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California Supreme Court Survey - A Review of Decisions: December 1994-July 1995

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California Supreme Court Survey

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The California Supreme Court Survey provides a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of issues that the supreme court has addressed, as well as to serve as a starting point for researching any of the topical areas. Attorney discipline, judicial misconduct, and death penalty appeal cases have been omitted from the survey.

The survey will review California Supreme Court cases in either and article or summary format. Articles provide an in-depth analysis of selected California Supreme Court cases including the potential impact a case may have on California law. Additionally, articles guide the reader to secondary sources that focus on specific points of law.

Summaries provide a brief outline of the areas of law addressed in selected California Supreme Court cases. Summaries are designed to provide the reader with a basic understanding of the legal implications of a cases in a concise format.

ARTICLES

SUMMARIES

I. ADOPTION

An unwed father who does not meet the requirements of a "presumed father" under California Family Code section 7611 has no statutory right, and will be denied a constitutional right, to withhold his consent to a third-party adoption if he does not promptly commit to his parental obligations during the pregnancy: **Adoption of Michael H.**

I. INTRODUCTION

In *Adoption of Michael H.*,[1] the California Supreme Court decided whether an unwed father who did not meet the statutory requirements of a "presumed father" under the Family Code may nevertheless have a constitutional right to object to a third-party adoption of his child.[2] The

1. 10 Cal. 4th 1043, 898 P.2d 891, 43 Cal. Rptr. 2d 445 (1995). Justice Mosk wrote the majority opinion, in which Chief Justice Lucas and Justices Arabian, Baxter, George, and Werdegar concurred. *Id.* at 1043-60, 898 P.2d at 891-901, 43 Cal. Rptr. 2d at 445-55. Justice Kennard wrote a separate opinion, concurring and dissenting. *Id.* at 1060-73, 898 P.2d at 901-10, 43 Cal. Rptr. 2d at 455-64 (Kennard, J., concurring and dissenting).

2. *Id.* at 1047-48, 898 P.2d at 892-93, 43 Cal. Rptr. 2d at 446-47; *see* CAL. FAM. CODE § 7611 (West 1994 & Supp. 1995); *see also* U.S. CONST. amend. XIV.

In July 1990, Stephanie learned she was pregnant. *Michael H.*, 10 Cal. 4th at 1048, 898 P.2d at 893, 43 Cal. Rptr. 2d at 447. She and her boyfriend Mark decided that adoption was their best alternative. *Id.* Mark attended some birthing classes with Stephanie and bought a trailer for them to live in. *Id.* However, they never moved into it together. *Id.* As the pregnancy progressed, their relationship grew increasingly unstable. *Id.* Mark checked himself into a drug rehabilitation hospital after he had "two violent outbursts" toward Stephanie, which culminated in his arrest for assault and his subsequent attempted suicide. *Id.* In November 1990, while in the hospital, Mark decided not to give his child up for adoption. *Id.* In January 1991, Stephanie moved into the San Diego home of the prospective adoptive parents, John and Margaret. *Id.* at 1049, 898 P.2d at 893, 43 Cal. Rptr. 2d at 447. After Michael was born on February 27, 1991, John and Margaret took immediate custody of him. *Id.* It was not until after Michael's birth that Mark asked for custody. *Id.* The adoptive parents petitioned the court to terminate Mark's status as father, and Mark brought an action to establish a father-child relationship. *Id.*; *see* CAL. FAM. CODE § 7662 (West 1994) (petition to terminate parental rights of father); *id.* § 7630 (action to determine father and child relationship).

The trial court determined that Mark was not a "presumed father" under § 7611 and that it was in the best interest of the child to be adopted by John and Margaret. *Michael H.*, 10 Cal. 4th at 1049, 898 P.2d at 893-94, 43 Cal. Rptr. 2d at 447-48. While Mark's appeal was pending, the California Supreme Court decided *Adoption of Kelsey*

court found that in order for the natural father to have a constitutional right to withhold his consent to the adoption, he would first have to meet the requirements of *Kelsey S.*[3] Reversing the court of appeal, the supreme court held that since the father in the present case did not immediately and continually commit to his parental responsibilities after learning of the pregnancy, he had no constitutional basis to interfere with the adoption.[4]

II. TREATMENT

A. *Majority Opinion*

Justice Mosk, writing for the majority, began his discussion with a review of the Uniform Parentage Act (UPA), focusing on the requirements for an unwed father to be considered a "presumed father."[5] The court noted that the UPA creates three different types, or "classes" of parents: mothers, fathers who meet the statutory requirements as "presumed fathers," and biological fathers who are not presumed fathers.[6] Since the trial court had found that Mark, the biological father in this

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S., which held that in some cases an unwed father may have a constitutional right to object to the third-party adoption of his child. 10 Cal. 4th at 1049, 898 P.2d at 894, 43 Cal. Rptr. 2d at 448; *see Adoption of Kelsey S.*, 1 Cal. 4th 816, 823 P.2d 1216, 4 Cal. Rptr. 2d 615 (1992). The court of appeal remanded the case to the trial court for a determination of whether Mark had a constitutional right to object to the adoption under the *Kelsey S.* standard. *Michael H.*, 10 Cal. 4th at 1049, 898 P.2d at 894, 43 Cal. Rptr. 2d at 448. On remand, the trial court found that Mark did have a constitutional basis to block the adoption, and the court of appeal affirmed. *Id.* at 1050, 898 P.2d at 894, 43 Cal. Rptr. 2d at 448.

3. *Kelsey S.*, 1 Cal. 4th 816, 823 P.2d 1216, 4 Cal. Rptr. 2d 615. The court stated: "If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent." *Id.* at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635. For a thorough discussion of the *Kelsey S.* decision, see Norman Allen, Adoption of Kelsey S.: *When Does an Unwed Father Know Best?*, 24 PAC. L.J. 1633 (1993).

4. *Michael H.*, 10 Cal. 4th at 1060, 898 P.2d at 901, 43 Cal. Rptr. 2d at 455.

5. *Id.* at 1050, 898 P.2d at 894, 43 Cal. Rptr. 2d at 448. The UPA begins with section 7600 of the Family Code. CAL. FAM. CODE §§ 7600-7730 (West 1994 & Supp. 1995). Section 7611, subdivision (d), provides that an unmarried father can qualify as a presumed father if: "[h]e receives the child into his home and openly holds out the child as his natural child." CAL. FAM. CODE § 7611(d) (West 1994 & Supp. 1995). *See generally* 10 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* §§ 409-410 (9th ed. 1989 & Supp. 1995) (discussing the nature and purpose of UPA, and defining parent-child relationship).

6. *Michael H.*, 10 Cal. 4th at 1051, 898 P.2d at 895, 43 Cal. Rptr. 2d at 449; *see* CAL. FAM. CODE §§ 7611-7612 (West 1994 & Supp. 1995); *see also* 32 CAL. JUR. 3D *Family Law* § 126 (1994 & Supp. 1995) (defining "parent").

case, was not a presumed father under the statute, he fell into the third category.[7] The court concluded that, under the *Kelsey S.* test, Mark may still have a constitutional basis to veto the adoption.[8]

The court then turned to the requirements set forth in *Kelsey S.*: the biological father must prove that he promptly came forward and took sufficient steps to demonstrate a "full commitment to his parental responsibilities" in order to assert the constitutional right.[9] The court asserted that the mere fact that a biological relationship existed between the father and child was not sufficient to provide a constitutional right to block the adoption.[10]

Turning to the facts of the case, the court took note of several factors which would weigh against Mark.[11] First, the child Michael had been in the custody of the adoptive parents since birth (over four years), and Mark had little chance to develop any meaningful relationship with Michael. Additionally, the adoptive parents were the only parents Michael had ever known.[12]

Next, the court focused on the time from July to October 1990, as the crucial period when Mark should have shown his full commitment to his impending parental responsibilities.[13] The court reiterated that the father must demonstrate the willingness to assume these responsibilities within a short time after learning of the pregnancy, and that this commitment must continue during the pregnancy.[14] Since Mark had waited many months before asserting his willingness to be a parent, he could not block the proposed third-party adoption.[15]

Additionally, the court emphasized several public policy goals which supported their decision to deny Mark a constitutional basis for blocking

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7. *Michael H.*, 10 Cal. 4th at 1051, 898 P.2d at 895, 43 Cal. Rptr. 2d at 449.

8. *Id.* at 1052, 898 P.2d at 896, 43 Cal. Rptr. 2d at 450.

9. *Id.* (quoting *Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635).

10. *Id.*; *see also* 2 C.J.S. *Adoption of Persons* § 58 (1991) (discussing parental consent for adoption of illegitimate children). *See generally* 32 CAL. JUR. 3D *Family Law* § 127 (1994 & Supp. 1995) (defining child and children);

11. *Michael H.*, 10 Cal. 4th at 1053, 898 P.2d at 896, 43 Cal. Rptr. 2d at 450.

12. *Id.*

13. *Id.*

14. *Id.* at 1054-55, 898 P.2d at 897, 43 Cal. Rptr. 2d at 451. The court emphasized that if a father does not *promptly* assert this commitment, "he cannot compensate for his failure to do so by attempting to assume his parental responsibilities many months after learning of the pregnancy." *Id.* at 1054, 898 P.2d at 897, 43 Cal. Rptr. 2d at 451.

15. *Id.* at 1055, 898 P.2d at 898, 43 Cal. Rptr. 2d at 451-52.

the adoption.[16] First, the biological father should promptly inform the mother of whether or not he objects to a proposed adoption of the child so that both parties have time to weigh their alternatives, including abortion.[17] Second, an unwed mother is likely to be in great need of the emotional and financial support offered by the father who promptly demonstrates his responsibilities, and unwed fathers should be encouraged to provide this support.[18] Third, requiring an unwed father to make his parental intentions known early on in the pregnancy results in greater certainty regarding the permanence of the proposed adoption.[19] Finally, the court rejected the attack on the statute's constitutionality, finding that the statute did not discriminate between unwed mothers and unwed fathers.[20]

The court concluded that Mark had not promptly come forward to demonstrate his full commitment to parenthood, and that he failed to assert his intended objection to the proposed adoption.[21] Therefore, Mark had no constitutional right to object to the third-party adoption. As a result, the court remanded the case to the superior court with instructions to rule in favor of the adoptive parents.[22]

B. Justice Kennard's Concurring and Dissenting Opinion

Justice Kennard concurred in the ultimate result that Michael remain with his adoptive parents, but dissented as to the majority's conclusion that Mark had not met the *Kelsey S.* requirements.[23] She found that Mark's actions would provide a constitutional basis for him to object to the adoption; however, she believed the *Kelsey S.* decision should not be applied retroactively.[24]

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16. *Id.* at 1055-56, 898 P.2d at 898-99, 43 Cal. Rptr. 2d at 452-53.

17. *Id.* at 1055, 898 P.2d at 898, 43 Cal. Rptr. 2d at 452. The court stressed the importance of a timely decision and notification by the father, reasoning that the mother "has only a relatively short time to make and implement her choice." *Id.*

18. *Id.* at 1055-56, 898 P.2d at 898, 43 Cal. Rptr. 2d at 452.

19. *Id.* at 1056, 898 P.2d at 898, 43 Cal. Rptr. 2d at 452. *See generally* Brooke A. Gershon, *Throwing Out the Baby with the Bath Water:* Adoption of Kelsey S. *Raises the Rights of Unwed Fathers Above the Best Interests of the Child*, 28 LOY. L.A. L. REV. 741 (1995) (discussing the need for certainty and finality in adoptions).

20. *Michael H.*, 10 Cal. 4th at 1059, 898 P.2d at 900, 43 Cal. Rptr. 2d at 454. In particular, the court pointed to "the many public policy justifications" offered by the prospective adoptive parents that demonstrated the substantial state interest involved. *Id.* at 1059-60, 898 P.2d at 901, 43 Cal. Rptr. 2d at 455.

21. *Id.* at 1060, 898 P.2d at 901, 43 Cal. Rptr. 2d at 455.

22. *Id.*

23. *Id.* at 1060-61, 898 P.2d at 901-02, 43 Cal. Rptr. 2d at 455-56 (Kennard, J., concurring and dissenting).

24. *Id.* (Kennard, J., concurring and dissenting).

Justice Kennard focused on all of Mark's actions, including his conduct after Michael was born.[25] She found that, looking at all the relevant circumstances both before and after the birth, Mark did everything possible to demonstrate his parental commitment to Michael.[26]

Justice Kennard then conceded that *Kelsey S.* should not be applied retroactively because Michael had been with his adoptive parents for over four years and the parties had relied on pre-*Kelsey S.* case law.[27] Balancing the interests, she concluded that the baby's need for continuity and a stable home outweighed any retroactive effect giving Mark parental rights.[28]

III. IMPACT

This decision does not change pre-existing law, but it does reinforce the requirements necessary for an unwed father to assert the right to object to an impending adoption.[29] The California Family Code defines both fathers and "presumed fathers."[30] Prior to *Kelsey S.*, if a biological

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25. *Id.* at 1065-66, 898 P.2d at 904-05, 43 Cal. Rptr. 2d at 458-59 (Kennard, J., concurring and dissenting). Justice Kennard asserted that the court below had found ample evidence to show that Mark had sufficiently demonstrated his commitment to parenthood. *Id.* at 1064, 898 P.2d at 903, 43 Cal. Rptr. 2d at 457 (Kennard, J., concurring and dissenting).

26. *Id.* at 1067, 898 P.2d at 906, 43 Cal. Rptr. 2d at 460 (Kennard, J., concurring and dissenting). Justice Kennard attacked the majority for focusing on the narrow time between July and November of 1990. *Id.* at 1068, 898 P.2d at 906, 43 Cal. Rptr. 2d at 460 (Kennard, J., concurring and dissenting). She gave greater weight to Mark's continued acknowledgment of paternity and his "impressive efforts" to pursue legal custody after Michael's birth than the majority did. *Id.* (Kennard, J., concurring and dissenting).

27. *Id.* at 1070-71, 898 P.2d at 908-09, 43 Cal. Rptr. 2d at 462-63 (Kennard, J., concurring and dissenting). While Justice Kennard noted that she had originally agreed that *Kelsey S.* should be applied retroactively, the present case convinced her that the *Kelsey S.* decision could not be made retroactive without prejudice to the parties involved. *Michael H.*, 10 Cal. 4th at 1072, 898 P.2d at 909, 43 Cal. Rptr. 2d at 463 (Kennard, J., concurring and dissenting).

