the act." [Citation.] "[A]cts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves" are sufficient to support a finding that the lewd act was committed by means of force. [Citation.]

(*People v. Morales* (2018) 29 Cal.App.5th 471, 480; see also *People v. Jimenez* (2019) 35 Cal.App.5th 373, 391.)

"Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family." (*People v. Cochran* (2002) 103 Cal.App.4th 8, 14; see also *People v. Veale* (2008) 160 Cal.App.4th 40, 46.) But, "[d]uress cannot be established unless there is evidence that 'the victim['s] participation was impelled, at least partly, by an implied threat. …' [Citation.]" (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321.) In *People v. Senior* (1992) 3 Cal. App. 4th 765, for example, during the initial molestation the defendant threatened to hit his daughter if she resisted. During later molestations, he restrained her. The appellate court found sufficient evidence of "duress" as to the later molests in the prior threat and the later restraint. (*Id*. at pp. 775-776; see also *People v. Garcia* (2016) 247 Cal.App.4th 1013, 1024.)

Lack of consent by the child victim is not an element of, nor is willingness by the child a defense to, a violation of Penal Code section 288. (*People v. Soto* (2011) 51 Cal.4th 229, 238; *People v. Saaverda* (2018) 24 Cal.App.5th 605, 612.) Even when the crime is based on a "duress" as opposed to a "force" theory, the focus is on the conduct of the assailant and not the state of mind of the child victim. (*People v. Soto*, *supra*, 51 Cal.4th at p. 245; see also *People v. Leal* (2004) 33 Cal.4th 999 ["duress" includes threat of hardship, such as not seeing a close relative]; *People v. Barton* (2020) 56 Cal.App.5th 496, 517-519.)

> [T]he legal definition of duress is objective in nature and not dependent on the response exhibited by a particular victim. In *People v. Leal*, *supra*, 33 Cal.4th 999, we held that "duress," as used in section 288(b)(1), means " 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' " (*Leal*, at p. 1004 … .) Because duress is measured by a purely objective standard, a jury could find that the defendant used threats or intimidation to commit a lewd act without resolving how the victim subjectively perceived or responded to this behavior. Consistent with the language of section 288 and the clear intent of the Legislature, the focus must be on the defendant's wrongful act, not the victim's response to it.

(*People v. Soto*, *supra*, 51 Cal.4th at p. 246, italics omitted.)

8990.1-General standard for proof of pandering 12/09

Penal Code section 266i, subdivision (a), which defines the crime of pandering, is subdivided into six parts labeled (1) through (6). But these subparts do not state different offenses—they merely define the different circumstances under which the crime of pandering may be committed. (*People v. Lax* (1971) 20 Cal.App.3d 481, 486.) The statute defines a broad spectrum of behavior and degrees of culpability. (*People v. Almodovar* (1987) 190 Cal.App.3d 732, 740.) " 'Pimping and pandering involve the corruption of others. The perpetrator of these offenses encourages, or profits from, the commission of crimes by others. The offenses evidence a "readiness to do evil" [citation] and are "extremely repugnant to accepted moral standards." …' [Citation.]" (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 856.)

The term "prostitution" for purposes of section 266i is not limited to acts of sexual intercourse, but includes lewd and dissolute acts of various kinds. (*People v. Grow* (1978) 84 Cal.App.3d 310, 313.)

The pimping and pandering statutes are designed to discourage prostitution by discouraging people other than the prostitute from augmenting or expanding a prostitute's operation or increasing the supply of available prostitutes. (*People v. McNulty* (1988) 202 Cal.App.3d 624, 632; *People v. Hashimoto* (1976) 54 Cal.App.3d 862, 867.) With one exception, case authority holds that a woman's pre-existing status as a prostitute is no defense to a pandering charge, and it is immaterial whether the procurement is at the prostitute's request or the defendant's initiative. (*People v. Patton* (1976) 63 Cal.App.3d 211, 216; *People v. Caravella* (1970) 5 Cal.App.3d 931, 933; but see *People v. Wagner* (2009) 170 Cal.App.4th 499, 506-510 [not pandering for defendant to ask existing prostitute to come work for him].) It is also immaterial that a defendant received no money or that the solicitation to become a prostitute was unsuccessful. (*People v. DeLoach* (1989) 207 Cal.App.3d 323, 333; *People v. Caravella*, *supra*.)

9090.1-There was no federal due process violation 11/10

THERE WAS NO FEDERAL DUE PROCESS VIOLATION.

Under the United States Constitution, before the federal speedy trial constitutional right is triggered, a defendant is protected against prejudicial pretrial delay by the federal right to due process of law. (*People v. Cowan* (2010) 50 Cal.4th 401, 430; see also *People v. Catlin* (2001) 26 Cal.4th 81, 107; *People v. Butler* (1995) 36 Cal.App.4th 455, 463-464; *People v. Belton* (1992) 6 Cal.App.4th 1425, 1429.) Although the California Supreme Court has described the exact standard as "not entirely settled" (*People v. Nelson* (2008) 43 Cal.4th 1242, 1251), certain principles have been established.

Federal due process requires dismissal only "if it were shown at trial that the preindictment delay in [the] case caused *substantial prejudice* to [the defendant's] rights to a fair trial and that the delay was an *intentional* device to gain tactical advantage over the accused." (*United States v. Marion* (1971) 404 U.S. 307, 324 (*Marion*), italics added; see also *United States v. Lovasco* (1977) 431 U.S. 783, 795.) "A [due process] claim based upon the federal Constitution requires a showing that the delay was undertaken to gain a tactical advantage over the defendant." (*People v. Catlin*, *supra*, 26 Cal.4th at p. 107; see also *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1183; cf. *People v. Nelson*, *supra*, 43 Cal.4th at pp. 1251-1254 and *People v. Boysen* (2007) 165 Cal.App.4th 761, 775-776.) Thus, the court should not apply any balancing test under federal due process analysis until the defendant establishes that the delay was intentionally caused by the state. (*People*

v. Hannon (1977) 19 Cal.3d 588, 610, fn. 12, *People v. Shockley* (1978) 79 Cal.App.3d 669, 678-679, fn. 2.) Certainly, "investigative delay does not deprive [a defendant] of due process, even if the defense might have been somewhat prejudiced by the lapse of time." (*United States v. Lovasco*, *supra*, 431 U.S. at p. 796.)

In addition, the defendant has the burden of establishing actual and substantial prejudice. (*Marion*, *supra*, 404 U.S. at p. 324; *People v. Belton*, *supra*, 6 Cal.App.4th at pp. 1433-1434.) But there is no presumption of prejudice. (*People v. Nelson*, *supra*, 43 Cal.4th at p. 1250.) Certainly, possible prejudice is inherent in any delay. Delay may weaken the government's case just as much as the defendant's. (*Doggett v. United States* (1992) 505 U.S. 647, 655; *Marion*, *supra*, at p. 322.) But such possible prejudice cannot prove a due process violation without consideration of the other criteria. (*Doggett v. United States*, *supra*.) The "real possibility" that memories will dim, witnesses will become inaccessible and evidence will be lost, are not in themselves enough to demonstrate that the defendant cannot receive a fair trial, and that the case therefore should be dismissed. (*Marion*, *supra*, at pp. 325-326.) "Even a showing of some detriment, however, does not necessarily mean that a denial of due process has occurred." (*People v. Price* (1985) 165 Cal.App.3d 536, 542.)

9100.1-6th Amendment does not apply until defendant is an "accused" 10/09

THE SIXTH AMENDMENT SPEEDY TRIAL RIGHT IS NOT TRIGGERED UNTIL THE DEFENDANT BECOMES AN "ACCUSED" AS DEFINED BY THE UNITED STATES SUPREME COURT.

The Sixth Amendment to the United States Constitution mandates that in all criminal prosecutions, the "accused" shall enjoy the right to a speedy trial. Consequently, a person is entitled to the protection of this amendment *only after* becoming an "accused." (*United States v. Marion* (1971) 404 U.S. 307, 313 (*Marion*).)

One becomes an "accused" in a felony case upon either (1) the filing of an indictment or information, or (2) actual restraint by arrest *and* being held to answer. (*Marion*, *supra*, 404 U.S. at p. 320; *People v. Martinez* (2000) 22 Cal.4th 750, 755, 759-762 (*Martinez*).) "[I]t is either a formal indictment or information or else the actual restraints imposed by arrest *and* holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." (*Marion*, *supra*, 404 U.S. at p. 320*,* italics added.) The California Supreme Court has indicated that the "arrest and holding to answer" Sixth Amendment trigger is broader than an arrest followed by a preliminary hearing binding a defendant over for trial. It includes arrest with continuing restraint. (*Martinez*, *supra*, 22 Cal.4th at pp. 762-765.)

But whatever the precise limits of "arrest and holding to answer," one does not become "accused" merely upon the filing of a felony complaint or the issuance of an arrest warrant. The Sixth Amendment speedy trial right does *not* extend to the period before arrest and continuing restraint when the sole accusatory pleading filed against the defendant is a felony criminal complaint. (*Marion*, *supra*, 404 U.S. at pp. 320-321; *People v. Hannon* (1977) 19 Cal.3d 588, 605, 607-608.) This is so because a felony complaint is not a formal accusation upon which a defendant may be brought to trial—it is a preliminary accusation invoking the authority of a magistrate only. (*Martinez*, *supra*, 22 Cal.4th at pp. 763-764.) Therefore, the filing of a felony complaint or the issuance of an arrest warrant are, by themselves, insufficient to trigger the protection of the federal constitutional right to a speedy trial. (*People v. DePriest* (2007) 42 Cal.4th 1, 26; *People v. Horning* (2004) 34 Cal.4th 871, 891; *Martinez*, *supra*, 22 Cal.4th at pp. 754-755, 761-762.)

By contrast, in misdemeanor cases the criminal complaint is the formal accusation giving the court trial jurisdiction. Thus, the federal constitutional right to a speedy trial is triggered by filing a misdemeanor criminal complaint. (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 254-259.)

9100.2-"Arrest" requires actual and continuing restraint 10/12

The term "arrest" under the *Marion* test (*United States v. Marion* (1971) 404 U.S. 307) has a limited, special meaning unique to the Sixth Amendment speedy trial right analysis. An arrest begins the speedy trial clock only if the arrest comes with "actual" or "continuing" restraint. (*United States v. Marion*, *supra*, 404 U.S. at p. 320; *People v. Martinez* (2000) 22 Cal.4th 750, 761-763; *People v. Williams* (2012) 207 Cal.App.4th 1, 6 [cite and release on promise to appear not "arrest" triggering Sixth Amendment speedy trial right].) Thus, for example, a "detainer" is not an arrest. (*People v. Horning* (2004) 34 Cal.4th 871, 891 [letter to Arizona Department of Corrections with arrest warrant attached "for use as detainer"]; see also *People v. Belton* (1992) 6 Cal.App.4th 1425, 1430-1431 [administrative segregation in prison not an arrest for federal speedy trial purposes].)

9100.3-Speedy trial rights do not relate back to dismissed case 10/09

"[T]he [federal] Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges. Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause." (*United States v. MacDonald* (1982) 456 U.S. 1, 7; see also *Serna v. Superior Court* (1985) 40 Cal.3d 239, 251; *People. v. Price* (1985) 165 Cal.App.3d 536, 541.)

9100.4-Defendant must establish presumptive prejudice 3/12

THE DEFENDANT CANNOT ESTABLISH A PRESUMPTION OF PREJUDICE TO SUPPORT THE CLAIMED VIOLATION OF THE SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL

Whether or not there is a violation of the Speedy Trial Clause of the Sixth Amendment is determined by the four-factor test set forth by the United States Supreme Court in *Barker v. Wingo* (1972) 407 U.S. 514 (*Barker*). The court need not engage in *Barker*'s four-factor test unless and until the defendant makes a threshold showing of actual or presumed prejudice. (*Leaututufu v. Superior Court* (2011) 202 Cal.App.4th Supp. 1, 6.) The defendant need not prove actual prejudice as a prerequisite to obtaining a hearing at which evidence relevant to this four-factor balancing test is heard if he or she can establish a presumption of prejudice. (*Moore v. Arizona* (1973) 414 U.S. 25, 26; *Serna v. Superior Court* (1985) 40 Cal.3d 239, 252.)

To establish a presumption of prejudice, the defendant must establish that the interval from the date the federal speedy trial right was triggered and the ultimate trial date crossed the dividing line from ordinary delay to presumptively prejudicial delay. (*Doggett v. United States* (1992) 505 U.S. 647, 651-652 (*Doggett*); *Barker*, *supra*, 407 U.S. at pp. 530-531.) In other words, "[t]he initial assertion of prejudice by the defendant due to the length of the delay, serves as a triggering mechanism for further analysis." (*Leaututufu v. Superior Court*, *supra*, 202 Cal.App.4th at Supp. pp. 6-7.)

"Prejudice is presumed when it is reasonable to assume sufficient time elapsed to affect adversely one or more of the interests protected by the speedy trial clause." (*Ogle v. Superior Court* (1992) 4 Cal.App.4th 1007, 1020.) These interests are (1) prevention of oppressive pretrial

incarceration; (2) minimization of the accused's anxiety and concern; and (3) limiting possible impairment of the defense. (*Barker*, *supra*, 407 U.S. at p. 532.)

The dividing line for "presumptive prejudice," depending on the charges, is generally around one year. (*Doggett*, *supra*, 505 U.S. at p. 652, fn. 1; *People v. Horning* (2004) 34 Cal.4th 871, 892.)

9100.5-Four *Barker v. Wingo* factors favor prosecution 2/14

THE *BARKER v. WINGO* FOUR FACTORS BALANCE IN FAVOR OF THE PROSECUTION.

Assuming the federal right to a speedy trial has been "triggered" and the threshold of actual or "presumptive" prejudice have both been established by the defendant, then the court must determine if there is a speedy trial violation using the four-factor test of *Barker v. Wingo* (1972) 407 U.S. 514, 522 (*Barker*).) Because "[t]he speedy-trial right is 'amorphous,' 'slippery,' and 'necessarily relative,' " the High Court in *Barker* "refused to 'quantif[y]' the right 'into a specified number of days or months' or to hinge the right on a defendant's explicit request for a speedy trial." (*Vermont v. Brillon* (2009) 556 U.S. 81, 89-90, quoting *Barker*, *supra*, 407 U.S. at p. 522.)

The four factors of the Sixth Amendment speedy trial balancing test are the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." (*Barker*, *supra*, 407 U.S. at p. 530.) None of these four factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." (*Id*. at p. 533.)

"The burden of demonstrating a speedy trial violation under *Barker*'s multifactor test lies with the defendant." (*People v. Williams* (2013) 58 Cal.4th 197, 233 (*Williams*), citing *Barker*, *supra*, 407 U.S. at p. 532.)

9100.5a-The length of the delay 9/20

The Length of the Delay

The overall length of the delay is the first of four *Barker v. Wingo* (1972) 407 U.S. 514 (*Barker*) factors that are considered in determining if a federal speedy trial violation has occurred. (*Doggett v. United States* (1992) 505 U.S. 647, 651-652 (*Doggett*).) Once the threshold dividing line of "presumptive prejudice" is passed "the presumption that pretrial delay has prejudiced the accused intensifies over time." (*Ibid.* [eight and a half-year delay in a simple narcotics case]; see also *Williams*, *supra*, 58 Cal.4th at p. 234.)

> The first of the *Barker* factors, the length of the delay "is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." (*Barker*, *supra*, 407 U.S. at p. 530.) If the defendant makes a showing of presumptive prejudice, "the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." (*Doggett*, *supra*, 505 U.S. at p. 652.)

(*Dews v. Superior Court* (2014) 223 Cal.App.4th 660, 665; see also *People v. Bradley* (2020) 51 Cal.App.5th 32, 41.) "In a complex case, delay will weigh less heavily against the state because the significance of the delay 'is necessarily dependent upon the peculiar circumstances of the case' and

because 'the delay that can be tolerated for an ordinary street crime is considerably less than for a serious … charge.' (*Barker*, *supra*, 407 U.S. at pp. 530-531.)" (*Williams*, *supra*, at p. 234 [seven year delay in capital case considered "extraordinary"].)

9100.5b-The reason for the delay 9/20

The Reason for the Delay

The second *Barker* factor is the reason for the delay. The United States Supreme Court states that the courts generally should deny a speedy trial claim if the government has pursued the defendant with "reasonable diligence." (*Doggett*, *supra*, 505 U.S. at p. 656.) The High Court attaches "great weight" to certain "inevitable and wholly justifiable" pretrial delays, including the need to collect witnesses and evidence and then to track down an evasive defendant. (*Ibid.*) "[D]elay occasioned by diligent prosecution would be 'wholly justifiable' and would not support a defendant's speedy trial claim absent a showing of 'specific prejudice to his defense.' " (*Williams*, *supra*, 58 Cal.4th at p. 237, citing *Doggett*, *supra*, 505 U.S. at p. 656.)

On the other hand, the Court has indicated that a defendant will often prevail if it is established that the government intentionally held back its prosecution in order to gain some impermissible advantage at trial. (*Doggett*, *supra*, 505 U.S. at p. 656.) Official bad faith in causing delay will be weighed heavily against the government. (*Barker*, *supra*, 407 U.S. at p. 531.) Dismissal would be "virtually automatic." (*Doggett*, *supra*, 505 U.S. at p. 656.)

"Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground." (*Doggett*, *supra*, 505 U.S. at p. 656.) Official negligence is not tolerated even in cases where the accused cannot demonstrate actual prejudice. (*Ibid.*) "Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. … [T]he weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows." (*Id.* at p. 657-658.) But, "to warrant granting relief, negligence unaccompanied by particularized trial prejudice must have lasted longer than negligence demonstrably causing such prejudice." (*Id.* at p. 657.)

In *Doggett*, the United States Supreme Court found the government did not exercise diligence in trying to find the defendant. The defendant had been living openly under his own name in the United States for six years. A simple credit check located his current address. This six-year delay caused by official negligence coupled with the greater presumption of prejudice, though unspecified, due to such a long delay convinced the High Court that a speedy trial violation had been established. (*Doggett*, *supra*, 505 U.S. at p. 657.)

Finally, the United States Supreme Court established a "general rule" that "delays sought by [assigned] counsel are ordinarily attributable to the defendants they represent." (*Vermont v. Brillon* (2009) 556 U.S. 81, 85; see also *People v. Bradley* (2020) 51 Cal.App.5th 32, 42.) The High Court cautioned, however, that "the State may bear responsibility if there is 'a breakdown in the public defender system.' " (*Vermont v. Brillon, supra*, 556 U.S at p. 94; see generally *Williams*, *supra*, 58 Cal.4th at pp. 245-249.)

9100.5c-Defendant's assertion of speedy trial rights 7/21

Defendant's Assertion of Speedy Trial Rights

The third factor in *Barker*'s federal speedy trial analysis is whether the defendant promptly asserted his or her rights.

> *Barker* rejected "the rule that a defendant who fails to demand a speedy trial forever waives his right." (*Barker*, *supra*, 407 U.S. at p. 528.) But the high court cautioned that its rejection of the demand-or waiver-rule did not mean that a defendant has no responsibility to assert his right. (*Ibid*.) Rather, "the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right." (*Ibid*.) "Whether and how a defendant asserts his right is closely related to the … [remaining *Barker* factors]. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." (*Barker*, *supra*, 407 U.S. at pp. 531-532.)

(*Williams*, *supra*, 58 Cal.4th at pp. 237-238.)

> In applying this factor, one court has explained: "The issue is not simply the number of times the accused acquiesced or objected; rather, the focus is on the surrounding circumstances, such as the timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, the accused's pretrial conduct (as that conduct bears on the speedy trial right), and so forth. [Citation.] The totality of the accused's responses to the delay is indicative of whether he or she actually wanted a speedy trial." [Citation.]

(*Id*. at p. 238; see also *People v. Bradley* (2020) 51 Cal.App.5th 32, 42.)

Thus, a defendant who has not promptly asserted the right to a speedy trial generally should not prevail. (*People v. Hsu* (2008) 168 Cal.App.4th 397, 407 [defendant failed to appear at sentencing for 15 years].) Thus, if a defendant knew or should have known of the pending case, the failure to seek a speedy trial can be dispositive against the defendant. (*People v. Ogle* (1992) 4 Cal.App.4th 1007, 1021.)

> [W]here the defendant had nothing to do with the delay, law enforcement conduct becomes a paramount concern in assessing prejudice … . In contrast, when the defendant knows about the pending case, responsibility for the delay may fairly be apportioned, his failure to assert his rights may be pivotal, and he will be in a position to protect his interests—if he chooses. [¶] Even when the government can offer no good reason to justify the delay, in a given case the defendant's own conduct may defeat his claim.

(*Id.* at pp. 1020-1021 [remanded for trial court to make factually findings regarding defendant's knowledge].)

Similarly, as a general rule, "delays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned." (*Vermont v. Brillon* (2009) 556 U.S. 81, 94 (*Brillon*).) This rule, however, "is not absolute. Delay resulting from a systemic 'breakdown in the public defender system,' [citation], could be charged to the State." (*Ibid*.) The United States Supreme Court "has not had occasion to explain what constitutes a breakdown in the public defender system" (*Williams*, *supra*, 58 Cal.4th at p. 245, but it has explained that "[a]n assigned counsel's failure 'to

move the case forward' does not warrant attribution of delay to the State." (*Brillon*, *supra*, at p. 92; see also *People v. Tran* (2021) 62 Cal.App.5th 330, 349-350.)

9100.5d-Actual prejudice to the defendant 9/20

Actual Prejudice to the Defendant

Actual prejudice is the final *Barker* factor. Prejudice for Sixth Amendment speedy trial purposes can take several recognized forms, including " 'oppressive pretrial incarceration,' 'anxiety and concern of the accused' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." (*Doggett*, *supra*, 505 U.S. at pp. 654-655; see also *Williams*, *supra*, 58 Cal.4th at p. 235.)

As to an in-custody defendant, " '[s]ignificant pretrial incarceration may support a presumption of prejudice, but this prejudice "unenhanced by tangible impairment of the defense function and unsupported by a better showing on the other [*Barker*] factors than was made here, does not alone make out a deprivation of the right to a speedy trial." ' [Citation.]" (*People v. Bradley* (2020) 51 Cal.App.5th 32, 43.)

"[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim." (*Doggett*, *supra*, 505 U.S. at p. 655.) However, in the absence of proof of such particularized prejudice the courts simply turn back to the length of the delay and the rule that the presumption of prejudice increases over time. (*Id*. at p. 657.) Even after applying the presumption of prejudice, the lack of actual prejudice is often fatal to a defendant's federal speedy trial claim. (See, e.g., *People v. Horning* (2004) 34 Cal.4th 871, 894; *Leaututufu v. Superior Court* (2011) 202 Cal.App.4th Supp. 1.)

9100.6-The effect of the presumption of prejudice on *Barker*'s four-factor test 5/14

THE PRESUMPTION OF PREJUDICE ALONE DOES NOT NECESSARILY ESTABLISH A FEDERAL SPEEDY TRIAL VIOLATION.

How the presumption of prejudice" fits into the *Barker v. Wingo* (1972) 407 U.S. 514 (*Barker*) four-factor test analysis has not been precisely defined by the United States Supreme Court, but it appears to impact both the first ("length of delay") and fourth ("actual prejudice to the defendant") factors.

> [T]he Government claims Doggett has failed to make any affirmative showing that the delay weakened his ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. Though Doggett did indeed come up short in this respect, the Government's argument takes it only so far: consideration of prejudice is not limited to the specifically demonstrable, and, as it concedes [citations], affirmative proof of particularized prejudice is not essential to every speedy trial claim. [Citations.] *Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.' 407 U.S., at 532. And though time can tilt the case against either side, see id., at 521; [*United States v.*] *Loud Hawk* [(1986) 474 U.S. 302], at 315, one cannot generally be sure which of them it has prejudiced more severely. Thus, we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker*

criteria, see *Loud Hawk*, *supra*, at 315, it is part of the mix of relevant facts, and its importance increases with the length of delay.

(*Doggett v. United States* (1992) 505 U.S. 647, 655-656.)

Resolving a split of authority among various superior court appellate divisions, the Court of Appeal in *Dews v. Superior Court* (2014) 223 Cal.App.4th 660 (*Dews*) held even after the defense has established a presumption of prejudice, the trial court must still employ *Barker* four-factor test to determine if the Sixth Amendment right to a speedy trial was violated. The appellate court in *Dews* rejected the defense claim that the speedy trial motion must be automatically granted if a presumption of prejudice is shown and the prosecution fails to justify the delay at the outset. (*Id*. at p. 663.) "[T]he [*Barker*] court contemplated a balancing of all the factors even in cases in which the prosecution cannot justify the delay." (*Id*. at p. 668.) The *Dews* court quoted with approval from a recent superior court appellate department opinion:

> "Among other factors, the court must weigh the length of the delay and the prejudice that implies against the reasons for the delay. This is in effect a sort of sliding scale: as the government's fault moves up the scale from indifference and negligence to deliberate action, the length of delay (needed to make out implied prejudice) reduces. Where the government (i.e., the People) presents some excuse or justification for the delay, courts will tolerate longer periods of delay … ." (*Leaututufu v. Superior Court* (2011) 202 Cal.App.4th Supp. 1, 9) "*[T]here is no definite time period after which the court must dismiss the case when (i) the People present no justification for delay, and (ii) the defendant shows no actual prejudice.*" (*Ibid*. italics added).

(*Dews*, *supra*, at p. 669.)

9110.1-Authorities acted with customary promptness 12/19

THE AUTHORITIES ACTED WITH CUSTOMARY PROMPTNESS.

A factor weighing heavily in favor of the prosecution is whether the authorities acted with customary promptness to get the accused before the court. A defendant cannot establish a federal speedy trial claim if his or her case has been prosecuted with "customary promptness." (*Doggett v. United States* (1992) 505 U.S. 647, 652 ; see, e.g., *People v. Almarez* (1985) 168 Cal.App.3d 262, 266 [acts of seeking a warrant, checking jail records, and staking-out a last known address were sufficient justification to overcome any prejudice suffered by the defendant].) In other words, "difficulty in allocating scarce investigative resources provides a valid justification for delay." (*People v. Abel* (2012) 53 Cal.4th 891, 911.)

> While from the panoramic vantage point of hindsight it can be argued that more effort or different means might have been employed by the police to apprehend petitioner, one is not compelled to conclude that what was done was unreasonable. In the total picture we must recognize that the duties and functions of a police officer are so varied and numerous as to require the constant exercise of discretion in the setting of priorities in his day-to-day work. Emergencies and other unexpected immediate demands upon his time can easily cause interruption of scheduled or planned activities of what might be called routine investigation. [¶] It is perhaps an unfortunate, but nonetheless existing, fact of life in a democratic society that only so much time, manpower and money can be expended toward any single criminal case.

(*Kaikas v. Superior Court* (1971) 18 Cal.App.3d 86, 90.) "But that doesn't mean the police and prosecution are immune from judicial scrutiny when those decisions impact the defendant's fair trial rights. Although the difficulty in allocating scarce prosecutorial resources is a strong justification for precharging delay [citation], courts will generally not countenance delays that are attributable to police negligence or intentional misconduct." (*People v. Booth* (2016) 3 Cal.App.5th 1284, 1309.)

Similar considerations apply when there is delay by the prosecution in determining whether a criminal suspect should be charged. The difficulty in allocating scarce prosecutorial resources is also valid justification for delay. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1257; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 915; but see *Dickerson v. Superior Ct.* (2019) 40 Cal.App.4th Supp. 1, 12-13 [prosecution must present evidence, not just argument, as to why the defendant's case, not just cases in general, was delayed].) Equally important, is a prosecuting agency's judgment that the evidence, though perhaps sufficient to establish probable cause to arrest, is inadequate to convict beyond a reasonable doubt. (*People v. Cowan* (2010) 50 Cal.4th 401, 435; *People v. Nelson*, *supra*, 43 Cal.4th at p. 1256.)

> In balancing prejudice and justification, it is important to remember that prosecutors are under no obligation to file charges as soon as probable cause exists but before they are satisfied that guilt can be proved beyond a reasonable doubt or before the resources are reasonably available to mount an effective prosecution. Any other rule "would subordinate the goal of orderly expedition to that of mere speed." (*People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at p. 915.)

(*People v. Boysen* (2007) 165 Cal.App.4th 761, 777.)

9110.2-Defendant primarily responsible for delay 6/14

DEFENDANT'S OWN CONDUCT WAS PRIMARILY RESPONSIBLE FOR THE DELAY.

The People should not be held accountable for delay in prosecution caused by the defendant's unilateral actions causing the delay. "[D]elay caused by the defense weighs against the defendant." (*Vermont v. Brillon* (2009) 556 U.S. 81, 90.) "The courts agree, for example, that delay caused by the conduct of the defendant constitutes good cause to deny his motion to dismiss." (*People v. Johnson* (1980) 26 Cal.3d 557, 570 [statutory speedy trial issue].) "[I]t is an established maxim of jurisprudence that ' "No man can take advantage of his own wrong.' " (*People v. Seely* (1946) 75 Cal.App.2d 525, 526.) In particular, where a criminal defendant is a fugitive from justice, he or she loses the right to insist upon a trial within the prescribed period. (*Ibid.*; *In re Shortridge* (1907) 5 Cal.App. 371, 379.)" (*People v. Lawrence* (1985) 172 Cal.App.3d 1069, 1077.)

"It is a familiar practice to consider an accused's own acts when ruling on a claim that a speedy trial is denied. [Citations.]" (*People v. Abraham* (1986) 185 Cal.App.3d 1221, 1228.) "Because the delay was directly caused by respondent's wrongful act, justification and good cause are demonstrated by the prosecution. [Citations.] We further conclude that, *as a matter of law*, the harm to respondent resulting from his wrongful act is outweighed by the justification. [Citation.]" (*Id.* at pp. 1229-1230, italics added.)

Indeed, delay attributed to a defendant fleeing the jurisdiction may constitute a waiver of the right to claim a due process or speedy trial violation. " '[A] defendant who flees the jurisdiction of a court for the purpose of avoiding prosecution waives the right to a speedy trial.' [Fn. omitted.]" (*People v. Perez* (1991) 229 Cal.App.3d 302, 308.) The balancing tests for a speedy trial or due

process claim "do[] not come into play when the defendant has fled the jurisdiction for the purpose of avoiding prosecution. [T]he fugitive, having done all he or she can do to avoid being brought to justice, cannot then claim that denial of the right to speedy trial resulted from the ensuing delay." (*Id*. at p. 314; see also *People v. Garcia* (2014) 223 Cal.App.4th 1173, 1178.) It does not matter whether the defendant knew the exact nature of the charges or whether charges were actually pending when the defendant fled the jurisdiction, so long as it is shown the defendant deliberately fled to avoid prosecution. (*People v. Garcia*, *supra*, 223 Cal.App.4th at p. 1179; *People v. Perez*, *supra*, 229 Cal.App.3d at p. 309.)

"We conclude that because defendant is solely to blame for the long delay in her trial, the application of sanctions would be inappropriate and a miscarriage of justice." (*People v. Lawrence*, *supra*, 172 Cal.App.3d at p. 1078 [*Hitch* motion for sanctions denied because evidence lost during 11 year period in which defendant left the state and used various aliases]; see also *People v. DePriest* (2007) 42 Cal.4th 1, 28 [defendant fled to Missouri where he committed new crime for which he was incarcerated]; *People v. Horning* (2004) 34 Cal.4th 871, 894 [defendant was either at large or incarcerated for crimes committed in Arizona]; *People v. Garcia¸ supra*, 223 Cal.App.4th at pp. 1178-1179 [after killing defendant asked witness to drive him to border where he escaped into Mexico and he was not arrested until 33 years later]; *People v. Hsu* (2008) 168 Cal.App.4th 397, 407 [defendant failed to appear at sentencing for 15 years]; see also *People v. Perez*, *supra*, 229 Cal.App.3d at pp. 308-314 [defendant failed to appear in court and fled to Venezuela]; *People v. Almarez* (1985) 168 Cal.App.3d 262, 265-266 [defendant gave false name or alias when contacted by authorities and thus avoiding outstanding arrest warrants].)