28. *Michael H.*, 10 Cal. 4th at 1072-73, 898 P.2d at 909-10, 43 Cal. Rptr. 2d at 463-64 (Kennard, J., concurring and dissenting).

29. *Id.* at 1060, 898 P.2d at 901, 43 Cal. Rptr. 2d at 455; *see* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993) (exploring United States Supreme Court cases regarding paternal rights and the changing definition of the traditional family).

30. *See* CAL. FAM. CODE § 7611 (West 1994 & Supp. 1995) (defining natural and presumed fathers). *See generally* 30 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Parent and Child* § 442 (9th Ed. 1989 & Supp. 1995) (discussing termination of rights of

father did not qualify as a presumed father under the statute he could not object to a third-party adoption of his child.[31] The *Kelsey S.* decision gave unwed fathers who were not presumed fathers an alternative to the statutory requirements.[32] If a biological father promptly came forward to demonstrate his commitment to the child and his intention to fulfill his parental responsibilities, he could be given the same opportunities a "presumed father" would have under the statute.[33]

The present case further defines the extent to which an unwed father must demonstrate his intent: the court explained that "promptly" means he will have to make his intention to be a father to the child known to the mother as soon as he learns of the pregnancy.[34] The court focused the inquiry on the father's conduct *during* the pregnancy.[35] More importantly, *Michael H.* affirms the important public policy goals of assuring permanency in adoption situations, and that the welfare of the child should take priority when balancing the equities.[36]

IV. CONCLUSION

The decision in *Michael H.* will likely provide greater guidance for lawyers representing both adoptive parents and unwed fathers. The court

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father who is not a presumed father).

31. *See Kelsey S.*, 1 Cal. 4th 816, 823 P.2d 1216, 4 Cal. Rptr. 2d 615; CAL. FAM. CODE § 7664 (West 1994 & Supp. 1995) (explaining claims of parental rights and adoption). *See generally*, Christian R. Van Deusen, *The Best Interest of the Child and the Law*, 18 PEPP. L. REV. 417 (1991) (exploring the rights of both children and parents surrounding adoption).

32. *Michael H.*, 10 Cal. 4th at 1063, 898 P.2d at 903, 43 Cal. Rptr. 2d at 457 (Kennard, J., concurring and dissenting). This alternative right is based on the due process and equal protection clauses of the Fourteenth Amendment. *Id.*; *see Kelsey S.*, 1 Cal. 4th at 849, 823 P.2d at 1236, 4 Cal. Rptr. 2d at 635.

33. *Michael H.*, 10 Cal. 4th at 1060, 898 P.2d at 901, 43 Cal. Rptr. 2d at 455; *see* Rebecca L. Steward, *Constitutional Rights of Unwed Fathers: Is Equal Protection Equal for Unwed Fathers?*, 19 SW. U. L. REV. 1087 (1990) (arguing for constitutional protection of parental rights for fathers regardless of marital status).

34. *Michael H.*, 10 Cal. 4th at 1060, 898 P.2d at 901, 43 Cal. Rptr. 2d at 455.

35. *Id.* The court did refer to Mark's concealment from Stephanie and the prospective adoptive parents of his hidden intent to veto the adoption and seek custody of the baby prior to Michael's birth. *Id.* Though the majority did not expressly highlight Mark's personal problems during the pregnancy in its discussion of the case, the fact that Mark was recovering from a drug addiction and had been arrested for assault probably factored into their decision. *See id.* at 1048, 898 P.2d at 893, 43 Cal. Rptr. 2d at 447.

36. *Id.* at 1055, 898 P.2d at 898, 43 Cal. Rptr. 2d at 452; *see* Mindy S. Halpern, *Father Knows Best—But Which Father? California's Presumption of Legitimacy Loses Its Conclusiveness: Michael H. v. Gerald D. and Its Aftermath*, 25 LOY. L.A. L. REV. 275 (1991) (discussing policy issues underlying the presumption of fatherhood). The *Michael H.* case discussed by Ms. Halpern was a United States Supreme Court case, not the same case discussed here.

has narrowed the definition of when an unwed father who is not a "presumed father" may yet have a constitutional right to withhold his consent for a third-party adoption.[37] If an unwed father wants to block the adoption of his biological child, he will have to act quickly to demonstrate his commitment to fatherhood.

DEBRA E. BEST

37. *Michael H.*, 10 Cal. 4th at 1060, 898 P.2d at 901, 43 Cal. Rptr. 2d at 455; *cf.* 32 CAL. JUR. 3D, *Family Law* § 155 (1994 & Supp. 1995) (stating the requirement that only consent of the child's mother is needed for an adoption if there is no "presumed father").

II. BAIL CONDITIONS

Even though imposing random drug testing and warrantless searches following own recognizance releases from custody may implicate constitutional rights, these conditions are reasonable and, as such, do not have to relate to assuring an appearance at a subsequent court proceeding: **In re York.**

I. INTRODUCTION

In *In re York*,[1] the California Supreme Court considered whether a judge or magistrate, in deciding to release a defendant from custody on his own recognizance, "may condition such release upon the defendant's agreement to submit to random drug testing and warrantless search and seizure during that [release] period."[2] The supreme court affirmed the court of appeal by holding that conditioning release in such a way was permitted in appropriate circumstances and did not violate statutory or constitutional provisions.[3]

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1. 9 Cal. 4th 1133, 892 P.2d 804, 40 Cal. Rptr. 2d 308 (1995). Justice George wrote the unanimous decision, in which Chief Justice Lucas and Justices Mosk, Kennard, Arabian, Baxter, and Werdegar concurred. *Id.* at 1137-53, 892 P.2d at 805-16, 40 Cal. Rptr. 2d at 309-20.

2. *Id.* at 1137, 892 P.2d at 805, 40 Cal. Rptr. 2d at 309. This case was brought on behalf of 11 individuals who had each been charged with at least one drug-related offense. *Id.* at 1138, 892 P.2d at 805-06, 40 Cal. Rptr. 2d at 309-10. Because petitioners could not post bail, each was allowed to either remain in custody until trial or obtain a release on their own recognizance, conditioned upon an agreement to comply with several conditions, including random drug and alcohol testing and warrantless searches and seizures of their person, homes, and vehicles. *Id.* at 1138, 892 P.2d at 806, 40 Cal. Rptr. 2d at 310. Several of the petitioners objected, but in each case, the judge or magistrate refused to release them without their agreement to the conditions. *Id.* These conditions were imposed without considering the specific drug history of each petitioner. *Id.*

The court of appeal consolidated the cases and ruled that a "court or magistrate may, in appropriate circumstances, condition a defendant's [own recognizance] release upon a defendant's agreement to submit to random drug testing and warrantless search and seizure" so long as the specific facts of the case warrant such impositions. *Id.* at 1139, 892 P.2d at 806, 40 Cal. Rptr. 2d at 310. The judge or magistrate in the present cases, however, failed to make individual inquiries as to the reasonableness of the conditions, and therefore, "[t]he Court of Appeal issued writs of habeas corpus, vacating those portions of the . . . release orders that required submission to random drug testing and warrantless search and seizure." *Id.* Because an inquiry into the specific facts of each case would likely re-impose the same conditions, the petitioners sought review in the California Supreme Court, contending that a judge or magistrate cannot condition an own recognizance release upon agreement to submit to random drug tests and warrantless searches and seizures. *Id.*

3. *Id.* at 1137-38, 892 P.2d at 805, 40 Cal. Rptr. 2d at 309.

II. TREATMENT

A. *California Penal Code Section 1318*

In *In re York*, petitioners first asserted that random drug testing and warrantless search and seizure conditions violated the "reasonable conditions" element placed upon a court in releasing a defendant on his own recognizance as set forth in California Penal Code section 1318(a)(2).[4] Petitioners argued that "reasonable conditions" meant only those conditions reasonably related to assuring a defendant's presence at a subsequent proceeding, and that even if it did not, the statute could not be interpreted to allow conditions to be imposed which would require a waiver of the defendant's constitutional rights.[5]

The supreme court first turned to the text of California Penal Code section 1318 to determine the definition of "reasonable conditions."[6] The court found that the section did not include any specific language to clarify the definition.[7] The court then examined the legislative history and found that, when sponsoring the 1988 amendment to section 1318, the California Attorney General set forth several conditions placed upon defendants released on their own recognizance.[8] These conditions,

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4. *Id.* at 1141, 892 P.2d at 808, 40 Cal. Rptr. 2d at 312.
California Penal Code § 1318 provides:

> (a) The defendant shall not be released from custody under an own recognizance until the defendant files with the clerk of the court or other person authorized to accept bail a signed release agreement which includes: (1) The defendant's promise to appear at all times and places, as ordered by the court or magistrate and as ordered by any court in which, or any magistrate before whom the charge is subsequently pending. (2) The defendant's promise to obey all *reasonable conditions* imposed by the court or magistrate. (3) The defendant's promise not to depart this state without leave of the court. (4) Agreement by the defendant to waive extradition if the defendant fails to appear as required and is apprehended outside of the State of California. (5) The acknowledgment of the defendant that he or she has been informed of the consequences and penalties applicable to violation of the conditions of release.

CAL. PENAL CODE § 1318 (West Supp. 1995) (emphasis added).

5. *In re York*, 9 Cal. 4th at 1141, 892 P.2d at 808, 40 Cal. Rptr. 2d at 312.

6. *Id.* at 1141-42, 892 P.2d at 808, 40 Cal. Rptr. 2d at 312. If the statutory language is unambiguous, the court need not look further. *Id.* at 1142, 892 P.2d at 808, 40 Cal. Rptr. 2d at 312 (citing Security Pac. Nat'l Bank v. Wozab, 51 Cal. 3d 991, 800 P.2d 557, 275 Cal. Rptr. 201 (1990)).

7. *Id.* at 1142, 892 P.2d at 808, 40 Cal. Rptr. 2d at 312.

8. *Id.* at 1143-44, 892 P.2d at 809-10, 40 Cal. Rptr. 2d at 313-14. The court turns to legislative history when the statutory language is unclear. *Id.* (citing Long Beach

which the judiciary routinely imposed on defendants, were not related to assuring the accused's appearance at a subsequent proceeding, but rather were related to the furtherance of public safety.[9] The court, therefore, concluded that the legislative intent was to give judges and magistrates broad discretion in imposing "reasonable conditions" including those related to furthering public safety but not necessarily those related to assuring future appearances.[10]

The court next turned to petitioners' constitutional argument and found no historical support for the assertion that the legislature intended to preclude courts from imposing reasonable conditions that violate a defendant's constitutional rights.[11] In fact, the court noted that committee reports analyzing the then-proposed 1988 amendment to section 1318 cited conditions that clearly violated a defendant's constitutional rights.[12] Accordingly, the court ruled that section 1318(a)(2) authorizes a

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Police Officers' Ass'n v. City of Long Beach, 46 Cal. 3d 736, 759 P.2d 504, 250 Cal. Rptr. 869 (1988)).

9. *Id.* The Attorney General sponsored Assembly Bill No. 4282, which was later passed as the 1988 amendment to California Penal Code § 1318. *Id.* at 1144, 892 P.2d at 810, 40 Cal. Rptr. 2d at 314. In a letter to the bill's author, the Attorney General explained that:

> Existing statutes . . . do not address the court's ability to impose conditions upon [own recognizance] release[s]. As a result, although the judiciary has routinely imposed limitations on the defendant's behavior as a condition of own-recognizance release, these conditions vary greatly from case-to-case. Probably the most common condition is the provo that the defendant refrain from criminal conduct while on release. In domestic violence and child molest cases it is common for the court to impose conditions to protect the victim. And when witness intimidation is a potential issue, the courts usually fashion conditions designed to protect the witness and the integrity of the judicial process.
>
> Despite this necessary, common[,] and long-standing practice, the only conditions expressly authorized by statute for own-recognizance release are those relating to the defendant's appearance . . . .
>
> AB 4282 will cure this deficiency by expressly providing that the court or magistrate may condition own-recognizance release on "reasonable conditions." In so doing, this bill will not only provide legislative authority and guidance for the courts, but will protect defendants from capricious release conditions.

Id.

The Governor and the chairs of the Assembly Committee on Public Safety, the Senate Committee on Judiciary, and the Appropriations Committee each received the same letter, which the Assembly Committee on Public Safety and the Senate Committee on Judiciary adopted in their analyses of Assembly Bill No. 4282. *Id.*

10. *Id.* at 1145, 892 P.2d at 810, 40 Cal. Rptr. 2d at 314.

11. *Id.* at 1146, 892 P.2d at 811, 40 Cal. Rptr. 2d at 315.

12. *Id.*

judge to impose conditions that violate a defendant's constitutional rights as long as the conditions are reasonable.[13]

B. Presumption of Innocence, Right of Privacy, and Right of Equal Protection

Petitioners further argued that, even if random drug testing and warrantless searches and seizures were not barred by statute, they violated the presumption of innocence, right of privacy, and right of equal protection.[14]

1. Presumption of Innocence

Petitioners' presumption of innocence argument is similar to the one the United States Supreme Court rejected in *Bell v. Wolfish*.[15] The *Bell* court found that the presumption of innocence applies only to the trial itself.[16] Based on *Bell*, the California Supreme Court decided that, because conditions imposed upon an own recognizance release do not affect any presumptions at trial, they do not infringe upon a defendant's presumption of innocence.[17]

2. Right to Privacy

The court then examined whether imposing random drug testing and warrantless searches and seizures violated the defendants' right to be free from unreasonable searches,[18] guaranteed by the Fourth Amendment to the United States Constitution[19] and article I, section 13 of the

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13. *Id.* at 1146-47, 892 P.2d at 811-12, 40 Cal. Rptr. 2d at 315-16.

14. *Id.* at 1147, 892 P.2d at 812, 40 Cal. Rptr. 2d at 316.

15. 441 U.S. 520, 532-33 (1979). In *Bell*, the petitioners were pretrial detainees, as well as sentenced prisoners, who were challenging various conditions and practices of New York's Metropolitan Correctional Center. *Id.* at 526. The Supreme Court found that the conditions and practices did not unfairly infringe upon the petitioners' right to a presumption of innocence because they all occurred before trial. *Id.* at 533. For a further discussion on bail hearings, see Jonathan P. Hobbs, *Criminal Procedure; Bail Hearings—Domestic Offenses*, 26 PAC. L.J. 252 (1995); Shari J. Cohen, Note, *Circumventing Due Process: A Judicial Response to Criminal Recidivism Under the Bail Reform Act*, 15 HASTINGS CONST. L.Q. 319 (1988).

16. *Bell*, 441 U.S. at 533.

17. *In re York*, 9 Cal. 4th at 1148, 892 P.2d at 812-13, 40 Cal. Rptr. 2d at 316-17.

18. *Id.* at 1148-51, 892 P.2d at 813-15, 40 Cal. Rptr. 2d at 317-19.

19. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

California Constitution.[20] The court also addressed petitioners' claim that the conditions violated their rights to privacy and due process of law guaranteed by the California Constitution, article I, sections 1[21] and 15,[22] respectively.[23] The court held that the conditions did not violate these rights for two reasons.[24] First, because a defendant who is unable to post bail lacks the reasonable expectation of privacy needed to be protected from warrantless searches and seizures by being incarcerated, the conditions at issue do not place greater restrictions on an own recognizance releasee than they would on a defendant who had not secured his own recognizance release.[25] Therefore, no waiver of Fourth Amendment rights was needed.[26] Second, the court compared own recogni-

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no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

20. Article I, section 13 of the California Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

CAL. CONST. art. I, § 13. For more information on random drug testing and the right of privacy, see Jennifer L. Spaziano, California Supreme Court Survey, 22 PEPP. L. REV. 794 (1995) (analyzing Hill v. NCAA); Karen E. Crummy, *Urine or You're Out: Student Athletes' Right of Privacy Stripped in* Hill v. NCAA, 29 U.S.F. L. REV. 197 (1994).

21. Article I, section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1.

22. Article I, section 15 of the California Constitution provides:

> The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel.
>
> Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law.

CAL. CONST. art. I, § 15.

23. *In re York*, 9 Cal. 4th at 1148-51, 892 P.2d at 813-15, 40 Cal. Rptr. 2d at 317-19.

24. *Id.* at 1149-51, 892 P.2d at 813-15, 40 Cal. Rptr. 2d at 317-19. For more on illegal searches and seizures, see 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* §§ 2273-74 (2d ed. 1989 & Supp. 1995).

25. *In re York*, 9 Cal. 4th at 1149, 892 P.2d at 813, 40 Cal. Rptr. 2d at 317.

26. *Id.*

zance releasees to people released on probation,[27] who must consent to a waiver of their Fourth Amendment rights in order to avoid a prison term. Similarly, an own recognizance releasee must consent to the conditions the court places upon him, or remain incarcerated.[28] While the petitioners in the instant situation had a "considerable incentive" to consent to these conditions, such consent was not "coerced or involuntary," and was, therefore, valid.[29] The court further noted that conditions implicating Fourth Amendment rights must still satisfy the reasonableness element of California Penal Code section 1318(a)(2).[30]

3. Equal Protection

Lastly, the court examined whether petitioners' right to equal protection was violated by forcing them to give up their Fourth Amendment rights simply because they could not afford bail, while those who did post bail retained those same rights.[31] The court stated that a judge or magistrate may impose these reasonable conditions upon any own recognizance releasee, regardless of his financial status.[32] In addition, the court stated that the clear intent of the legislature was to "further public safety," not to "discriminate against indigent defendants."[33] Therefore, petitioners failed to establish that applying the conditions to own recognizance releasees violates equal protection under the laws.[34]

Because the supreme court determined that the conditions imposed upon the petitioners' own recognizance release were reasonable and did

27. *Id.* at 1150-51, 892 P.2d at 814-15, 40 Cal. Rptr. 2d at 318-19.

28. *Id.* at 1150, 892 P.2d at 814, 40 Cal. Rptr. 2d at 318. For information on house arrest as an alternative to confinement and conditions placed upon the house arrest, see Christian A. Ameri, *Crimes; Home Detention Programs—Alternative to Confinement*, 26 PAC. L.J. 413 (1995).

29. *In re York*, 9 Cal. 4th at 1150, 892 P.2d at 814, 40 Cal. Rptr. 2d at 318.

30. *Id.* at 1150-51, 892 P.2d at 814, 40 Cal. Rptr. 2d at 318.

31. *Id.* at 1151-52, 892 P.2d at 815, 40 Cal. Rptr. 2d at 319. The court stated that it assumed petitioners were correct in asserting that random drug testing and warrantless searches and seizures could not be imposed upon a defendant who posts bail without addressing the issue. *Id.* at 1152, 892 P.2d at 815, 40 Cal. Rptr. 2d at 319; *cf.* 20 CAL. JUR. 3D *Criminal Law* § 2587 (1985 & Supp. 1995) (listing factors the judge or magistrate considers when deciding between own recognizance release and setting of reasonable bail).

32. *In re York*, 9 Cal. 4th at 1152, 892 P.2d at 815, 40 Cal. Rptr. 2d at 319.

33. *Id.*

34. *Id.* at 1153, 892 P.2d at 815, 40 Cal. Rptr. 2d at 319.

not unfairly infringe on their rights, the court affirmed the court of appeal's judgment.[35]

III. IMPACT

Before the 1988 amendment to California Penal Code section 1318, courts routinely held that any condition placed upon a defendant released on his own recognizance had to be reasonably related to insuring appearance at subsequent court proceedings.[36] The 1988 amendment, however, permitted courts to impose any "reasonable conditions" upon the releasees.[37] The California Supreme Court made it clear in *In re York* that these conditions included warrantless searches and seizures and random drug tests, as long as it was reasonable under the circumstances.[38] In doing so, the court upheld the court of appeal's decision that a judge or magistrate must inquire into the "specific facts and circumstances of the defendant's case" in determining whether to impose such conditions.[39] Additionally, the court upheld the ruling that a court cannot unilaterally impose such restrictions on all defendants accused of drug related crimes.[40] Therefore, even though the court held that imposing such conditions is permissible, a court is limited as to what extent and to when it may impose these conditions.[41]

IV. CONCLUSION

In *In re York*, the California Supreme Court held that random drug tests and warrantless searches and seizures are reasonable conditions to be placed upon the own recognizance release of a defendant and, therefore, do not violate his rights to a presumption of innocence, privacy, or equal protection under the laws.[42] However, this standard only applies if a court makes some inquiry into the specific facts of the

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35. *Id.* at 1153, 892 P.2d at 816, 40 Cal. Rptr. 2d at 320.

36. *See, e.g.*, McIntosh v. Municipal Court, 124 Cal. App. 3d 1083, 177 Cal. Rptr. 683 (1981) (holding that conditioning release on signing a written declaration not to "trespass, blockade, or fail to disperse" at a nuclear power plant was an abuse of discretion); Van Atta v. Scott, 27 Cal. 3d 424, 613 P.2d 210, 166 Cal. Rptr. 149 (1980) (examining the constitutionality of the own-recognizance system); People v. McCaughey 261 Cal. App. 2d 131, 67 Cal. Rptr. 683 (1968) (willful failure to appear case). *See generally* 20 CAL. JUR. 3D *Criminal Law* § 2624 (1985); 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Proceedings Before Trial* § 2035 (2d ed. 1989) (discussing decisions involving the "reasonably related" standard).

37. *See* 20 CAL. JUR. 3D *Criminal Law* § 2624 (Supp. 1995).

38. *In re York*, 9 Cal. 4th at 1137-38, 892 P.2d at 805, 40 Cal. Rptr. 2d at 309.

39. *Id.*

40. *Id.* at 1139, 1153, 892 P.2d at 806, 816, 40 Cal. Rptr. 2d at 310, 320.

41. *Id.* at 1137-38, 892 P.2d at 805, 40 Cal. Rptr. 2d at 309.

42. *Id.* at 1145-53, 892 P.2d at 811-15, 40 Cal. Rptr. 2d at 315-19.

defendant's case to justify the implication of specific constitutional rights.

MARC S. HANISH

III. CONSTITUTIONAL LAW

An injunction requiring protesters to demonstrate across the street from an abortion clinic withstands constitutional scrutiny under the new test established by the United States Supreme Court in Madsen v. Women's Health Center, *114 S.Ct. 2516 (1994), where that injunction is content neutral, serves significant state interests, leaves adequate alternative avenues of communication, and burdens protesters' First Amendment rights no more than is necessary to serve state interests:*
Planned Parenthood Shasta-Diablo v. Williams.

I. INTRODUCTION

Reviewing the case on remand, the California Supreme Court in *Planned Parenthood Shasta-Diablo v. Williams*[1] re-examined its earlier holding[2] in light of the new test for the constitutionality of injunctions restricting First Amendment rights.[3] The United States Supreme Court articulated the new test in *Madsen v. Women's Health Center.*[4] In its first review of the *Williams* case, the California Supreme Court applied the existing four-part test for determining the constitutionality of time, place and manner speech restrictions.[5] On the basis of that test, the court held the injunction constitutionally valid.[6] The United States Su-

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1. 10 Cal. 4th 1009, 898 P.2d 402, 43 Cal. Rptr. 2d 88, *petition for cert. filed*, 64 U.S.L.W. 3287 (U.S. Oct. 10, 1995). Justice Arabian authored the majority opinion in which Chief Justice Lucas, and Justices Mosk, Baxter, George and Strankman concurred. *Id.* at 1011-25, 898 P.2d at 403-13, 43 Cal. Rptr. 2d at 88-99. Justice Kennard wrote a separate dissenting opinion. *Id.* at 1025-40, 898 P.2d at 413-22, 43 Cal. Rptr 2d at 99-109 (Kennard, J., dissenting).

2. *See* Planned Parenthood Shasta-Diablo v. Williams, 7 Cal. 4th 860, 873 P.2d 1224, 30 Cal. Rptr. 2d 629, *vacated*, 115 S. Ct. 413 (1994).

3. The First Amendment to the United States Constitution states in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. CONST. amend. I. The Constitution and its amendments are made applicable to the states through the Fourteenth Amendment, which states that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1. *See generally* Russel W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883 (1991) (outlining the parameters of the First Amendment right to free speech).

4. 114 S. Ct. 2516 (1994).

5. *Williams*, 7 Cal. 4th at 866-67, 873 P.2d at 1227, 30 Cal. Rptr. 2d at 632; *see Williams*, 10 Cal. 4th at 1014, 898 P.2d at 405, 43 Cal. Rptr. 2d at 91; Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (setting forth the pre-*Madsen* test); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (same).

6. *Williams*, 10 Cal. 4th at 1015, 898 P.2d at 406, 43 Cal. Rptr. 2d at 92. *See*

preme Court's subsequent decision in *Madsen*, however, distinguished between injunctions and generally applicable ordinances and established a "slightly stricter" constitutional test for injunctions.[7] Applying this new standard, the California Supreme Court reaffirmed the Court of Appeal's decision and held that the permanent injunction imposed by the *Williams* trial court withstood the heightened constitutional scrutiny mandated by *Madsen*.[8]

II. STATEMENT OF THE CASE

In 1990, Planned Parenthood operated a family planning clinic in Vallejo, California.[9] In response to increasingly disruptive anti-abortion protests held directly outside the clinic, Planned Parenthood sought an injunction limiting the protestors' activities to the sidewalk across the street from the clinic.[10] The trial court ultimately granted a permanent

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generally 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 286 (9th ed. 1988 & Supp. 1995) (discussing the lower court's decision in *Williams*, 7 Cal. 4th at 860, 873 P.2d at 1224, 30 Cal. Rptr. 2d at 629).

7. *Williams*, 10 Cal. 4th at 1011, 898 P.2d at 403-04, 43 Cal. Rptr. 2d at 89-90 (citing *Madsen*, 114 S. Ct. at 2526-27). *See generally* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 286 (9th ed. 1988 & Supp. 1995) (discussing *Madsen*, 114 S. Ct. at 2516); Mathew D. Staver, *Injunctive Relief and the* Madsen *Test*, 14 ST. LOUIS U. PUB. L. REV. 465 (1995) (explaining the *Madsen* decision's effect on the distinction between injunctions and ordinances for free speech purposes).

8. *Williams*, 10 Cal. 4th at 1025, 898 P.2d at 412-13, 43 Cal. Rptr. 2d at 98-99. *See generally* 13 CAL. JUR. 3D *Constitutional Law* § 260 (1992 & Supp. 1995) (outlining reasonable restrictions allowed on the expression of speech).

9. *Williams*, 10 Cal. 4th at 1012, 898 P.2d at 404, 43 Cal. Rptr. 2d at 90.

10. *Id.* at 1013, 898 P.2d at 403, 43 Cal. Rptr. 2d at 89. Planned Parenthood initially obtained a temporary restraining order from the trial court forbidding the protestors to harass "any person entering or leaving the building" and limited the protestor's picketing activities to the sidewalk in front of the building. *Id.* at 1013, 898 P.2d at 404, 43 Cal. Rptr. 2d at 90. The number of protestors allowed to picket on the sidewalk in front of the clinic was later limited to four by a preliminary injunction. *Id.*

injunction,[11] thereby relegating the protestors' activities to a sidewalk across the street.[12]

The California Court of Appeal reviewed the injunction and found the "place" restriction constitutional.[13] The California Supreme Court later affirmed the appellate court's decision.[14] The United States Supreme Court subsequently vacated that judgment and remanded the case for reconsideration in light of the heightened scrutiny set forth in *Madsen*.[15]

III. TREATMENT

A. *The Majority Opinion*

Justice Arabian's opinion began by reviewing the California Supreme Court's analysis in the first *Williams* decision.[16] In reaching its decision,

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11. The permanent injunction explicitly prohibited the protestors from:

> (1) blocking any entrance or exit to the clinic building; (2) recording the license numbers of cars entering or leaving the clinic; (3) photographing any person entering or leaving the clinic building; (4) referring, in oral statements while at the clinic site, to physicians, staff or clients as "murdering" or "murderers," "killing" or "killers," or to children or babies being "killed" or "murdered" by anyone in the clinic building in the presence of children under 12; and (5) shouting at or touching physicians, staff or patients entering or leaving the clinic or making noise that could be heard inside the premises.