9110.3-Delay to complete undercover operation is justified 10/09

DELAY TO COMPLETE AN UNDERCOVER POLICE OPERATION IS JUSTIFIED.

Adequate justification for delay exists if a defendant's case is part of a continuing undercover operation by law enforcement that would be compromised by an early arrest and prosecution. In *People v. Patejdl* (1973) 35 Cal.App.3d 936, for example, a delay of eleven months was held justified because the police were conducting an undercover narcotics buy-program and an indictment of the defendant would have ruined the investigation. The appellate court held the need to complete the investigation constituted strong justification for the delay. (*Id.* at pp. 944-946.)

The same result was reached on similar facts in *People v. Wright* (1969) 2 Cal.App.3d 732. The appellate court stated: "It is … obvious that the effectiveness of [an undercover agent] does not survive the time it becomes known that he is a policeman. The public thus has a substantial interest in keeping the officer's identity secret for a reasonable period of time while he continues his investigations. This public interest is a legitimate reason for delaying the arrest of an individual wrongdoer." (*Id.* at p. 736.)

9110.4-Availability of new evidence justifies delay 12/15

INVESTIGATIVE DELAY LEADING TO NEW EVIDENCE IS STRONG JUSTIFICATION FOR DELAY.

The justification for delay is strong when it is "investigative delay, nothing else." (*People v. Nelson* (2008) 43 Cal.4th 1242, 1256; see also *People v. Cowan*, *supra*, 50 Cal.4th at pp. 431, 434.)

In *United States v. Lovasco* (1977) 431 U.S. 7893, the United States Supreme Court "h[e]ld that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." (*Id*. at p. 796.) Certainly, the availability of new evidence is a form of justified investigative delay. (See, e.g., *People v. New* (2008) 163 Cal.App.4th 442 [similarity of defendant's killing of third wife provided circumstantial evidence that first wife's killing at hands of defendant was not an accident].)

In addition, many previously unsolved crimes result in prosecution years after the fact due to scientific, medical or forensic advances. "Even when foul play is suspected, when available medical evidence does not support the suspicion further investigation certainly is justified." (*People v. Catlin* (2001) 26 Cal.4th 81, 109 ["Because of limitations in forensic science and because of the manner in which [the victim's] tissue had been preserved, it would have been extremely difficult or impossible to make out a case against defendant at or near the time of the murder."].) In recent years, this has been particularly true through the use of DNA. (See *People v. Nelson*, *supra*, 43 Cal.4th at p. 1254 [defendant linked to 1976 murder through DNA comparison in 2002].)

> In this case, the justification for the delay was strong. The delay was investigative delay, nothing else. The police may have had some basis to suspect defendant of the crime shortly after it was committed in 1976. But law enforcement agencies did not fully solve this case until 2002, when a comparison of defendant's DNA with the crime scene evidence resulted in a match, i.e., until the cold hit showed that the evidence came from defendant. Only at that point did the prosecution believe it had sufficient evidence to charge defendant. A court should not second-guess the prosecution's decision regarding whether sufficient evidence exists to warrant bringing charges.

(*Id*. at p. 1256; see also *People v. Cordova* (2015) 62 Cal.4th 104, 120; *People v. Lazarus* (2015) 238 Cal.App.4th 734, 758-759.)

9120.1-Defendant cannot establish actual prejudice 11/13

THE DEFENDANT CANNOT ESTABLISH ACTUAL PREJUDICE.

A showing of actual prejudice requires proof that the defendant's ability to defend against the charges has been impaired as a result of delay. The defendant must present evidence of actual prejudice. Bare conclusory statements, such as a claim of lack of recall, are not sufficient to establish actual prejudice. (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 250.) "The showing of actual prejudice which the law requires must be supported by particular facts and not … by bare conclusionary statements." (*Crockett v. Superior Court* (1975) 14 Cal.3d 433, 442.) In some cases declarations may be sufficient. (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1332; *People v. Ibarra* (1984) 162 Cal.App.3d 853, 858.) But a mere allegation of prejudice, even when supported by affidavits, is not sufficient to carry the defendant's burden. (*People v. Ibarra*, *supra*.) Certainly, vague, general, or conclusory declarations are insufficient to establish actual prejudice. (*Blake v. Superior Court* (1980) 108 Cal.App.3d 244, 250-251; *People v. Sahagun* (1979) 89 Cal.App.3d 1, 23-24.)

The "real possibility" that memories will dim, witnesses will become inaccessible, and evidence will be lost are not in themselves enough to demonstrate that the defendant cannot receive a fair trial and, therefore, that the case should be dismissed. (*United States v. Marion* (1971) 404 U.S. 307, 325-326.) " 'I can't recall,' standing alone, realistically cannot be considered more than *minimal prejudice* when weighed against the justification for the delay. [Fn. omitted.]" (*People v. Vanderburg* (1973) 32 Cal.App.3d 526, 533, italics in original.) Clearly a defendant cannot make a showing of actual prejudice by vague claims of lost or faded memories. (*Serna v. Superior Court*, *supra*, 40 Cal.3d at pp. 250-251 [Four year delay]; *Shleffar v. Superior Court* (1986) 178 Cal.App.3d 937 [27 month delay].)

Even if there is a showing of faded witness memory, the defendant must establish that these memories faded as the result of the unjustified delay rather than for other reasons, such as drug or alcohol use. (*People v. Jones* (2013) 57 Cal.4th 899, 922-923; *People v. Cowan* (2010) 50 Cal.4th 401, 432; see also *People v. Butler* (1995) 36 Cal.App.4th 455, 464; *People v. Morris* (1988) 46 Cal.3d 1, 37-38; *People v. Sahagun*, *supra*, 89 Cal.App.3d at p. 24.)

Finally, a defendant cannot rely on the loss or destruction of evidence in the hands of law enforcement as a form of actual prejudice. Under such circumstances, the determination whether defendant is entitled to a remedy, and what remedy is appropriate, is judged by *Trombetta-Hitch* principles, rather than applying the windfall dismissal remedy for speedy trial violations. (*People v. Price* (1985) 165 Cal.App.3d 536, 545.)

9120.2-No prejudice through lost plea bargaining/sentencing opportunity 11/07

DEFENDANT CANNOT ESTABLISH PREJUDICE THROUGH LOST PLEA BARGAINING OR SENTENCING OPPORTUNITIES.

A defendant's claim that pretrial delay prejudiced their ability to plea bargain, or to obtain a lesser or concurrent sentence, is not a cognizable ground to claim a constitutional speedy trial or due process violation. (*People v. Lowe* (2007) 40 Cal.4th 937.)

> The prosecution in this case filed criminal charges against defendant, but it did not notify him thereof until he had completed a jail term in a neighboring county for a probation violation. There is no evidence that the delay has impaired defendant's ability to defend against the charges. He contends, however, that he should be allowed to establish prejudice from the delay simply by showing that he lost the chance to serve any sentence stemming from the pending charges concurrently with the jail term he was already serving on the probation violation. We disagree.

(*Id*. at pp. 939-940.) This ruling made California law consistent with numerous federal cases cited by the California Supreme Court.

> Consistent with these decisions construing the federal Constitution's right to a speedy trial, we reject defendant's contention that under the California Constitution's speedy trial right, a pending criminal charge must be dismissed solely because the delay in bringing the defendant to trial has cost the defendant the chance to serve the sentence on that charge concurrently with the sentence in another case. If that were so, a delay in bringing a defendant to trial would require dismissal of even a very serious charge (such as murder), despite overwhelming evidence of the defendant's guilt, merely because the defendant was denied the potential benefit of serving some slight portion (perhaps only a few months) of the sentence for that crime concurrently with a sentence previously imposed

in another case. In that situation, the drastic sanction of dismissal would be grossly disproportionate to the harm that the defendant actually suffered—the mere possibility, however slight, that the sentence ultimately imposed for the dismissed crime might have been effectively reduced in some measure, however small, by concurrent service with the sentence for another crime.

(*Id*. at pp. 945-946.)

9120.3-Dismissal is not exclusive remedy to mitigate prejudice 1/17

DISMISSAL IS NOT THE EXCLUSIVE REMEDY TO MITIGATE PREJUDICE.

Even if a defendant is able to establish actual prejudice to their ability to defend the charges as a result of unjustified delay, the court should consider remedial measures short of dismissal to mitigate the prejudice. "If the trial court concludes the delay denied the defendant due process or his constitutional speedy trial rights, the remedy is generally dismissal of the charge." (*People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1330.) But the court has discretion to fashion a remedy other than dismissal in many circumstances. (*Ibid*.; see also *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1185.) "When faced with a situation of this type in a criminal prosecution, trial courts should avoid using a meat ax when a scalpel will do. Dismissal of a prosecution is not called for when a less severe remedy will afford a defendant due process and a fair trial." (*People v. Price* (1985) 165 Cal.App.3d 536, 545.) "When, as here, the delay in prosecution resulted in the loss to the defense of identifiable evidence, the prejudice to the defendant may be substantially mitigated, even virtually eliminated, by presenting the evidence to the jury through alternate means." (*People v. Conrad*, *supra*, 145 Cal.App.4th at p. 1185 [jury instruction].) When raised by way of petition for writ of habeas corpus, the court has "broad discretion to formulate a remedy that is tailored to redress the particular constitutional violation that has occurred." (*People v. Booth* (2016) 3 Cal.App.5th 1284, 1312 [remedy was a new trial with the tape recorded exonerating statements of the unavailable defense witness ordered to be admitted despite their hearsay nature].)

9130.1-Speedy trial motion should be reserved for trial court 9/10

A NON-STATUTORY SPEEDY TRIAL MOTION ALLEGING PREJUDICE TO THE ABILITY OF THE DEFENDANT TO DEFEND THE CASE SHOULD BE RESERVED FOR THE TRIAL COURT.

The defense asserts that the federal and state constitutional rights to a speedy trial and due process of law have been violated by pretrial delay, causing prejudice to the defendant's ability to defend the charges. But such prejudice is difficult, if not impossible, to assess before trial. Actual prejudice can only be fully assessed after a defendant has been forced to do his or her best to prevail at trial. Accordingly, the California Supreme Court has suggested that a motion to dismiss on speedy trial grounds often should be deferred to the trial court and decided after trial. (*People v. Martinez* (2000) 22 Cal.4th 750, 768-770; see also *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 507.) California appellate courts agree. "The appropriate time to seek relief from the prejudice resulting from prosecutorial delay is during or after trial when the claimed denial of due process can be appraised in the light of what the trial discloses." (*People v. Price* (1985) 165 Cal.App.3d 536, 542.) It is within the court's discretion whether to rule upon the motion before, during or after trial. (*People v. Martinez*, *supra*; see also *People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1330; *People*

v. Boysen (2007) 165 Cal.App.4th 761, 781-782; *People v. Abraham* (1986) 185 Cal.App.3d 1221, 1225-1226.)

It is for this reason that a magistrate at a preliminary hearing also has discretion to decline to hear this type of motion. (*Jackson v. Superior Court* (1982) 135 Cal.App.3d 767, overruled on other grounds in *People v. Konow* (2004) 32 Cal.4th 995, 1025, fn. 28.) Judicial economy and efficiency dictate that this motion be heard in the trial court. (*Jackson*, *supra*, at p. 772.)

On the issue of prejudice, the possibility of fabricated testimony by the defendant (such as feigned memory loss) at a motion to dismiss before trial is very real. The defendant's credibility and the nature of his or her testimony must be carefully scrutinized. (*Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 954.) The court is in a much better position to make these judgments if the defendant is first forced to prepare for and present a defense at trial. (See *People v. Butler* (1995) 36 Cal.App.4th 455, 464.)

In *United States v. Marion* (1971) 404 U.S. 307, which dealt with prefiling delays of three to six years, the United States Supreme Court held:

> Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them. Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. *Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature.*

(*Id*. at pp. 325-326, italics added.)

Evidence of the defendant's guilt as shown by the available evidence must also be considered in the balancing process. (*People v. Vanderburg* (1973) 32 Cal.App.3d 526, 533-534; see also *People v. Cave* (1978) 81 Cal.App.3d 957, 966.) This consideration also mitigates in favor of reserving the present motion to the trial department where the actual evidence against the defendant would be presented.

Finally, another reason for deferring speedy trial issues to the trial court is the potential for remedying any prejudice to the defense without the need to impose the drastic remedy of outright dismissal. For example, the trial court would have discretion to fashion a curative jury instruction. (See *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1185-1186.)

9140.1-State due process not violated by pretrial delay 1/17

DEFENDANT'S STATE CONSTITUTIONAL RIGHT TO DUE PROCESS WAS NOT VIOLATED BY PREFILING DELAY.

A defense claim of unreasonable delay in arresting the defendant or filing a criminal complaint against the defendant implicates the state constitutional right of due process, not the federal or state constitutional speedy trial right. (*People v. Cordova* (2015) 62 Cal.th 104, 119; *People v. Abel* (2012) 53 Cal.4th 891, 908 (*Abel*); *People v. Cowan* (2010) 50 Cal.4th 401, 430; *People v. Catlin* (2001) 26 Cal.4th 81, 107.) "The statute of limitations is usually considered the

primary guarantee against overly stale criminal charges [citation], but the right of due process provides additional protection, safeguarding a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence [citation]." (*Abel*, *supra*, 53 Cal.4th at p. 908.) "At bottom, the court must ascertain whether the precharging delay tilted the playing field against the defendant in such a way that it prevented him from receiving a fair trial." (*People v. Booth* (2016) 3 Cal.App.5th 1284, 1303.)

Unlike federal due process, "[i]t is firmly established California law that a finding of a denial of due process based on preaccusation delay is not dependent on a finding that the delay was undertaken by the prosecution to disadvantage the defendant." (*People v. Boysen* (2008) 165 Cal.App.4th 761, 772-773.) "Although under California law a defendant need not show that the preaccusation delay was undertaken to give the prosecution a tactical advantage, the absence of such evidence is nevertheless relevant in the weighing of the prejudice to the defendant against the justification for the delay." (*People v. New* (2008) 163 Cal.App.4th 442, 466.)

"But regardless of whether defendant's claim is based on a due process analysis or a right to a speedy trial not defined by statute, the test is the same, i.e., any prejudice to the defendant resulting from the delay must be weighed against justification for the delay." (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 505; see also *People v. Nelson* (2008) 43 Cal.4th 1242, 1251 (*Nelson*); *Jones v. Superior Court* (1970) 3 Cal.3d 734, 740.) Lack of justification may take the form of either purposeful delay or negligence. (*People v. Lazarus* (2015) 238 Cal.App.4th 734, 754-756 (*Lazarus*).)

Under this weighing test, *there is no presumption of prejudice*. (*People v. Jones* (2013) 57 Cal.4th 899, 921; *Nelson*, *supra*, 43 Cal.4th at p. 1250; *Serna v. Superior Court* (1985) 40 Cal.3d 239, 249-250; *Scherling v. Superior Court*, *supra*, 22 Cal.3d at p. 505, fn. 8; *Jones v. Superior Court*, *supra*, 3 Cal.3d at p. 740.) Since prejudice is not presumed, there must be actual prejudice, and the burden is on the defendant to show such prejudice. (*Nelson*, *supra*, 43 Cal.4th at p. 1250; *Serna v. Superior Court*, *supra*, 40 Cal.3d at p. 250; *Lazarus*, *supra*, 238 Cal.App.4th at p. 754.) "A defendant seeking relief for undue delay in filing charges must first demonstrate resulting prejudice, such as by showing the loss of a material witness or other missing evidence, or fading memory caused by the lapse of time." (*Abel*, *supra*, 53 Cal.4th at p. 908.) "[I]f the defendant fails to meet his or her burden of showing prejudice, there is no need to determine whether the delay was justified. [Citations.]" (*Id*. at p. 909; see, e.g., *People v. Lewis* (2015) 234 Cal.App.4th 203, 213 [defense claims of prejudice "wholly speculative"].)

"Even a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial. By the same token, the more reasonable the delay, the more prejudice the defense would have to show to require dismissal. Therein lies the delicate task of balancing competing interests." (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 915.)

> [W]hether the delay was negligent or purposeful is relevant to the balancing process. Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.

(*Nelson*, *supra*, 43 Cal.4th at p. 1256; see also *People v. Cordova*, *supra*, 62 Cal.4th at pp. 119-120; *People v. Cowan*, *supra*, 50 Cal.4th at p. 431.)

> When, as here, there is both prejudice from, as well as justification for, the precharging delay that occurred, the question of whether the delay violated due process will often depend on the strength of the prosecution's case. [Citation.] If the evidence of the defendant's guilt is strong, the likelihood of consequential prejudice from the precharging delay is reduced and a longer delay will be tolerated, but if the evidence against the defendant is weak, the claimed prejudice will take on added significance and enhance the probability of an unfair trial. [Citation.]

(*People v. Booth*, *supra*, 3 Cal.App.5th at p. 1310.) Finally, in the weighing process, the seriousness of the crime also must be given appropriate consideration. (*Lazarus*, *supra*, 238 Cal.App.4th at p. 757.)

9140.2-State speedy trial right not violated by delay 9/20

DEFENDANT'S STATE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED.

"A defendant's state and federal constitutional speedy trial rights (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15, cl. 1) do not attach before the defendant is arrested or a charging document has been filed." (*People v. Abel* (2012) 53 Cal.4th 891, 908.) There are important differences, however, between the state and federal constitutional speedy trial guarantees.

First, a defendant's state constitutional speedy trial right is triggered by the filing of a felony or misdemeanor complaint—the federal constitutional speedy trial right is not. This is so because article I, section 15, of the California Constitution states that the "defendant" (and not an "accused") in a criminal case has the right to a speedy trial. (*People v. DePriest* (2007) 42 Cal.4th 1, 27; *People v. Martinez* (2000) 22 Cal.4th 750, 765; see also *People v. Conrad* (2006) 145 Cal.App.4th 1175, 1182-1183.)

Second, unlike the federal constitutional right to a speedy trial, "state speedy trial rights 'will be deemed waived unless the defendant *both* objects to the date set *and* thereafter files a timely motion to dismiss.' [Citation.]" (*People v. Bradley* (2020) 51 Cal.App.5th 32, 39, italics in original.)

Finally, *there is no presumption of prejudice*. While uncommonly long delay may trigger a presumption of prejudice under the Sixth Amendment, there is no presumption of prejudice under the California Constitution. Instead, the defendant has the burden of affirmatively demonstrating actual prejudice in order to establish a speedy trial claim under the state constitution. Ultimately, prejudice to the defendant resulting from the delay must be weighed against the justification for the delay. (*People v. DePriest*, *supra*, 42 Cal.4th at p. 27; *People v. Martinez*, *supra*, 22 Cal.4th at pp. 766-768; see also *People v. Conrad*, *supra*, 145 Cal.App.4th at p. 1183.)

As pointed out by the appellate court in *Shleffar v. Superior Court* (1986) 178 Cal.App.3d 937:

> The purpose of the [state] constitutional speedy trial provision is to insure timely prosecutions and to prevent unjustified delays from inhibiting the sound presentation of a defense. But unless a defendant can demonstrate specific prejudice flowing from the delay, the draconian remedy of dismissal should not be invoked merely because the accused was not arrested as quickly as would be possible in the best of all worlds. It is only because a delay can infect the truth finding process by preventing the accused from mounting a viable defense that a dismissal is ever justified.

(*Id*. at p. 946.)

Thus, even a long period of time between the crime and the trial, without more, is not grounds for dismissal under the state speedy trial provision, especially in murder cases where there is no statute of limitations. (See, e.g., *Scherling v. Superior Court* (1978) 22 Cal.3d 493 [11 year delay]; see also *People v. Nelson* (2008) 43 Cal.4th 1242, 1250.) And, until the defendant proves prejudice, there is no need to explore justification for any delay. "[I]t would be unwise to impose upon the courts the inquisitional function of scrutinizing the internal operations of law enforcement agencies when no possible prejudice to the accused has been shown." (*People v. Sobiek* (1973) 30 Cal.App.3d 458, 471.)

9140.3-*Stabio* is wrongly decided 10/09

***STABIO* IS WRONGLY REASONED AND HAS BEEN OVERRULED BY IMPLICATION.**

The defense relies upon the case of *Stabio v. Superior Court* (1994) 21 Cal.App.4th 1488 (*Stabio*). This opinion was aberrant when decided and has since been overruled by the California Supreme Court by implication. And, on careful scrutiny, its reasoning contains several obvious flaws and omissions.

First, the appellate court in *Stabio* erroneously stated: "The federal speedy trial right is triggered when the defendant is accused—when a formal indictment or information is filed, *or the defendant is arrested*. (*United States v. Marion* (1971) 404 U.S. 307, 318-320.)" (*Stabio*, *supra*, 21 Cal.App.4th at p. 1493, italics added.) The court in *Stabio* left out the additional requirement that when arrested a defendant also must be "held to answer" before the federal right to a speedy trial is triggered. The highlight language is directly contrary to higher authority from the United States Supreme Court, and should not be followed. This is a clear misreading of the explicit language of *Marion*. "Both *United States v. Marion* … and *United States v. Lovasco* [(1977)] 431 U.S. 783, 788, establish that an arrest triggers the protection of the Sixth Amendment *only* if the defendant is thereafter held to answer the charges." (*People v. Price* (1985) 165 Cal.App.3d 536, 541, italics added.)

The United States Supreme Court in *United States v. MacDonald* (1982) 456 U.S. 1 clearly held: "Although delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment, [citation], or to a claim under any applicable statutes of limitations, no Sixth Amendment right to a speedy trial arises until charges are pending." (*Id*. at p. 7.) And charges are not pending until a person is both arrested and held to answer under *Marion*.

Second, despite established authority to the contrary, the appellate court in *Stabio* inexplicably applied the Sixth Amendment concepts of presumptive prejudice and the *Barker* four-factor test to delay occurring after filing a felony complaint, an act which triggered only the California speedy trial right. (*Stabio*, *supra*, 21 Cal.App.4th at p. 1493.) *Stabio* found a presumption of prejudice under the state speedy trial provision because one year had elapsed since the felony complaint was filed. The court then applied the federal *Barker* four-factor test rather than California's established balancing test.

Unlike the federal speedy trial provisions, under the state constitutional speedy trial provision *there is never a presumption of prejudice*. Since prejudice is not presumed, there must be actual prejudice, and the burden is on the defendant to show such prejudice. (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250; *People v. DePriest* (2007) 42 Cal.4th 1, 27; *People v. Martinez* (2000) 22 Cal.4th 750, 766-678.) The California Supreme Court in *Martinez* reaffirmed its long-standing

rule: "No presumption of prejudice arises from delay after the filing of the complaint and before arrest or formal accusation by indictment or information [citation]; rather, the defendant seeking dismissal must affirmatively demonstrate prejudice [citation]." (*Id.* at p. 767.)

Even before *Martinez*, the flaws in *Stabio* did not go unnoticed.

> [W]e consider a recent appellate court case that appears to accept that a defendant need not prove actual prejudice in order to prevail on the claim that his right to a speedy trial was violated by a lengthy preaccusation delay. In *Stabio v. Superior Court* … , although the delay at issue was preaccusation, the court followed the Sixth Amendment analysis developed by the court in *Barker v. Wingo* [(1972) 407 U.S. 514], and apparently concluded that a delay of four years and one month between the date the criminal complaint was filed and the defendant was arrested created a presumption of prejudice. We disagree that a Sixth Amendment analysis is appropriate when the claim is preaccusation delay, and we further disagree that the mere fact of a four-year delay in prosecution creates a presumption that a defendant will not be afforded a fair trial.

(*People v. Butler* (1995) 36 Cal.App.4th 455, 467.)

9150.1-Failure to object to trial beyond statutory date is waiver 12/18

A felony case must be dismissed if the defendant is not brought to trial within 60 days of their arraignment on the information or indictment. (Pen. Code, § 1382, subd. (a)(2).) But subdivision (a)(2)(B) states the felony shall not be dismissed if: "The defendant requests or consents to the setting of a trial date beyond the 60-day period. Whenever a case is set for trial on a date beyond the 60-day period by request or consent, expressed or implied, of the defendant without a general waiver, the defendant shall be brought to trial on the date set for trial or within 10 days thereafter."

Similar provisions apply to misdemeanor cases. There is a 30-day period for an in custody misdemeanor defendant and a 1 45-day period for an out-of-custody misdemeanor defendant. (Pen. Code, § 1382, subd. (a)(3).)

> A defendant charged with a misdemeanor has a right under Penal Code section 1382 to be brought to trial within 45 days after arraignment if the defendant is not in custody at that time. (§ 1382, subd. (a)(3).) If, however, the defendant requests or consents to the setting of a trial date after that 45-day period, the defendant must be brought to trial "on the date set for trial or within 10 days thereafter." (§ 1382, subd. (a)(3)(B).) If the defendant is not brought to trial within those time periods, the case against the defendant must be dismissed unless good cause for the delay is shown. (§ 1382, subd. (a).)

(*Pogosyan v. Appellate Division of Superior Ct.* (2018) 26 Cal.App.5th 1028, 1031.)

An "expressed" waiver to a speedy trial usually takes the form of the defendant's personal; on-the-record, time waiver. (See *People v. Anderson* (2001) 25 Cal.4th 543, 605.)

An "implied" time waiver occurs when the defendant fails to object to the setting of a trial date beyond the applicable speedy trial time period. To avoid entering an implied time waiver, the defendant's objection must be made "at the time a cause is set for trial beyond the statutory period." (*People v. Wilson* (1963) 60 Cal.2d 139, 146-147.) "[A] defendant's failure to timely object to the delay and thereafter move for dismissal of the charges is normally deemed a waiver of his right to speedy trial." (*People v. Wright* (1990) 52 Cal.3d 367, 389; see also *People v. Harrison* (2005) 35 Cal.4th 208, 225.) The duty to object timely is not excused because the defendant simply forgot to

object or because the omission was a stratagem. "Neither inadvertence nor gamesmanship dissipates that duty." (See *People v. Lenschmidt* (1980) 103 Cal.App.3d 393, 397 [discussing Pen. Code, § 1381].)

9150.2-Statutory speedy trial date can be extended for good cause 12/18

Subdivision (a) of Penal Code section 1382 sets forth the statutory time limits for both misdemeanor and felony trials, and calls for dismissal if the case is not brought to trial within these time frames. But dismissal is not required under subdivision (a) if "good cause to the contrary is shown."

> Section 1382 does not define "good cause" as that term is used in the provision, but numerous California appellate decisions that have reviewed good-cause determinations under this statute demonstrate that, in general, a number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for the delay, (2) the duration of the delay, and (3) the prejudice to either the defendant or the prosecution that is likely to result from the delay. [Citations] Past decisions further establish that in making its good-cause determination, a trial court must consider all of the relevant circumstances of the particular case, "applying principles of common sense to the totality of circumstances … ." [Citations.] The cases recognize that, as a general matter, a trial court "has broad discretion to determine whether good cause exists to grant a continuance of the trial" [citation], and that, in reviewing a trial court's good-cause determination, an appellate court applies an "abuse of discretion" standard. [Citations.]

(*People v. Sutton* (2010) 48 Cal.4th 533, 547, fns. omitted.)

> Past California decisions have examined a wide variety of circumstances that have been proffered or relied upon as a basis under section 1382 for finding good cause to delay a trial, including (1) the unavailability of a witness, (2) the unavailability of a judge, (3) the unavailability of a courtroom, (4) counsel's need for additional time to prepare for trial, (5) the unavailability of counsel, and (6) the interest in trying jointly charged defendants in a single trial.

(*Id*. at p. 547.)

> In reviewing trial courts' exercise of that discretion, the appellate courts have evolved certain general principles. The courts agree, for example, that delay caused by the conduct of the defendant constitutes good cause to deny his motion to dismiss. Delay for defendant's benefit also constitutes good cause. Finally, delay arising from unforeseen circumstances, such as the unexpected illness or unavailability of counsel or witnesses constitutes good cause to avoid dismissal. Delay attributable to the fault of the prosecution, on the other hand, does not constitute good cause. Neither does delay caused by improper court administration.

(*People v. Johnson* (1980) 26 Cal.3d 557, 570; see also *People v. Bilbrey* (2018) 25 Cal.App.5th 764, 780-781.)

Thus, for example, unless attributed to the state's chronic inability to provide enough public defenders to try cases in a timely manner, good cause normally exists when appointed defense counsel is unavailable to try the defendant's case because he or she is engaged in trial on other matters. (*People v. Sutter*, *supra*, 48 Cal.4th at pp. 551-557.) Similarly, unless due to chronic court congestion, the unavailability of available criminal courts is good cause. (Distinguish *People v.*

Hajjaj (2010) 50 Cal.4th 1184, 1198 [chronic backlog in Riverside County]; *People v. Engram* (2010) 50 Cal.4th 1131 [same].)

Finally, special provisions of Penal Code section 1050 permit continuances when the assigned prosecutor in specified types of charges is unavailable because they are handling another case. (See Pen. Code, § 1050, subd. (g); *Burgos v. Superior Court* (2012) 206 Cal.App.4th 817.)

9150.3-Need to maintain joinder of defendants is good cause 10/12

Subdivision (a) of Penal Code section 1382 sets forth the statutory time limits for both misdemeanor and felony trials, and calls for dismissal if the case is not brought to trial within these time frames. But dismissal is not required under subdivision (a) if "good cause to the contrary is shown." The Legislature has specifically defined "good cause" to include the need to maintain joinder of jointly charged defendants. Penal Code section 1050.1 states:

> In any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the arraignment, preliminary hearing, or trial of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants unless it appears to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time.

If the conditions set forth in this statute exist, the trial court can find good cause under these circumstances even without a formal continuance motion by the prosecutor. (*People v. Sutter* (2010) 48 Cal.4th 533, 558-559.)

What is a "reasonable period of time" to continue one defendant's trial to accommodate delays related to a codefendant or codefendant's counsel various with the circumstances.

> And although past California decisions have held that a *lengthy* continuance of an objecting codefendant's trial to facilitate a joint trial is permissible only in instances in which the state interest in avoiding multiple trials is especially compelling—as when the trials are likely to be long and complex and impose considerable burdens on numerous witnesses (see, e.g., *Greenberger v. Superior Court* (1990) 219 Cal.App.3d 487, 501-506 [upholding six-month continuance of a complex murder trial involving numerous witnesses, where trial court found counsel for codefendants needed substantial time to prepare adequately for trial])—when the proposed delay to permit a single joint trial is relatively brief, the substantial state interests that are served in every instance by proceeding in a single joint trial generally will support a finding of good cause to continue the codefendant's trial under section 1382, even when there is no indication that, were the defendants' trials to be severed, the separate trials would be unusually long or complex. (See, e.g., *People v. McFarland* [(1962)] 209 Cal.App.2d 772, 776-778; see also § 1050.1.)

(*People v. Sutton*, *supra*, 48 Cal.4th at p. 560, italics in original, fn. omitted [trial court did not abuse discretion in trialing codefendant's felony narcotics trial six days because codefendant's counsel was in trial elsewhere]; see also *Smith v. Superior Court* (2012) 54 Cal.4th 592, 596 ["[W]hen the circumstances of one defendant cause a trial to be continued beyond the 60-day period, there is good

cause to continue a codefendant's trial to a date within section 1382's 10-day grace period to permit the defendants to be tried jointly."].)