Planned Parenthood Shasta-Diablo v. Williams, 7 Cal. 4th 860, 867, 873 P.2d 1224, 1227, 30 Cal. Rptr. 2d 629, 632, *vacated*, 115 S. Ct. 413 (1994).

12. *Williams*, 10 Cal. 4th at 1013, 898 P.2d at 405, 43 Cal. Rptr. 2d at 91. The injunction stated in pertinent part, "'[a]ll picketing, demonstrating, or counseling at the PLANNED PARENTHOOD building shall *only* take place along the public sidewalk *across the street* from PLANNED PARENTHOOD building.'" *Id.* at 1031, 898 P.2d at 416, 43 Cal. Rptr. 2d at 102 (Kennard, J., dissenting) (emphasis added by the court) (quoting the trial court's order). In granting the injunction, the trial court observed:

> [The protestors] (1) confronted and intimidated women seeking the clinic's services and forced plastic replicas of fetuses and "counseling" upon the clinic's patients and staff; (2) interfered with or obstructed entrance to and exit from the clinic; (3) pursued patients to their cars and public transportation to distribute literature and plastic fetuses; and (4) caused some of the women seeking medical services to become emotionally distraught.

Id. at 1013, 898 P.2d at 404-05, 43 Cal. Rptr. 2d at 90-91.

13. *Id.* at 1014, 898 P.2d at 405, 43 Cal. Rptr. 2d at 91.

14. *Id.*

15. *Id.* at 1009, 898 P.2d at 402, 43 Cal. Rptr. 2d at 88; *see Williams*, 115 S. Ct. 413, 413 (1994).

16. *Williams*, 10 Cal. 4th at 1014-15, 898 P.2d at 405-06, 43 Cal. Rptr. 2d at 91-92. For a comprehensive discussion of the California Supreme Court's first holding in *Williams*, see Robert E. Sabido, California Supreme Court Survey, 22 PEPP. L. REV. 1190, 1190-98 (1995).

the court asserted that it had correctly applied the United States Supreme Court's four-part test for determining whether ordinances and injunctions regulating free speech are constitutional.[17] The test required such speech restrictions to be content neutral,[18] serve a significant governmental interest,[19] be "sufficiently narrowly tailored to achieve the expressed governmental interests,"[20] and leave open "adequate alternative avenues of communication."[21] Justice Arabian emphasized that the trial court's injunction satisfied the constitutional criteria and that the injunction's place restriction had been properly upheld.[22]

The court then turned its attention to the new *Madsen* test.[23] In its analysis, the court noted that the new test was designed primarily for injunctions.[24] Further, the only significant difference between the old test and the *Madsen* test is the question of whether an injunction is narrowly tailored.[25] The court observed that, according to *Madsen*, injunctions pose a greater threat to First Amendment rights than ordinances, necessitating "a somewhat more stringent application" of constitutional principles.[26] Thus, the narrowly tailored prong was effectively transformed by *Madsen* into a question of "whether the challenged provisions of the injunction *burden[ed] no more speech than necessary* to serve a significant government interest."[27]

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17. *Williams*, 10 Cal. 4th at 1014-15, 898 P.2d at 405, 43 Cal. Rptr. 2d at 91; *see* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (stating that the government may place restrictions on protected speech provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information" (citation omitted)); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (outlining the four-part standard of constitutional validity).

18. *Williams*, 10 Cal. 4th at 1014, 898 P.2d at 405, 43 Cal. Rptr. 2d at 91.

19. *Id.*

20. *Id.* at 1015, 898 P.2d at 406, 43 Cal. Rptr. 2d at 92.

21. *Id.*

22. *Id.*

23. *Id.* at 1015-19, 898 P.2d at 406-08, 43 Cal. Rptr. 2d at 92-94.

24. *Id.* at 1017, 898 P.2d at 407, 43 Cal. Rptr. 2d at 93. The court observed that the Supreme Court was concerned by the "(greater risks of censorship and discriminatory application)" that injunctions posed in comparison to "(general ordinances.)" *Id.* (quoting Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2524 (1994)).

25. *Id.*

26. *Id.* (quoting *Madsen*, 114 S. Ct. at 2524).

27. *Id.* (quoting *Madsen*, 114 S. Ct. at 2525) (emphasis added).

The court next subjected the facts of *Williams* to the heightened scrutiny of the new standard.[28] The court observed that in both *Madsen* and *Williams*, "the trial court was confronted with a relatively restricted geographic area in front of the family planning clinic, physical harassment of patients occurring within these narrow confines, and an earlier injunction that had not proved to be successful."[29] The trial court was thus forced to balance the interests of the state in maintaining patient safety and accessibility of the thoroughfare against the protestors' First Amendment rights.[30] The court found that the injunction succeeded in keeping the roadway clear and still allowed the protestors to communicate their views, albeit at a distance of sixty feet.[31] Applying the *Madsen* test, the *Williams* majority concluded that the place restriction burdened no more speech than was absolutely necessary to accomplish the government's interests and, therefore, "more than . . . [met *Madsen*'s] heightened standard."[32] Accordingly, the California Supreme Court upheld its earlier decision.[33]

B. The Dissenting Opinion

Borrowing heavily from her earlier dissent in the first *Williams* decision,[34] Justice Kennard's lengthy dissent asserted that the trial court's injunction "was much broader than necessary to accomplish its objective."[35] She further argued that the preliminary injunction had already accomplished the objectives of the later, more restrictive permanent injunction.[36] Justice Kennard also pointed out that by limiting the

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28. *Id.* at 1019-25, 898 P.2d at 408-12, 43 Cal. Rptr. 2d at 94-98.

29. *Id.* at 1024, 898 P.2d at 412, 43 Cal. Rptr. 2d at 98. The court observed that in both *Madsen* and *Williams* the protestors "impeded access to the clinic, . . . blocked traffic, . . . physically stalked patients attempting to enter the clinic" and continued to do so even after the issuance of preliminary, less restrictive injunctions. *Id.* at 1020, 898 P.2d at 409, 43 Cal. Rptr. 2d at 95.

30. *Id.* at 1024, 898 P.2d at 412, 43 Cal. Rptr. 2d at 98.

31. *Id.* The court took judicial notice that the distance between the clinic and the far sidewalk was approximately 60 feet. *Id.* at 1021, 898 P.2d at 409-10, 43 Cal. Rptr. 2d at 95-96. The buffer zone created by the injunction in *Madsen* was 36 feet. *Id.* at 1021, 898 P.2d at 409, 43 Cal. Rptr. 2d at 95 (citing *Madsen*, 114 S. Ct. at 2526). The court deemed this 24 foot difference negligible. *Id.* at 1021, 898 P.2d at 409-10, 43 Cal. Rptr. 2d at 95-96.

32. *Id.* at 1024, 898 P.2d at 411, 43 Cal. Rptr. 2d at 97.

33. *Id.* at 1025, 898 P.2d at 412-13, 43 Cal. Rptr. 2d at 98-99.

34. *See* Planned Parenthood Shasta-Diablo v. Williams, 7 Cal. 4th 860, 883-94, 873 P.2d 1224, 1238, 30 Cal. Rptr. 2d 629, 643-50 (Kennard, J., dissenting), *vacated*, 115 S. Ct. 413 (1994).

35. *Williams*, 10 Cal. 4th at 1026, 898 P.2d at 413, 43 Cal. Rptr. 2d at 99 (Kennard, J., dissenting).

36. *Id.* (Kennard, J., dissenting). Justice Kennard identified these objectives as "protecting the health and safety of the clinic's patients, . . . providing unimpeded public

protestors to the sidewalk across the street from the clinic, the injunction prohibited expressive activities "in an undefined and potentially infinite area outside the designated zone," in effect "walling speech *in* rather than *out*."[37]

Justice Kennard also argued that significant differences existed between the facts of *Madsen* and *Williams*.[38] First, unlike *Madsen*, the injunction in *Williams* was preceded by an effective, less restrictive injunction.[39] In addition, the *Williams* protestors were restricted to the other side of a wide, noisy thoroughfare, from which their message had to be "heard over the roar of traffic."[40] Finally, Justice Kennard concluded that "the trial court's permanent injunction burdened more speech than was necessary to protect the clinic's staff and patients, and thus violated the First Amendment to the United States Constitution."[41]

IV. CONCLUSION

In *Madsen*, the United States Supreme Court established a stricter test for constitutionality than that initially applied by the California Supreme Court in *Williams*.[42] Prior to *Madsen*, precedent required the court to determine whether the time, place, and manner restrictions on picketing and leafletting were content neutral, narrowly tailored measures that served significant state interests and left open adequate alternative avenues of communication.[43] The standard now applicable in California requires any such injunction to "burden no more speech than necessary."[44]

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access to the clinic's facilities, and . . . ensuring the free flow of traffic on the street and sidewalk in front of the clinic." *Id.* (Kennard, J., dissenting).

37. *Id.* at 1027, 898 P.2d at 413, 43 Cal. Rptr. 2d at 99 (Kennard, J., dissenting).

38. *Id.* at 1026-38, 898 P.2d at 417-21, 43 Cal. Rptr. 2d at 103-07 (Kennard, J., dissenting).

39. *Id.* at 1038, 898 P.2d at 421, 43 Cal. Rptr. 2d at 107 (Kennard, J., dissenting).

40. *Id.* (Kennard, J., dissenting).

41. *Id.* (Kennard, J., dissenting).

42. *Id.* at 1012, 898 P.2d at 403-04, 43 Cal. Rptr. 2d at 89-90. *Compare* Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2526 (1994) *with* Planned Parenthood Shasta-Diablo v. Williams, 7 Cal. 4th 860, 888-94, 873 P.2d 1224, 1228-36, 30 Cal. Rptr. 2d 629, 633-41, *vacated*, 115 S. Ct. 413 (1994).

43. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (setting forth the pre-*Madsen* test); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (same).

44. *Williams*, 10 Cal. 4th at 1017, 898 P.2d at 407, 43 Cal. Rptr. 2d at 93 (quoting *Madsen*, 114 S. Ct. at 2526). *See generally* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 286C (Supp. 1995) (discussing *Madsen*, 114 S. Ct. at

In the *Williams* case on remand, the California Supreme Court rendered its interpretation of the new *Madsen* standard. Writing for the six member majority, Justice Arabian described the new standard as only "slightly" higher than the earlier test[45] and then affirmed the court's earlier decision.[46] Thus, the decision in *Williams* may signal the California Supreme Court's continued willingness to uphold injunctions limiting free speech in the interest of protecting the rights of women seeking abortions.[47]

L. SCOTT BARTELL

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45. *Williams*, 10 Cal. 4th at 1012, 898 P.2d at 403-04, 43 Cal. Rptr. 2d at 89-90.

46. *Id.* at 1025, 898 P.2d at 412-13, 43 Cal. Rptr. 2d at 98-99.

47. *See* Jennifer Wohlstadter, Note, Madsen v. Women's Health Center, Inc.: *The Constitutionality of Abortion Clinic Buffer Zones*, 25 GOLDEN GATE U. L. REV. 543 (1995) (discussing *Madsen*'s potential effect on protests near abortion centers).

IV. CRIMINAL LAW

A. *Enhancement of a defendant's sentence for possession of a weapon during the commission of a drug offense is valid even if the defendant was not present at the time the drugs and weapon were seized, as long as the defendant knew of the weapon, the weapon was near the drugs, and the defendant could have used the weapon in furtherance of the drug offense:* **People v. Bland.**

I. INTRODUCTION

In *People v. Bland*,[1] the California Supreme Court addressed whether California Penal Code section 12002,[2] a sentence enhancement provision for possessing a weapon in the commission of a felony, applied to the defendant when he was not present at the time officers seized cocaine and a weapon from his bedroom.[3] The supreme court reversed the

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1. 10 Cal. 4th 991, 898 P.2d 391, 43 Cal. Rptr. 2d 77 (1995). Justice Kennard wrote the majority opinion, in which Chief Justice Lucas and Justices Mosk, Arabian, Baxter, and George concurred. *Id.* at 995-1006, 898 P.2d at 393-401, 43 Cal. Rptr. 2d at 79-87. Justice Werdegar wrote a concurring opinion. *Id.* at 1006-08, 898 P.2d at 401-02, 43 Cal. Rptr. 2d at 87-88 (Werdegar, J., concurring).

2. California Penal Code § 12022(a)(1) provides in relevant part:

> [A]ny person who is armed with a firearm in the commission or attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one year . . . . This additional term shall apply to any person who is a principal in the commission or attempted commission of a felony . . . whether or not the person is personally armed with a firearm.

CAL. PEN. CODE § 12022(a)(1) (West 1992 & Supp. 1995).

Penal Code § 12022(a)(2) provides, in pertinent part: "If the firearm is an assault weapon . . . the additional term . . . shall be three years . . . " CAL. PEN. CODE § 12022(a)(2) (West 1992 & Supp. 1995). *See generally* 18 CAL. JUR. 3D *Criminal Law* §§ 1628-1633 (1994 & Supp. 1995) (providing a general overview of sentence enhancements for armed felonies).

3. *Bland*, 10 Cal. 4th at 995, 898 P.2d at 393, 43 Cal. Rptr. 2d at 79. The defendant, Marvin Bland, was sitting in a police car outside of his house while officers searched his home for stolen auto parts. *Id.* at 995, 898 P.2d at 394, 43 Cal. Rptr. 2d at 80. The search produced a bag of rock cocaine, found in the defendant's bedroom closet, and unloaded firearms, including an assault weapon, found under the defendant's bed. *Id.* The jury convicted the defendant for cocaine possession with

appellate decision, upholding the trial court's decision to add three years to the defendant's sentence for possessing a weapon in the commission of a drug offense.[4] The California Supreme Court held that when firearms and drugs are kept near each other in a place frequented by the defendant, sufficient evidence exists "that the defendant was 'armed with a firearm in the commission' of the felony drug offense."[5]

II. TREATMENT

A. *Majority Opinion*

Justice Kennard, writing for the majority, first considered the legislative intent in enacting, Penal Code sections 12022 and 12022.5,[6] which impose an increased sentence for defendants who were armed or used a firearm in the commission of a felony.[7] The court noted that the sentence enhancement provisions were enacted to deter offenders from using firearms in the commission of crimes because the use of firearms creates a risk of death or injury.[8] The court emphasized the distinction between being armed and actually using a firearm[9] and determined that being armed does not require actual possession of the firearm on the body.[10] The court further advanced the notion that someone can be armed if a weapon is available for offensive or defensive use.[11]

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intent to distribute. *Id.* Three years were added to Bland's sentence because the jury determined that under § 12022, he was armed with a weapon during the commission of the drug offense. *Id.* at 996, 898 P.2d at 394, 43 Cal. Rptr. 2d at 80. The court of appeal affirmed Bland's drug convictions, but rescinded the three-year enhancement. *Id.* The court of appeal reasoned that there was no way that the defendant could have reached the weapons because he was outside of the house when the drugs and weapons were seized. *Id.*

4. *Id.* at 1006, 898 P.2d at 401, 43 Cal. Rptr. 2d at 87.