9150.4-PC1381 demand for trial 9/19

A defendant currently serving a sentence in state prison or county jail may demand resolution of a pending case within 90 days or have the pending action dismissed. (Pen. Code, § 1381 (§ 1381).) The pending case can be in a variety of procedural postures from pre-arraignment to sentencing. For example, section 1381 applies when a defendant has been convicted and placed on probation with imposition of sentence suspended and now faces revocation of probation. (*People v. Wagner* (2009) 45 Cal.4th 1039, 1056 (*Wagner*). But § 1381 does not apply if sentence imposed with execution of the sentence suspended. (*People v. Smith* (2019) 35 Cal.App.5th 399.) Section 1381 also does not apply to out of state prisoners with pending cases in California. (*People v. Dial* (2004) 123 Cal.App.4th 1116, 1122; *People v. Mahan* (1980) 111 Cal.App.3d 28, 33-34.)

A proper demand under section 1381 is made by delivering "written notice of the place of his or her imprisonment … and his or her desire to be brought to trial or for sentencing … ." to the district attorney. A defendant must demonstrate strict and literal compliance with section 1381 before invoking the drastic sanction of dismissal. (*People v. Garcia* (1985) 171 Cal.App.3d 1187, 1191 (*Garcia*); *People v. Gutierrez* (1994) 30 Cal.App.4th 105, 111 (*Gutierrez*); *People v. Ruster* (1974) 40 Cal.App.3d 865, 873.) " 'Any other rule would encourage resort to half-hearted, disingenuous gestures toward compliance calculated at most to start the 90-day period running and contrived in fact to achieve official default.' [Citation.]" (*Garcia*, *supra*, 171 Cal.App.3d at p. 1191.)

Following this rule of strict compliance, a demand sent to a probation officer or county clerk rather than the district attorney is insufficient notice. (*Reynolds v. Superior Court* (1980) 113 Cal.App.3d 510, 514-515.) A demand made before charges are filed is ineffective. (*People v. Belton* (1992) 6 Cal.App.4th 1425, 1432-1433.) And a demand made by a defendant in county jail after being sentenced to state prison but before being transported to prison does not start the statute running. (*Gutierrez*, *supra*, 30 Cal.App.4th at p. 111.)

In one case, the inmate sent a letter to the district attorney's office asking if charges had been dismissed due to the passage of time. The prosecutor took no action. The appellate court ruled section 1381 did not apply because the inmate did not express any "desire to be brought to trial." (*Garcia*, *supra*, 171 Cal.App.3d at pp. 1191-1192.) Similarly, a defendant filing a motion to dismiss under section 1381 evidences the desire to have charges dismissed rather than any desire to be brought to trial. (*Gutierrez*, *supra*, 30 Cal.App.4th at p. 111.)

Even a fully effective section 1381 demand does not automatically cause the action to be dismissed if unresolved after 90 days. Certainly a defendant can consent to a continuance. (*People v. Contreras* (2009) 177 Cal.App.4th 1296, 1303-1304.) In addition, the expressed "desire to be brought to trial" carries with it the implied condition that defendant reasonably cooperate with and not obstruct the prosecutor's efforts to bring the case to trial. (*People v. Manina* (1975) 45 Cal.App.3d 896, 900.) Delay attributable to the defendant can extend the statutory period. For example, the statute is tolled while he or she is unavailable because of active criminal proceedings in the other county, including proceedings related to other section 1381 demands. (*People v. Boggs* (1985) 166 Cal.App.3d 851, 855-856; see also *People v. Manina*, *supra*, 45 Cal.App.3d at pp. 900-901.)

Although the remedy for not timely honoring a section 1381 demand is "dismiss[al] of the action," this does not necessarily include the entire case. For example, when a section 1381 violation occurs in a probation revocation matter, the remedy is dismissal of the revocation action only, not the underlying conviction. (*Wagner*, *supra*, 45 Cal.4th at pp. 1053, 1058.)

Finally, subject to Penal Code section 1387, a dismissal of an action under section 1381 does not bar a new prosecution for the same offense. (*Wagner*, *supra*, 45 Cal.4th at pp. 1059-1061; *People v. Crockett* (1975) 14 Cal.3d 433, 439-440; *Gutierrez*, *supra*, 30 Cal.App.4th at p. 111.) If the action is refiled, the burden is on the defendant to make a new section 1381. (*People v. Eldridge* (1997) 52 Cal.App.4th 91, 95-96.) But any new filing also would be subject to constitutional speedy trial analysis if the defendant could show actual prejudice from the delay. (*Gutierrez*, *supra*, 30 Cal.App.4th at p. 111.)

9160.1-If issue not forfeited, timeliness of prosecution can be determined after trial 8/19

Generally "the prosecution bears the burden of proving by a preponderance of evidence that the action was commenced within the applicable limitations period." (*People v. Simmons* (2012) 210 Cal.App.4th 778, 794 (*Simmons*), citing *People v. Castillo* (2008) 168 Cal.App.4th 364,369, and *People v. Linder* (2006) 139 Cal.App.4th 75, 84; see also *People v. Mahoney* (2013) 220 Cal.App.4th 781, 790.) "A more accurate description of the rule is that 'the statute of limitations is a substantive matter which the prosecution must prove by a preponderance of evidence if the defense puts the prosecution to its proof.' (*People v. Le* (2000) 82 Cal.App.4th 1352, 1360; … .)" (*Simmons*, *supra*, 210 Cal.App.4th at p. 794.) If the defense does not put the prosecution to its proof, the issue may or may not be forfeited post-judgment.

When the charging document "indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time." (*People v. Williams* (1999) 21 Cal.4th 335, 341 (*Williams*); see also *People v. Dalton* (2019) 7 Cal.5th 166, 241; *People v. Delgado* (2010) 181 Cal.App.4th 839, 849; *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1270.) If the court cannot determine from the available record whether the action is barred, it should hold a hearing or, if it is an appellate court, it should remand for a hearing." (*People v. Williams*, *supra*, at p. 341; see also *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1051; *People v. Lynch* (2010) 182 Cal.App.4th 1262, 1271-1275.) On remand, there is no right to a jury trial on the underlying factual issues relating to the statute of limitations. (*People v. Lynch*, *supra*, at pp. 1275-1276.)

> [W]hen the trial court determines that certain counts are not time-barred, defendant's convictions as to those charged offenses will stand if the reviewing court can determine from the available record, including both the trial record and the preliminary hearing transcript, that the action is not time-barred despite the prosecution's error in filing an information in which those counts appeared to be time-barred.

(*People v. Smith* (2002) 98 Cal.App.4th 1182, 1189; see also *People v. Delgado*, *supra*, 181 Cal.App.4th at p. 849; *People v. Hollie*, *supra*, 180 Cal.App.4th at p.1271.)

But, "[w]hen the charging document does not indicate on its face the action is time barred, the forfeiture rule applies." (*People v. Martinez* (2017) 10 Cal.App.5th 686, 715.) "[A] defendant may forfeit factual issues relating to the statute of limitations when, as here, the information alleges facts indicating that the prosecution was timely." (*Simmons*, *supra*, 210 Cal.App.4th at p. 793; see also *People v. Ortega* (2013) 218 Cal.App.4th 1418, 1428.)

> Indeed, this is precisely what we held in *People v. Padfield* (1982) 136 Cal.App.3d 218, a case quoted with approval in *Williams*, *supra*, 21 Cal.4th at page 345. There, the information alleged discovery of the crime within the limitations period. The defendant pled no contest and then asserted the statute of limitations on appeal. We held the defendant had forfeited the issue, explaining that the nonforfeiture rule was limited to cases where the accusatory pleading showed on its face that the action was untimely. "[W]hen the pleading is facially sufficient, the issue of the statute of limitations is solely an evidentiary one. The sufficiency of the evidence introduced on this issue does not raise a question of jurisdiction in the fundamental sense." (*People v. Padfield*, *supra*, 136 Cal.App.3d at p. 226; see *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1439 [noting that if "the People plead facts to avoid the bar of the statute of limitations, and the defendant fails to put the People to their proof in the trial court, then the defendant forfeits the statute of limitations issue and cannot raise it for the first time on appeal"].)

(*Simmons*, *supra*, 210 Cal.App.4th at pp. 793-794.)

9170.1- Defendant can waive or forfeit right to raise statute of limitations violation 12/19

A defendant may intentionally relinquish the protection of the statute of limitations. In *Cowan v. Superior Court* (1996) 14 Cal.4th 367 (*Cowan*), the California Supreme Court held a defendants may plead guilty to time-barred lesser offenses as part of negotiated dispositions, provided they do so for their own benefit and with an express informed waiver of the right to assert the statute. (*Id*. at p. 374.) Citing case from another state, the *Cowan* court adopted the following rule:

> [The] statute of limitations can be waived if the trial court determines that the following prerequisites have been met: [¶] "(1) the waiver is knowing, intelligent, and voluntary; (2) it is made for the defendant's benefit and after consultation with counsel; and (3) the defendant's waiver does not handicap his defense or contravene any other public policy reasons motivating the enactment of the statutes."

(*Id*. at p. 372.) "The court need merely inform the defendant in some fashion that the charge is, or may be, time-barred, and elicit a simple waiver of the bar." (*Id*. at p. 373.)

The same principles apply if the case goes to trial. The appellate court in *People v. Stanfill* (1999) 76 Cal.App.4th 1137 (*Stanfill*) held "a defendant forfeits the right to complain on appeal of conviction of a time-barred lesser included offense where the charged offense was not time-barred and the defendant either requested or acquiesced in the giving of instructions on the lesser offense." (*Id*. at p. 1150 [the defense in *Stanfill* requested these instructions].) The appellate court in *People v. Meza* (2019) 38 Cal.App.5th 821 (*Meza*) disagreed with *Stanfill* to the extent it held a defendant could forfeit the protection of the statute of limitations by acquiescence rather than express waiver. The *Meza* court held that the defendant did not waive the statute of limitation on time-barred lesser included offenses simply because his attorney did not object to their inclusion in the prosecutor's proffered set of jury instructions. (*Id*. at pp. 827-830; see also *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1088-1089.)

> We conclude that, taken alone, general assent to a packet of jury instructions submitted by the prosecution does not show a defendant understood the instructions would allow him to be convicted of a time-barred offense. … Regardless whether we agree with *Stanfill*, we decline to extend its holding to allow forfeiture where the prosecution requested

the instruction and there is no evidence the defendant made an informed decision to relinquish his right to challenge a conviction for the time-barred lesser included offense on appeal.)

(*Meza*, *supra*, 38 Cal.App.5th at pp. 828-829.)

9180.1-Extension of limitation period does not violate ex post facto 1/13

So long as the statute of limitations applicable at the time of offense has not expired, the Legislature may extend the limitations period without violating ex post facto. (*Stogner v. California* (2003) 539 U.S. 607, 632-633, 618-619; *People v. Delgado* (2010) 181 Cal.App.4th 839, 850; *People v. Superior Court (German)* (2004) 116 Cal.App.4th 1192, 1196.) "Although the six-year period of limitations was applicable when the offenses were committed, the extension of the limitations period to 10 years governs the present case without violation of the prohibition against ex post facto laws." (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1272.) "Here, the Legislature did not revive an expired statute of limitations period but simply extended one *before* expiration. That is constitutionally permissible." (*In re White* (2008) 163 Cal.App.4th 1576, 1583.) "The critical question for purposes of ex post facto analysis" is whether the provisions of the [longer] statute of limitations "became effective as to the charged offenses before expiration of the standard limitations period." (*People v. Terry* (2005) 127 Cal.App.4th 750, 775; see also *People v. Simmons* (2012) 210 Cal.App.4th 778, 787-788.)

The California Legislature has made clear that they intend this rule to apply to any offense still within the original statute of limitations when the limitations period is extended. According to Penal Code section 803.6:

> (a) If more than one time period described in this chapter applies, the time for commencing an action shall be governed by that period that expires the latest in time.
>
> (b) *Any change in the time period for the commencement of prosecution described in this chapter applies to any crime if prosecution for the crime was not barred on the effective date of the change by the statute of limitations in effect immediately prior to the effective date of the change.*
>
> (c) This section is declaratory of existing law.

(Italics added.)

9190.1-Misd. per PC17(b)(4) or (5) has same statute of limitations as felony 11/09

The statute of limitations for each criminal offense is generally based on its potential punishment. (Pen. Code, §§ 799-802.) In determining the applicable statute of limitations for a "wobbler," Penal Code section 805, subdivision (a), provides "[a]n offense is deemed punishable by the maximum punishment prescribed by statute for the offense regardless of the punishment actually sought or imposed." In other words, the statute of limitations for an offense filed as a misdemeanor pursuant to Penal Code section 17, subdivision (b)(4), or reduced by the magistrate pursuant to section 17, subdivision (b)(5), is the same as the identical offense charged as a felony, rather than the one-year misdemeanor statute of limitations. (*People v. Soni* (2005) 134 Cal.App.4th 1510, 1514-1517; *People v. Superior Court (Ongley)* (1987) 195 Cal.App.3d 165, 169.)

9200.1-General standards for statutory construction 11/15

The basic rules of statutory construction are well established:

> We begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." In determining such intent "[t]he court turns first to the words themselves for the answer." We are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." "If possible, significance shall be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." "[A] construction making some words surplusage is to be avoided." "When used in a statute [words] must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.

(*Moyer v. Workmen's Compensation Appeals Board* (1973) 10 Cal.3d 222, 230, internal citations omitted; similarly, see *People v. Arias* (2008) 45 Cal.4th 169, 177; see also *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037; *People v. Cordell* (2011) 195 Cal.App.4th 1564, 1575.)

> If the plain language of the statute does not resolve the inquiry, we may turn to maxims of construction, or consider other aids, including the statute's legislative history and the wider historical circumstances of its enactment, as well as the public policy underlying the law. [Citation.] The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.]

(*People v. Faranso* (2015) 240 Cal.App.4th 456, 461-462.)

In the statutory interpretation process, courts are not super-legislatures determining the wisdom, desirability, or propriety of statutes enacted by the Legislature. (*Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1047; *People v. Christman* (2014) 229 Cal.App.4th 810, 816; *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1081.) The court may not substitute their social and economic beliefs for those of the people's elected representatives. (*Estate of Horman* (1971) 5 Cal.3d 62, 77; *Golden State Homebuilding Assoc. v. City of Modesto* (1994) 26 Cal.App.4th 601, 609.) "[W]e must defer to and honor the Legislature's reasonable determinations made in the course of its efforts to protect the safety and welfare of the public." (*People v. Vangelder* (2013) 58 Cal.4th 1, 34.) Nor does "the fact that a statute could have been drafted to more cleanly state a rule does not, in and of itself, demonstrate the Legislature intended to state some other rule." (*People v. Cortez* (2010) 189 Cal.App.4th 1436, 1440, italics omitted.)

"In the end, ' "we must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003; see also *People v. Barba* (2012) 211 Cal.App.4th 214, 222; *People v. Plumlee* (2008)166 Cal.App.4th 935, 940.)

9200.2-Same rules of statutory construction apply to initiative measures 12/18

"The rules of statutory construction are the same whether applied to the California Constitution or a statutory provision (*Winchester v. Mabury* (1898) 122 Cal. 522, 527), and '[t]he same rules of interpretation should apply to initiative measures enacted as statutes.' (*Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal. App. 3d 661, 672.)" (*People v. Bustamante* (1997) 57 Cal.App.4th 693, 699, fn. 5; see also *People v. Estrada* (2017) 3 Cal.5th 661, 668; *People v. Rizo* (2000) 22 Cal.4th 681, 685.) "We apply the same interpretive principles to initiatives as to legislative enactments, beginning with the text as the best guide to voter intent and turning to extrinsic sources such as ballot materials when necessary to resolve ambiguities." (*In re C.B.* (2018) 5 Cal.5th 118, 125.)

> When we interpret an initiative, we apply the same principles governing statutory construction. We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole. If the language is not ambiguous, we presume the voters intended the meaning apparent from that language, and we may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language. If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure.

(*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571; see also *People v. Arroyo* (2016) 62 Cal.4th 589, 593.)

"In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration. [Citations.]" (*In re Lance W.* (1985) 37 Cal.3d 873, 889; see also *People v. Adelmann* (2018) 4 Cal.5th 1071, 1075; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1099-1100.) " '[I]n the case of a voters' initiative statute … we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.' " (*Robert L. v. Superior Ct.* (2003) 30 Cal.4th 894, 909, quoting *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114; see also *People v. Rocco* (2012) 209 Cal.App.4th 1571, 1575.)

"Ballot pamphlet arguments have been recognized as a proper extrinsic aid in construing voter initiatives adopted by popular vote. [Citations.]" (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 171; see also *Santos v. Brown* (2015) 238 Cal.App.4th 398, 410; *People v. Shabazz* (2015) 237 Cal.App.4th 303, 313.) Ballot explanations by the Legislative Analyst are also a source of construing voter intent. (*In re Lance W.*, *supra*, 37 Cal.3d at p. 888; *People v. Walker* (2016) 5 Cal.App.5th 872, 877.)

"We presume the electorate, when it enacts an initiative, is ' "aware of existing laws and judicial construction thereof." ' (*People v. Gonzales* (2017) 2 Cal.5th 858, 869.)" (*People v. Perez* (2018) 4 Cal.5th 1055, 1067-1068; see also *Santos v. Brown*, *supra*, 238 Cal.App.4th at p. 410.)

> Even in the absence of the Legislative Analyst's advice …, the electorate would be deemed to know of the superseding impact of federal constitutional provisions on state laws or constitutional provisions which conflict with and restrict rights guaranteed by the United States Constitution. The adopting body is presumed to be aware of existing laws and judicial construction thereof [citation]) and to have intended that its enactments be constitutionally valid. [Citation].) We would, therefore, be compelled to "adopt an

interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality." [Citation.]

(*In re Lance W.*, *supra*, 37 Cal.3d at p. 890, fn. 11; see also *People v. Rivera*, *supra*, 233 Cal.App.4th at p. 1100; *In re C.Z.* (2013) 221 Cal.App.4th 1497, 1507.)

9200.3-Court cannot interpret or rewrite statute free of ambiguity 10/15

"Statutory construction begins with the plain, commonsense meaning of the words in the statute, ' "because it is generally the most reliable indicator of legislative intent and purpose." ' (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.)" (*People v. Manzo* (2012) 53 Cal.4th 880, 885.) Thus, there is no need to engage in an elaborate exercise in statutory construction, such as examining legislative history or attempting to discern legislative intent, when the language of the statute is clear and unambiguous. (*People v. Jones* (1993) 5 Cal.4th 1142, 1146; *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008; see also *People v. Love* (2008) 166 Cal.App.4th 1292, 1297.) " 'If the statute's text evinces an unmistakable plain meaning, we need go no further.' [Citation.]" (*In re C.H.* (2011) 53 Cal.4th 94, 100.) In sum, "courts have no authority to rewrite a statute." (*In re G.Y.* (2015) 234 Cal.App.4th 1196, 1204.)

"It is a cardinal rule of interpretation that a statute free from ambiguity and uncertainty needs no interpretation. '[I]nterpretation and construction is for the purpose of ascertaining the legislative will. When this is clear, interpretation is not allowable.' [Citation.]" (*People v. Flores* (1979) 92 Cal.App.3d 461, 472.) Conversely, " '[a]n intent that finds no expression in the words of the statute cannot be found to exist. The courts may not speculate that the Legislature meant something other than what it said. Nor may they rewrite a statute to make it express an intention not expressed therein.' [Citation.]" (*Hennigan v. United Pacific Insurance Company* (1975) 53 Cal.App.3d 1, 7.)

It is only when the literal construction of a statute, clear and unambiguous on its face, is inconsistent with the provisions of another statute that further application of the rules of statutory construction becomes necessary.

> "[T]he basic principle of statutory … construction … mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language. … There are a few exceptions to the rule. "[It] is not applied … when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body. … The rule also does not apply where a literal reading would achieve the absurd consequence of rendering other provisions of the same enactment ineffective.

(*People v. Goodliffe* (2009) 177 Cal.App.4th 723, 726, internal citations omitted.) In other words: "The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statute's legislative history, appear from its provisions considered as a whole." (*Silver v. Brown* (1966) 63 Cal.2d 841, 845; see also *Rehman v. Department of Motor Vehicles* (2009) 178 Cal.App.4th 581, 587.) Similarly, "[u]nder certain circumstances, courts can act to harmonize statutes by finding implied repeal or amendment where the statutes at issue are so ' " 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. …' " ' [Citation.]" [Citation.]" (*In re J.S.* (2015) 237 Cal.App.4th 452, 459.)

9200.4-Specific statute generally controls over general statute (*Williamson* rule) 6/21

"In discerning the Legislative intent in enacting a statute, courts may rely on the doctrine that a specific statute precludes prosecution under a general statute. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1242-1243.)" (*People v. Cordell* (2011) 195 Cal.App.4th 1564, 1576.) " 'It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment.' [Citation.]" (*In re Williamson* (1954) 43 Cal.2d 651, 654 (*Williamson*); see also *People v. Murphy* (2011) 52 Cal.4th 81, 86; *Hudson v. Superior Court* (2017) 7 Cal.App.5th 999, 1007.) "The rule is not one of constitutional or statutory mandate, but serves as an aid to judicial interpretation when two statutes conflict." (*People v. Walker* (2002) 29 Cal.4th 577, 586; see also *People v. Brown* (2016) 6 Cal.App.5th 1074, 1080.) " 'The principle that a specific statute prevails over a general one applies only when the two sections cannot be reconciled.' [Citation]" (*People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

> The doctrine that a specific statute precludes any prosecution under a general statute is a rule designed to ascertain and carry out legislative intent. The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply. Indeed, in most instances, an overlap of provisions is determinative of the issue of legislative intent and "requires us to give effect to the special provision alone in the face of the dual applicability of the general provision … and the special provision … ." [Citation.]

(*People v. Jenkins* (1980) 28 Cal.3d 494, 505-506.) Thus, "when the Legislature has enacted a specific statute addressing a specific matter, and has prescribed a sanction therefor, the People may not prosecute under a general statute that covers the same conduct, but which prescribes a more severe penalty, unless a legislative intent to permit such alternative prosecution clearly appears. [Citation.]" (*Mitchell v. Superior Ct.* (1989) 49 Cal.3d 1230, 1250, italics omitted.)

"Absent some indication of legislative intent to the contrary, the *Williamson* rule applies when (1) 'each element of the general statute corresponds to an element on the face of the special statute' or (2) when 'it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute.' (Citation.)" (*People v. Murphy*, *supra*, 52 Cal.4th at p. 86; see also *People v. Joseph* (2019) 33 Cal.App.5th 943, 953-954; *People v. Henry* (2018) 28 Cal.App.5th 786, 792; *People v. Villagran* (2016) 5 Cal.App.5th 880, 895.) If neither of tests is satisfied, the *Williamson* rule generally does not apply. (See, e.g., *People v. Webb* (2017) 13 Cal.App.5th 486, 492-493; *People v. Sanchez* (1994) 27 Cal.App.4th 918, 923.) This rule also does not apply if both statutes provide the same punishment. (*People v. Cockburn* (2003) 109 Cal.App.4th 1151, 1159.) It also does not apply if "the Legislature has clearly expressed its intent to permit alternative prosecution under a statute that prescribes a more serious penalty." (*People v. Lyon* (2021) 61 Cal.App.5th 237, 257.)

9200.5-Rule of lenity has limited application 1/19

The rule of lenity "exists to ' "ensure[ ] that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability. [Citation.]" ' [Citations.] " (*People v. Laird* (2018) 27 Cal.App.5th 458, 468.) The rule of lenity "generally requires that 'ambiguity in a criminal statute should be resolved in favor of lenity, giving the defendant the benefit of every reasonable doubt on questions of interpretation. … [Citation.]" (*In re M.M.* (2012) 54 Cal.4th 530, 545.) But "[t]he rule of lenity does not apply every time there are two or more reasonable interpretations of a penal statute. (*People v. Cole* (2006) 38 Cal.4th 964, 986.)" (*People v. Manzo* (2012) 53 Cal.4th 880, 889.) "Rather, the rule applies ' "only if the court can do no more than guess what the legislative body intended; there must be an *egregious* ambiguity and uncertainty to justify invoking the rule." ' (*People v. Avery* (2002) 27 Cal.4th 49, 58, italics added.)" (*People v. Manzo*, *supra*, 53 Cal.4th at p. 889; see also *People v. Yearwood* (2013) 213 Cal.App.4th 161, 177; *People v. Nguyen* (2013) 212 Cal.App.4th 1311, 1320.) "[T]he rule of lenity is a tie-breaking principle, of relevance when ' "two reasonable interpretations of the same provision stand in relative equipoise … ." ' " (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1102, fn. 30; see also *People v. Myles* (2012) 53 Cal.4th 1261, 1271; *People v. Ramirez* (2014) 224 Cal.App.4th 1078, 1085.)

> The rule of lenity " ' "is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language." ' [Citation.] Or in the words of Justice Black, writing for the court in *United States v. Raynor* (1938) 302 U.S. 540, 552 the rule does not 'require[] that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope—nor does any rule require that the act be given the "narrowest meaning." It is sufficient if the words are given their fair meaning in accord with the evident intent of [the legislative body].' " (*People v. Anderson* (1987) 43 Cal.3d 1104, 1146.)

(*People v. Manzo*, *supra*, 53 Cal.4th at pp. 889-890.)

9200.6-A statute should be construed to preserve its constitutionality 3/17

"There is a ' "strong presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.' " ' (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 568.)" (*People v. Acosta* (2014) 226 Cal.App.4th 108, 117.) "Under well-established precedent, of course, a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question." (*People v. Engram* (2010) 50 Cal.4th 1131, 1161; see also *People v. Harrison* (2013) 57 Cal.4th 1211, 1228.)

> "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers." [Citations.]

(*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509; see, e.g., *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298-299 [refusing to apply provisions of several new statutes to crimes committed before statutes' effective date because such application both would be "retrospective" in that it would change legal consequences of defendant's past conduct, and "would also likely violate the rule against ex post facto legislation, since each of these provisions appears to define conduct as a crime, to increase punishment for a crime, or to eliminate a defense"]; accord *People v. Douglas M.* (2013) 220 Cal.App.4th 1068, 1077; see also *People v. Morera-Munoz* (2016) 5 Cal.App.5th 838, 856.)

> The judiciary bears an obligation to "construe enactments to give specific content to terms that might otherwise be unconstitutionally vague." [Citation.] Thus we have declared that "A statute will not be held void for uncertainty if any reasonable and practical construction can be given its language." [Citation.] If by fair and reasonable interpretation we can construe [a statute] to sustain its validity, we must adopt such interpretation [citations], even if that course requires us to depart from prior precedent which fastened an unconstitutionally broad interpretation on the statute.

(*Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 253-254.)

9210.1-Statutes presumed constitutional 3/17

" '[T]he burden of establishing the unconstitutionality of a statute rests on [the party] who assails it … .' [Citation.]" (*Brown v. Superior Court* (1971) 5 Cal.3d 509, 520.) It is well established that courts should exercise judicial restraint when passing on the constitutionality of legislation. Courts must indulge every presumption in favor of a statute's constitutionality. A statute must be upheld unless its unconstitutionality is clearly, positively and unmistakably demonstrated. Any mere doubt must be resolved in favor of the statute. (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780; *Calfarm Insurance Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814; *In re Ricky H.* (1970) 2 Cal.3d 513, 519; *In re Elizabeth T.* (1992) 9 Cal.App.4th 636, 640.) Moreover, if there is a question as to how a statute will be read, it is the courts' duty to construe the statute so as to uphold its constitutionality. (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 253; *Braxton v. Municipal Court* (1973) 10 Cal.3d 138, 145; see also *People v. Morera-Munoz* (2016) 5 Cal.App.5th 838, 856; *Ombudsman Services of Northern California* v. *Superior* (2007) 154 Cal.App.4th 1233, 1248.)

9210.2-Statute conveying warning of prohibited acts not void for vagueness 6/20

"The void-for-vagueness doctrine is based on the due process clause, which 'requires … some level of definiteness in criminal statutes. [Citation.]' (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269.)" (*In re Perdue* (2013) 221 Cal.App.4th 1070, 1077.) "Thus, ' "a criminal statute must ' "be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt.'" [Citations.]' [Citation.]" (*People v. Morgan* (2007) 42 Cal.4th 593, 605.)" (*In re Perdue*, *supra*, 221 Cal.App.4th at p. 1077; see also *People v. Bermudez* (2020) 45 Cal.App.5th 358, 367.) "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." (*United States v. Williams* (2008) 553 U.S. 285, 304; see also *Holder v. Humanitarian Law Project* (2010) 561 U.S. 1, 18.)

A statute is void for vagueness if it forbids or requires one to act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 350-351; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106-1107; *People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 389-390; *People v. Solis* (2012) 206 Cal.App.4th 1201, 1216.) But due process requires only a reasonable degree of certainty. (*Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1107; *People v. Mitchell* (1994) 30 Cal.App.4th 783, 799.) The United States Supreme Court has consistently held that lack of precision alone is not violative of due process. Nor is difficulty in discerning a statute's meaning. All the constitution requires is that the language of a statute "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." (*Roth v. United States* (1957) 354 U.S. 476, 491; see also *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 484.) In other words, "[a] statute is not unconstitutionally vague if the 'accused can reasonably be held to understand by the terms of the statute that his conduct is prohibited." (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 493.)" (*People v. Acosta* (2014) 226 Cal.App.4th 108, 116.)

And a statute cannot be held void for uncertainty if any reasonable and practical construction can be given to its language. (*Lockheed Aircraft Corp. v. Superior Court*, *supra*, 28 Cal.2d at p. 484.) The courts are obligated to preserve a statute by giving meaning to any uncertain terms by reference to other definable sources or to the common human experience. (*People v. Heitzman* (1994) 9 Cal.4th 189, 209; *People v. Mitchell*, *supra*, 30 Cal.App.4th at p. 799.) "Terms that might otherwise be considered vague may meet the standard of reasonable certainty when considered in context with other terms, and in view of the legislative purpose." (*People v. North* (2003) 112 Cal.App.4th 621, 628; see also *People v. Gonzales* (2010) 183 Cal.App.4th 24, 38-39.)

A void-for-vagueness doctrine can only be used to challenge the elements of a criminal offense, and not to attack statutes unrelated to the definition of any crime. (*People v. Redd* (2010) 48 Cal.4th 691, 717.)

Finally, a defendant "who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." (*Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 495; see also *Holder v. Humanitarian Law Project*, *supra*, 561 U.S. at p. 20.)

9210.3-Statute rationally related to valid state interest does not violate due process 4/20

The Due Process Clause of the Fourteenth Amendment of the United States Constitution encompasses substantive due process. As with an equal protection challenge, under substantive due process, "[w]hen evaluating the constitutionality of a statute, the courts have developed several levels of scrutiny (i.e., strict, intermediate, and rational-basis), depending on the nature of the right affected by the statute and the manner in which the right is impacted." (*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1374.)

The "guarantee of 'due process of law' … include[s] a substantive component, which forbids the government from infringing on certain "fundamental" liberty interests *at all*, no matter what procedural process is provided, unless the infringement is narrowly tailored to serve a compelling state interest" (*Reno v. Flores* (1993) 507 U.S. 292, 301-302, italics in original; see *Collins v. Harker Heights* (1992) 503 U.S. 115, 125; *Youngberg v. Romeo* (1982) 457 U.S. 307, 320, citing *Poe v. Ullman* (1961) 367 U.S. 497, 542 (dis. opn. of Harlan, J.).)