5. *Id.*

6. California Penal Code § 12022.5(a) provides:

> [A]ny person who personally uses a firearm in the commission or attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for 3, 4, 5, or 10 years . . . .

CAL. PEN. CODE § 12022.5(a) (West 1992 & Supp. 1995).

7. *Bland*, 10 Cal. 4th at 996, 898 P.2d at 394, 43 Cal. Rptr. 2d at 80.

8. *Id.* at 996, 898 P.2d at 394-95, 43 Cal. Rptr. 2d at 80-81; *see* 18 CAL. JUR. 3D *Criminal Law* § 1628 (1984 & Supp. 1995) (maintaining that the sentence enhancement statute is constitutional because the desire of the legislature to deter the use of firearms in the commission of felonies is reasonable).

9. *Bland*, 10 Cal. 4th at 996-97, 898 P.2d at 395, 43 Cal. Rptr. 2d at 81.

10. *Id.* at 997, 898 P.2d at 395, 43 Cal. Rptr. 2d at 81.

11. *Id.* (citing People v. Mendival, 2 Cal. App. 4th 562, 573, 3 Cal. Rptr. 2d 566, 574 (1992) (finding that the ready access to a weapon constitutes being armed)).

Next, the court focused on whether the defendant was armed in the instant case.[12] The court reasoned that defendant Bland could have used the firearm at any time while he possessed the drugs.[13] Additionally, the drugs were kept in close proximity to the gun. As a result, the jury could reasonably infer that at some point the defendant had been physically present in the room and had ready access to the gun to aid him in committing the drug offense.[14]

The court then discussed section 12022(a)(2), which provides for a three-year sentence enhancement for commission of an armed felony.[15] The court validated the enhancement because Bland had the gun available to assist him during the entire time he possessed the drugs.[16]

The court resolved that the legislative intent, "to deter those engaged in felonies from creating a risk of death or injury by having a firearm at the scene of the crime,"[17] is consistent with the finding that a firearm kept near drugs creates a risk of harm because the defendant may use the weapon to protect himself from the police or the drugs from theft.[18]

Finally, the court held that Bland was armed in the commission of a felony since the gun was found near the drugs and the jury reasonably inferred three main points.[19] First, Bland knew the gun was in his bed-

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12. *Bland*, 10 Cal. 4th at 1000, 898 P.2d at 397, 43 Cal. Rptr. 2d at 83.

13. *Id.*

14. *Id.*; *see* Rory Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1045 n.65 (1995) ("It is fair to consider narcotics and weapons offenses together because in reality they are often committed together and charged together.").

15. *Id.*; *see* 3 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1500 (2d ed. 1989 & Supp. 1995) ("[S]ince the [sentence enhancement] statutes do not create crimes, neither double jeopardy nor double punishment is involved when the punishment for another crime is enhanced because of weapon use in its commission.").

16. *Bland*, 10 Cal. 4th at 1003, 898 P.2d at 398, 43 Cal. Rptr. 2d at 84; *see* 18 CAL. JUR. 3D *Criminal Law* § 1629 (1984 & Supp. 1995) (explaining that the additional punishment for possessing a firearm must run consecutively rather than concurrently to the term imposed for the felony conviction); 3 B.E. WITKIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1501 (2d ed. 1989 & Supp. 1995) (noting that the court does have some discretion in choosing among the term lengths set forth in 12022(b)). *Contra* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993) (criticizing mandatory sentencing and the displacement of judicial discretion).

17. *Bland*, 10 Cal. 4th at 1001-02, 898 P.2d at 398, 43 Cal. Rptr. 2d at 84.

18. *Id.*

19. *Id.* at 1003-04, 898 P.2d at 399, 43 Cal. Rptr. 2d at 85.

room.[20] Second, the firearm's presence was not accidental or coincidental.[21] Third, at some point during Bland's possession of the drugs, the gun was available to secure that possession.[22]

B. Justice Werdegar's Concurring Opinion

Justice Werdegar wrote separately to reject the majority's notion of establishing a general rule that weapon proximity can deem a defendant armed.[23] Justice Werdegar asserted that proximity should be only one factor in evaluating the totality of the circumstances when deciding whether the evidence warrants sentence enhancement.[24]

III. IMPACT AND CONCLUSION

In *People v. Stiltner*,[25] the court stated that "[a] person is armed with a deadly weapon when he simply carries a weapon or has it available for use in either offense or defense."[26] In *People v. Nelums*,[27] the supreme court further relaxed the standard for sentence enhancement when it determined that the subject weapon need not be loaded or operable.[28]

In *Bland*, the California Supreme Court continued to expand the sentence enhancement provision by holding that when drugs and a firearm are in close proximity, the defendant knows of the firearm, and the defendant could have used the firearm in furtherance of the drug offense, the defendant may be subject to California Penal Code section 12022 sentence enhancement.[29] *Bland* broadens the meaning of being

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20. *Id.* at 1002, 898 P.2d at 399, 43 Cal. Rptr. 2d at 85.

21. *Id.*

22. *Id.* at 1002-04, 898 P.2d at 399-400, 43 Cal. Rptr. 2d at 85-86. The court remarked that the jury could decide that the defendant was armed even though the gun was unloaded. *Id.* at 1005, 898 P.2d at 400, 43 Cal. Rptr. 2d at 86. The court further declared that the omission of the word "knowingly" in the jury instructions, regarding access to the firearm, does not require setting the sentence enhancement aside since it is improbable that the jury would have otherwise reached a different conclusion. *Id.* at 1005-06, 898 P.2d at 400-01, 43 Cal. Rptr. 2d at 86-87.

23. *Id.* at 1007-08, 898 P.2d at 402, 43 Cal Rptr. 2d at 88 (Werdegar, J., concurring).

24. *Id.* at 1008, 898 P.2d at 402, 43 Cal. Rptr. 2d at 88 (Werdegar, J., concurring).

25. 132 Cal. App. 3d 216, 182 Cal. Rptr. 790 (1982).

26. *Id.* at 230, 182 Cal. Rptr. at 797-98 (citing People v. Reaves, 42 Cal. App. 3d 852, 856-57, 177 Cal. Rptr. 163, 166 (1974)).

27. 31 Cal. 3d 355, 644 P.2d 201, 182 Cal. Rptr. 515 (1982).

28. *Id.* at 359, 644 P.2d at 204, 182 Cal. Rptr. at 518.

29. *Bland*, 10 Cal. 4th at 1002-03, 898 P.2d at 399, 43 Cal. Rptr. 2d at 84 (1995).

armed in the commission of a felony and gives prosecutors new ammunition for prosecuting drug offenders.[30]

LORI L. PROUDFIT

30. *See generally* Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993) (examining the federal sentence enhancement guidelines); Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992) (same); David R. Truman, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U. L.Q. 683 (1995) (emphasizing California law in discussing sentence enhancement laws and gang activity in various states).

B. *A court may bifurcate the jury trial of an alleged repeat offender into two proceedings: one, to determine whether the defendant is guilty of the currently charged crime, and; two, to determine whether the defendant was previously convicted:* **People v. Calderon.**

I. INTRODUCTION

In *People v. Calderon*,[1] the California Supreme Court granted review to determine whether a court may bifurcate the jury trial of an alleged repeat offender into two proceedings: one, to determine whether the defendant is guilty of the currently charged crime, and; two, to determine whether the offender was previously convicted.[2] The court held that the trial court may bifurcate an alleged repeat offender's jury trial in this manner.[3] Additionally, the supreme court held that a trial court

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1. 9 Cal. 4th 69, 885 P.2d 83, 36 Cal. Rptr. 2d 333 (1994). Justice George authored the majority opinion, in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter and Werdegar concurred. *Id.* at 71-82, 885 P.2d at 86-93, 36 Cal. Rptr. 2d at 335-42. Justice Mosk wrote a separate opinion in which he concurred with the majority's legal analysis but dissented to the majority's disposition of the case. *Id.* at 82, 885 P.2d at 93, 36 Cal. Rptr. 2d at 342 (Mosk, J., concurring and dissenting).

2. *Id.* at 71-72, 885 P.2d at 86, 36 Cal. Rptr. 2d at 335. In *Calderon*, the prosecution charged the defendant with second-degree burglary after the police caught him walking out of a convenience store without paying for two cases of beer. *Id.* at 72-73, 885 P.2d at 86-87, 36 Cal. Rptr. 2d at 335-36. The prosecution sought to increase the defendant's potential sentence under California law, by alleging that the defendant suffered a prior conviction for attempted robbery. *Id.* at 72, 885 P.2d at 86, 36 Cal. Rptr. 2d at 336.

The defendant made a pre-trial motion to bifurcate the trial into two proceedings. *Id.* In the first proceeding, the jury was to determine whether the defendant was guilty of second degree burglary; while in the second proceeding, the jury was to determine whether the defendant had been previously convicted of attempted robbery. *Id.* The trial court denied the motion, and the defendant then admitted that he had been previously convicted of attempted robbery. *Id.* This admission came before the start of the jury trial. *Id.*

During the trial, the court warned the defendant that it would allow the prosecution to impeach his testimony "with evidence that he had been convicted of a 'theft-related felony.'" *Id.* at 73, 885 P.2d at 87, 36 Cal. Rptr. 2d at 336. Thus, the defendant admitted during his testimony that he had been previously convicted of "a theft-related felony." *Id.* The jury returned a guilty verdict, and the defendant was sentenced to three years in state prison for the burglary charge. *Id.* In addition, his three-year sentence was increased by one year, because of his previous attempted robbery conviction. *Id.* The court of appeal affirmed both the conviction and the sentence enhancement. *Id.*

3. *Id.* at 75, 885 P.2d at 88, 36 Cal. Rptr. 2d at 337-38.

should bifurcate the trial only if a unitary trial will unduly prejudice the defendant.[4]

II. TREATMENT

A. *The Majority Opinion*

1. A Trial Court Has the Discretion to Bifurcate the Trial Into Two Separate Proceedings

California law enhances the punishment of a convicted defendant if "the prosecution alleges and proves that the defendant has suffered one or more prior convictions."[5] When a defendant denies an alleged prior conviction, California Penal Code section 1025 states that the jury trying the case must determine both the guilt of the defendant and the truthfulness of the prior conviction.[6]

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4. *Id.* at 77-78, 885 P.2d at 90, 36 Cal. Rptr. 2d at 339.

5. *Id.* at 71-72, 885 P.2d at 86, 36 Cal. Rptr. 2d at 335 (quoting People v. Saunders, 5 Cal. 4th 580, 585, 853 P.2d 1093, 1094, 20 Cal. Rptr. 2d 638, 639 (1993), *cert. denied*, 114 S. Ct. 1101 (1994)); *see* CAL. CONST. art. I, § 28(f) ("Any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of . . . enhancement of sentence in any criminal proceeding."); *see also* CAL. PENAL CODE § 667(a) (West 1988 & Supp. 1995) ("[A]ny person convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction . . . . "); CAL. PENAL CODE § 667.5 (West 1988 & Supp. 1995) (enhancing punishment for defendants previously convicted of violent felonies); CAL. HEALTH & SAFETY CODE § 11370.2 (West 1991 & Supp. 1995) (imposing three-year sentence enhancement for criminals previously convicted of violating California controlled substance laws). *See generally* 22 CAL. JUR. 3D *Criminal Law* § 3370 (1985 & Supp. 1995) (stating that the purpose for enhancing the punishment of a repeat offender is to "seek some other method to curb his propensities and to deter others in like situations from committing subsequent offenses . . . [and] to diminish the opportunities for evil deeds . . . by removing them from the theater of free men for longer periods."); 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment For Crimes* § 1492 (2d ed. 1989 & Supp. 1995) (listing California Penal Code sections that enhance the sentences of repeat offenders).

For a criticism of sentence enhancement for repeat offenders, see Markus D. Dubber, Note, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Offender Criminal Statute*, 43 STAN. L. REV. 193 (1990).

6. California Penal Code section 1025 provides in pertinent part:

> When a defendant is charged . . . with having suffered a previous conviction . . . he must be asked whether he has suffered such conviction . . . . If he answers that he has not . . . 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.

The California Supreme Court conceded that nothing in section 1025's language authorizes a trial court to bifurcate the twofold determination of guilt and truth of a prior conviction into separate proceedings.[7] Nevertheless, the court found implied authority to bifurcate in section 1044,[8] which grants a trial court broad discretion to conduct criminal trial proceedings in a manner that most "expeditiously and effectively" arrives at the truth.[9] Therefore, the court held that a trial court has the discretion to bifurcate the trial in order to more "expeditiously and effectively" determine the truth.[10]

CAL. PENAL CODE § 1025 (West 1985 & Supp. 1995). *See generally* 22 CAL. JUR. 3D *Criminal Law* § 3384 (1985 & Supp. 1995) ("In case of a plea of not guilty, the issue of a prior conviction is tried by the same jury that determines the defendant's guilt respecting the primary offense."); 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment For Crimes* § 1527(2)(a) (2d ed. 1989 & Supp. 1995) ("If the defendant pleaded *not guilty* and went to trial on the main offense, the issue of prior conviction is submitted to that same jury.").

7. People v. Calderon, 9 Cal. 4th 69, 74, 885 P.2d 83, 87-88, 36 Cal. Rptr. 2d 333, 337 (1994). In addition, the court noted that the United States Supreme Court has held that a defendant's due process rights are not violated merely because the trial court failed to bifurcate the determination of the defendant's guilt and the truthfulness of an alleged prior conviction. *Id.* at 75, 885 P.2d at 88, 36 Cal. Rptr. 2d at 338 (citing Spencer v. Texas, 385 U.S. 554, 568 (1967)). In *Spencer*, the Court noted that "[t]wo-part jury trials . . . have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure." *Spencer*, 385 U.S. at 568.