The intermediate scrutiny test is used when a statute regulates, but does not prohibit, an otherwise fundamental constitutional right, such as gun laws which only regulates the manner of possession. (*People v. Mitchell*, *supra*, 209 Cal.App.4th at p. 1374.)

> Under the intermediate scrutiny test, the statute must serve an important governmental interest and there should be a reasonable fit between the regulation and the governmental objective. [Citation.] The regulation need not be the least restrictive means of serving the governmental interest, but it should be narrowly tailored to serve the interest, should not burden the protected right more than is reasonably necessary to further the governmental interest, and should leave open ample alternative means of exercising the protected right. [Citation.]

(*Ibid*.)

Finally, "[i]n the absence of a fundamental liberty interest, we review the constitutionality of the challenged [statute] to determine whether it bears some rational relationship to a valid state interest." (*People v Grant* (2011) 195 Cal.App.4th 107, 113-114.)

> Generally, the constitutional guaranty of substantive due process protects against arbitrary legislative action; it requires legislation not to be "unreasonable, arbitrary or capricious" but to have "a real and substantial relation to the object sought to be attained." [Citation.] Thus, legislation does not violate substantive due process so long as it reasonably relates "to a proper legislative goal." [Citations.]"

(*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125.) "Once it is established that the general prohibition furthers the legislative goal, the Legislature has wide discretion in determining what limits will be set on the prohibition. [Citation.] As long as the statute rationally serves its purpose, it is not made arbitrary or capricious because it might have been drawn more narrowly or widely." (*People v. Mitchell* (1994) 30 Cal.App.4th 783, 798; see also *Hale v. Morgan* (1978) 22 Cal.3d 388, 398 ["availability of less drastic remedial alternatives" does not invalidate a statute].) In short, substantive due process simply " 'requires a rational relationship between the objectives of a legislative enactment and the methods chosen to achieve those objectives.' [Citation.]" (*People v. Cervantes* (2020) 44 Cal.App.5th 884, 889.)

9210.4-"Facial," "as applied," "vague," and "overbroad," challenges distinguished 4/19

It is important to clarify the nature of a constitution challenge to a statute. "A challenge to the constitutional validity of a statute may be of two types: a facial challenge and an as-applied challenge. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (*Tobe*).)" (*San Francisco Unified School Dist. v. City & Co. of San Francisco* (2012) 205 Cal.App.4th 1070, 1079.)

> When evaluating a facial challenge to the constitutional validity of a statute, we consider the text of the statute itself, not its application to the particular circumstances of the individual. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) If a statute is constitutional in its general and ordinary application, the statute is not facially unconstitutional merely because "there might be some instances in which application of the law might improperly impinge upon constitutional rights." [Citations.] Any overbreadth in a generally constitutional statute can be cured by a case-by-case analysis of the particular fact situation.

(*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1373-1374; see also *People v. Diaz* (2018) 24 Cal.App.5th Supp. 1, 5.) "At a minimum, a successful facial challenge requires a showing that the

statute is unconstitutional as to 'a substantial portion of those persons to whom the statute applies.' [Citations.]" (*People v. Mitchell*, *supra*, 209 Cal.App.4th at p. 1374, fn. 3.) A person who brings a facial challenge to the constitutionality of a statute must " ' "demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." ' " (*Tobe*, *supra*, 9 Cal.4th at p. 1084.) "To succeed in a typical facial challenge, [the defendant] must show that ' "no set of circumstances exists under which [the challenged statute] would be valid" [citation], or that the statute lacks any "plainly legitimate sweep" [citation].' (*United States v. Stevens* (2010) 559 U.S. 460, 472.)" (*Raef v. Superior Court* (2015) 240 Cal.App.4th 1112, 1120.)

> Such a challenge succeeds where a plaintiff demonstrates the statutory scheme is unconstitutional in all cases. However, as our courts frequently observe, the standard governing a facial challenge remains the subject of controversy. Some courts determine only whether a statute conflicts with due process principles in general or in a vast majority of cases. [Citations.]

(*Alviso v. Sonoma County Sheriff's Dept.* (2010) 186 Cal.App.4th 198, 204-205; see also *People v. Buenrostro* (2018) 6 Cal.5th 367, 388.)

"In contrast, an as-applied challenge seeks 'relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied.' [Citation.]" (*San Francisco Unified School Dist. v. City & Co. of San Francisco*, *supra*, 205 Cal.App.4th at p. 1079.) "When a criminal defendant claims that a facially valid statute or ordinance has been applied in a constitutionally impermissible manner to the defendant, the court evaluates the propriety of the application on a case-by-case basis to determine whether to relieve the defendant of the sanction." (*Tobe*, *supra*, 9 Cal.4th at p. 1084; see also *In re Taylor* (2015) 60 Cal.4th 1019, 1039; *People v. Mitchell*, *supra*, 209 Cal.App.4th at p. 1378; *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 192.) "We consider whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.' *Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 495 … ." (*Holder v. Humanitarian Law Project* (2010) 561 U.S. 1, 20.) Thus, a defendant raising a void for vagueness challenge may not test a statute's constitutionality against hypothetical situations in which problems of interpretation may arise. (*Holder v. Humanitarian Law Project*, *supra*, 561 U.S.at pp. 19-20; *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, *supra*, 455 U.S. at p. 495; see also *Tobe*, *supra*, 9 Cal.4th at p. 1095; *In re Cregler* (1961) 5 Cal.2d 308, 313; *People v. Sipe* (1995) 36 Cal.App.4th 468, 481.)

> A void for vagueness challenge is also different from a claim of substantial overbreadth. Although, as we pointed out in *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1109 "[t]he concepts of vagueness and overbreadth are related," there are important differences. "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 114.)

(*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115; see also *People v. Barajas* (2011) 198 Cal.App.4th 748, 754.)

> The scope of permissible challenges to a law based on grounds of vagueness differs in another important respect from challenges based on overbreadth. While a claim of overbreadth may succeed if it is shown that the law at issue is "substantially overbroad,"

> that is, affects more than a marginal group of those potentially subject to its sweep [citation], a claim that a law is unconstitutionally vague can succeed only where the litigant demonstrates, not that it affects a substantial number of others, but that the law is vague as to her or "impermissibly vague *in all of its applications*." (*Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 497-498.)

(*People ex rel. Gallo v. Acuna*, *supra*, 14 Cal.4th at p, 1116, italics in original.)

The United States Supreme Court has "not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." (*United States v. Salerno* (1987) 481 U.S. 739, 745; see also *Hatch v. Superior Court*, *supra*, 80 Cal.App.4th at p. 193.) But even as to an overbreadth challenge: "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." (*Members of City Council of City of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789, 800; see also *In re J.C.* (2014) 228 Cal.App.4th 1394, 1401; *People v. Serrano* (1992) 11 Cal.App.4th 1672, 1675-1676.)

> In *United States v. Salerno* (1987) 481 U.S. 739, our Supreme Court stated: "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." (*Id*. at p. 745 (lead opn. of Rehnquist, C. J.).)

(*People v. Grant* (2011) 195 Cal.App.4th 107, 113, fn. 2.)

9220.1-General rules governing equal protection challenges 4/15

"Both the state and federal Constitutions provide that no person shall be deprived of equal protection of the laws. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).)" (*People v. Valladares* (2009) 173 Cal.App.4th 1388, 1397-1398.)

> The equality guaranteed by the equal protection clauses of the federal and state Constitutions is equality under the same conditions, and among persons similarly situated. The Legislature may make reasonable classifications of persons and other activities, provided the classifications are based upon some legitimate object to be accomplished.

(*Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 659; see also *People v. Jeha* (2010) 187 Cal.App.4th 1063, 1073; *People v. Alvarado* (2010) 187 Cal.App.4th 72, 76.)

> The crux of the constitutional promise of equal protection is that persons similarly situated shall be treated equally by the laws. [Citation.] However, neither clause [of the United States or California Constitutions] prohibits legislative bodies from making classifications; they simply require that laws or other governmental regulations be justified by sufficient reasons. The necessary quantum of such reasons varies, depending on the nature of the classification.

(*In re Evans* (1996) 49 Cal.App.4th 1263, 1270; see also *People v. Delacy* (2011) 192 Cal.App.4th 1481, 1493-1494.)

"Equal protection analysis does not entitle the judiciary to second-guess the wisdom, fairness, or logic of the law. (*Heller v. Doe* (1993) 509 U.S. 312, 319.)" (*People v. Turnage* (2012) 55 Cal.4th 62, 74.) Thus, for example, "[t]he Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free to

recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident." (*Board of Education v. Watson* (1966) 63 Cal.2d 829, 833.) "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." (*Dandridge v. Williams* (1970) 397 U.S. 471, 486-487.) Thus, for example, "[t]he right to equal protection of the law generally does not prevent the state from setting a starting point for a change in the law." (*People v. Lynch* (2012) 209 Cal.App.4th 353, 359.)

When the equal protection challenge is to the face of a penal statute, the analysis should "focus on the abstract elements of the offense rather than on the particular facts of [the] case." (*People v. Brandao* (2012) 203 Cal.App.4th 436, 442.)

Upon finding an equal protection violation in a statutory scheme the court must determine the appropriate remedy. "In choosing the proper remedy for the equal protection violation, our primary concern is to ascertain, as best as we can, which alternative the Legislature would prefer." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1207, overruled on other grounds in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888; see also *People v. Schoop* (2012) 212 Cal.App.4th 457, 474.)

9220.2-Equal protection applies only to similarly situated groups 4/20

"Equal protection under the state and federal Constitutions requires that persons similarly situated must receive like treatment under the law." (*People v. Doyle* (2013) 220 Cal.App.4th 1251, 1264.) "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." (*In re Eric J.* (1979) 25 Cal.3d 522, 530, italics in original; see also *City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439; *In re Lemanuel C.* (2007) 41 Cal.4th 33, 47.) "[A] defendant … must establish that he was similarly situated to a group that is treated unequally under the existing law." (*People v. Kennedy* (2009) 180 Cal.App.4th 403, 410.) Under the equal protection clause, the courts do not inquire "whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citation.]" (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "In other words, we ask at the threshold whether two classes that are different in some respects are sufficiently similar with respect to the laws in question to require the government to justify its differential treatment of these classes under those laws." (*People v. McKee* (2010) 47 Cal.4th 1172, 1202.)

> "Broadly stated, equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws [that] is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness.' [Citation.]" [Citation.] It does not mean, however, that " 'things … different in fact or opinion [must] be treated in law as though they were the same.' [Citation.]" [Citation.]) "[N]either the Fourteenth Amendment of the Constitution of the United States nor the California Constitution [citations] precludes classification by the Legislature or requires uniform operation of the law with respect to persons who are different." [Citation.]

(*People v. Guzman* (2005) 35 Cal.4th 577, 591; see also *People v. Mendoza* (2016) 62 Cal.4th 856, 912.) "Generally, offenders who commit different crimes are not similarly situated." (*People v. Doyle*, *supra*, 220 Cal.App.4th at p. 1266.) Similarly, for purposes of punishment, juveniles are not

similarly situated to adults who commit otherwise comparable crimes. (*In re Jones* (2019) 42 Cal.App.5th 477, 481.)

9220.3-The three levels of equal protection scrutiny 6/20

A statutory system that treats similarly situated groups in an unequal manner does not necessarily violate due process. (*People v. Jeha* (2010) 187 Cal.App.4th 1063, 1073.) "Instead, a finding that a defendant is similarly situated requires us to determine whether the statutorily authorized difference in treatment withstands the appropriate level of scrutiny." (*Ibid*.) "Statutes challenged under the equal protection clause will receive differing levels of scrutiny depending upon the nature of the distinctions they establish." (*People v. Silva* (1994) 27 Cal.App.4th 1160, 1167.) In other words, "[t]he extent of justification required to survive equal protection scrutiny in a specific context depends on the nature or effect of the classification at issue." (*People v. Chatman* (2018) 4 Cal.5th 277, 288.)

> "In considering whether state legislation violates the Equal Protection Clause …, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. [Citations.] Classifications based on race or national origin, [citation] and classifications affecting fundamental rights [citation], are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy." (*Clark v. Jeter* (1988) 486 U.S. 456, 461.)

(*People v. Delacy* (2011) 192 Cal.App.4th 1481, 1494.)

9220.3a-Rational basis test 6/20

"In the absence of any demonstration of a suspect classification or a distinction that impacts a fundamental right, the challenged disparity in treatment need only survive rational basis scrutiny." (*In re C.B.* (2018) 5 Cal.5th 118, 134.) Under the rational basis test, a statute must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational or plausible basis for the classification. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 645.)

> On rational-basis review, a classification in a statute … comes to us bearing a strong presumption of validity, … and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it." [Citations.] Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.

(*F.C.C. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 314-315.) " '[T]he equal protection clause is not an authorization to the courts to second-guess the Legislature on the best way to deal with aspects of a problem.' [Citation.]" (*People v. Valdez* (2009) 174 Cal.App.4th 1528, 1532.) "When conducting rational basis review, we must accept any gross generalizations and rough accommodations that the Legislature seems to have made. A classification is not arbitrary or irrational simply because there is an 'imperfect fit between means and ends.' [Citation.]" (*People v. Turnage* (2012) 55 Cal.4th 62, 77.)

> Where … a disputed statutory disparity implicates no suspect class or fundamental right, "equal protection of the law is denied only where there is no 'rational relationship between the disparity of treatment and some legitimate governmental purpose.' " [Citations.] "This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. [Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in ' "rational speculation" ' as to the justifications for the legislative choice [citation]. It is immaterial for rational basis review 'whether or not' any such speculation has 'a foundation in the record.' " [Citation.] To mount a successful rational basis challenge, a party must " 'negative every conceivable basis' " that might support the disputed statutory disparity. [Citations.] If a plausible basis exists for the disparity, courts may not second-guess its " 'wisdom, fairness, or logic.' " [Citations.]

(*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881.) "At bottom, the Legislature is afforded considerable latitude in defining and setting the consequences of criminal offenses." (*Id*. at p. 887.)

> This core feature of equal protection sets a high bar before a law is deemed to lack even the minimal rationality necessary for it to survive constitutional scrutiny. Coupled with a rebuttable presumption that legislation is constitutional, this high bar helps ensure that democratically enacted laws are not invalidated merely based on a court's cursory conclusion that a statute's trade-offs seem unwise or unfair.

(*People v. Chatman*, *supra*, 4 Cal.5th at p. 289.)

"Preserving the government's financial integrity and resources is a legitimate state interest." (*People v. Chatman* (2018) 4 Cal.5th 277, 290.) "On the other hand, an entirely arbitrary decision to withhold a benefit from one subset of people, devoid of any conceivable degree of coherent justification, might not pass rational basis review merely because it decreases the expenditure of resources. (*Id*. at p. 291.)

9220.3b-Strict scrutiny test 6/20

When the strict scrutiny standard applies, the state has the burden of establishing it has a compelling interest that justifies the law and that the distinctions, or disparate treatment, made by that law are necessary to further its purpose. (*People v. McKee* (2012) 207 Cal.App.4th 1325, 1335; *Warden v. State Bar* (1999) 21 Cal.4th 628, 641.) "Alternatively stated, applying the strict scrutiny standard, a law 'is upheld only if it is necessary to further a compelling state interest.' (*People v. Buffington* (1999) 74 Cal.App.4th 1149, 1156.)" (*People v. McKee*, *supra*, 207 Cal.App.4th at p. 1335.)

9220.3c-Intermediate level of scrutiny 6/20

Under the federal equal protection analysis, between the "extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny … ." (*Clark v. Jete*r (1988) 486 U.S. 456, 461.) "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." (*Ibid*.) The federal intermediate scrutiny standard "generally has been applied to discriminatory classifications based on sex or illegitimacy." (*Ibid*.) In contrast, "California cases long have established that statutes that discriminate on the basis of sex or gender

are subject to strict scrutiny under the California Constitution … .” (*In re Marriage Cases* (2008) 43 Cal.4th 757, 833.) But intermediate scrutiny has been applied to California statutes regulating the manner of possession of a weapon rather than completely banning the possession of the weapon when challenged under the Second Amendment’s right to bear arms clause. (*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1374-1375.)

9220.4-Prospective application of statutory changes does not offend equal protection 11/16

“Sentencing changes ameliorating punishment need not be given retroactive effect. (*People v. Morales* (2016) 63 Cal.4th 399, 409.) A legislative or voter determination that statutory changes, including those mitigating or ameliorating punishment, should only apply prospectively generally does not violate equal protection. (*People v. Floyd* (2003) 31 Cal.4th 179, 188; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 178; see also *People v. Dobson* (2016) 245 Cal.App.4th 310, 320 [that different rules apply for reducing sentences for defendants already serving 25 years to life under original Three Strikes Law than for those sentenced after Three Strikes Reform Act does not violate equal protection]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1467 [same]; *People v. Losa* (2014) 232 Cal.App.4th 789, 793 [same]; *People v. Rosalinda C.* (2014) 224 Cal.App.4th 1, 12-15 [prospective legislative reduction in length of MDSO commitment does not violate equal protection].) So long as the legislature has a rational basis for makes such changes applicable starting at particular time, such as to those sentenced after a certain date, an equal protection challenge will not lie as to those defendants whose cases were governed by the former law. (*People v. Yearwood*, *supra*, 213 Cal.App.4th at pp. 178-179.)

“Defendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense. Numerous courts, however, have rejected such a claim—including this court.” (*People v. Floyd*, *supra*, 31 Cal.4th at p. 188.) “ ‘[T]he 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.’ [Citation.]” (*Id*. at p. 191; see also *People v. Rosalinda C.*, *supra*, 224 Cal.App.4th at p. 13; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 398.)

The *Estrada* rule (*In re Estrada* (1965) 63 Cal.2d 740) is not “constitutionally compelled” and does not require a contrary result. (*People v. Floyd*, *supra*, 31 Cal.4th at p. 189.) The *Estrada* decision “recognized that when the Legislature has amended a statute to lessen the punishment, its determination as to which statute should apply to all convictions not yet final, ‘either way, would have been legal and constitutional.’ [Citations.]” (*Id*. at pp. 188-189.)

9230.1-Ex post facto prohibition only applies to retroactive laws 10/21

“Both the United States Constitution (art. I, §§ 9 and 10) and the California Constitution (art. I, § 9) prohibit the passage of ex post facto laws … . This court has observed that there is no significant difference between the federal and state ex post facto clauses. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295-297.)” (*In re E.J.* (2010) 47 Cal.4th 1258, 1279.)

> To fall within the ex post facto provisions, “ ‘two critical elements’ ” must be met. (*John L.* [*v. Superior Court* (2004) 33 Cal.4th 158] at p. 172.) “First, the law must be retroactive.” (*Ibid*.) Second, “the law must have one of the following four effects: it makes criminal acts that were innocent when done; it makes the crime greater or more aggravated than it was when committed; it inflicts a greater punishment for the crime than was available when the

> crime was committed; or it alters the rules of evidence or the required proof for conviction." (*In re Robert M.* (2013) 215 Cal.App.4th 1178, 1186.")

(*In re Edward C.* (2014) 223 Cal.App.4th 813, 825.)

"[T]he question whether a new law is being applied retrospectively is closely intertwined with the question whether it is an unconstitutional ex post facto law, because a finding that the law is being applied retrospectively is a threshold requirement for finding it impermissibly ex post facto." (*In re E.J.*, *supra*, 47 Cal.4th at p.1276; see also *People v. Mills* (1992) 6 Cal.App.4th 1278, 1282-1283 (*Mills*).) According to the United States Supreme Court, "our decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." (*Weaver v. Graham* (1981) 450 U.S. 24, 29, fns. omitted.)

Penal Code section 3 "reflects the common understanding that legislative provisions are presumed to operate prospectively, and that they should be so interpreted 'unless express language or clear and unavoidable implication negatives the presumption.' [Citation.]" (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208; see also *People v. Brown* (2012) 54 Cal.4th 314, 319-320; *In re E.J.*, *supra*, 47 Cal.4th at p. 1272.) "[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application." (*Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at p. 1209; see, e.g., *People v. Gonzalez* (2012) 210 Cal.App.4th 724, 734-736 [corroboration of jail informant requirement, Pen. Code, § 1111.5, does not apply to cases tried before effective date of statute].)

> In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was completed before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations.] A law is not retroactive "merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." [Citation.])

(*People v. Grant* (1999) 20 Cal.4th 150, 157.) For example, where a new law "retroactively increase[s] the punishment for [a] crime, it [is] retrospective for purposes of the ex post facto test." (*Mills*, *supra*, 6 Cal.App.4th at p. 1285.) "A retrospective law violates the ex post facto clauses when it 'substantially alters the consequences attached to a crime already completed, and therefore changes "the quantum of punishment." ' " (*In re Ramirez* (1985) 39 Cal.3d 931, 936.) "The clearest example of [an ex post facto] law is one which defines a new crime and applies its definition retroactively to [punish] conduct which was not criminal at the time it occurred." (*Mills*, *supra*, 6 Cal.App.4th at p. 1282; see also *In re E.J.*, *supra*, 47 Cal.4th at p. 1277; distinguish *People v. Joseph* (2021) 63 Cal.App.5th 1058, 1066-1068 [although conspiracy started before enactment of law there was no ex post facto violation because it was not completed until after law went into effect].)

But not all sentencing changes implicate the ex post facto prohibition. "[T]he ex post facto clause regulates increases in the ' "quantum of punishment." ' " [Citations.] Although no universal definition exists [citation], this concept appears limited to substantive measures, standards, and formulas affecting the time spent incarcerated for an adjudicated crime." (*John L. v. Superior Court*, *supra*, 33 Cal.4th at pp. 181-182.) "[A]n ex post facto violation does not occur simply because a postcrime law withdraws substantial procedural rights in a criminal case. [Citation.] Even new

methods for determining a criminal sentence do not necessarily involve punishment in the ex post facto sense." (*Id*. at p. 181.) Thus, "not every amendment having 'any conceivable risk' of lengthening the expected term of confinement raises ex post facto concerns." (*Id*. at p. 182; see also *People v. Delgado* (2010) 181 Cal.App.4th 839, 847-848.)

9230.2-Enhancements for second offenders are not ex post facto 11/09

There is no constitutional bar to increasing the penalty for subsequent crimes based on the defendant's status as a repeat offender because, even if the prior offense predates enactment of the increased penalty, the penalty attaches to the subsequent offense rather than to the prior one. (*People v. Jackson* (1985) 37 Cal.3d 826, 833; *People v. Rivadeneira* (1991) 232 Cal.App.3d 1416, 1420.) "[C]onvicted criminals who commit a second crime *after* completing their sentence, including any probation or parole, are subject to harsher treatment as recidivists under new laws enacted between the time of the two crimes. California courts have held that such statutes are not retroactive and that no ex post facto violation thus occurs. [Citations.]" (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 174, fn. 5.)

In *People v. Calderon* (1962) 205 Cal.App.2d 566 the appellate court dealt with a statute providing an enhanced penalty when the defendant has a prior conviction for a similar offense.

> It is well established that statutes providing for an increased penalty for subsequent offenses are constitutional. [Citations.] They are not void as *ex post facto* laws [citation]; nor do they infringe constitutional privileges against double jeopardy [citations]. They do not deny the equal protection of the laws or due process of the law [citations]; nor do they impose a penalty on crimes outside the jurisdiction [citation].
>
> The fundamental mistake of defendant is his assumption that the judgment imposes a punishment on crimes for which he had already been convicted and punished. This is not the case, since the punishment is for the new crime only, although it is more severe where he is an habitual criminal. [Citations.]

(*Id*. at p. 572; see also *People v. Williams* (1983) 140 Cal.App.3d 445, 448-449 [prison priors].)

These principles have been applied to the enactment and expansion of "serious" and "violent" felony prior lists, as well as to the "three strikes" law. (See *People v. James* (2001) 91 Cal.App.4th 1147; *People v. O'Roark* (1998) 63 Cal.App.4th 872; *People v. Moenius* (1998) 60 Cal.App.4th 820; *Gonzalez v. Superior Court* (1995) 37 Cal.App.4th 1302.)

In *People v. Venegas* (1970) 10 Cal.App.3d 814, the defendant was convicted of a felony in 1964. In 1965 convicted felons were prohibited from possessing concealable firearms. The defendant contended application of the 1965 statute to him constituted an ex post facto law. The appellate court said: " 'An ex post facto law is one generally which inflicts greater punishment than the law imposed for the crime *at the time it was committed* or which was *passed after the commission of the crime of which defendant is accused*' [citation] … . A statute is not retroactive in its operation merely because it draws upon facts antecedent to its enactment for its operation. [Citation.]" (*Id.* at pp. 822-823, italics in original; similarly, see *People v. Mesce* (1997) 52 Cal.App.4th 618, 622-626; *People v. Mills* (1992) 6 Cal.App.4th 1278, 1288.)

Finally, the same reasoning has been applied to changes in the law extending the "look back" period for a prior conviction of driving under the influence enhancing the penalty for a later offense or elevating a subsequent violation to a felony. (*People v. Treadway* (2008) 163 Cal.App.4th 689;

People v. Wohl (1990) 226 Cal.App.3d 270; *People v. Sweet* (1989) 207 Cal.App.3d 78; *Carter v. Superior Court* (1983) 149 Cal.App.3d 184.)

9300.1-Subpoena for witness must be quashed if testimony irrelevant 11/07

Although a defendant has a constitutional right to compel the attendance of witnesses, a court may properly quash a subpoena issued on a defendant's behalf when the defendant fails to show the witness could offer relevant testimony. (*In re Gary W.* (1971) 5 Cal.3d 296, 310; *In re Finn* (1960) 54 Cal.2d 807, 813 [subpoenas for chief of police and four police commissioners quashed].)

The right to subpoena witnesses does not authorize the indiscriminate use of process to call witnesses whose testimony could not possibly be received or which is grossly cumulative. Courts have inherent power to control the issuance of process, and they should not permit an abuse of the right to subpoena witnesses. (*People v. Manson* (1976) 61 Cal.App.3d 102, 197; *People v. Fernandez* (1963) 222 Cal.App.2d 760, 768-769 [court refused to issue subpoenas for 33 witnesses at a hospital].)

> "Obviously, the right to subpoena witnesses which is given to every defendant by the Constitution and laws of this state [citations] does not authorize the indiscriminate use of the process of the court to call witnesses whose testimony could not possibly be received or which is grossly cumulative … . Anyone who has had anything to do with the administration of criminal law knows that defendants occasionally express a wish to call many witnesses from all parts of the state who cannot possibly add a single relevant fact to the complex of factors applying to the crime charged; the courts do have inherent power to control the issuance of their own process and they should not permit an abuse of the constitutional right to subpoena witnesses. …"

(*People v. Smith* (1985) 38 Cal.3d 945, 958-959, quoting with approval from *People v. Fernandez*, *supra*, 222 Cal.App.2d at pp. 768-769.) The court may quash a subpoena when the defendant makes no offer of proof or showing of the specific testimony sought to be elicited from the witness. (*People v. Rhone* (1968) 267 Cal.App.2d 652, 656-657 [subpoena for police chief quashed]; see also *Lucas v. Superior Court* (1988) 203 Cal.App.3d 733, 740-741.)

The appellate cases have also held that a highly placed public official should not be required to respond to a personal subpoena in his official capacity in the absence of "compelling reasons." (*Civiletti v. Municipal Court* (1981) 116 Cal.App.3d 105, 110; *State Board of Pharmacy v. Superior Court* (1978) 78 Cal.App.3d 641, 644; see also *Westly v. Superior Court* (2004) 125 Cal.App.4th 907, 910; *People v. Rhone*, *supra*, 267 Cal.App.2d at pp. 656-657.)

Finally, it should be noted that the abuse of the court's process can be the basis for contempt proceedings and imposition of sanctions. (*Fabricant v. Superior Court* (1980) 104 Cal.App.3d 905, 916.)

9310.1-SDT unsupported by good cause must be quashed 10/20

The scope of discovery which may be obtained from a third party in a criminal case is controlled by common law principles, rather than by the criminal discovery statutes. (*People v. Superior Court (Broderick)* (1991) 231 Cal.App.3d 584, 594; Pen. Code, § 1054 et seq.) The statutory provisions governing civil discovery, such as those governing an SDT (Code Civ. Proc., § 1985, subd. (b)), do not apply in criminal cases. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535; *M.B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 1393-1394.)

Issuance of a subpoena duces tecum (SDT) in a criminal case is returnable only to the court. (Pen. Code, § 1326, subds. (b)-(c); Evid. Code, § 1560, subd. (b).) Thus, unlike a civil SDT, at the issuance stage of an SDT in a criminal case there is no requirement for a showing of good cause. (*Facebook, Inc. v. Superior Court* (2020) 10 Cal.5th 329, 343-344 (*Facebook*).) Nevertheless, a party on whose behalf the criminal SDT was issued is not entitled to access to the records described until a judicial determination has been made that the person is legally entitled to receive them. (*People v. Blair* (1979) 25 Cal.3d 640, 651.) And, as explained below, "in order to defend such a subpoena against a motion to quash, the subpoenaing party must at that point establish good cause to acquire the subpoenaed records." (*Facebook*, *supra*, 10 Cal.5th at p. 344.) Good cause for discovery does not automatically exist in every case. (*Hill v. Superior Court* (1974) 10 Cal.3d 812, 819; *Joe Z. v. Superior Court* (1970) 3 Cal.3d 797, 804.) Without adequate factual allegations to rebut a motion to quash, the court is prevented from exercising its discretion in making an independent assessment of good cause. (*Wood v. Superior Court* (1985) 166 Cal.App.3d 1138, 1150.) The defense must make a factual showing in seven areas, known as the seven *Alhambra* factors to establish good cause. (*Facebook*, *supra*, 10 Cal.54th 345-347, citing *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118.)

First, the defense must establish a plausible justification for the material requested to preclude the possibility that they are on a "fishing expedition." (*Facebook*, *supra*, 10 Cal.5th at p. 345; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 538; *Hill v. Superior Court*, *supra*, 10 Cal.3d at p. 817; *People v. Navarro* (1978) 84 Cal.App.3d 355, 359.) "[E]ach legal claim that a defendant advances to justify acquiring and inspecting sought information must be scrutinized and assessed regarding its validity and strength." (*Facebook*, *supra*, 10 Cal.5th at p. 352.)

Second, the defense must request the information with adequate specificity and without being overbroad. (*Facebook*, *supra*, 10 Cal.5th at p. 346.)

Third, the defense must show the items sought are reasonably available to the third party from which it is sought and not readily available to the subpoenaing party from other sources. (*Facebook*, *supra*, 10 Cal.5th at p. 346; *Hill v. Superior Court*, *supra*, 10 Cal.3d at p. 817.)

Fourth, the court must assess whether production of the requested materials violate a third party's confidentiality or privacy rights, or intrude upon any protected governmental interest. (*Facebook*, *supra*, 10 Cal.5th at p. 346.)

Fifth, the court should take into account whether the SDT was timely issued. (*Facebook*, *supra*, 10 Cal.5th at p. 347.)

Sixth, an important factor to consider is whether the time required to produce the requested information would necessitate an unreasonable delay of the trial. (*Facebook*, *supra*, 10 Cal.5th at p. 347.)

Finally, the court may quash an SDT for materials it reasonably determines are of minimal relevance and value to the issuing party, and overburdensome on the person or organization served. (*Facebook*, *supra*, 10 Cal.5th at p. 347; *People v. Pierce* (2019) 38 Cal.App.5th 321, 340.)

Application of these factors, as with other discovery requests, are addressed to the sound discretion of the trial court. (*Facebook*, *supra*, 10 Cal.5th at p. 359; *Pitchess v. Superior Court*, *supra*, 11 Cal.3d at p. 535.)

9400.1-General standard for proof of theft 7/18

Penal Code section 484 sets forth the crime of theft by larceny. "In its current formulation, larceny is the trespassory taking and carrying away of personal property of another with the intent to permanently deprive the owner of possession. [Citations.]" (*People v. Kaufman* (2017) 17 Cal.App.5th 370, 379.)

> The elements of theft by larceny are well settled: the offense is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away. [Citations.] The act of taking personal property from the possession of another is always a trespass unless the owner consents to the taking freely and unconditionally or the taker has a legal right to take the property. [Citation.]

(*People v. Davis* (1998) 19 Cal.4th 301, 305; see also *People v. Mireles* (2018) 21 Cal.App.5th 237, 242; *People v. Kaufman*, *supra*, 17 Cal.App.5th at p. 382; *People v. Fenderson* (2010) 188 Cal.App.4th 625, 636.)

"California courts have long held that theft by larceny requires the intent to permanently deprive the owner of possession of the property." (*People v. Avery* (2002) 27 Cal.4th 49, 54 (*Avery*).) But:

> Our Supreme Court has admonished that California's intent-to-deprive-permanently requirement for the crime of theft is flexible and not to be taken literally. "[T]he general rule is that the intent to steal required for conviction of larceny is an intent to deprive the owner permanently of possession of the property. [Citations.]" (*People v. Davis* (1998) 19 Cal.4th 301, 307; see also *People v. Turner* (1968) 267 Cal.App.2d 440, 443.) The rule is not "inflexible," however, and in certain cases "the requisite intent to steal may be found even though the defendant's primary purpose in taking the property is not to deprive the owner permanently of possession," such as "(1) when the defendant intends to 'sell' the property back to its owner, (2) when the defendant intends to claim a reward for 'finding' the property, and (3) when … the defendant intends to return the property to its owner for a 'refund.' " (*People v. Davis*, *supra*, 19 Cal.4th at p. 307.) In each of those exceptions, although the defendant does not intend to deprive the owner permanently of possession of the property, the defendant does intend to appropriate the value of permanent possession of the property.

(*People v. Bell* (2011) 197 Cal.App.4th 822, 826-827.) In *Avery*, the Supreme Court expanded on the flexibility of the rule: "We now conclude that an intent to take the property for so extended a period as to deprive the owner of a major portion of its value or enjoyment satisfies the common law, and therefore California, intent requirement." (*Avery*, *supra*, 27 Cal.4th at p. 55.) Thus, a defendant who rents an apartment without intent to pay the landlord can be guilty of theft. (*People v. Bell*, *supra*, 197 Cal.App.4th at pp. 828-829 ["The leasehold is temporary in that it is for a fixed term and not permanent in that sense, but its value in terms of rent, when taken by a thief, is permanent when the thief does not intend to pay rent."].)

9410.1-General standard for proof of receiving stolen property 11/11

Subdivision (a) of Penal Code section 496 defines the crime of receiving stolen property. The elements of the offense of receiving stolen property are that (1) the property was stolen, (2) the defendant received, concealed, or withheld it from its owner, and (3) the defendant knew the property was stolen. (*People v. Price* (1991) 1 Cal.4th 324, 464; *People v. Anderson* (1989) 210 Cal.App.3d 414, 420.)

Mere possession of recently stolen property, if uncorroborated by other evidence, is insufficient to establish the knowledge element. (*People v. Najera* (2008) 43 Cal.4th 1132, 1138.) But, it has long been held that the possession of recently stolen property raises a strong inference that the defendant knew the property was stolen. This inference is so strong that only slight additional evidence, such as the absence of an explanation, an unsatisfactory explanation, or other suspicious circumstances is sufficient to convict. (*People v. McFarland* (1962) 58 Cal.2d 748, 754-755; *People v. Anderson*, *supra*, 210 Cal.App.3d at p. 421; *People v. Siegfried* (1967) 249 Cal.App.2d 489, 493.) Knowledge may also be inferred from the fact the property was obtained from a person of questionable character, that the defendant bought or sold the property at an unreasonably low price, or that the property was altered to prevent identification. (*People v. Malouf* (1955) 135 Cal.App.2d 697, 706; *People v. Boyden* (1953) 116 Cal.App.2d 278, 288.) Although the strength of this inference declines over time, thefts occurring many months before have been held to be "recent." (*People v. Anderson*, *supra*, at pp. 421-422.)

The People need not prove that someone other than the defendant stole the property. Indeed, a defendant may be convicted of receiving stolen property even where the evidence shows the defendant stole it. (*People v. Price*, *supra,* 1 Cal.4th at p. 464.) Penal Code section 496, subdivision (a), expressly provides that any thief can charged with both theft and receiving stolen property, and may be convicted of either offense but not both. (*People v. Hinks* (1997) 58 Cal.App.4th 1157, 1165; *People v. Strong* (1994) 30 Cal.App.4th 366, 373; see also *People v. Ceja* (2010) 49 Cal.4th 1 [if improperly convicted of both, the theft conviction stands and the receiving conviction is set aside].) In contrast, a burglar can be charged with and convicted of both burglary and receiving stolen property arising from a single incident. (*People v. Allen* (1999) 21 Cal.4th 846, 862-867.) Finally, a defendant can be convicted of violating both Vehicle Code section 10851, subdivision (a), and Penal Code section 496(a), depending upon whether a theft ("takes") or post-theft ("drives") theory of liability is found under Vehicle Code section 10851, subdivision (a). (*People v. Garza* (2005) 35 Cal.4th 866, 881.)

9420.1-General standard of proof for taking and driving vehicle per VC10851 6/20

The gist of the crime of violating Vehicle Code section 10851, subdivision (a) (§ 10851(a)), is the taking or driving of an automobile without the owner's consent and with the specific intent to permanently or temporarily deprive the owner of title to or possession of the automobile. (*DeMond v. Superior Court* (1962) 57 Cal.2d 340, 344; see also *People v. Windham* (1987) 194 Cal.App.3d 1580, 1590; *People v. James* (1984) 157 Cal.App.3d 381, 386.) "[S]ection 10851(a) 'proscribes a wide range of conduct' " from stealing a car to joyriding. (*People v. Garza* (2005) 35 Cal.4th 866, 876.) Because the statute "separately prohibits the acts of driving a vehicle and taking a vehicle …, a defendant who steals a vehicle and then continues to drive it after the theft is complete commits separate and distinct violations of section 10851(a)." (*Id*. at p. 880.) " 'Where the evidence shows a

"substantial break" between the taking and the driving, posttheft driving may give rise to a conviction under Vehicle Code section 10851 distinct from any liability for vehicle theft.' [Citations.]" (*People v. Lara* (2019) 6 Cal.5th 1128, 1136.)

Once the unlawful taking of the vehicle is established, possession of the recently stolen car with slight corroboration is sufficient to sustain a conviction of Vehicle Code section 10851. (*People v. Windham*, *supra*, 194 Cal.App.3d at p. 1590; *In re Robert V.* (1982) 132 Cal.App.3d 815, 821-822; *People v. McFarland* (1962) 58 Cal.2d 748, 754.) The specific intent to deprive the owner of possession of his or her car may be inferred from all the facts and circumstances of the case. (*People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1577; *People v. Windham*, *supra,* 194 Cal.App.3d at p. 1590; *In re Robert V.*, *supra*, 132 Cal.App.3d at p. 821.)

> Mere possession of a stolen car under suspicious circumstances is sufficient to sustain a conviction of unlawful taking. Possession of recently stolen property is so incriminating that to warrant a conviction of unlawful taking there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt. [Citation.] Where recently stolen property is found in the conscious possession of a defendant who, upon being questioned by the police, gives a false explanation regarding his possession or remains silent under circumstances indicating consciousness of guilt, an inference of guilt is permissible. The jury is empowered to determine whether or not the inference should be drawn in light of all of the evidence. [Citation.] Specific intent to deprive the owner of possession of his car may be inferred from all the facts and circumstances of the particular case. Once the unlawful taking of the vehicle has been established, possession of the recently taken vehicle by the defendant with slight corroboration through statements or conduct tending to show guilt is sufficient to sustain a conviction of Vehicle Code section 10851. [Citation.]

(*People v. Clifton* (1985) 171 Cal.App.3d 195, 199-200; accord *People v. Chubbuck* (2019) 43 Cal.App.5th 1, 11.) Flight, for example, upon detection or apprehension for driving a recently stolen vehicle is sufficient corroborating evidence of a defendant's guilty mental state. (*In re Robert V.*, *supra*, 132 Cal.App.3d at pp. 821-822; *People v. Miles* (1969) 272 Cal.App.2d 212, 218.)

"A violation of section 10851(a) is a "wobbler" offense that may be punished as either a misdemeanor or a felony." (*People v. Jackson* (2018) 26 Cal.App.5th 371, 377.) But under Proposition 47, " 'an offender who obtains a [vehicle] valued at [$950 or less] by theft must be charged with petty theft and may not be charged as a felon under any other criminal provision.' " (*People v. Page* (2017) 3 Cal.5th 1175, 1183.) Proposition 47 applies regardless whether the taking or "theft" of a vehicle valued at $950 or less was with specific intent to temporarily or permanently deprive the owner of possession under section 10851. (*People v. Bullard* (2020) 9 Cal.5th 94.) "While a theft-based violation of Vehicle Code section 10851 may be punished as a felony only if the vehicle is shown to have been worth over $950, a violation committed by posttheft driving may be charged and sentenced as a felony regardless of value." (*People v. Lara*, *supra*, 6 Cal.5th at p. 1136, fn. omitted; see also *People v. Martell* (2019) 42 Cal.App.5th 225, 233-235; distinguish *People v. Orozco* (2020) 9 Cal.5th 111 [Prop. 47 does not apply to Pen. Code, § 496d, receiving a stolen vehicle].)

9420.2-Accessory to taking and driving auto need not be driver 11/11

It is not an automatic defense to vehicle theft or receiving stolen property that the defendant was only a passenger in the stolen vehicle. According to the appellate court in *People v. Miles* (1969) 272 Cal.App.2d 212, "[s]ection 10851 of the Vehicle Code provides accessorial liability for an accomplice in the driving or unauthorized taking; mere possession of a stolen car under suspicious circumstances is sufficient to sustain a conviction of unlawful taking." (*Id*. at p. 218.)

> [T]he fact a person is a passenger in a stolen vehicle will not necessarily preclude a conviction for receiving stolen property. … [A]dditional factual circumstances are necessary to establish a passenger has possession or control of the stolen car. … [T]here is no single factor or specific combination of factors which unerringly points to possession of the stolen vehicle by a passenger. If anything, these decisions emphasize the question of possession turns on the unique factual circumstances of each case.

(*People v. Land* (1994) 30 Cal.App.4th 220, 228 [upholding passenger's conviction for receiving stolen property]; distinguish *In re Anthony J.* (2004) 117 Cal.App.4th 718, 729 [insufficient evidence passenger had actual or constructive possession of stolen vehicle].)

The appellate court in *People v. Williams* (1971) 17 Cal.App.3d 275 held that evidence of a passenger's joint activity with the driver was sufficient to support the belief he participated in stealing the vehicle. "The offense of unauthorized taking or stealing is committed not only by the driver or taker of the vehicle but by 'any person who is a party or accessory to or an accomplice in the driving or unauthorized taking or stealing.' [Citation.]" (*Id.* at pp. 278-279.)

9450.1-Possession of recently stolen property needs slight corroboration 11/11

It has long been the rule that possession of recently stolen property is so incriminating that to warrant conviction for theft, robbery, burglary, or receiving stolen property there need only be, in addition, slight corroboration. (*People v. McFarland* (1962) 58 Cal.2d 748, 754; see also *People v. Anderson* (2007) 152 Cal.App.4th 919, 948 [robbery]; *People v. Hernandez* (1995) 34 Cal.App.4th 73, 80-81 [burglary and receiving stolen property]; *People v. Gamble* (1994) 22 Cal.App.4th 446, 452-455 [robbery and receiving stolen property]; *People v. Banks* (1976) 62 Cal.App.3d 38, 42 [burglary].) While this is the appropriate standard to sustain a conviction, the standard on a motion to dismiss pursuant to Penal Code section 995 is considerably less. Possession of recently stolen property alone is sufficient to support holding a defendant to answer for possession of stolen property or theft, as well as associated crimes.

In *People v. Jackson* (1970) 14 Cal.App.3d 57, the appellate court wrote: "While unexplained possession of stolen property, standing alone, will not support a *conviction* for the theft of the property or for the crime of receiving stolen property, such possession is a circumstance which could lead a reasonable person to entertain a strong suspicion that the possessor either stole it or received it with knowledge of its stolen character. [Citations.]" (*Id*. at p. 63, italics in original; similarly, see *People v. Martin* (1973) 9 Cal.3d 687, 696.) If the property was stolen during a recent burglary or robbery, its possession similarly could lead one to conclude the possessor also participated in those crimes.

After the preliminary hearing, when corroboration is required (such as at trial), the appellate courts have found many factual situations supply such corroboration. For example, one corroborating circumstance is when only a short interval separates theft of the property from its

discovery in the defendant's possession. (*People v. Young* (1981) 120 Cal.App.3d 683, 694; *People v. Mitchell* (1969) 275 Cal.App.2d 351, 355; *People v. Holley* (1961) 194 Cal.App.2d 538, 541.)

Similarly, possession of stolen property, "accompanied by no explanation or unsatisfactory explanation, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen." (*People v. Myles* (1975) 50 Cal.App.3d 423, 428.) The possession of a number of similar items may be a corroborating circumstance. (*People v. Martin*, *supra*, 9 Cal.3d at p. 696) Flight from detection or apprehension is adequate corroboration to support a conviction. (*In re Robert V.* (1982) 132 Cal.App.3d 815, 821.) And, of course, concealment of the stolen property supplies corroboration. (*People v. Peters* (1980) 128 Cal.App.3d 75, 83.)

9450.2-Value of item stolen linked to fair market value 4/21

To establish certain felonies, such as grand theft, the prosecution bears the burden of proving the value of the stolen property was more than $950. (See, e.g., Pen. Code, §§ 484, 490.2, 459, 459.5; *People v. Valenzuela* (2019) 7 Cal.5th 415, 420; *People v. Lopez* (2020) 9 Cal.5th 254, 265; *People v. Jennings* (2019) 42 Cal.App.5th 664, 670.) "In determining the value of the property obtained, for the purposes of [theft offenses], the reasonable and fair market value shall be the test." (Pen. Code, § 484; see also *People v. Romanowski* (2017) 2 Cal.5th 903, 914 ["section 484 is a definitional section" that "sets the ground rules for how … [s]pecific theft crimes … set out in a variety of other sections" of the Penal Code "are [to be] adjudicated"]; *People v. Seals* (2017) 14 Cal.App.5th 1210, 1215.) The fair market value of an item is "the highest price obtainable in the market place" as between "a willing buyer and a willing seller, neither of whom is forced to act." (*People v. Pena* (1977) 68 Cal.App.3d 100, 103; see also *People v. Romanowski*, *supra*, 2 Cal.5th at p. 915.) "Put another way, 'fair market value' means the highest price obtainable in the market place rather than the lowest price or the average price." (*People v. Pena*, *supra*, 68 Cal.App.3d at p. 104.) Fair market value is "not the value of the property to any particular individual." (*People v. Lizarraga* (1954) 122 Cal.App.2d 436, 438.) "Fair market value may be established by opinion or circumstantial evidence. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 357-358; *People v. Lizarraga*, *supr*a, 122 Cal.App.2d at p. 437 [testimony of experienced furriers sufficient to establish value of stolen fur pieces]; *People v. Williams* (1959) 169 Cal.App.2d 400, 403 [testimony by experienced salesclerk sufficient to establish value of stolen suits].)" (*People v. Grant* (2020) 57 Cal.App.5th 323, 329.) "[T]he price charged by a retail store from which merchandise is stolen" is also "sufficient to establish the value of the merchandise," absent proof to the contrary. (*People v. Tijerina* (1969) 1 Cal.3d 41, 45.) Jurors may also "rely on their common knowledge" in determining the value of an item. (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1366.) ["inference by the jurors was not mere speculation, but was instead reasonably based on common knowledge regarding the value of late-model BMW's"]; distinguish *People v. Grant*, *supra*, 57 Cal.App.5th at pp. 330-332 [proof of "comparable value" on price tag rather than actual sales price insufficient to prove value of item].)

9500.1-Judge has broad discretion to modify the normal order of proof 3/17

Evidence Code section 320 states that "[e]xcept as otherwise provided by law, the court in its discretion shall regulate the order of proof." The order of proof in a criminal jury trial is set forth in Penal Code section 1093, which states in pertinent part:

> The jury having been impaneled and sworn, unless waived, the trial shall proceed in the following order, unless otherwise directed by the court: …
>
> (c) The district attorney, or other counsel for the people shall then offer the evidence in support of the charge. The defendant or his or her counsel may then offer his or her evidence in support of the defense.
>
> (d) The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case. …

Penal Code section 1094 allows the trial court to depart from the normal order of proof: "When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in Section 1093 may be departed from." " '[T]he order of proof in a criminal case rests in the sound discretion of the trial court.' [Citation]." (*People v. Thompson* (2016) 1 Cal.5th 1043, 1087.)

Under Penal Code section 1044, the trial court has the duty to conduct a criminal trial in an orderly and expeditious manner. Similarly, the trial court has broad discretion to regulate witness examinations. (Evid. Code, § 765.) Under Evidence Code section 774, for example, the trial court may permit reexamination of a witness on any new matter on which another party has examined the witness. (See *People v. Tafoya* (2007) 42 Cal.4th 147, 175 [prosecution allowed to reopen cross-examination of defendant regarding new topic raised during cross-examination by codefendant's lawyer]; see also *People v. Chatman* (2006) 38 Cal.4th 344, 382 [when a defendant voluntarily testifies, the district attorney may introduce evidence through cross-examination that explains or refutes his statements or the inferences that may reasonably be drawn from them].)

9500.2-Trial court has discretion to grant or deny motion to reopen case 4/20

"The decision to reopen a criminal matter to permit the introduction of additional evidence is a matter left to the broad discretion of the trial court. (*People v. Monterroso* (2004) 34 Cal.4th 743, 779 (*Monterroso*); *People v. Marshall* (1996) 13 Cal.4th 799, 836; see [Pen. Code], §§ 1093, 1094.)" (*People v. Jones* (2012) 54 Cal.4th 1, 66 [sustaining trial court's denial of defense request to reopen]; see also *People v. Earley* (2004) 122 Cal.App.4th 542, 546 [affirming trial court's denial of defendant's request, made after both sides rested and against his attorney's advice, to reopen so he could testify].)

> "In determining whether an abuse of discretion occurred, the reviewing court considers four factors: ' "(1) the stage the proceedings when the motion was made; (2) the defendant's diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence." ' " [Citation.]

(*People v. Beck & Cruz* (2019) 8 Cal.5th 548, 637, citing *People v. Homick* (2012) 55 Cal.4th 816, 881; see also *People v. Masters* (2016) 62 Cal.4th 1019, 1069.)

Thus, there is no abuse of discretion in refusing to allow reopening of the case where "the evidence the defense sought to offer at reopening was indisputably available during the trial."

(*Monterroso*, *supra*, 34 Cal.4th at p. 779 ["The trial court was entitled to rely on defendant's lack of diligence in denying the motion to reopen."]; see also *People v. Funes*, *supra*, 23 Cal.App.4th at p. 1521 [no abuse of discretion in denying motion to reopen where defense had pretrial access to all of the medical reports that indicated that the overlooked evidence might be relevant].)

Conversely, there is no abuse of discretion in allowing prosecution to reopen when, for example, "[t]he evidence was highly pertinent and it was offered as soon as the necessary foundational showing could be made." (*People v. Garvey* (1979) 99 Cal.App.3d 320, 324 [allowed after defense had rested].) Fairness dictates, however, that the defense be given the opportunity to rebut any new prosecution evidence in surrebuttal. (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 794.)

9500.3-The prosecution can present rebuttal to any new defense evidence 10/16

"Rebuttal evidence is relevant and thus admissible if it 'tend[s] to disprove a fact of consequence on which the defendant has introduced evidence.' [Citation.] The trial court is vested with broad discretion in determining the admissibility of evidence in rebuttal." (*People v. Clark* (2011) 52 Cal.4th 856, 936; see *People v. Mills* (2010) 48 Cal.4th 158, 195 [the trial court has "broad power to control the presentation of proposed impeachment evidence"].)" (*People v. Nunez & Satele* (2013) 57 Cal.4th1, 27.)

In *People v. Carter* (1957) 48 Cal.2d 737 (*Carter*), the California Supreme Court held that "proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime." (*Id*. at p. 753.) In *Carter*, a murder case, the prosecution did not present the defendant's red cap, which was left at the scene of the crime, until rebuttal. The defendant had testified he had not been at the scene and had not left anything there. The prosecution gave no reason for failing to produce evidence regarding the cap during its case-in-chief. The Supreme Court disapproved of the prosecutor's tactics and observed rebuttal evidence "is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." (*Id*. at pp. 753-754.)

But the California Supreme Court has limited the *Carter* rule. "We have applied *Carter* only to ' "crucial" ' or ' "material" ' evidence that properly belonged only in the case-in-chief. [Citation.]" (*People v. Friend* (2009) 47 Cal.4th 1, 44 [proffered testimony bolstering a key prosecution witness' credibility "was not evidence that by itself established guilt or was directly probative of the crimes charged"]; see also *People v. Nunez & Satele*, *supra*, 57 Cal.4th at p. 30.) *Carter* is also inapplicable if the prosecution was unaware of the evidence during its case-in-chief. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1211.) In addition, "[t]estimony that repeats or fortifies a part of the prosecution's case that has been impeached by defense evidence may properly be admitted in rebuttal. [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1199.)

Finally, otherwise admissible rebuttal evidence does not become inadmissible simply because the prosecutor could also have introduced it during cross-examination of a defense witness. (*People v. O'Malley* (2016) 62 Cal.4th 944, 997.)

9500.4-Trial court has discretion whether to allow rebuttal evidence 11/15

At the conclusion of each side's case-in-chief, "[t]he parties may then respectively offer rebutting testimony only … ." (Evid. Code, § 1093, subd. (d).) "The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion." (*People v. Young* (2005) 34 Cal.4th 1149, 1199; see also *People v. Nguyen* (2015) 61 Cal.4th 1015, 1065 [defense rebuttal witness properly excluded as cumulative].)

9500.5-Defense right to surrebuttal is limited 7/12

Although Evidence Code section 320 and Penal Code section 1094 give the trial court discretion to alter the normal order of proof in a criminal case, the limits on this discretion when on surrebuttal historically are stricter that for rebuttal. "On surrebuttal the defendant in a criminal action is entitled to rebut only *new* matter educed by the People." (*People v. Remington* (1925) 74 Cal.App. 371, 376, italics in original.)

In *People v. Hill* (1897) 116 Cal. 562, for example, the defense case-in-chief consisted of evidence of defendant's insanity at the time of the murder. In rebuttal, the prosecution presented an expert to testify the defendant was sane. The defense then sought to introduce in surrebuttal the testimony of a physician as to defendant's insanity. The trial court refused to permit such evidence as rebuttal, on the ground that it was properly a part of defendant's case-in-chief. The California Supreme Court affirmed.

> The defendant was entitled to rebut any new matter offered on the subject by the people, but the evidence of the [prosecution's] expert involved nothing new. It was purely evidence in contradiction of defendant's evidence, and nothing more. Its purpose and effect was, instead of denying the facts shown by defendant, to rebut by a perfectly proper method the inference sought to be drawn therefrom. It was only the method of meeting defendant's evidence, and not the matter which was new or different; no new fact was shown, and there was nothing, therefore, which was the proper subject of rebuttal. If defendant desired the opinions of experts to support the facts as to his state of mind, such evidence was a part of his original case.

(*Id*. at p. 566.)

Similarly, in *People v. Griffith* (1905) 146 Cal. 339, the defense case-in chief included the testimony of experts that the defendant suffered from "chronic alcohol insanity." The prosecution called experts in rebuttal to refute these opinions because a particular type of delusion, which they deemed essential to the diagnosis, was not noted by the defense experts. On surrebuttal the defense attempted to recall their experts. The prosecution objected that this was improper surrebuttal and the trial court sustained the objection. The California Supreme Court affirmed the trial court's ruling. (*Id*. at p. 347.) The court also noted:

> If it be conceded that it was technically surrebutter to allow the defense in turn to show by the opinion of their recalled experts, that such a delusion was not essential, nevertheless it was but touching directly upon a matter which these same witnesses had discussed indirectly in their first examinations. If the practice could be continued without being checked in the discretion of the court, it could go on to infinity. So that, even if it be regarded as technically evidence in surrebutter, the whole ground of the examination had

previously been completely covered.
(*Id*. at p. 348)

9510.1-Defendant's presence not required at chambers or bench discussions 2/18

Generally, the defendant does not have a right to be present at chambers or bench conferences between the court and counsel.

> "[A] criminal defendant has a right to be personally present at certain pretrial proceedings and at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, section 15 of article I of the California Constitution, and sections 977 and 1043. [Citation.]" [Citation.] The right is not absolute, however. Under federal constitutional principles, a defendant is entitled to be present at a certain proceeding only if his or her appearance "is necessary to prevent 'interference with [his] opportunity for effective cross-examination' " or if the proceeding represents a " 'stage … that is critical to [the] outcome' and 'his presence would contribute to the fairness of the procedure.' [Citation.]" [Citation.] Our state Constitution's right to personal presence is circumscribed in a similar manner, as are sections 977 and 1043, which codify that right. [Citations.]

(*People v. Clark* (2011) 52 Cal.4th 856, 1003-1004, fn. omitted.)

"This court has made it clear that neither the state nor the federal Constitution, nor the statutory requirement that a defendant be present at 'all … proceedings' ([Pen. Code] § 977, subd. (b)(1)), provides a criminal defendant with the right to be personally present in chambers or at bench discussions outside the jury's presence on questions of law or other matters as to which his presence bears no reasonable, substantial relation to his opportunity to defend the charges against him." (*People v. Harris* (2008) 43 Cal.4th 1269, 1306, fn. omitted; see also *People v. Lopez* (2013) 56 Cal.4th 1028, 1051.) "For example, 'a defendant may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case, because the defendant's presence would not contribute to the fairness of the proceeding.' (*People v. Perry* (2006) 38 Cal.4th 302, 312.)" (*People v. Young* (2017) 17 Cal.App.5th 451, 466.)

9520.1-Proper scope of opening statement 7/20

"The function of an opening statement is not only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning." (*People v. Dennis* (1998) 17 Cal.4th 468, 518; see also *People v. Adams* (2014) 60 Cal.4th 541, 569.)

> "The purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present. …" (*People v. Millwee* (1998) 18 Cal.4th 96, 137.) "Nothing prevents the statement from being presented in a story-like manner that holds the attention of lay jurors and ties the facts and governing law together in an understandable way." (*Ibid*.)

(*People v. Farnam* (2002) 28 Cal.4th 107, 168.)

In effectuating the purpose of the opening statement, a prosecutor may make " 'use of matters which are admissible in evidence, and which are subsequently in fact received in evidence … .' (*People v. Green* (1956) 47 Cal.2d 209, 215.)" (*People v. Wash* (1993) 6 Cal.4th 215, 257

[defendant's taped confession played and photographs and slides of the crime scene and murder victims were displayed].) Thus, the "use of photographs and tape recordings, intended later to be admitted in evidence, as visual or auditory aids is appropriate." (*People v. Fauber* (1992) 2 Cal.4th 792, 827; see also *People v. Green*, *supra*, 47 Cal.2d at p. 215 [upholding use of photographs of murder victim during opening statement]; *People v. Kirk* (1974) 43 Cal.App.3d 921, 929 [rejecting claim of prosecutorial misconduct based on use of taped admissions during opening statement].)

The prosecutor should avoid misstating the facts or referring to clearly inadmissible evidence in the opening statement. (*People v. Flores* (2020) 9 Cal.5th 371, 402-405.) But " '[r]emarks made in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor "was 'so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted.' " ' " (*People v. Dykes* (2009) 46 Cal.4th 731, 762.) " '[P]rosecutorial misconduct in an opening statement is not grounds for reversal of the judgment on appeal unless the misconduct was prejudicial or the conduct of the prosecutor so egregious as to deny the defendant a fair trial.' " (*People v. Wrest* (1992) 3 Cal.4th 1088, 1109,

9530.1-Leading questions permitted only in special circumstances 7/20

Evidence Code section 767, subdivision (a)(1), provides that leading questions "may not be asked of a witness on direct or redirect examination" except in "special circumstances where the interests of justice otherwise require." "A question is 'leading' if it 'suggests to the witness the answer the examining party requires.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 672; see also *People v. Robinson* (2020) 47 Cal.App.5th 1027, 1031.) " 'Leading questions may be asked on direct examination if there is little danger of improper suggestion and where such questions are necessary to obtain relevant evidence. Examples include preliminary matters … .' [Citation.]" (*People v. Williams* (2013) 56 Cal.4th 165, 192.)

> "Questions calling for a 'yes' or 'no' answer are not leading unless they are unduly suggestive under the circumstances. [Citations.] Furthermore, leading questions are not always impermissible on direct examination. 'Evidence Code section 767, subdivision (a)(1), provides that leading questions "may not be asked of a witness on direct or redirect examination" except in "special circumstances where the interests of justice otherwise require." Trial courts have broad discretion to decide when such special circumstances are present. [Citations.]" [Citation.]

(*People v. Harris* (2008) 43 Cal.4th 1269, 1285, citing *People v. Williams*, *supra*, 16 Cal.4th at p. 672; see also *People v. Pearson* (2013) 56 Cal.4th 393, 426.)

9540.1-Reasonable restrictions on defense cross-examination are permissible 6/20

" 'Cross-examination' is the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness." (Evid. Code, § 761.) "Cross-examination … 'may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given … on direct examination.' [Citation.]" (*People v. McClellan* (1969) 71 Cal.2d 793, 811; accord, *People v. Farley* (2009) 46 Cal.4th 1053, 1109.) "Cross-examination may expose facts from which jurors can appropriately draw inferences about the reliability of a witness, including the possibility of bias." (*People v. Brady* (2010) 50 Cal.4th 547, 560; see also *People v. Capistrano* (2014) 59 Cal.4th 830, 866.)

The trial court has wide latitude to restrict cross-examination, and may impose reasonable limits on the scope such of cross-examination. (*People v. Gonzales* (2011) 51 Cal.4th 894, 945.) " 'It is settled that the trial court is given wide discretion in controlling the scope of relevant cross-examination.' " (*People v. Lancaster* (2007) 41 Cal.4th 50, 102; see also *People v. Smith* (2007) 40 Cal.4th 483, 513.) " 'The court shall exercise reasonable control over the mode of interrogation of a witness' (Evid. Code, § 765, subd. (a)) and need not permit examination of a witness that amounts to nothing more than a fishing expedition [Citation]." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1038.)

> A criminal defendant's constitutional right to confront witnesses is violated when the court prohibits the defendant from conducting otherwise appropriate cross-examination designed to show a prototypical kind of bias on the witness's part, and thereby provide the jury with facts from which it could appropriately draw inferences regarding the witness's reliability. But not every restriction on a defendant's cross-examination violates the Constitution.

(*People v. Sanchez* (2016) 63 Cal.4th 411, 450.)