8. California Penal Code § 1044 provides in pertinent part that "[i]t 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 matter involved." CAL. PENAL CODE § 1044 (West 1985 & Supp. 1995). *See generally* 21 CAL. JUR. 3D *Criminal Law* § 2925 (1985 & Supp. 1995) ("In the progress of a criminal trial, the trial judge has considerable discretion over the proper conduct of the trial.").

9. *Calderon*, 9 Cal. 4th at 74-75, 885 P.2d at 88, 36 Cal. Rptr. 2d at 337-38. The court noted that the United States Supreme Court considered a bifurcated trial "probably the fairest" whenever the jury must determine both the defendant's guilt and the truth of an alleged prior conviction. *Id.* at 75, 885 P.2d at 88, 36 Cal. Rptr. 2d at 338 (citing *Spencer*, 385 U.S. at 567-68 (suggesting that the Court would support a two-stage jury trial if it had to decide the issue "in a legislative or rule-making context")).

10. *Id.* at 75, 885 P.2d at 88, 36 Cal. Rptr. 2d at 337-38. *See generally* 22 CAL. JUR. 3D *Criminal Law* § 3384 (1985 & Supp. 1995) ("It has been held that, whenever charged prior convictions are in issue . . . the defendant is entitled to a bifurcated proceeding in which the jury is not informed of his prior convictions . . . until it has found him guilty of the primary offense."); 5 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Trial* § 2833 (2d ed. 1989 & Supp. 1995) (discussing California cases that address trial bifurcation of an alleged repeat offender).

The court compared the approaches that other jurisdictions have taken, and noted that the judge, not the jury, decided the truth of an alleged prior conviction in approximately half of the states, the District of Columbia, and in the federal system. *Calderon*, 9 Cal. 4th at 76, 885 P.2d at 89, 36 Cal. Rptr. 2d at 338; *see, e.g.*, ALA. CODE § 13A-5-10(a) (1994) ("The court may conduct a hearing upon the issues of

2. A Court Should Exercise Its Discretion and Bifurcate The Trial When a Unitary Trial Will Unduly Prejudice the Defendant

According to the court, a unitary trial to determine both the defendant's guilt and the truth of an alleged prior conviction may unduly prejudice a defendant and thus, adversely affect the determination of truth.[11] The court explained that a unitary trial allows the jury to hear evidence relating to an alleged prior conviction before the jury determines the defendant's guilt in the currently charged offense.[12] Consequently, the jury may erroneously find the defendant guilty of the currently charged offense merely because the defendant was involved in previous offenses.[13]

The court listed factors that a trial court should weigh when determining how strong the danger of prejudice will be in a unitary trial.[14] According to the court, a trial court should consider the similarity between the currently charged offense and the prior conviction,[15] the

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whether a defendant is a repeat or habitual offender . . . ."); D.C. CODE ANN. § 23-111(c)(1) (1989 & Supp. 1995) ("The hearing [to determine the truth of an alleged prior conviction] shall be before the court without a jury . . . ."); FLA. STAT. ANN. § 775.084(3)(a) (West 1995) ("In a separate proceeding, the court shall determine if the defendant is a habitual felony offender or a habitual violent felony offender."); ILL ANN. STAT. Ch. 720, para. 5/33B-2(a) (Smith-Hurd 1993 & Supp. 1995) ("The court shall hear and determine . . . [the] issue [of an alleged prior conviction] and shall make a written finding thereon."); N.Y. CRIM. PROC. LAW § 400.20(9) (McKinney 1994 & Supp. 1995) ("Such a hearing [to determine the truth of an alleged prior conviction] shall be before the court without a jury . . . .").

The court also observed that at least 16 of the states that permit the jury to decide the truth of an alleged prior conviction statutorily require bifurcation. *Calderon*, 9 Cal. 4th at 76-77, 885 P.2d at 89, 36 Cal. Rptr. 2d at 339; *see, e.g.*, OKLA. STAT. ANN. tit. 22, § 860 (West 1986 & Supp. 1995) ("[D]uring the trial of the case, no reference shall be made nor evidence received of prior offenses . . . . If the verdict be guilty of the offense charged, . . . evidence of prior offenses shall be received."); TEX. CRIM. PROC. CODE ANN. §§ 36.01, 37.07 (West 1981 & Supp. 1995) ("When prior convictions are alleged for purposes of enhancement only . . . that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held.").

11. *Calderon*, 9 Cal. 4th at 75, 885 P.2d at 88, 36 Cal. Rptr. 2d at 337.

12. *Id.*

13. *Id.* (quoting People v. Thompson, 45 Cal. 3d 86, 109, 753 P.2d 37, 50, 246 Cal. Rptr. 245, 258 ("Evidence that involves crimes other than those for which a defendant is being tried is admitted only with caution, as there is the serious danger that the jury will conclude that defendant has a criminal disposition and thus probably committed the presently charged offense."), *cert. denied*, 488 U.S. 960 (1988)).

14. *Id.* at 79, 885 P.2d at 91, 36 Cal. Rptr. 2d at 340. The court noted that the list of factors was not exhaustive. *Id.*

15. *Id.* The danger of prejudice is greater when the two offenses are very similar,

closeness in time between the prior conviction and the current offense,[16] and the "relative seriousness or inflammatory nature of the prior conviction."[17]

Additionally, the court stated that a trial court should consider any other factors that may mitigate the danger of prejudice.[18] One such factor that the court acknowledged is the prosecution's use of the prior conviction evidence for "purposes other than sentence enhancement."[19] The court explained that this use discloses the prior conviction evidence to the jury before the jury determines the defendant's guilt, despite the fact that the trial is bifurcated.[20] The court further stated that the prosecution may use evidence of a prior conviction to impeach the defendant's testimony; to prove "the defendant's identity, intent, or plan;" or to prove an element of the currently charged offense.[21] The court ruled that the presence of these factors may sufficiently mitigate the danger of prejudice, and negate the need to bifurcate the trial.[22]

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since a jury will more likely conclude that the defendant has a criminal disposition. *See* People v. Beagle, 6 Cal. 3d 441, 453, 492 P.2d 1, 8, 99 Cal. Rptr. 313, 320 (1972) ("A . . . difficult problem arises when the prior conviction is for the same or substantially similar conduct for which the accused is on trial . . . because of the inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.'") (quoting Gordon v. United States, 383 F.2d 936, 940 (App. D.C. 1967), *cert. denied*, 390 U.S. 1029 (1968)).

16. *Calderon*, 9 Cal. 4th at 79, 885 P.2d at 91, 36 Cal. Rptr. 2d at 340. The danger of prejudice is greater if the defendant was not recently convicted. *See Beagle*, 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320 ("The nearness or remoteness of the prior conviction is . . . a factor of no small importance . . . . [I]f [the prior conviction] . . . occurred long before and has been followed by a legally blameless life, [it] should generally be excluded on the ground of remoteness.").

17. *Calderon*, 9 Cal. 4th at 79, 885 P.2d at 91, 36 Cal. Rptr. 2d at 340. The danger of prejudice is greater when the prior conviction involves a serious and inflammatory offense. *See* People v. Marquez, 1 Cal. 4th 553, 573, 822 P.2d 418, 428, 3 Cal. Rptr. 2d 710, 720 (1992) (discussing the potential prejudicial effect of "joining . . . an inflammatory offense such as child molestation with a murder offense").

18. *Calderon*, 9 Cal. 4th at 78, 885 P.2d at 90, 36 Cal. Rptr. 2d at 339-40 (overruling People v. Bracamonte, 119 Cal. App. 3d 644, 654, 174 Cal. Rptr. 191, 198 (1981) (holding that an alleged repeat offender is always entitled to a bifurcated trial, regardless of the circumstances)).

19. *Id.* at 78-79, 885 P.2d at 91, 36 Cal. Rptr. 2d at 340 (citing 3 ABA STANDARDS FOR CRIMINAL JUSTICE 15-3.4 (2d ed. 1980) (stating that a court should prevent disclosure of evidence regarding the defendant's prior convictions "[w]hen the defendant's prior convictions are admissible solely for the purpose of determining the sentence to be imposed")).

20. *Id.* at 78, 885 P.2d at 90, 36 Cal. Rptr. 2d at 340.

21. *Id.* at 78, 885 P.2d at 90, 36 Cal. Rptr. 2d at 339-40 (citing People v. Castro, 38 Cal. 3d 301, 696 P.2d 111, 211 Cal. Rptr. 719 (1985) (allowing impeachment of defendant with evidence of prior convictions); People v. Valentine, 42 Cal. 3d 170, 173, 720 P.2d 913, 914, 228 Cal. Rptr. 25, 26 (1986) ("[T]he jury must be advised that defendant is an ex-felon where that is an element of a current charge.")).

22. *Id.* at 79, 885 P.2d at 91, 36 Cal. Rptr. 2d at 340. The court asserted, however,

Finally, the court granted trial courts the option to conditionally bifurcate a trial, subject to future developments during the trial.[23] The court suggested that a trial court may retract its ruling to bifurcate and instead conduct a unitary trial if either the prosecution or the defense disclose information during the trial that mitigates the danger of prejudice.[24]

Turning to the facts of the instant case, the court held that the trial court erred when it denied the defendant's motion to bifurcate the trial without first determining whether a unitary trial would unduly prejudice the defendant.[25] The court found, however, that the trial court's error did not prejudicially affect the jury's determination of the defendant's guilt.[26] The court reasoned that the defendant did not concede his previous conviction in front of the jury.[27] The court also noted that the prosecution did not use evidence of the prior conviction during the trial to enhance the sentence of the currently charged offense.[28]

Nevertheless, the court found that the trial court's error might have prejudiced the jury's determination of the truth of the alleged prior conviction.[29] The court reasoned that the trial court "caused [the] defendant to forego his right to have a jury determine" the truthfulness of his prior conviction, when it denied his motion to bifurcate the trial.[30]

In its disposition of the case, the court affirmed the defendant's second degree burglary conviction, but reversed the sentence enhancement.[31] The court remanded the sentence enhancement issue and in-

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that the interest in avoiding prejudice will often override the interest of convenience associated with a unitary trial. *Id.*

23. *Id.*

24. *Id.; see supra* note 21 and accompanying text.

25. *Id.* at 80, 885 P.2d at 91, 36 Cal. Rptr. 2d at 341.

26. *Id.* The court opined that it would have bifurcated the trial in the first place because the "defendant recently had been convicted of attempted robbery," and because the conviction was similar in nature and seriousness to the second-degree burglary charge. *Id.* at 80, 888 P.2d at 92, 36 Cal. Rptr. 2d at 341. Additionally, the court noted the lack of mitigating circumstances at the time the trial court denied the defendant's motion to bifurcate. *Id.* Therefore, there was a substantial risk that the jury would prejudicially conclude that the defendant committed the burglary since he had recently attempted robbery. *Id.* at 80-81, 885 P.2d at 92, 36 Cal. Rptr. 2d at 341.

27. *Id.* at 80, 885 P.2d at 91, 36 Cal. Rptr. 2d at 341; *see supra* note 2.

28. *Id.*

29. *Id.* at 80, 885 P.2d at 92, 36 Cal. Rptr. 2d at 341.

30. *Id.*

31. *Id.* at 81, 885 P.2d at 92, 36 Cal. Rptr. 2d at 342.

structed the trial court to determine whether its previous refusal to bifurcate the trial remained valid in light of the court's present decision.[32]

B. *Justice Mosk's Concurring and Dissenting Opinion*

Justice Mosk agreed with the majority's analysis of the law but dissented to the majority's disposition of the case.[33] Specifically, Justice Mosk would remand the case to let the lower courts consider the burglary charge and the resulting four-year state prison sentence, both of which he considered harsh for a non-violent "attempt, and failure, to take $29 worth of beer from the refrigerator of a convenience store without paying the cashier."[34]

III. HISTORICAL BACKGROUND AND IMPACT

The California Legislature enacted Penal Code section 1025 in 1874.[35] Section 1025 entrusts a jury with two responsibilities whenever a criminal defendant pleads not guilty and denies an alleged prior conviction.[36] The jury must determine: (1) whether the defendant is guilty of the currently charged offense, and; (2) whether the defendant has a prior conviction.[37] Initially, the jury concurrently determined the defendant's guilt and the truth of the alleged prior conviction.[38]

In *People v. Bracamonte*,[39] however, the California Court of Appeal held that the jury should always determine the defendant's guilt before it determines the truth of the alleged prior conviction.[40] The *Bracamonte*

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32. *Id.* at 81, 885 P.2d at 92-93, 36 Cal. Rptr. 2d at 342. The court instructed the lower courts to "reinstate the sentence enhancement" if the trial court finds that it properly refused to bifurcate the determination of guilt and truth. *Id.* at 81-82, 885 P.2d at 93, 36 Cal. Rptr. 2d at 342. On the other hand, the court instructed the lower courts to grant the defendant a "limited new trial" on the truthfulness of the alleged prior conviction if the trial court finds that it should have bifurcated the defendant's trial. *Id.* at 82, 885 P.2d at 93, 36 Cal. Rptr. 2d at 342.

33. *Id.* (Mosk, J., concurring and dissenting).

34. *Id.* (Mosk, J., concurring and dissenting). Justice Mosk stated that courts should reserve the overcrowded state prisons for criminals who commit truly serious crimes. *Id.* (Mosk, J., concurring and dissenting).

35. CAL. PENAL CODE § 1025 (West 1985 & Supp. 1995).

36. *Id.*

37. *Id.*

38. *See* People v. Saunders, 5 Cal. 4th 580, 588, 853 P.2d 1093, 1096, 20 Cal. Rptr. 2d 638, 641 (1993) (citing People v. Owens, 112 Cal. App. 3d 441, 169 Cal. Rptr. 359 (1980) (permitting concurrent determination of defendant's guilt and truth of alleged prior conviction)), *cert. denied*, 114 S. Ct. 1101 (1994).

39. 119 Cal. App. 3d 644, 174 Cal. Rptr. 191 (1981).