Reasonable restrictions on defense cross-examination of witnesses, including application of the rules of evidence, do not violate a defendant's Sixth Amendment rights.

> [T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. [Citation.]" (*Delaware v. Fensterer* [(1985)] 474 U.S. [15] at p. 20; accord, *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) The confrontation clause allows "trial judges … wide latitude … to impose reasonable limits on … cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 679.) In other words, a trial court may restrict cross-examination on the basis of the well-established principles of Evidence Code section 352, i.e., probative value versus undue prejudice. [Citation.] There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced a significantly different impression of credibility.

(*People v. King* (2010) 183 Cal.App.4th 1281, 1314-1315, fn. omitted; see also *People v. Williams* (2016) 1 Cal.5th 1166, 1192; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 118-119.)

> Cross-examination is subject to restriction under Evidence Code section 352 if it is cumulative or if it constitutes impeachment on collateral issues. [Citations.] The trial court's wide discretion under Evidence Code section 352 to limit cross-examination is not abused by the exclusion of impeachment evidence which has only marginal probative value. [Citations.] "Moreover, reliance on Evidence Code section 352 to exclude evidence of marginal impeachment value that would entail the undue consumption of time generally does not contravene a defendant's constitutional rights to confrontation and cross-examination." [Citation.]

(*People v. Ardoin*, *supra*, 196 Cal.App.4th at p. 122.)

9540.2-Cross-examination on collateral matters should not be allowed 5/14

"Of course, the trial court has wide latitude under state law to exclude evidence offered for impeachment that is collateral and has no relevance to the action." (*People v. Contreras* (2013) 58 Cal.4th 123, 152.) "[A] matter is 'collateral' if it has no logical bearing on any material, disputed issue." (*Ibid*.) "We have consistently held that it is within the trial court's discretion to exclude collateral evidence offered for impeachment purposes (see, e.g., *People v. Redmond* (1981) 29 Cal.3d 904, 913 …), as well as to exclude evidence that is cumulative, confusing or misleading (Evid. Code, § 352)." (*People v. Douglas* (1990) 50 Cal.3d 468, 509.) "Courts may 'prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citations.]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1052; see also *People v. Mendoza* (2011) 52 Cal.4th 1056, 1089-1090.)

Thus, "[a] party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted. [Citations.]" (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.) "This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions." (*Ibid*.) "While cross-examination to test the credibility of a prosecution witness is to be given wide latitude[citation], its control is within the discretion of the trial court [citation], and the trial court's exclusion of collateral matter offered for impeachment purposes has been consistently upheld. [Citation.]" (*People v. Flores* (1977) 71 Cal.App.3d 559, 567.)

"Although it is improper to elicit otherwise irrelevant testimony on cross-examination merely for the purpose of contradicting it (*People v. Lavergne* [*supra*, 4 Cal.3d at p.] 744), the trial court has discretion to admit or exclude evidence offered for impeachment on a collateral matter [citations]." (*People v. Mayfield* (1997) 14 Cal.4th 668, 748; see also *People v. Morrison* (2011) 199 Cal.App.4th 158, 164-165.) But "the exclusion of impeaching evidence on collateral matters which has only slight probative bearing on the issue of veracity does not infringe on a defendant's right of confrontation. (*People v. Jennings* (1991) 53 Cal.3d 334, 372.)" (*People v. King* (2010) 183 Cal.App.4th 1281, 1315; see also *People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 751; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 119.)

9540.3-An examiner should not ask argumentative questions 5/19

"An argumentative question is designed to engage a witness in argument rather than elicit facts within the witness's knowledge." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1125; see also *People v. Pearson* (2013) 56 Cal.4th 393, 435.)

> An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable. … An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all.

(*People v. Chatman* (2006) 38 Cal.4th 344, 384; see also *People v. Armstrong* (2019) 6 Cal.5th 735, 796, fn. 23; but see *People v. Anderson* (2018) 5 Cal.5th 372, 413-414 [prosecutor's questions not argumentative]; *People v. Williams* (2013) 56 Cal.4th 165, 192 [same].) A court's ruling sustaining an objection to an argumentative question does not infringe on a defendant's constitutional rights. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1252.)

9540.4-Scope of cross-examination of defendant is broad 8/13

"The permissible scope of cross-examination of a defendant is generally broad." (*People v. Chatman* (2015) 38 Cal.4th 344, 382.)

> "Where a defendant takes the stand and makes a general denial of the crime the permissible scope of cross-examination is very wide." (*People v. Ing* (1967) 65 Cal.2d 603, 611, and cases cited therein.) When a defendant voluntarily testifies in his own defense the People may "fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them." (*People v. Schader* (1969) 71 Cal.2d 761, 770.)

(*People v. Harris* (1981) 28 Cal.3d 935, 953.)

"[W]hen a defendant does testify, all bets are off. He waives his Fifth Amendment privilege [citation] and is subject to cross-examination just as any other witness is. [Citations.]" (*People v. Vega* (2015) 236 Cal.App.4th 484, 497 (*Vega*).)

> [T]he United States Supreme Court said that an accused who takes the stand "subjects himself to the same rule as that applying to any other witness." The court explained that "where the accused takes the stand in his own behalf and voluntarily testifies for himself … he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it."

(*Vega*, *supra*, at p. 499, citing *Caminetti v. United States* (1917) 242 U.S. 470, 493-494.)

For example, "[t]he failure to explain or deny adverse evidence can be a basis for disbelieving any witness's testimony and is always relevant to credibility." (*Vega*, *supra*, 236 Cal.App.4th at p. 496.) Thus it is not unfair to tell jurors they may draw reasonable factual inferences against a defendant based on unsatisfactory and implausible answers to questions during his or her testimony. (*Ibid*.) "[I]f a person charged with a crime is given the opportunity to explain or deny evidence against him but fails to do so (or gives an implausible explanation), then that evidence may be entitled to added weight." (*Ibid*.)

Additionally, "[i]t is settled that a criminal defendant can be asked whether prosecution witnesses are lying. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 98.)" (*People v. Johnigan* (2011) 196 Cal.app.4th 1084, 1097 [subject to the a foundation being laid for defendant having personal knowledge rather than being asked to speculate]; distinguish *People v. Zambrano* (2004) 124 Cal.App.4th 228 [improper to ask defendant whether police officers were lying in their testimony].)

> A defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. … Were a defendant to testify on direct examination that a witness against him lied, and go on to give reasons for this deception, surely that testimony would not be excluded merely because credibility determinations fall squarely within the jury's province. Similarly, cross-examination along this line should not be categorically prohibited.

(*People v. Chatman*, *supra*, 38 Cal.4th at p. 382.)

9540.5-Defendant's testimony at suppression motion can be used to impeach at trial 8/15

Although not admissible in the prosecution's case-in-chief, a defendant's testimony during a motion to suppress on Fourth Amendment grounds may be admitted at other stages of trial, such as on cross-examination to impeach the defendant. The United States Supreme Court in *Simmons v. United States* (1968) 390 U.S. 377, established the rule that when a defendant gives testimony in support of a motion to suppress evidence on Fourth Amendment grounds, that testimony is not to be admitted against him as proof of guilt at trial, assuming an objection is made. (*Id*. at pp. 389-394.)

> However, the privilege against self-incrimination is not absolute and can be waived. (*People v. Humiston* (1993) 20 Cal.App.4th 460, 474-475 (*Humiston*).) " '[T]he defendant waives the privilege with respect to any matter to which he testified expressly or impliedly on direct examination and that is relevant to impeach his credibility as a witness. [Citation.]' " (*Id*. at p. 474.) Thus: "[I]f a defendant testifies at a suppression hearing in superior court or a suppression motion at a preliminary hearing, his testimony may not be used against him by the prosecution in its case-in-chief. [Citation.] 'However, if a defendant's testimony at a pretrial suppression hearing is inconsistent with his testimony at trial, the People may use such pretrial testimony for impeachment. [Citation.]' [Citation.] This rule does not force a defendant to choose between a valid Fourth Amendment claim and the Fifth Amendment right against self-incrimination. 'He may testify truthfully at his suppression motion should he elect to do so. In the event that he chooses to testify truthfully at trial, he runs no risk of being impeached. He has, however, no right to commit perjury and is not entitled to a "false aura of veracity." [Citation.] If his trial testimony is inconsistent with that previously given at the suppression hearing, he may be impeached therewith. [Citations.]' " (*Humiston*, *supra*, 20 Cal.App.4th 460, 474-475, italics omitted; see *People v. Beyah* (2009) 170 Cal.App.4th 1241, 1249-1250 [applying this reasoning in the context of alleged instructional error].)

(*People v. Spence* (2012) 212 Cal.App.4th 478, 496 (*Spence*).) This exception does not apply to permit impeachment of third party witness. (*James v. Illinois* (1990) 493 U.S. 307, 314-319 (*James*); *People v. Johnson* (2010) 183 Cal.App.4th 253, 283.) But the defendant's testimony at a motion to suppress testimony may be used to discredit a defense expert. (*Spence*, *supra*, 212 Cal.App.4th at pp. 503-506; *People v. Boyer* (2006) 38 Cal.4th 412, 462-463 (*Boyer*).)

> The facts before this court are different from those in *James*, and when we apply its balancing test, we find that allowing the impeachment of the expert witness's opinion, by presenting the excerpt from Spence's suppression testimony, will best promote truth seeking; it will not chill defendants "from presenting their best defense—and sometimes any defense at all—through the testimony of others" (*James*, *supra*, at pp. 314-315), and it will not "unduly encourage police misconduct by preserving a broad area in which the evidence could be used despite its illegal procurement." (*Boyer*, *supra*, 38 Cal.4th at p. 462.)

(*Spence*, *supra*, 212 Cal.App.4th at p. 505.)

9550.1-Trial court can control length, content and sequence of closing arguments 9/18

"It shall be the duty of the judge to control all proceedings during the trial, and to limit … the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (Pen. Code, § 1044.) "[I]t is equally settled that a judge in a criminal case 'must be given great latitude in controlling the duration and limiting the scope of closing summations.' [Citations]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1184.) "The judge has broad discretion to limit counsel to a reasonable time and to terminate argument when continuation would be repetitive or redundant." (*Ibid*.; see also *People v. Masters* (2016) 62 Cal.4th 1019, 1074; *People v. Stout* (1967) 66 Cal.2d 184, 200.) In addition, the judge has authority to limit the content of counsel's argument to ensure that it does not "stray unduly from the mark." (*People v. Masters*, *supra*¸ 62 Cal.4th at p. 1074; *People v. Boyette* (2002) 29 Cal.4th 381, 463.)

In a multiple defendant case, the judge also has the power to determine the sequence of the defense argument. "Trial courts have broad discretion to control the sequence of closing argument. (See, e.g., Pen. Code, § 1044; *Herring v. New York* (1975) 422 U.S. 853, 862.)" (*People v. Daveggio & Michaud* (2018) 4 Cal.5th 790, 865 [no error in denying defendant's request for rebuttal argument to co-defendant's closing statement].)

9620.1-Dirk or dagger under PC21310 is knife designed for stabbing 3/21

It is a felony to carry a concealed dirk or dagger upon one's person. (Pen. Code, § 21310 [formerly § 12020, subd. (a)(4)].) The weapon must be substantially concealed to constitute the crime—total concealment is not necessary. (*People v. Wharton* (1992) 5 Cal.App.4th 72, 75; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955.) The weapon must be on the person, not in an adjacent location or container. (*People v. Hester* (2020) 58 Cal.App.5th 630, 639 [backpack worn by defendant was on his person]; *People v. Pellecer* (2013) 213 Cal.App.4th 508, 512-518 [backpack that defendant was leaning upon was not on his person].)

Not all knives are dirks or daggers. "Dirk and dagger are used synonymously and consist of any straight stabbing weapon." (*People v. Castillolopez* (2016) 63 Cal.4th 322, 327-328.) There a statutory definition:

> [A] "dirk" or "dagger" means 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. A nonlocking folding knife, a folding knife that is not prohibited by Section 21510, or a pocketknife is capable of ready use as a stabbing weapon that may inflict great bodily injury or death only if the blade of the knife is exposed and locked into position.

(Pen. Code, § 16470.)

As with other alleged illegal weapon offenses, the first issue is whether the item has the necessary characteristics to fall with the statutory definition. (*People v. King* (2006) 38 Cal.4th 617, 627; *People v. Mayberry* (2008) 160 Cal.App.4th 165, 172.) Whether there is sufficient evidence that a bladed object has the necessary characteristics of a dirk or dagger is generally a question of statutory interpretation. (See, e.g., *People v. Plumlee* (2008) 166 Cal.App.4th 935, 941 [despite contrary finding by magistrate, there was sufficient evidence presented at preliminary hearing that defendant's switchblade knife also fit statutory definition of dirk or dagger]; *In re Luke W.* (2001) 88 Cal.App.4th 650, 653-654 [blade inside thick credit card shaped object fit within statutory

exception of "pocketknife," and thus, was not prohibited dirk or dagger]; *In re George W.* (1998) 68 Cal.App.4th 1208, 1215 [true finding reversed because of lack of evidence folding knife was "exposed and locked into position"]; distinguish *People v. Hester*, *supra*, 58 Cal.App.5th 637-638 [box cutters with blades that locked in place when open satisfied statutory definition even though both found in retracted position].)

Some appellate courts hold the issue whether a weapon is a "dirk or dagger" can be decided as a matter of law. Several reported cases hold that objects with no apparent purpose other than for stabbing should be classified as dirks or daggers as a matter of law. (See, e.g., *People v. Cabral* (1975) 51 Cal.App.3d 707, 711-712 [straightened bed spring with sharpened tip and shoe lace wrapped around other end to serve as handle]; *People v. McClure* (1979) 98 Cal.App.3d Supp. 31, 32-33 [belt buckle knife, prohibited separately under former Pen. Code, § 12020, subd. (a), also held to be dagger as a matter of law].)

Conversely, some items are *not* dirks or daggers as a matter of law. Reported cases hold that some knives were clearly designed for an innocent purpose, and display characteristics that substantially limit their effectiveness as stabbing instruments. (See, e.g., *People v. Castillolopez*, *supra*, 63 Cal.4th at pp. 331-335 [folding knife without a locking blade]; *People v. Barrios* (1992) 7 Cal.App.4th 501, 503 [unaltered bread knife]; *Bills v. Superior Court* (1978) 86 Cal.App.3d 855, 862 [unaltered barber scissors].)

The second question, again as with other illegal weapons offenses, is whether the defendant had the requisite mental state of knowledge as the illegal characteristics of the dirk or dagger. "To rule out an innocent possession the Supreme Court has required that the prosecution prove that the defendant had actual knowledge of the characteristic that made possession of the item unlawful. (See *People v. King*, *supra*, 38 Cal.4th at p. 626 … .)" (*People v. Mayberry*, *supra*, 160 Cal.App.4th at p.172.) Carrying a concealed dirk or dagger is, nevertheless, a general intent crime. (*People v. Bermudez* (2020) 45 Cal.App.5th 370, 358, fn. 7.)

> [T]he defendant must knowingly and intentionally carry concealed on his or her person an instrument "that is capable of ready use as a stabbing instrument." [Citation.] A defendant who does not know that he is carrying the weapon or that the concealed weapon may be used as a stabbing weapon is therefore not guilty of violating [former] section 12020.

(*People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332.) But, the defendant's intended use of the concealed dirk or dagger is neither an element of the offense nor a defense. (*Id*. at pp. 331, 334.) "[W]hen the instrument may have innocent uses, the jury should be given an instruction stating: 'When deciding whether the defendant knew the object … could be used as a stabbing weapon, consider all the surrounding circumstances, including the time and place of possession. Consider also the destination of the defendant, the alteration of the object from standard form, and other facts, if any.' " (*People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1372; see also *People v. Bermudez*, *supra*, 45 Cal.App.5th at pp. 370, 374.)

9630.1-Common item possessed as weapon can violate PC22210 4/18

Penal Code section 22210 [formerly § 12020, subd. (a)(1)], prohibited possession of "any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sap, or sandbag." An ordinary object with innocent uses may fall within the terms of Penal Code section 22210 if the prosecution proves that the object was possessed as a weapon. (*People v. Davis* (2013) 214 Cal.App.4th 1322, 1327 (*Davis*).) If the prosecution meets its burden in this regard there are no additional requirements of showing the object was altered from its original form or that the defendant actually intended to use the object as a weapon. (*People v. Baugh* (2018) 20 Cal.App.5th 438, 442-446.) "The only way to meet that burden is by evidence 'indicat[ing] that the possessor would use the object for a dangerous, not harmless, purpose.' [Citation.] The evidence may be circumstantial, and may be rebutted by the defendant with evidence of 'innocent usage.' " (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [ordinary bicycle lock could be "slungshot"].)

As explained in *People v. King* (2006) 38 Cal.4th 617, "an item commonly used for a nonviolent purpose, such as a baseball bat or a table leg, could qualify as a billy, but only 'when the attendant circumstances, including the time, place, destination of the possessor, the alteration of the object from standard form, and other relevant facts indicated that the possessor would use the object for a dangerous, not harmless, purpose.' " (*Id*. at p. 624; see also *People v. Grubb* (1965) 63 Cal.2d 614, 621 [altered baseball bat, taped at the smaller end, heavier at the unbroken end, carried about in the car, obviously usable as a billy, and clearly not transported for the purpose of playing baseball, violated the statute]; see also *People v. Baugh*, *supra*, 20 Cal.App.5th at p. 446 ["In light of the fact Baugh kept a wooden bat by his side, at the ready, under circumstances in which an inference could be drawn that he felt the need for a weapon and had a willingness to use it, we think a rational jury could have found the bat was in his possession because he viewed it as weaponized—in short, it was a useful cudgel—not because he had some innocent use in mind."].)

The defendant in *Davis* had a modified baseball bat in his truck. It had a number of holes drilled partially through the handle, and it had a leather wrist strap. The bat had been painted black, and in two separate places had two red lightning bolts drawn on it. When asked by the officer why he had the bat, defendant said he repossessed vehicles late at night and needed the bat for protection. The appellate court upheld the defendant's conviction for carrying an illegal billy.

> Here, the bat had been modified in a way the jury could reasonably conclude made it more useful as a weapon: the holes in its handle could reasonably be seen to make it easier to grip, and the strap could make it easier to carry and to swing. Moreover, defendant admitted to [the officer] at the time of his arrest that he needed the bat for protection—i.e., as a weapon. On this record, the jury could properly conclude the bat was a billy.

(*Davis*, *supra*, 214 Cal.App.4th at pp. 1328-1329.)

9640.1-General standard for proof of felon in possession of firearm 12/19

Penal Code section 29800 [formerly § 12021] prohibits all convicted felons from owning or possession firearms. (See also, Pen. Code, §§ 29805 [qualifying prior misdemeanor convictions] and 29900 [prior "violent offense" convictions].) The elements of this offense are (1) conviction of a felony, and (2) ownership, possession, custody, or control of a firearm capable of being concealed on the person. (*People v. Bray* (1975) 52 Cal.App.3d 494, 497.) It is a general-intent crime that require knowing possession of the prohibited item. (*People v. Bay* (2019) 40 Cal.App.5th 126, 131-132.) No specific criminal intent need be proven. (*People v. Neese* (1969) 272 Cal.App.2d 235,

245.) The defendant simply must knowingly possess the firearm. (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922.) But knowledge that the possession is illegal is not an element of the offense. (*People v. Howard* (1976) 63 Cal.App.3d 249, 256; see also *People v. Snyder* (1982) 32 Cal.3d 590.)

"Possession may be either actual or constructive as long as it is intentional." (*People v. Spurlin* (2000) 81 Cal.App.4th 119, 130.)

> Possession may be actual or constructive. " 'A defendant has actual possession when the weapon is in his [or her] immediate possession or control,' " i.e., when he or she is actually holding or touching it. [Citations.] "To establish constructive possession, the prosecution must prove a defendant knowingly exercised a right to control the prohibited item, either directly or through another person." [Citation.] Although a defendant may share possession with other people, "mere proximity" or opportunity to access the contraband, "standing alone, is not sufficient evidence of possession. [Citations.]

(*People v. Bay*, *supra*, 40 Cal.App.5th at p. 132 [jury could reasonably infer that backpack containing gun found inside car where defendant sat with two other passengers belonged to defendant].) "Possession may be imputed when the contraband is found in a place which is immediately accessible to the joint dominion and control of the accused and another." (*People v. Miranda* (2011) 192 Cal.App.4th 398, 410.) For example, in *People v. Nieto* (1966) 247 Cal.App.2d 364, the appellate court held: "The evidence clearly shows that the guns were found under the front seat of appellant's car at a time when he was driving the vehicle. At the very least, this is circumstantial evidence supportive of a finding of joint or constructive possession, custody or control of the guns by appellant, and sufficient to sustain his conviction." (*Id*. at p. 368; similarly see *People v. Harrison* (1969) 1 Cal.App.3d 115 [upholding the driver's conviction for possession of a weapon found under the seat of the passenger]; but see *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 ["mere proximity to the weapon, standing alone, is not sufficient evidence of possession"].)

9800.1-Test for whether witness competent to testify 2/21

"[E]very person is qualified to testify except as provided by statute. (Evid. Code, § 700.)" (*People v. Anderson* (2001) 25 Cal.4th 543, 572.) Under Evidence Code section 701, subdivision (a), "[a] person is disqualified to be a witness if he or she is: [¶] (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or [¶] (2) Incapable of understanding the duty of a witness to tell the truth." "The grounds stated in Evidence Code section 701, subdivision (a)(1) and (2), are the '*only*' grounds for disqualifying a witness from testifying." (*People v. Sanchez* (2019) 7 Cal.5th 14, 30, italics in original.) " 'The fact that a witness has made inconsistent and exaggerated statements does not indicate an inability to perceive [or] recollect ....' [Citation.] Nor does a witness's mental defect or insane delusions necessarily reflect that the witness lacks the capacity to perceive or recollect." (*People v. Lewis* (2001) 26 Cal.4th 334, 356; see also *People v. Flinner* (2020) 10 Cal.5th 686, 742.)

The credibility of a witness is an issue for the jury, and not a relevant factor in determining competence to testify. (*People v. Sanchez*, *supra*, 7 Cal.5th at p. 31; *People v. Avila* (2006) 38 Cal.4th 491, 589-590.) " 'Inconsistencies in testimony and a failure to remember aspects of the subject of the testimony, however, do not disqualify a witness. [Citation.] They present questions of

credibility for resolution by the trier of fact.' (*People v. Mincey* (1992) 2 Cal.4th 408, 444.)" (*People v. Lopez* (2018) 5 Cal.5th 339, 352.) "The issue of competency is distinct from the issue of credibility, and 'contradictory [or inconsistent] testimony does not suffice to show incapacity to understand the duty of truth[.]' [Citations.]" (*People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 959.) The determinations whether the witness actually perceived and does recall, in addition to being truthful, are left to the trier of fact. (*People v. Lewis* (2001) 26 Cal.4th at p. 356; *People v. Dennis* (1998) 17 Cal.4th 468, 526.)

"Capacity to communicate, or to understand the duty of truthful testimony, is a preliminary fact to be determined exclusively by the court, the burden of proof is on the party who objects to the proffered witness, and a trial court's determination will be upheld in the absence of a clear abuse of discretion." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 573; see also *People v. Gonzales* (2012) 54 Cal.4th 1234, 1265; *People v. Avila*, *supra*, 38 Cal.4th at p. 589.) "The party challenging a witness's competency has the burden to prove incompetency by a preponderance of the evidence." (*People v. Giron-Chamul*, *supra*, 245 Cal.App.4th at p. 959.)

9800.2-Child competency to testify 8/19

The legal standards for witness competency under Evidence Code sections 700 and 701 also apply to child witnesses. "In addition to an awareness of the difference between truth and falsehood, other prerequisites for competency as a child witness are the capacity to observe, sufficient intelligence, adequate memory, the ability to communicate, and an appreciation of the obligation to speak the truth." (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 167, fn. 7; see also *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1368 [collecting cases in which four-and five-year-old children found competent to testify].) In *People v. Dennis* (1998) 17 Cal.4th 468, the California Supreme Court "rejected the defendant's argument that the child witness's testimony was unreliable because of gaps in her memory and her discussions of the events with the prosecutor and others." (*Id*., at p. 526; see also *People v. Sanchez* (2019) 7 Cal.5th 14, 32; *People v. Lopez* (2018) 5 Cal.5th 339, 353.)

> [C]hildren have imaginations. "[T]he fact that a very young witness makes inconsistent or exaggerated statements does not indicate an inability to perceive, recollect, and communicate or an inability to understand the duty to tell the truth," even if some parts of the child's testimony may be "inherently incredible." (*Adamson v. Department of Social Services* (1988) 207 Cal.App.3d 14, 20; see, e.g., *People v. Burton* (1961) 55 Cal.2d 328, 341-342 [child witness understood difference between truth and lies despite "asserted inherent improbability of her testimony that on two previous occasions when [the] defendant committed the lewd act [against her] an 18-year-old girl was present and did nothing"]; *In re Amy M.* (1991) 232 Cal.App.3d 849, 857-858 [upholding finding of competency where child testified to "hallucinations" about her mother and guinea pig].) Instead, "questions about whether aspects of [a child's] testimony were believable are questions of credibility for the trier of fact." (*Adamson*, at p. 20.)

(*People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 960.)

9805.1-Witness must have personal knowledge 8/19

Evidence Code section 702, subdivision (a), states that "the testimony of a witness [at trial] concerning a particular matter is inadmissible unless [the witness] has personal knowledge of the matter." The personal knowledge requirement also applies to statements of hearsay declarants. (*People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104.)

"When a witness's personal knowledge is in question, the trial court must make a preliminary determination of whether 'there is evidence sufficient to sustain a finding' that the witness has the requisite knowledge. (Evid. Code, § 403, subd. (a)(2).)" (*People v. Cortez* (2016) 63 Cal.4th 101, 124.) " 'Direct proof of perception, or proof that forecloses all speculation is not required.' [Citation.]" (*Ibid*.) The trial court may exclude testimony for lack of personal knowledge " 'only if no jury could reasonably find that [the witness] has such knowledge.' … [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 573; see also *People v. Johnson* (2018) 6 Cal.5th 541, 583; *People v. Lopez* (2018) 5 Cal.5th 339, 351.)

> A witness challenged for lack of personal knowledge *must* … be allowed to testify *if there is evidence from which a rational trier of fact could find* that the witness accurately perceived and recollected the testimonial events. Once that threshold is passed, it is for the jury to decide whether the witness's perceptions and recollections are credible.

(*Id*. at p. 574, original italics.) An appellate court reviews a trial court's determination of this issue using the abuse of discretion standard. (*People v. Sanchez* (2019) 7 Cal.5th 14, 33; *People v. Lopez*, *supra*, 5 Cal.5th at p. 352.)

9810.1-Defense burden to show materiality of unavailable witness 9/20

"Generally, an accused is not entitled to a dismissal simply because he is unable to produce witnesses assertedly necessary to his defense." (*Bellizzi v. Superior Court* (1974) 12 Cal.3d 33, 36; see also *People v. Kirkpatrick* (1972) 7 Cal.3d 480, 486; similarly see People v. Aguilera (2020) 50 Cal.App.5th 894, 915-918 [dismissal improper remedy although federal government refused to turn over potentially exculpatory information to both prosecution and defense because defense could not prove materiality].) The appellate courts have held that the police have no duty to maintain contact with witnesses who are ordinary citizens. The police and prosecution are required only to refrain from conduct that makes a witness unavailable to the defense. (*Bellizzi v. Superior Court*, *supra*, 12 Cal.3d at pp. 36-37; *People v. Hernandez* (1978) 84 Cal.App.3d 408, 411.)

> To prevail on a claim of prosecutorial violation of the right to compulsory process, a defendant must establish three elements. " 'First, he must demonstrate prosecutorial misconduct, i.e., conduct that was "entirely unnecessary to the proper performance of the prosecutor's duties and was of such a nature as to transform a defense witness willing to testify into one unwilling to testify." ' (*In re Williams* (1994) 7 Cal.4th 572, 603.) Second, he must establish the prosecutor's misconduct was a substantial cause in depriving the defendant of the witness's testimony. (*Ibid*.) The defendant, however, 'is not required to prove that the conduct under challenge was the "direct or exclusive" cause. [Citations.] Rather, he need only show that the conduct was a substantial cause. [Citations.] The misconduct in question may be deemed a substantial cause when, for example, it carries significant coercive force [citation] and is soon followed by the witness's refusal to testify.' (*In re Martin* [(1987)] 44 Cal.3d [1] at p. 31.) Finally, the defendant must show the testimony he was unable to present was material to his defense." (*People v. Lucas* (1995)

12 Cal.4th 415, 457; see *In re Williams*, at p. 603; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858.)

(*People v. Jacinto* (2010) 49 Cal.4th 263, 269-270.)

Police or prosecutorial action that makes a "material witness" for the defense unavailable, such as through deportation, may require dismissal of charges under the compulsory process clause. But the earlier, more lenient standard adopted in *People v. Mejia* (1976) 57 Cal.App.3d 574 (*Mejia*), requiring only that the defense show a reasonable probability that a witness in a position to perceive could provide favorable defense testimony, is no longer the test. Following the passage of the "Truth-in-Evidence" provision of Article I, section 28, subdivision (d) [now subd. (f)(2)] of the California Constitution, enacted as part of Proposition 8, federal law prevails. (*People v. Valencia* (1990) 218 Cal.App.3d 808, 819 (*Valencia*); *People v. Lopez* (1988) 198 Cal.App.3d 135, 146 (*Lopez*).) The appellate courts in *Valencia* and *Lopez* disagreed on the appropriate federal test to apply. The *Valencia* court followed *United States v. Valenzuela-Bernal*, *supra*, 458 U.S. 858, holding "the defendant must make a 'plausible showing that the testimony of the deported [witness] would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.' " (*People v. Valencia*, *supra*, 218 Cal.App.3d at p. 825.) The *Lopez* court followed *California v. Trombetta* (1984) 467 U.S. 479, holding that to justify any relief, the defense must also show that the exculpatory value of the witness's testimony was apparent at the time of the deportation, and was of such a character that defendant cannot obtain comparable evidence by other reasonably available means. (*People v. Lopez*, *supra*, 198 Cal.App.3d at pp. 144-146.)

9810.2-Mere release of illegal alien/witness requires no sanction 6/20

In limited situations, the appellate courts have held that sanctions, including dismissal, may be required when police action lead to the actual deportation of a witness who can offer exculpatory testimony. (*People v. Lopez* (1988) 198 Cal.App.3d 135, 142-146; cf. *People v. Mejia* (1976) 57 Cal.App.3d 574 (*Mejia*).) In the typical case, the deported witness had been arrested as a suspect along with the defendant and was later turned over to federal immigration authorities for deportation without any notice to the defendant. (See, e.g., *Mejia*, *supra*.)

> It would not be imposing a significant burden upon the prosecution to require the prosecutor to give reasonable notice to defense counsel of the impending release from jail of a material alien witness in order that defense counsel could take such action as he may deem necessary to interview the witness and make him or his testimony available for trial. While we do not impose such a requirement in every case, such a notice would certainly satisfy the prosecutor's obligation to take whatever reasonable steps that may be required to assure that the defendant is not deprived of the opportunity to make the witness available for trial. … Because the giving of such a notice would impose only a minor inconvenience upon the prosecutor and would eliminate controversy such as has arisen in this case, we commend such practice to prosecutors. By these guidelines we do not intend to entirely relieve a defendant of some duty of diligence to make a known alien witness available for trial. Under other facts, that duty may well serve to qualify the People's burden in this regard.

(*Cordova v. Superior Court* (1983) 148 Cal.App.3d 177, 186-187.)

In contrast, the appellate court in *In re Jesus B.* (1977) 75 Cal.App.3d 444, held no dismissal was required where the police merely released an illegal alien victim taking only minimal steps to obtain a local address and then relying upon the alien's assurance he would be available. (*Id.* at pp. 450-451.) There, the appellate court held it was unnecessary to incarcerate the alien as a material witness, issue him a subpoena, or even to notify defense counsel of his release. (*Id.* at pp. 451-452.)

> [T]the People are not required to do everything possible to assure the witness' presence in order to fulfill their obligation. All that is required is to take those steps as appear reasonably calculated under the circumstances to assure his presence. The totality of the efforts to assure the presence of a material witness must be considered, including the character of the official acts taken, the degree of control exercisable over the witness, and such matters as whether the prosecutor reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him.

(*Id.* at p. 450.)

Finally, these principles do not apply when neither the investigating police agency nor the prosecution is responsible for the witness' deportation. In *People v. Jacinto* (2010) 49 Cal.4th 263, the defense subpoenaed eyewitness Esparza who was expected to offer exonerating testimony at defendant's trial. The witness was in the custody of the sheriff at the time but was later transferred to federal custody because of a mandatory immigration detainer. He was then deported. The trial court granted the defense motion to dismiss. The California Supreme Court reversed. First, the court found there was no conduct by the prosecutor which caused the defense witness to be deported. "Because it was the sheriff, not the prosecutor, who released Esparza to immigration officials, to satisfy this element defendant must show the jail officials were part of the prosecution team (or otherwise acted at the prosecution's behest). This he did not do." (*Id*. at p. 270.) Second, the court found no "misconduct" occurred. "[E]ven were the jail personnel to be characterized as members of the prosecution team, defendant would face an additional obstacle to establishing his claim of prosecutorial misconduct: no *misconduct* occurred in connection with Esparza's deportation because the sheriff properly acquiesced to ICE's request for Esparza, as represented by the issuance of the federal immigration detainer." (*Id*. at p. 272, italics in original.) Finally, the court noted that the defense was aware of Esparza's status and potential deportation but took no steps other than serving the subpoena to ensure his availability or otherwise preserve his testimony (i.e., schedule a conditional examination). "In short, defendant was not without legal tools to ensure that Esparza was available to testify on his behalf." (*Id*. at p. 274.)

9810.3-No dismissal for unavailability of ordinary citizen witness 10/09

"Generally, an accused is not entitled to a dismissal simply because he is unable to produce witnesses assertedly necessary to his defense." (*Bellizzi v. Superior Court* (1974) 12 Cal.3d 33, 36; see also, *People v. Kirkpatrick* (1972) 7 Cal.3d 480, 486.) It is not the duty of the prosecution to keep track of witnesses the defendant may later want. (*People v. Rance* (1980) 106 Cal.App.3d 245, 253.)

A different rule is applied to police informants. (*People v. Rance*, *supra*, 106 Cal.App.3d at pp. 253-254.) Because only the police can realistically ensure the attendance of an informant as a witness, the prosecution must bear responsibility for maintaining the police informant's availability. (*Bellizzi v. Superior Court*, *supra*, 12 Cal.3d at p. 37.) This rule, however, does not apply to other types of witnesses.

> While [case law] impose a duty upon the police and prosecution to exercise due diligence to maintain means of contact with an informant who is a material witness whose testimony might conceivably be favorable to a defendant, the duty is different in the case of a noninformant witness. There it requires only that the police or prosecution refrain from conduct which makes the noninformant material witness unavailable.

(*People v. Hernandez* (1978) 84 Cal.App.3d 408, 411 [no sanctions when police released a material witness who was also a victim, who had no regular address and could not be located for trial].)

> Significant reasons compel the difference between the duty of maintenance of contact by the police with their informant, on the one hand, and the limited duty with respect to an ordinary witness, on the other. … The ordinary witness has not made himself part of the police mechanism by becoming an agent of law enforcement. He is not in contact with the police except as his possible status as a victim may require that he report a crime. *He is not under police control*.

(*Ibid.*, italics added; similarly see *People v. Guereca* (1987) 189 Cal.App.3d 884, 888 [unwitting stranger who gave information to undercover officer].)

The appellate courts have even held a police officer who resigns and moves out of state is not the type of witness with whom the prosecution must maintain contact. (*People v. Rance*, *supra*, 106 Cal.App.3d 245.)

9820.1-Witness is unavailable if good faith efforts to produce fail 5/21

Establishing unavailability of a witness is a foundational element of many hearsay exceptions. A person is unavailable when "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).) "The proponent of the evidence has the burden of showing by competent evidence that the witness is unavailable." (*People v. Smith* (2003) 30 Cal.4th 581, 609; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1297.) "A finding of witness unavailability under Evidence Code section 240 satisfies the unavailability requirement of Confrontation Clause as interpreted in *Crawford [v. Washington* (2004) 541 U.S. 36]." (*People v. Byron* (2009) 170 Cal.App.4th 657, 671; accord *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1293 ["The due diligence requirement imposed by California law is essentially the same as the federal constitutional good faith requirement."].)

For the prosecution to show a witness is unavailable, it must make a good faith effort and exercise reasonable or due diligence to obtain the appearance of the witness. (*People v. Sanchez* (2016) 63 Cal.4th 411, 440; *People v. Cromer* (2001) 24 Cal.4th 889, 897.) "Good faith efforts" involve taking reasonable steps to locate an absent witness, but do not include pursuing futile acts not likely to produce the witness for trial. (*People v. Hovey* (1988) 44 Cal.3d 543, 562.) "What constitutes due diligence depends on the facts of each case." (*People v. Sanders* (1995) 11 Cal.4th 475, 523.)

> We have said that the term "due diligence" is "incapable of a mechanical definition," but it "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." [Citations] Relevant considerations include " 'whether the search was timely begun' " [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation].

(*People v. Cromer*, *supra*, 24 Cal.4th at p. 904; see also *People v. Thomas* (2011) 51 Cal.4th 449, 500.)

"Our review of the case law shows that in those cases in which courts have not found adequate diligence, the efforts of the prosecutor or defense counsel have been perfunctory or obviously negligent. [Citations.] On the other hand, diligence has been found when the prosecution's efforts are timely, reasonably extensive and carried out over a reasonable period. [Citations.]" (*People v. Bunyard* (2009) 45 Cal.4th 836, 855-856.) "[W]hen a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence, … but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." (*Hardy v. Cross* (2011) 565 U.S. 65, 71-72.) "That additional efforts might have been made or other lines of inquiry pursued does not affect this conclusion. [Citation.] It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1299; see also *People v. Fuiava* (2012) 53 Cal.4th 622, 677; *People v. Royal* (2019) 43 Cal.5th 121, 136.)

"The prosecution is not required 'to keep "periodic tabs" on every material witnesses in a criminal case. …' [Citation.] Also, the prosecution is not required, absent knowledge of a 'substantial risk that this important witness would flee,' to 'take adequate preventative measures' to stop the witness from disappearing. [Citations.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 342; see also *People v. Friend* (2009) 47 Cal.4th 1, 68; but see *People v. Louis* (1986) 42 Cal.3d 969, 992-993 & fn. 7 [indications prosecution hoped witness would disappear after preliminary hearing testimony].)

Fears that a witness will flee upon service can justify delayed service. (*People v. Diaz* (2002) 95 Cal.App.4th 695; but see *People v. Avila* (2005) 131 Cal.App.4th 163.)

Finally, for Confrontation Clause purposes, a finding of unavailability may be made even if no subpoena issued, such as when the witness who has testifies at one hearing agrees to testify at a subsequent hearing and then disappears.

> [T]he Seventh Circuit found that the State's efforts were insufficient because it had neglected to serve [the victim] with a subpoena after she expressed fear about testifying at the retrial. [The victim], however, had expressed fear about testifying at the first trial but had nevertheless appeared in court and had taken the stand. The State represented that [the victim], although fearful, had agreed to testify at the retrial as well. … We have never held that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes, and the issuance of a subpoena may do little good if a sexual assault witness is so fearful of an assailant that she is willing to risk his acquittal by failing to testify at trial.

(*Hardy v. Cross*, *supra*, 565 U.S. at p. 71.)

Appellate courts use the de novo standard of review as to whether due diligence has been demonstrated. (*People v. Bunyard*, *supra*, 45 Cal.4th at p. 851; *People v. Windfield* (2021) 59 Cal.App.5th 496, 508.)

9820.2-Witness may be unavailable due to substantial physical or mental trauma 12/14

Establishing unavailability of a witness is a foundational element of many hearsay exceptions. A person is "unavailable as a witness" if he or she is "[d]ead or unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity." (Evid. Code, § 240, subd. (a)(3).)

> Expert testimony that establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

(Evid. Code, § 240, subd. (c).) The appellate court in *People v. Gomez* (1972) 26 Cal.App.3d 225 construed Evidence Code section 240, subdivision (a)(3) as meaning "that the illness or infirmity must be of comparative severity; it must exist to such a degree as to render the witness's attendance, or his testifying, relatively impossible and not merely inconvenient." (*Id*. at p. 230.)

The appellate court in *People v. Christensen* (2014) 229 Cal.App.4th 781, upheld the trial court's ruling that Joshua, a young child molest victim suffering from Asperger's syndrome, was unavailable under these provisions.

> [I]n the matter before us, we have the testimony of two expert witnesses—one psychiatrist and one marriage and family therapist—to the effect that Joshua would be severely traumatized, and suffer a substantial and long-lasting regression in his condition, were he required to testify again. Consequently, this case is similar to *People v. Winslow* [(2004)] 123 Cal.App.4th 464 [13-year-old sodomy victim] and *People v. Gomez*, *supra*, 26 Cal.App.3d 225, [statutory rape], in which the appellate courts affirmed determinations that the victims were "unavailable," within the meaning of Evidence Code section 240, subdivision (a)(3), based on medical testimony. It is distinguishable from *People v. Williams* [(1979)] 93 Cal.App.3d 40, wherein the appellate court overturned a finding that a rape victim was unavailable to testify, because of the lack of medical testimony on the point.
>
> Substantial evidence, in the form of expert testimony, supports the trial court's finding of fact that Joshua would suffer substantial trauma if he had to testify again. Furthermore, having performed an independent review, we conclude the trial court properly applied the law to the facts to determine that Joshua was "unavailable," within the meaning of Evidence Code section 240, subdivision (a)(3), inasmuch as it would have been relatively impossible for Joshua to testify without suffering substantial trauma.

(*People v. Christensen*, *supra*, 229 Cal.App.4th at p[. 795.)

"[T]he determination whether a witness is unavailable to testify at trial due to mental illness or infirmity that would cause substantial trauma, is a mixed question of law and fact, with factual findings subject to a deferential standard of substantial evidence, and findings of law subject to independent review. [Citation.]" (*People v. Mays* (2009) 174 Cal.App.4th 156, 172.)

9820.3-Witness is unavailable when refusing to testify despite contempt order 10/20

Establishing unavailability of a witness is a foundational element of many hearsay exceptions. "A witness is unavailable for purposes of [Evidence Code] section 1291 and a confrontation clause claim if he is entitled to invoke the privilege against self-incrimination and does, in fact, invoke that privilege. (*People v. Williams* (2008) 43 Cal.4th 584, 613, 618, 625.)" (*People v. Hull* (2019) 31 Cal.App.5th 1003, 1022.) A person also is deemed unavailable when they are "[p]ersistent in failing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusing to testify." (Evid. Code, § 240, subd. (a)(6).) This provision appears to codify previous case authority such as *People v. Francis* (1988) 200 Cal.App.3d 579, 587 ["We find that a witness who is physically available yet refuses to testify, after the court has used all available avenues to coerce such testimony, is unavailable."].) "Courts have admitted 'former testimony of a witness who is physically available but who refuses to testify (without making a claim of privilege) if the court makes a finding of unavailability only after taking reasonable steps to induce the witness to testify unless it is obvious that such steps would be unavailing.' [Citations.]" (*People v. Smith* (2003) 30 Cal.4th 581, 624; see also *People v. Lawson* (2020) 52 Cal.App.5th 1121, 1128-1132 [despite threat of contempt, sexual assault victim who refused to testify for third time citing extreme trauma and desire to put incident behind her, was properly found unavailable].)

9820.4-A defendant is not unavailable simply because he or she decides to not testify 12/14

Many hearsay exceptions require that the declarant be "unavailable" within the meaning of Evidence Code section 240. "It has long been the law that a defendant cannot make himself or herself ' "unavailable" ' for purposes of the statutory hearsay provisions by exercising a privilege not to testify at trial." (*People v. Lightsey* (2012) 54 Cal.4th 668, 716.)

> Defendant was certainly not unavailable to himself. Although he possessed, and exercised, a privilege not to testify, the choice was his. He could have testified had he so elected. As stated in the Comment of the Assembly Committee on the Judiciary to Evidence Code section 240, the section defining the phrase "unavailable as a witness," "if the out-of-court statement is that of the party himself, he may not create 'unavailability' under this section by invoking a privilege not to testify."

(*People v. Edward*s (1991) 54 Cal. 3d 787, 819; see also *People v. Elliot* (2005) 37 Cal.4th 453, 483.)

9820.5-Due diligence required if witness may disappear or be deported 8/20

Establishing unavailability of a witness is a foundational element of many hearsay exceptions as well as the Confrontation Clause of the Sixth Amendment. (See generally, *People v. Herrera* (2010) 49 Cal.4th 613, 620-623.) A person is unavailable if "[a]bsent from the hearing and the court is unable to compel his or her attendance by its process." (Evid. Code, § 240, subd. (a)(4).) "The proponent of the evidence has the burden of showing by competent evidence that the witness is unavailable." (*People v. Smith* (2003) 30 Cal.4th 581, 609; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1297.)

For the prosecution to show a witness is unavailable, it must make a good faith effort and exercise reasonable diligence to obtain the appearance of the witness. (*People v. Cromer* (2001) 24 Cal.4th 889, 897.)

> [T]he requirement of due diligence is not limited to situations in which the prosecution is trying to find a witness who has gone missing. "[N]o less important 'is the duty to use reasonable means *to prevent a present witness from becoming absent*.' [Citation.] If the prosecution fails in this latter duty, it does not satisfy the requirement of due diligence. [Citation.]" [Citations.]

(*People v. Rolden* (2012) 205 Cal.App.4th 969, 980 (*Rolden*), italics in original.) "We have also stated that when there is knowledge of ' "a substantial risk" ' that an ' "important witness would flee," ' the prosecutor is required to ' "take adequate preventative measures" to stop the witness from disappearing.' " (*People v. Friend* (2009) 47 Cal.4th 1, 68.) "In [*People v. Louis* (1986) 42 Cal.3d 969, 989-991], we held that if a particular witness's testimony is deemed 'critical' or 'vital' to the prosecution's case, the People must take reasonable precautions to prevent the witness from disappearing." (*People v. Hovey* (1988) 44 Cal.3d 543, 564.)

The appellate court in *Rolden* held the prosecution made inadequate efforts to procure attendance of the Mexican citizen victim having knowledge of his impending deportation after he testified at the preliminary hearing. (*Rolden*, *supra*, 205 Cal.App.4th at pp. 984-985.) Among the actions that can satisfy the due diligence requirement of Evidence Code section 240, as well as the Confrontation Clause, in such situations are requesting a conditional examination, videotaping of the preliminary hearing and/or conditional examination testimony, seeking an order to detain the person as a material witness under state law, requesting a federal court order to either retain custody of the alien witness or otherwise delay his or her deportation, subpoenaing the witness and receiving assurances they would cooperate, using applicable treaty provisions to secure the witness' presence from their foreign county, and promptly notifying the defense so they can take steps to preserve the witness' testimony. (*Id*. at pp. 980-985; accord *People v. Torres* (2020) 48 Cal.App.5th 731, 740-744.)

9820.6-Foreign citizen out of U.S. is unavailable per se 11/16

Establishing unavailability of a witness is a foundational element of many hearsay exceptions as well as the Confrontation Clause of the Sixth Amendment. (See generally, *People v. Herrera* (2010) 49 Cal.4th 613, 620-623.) A person is unavailable if "[a]bsent from the hearing and the court is unable to compel his or her attendance by its process." (Evid. Code, § 240, subd. (a)(4).) "The proponent of the evidence has the burden of showing by competent evidence that the witness is unavailable." (*People v. Smith* (2003) 30 Cal.4th 581, 609; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1297.)

For the prosecution to show a witness is unavailable, it ordinarily must make a good faith effort and exercise reasonable diligence to obtain the appearance of the witness. (*People v.Cromer* (2001) 24 Cal.4th 889, 897.) But, the requirement of "good faith" or "due diligence" has been held to apply only where means exist to compel the witness to attend. (See *Mancusi v. Stubbs* (1972) 408 U.S. 204, 212-213.) In other words: "The law does not require a futile act." (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 118.)

Means to compel attendance through court process generally exist only when the witness is within the United States, or is a citizen or resident of the United States in another country. (28 U.S.C. § 1783; *People v. St. Germain* (1982) 138 Cal.App.3d 507, 517 [first witness, citizen of Netherlands with green card, was available].) When a witness is a nonresident foreign citizen not in the United States, he or she may be considered "per se unavailable" pursuant to Evidence Code

section 240, subdivision (a)(4). (*Id.* at pp. 517-518 [second witness, a citizen of Holland without green card, not available]; *People v. Ware* (1978) 78 Cal.App.3d 822, 829 [Spain]; see also *Mancusi v. Stubbs*, *supra*, 408 U.S. at pp. 211-213 [United States citizen who took up permanent residence in Sweden was unavailable].)

In *People v. St. Germain*, *supra*, 138 Cal.App.3d 507, the appellate court determined that as to the second witness the prosecutor had shown the witness to be "unavailable" as required by the Evidence Code and the Sixth Amendment by "showing that the witness was a nonresident of the United States, a citizen of another country and that '[w]e have no treaty provisions nor any compact with the foreign country.' " (*Id.* at p. 518; see also *People v. Herrera*, *supra*, 49 Cal.4th 629-632 [El Salvador]; *People v. Smith*, *supra*, 30 Cal.4th at pp. 608-611 [Japan]; *People v. Martinez* (2007) 154 Cal.App.4th 314, 324-332 [Canada]; but see *People v. Sandoval* (2001) 87 Cal.App.4th 1425 [Confrontation Clause violated because witness in Mexico was willing to testify but prosecution unwilling to pay travel expenses]; see also *People v. Foy* (2016) 245 Cal.App.4th 328, 345 [noting the United States now has treaty with Mexico allowing prosecutors to request assistance from Mexican authorities in obtaining the attendance of a Mexican citizen]; distinguish *People v. Sanchez* (2016) 63 Cal.4th 411, 442 [in light of other failed efforts to locate the Mexican witness, it was "speculative to believe that additional efforts would have resulted in finding him and convincing him to return voluntarily to the United States to testify" under the treaty with Mexico].)

> The foregoing authorities make clear that, when a criminal trial is at issue, unavailability in the constitutional sense does not invariably turn on the inability of the state court to compel the out-of-state witness's attendance through its own process, but also takes into consideration the existence of agreements or established procedures for securing a witness's presence that depend on the voluntary assistance of another government. [Citation.] Where such options exist, the extent to which the prosecution had the opportunity to utilize them and endeavored to do so is relevant in determining whether the obligations to act in good faith and with due diligence have been met. [Citations.]

(*People v. Herrera*, *supra*, 49 Cal.4th at p. 628, fn. omitted.)

9820.7-Due diligence requires use of Interstate Compact for out-of-state witnesses 6/20

Establishing unavailability of a witness is a foundational element of many hearsay exceptions as well as the Confrontation Clause of the Sixth Amendment. (See generally, *People v. Herrera* (2010) 49 Cal.4th 613, 620-623.) A person is unavailable if "[a]bsent from the hearing and the court is unable to compel his or her attendance by its process." (Evid. Code, § 240, subd. (a)(4).) "The proponent of the evidence has the burden of showing by competent evidence that the witness is unavailable." (*People v. Smith* (2003) 30 Cal.4th 581, 609; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1297.)

"A witness who is absent from a trial is not 'unavailable' in the constitutional sense unless the prosecution has made a 'good faith effort' to obtain the witness's presence at the trial." (*Barber v. Page* (1968) 390 U.S. 719, 724-725.) In *Page*, the witness whose testimony was sought in an Oklahoma trial was incarcerated in a federal prison in Texas. To justify its introduction of the witness's preliminary hearing testimony, despite having made no effort to obtain his presence at trial, the prosecution claimed the witness was outside of Oklahoma and therefore per se "unavailable." (*Id*. at pp. 722-723.) The United States Supreme Court rejected this argument. "[I]n

the case of a prospective witness currently in federal custody … federal courts [have] the power to issue writs of habeas corpus ad testificandum at the request of state prosecutorial authorities." (*Id*. at p. 24.) The court also noted that "[f]or witnesses not in prison, the [Uniform Act] provides a means by which prosecuting authorities from one State can obtain an order from a court in the State where the witness is found directing the witness to appear in court in the first State to testify." (*Id*. at p. 723, fn. 4.) The *Barber* court held the defendant was deprived of his Sixth Amendment confrontation rights by the introduction of the witness's former testimony. (*Id*. at pp. 724-725.)

Thus, a witness living outside California but within the United States is not necessarily "unavailable" because California has adopted the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases." (Pen. Code, § 1334 et seq.)

> [U]navailability in the constitutional sense does not invariably turn on the inability of the state court to compel the out-of-state witness's attendance through its own process, but also takes into consideration the existence of agreements or established procedures for securing a witness's presence that depend on the voluntary assistance of another government. [Citation.] Where such options exist, the extent to which the prosecution had the opportunity to utilize them and endeavored to do so is relevant in determining whether the obligations to act in good faith and with due diligence have been met. [Citations.]

(*People v. Herrera*, *supra*, 49 Cal.4th at p. 628, fn. omitted.)

In *People v. Foy* (2016) 245 Cal.App.4th 328, for example, the robbery victim moved to Connecticut. The prosecution located the witness a week before trial but she refused to return to California voluntarily. The witness's conditional examination testimony was read to the jury instead. According to the appellate court case law held "that admission of a witness's former testimony without a finding of constitutional unavailability violates the confrontation clause of the Sixth Amendment. This authority also makes plain that the prosecution's efforts to use the Uniform Act or other established procedures for obtaining the presence of an out-of-state witness is relevant to that constitutional test." (*Id*. at p. 346.) In the instant case, the appellate court found the prosecution did not demonstrate good faith efforts to procure the victim's attendance. (*Id*. at p. 349.) By not using the Uniform Act the prosecution did not meet their burden of proving due diligence. (*Id*. at p. 350; accord *People v. Blackwood* (1983) 138 Cal.App.3d 939, 946-947; *People v. Masters* (1982) 134 Cal.App.3d 509, 526-528; distinguish *People v. Cogswell* (201) 48 Cal.4th 467 [sexual assault victim living in Colorado found unavailable when she refused to return to California and testify even after being served with a properly issued subpoena from a Colorado court under the Uniform Act].)

9830.1-Testimony of witness refusing cross-examination may be stricken 6/20

"If a witness frustrates cross-examination by declining to answer some or all of the questions, the court may strike all or part of the witness's testimony. (*People v. Daggett* (1990) 225 Cal.App.3d 751, 760.)" (*People v. Price* (1991) 1 Cal.4th 324, 421.)

> "Where a witness refuses to submit to cross-examination, or is unavailable for that purpose, the conventional remedy is to exclude the witness's testimony on direct." [Citation.] Moreover where a witness "frustrates" cross-examination by declining to answer some or all of the questions, the court may strike all or part of the testimony. [Citation.] The decision whether to strike the direct examination, or a partial strike of the testimony, of a

witness who does not submit to cross-examination is left to the discretion of the trial court. [Citation.]

(*People v. Noriega* (2015) 237 Cal.App.4th 991, 1000-1001 [distinguishing genuine from feigned memory loss].) Similarly, "a defendant's right to take the witness stand to offer his or her account of the events in question coexists with the prosecutor's right to fairly test that testimony through cross-examination." (*People v. Brooks* (2017) 3 Cal.5th 1, 30.)

Accordingly, the defense is not entitled to place testimony, whether that of the defendant personally or of a defense witness, before the trier of fact free from any threat of cross-examination or impeachment by the prosecution, even if the witness has a valid Fifth Amendment privilege. (*People v. Hecker* (1990) 219 Cal.App.3d 1238, 1248.) "There are … exceptionally few caveats to the proposition that the right to introduce evidence necessarily implicates the responsibility to permit it to be fairly tested. … [A] criminal defendant ' "has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts." ' " (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 736, fn. omitted, quoting *Brown v. United States* (1958) 356 U.S. 148, 155; see also *People v. Lena* (2017) 8 Cal.App.5th 1145, 1149.)

> Defendant's constitutional right to testify in his own behalf must be considered in light of the principle that "[w]hen a defendant voluntarily testifies in his own defense the People may 'fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them.' [Citation.]"

(*People v. Reynolds* (1984) 152 Cal.App.3d 42, 46.) "Defendant's refusal to answer relevant questions [may deprive] the prosecution its right to subject [his] claim[s] to 'the greatest legal engine ever invented for the discovery of truth,' cross-examination. [Citation.]" (*Ibid*.)

"Courts have long recognized that when a defendant refuses to submit to cross-examination, a trial court may, in its discretion, impose sanctions." (*People v. Lena*, *supra*, 8 Cal.App.5th at p. 1149.) In deciding whether to strike a defendant's or a defense witness's testimony based on his or her refusal to answer one or more questions, the trial court should examine " 'the *motive* of the witness and the *materiality* of the answer.' [Citation.]" (*People v. Reynolds*, *supra*, 152 Cal.App.3d at p. 47, italics in original.) The court should also consider if less severe remedies are available before employing the "drastic solution" of striking the witness's entire testimony. (*Id*. at pp. 47-48.) These include striking part of the testimony or allowing the trier of fact to consider the witness' failure to answer in evaluating his credibility. (*Id*. at p. 48, *People v. Hecker*, *supra*, 219 Cal.App.3d at p. 1248.) When the prosecutor's questions are peripheral to the case, however, the witness' refusal to answer them may not justify the sanction of striking. (*People v. Seminoff* (2008) 159 Cal.App.4th 518, 527)

For example, no abuse of discretion was found when the judge struck the defendant's direct testimony in *People v. Lena*, *supra*, 8 Cal.App.5th 1145:

> It is evident from the record that the trial court appropriately took into account Lena's motive for refusing to submit to cross-examination and considered the degree of hindrance to the prosecution. It is also evident that the trial court took a deliberate, measured approach, first giving Lena multiple warnings before deciding to strike his testimony. Quite obviously, the lesser sanction of partially striking his testimony was not appropriate, because Lena's categorical refusal to submit to any cross examination did not

allow the parsing of his testimony by subject matter. Given Lena's absolutist stance and the frivolous rationale he gave for taking it, the court was well within its discretion to conclude that a lesser sanction was not commensurate with the injury to the truth-seeking process that Lena had inflicted.

(*Id*. at p. 1150; see also *People v. Reynolds*, *supra*, 152 Cal.App.3d at pp. 46-47 [fearing retaliation, defendant refused to name fellow inmates involved in crime he claimed he did not commit].)

9830.2-Valid assertion of privilege inadmissible before jury 8/19

Evidence Code section 913, subdivision (a), states in pertinent part when a privilege is asserted "neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding."

"Allowing a witness to be put on the stand to have the witness exercise the privilege before the jury would only invite the jury to make an improper inference. [Citations.] Therefore, 'it is the better practice for the court to require the exercise of the privilege out of the presence of the jury.' [Citation.] We have 'commend[ed]' the approach 'as a means by which to avoid the potentially prejudicial impact of the witness asserting the privilege before the jury.' [Citation.]" (*People v. Frierson* (1991) 53 Cal.3d 730, 743; see *People v. Smith* (2007) 40 Cal.4th 483, 516.)

(*People v. Richardson* (2008) 43 Cal.4th 959, 1011; see also *People v. Bell* (2019) 7 Cal.5th 70, 103.)

Finally, the trial court did not err in declining to instruct the jury that Brown did not testify because of his assertion of the privilege. Such an instruction may have invited the jury to infer that Brown had invoked the privilege because he was guilty of the offense. Such inference is impermissible. (Evid. Code, § 913; *People v. Holloway* (2004) 33 Cal.4th 96, 130 ["a person may invoke the privilege for reasons other than guilt, and '[a] defendant's rights to due process and to present a defense do not include a right to present to the jury a speculative, factually unfounded inference' "]; *People v. Bernal* (1967) 254 Cal.App.2d 283, 294 ["the defendant, as opposed to the witness, has no right which he may assert superior or even equal to that of the witness who exercises the privilege against self-incrimination. … [T]he claim of privilege having no evidentiary value, it could have no relevance to the question of defendant's guilt or innocence"].)

(*People v. Richardson*, *supra*, 43 Cal.4th at pp. 1011-1012; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 619-620.)

A different analysis applies if the court determines the witness does not the legal right to claim a privilege.

Once a court determines a witness has a valid Fifth Amendment right not to testify, it is, of course, improper to require him to invoke the privilege in front of a jury; such a procedure encourages inappropriate speculation on the part of jurors about the reasons for the invocation. … These points are well established by existing case law. [Citation.] But where a witness has no constitutional or statutory right to refuse to testify, a different analysis applies. Jurors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony.

(*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554, italics in original; but see *People v. Perez*

(2016) 243 Cal.App.4th 863, 885-889 [if witness refuses to answer any questions it is improper for prosecutor to pose leading questions containing the content of his prior statements to the police]; *People v. Murillo* (2014) 231 Cal.App.4th 448, 455-456 [improper to ask witness who refused to testify numerous leading questions suggesting facts to jury for which there was no other proof].)

9830.3-Witness claim of memory loss does not deny defendant's confrontation right 11/16

"The Sixth Amendment right of confrontation secures a defendant's right of cross-examination. *(Douglas v. Alabama* (1965) 380 U.S. 415, 418.)" (*People v. Foalima* (2015) 239 Cal.App.4th 1376, 1390 (*Foalima*).) The right of confrontation "has long been read as securing an adequate opportunity to cross-examine adverse witnesses." (*United States v. Owens* (1988) 484 U.S. 554, 557 (*Owens*).) " '[T]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." ' [Citations.]" (*Owens*, *supra*, 484 U.S. at p. 559, original italics.) "That opportunity may be denied if a witness refuses to answer questions, but it is not denied if a witness cannot remember. (*Foalima*, *supra*, 239 Cal.App.4th at p. 1390.) A witness who "refuses to answer any question on direct or cross-examination denies a defendant the right to confrontation which contemplates a meaningful opportunity to cross-examine the witness. [Citations.]" (*People v. Rios* (1985) 163 Cal.App.3d 852, 864, fn. omitted; see also *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 961-969 [alleged child molest refused to answer hundreds of questions posed by both sides, including approximately 150 that sought substantial information on important issues in the trial]; *People v. Murillo* (2014) 231 Cal.App.4th 448, 455-456 [witness's refusal on cross-examination to answer over 100 leading questions while the prosecutor read the witness's prior statement to police denied defendant his right of confrontation].)

By contrast, a witness who suffers from memory loss—real or feigned—is considered "subject to cross-examination" because his presence and responses provide the "jury with the opportunity to see [his] demeanor and assess [his] credibility." (*People v. Gunder* (2007) 151 Cal.App.4th 412, 420.) "The circumstance of feigned memory loss is not parallel to an entire refusal to testify. The witness feigning memory loss is in fact subject to cross-examination, providing a jury with the opportunity to see the demeanor and assess the credibility of the witness, which in turn gives it a basis for judging the prior hearsay statement's credibility." (*Id*. at p. 420.)