40. *Id.* at 654, 174 Cal. Rptr. at 198.

court reasoned that evidence of the defendant's prior conviction prejudices the jury's determination of the defendant's guilt.[41]

Disapproving *Bracamonte*, the California Supreme Court in *People v. Calderon*[42] held that bifurcation of the jury's dual determination is not always required.[43] Instead, the court ruled that a trial court should bifurcate only when a concurrent determination will unduly prejudice the defendant.[44]

The *Calderon* decision impacts criminal courts throughout the state. Whenever the prosecution alleges that a defendant has a prior conviction, the court must carefully examine the unique circumstances of each case to determine whether a concurrent determination will unduly prejudice the defendant.[45] The court may not summarily grant or deny a defendant's motion to bifurcate.

Calderon also impacts the state's criminal defense attorneys. A defense attorney who wishes to bifurcate the jury's dual determination must convince the court that a concurrent determination of the client's guilt and the truth of the alleged prior conviction will prejudice the client.[46]

As a whole, the *Calderon* decision safeguards a criminal defendant's right to a fair trial. Although the prosecution can easily prove a prior conviction with certified copies of court documents,[47] it is the timing of the presentation of proof that affects the defendant's right to a fair trial. At the same time, the *Calderon* decision reduces unnecessary delay in criminal proceedings. Trial courts will bifurcate the jury's determination

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41. *Id.* at 649-50, 174 Cal. Rptr. at 195.

42. 9 Cal. 4th 69, 885 P.2d 83, 36 Cal. Rptr. 2d 333 (1994).

43. *Id.* at 79-80, 885 P.2d at 91, 36 Cal. Rptr. 2d at 341.

44. *Id.* at 72, 885 P.2d at 86, 36 Cal. Rptr. 2d at 335.

45. *See supra* notes 15-22 and accompanying text.

46. *See supra* notes 15-17 and accompanying text.

47. *See* CAL. PENAL CODE § 969b (West 1985 & Supp. 1995) ("For the purpose of establishing . . . that a person being tried . . . has been convicted . . . the records or copies of records of any state penitentiary, reformatory, county jail, city jail, or federal penitentiary . . . certified by the official custodian of such records, may be introduced as such evidence."). *See generally* 22 CAL. JUR. 3D *Criminal Law* § 3389 (1985 & Supp. 1995) ("A prior conviction may be proved by introduction in evidence of a certified copy of the judgment of conviction of that offense."); 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment For Crimes* § 1528 (2d ed. 1989 & Supp. 1995) ("The common method of proof of a prior conviction is introduction of the record of conviction, certified by the official custodian."); Michael G. Oleinik, *California Supreme Court Survey*, People v. Tenner, 21 PEPP. L. REV. 1051 (1994).

of guilt and truth only when a concurrent determination will unduly prejudice the defendant. Indeed, *Calderon* strikes a healthy balance between fairness and efficiency in the California criminal justice system.

ROBERT E. SABIDO

C. *A person may be convicted of possession of an illegal drug despite having ingested the drug prior to arrest if there is substantial evidence of past possession:* **People v. Palaschak.**

I. INTRODUCTION

In *People v. Palaschak*,[1] the California Supreme Court considered whether a conviction for drug possession could be supported if the drug was ingested prior to arrest.[2] The court held that ingestion of the drug

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1. 9 Cal. 4th 1236, 893 P.2d 717, 40 Cal. Rptr. 2d 722 (1995). Chief Justice Lucas delivered the unanimous opinion of the court, in which Justices Mosk, Kennard, Arabian, Baxter, George, and Werdegar joined. *Id.* at 1237, 1243, 893 P.2d at 717, 721, 40 Cal. Rptr. 2d at 722, 726.

2. *Id.* at 1237, 893 P.2d at 717, 40 Cal. Rptr. 2d at 722.

In May of 1991, defendant Douglas Andrew Palaschak, an attorney, informed his receptionist, Jessica Jobin, that he wanted to try LSD. *Id.* at 1238, 893 P.2d at 718, 40 Cal. Rptr. 2d at 723. On May 7, "defendant loaned his car to Jobin so that she could obtain some LSD." *Id.* She bought 50 "hits" or doses of LSD, placed two hits in a birthday card, and gave the card to Palaschak as a birthday gift the next day. *Id.* On May 9, defendant and Jobin ingested some of the LSD at defendant's office. *Id.* After his seventeen-year-old secretary observed their unusual behavior, defendant acknowledged they had taken LSD and "asked her to join them." *Id.* Jobin then gave the secretary two hits of LSD. *Id.* The secretary, however, did not consume the LSD. Instead, she left and called the police. *Id.* After the police arrived, defendant admitted taking LSD, and Jobin gave the officers the remaining hits. *Id.* Both Jobin and the defendant were subsequently arrested. *Id.*

Defendant was charged with conspiracy to possess LSD, possession of LSD, and furnishing or attempting to furnish LSD to a minor. *Id.* The jury only convicted him of possession of LSD. *Id.*; *see* CAL. HEALTH & SAFETY CODE § 11377 (West 1991 & Supp. 1995) (providing that the unauthorized possession of a controlled substance is punishable by imprisonment for up to one year). The jury asked the trial judge during its deliberations whether "'possession [has] to be at the time of arrest[.]'" *Palaschak*, 9 Cal. 4th at 1239, 893 P.2d at 718, 40 Cal. Rptr. 2d at 723 (alteration in original). Instead of answering "yes" or "no," the judge reinstructed the jury as to the elements of possession of a controlled substance. *Id.*; *see* CALJIC No. 12.00 (5th ed. Supp. 1995) (providing the elements of possession are control, knowledge of presence and nature of substance, and sufficient amount). The trial judge reduced defendant's conviction to a misdemeanor and probation, with a condition of 90 days imprisonment. *Palaschak*, 9 Cal. 4th at 1239, 893 P.2d at 718, 40 Cal. Rptr. 2d at 723. The court of appeal reversed the conviction, stating that the possession charge was unsupported by substantial evidence, since, at the time of the arrest, defendant no longer had "dominion and control" over the drug. *Id.* at 1239, 893 P.2d at 718-19, 40 Cal. Rptr. 2d at 723-24. The California Supreme Court granted review and reversed the judgment of the court of appeal. *Id.* at 1243, 893 P.2d at 721, 40 Cal. Rptr. 2d at 726.

prior to arrest can sustain a possession charge as long as there is substantial evidence, either direct or circumstantial, of past possession.[3] Therefore, the supreme court, in a unanimous decision, reversed the judgment of the court of appeal and reinstated the conviction.[4]

II. TREATMENT

Chief Justice Lucas began the opinion by addressing the arguments of the court of appeal.[5] The Chief Justice first acknowledged that the use or ingestion of LSD has not been criminalized.[6] The court also recognized that "evidence of useless traces or residue of narcotic substances do not constitute sufficient evidence to sustain a conviction for possession of narcotics."[7] The Chief Justice did not agree, however, with the court of appeal's conclusion that evidence of past possession was insufficient to sustain a drug possession charge in this case.[8]

The court agreed with the court of appeal's dissenting opinion which argued that there was more than enough evidence to sustain the defendant's conviction.[9] The court asserted that a possession charge should not be defeated if the evidence is lost or destroyed by ingestion.[10] Although the court declined to rule on whether evidence of drug ingestion alone could sustain a possession charge,[11] it held that direct or

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3. *Palaschak*, 9 Cal. 4th at 1240-41, 893 P.2d at 719-20, 40 Cal. Rptr. 2d at 724-25.

4. *Id.* at 1243, 893 P.2d at 721, 40 Cal. Rptr. 2d at 726.

5. *Id.* at 1239-40, 893 P.2d at 718-19, 40 Cal. Rptr. 2d at 723-24.

6. *Id.* at 1239, 893 P.2d at 718, 40 Cal. Rptr. 2d at 723; *see* People v. Spann, 187 Cal. App. 3d 400, 232 Cal. Rptr. 31 (1986) (discussing drug possession and use laws in California).

7. *Palaschak*, 9 Cal. 4th at 1240, 893 P.2d at 719, 40 Cal. Rptr. 2d at 724 (quoting People v. Fein, 4 Cal. 3d 747, 754, 484 P.2d 583, 588, 94 Cal. Rptr. 607, 612 (1971)); *see* People v. Leal, 64 Cal. 2d 504, 413 P.2d 665, 50 Cal. Rptr. 777 (1966) (holding that paraphernalia "bearing useless traces or residue of narcotics" is insufficient to sustain possession charge); People v. Sullivan, 234 Cal. App. 2d 562, 44 Cal. Rptr. 524 (1965) (same); *see also* 18 CAL. JUR. 3D *Criminal Law* § 1542 (1984 & Supp. 1995) (discussing the quantities necessary to sustain a possession charge).

8. *Palaschak*, 9 Cal. 4th at 1240, 893 P.2d at 719, 40 Cal. Rptr. 2d at 724.

9. *Id.*

10. *Id.* at 1241, 893 P.2d at 720, 40 Cal. Rptr. 2d at 725; *see* People v. Stump, 14 Cal. App. 3d 440, 92 Cal. Rptr. 270 (1971) (possession charge established despite the fact that defendant swallowed balloon containing drug); People v. Smith, 184 Cal. App. 2d 606, 7 Cal. Rptr. 607 (1960) (possession conviction sustained despite defendant's attempt to ingest the evidence prior to arrest). *See generally* Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085 (1987) (analyzing the legal controls on evidence destruction); 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Public Peace and Welfare* § 1003 (2d ed. 1988 & Supp. 1995) (discussing the effect of evidence destruction on possession charges).

11. *Palaschak*, 9 Cal. 4th at 1240-41, 893 P.2d at 719, 40 Cal. Rptr. 2d at 724. The court, in prior cases, has held that mere evidence of use or being under the influ-

circumstantial evidence of past possession was sufficient to convict for that offense.[12] The court reasoned that, because proof of possession at the time of arrest is not required,[13] satisfactory evidence of past possession beyond evidence of ingestion will support a possession charge.[14]

The court concluded by noting that the present case had each element needed to establish drug possession.[15] The essential elements are "dominion and control of the substance in a quantity usable for consumption . . . with knowledge of its presence and of its restricted dangerous drug character."[16] The record showed that defendant requested and obtained LSD, and he admitted ingesting one and one-half doses.[17] The court declared that the evidence established defendant's possession of the illegal drug and sustained his conviction despite the fact that he ingested the drug prior to arrest.[18]

III. IMPACT

Prior to the court's decision in *Palaschak*, the supreme court had held that one element necessary to sustain a conviction for possession of

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ence of an illegal drug does not circumstantially prove possession. *See* People v. Spann, 187 Cal. App. 3d 400, 403, 232 Cal. Rptr. 31, 32 (1986) (stating that after consumption the user no longer has dominion and control over the drug and therefore does not possess it); *see also* Thomas R. Ascik, *For the Criminal Practitioner*, 52 WASH. & LEE L. REV. 375, 407 (1995) (distinguishing between use and possession); 28 C.J.S. *Drugs & Narcotics Supp.* § 157 (1974 & Supp. 1995) (discussing the effect of ingestion on dominion and control); 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Public Peace and Welfare* § 1003 (discussing what constitutes illegal possession).

The court added that ingestion "at best only raises an inference of prior possession." *Palaschak*, 9 Cal. 4th at 1241, 893 P.2d at 719, 40 Cal. Rptr. 2d at 724.

12. *Palaschak*, 9 Cal. 4th at 1242, 893 P.2d at 720, 40 Cal. Rptr. 2d at 725.

13. *Id.* (citing People v. Sullivan, 234 Cal. App. 2d 562, 567, 44 Cal. Rptr. 524, 529 (1965)); *see* 18 CAL. JUR. 3D § 1547 (1984 & Supp. 1995) (discussing the elements of possession).

14. *Palaschak*, 9 Cal. 4th at 1242-43, 893 P.2d at 720-21, 40 Cal. Rptr. 2d at 725-26.

15. *Id.* at 1242, 893 P.2d at 720, 40 Cal. Rptr. 2d at 725.

16. *Id.* (quoting People v. Camp, 104 Cal. App. 3d 244, 247-48, 163 Cal. Rptr. 510, 512, *cert. denied*, 449 U.S. 960 (1980)).

17. *Palaschak*, 9 Cal. 4th at 1242, 893 P.2d at 720-21, 40 Cal. Rptr. 2d at 725-26. Defendant's secretary testified that, at defendant's request, she gave him two hits of LSD. *Id.* at 1242, 893 P.2d at 720, 40 Cal. Rptr. 2d at 725. Defendant admitted to police and to the media that he ingested the drug. *Id.* at 1242, 893 P.2d at 721, 40 Cal. Rptr. 2d at 726. He told reporters that he had taken the drug "in order to create a 'better social environment' in his office." *Ventura Lawyer Loses Drug Charge Appeal*, DAILY NEWS L.A., May 10, 1995, at TO2.

18. *Palaschak*, 9 Cal. 4th at 1242-43, 893 P.2d at 721, 40 Cal. Rptr 2d at 726.

a controlled substance is the defendant's possession, either physical or constructive, of the drug.[19] A defendant possesses a drug when it is under his or her dominion and control.[20] Before *Palaschak*, the court of appeal held that once a defendant ingested a drug there was no longer dominion and control.[21] Therefore, it was thought that possession ended once ingestion occurred.

The court's decision in *Palaschak* modified the law. The court held that as long as there is some additional evidence of past possession, ingestion of the drug will not defeat a possession charge.[22] The effect of this holding is that although the use of LSD alone is not illegal, use or ingestion plus sufficient evidence of past possession can sustain a possession charge.[23] The question that remains unanswered is how much additional evidence of past possession is needed. The court previously held that such evidence can be direct or circumstantial,[24] but the definition of sufficient is still an issue.

IV. CONCLUSION

In *Palaschak*, the California Supreme Court held that a person may be convicted of possessing an illegal drug despite having ingested the drug prior to arrest.[25] As a result of this case, a drug possession charge can be based on sufficient direct or circumstantial evidence of past possession, regardless of whether the defendant has already consumed or

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19. *See* 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW *Crimes Against Public Peach and Welfare* §§ 1001, 1003, 1004. *See generally* Michael S. Deal, United States v. Walker: *Constructive Possession of Controlled Substances: Pushing the Limits of Exclusive Control*, 2 J. PHARMACY & L. 401 (1994) (discussing the constructive possession doctrine); Charles H. Whitebread & Ronald Stevens, *Constructive Possession in Narcotics Cases: To Have and Have Not*, 58 VA. L. REV. 751 (1972) (same); George H. Singer, Note, *Constructive Possession of Controlled Substances: A North Dakota Look at a Nationwide Problem*, 68 N.D. L. REV. 981 (1992) (same).