> [The constitutionally guaranteed opportunity to cross-examine witnesses] is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination, [citation]) the very fact that he has a bad memory. [The] ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination when a … witness' past belief is introduced and he is unable to recollect the reason for that past belief. … The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee.

(*Owens*, *supra*, 484 U.S. at pp. 559-560; see also *Foalima*, *supra*, 239 Cal.App.4th at p. 1392 [Prosecution witness "Tupuo's asserted inability to recall or remember most of the events about which he was questioned did not by itself deny defendant an opportunity to cross-examine him."].)

A trial court's denial of a defendant's motion to strike the testimony of a witness claiming memory loss is reviewed on appeal for an abuse of discretion. (*People v. Price* (1991) 1 Cal.4th 324, 422; *Foalima*, *supra*, 239 Cal.App.4th at p. 1390.)

9840.1-A defendant has limited right to exclude witness testimony as coerced 10/18

"A defendant may assert a violation of his or her own right to due process of the law and a fair trial based upon third party witness coercion … if the defendant can establish that trial evidence was coerced or rendered unreliable by prior coercion and that the admission of this evidence would deprive the defendant of a fair trial." (*People v. Williams* (2010) 49 Cal.4th 405, 452-453, italics omitted; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1036.) The defendant must show that improper coercion "directly impaired the free and voluntary nature" of the evidence offered at trial. (*People v. Boyer* (2006) 38 Cal.4th 412, 444.) Absent evidence that the alleged coercion extended to and influenced the witness' actual testimony, the defendant's request to exclude such testimony should be denied. (*People v. Smith* (2018) 4 Cal.5th 1134, 1170.) "[T]he case law fails to support defendant's premise that a third party witness's statements are rendered inadmissible against a defendant if induced by improper offers of leniency." (*People v. Ervin* (2000) 22 Cal.4th 48, 83.) "We have never held … that an offer of leniency in return for cooperation with the police renders a third party statement involuntary or eventual trial testimony coerced." (*People v. Badgett* (1995) 10 Cal.4th 330, 354; distinguish *People v. Lee* (2002) 95 Cal.App.4th 772, 785-788 [witness's pretrial statement identifying defendant as killer should have been excluded as coerced].)

9880.1-General standards for writ of error *coram nobis* 6/20

A petition for a writ of error *coram nobis* is the common law equivalent of a motion to vacate the judgment. (*People v. Kim* (2009) 45 Cal.4th 1078, 1096 (*Kim*); *People v. Tuthill* (1948) 32 Cal.2d 819, 821.) It is a legal remedy of a limited nature. (*Kim*, *supra*, 45 Cal.4th at p. 1092.) Its scope is narrower than a petition for writ of habeas corpus. (*Id*. at p. 1091.) The California Supreme Court has declined to expand the scope of *coram nobis* to create a generalized post-conviction, post-custody remedy. (*Id*. at p. 1107.) In addition, there is no such thing as a nonstatutory post-conviction, post-custody motion to vacate a judgment to withdraw a plea that is distinguishable in its requirements or effect from a petition for a writ of error *coram nobis*. (*People v. Gari* (2011) 199 Cal.App.4th 510, 522.)

A writ of *coram nobis* will be granted only if three requirements are met:

> (1) Petitioner must "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of judgment." [Citations.] (2) Petitioner must also show that the "newly discovered evidence … [does not go] to the merits of the issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial."… (3) Petitioner "must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. …"

(*People v. Shipman* (1965) 62 Cal.2d 226, 230.) "These factors set forth in *Shipman* continue to outline the modern limits of the writ. (*People v. McElwee* (2005) 128 Cal.App.4th 1348, 1352.)" (*Kim*, *supra*, 45 Cal.4th at p. 1093.)

"To qualify as the basis for relief on *coram nobis*, newly discovered facts must establish a basic flaw that would have prevented rendition of the judgment." (*Kim*, *supra*, 45 Cal.4th at p. 1103.) It is not sufficient that the fact would have been material and beneficial to the defendant at trial, but it must be proved that this fact would have prevented rendition of judgment. (*People v. Tuthill*, *supra*, 32 Cal.2d at p. 827, cited in *Kim*, *supra*, 45 Cal.4th at p. 1095.) Similarly, "[n]ew facts that would merely have affected the willingness of a litigant to enter a plea, or would have encouraged or convinced him or her to make different strategic choices or seek a different disposition, are not facts that would have prevented rendition of the judgment." (*Kim*, *supra*, 45 Cal.4th at p. 1103; see also *People v. Gari*, *supra*, 199 Cal.App.4th at pp. 519-520.) But, where conviction was the result of a guilty plea rather than a trial, the writ may lie where the guilty plea was the result of fraud, coercion, or mistake of fact. (See *In re Hough* (1944) 24 Cal.2d 522, 531; see also *People v. Carty* (2003) 110 Cal.App.4th 1518, 1523; *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1619.) "[F]acts that have justified issuance of the writ in the past have included a litigant's insanity or minority, that the litigant had never been properly served, and that a defendant's plea was procured through extrinsic fraud or mob violence." (*Kim*, *supra*, 45 Cal.4th at p. 1102.)

The allegedly new fact must have been in existence at the time of judgment. (*Kim*, *supra*, 45 Cal.4th at p. 1093.) And it must be shown that the new fact was unknown to the petitioner. (*Ibid*, see also *People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1147 [facts known because raised in previous motion three months earlier].) Finally, "[f]or a newly discovered fact to qualify as the basis for the writ of error *coram nobis*, [the court must] look to the fact itself and not its legal effect." (*Kim*, *supra*, 45 Cal.4th at p. 1093; see also *People v. Gari*, *supra*, 199 Cal.App.4th at p. 519.)

"The granting of a writ of error *coram nobis* is completely discretionary." (*People v. Forrest* (2017) 16 Cal.App.5th 1099, 1111.) "The petition for writ of error *coram nobis* is opposed by a strong presumption that the judgment of conviction was correct [citations], and the trial judge is required to weigh a defendant's statements contained in his petition against this presumption [citation]." (*People v. Crouch* (1968) 267 Cal.App.2d 64, 67.)

On appeal, denial of a writ of *coram nobis* is reviewed under an abuse of discretion standard. (*Kim*, *supra*, 45 Cal.4th at p. 1096; *People v. McElwee*, *supra*, 128 Cal.App.4th at p. 1352.)

9880.2-Procedural requirements for writ of error *coram nobis* 3/18

Before the court reaches the merit of a *coram nobis* petition, the petitioner must overcome several procedural hurdles.

For example, the petition for writ of *coram nobis* must be denied if the alleged error could have been raised in another way, by appeal or habeas corpus. (*People v. Kim* (2009) 45 Cal.4th 1078, 1093, 1099 (*Kim*) [petitioner failed to seek habeas relief while in custody].) In the context of immigration consequences, Penal Code section 1016.5 is an adequate remedy at law. (*Kim*, *supra*, at p. 1104; *Mendez v. Superior Court* (2001) 87 Cal.App.4th 791, 789.)

In addition, pursuant to Penal Code section 1265, the appellate court retains jurisdiction to entertain a petition to vacate the judgment it previously affirmed. "Thus, by operation of the statute, once a judgment has been appealed, the appellate court has the exclusive jurisdiction to adjudicate a coram nobis petition." (*People v. Forrest* (2017) 16 Cal.App.5th 1099, 1107.)

Also, like a habeas petitioner, it is also procedurally improper for a *coram nobis* petitioner to raise his or her claims in a piecemeal fashion. (*Kim*, *supra*, 45 Cal.4th at pp. 1100-1101.)

Finally, the writ must be denied if the petitioner does not show due diligence in seeking the remedy. (*Kim*, *supra*, 45 Cal.4th at p. 1096 [unjustified 7 year delay]; *People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1148 [failed to appeal denial of first motion on same grounds three months earlier].) The petitioner must explain and justify delay. (*Kim*, *supra*, at p. 1096) This showing should include the time and circumstances in which the facts justifying relief were discovered, so that the court can determine whether the petitioner was diligent. (*Id*. at pp. 1096-1097; *People v. Adamson* (1949) 34 Cal.2d 320, 328-329.) "This diligence requirement is analogous to that which we apply to petitions for writs of habeas corpus, where we require a petitioner to set forth with specificity when the 'petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim.' [Citation.]" (*Kim*, *supra*, at p. 1097.) "The diligence requirement is not some abstract technical obstacle placed randomly before litigants seeking relief, but instead reflects the balance between the state's interest in the finality of decided cases and its interest in providing a reasonable avenue of relief for those whose rights have allegedly been violated." (*Ibid*.)

9880.3-*Coram nobis* cannot be used to challenge errors of law 6/20

Coram nobis cannot be used to correct an error of law. (*People v. Kim* (2009) 45 Cal.4th 1078, 1093 (*Kim*); see also *People v. Mbaabu* (2013) 213 Cal.App.4th 1139, 1147; *People v. Vasilyan* (2009) 174 Cal.App.4th 443, 453.) This restriction encompasses any number of claims of constitutional error. (*Kim*, *supra*, 45 Cal.4th at p. 1095 [citing case examples].) For example, "[t]hat a claim of ineffective assistance of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis* has long been the rule." (*Id*. at p. 1104; see also *People v. Mbaabu*, *supra*, 213 Cal.App.4th at pp. 1147-1148.) Thus, "[a] writ of error *coram nobis*, based on a claim of ineffective assistance of counsel for failure to advise the defendant of the immigration consequences of his or her plea, cannot be used to challenge a conviction or withdraw the plea." (*People v. Aguilar* (2014) 227 Cal.App.4th 60, 68; see also *Kim*, *supra*, 45 Cal.4th at p.1103.)

9900.1-People's right to writ when appeal available 10/15

"As a general rule, the People may not seek an extraordinary writ in circumstances where the Legislature has not provided for an appeal. [Citations.]" (*People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999, 1008; see also *People v. Superior Court (Kaulick)* (2013) 215 Cal.app.4th 1279, 1294; *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 45 (*Meraz*).) If the Legislature has provided the People with statutory authority to appeal a particular trial court ruling, then the ordinary procedural requirements for proceeding by way or extraordinary writ petition are applicable. For example, one "requirement for issuance of either a writ of mandate or a writ of prohibition is the lack of 'a plain, speedy, and adequate remedy, in the ordinary course of law.' (Code Civ. Proc., §§ 1086, 1103.)" (*Meraz*, *supra*, 163 Cal.App.4th at p. 46; see also *People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 988.)

When the Legislature has provided the People the right to appeal and the prosecution has met the procedural requirements for seeking extraordinary relief, the People can use the writ proceedings to challenge many types of rulings, including an abuse of discretion by the trial court. Generally, "a writ of mandate cannot be used to control the exercise of discretion." (*Meraz*, *supra*, 163

Cal.App.4th at p. 45) But, " 'that rule is qualified in that, "An abuse of discretion … is not the exercise of discretion, but is action beyond the limits of discretion, and it is settled that the writ will issue to correct such abuse if the facts otherwise justify its issuance." [Citation.]' " (*Ibid*.) "[E]xtraordinary relief is appropriate if the trial court's ruling is clearly erroneous as a matter of law and the petitioner [i.e., the People] will suffer substantial prejudice. [Citation.]" (*Prince v. Superior Court* (1992) 8 Cal.App.4th 1176, 1179.)

Finally, writ relief is available when the trial court fails to perform a ministerial duty. (*People v. Superior Court (Kaulick)*, *supra*, 215 Cal.App.4th at p. 1295 [court failed to give People due process notice and right to be heard before resentencing a three strikes defendant under Prop. 36].)

> "Mandamus is issued 'to compel the performance of an act which the law specially enjoins … .' (Code Civ. Proc., § 1085.) Although mandamus does not generally lie to control the exercise of judicial discretion, the writ will issue 'where, under the facts, that discretion can be exercised in only one way.' " (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205; *State Farm etc. Ins. Co. v. Superior Court* (1956) 47 Cal.2d 428, 432 ["[m]andate lies to control judicial discretion when that discretion has been abused"].) " 'In a legal sense discretion is abused whenever in the exercise of its discretion the court *exceeds the bounds of reason*, all of the circumstances before it being considered.' " (*State Farm etc. Ins. Co.*, at p. 432, 304 P.2d 13, italics added.)

(*Diaz-Barba v. Superior Court* (2015) 236 Cal.App.4th 1470.) In addition:

> A writ of mandate may be issued against a public body or public officer "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station" in cases "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc. §§ 1085, 1086; *People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491 (*El Dorado*).) "Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty [citations]." (*El Dorado*, *supra*, 5 Cal.3d at p. 491) "A 'ministerial duty' is one generally imposed upon a person in public office who, by virtue of that position, is obligated 'to perform in a prescribed manner required by law when a given state of facts exists. [Citation.]' [Citations.]" (*City of King City v. Community Bank of Central California* (2005) 131 Cal.App.4th 913, 926.)

(*Flores v. Dept. of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 205.)

9900.2-People's right to writ when appeal not available 8/14

"As a general rule, the People may not seek an extraordinary writ in circumstances where the Legislature has not provided for an appeal. [Citations.]" (*People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999, 1008; see also *People v. Superior Court (Meraz)* (2008) 163 Cal.App.4th 28, 45.) But there are exceptions to this rule.

> If the prosecution has not been granted by statute a right to appeal, *review of any alleged error may be sought by a petition for writ of mandate only when a trial court has acted in excess of its jurisdiction and the need for such review outweighs the risk of harassment of the accused*. [Citations.] Mandate is not available to the prosecution for review of "ordinary judicial error" [citation] or even "egregiously erroneous" orders

> [citations] when the order or ruling "on its face is a timely exercise of a well-established statutory power of trial courts … from which no appeal is provided in [Penal Code] section 1238." [Citation.]

(*People v. Superior Court (Stanley)* (1979) 24 Cal.3d 622, 625-626 (*Stanley*), footnote omitted, italics added; see also *People v. Superior Court (Martinez)* (2014) 225 Cal.App.4th 979, 988; *People v. Superior Court (Maldonado)* (2006) 137 Cal.App.4th 353, 364 (*Maldonado*).)

> It is not completely settled what it means to find a court acted in 'excess of jurisdiction' in the context of deciding whether the People are entitled to writ review of a trial court's order or ruling. Several court of appeal decisions appear to construe the term "jurisdiction" in the clause "excess of jurisdiction" as something broader than the trial court's personal and subject matter jurisdiction over the matter being considered for writ review. On the other hand, a few have adhered to this narrower definition of the term.

(*Maldonado*, *supra*, 137 Cal.App.4th at p. 364, footnote citations omitted.)

> This broader definition focuses on whether the court had the power to reach the result it did, that is, whether it was empowered to afford the particular relief or issue the particular order or make the particular ruling it did. If "the order or ruling 'on its face is a timely exercise of a well-established statutory power of trial courts … from which no appeal is provided,' " then the prosecution is denied the opportunity for writ relief. And the prosecution is denied that opportunity, even if the court erred or egregiously erred in exercising that power and making that order or ruling. That is, it need not be a correct result, it need only be a result the trial court is authorized to reach. If so, the order or ruling is outside the proper scope of appellate review by way of writ as well as appeal.

(*Maldonado*, *supra*, 137 Cal.App.4th at p. 365, citing *Stanley*, *supra*, 24 Cal.3d at p. 626, and footnote 3.)

Thus, even in the absence of statutory authority permitting a People's appeal or writ, while the prosecution generally cannot challenge the correctness of the result the trial court reached, the prosecution can use a petition for extraordinary relief to challenge than the trial court's legal authority to reach that result. (*Stanley*, *supra*, 24 Cal.3d at p. 626; *Maldonado*, *supra*, 137 Cal.App.4th at p. 365.)

In addition, writ review by the prosecution of a discretionary decision is authorized if the trial court made its ruling without exercising whatever level of discretion it is authorized to exercise in reaching that result. (*Maldonado*, *supra*, 137 Cal.App.4th at p. 366.)

"The courts likewise have allowed writ review in situations where the appellate court finds a trial court acted 'in excess of its jurisdiction' by making a decision without hearing evidence when such evidence is required before making that decision." (*Maldonado*, *supra*, 137 Cal.App.4th at p. 367, citing case examples.)

9900.3-Prosecution can writ certain adverse pretrial rulings 12/14

The prosecution may obtain appellate review of an adverse pretrial evidentiary ruling by the trial court by accepting a dismissal of the charge pursuant to Penal Code section 1385 prior to jeopardy attaching. (*People v. Chacon* (2007) 40 Cal.4th 558, 565.) The People may then seek relief by way of extraordinary writ if the remedy of appeal is inadequate, such as when other related charges or other defendants remain set for trial. (*People v. Superior Court (Martinez)* (1993) 19 Cal.App.4th 738, 743; *People v. Superior Court (Smart)* (1986) 179 Cal.App.3d 860, 862.)

Similarly, but without requiring dismissal of any charges, the prosecution can seek extraordinary relief from invalid discovery orders that threaten to expose privileged or other protected information.

> Review of a discovery ruling by extraordinary writ will be granted if the ruling threatens immediate harm, such as loss of a privilege against disclosure, for which no other remedy exists. (*Doe v. Superior Court* (2011) 194 Cal.App.4th 750, 754; *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1439.) Appeal from a final judgment is not an adequate remedy when a court orders production of privileged materials because, once the privileged materials have been disclosed, the harm has occurred and cannot be undone. (*Union Bank of California v. Superior Court* (2005) 130 Cal.App.4th 378, 388; *Raytheon Co. v. Superior Court* (1989) 208 Cal.App.3d 683, 686.)

(*Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1101-1102.)

9910.1-Failure to provide full record on review requires denial 6/20

A petition for extraordinary writ must supply to the reviewing court a full and complete record of hearings and documents filed in the lower court.

> A defendant seeking review of a ruling of the trial court by means of a petition for extraordinary writ must provide the appellate court with a record sufficient to permit such review. [Citations.] The record must if possible be lodged with the appellate court at the time the original petition for writ is filed. To be adequate, such a record should ordinarily include any written motion and opposition thereto together with their respective points and authorities, any relevant pleadings or reporter's transcripts, and any written dispositive order. Whenever the consideration of an exhibit is necessary for a complete understanding of the case, a copy thereof must also be furnished. And each item in the record, of course, must be legible.

(*Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186-187; see also *Munoz v. Superior Court* (2020) 45 Cal.App.5th 774, 778, fn. 4; *Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1085.) Without a complete record, the reviewing court is left to speculate whether there has been an abuse of discretion. (*Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 156-157.) Absent a proper record, therefore, a petition for extraordinary writ should be denied. (*Mahoney v. Superior Court* (1983) 142 Cal.App.3d 937, 939-940; *Krueger v. Superior Court* (1979) 89 Cal.App.3d 934, 938-939.)

9920.1-Court should summarily deny inadequate writ petition 5/13

"A proceeding in mandamus is generally subject to the general rules of pleading applicable to civil actions." (*Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 271.) In determining the sufficiency of a petition for a writ of mandate, the court must consider all allegations therein as admitted and true. But if, taking all such allegations as true, the petition sets forth no grounds for relief, the court has no alternative but to dismiss it. (*Dunn v. Municipal Court* (1963) 220 Cal.App.2d 858, 865, fn. 5; *McPheeters v. Board of Medical Examiners of State of California* (1947) 82 Cal.App.2d 709, 716.) Where the petition itself is insufficient there is no reason for filing an answer or proceeding further in the case. (*McPheeters v. Board of Medical Examiners of State of California*, *supra*, 82 Cal.App.2d at p. 716.) Instead, the court should summarily deny such a deficient petition.

9920.2- Court should strike unverified writ return 5/13

"In the absence of a true return, all well-pleaded and verified allegations of the writ petition are accepted as true. (Code Civ. Proc., § 1094; *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 372-373, fn. 5; *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 996, fn. 2; *Coppinger v. Superior Court* (1982) 134 Cal.App.3d 883, 885.)" (*Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1084.) Therefore, an unverified return should be stricken for purposes of addressing the petition's merit. (*Ibid*.; *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1287.)

9920.3-Writ cannot raise matters not raised in lower court 8/14

Neither prohibition nor mandate will ordinarily be issued by an appellate court unless the precise issue has been raised and ruled upon in the lower court. (*Citizens Utilities Co. v. Superior Court* (1963) 59 Cal.2d 805, 814; *Grimsley v. Board of Supervisors* (1985) 169 Cal.App.3d 960, 966.) "This obvious principle is one of the cornerstones of our system of lower and higher tribunals." (*Rescue Army v. Municipal Court* (1946) 28 Cal.2d 460, 464.)

> The superior court does not have the authority or jurisdiction to issue mandamus or prohibition against itself. "Mandamus or prohibition may be issued only by a court to another court of inferior jurisdiction." [Citations.] However, "[b]efore seeking mandate in an appellate court to compel action by a trial court, a party should first request the lower court to act. If such request has not been made the writ ordinarily will not issue unless it appears that the demand would have been futile. [Citations.]" (*Phelan v. Superior Court of San Francisco* (1950) 35 Cal.2d 363, 372.)

(*People v. Davis* (2014) 226 Cal.App.4th 1353, 1371.)

9920.4-Requirements for writ of mandate 8/14

A petition for writ of mandate "is an independent proceeding" that vests the court "with jurisdiction to act." (*People v. Picklesimer* (2010) 48 Cal.4th 330, 339 (*Picklesimer*); see Code Civ. Proc., § 1085; see also *People v. Davis* (2014) 226 Cal.App.4th 1353, 1370.) "To obtain relief, a petitioner must demonstrate (1) no 'plain, speedy, and adequate' alternative remedy exists (Code Civ. Proc., § 1086); (2) 'a clear, present … ministerial duty on the part of the respondent'; and (3) a correlative 'clear, present, and beneficial right in the petitioner to the performance of that duty.' [Citations.]" (*Picklesimer, supra*, 48 Cal.4th at p. 340.)

"A ministerial duty is an obligation to perform a specific act in a manner prescribed by law whenever a given state of facts exists, without regard to any personal judgment as to the propriety of the act. [Citation.]" (*Picklesimer*, *supra*, 48 Cal.4th at p. 340.) "Although it is well established that mandamus cannot be issued to control a court's discretion, in unusual circumstances the writ will lie where, under the facts, that discretion can be exercised in only one way. [Citation.]" (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 851; see also *People v. Davis*, *supra* 226 Cal.App.4th at p. 1372.)

9920.5-Requirements for writ of prohibition 11/18

"A petition for writ of prohibition lies to prevent a threatened judicial act that is without, or in excess of, a court's jurisdiction. (Code Civ. Proc., § 1102 ['The writ of prohibition arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.']" (*Heidary v. Superior Ct.* (2018) 26 Cal.App.5th 110, 116.) A petition for writ of prohibition is available when there is no plain, speedy, and adequate remedy at law. (Code Civ. Proc., § 1103.)

9930.1-Petitioner's burden to prove inadequacy of appeal 8/17

A basic requirement for the issuance of either a writ of mandate or prohibition is that there is no plain, speedy and adequate remedy in the ordinary course of law. (Code Civ. Proc., §§ 1086, 1103, subd. (a).) A petition for writ of mandate or prohibition may be dismissed if the petitioner has a plain, speedy and adequate remedy at law. (*Dhillon v. John Muir Health* 92017) 2 Cal.5th 1118, 1119.) The burden is clearly upon the petitioner to demonstrate the inadequacy of the remedy of appeal. (*Flores v. Dept. of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 205.)

It has long been the general rule that appeal from a criminal conviction is an adequate remedy even where the specific error complained of is not directly appealable and may be raised only after trial. (*Sledge v. Superior Court* (1974) 11 Cal.3d 70, 75-76; *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 366; *Gilliam v. Municipal Court* (1979) 97 Cal.App.3d 704, 709.) Nor will the remedy of appeal be held inadequate simply because it is not so expeditious as an extraordinary writ. (*Corona Unified Hospital District v. Superior Court* (1964) 61 Cal.2d 846, 851; *Dickenson v. Municipal Court* (1958) 162 Cal.App.2d 85, 89.)

A reviewing court has discretion in accordance with established legal principles and legal practice to determine the adequacy of the remedy of appeal. (*Rescue Army v. Municipal Court* (1946) 28 Cal.2d 460, 467.) Instances in which the remedy of appeal has been held to be inadequate generally involve rare situations such as where the public interest requires prompt resolution which would be frustrated by the time required for appeal, or where there is need for prompt resolution of a constitutional challenge to a statute. (*Morse v. Municipal Court* (1974) 13 Cal.3d 149, 155; *People v. Superior Court (Dodson)* (1983) 148 Cal.App.3d 990, 996.)

9930.2-Writ generally does not lie to test pretrial evidentiary rulings 10/09

In the absence of statutory authority, rulings on the admissibility of evidence are not subject to pretrial review by extraordinary writ. (*People v. Campa* (1984) 36 Cal.3d 870, 885-886; *People v. Municipal Court (Ahnemann)* (1974) 12 Cal.3d 658, 660.) One reason for this rule is that in limine rulings on the admissibility of evidence are not binding on the trial court. (*People v. Chacon* (2007) 40 Cal.4th 558, 565; *People v. Yarbrough* (1991) 227 Cal.App.3d 1650, 1655.) Another reason is that, as to a criminal defendant, post-judgment appeal is generally an adequate remedy at law. (*Provencher v. Municipal Court* (1978) 83 Cal.App.3d 132.) "If reviewing courts made themselves routinely available to intervene by writ whenever a litigant claimed a mistake had been made in a law-and-motion department, trials would be delayed, litigants would be vexed with multiple proceedings, and judgment appeals would be kept waiting." (*Burrus v. Municipal Court* (1973) 36 Cal.App.3d 233, 236; see also *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, 129.)

The prosecution may obtain appellate review of an adverse pretrial evidentiary ruling by the trial court by accepting a dismissal of the charge pursuant to Penal Code section 1385. (*People v. Chacon*, *supra*, 40 Cal.4th at p. 565.) The People may then seek relief by way of extraordinary writ if the appellate remedy is inadequate, such as when other related charges or defendants remain set for trial. (*People v. Superior Court (Martinez)* (1993) 19 Cal.App.4th 738, 743; *People v. Superior Court (Smart)* (1986) 179 Cal.App.3d 860, 862.)

9940.1-Untimely petition for writ should be denied 10/09

"Where there is otherwise no statutory authority or time limit in filing a writ, it must usually be filed within 60 days." (*People v. Superior Court (Brent)* (1992) 2 Cal.App.4th 675, 682.) "There is no statutory time limit for most writ petitions. A filing period of 60 days is typically recognized, but a petition filed after 60 days will not be denied unless the respondent can show prejudice. [Citations.]" (*Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1505, fn. 9.)

> It is true that, when there is no statutory time limit on filing a writ petition, a 60-day period usually is imposed. (*Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 356 (*Planned Parenthood*).) However, "the approach of the Supreme Court to the timeliness of a petition has been one of laches." (*People v. Superior Court (Clements)* (1988) 200 Cal.App.3d 491, 496 (*Clements*), citing *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 163; *Bryant v. Superior Court* (1936) 16 Cal.App.2d 556, 561.) "Under the doctrine of laches a writ may be denied where a party unreasonably delays in filing the petition and there is prejudice to the real party in interest." (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.)

(*People v. Superior Court (Lopez)* (2005) 125 Cal.App.4th 1558, 1562 (*Lopez*).)

In addition, the court has discretion to hear a writ petition beyond the 60-day period. (*Planned Parenthood*, *supra*, 83 Cal.App.4th at pp. 356-357.) This discretion is most commonly invoked when the petition presents a question of first impression and an issue of importance to the public. (*Lopez*, *supra,* 125 Cal.App.4th at p.1563; *Clements*, *supra*, 200 Cal.App.3d at pp. 496-497)

9940.2-Writ on PC995 denial must be timely 6/20

A defendant may petition the court of appeal for an extraordinary writ seeking pretrial review of the denial of a motion to dismiss under Penal Code section 995. (Pen. Code, § 999a; *Hudson v. Superior Court* (2017) 7 Cal.App.5th 999, 1006.) But the petition must be timely filed. Penal Code section 999a requires that such a petition be filed in the appellate within 15 days after the denial of the Penal Code section 995 motion by the trial court. Penal Code section 999a permits no exceptions. (*Ghent v. Superior Court* (1979) 90 Cal.App.3d 944, 950, fn. 7.)

In addition, the petition must be denied if the defense did not comply with the time limits set forth in Penal Code section 1510. Penal Code section 1510 precludes pretrial review of a Penal Code section 995 motion if the motion was not made in the trial court within 60 days of arraignment on the challenged felony information or indictment. This time limit is also jurisdictional. (*Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1460-1461 [motion need only be properly noticed, not necessarily ruled upon, within these time limits]; *Smith v. Superior Court* (1978) 76 Cal.App.3d 731, 733-735 ["reserving" motion insufficient].) Failure to meet the time limit set forth in Penal Code section 1510 is only excused if "within these time limits the defendant was unaware of the issue or had no opportunity to raise the issue." (See *Artega v. Superior Court* (2015) 233

Cal.App.4th 851, 859 (*Artega*); *Fleming v. Superior Court* (2010) 191 Cal.App.4th 73, 103 (*Fleming*).) Substantial delay in preparation of the reporter's transcript of the preliminary hearing can excuse a late filed motion. (*Artega v*, *supra*, 233 Cal.App.4th at pp. 859-860; *Ghent v. Superior Court*, *supra*, 90 Cal.App.3d at pp. 951-952.) Ineffective assistance of previous counsel can satisfy the unawareness exception under some circumstances. (*Artega v*, *supra*, 233 Cal.App.4th at p. 860; *Fleming*, *supra*, 191 Cal.App.4th at p. 104.) The complexity of the record and the legal issues involved can excuse non-compliance with the 60 day time limit of Penal Code section 1510 as well. (*Artega*, *supra*, 233 Cal.App.4th at pp. 860-861 [delay excused because of the length of the grand jury transcript and the complexity of the issues raised]; *McGill v. Superior Court* (2011) 195 Cal.App.4th 1454, 1513-1515 [same].)

9940.3-Writ on PC1538.5 denial must be timely 6/20

A defendant may petition the court of appeal for an extraordinary writ seeking pretrial review of the denial of motion to suppress evidence at a special hearing held in the superior court. (Pen. Code, § 1538.5, subd. (i).) But the petition must be timely filed. "After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition *filed within 30 days after the denial of his or her motion* at the special hearing." (*Ibid.* italics added.) Timely filing of a writ to obtain pretrial review of a motion conducted pursuant to Penal Code section 1538.5 is jurisdictional. A late filing cannot be excused in absence of a showing that the People are estopped to assert the delay. (*Clifton v. Superior Court* (1970) 7 Cal.App.3d 245, 252; *Gomes v. Superior Court* (1969) 272 Cal.App.2d 702, 704.)

In addition, Penal Code section 1510 precludes pretrial review of a Penal Code section 1538.5 suppression motion if the motion was not made (i.e., filed) in the trial court within 45 days of arraignment on a misdemeanor complaint and 60 days of arraignment on a felony information or indictment. This time limit is also jurisdictional. (*Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1460-1461 [motion need only be properly noticed, not necessarily ruled upon, within these time limits]; *Smith v. Superior Court* (1978) 76 Cal.App.3d 731, 733-735 ["reserving" motion insufficient].) Failure to meet the time limit set forth in Penal Code section 1510 is only excused if "within these time limits the defendant was unaware of the issue or had no opportunity to raise the issue."

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