20. *See* People v. Camp, 104 Cal. App. 3d 244, 163 Cal. Rptr. 510, *cert. denied*, 449 U.S. 960 (1980); 18 CAL. JUR. 3D *Criminal Law* § 1547 (1984 & Supp. 1995). *See generally* 28 C.J.S., *Drugs & Narcotics Supp.* § 155 (1974 & Supp. 1995) (discussing elements of possession).

21. *See* People v. Stump, 14 Cal. App. 3d 440, 92 Cal. Rptr. 270 (1971); People v. Smith, 184 Cal. App. 2d 606, 7 Cal. Rptr. 607 (1960); 2 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against Public Peace and Welfare* § 1003 (2d ed. 1988 & Supp. 1995); Solum & Marzen, *supra* note 10, at 1085.

22. *People v. Palaschak*, 9 Cal. 4th 1236, 1242-43, 893 P.2d 717, 721, 40 Cal. Rptr. 2d 722, 726 (1995).

23. *Id.* at 1240-41, 893 P.2d at 719, 40 Cal. Rptr. 2d at 724.

24. *Id.* at 1241, 893 P.2d at 720, 40 Cal. Rptr. 2d at 725; *see* 18 CAL. JUR. 3D *Criminal Law* § 1567 (1984 & Supp. 1995) (discussing the weight of evidence for possession of drugs).

25. *Palaschak*, 9 Cal. 4th at 1242, 893 P.2d at 721, 40 Cal. Rptr. 2d at 726.

ingested the drug.[26] It seems unlikely that evidence of ingestion alone will sustain a possession charge because the court stated that ingestion "at best raises only an inference of prior possession."[27] The court's ruling in this case, however, slightly blurs the distinction between the "use" and "possession" of a drug.

WENDY M. HUNTER

26. *Id.* at 1242-43, 893 P.2d at 721, 40 Cal. Rptr. 2d at 726.
27. *Id.* at 1240-41, 893 P.2d at 719, 40 Cal. Rptr. 2d at 724.

D. *Under California Penal Code section 208(d), kidnapping with intent to commit rape is a separate offense, not an enhancement to simple kidnapping, and movement of a victim at night from a parking lot to an area 105 feet away behind a wall was sufficient evidence of asportation to support a kidnapping conviction:* **People v. Rayford.**

I. INTRODUCTION

In *People v. Rayford*,[1] the California Supreme Court considered two issues. The first issue was whether California Penal Code section 208(d), which proscribes kidnapping "with the intent to commit rape, oral copulation, sodomy, or rape by instrument,"[2] is a separate offense rather than merely an enhancement to simple kidnapping.[3] The second issue was under what circumstances would evidence of asportation be sufficient to support a conviction under Penal Code section 208(d).[4] The court held that kidnapping with the intent to commit rape is a separate crime and that the evidence of asportation, in this case, was sufficient to support the kidnapping conviction under section 208(d).[5]

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1. 9 Cal. 4th 1, 884 P.2d 1369, 36 Cal. Rptr. 2d 317 (1994). Justice Arabian wrote the majority opinion, in which Chief Justice Lucas and Justices Kennard, Baxter, George, and Werdegar joined. *Id.* at 1-23, 884 P.2d at 1369-82, 36 Cal. Rptr. 2d at 317-31. Justice Mosk filed a dissenting opinion. *Id.* at 24-26, 884 P.2d at 1382-84, 36 Cal. Rptr. 2d at 331-33 (Mosk, J., dissenting).

2. CAL. PENAL CODE § 208(d) (West 1988 & Supp. 1995).

3. *Rayford*, 9 Cal. 4th at 5, 884 P.2d at 1370, 36 Cal. Rptr. 2d at 319.

4. *Id.* In the present case, the defendant approached the victim as the victim entered the parking lot of a closed store at night. *Id.* at 5-6, 884 P.2d at 1370, 36 Cal. Rptr. 2d at 319. The defendant told her he had a gun and ordered her to walk with him. *Id.* at 6, 884 P.2d at 1370, 36 Cal. Rptr. 2d at 319. He took the victim behind a wall at the end of the parking lot, approximately 34 feet from the street. *Id.* The defendant told the victim to remove her clothes, which she did. *Id.* The victim was able to dissuade defendant from raping her because she was menstruating. *Id.* It was later determined that the defendant had moved the victim a distance of approximately 105 feet. *Id.*

5. *Id.* at 5, 884 P.2d at 1370, 36 Cal. Rptr. 2d at 319. The defendant was found guilty of the kidnapping charges and sentenced to 17 years in prison. *Id.* at 7, 884 P.2d at 1371, 36 Cal. Rptr. 2d at 320. The court of appeal tentatively concluded that § 208(d) was an enhancement to simple kidnapping under § 207(a), but that defendant had "waived his right to challenge the form of the pleading by failing to file a demurrer." *Id.* The court of appeal went on to conclude that the standard to determine the sufficiency of asportation under § 208(d) was the same as that under § 207 simple kidnapping. *Id.* Applying that standard, the court of appeal found the asportation evidence insufficient and reversed the kidnapping conviction, remanding the case for resentencing. *Id.*

II. TREATMENT

A. *The Majority Opinion*

The court first considered the question of whether section 208(d) sets forth a separate crime or is an enhancement to simple kidnapping under section 207.[6] The court noted that if it determined section 208(d) provided merely an enhancement to section 207(a) simple kidnapping, then the asportation test for section 207(a) would necessarily be part of section 208(d), and it would not have to address the issue of asportation.[7] Both parties submitted that section 208(d) set forth a separate crime and the California Supreme Court agreed.[8] The court gave two reasons for its conclusion. First, the legislature referred to section 208(d) as a separate offense in section 667.61.[9] Second, the court looked to its own approach to determine whether a statute is an enhancement or a separate crime. In *People v. Hernandez*,[10] the court contrasted an enhancement, "'an additional term of imprisonment added to the base term,'"[11] with a separate offense, whose base term "involve[s] . . . a choice among three possible terms prescribed by statute."[12] The *Rayford* court noted that the legislature modified the way in which it drafts enhancements since *People v. Hernandez*, but concluded that the legislative history accompanying the passage of section 208(d) supported

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6. *Id.* at 8, 884 P.2d at 1371, 36 Cal. Rptr. 2d at 320. California Penal Code § 207(a) provides in relevant part, "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 part of the same county, is guilty of kidnapping." CAL. PENAL CODE § 207(a) (West 1988 & Supp. 1995). *See* 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against the Person* § 532 (2d ed. 1989 & Supp. 1995) (discussing the nature of the crime of simple kidnapping); 17 CAL. JUR. 3D *Criminal Law* §§ 459-463 (1984 & Supp. 1995) (simple kidnapping). California Penal Code § 208(d) states: "If the person is kidnapped with the intent to commit rape, oral copulation, sodomy, or rape by instrument, the kidnapping is punishable by imprisonment in the state prison for 5, 8, or 11 years. CAL. PENAL CODE § 208(d) (West 1988 & Supp. 1995). *See* 17 CAL. JUR. 3D *Criminal Law* §§ 464-476 (1984 & Supp. 1994) (aggravated kidnapping). *See generally* 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Crimes Against the Person* §§ 532-553 (2d ed. 1989 & Supp. 1995) (discussing the nature of the crime and elements of the offense of simple and aggravated kidnapping).

7. *Rayford*, 9 Cal. 4th at 8, 884 P.2d at 1372, 36 Cal. Rptr. 2d at 320.

8. *Id.*

9. *Id.* at 8, 884 P.2d at 1372, 36 Cal. Rptr. 2d at 321.

10. 46 Cal. 3d 194, 757 P.2d 1013, 249 Cal. Rptr. 850 (1988).

11. *Id.* at 207, 757 P.2d at 1020, 249 Cal. Rptr. at 857 (quoting CAL. CT. R. 405(c)).

12. *Id.*

its finding that section 208(d) sets forth a separate crime and not merely an enhancement.[13]

The court next addressed the issue of asportation. In particular, the court discussed the standard for sufficient evidence of asportation.[14] The court noted that there were two different asportation standards, one for aggravated kidnapping under section 209(b) and one for simple kidnapping under section 207(a).[15] The *Daniels* standard for aggravated kidnapping has two elements: (1) movement of the victim that is not merely incidental to the associated robbery, and (2) movement that substantially increases the risk of harm over that which is already present in the robbery.[16] The standard for simple kidnapping focuses on the movement of the victim, requiring the movement to be "substantial in character."[17] The court concluded that the proper standard for section 208(d) kidnapping is the *Daniels* standard used for aggravated kidnapping.[18]

In reaching its conclusion, the court examined the language of both section 208(d) and section 209(b). Noting the similarity between the two sections, the court reasoned that "the Legislature undoubtedly intended to incorporate a similar asportation requirement [to section 209(b)] into section 208(d)."[19] The court further reasoned that the *Daniels* standard should apply to section 208(d) because, unlike simple kidnapping, one cannot commit section 208(d) kidnapping in the absence of the "associated crimes or attempted crimes of 'rape, oral copulation, sodomy, or rape by instrument.'"[20] Thus, since section 208(d) "proscribe[s] kidnapping for the purpose of committing a particular offense," the court noted that the second prong of the *Daniels* standard, which focuses on the increased danger to the victim caused by the movement, beyond the danger inherent in the underlying crime, is the proper standard for section 208(d).[21]

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13. *Rayford*, 9 Cal. 4th at 9-11, 884 P.2d at 1373-74, 36 Cal. Rptr. 2d at 322-23.

14. *Id.* at 11, 884 P.2d at 1374, 36 Cal. Rptr. 2d at 323.

15. *Id.* at 11-12, 884 P.2d at 1374, 36 Cal. Rptr. 2d at 323.

16. *Id.* at 12, 884 P.2d at 1374, 36 Cal. Rptr. 2d at 323. (citing People v. Daniels, 71 Cal. 2d 1119, 1139, 459 P.2d 225, 238, 80 Cal. Rptr. 897, 910 (1969)). The court discussed both prongs of the *Daniels* standard, stating that the first prong is determined by looking at the "scope and nature" of the movement and the second prong is determined by "considering the context of the environment in which the movement occurred." *Id.*

17. *Id.* at 14, 884 P.2d at 1375, 36 Cal. Rptr. 2d at 325; *see supra* note 14 and accompanying text. The standard for simple kidnapping has not been clearly defined and the court noted that it has offered little guidance as to what the term "substantial in character" means. *Id.*

18. *Id.* at 14, 884 P.2d at 1376, 36 Cal. Rptr. 2d at 325.

19. *Id.* at 21, 884 P.2d at 1380, 36 Cal. Rptr. 2d at 329.

20. *Id.*

21. *Id.* at 21, 884 P.2d at 1381, 36 Cal. Rptr. 2d at 329-30.

Using the *Daniels* standard, the court reversed the decision of the court of appeals and agreed with the jury's findings that the evidence in the present case was sufficient to support the kidnapping conviction.[22]

B. Justice Mosk's Dissenting Opinion

Justice Mosk agreed with the majority opinion that the *Daniels* standard is the proper standard for section 208(d) kidnapping, but he found that the evidence of asportation insufficient to support the verdict.[23] Justice Mosk felt that the movement of the victim did not substantially increase the risk of harm to her.[24] In his dissent, Justice Mosk pointed out that the area to which the victim was moved was lighted with about the same intensity as the primary location and the defendant and victim remained visible from the street at all times.[25] Based upon the record and his view that the secondary location did not aid concealment of the attempted rape, Justice Mosk concluded that "no reasonable trier of fact could have found the asportation of . . . [the victim] 'substantially increased her risk of harm.'"[26]

III. IMPACT

In *Rayford*, the California Supreme Court decided that the *Daniels* test was the proper standard of asportation for section 208(d) kidnapping for rape.[27] The court may have resolved the immediate issue, however, its continued use of asportation as the defining element does not eliminate the problem. The problem, which the present case illustrates, is that there are no guidelines for the application of the test and a defendant may be subjected to the harsh penalties of aggravated kidnapping for minimal movement. While the court may have eliminated the confusion that existed amongst the lower courts concerning which test applied to section 208(d), it did not provide the courts with guidelines to eliminate the confusion surrounding its application, i.e., when is the movement not merely incidental and when has that movement substantially increased the risk of harm. Justice Mosk's dissent illustrates how, even though this

22. *Id.* at 23, 884 P.2d at 1382, 36 Cal. Rptr. 2d at 331.
23. *Id.* at 24, 884 P.2d at 1383, 36 Cal. Rptr. 2d at 332 (Mosk, J. dissenting).
24. *Id.* (Mosk, J., dissenting).
25. *Id.* at 25, 884 P.2d at 1383-84, 36 Cal. Rptr. 2d at 332 (Mosk, J. dissenting).
26. *Id.* (Mosk, J., dissenting).
27. *Id.* at 20-21, 884 P.2d at 1380, 36 Cal. Rptr. 2d at 329.

test may work in theory, in fact minimal evidence of asportation can result in a conviction of aggravated kidnapping.[28]

Like Justice Mosk, I do not disagree with the court's finding that the *Daniels* test is the proper standard of asportation for section 208(d) kidnapping, however, I feel that the court needs to provide some guidelines regarding its application to help ensure that the test works in fact, as well as in theory.[29]

IV. CONCLUSION

In reaching its decision in *People v. Rayford*, the court extended the *Daniels* test to section 208(d) kidnapping for rape.[30] This decision is contrary to the court's previous decisions in which it "declined to extend the *Daniels* test to either simple kidnapping or a kidnapping involving an associated crime other than robbery."[31] Considering the *Daniels* test's suitability to types of kidnapping, which by definition proscribe kidnapping for the purpose of committing another offense, it is likely that the court will extend this test to kidnapping involving other associated crimes.

NICOLE CALABRO

28. *Id.* at 25, 884 P.2d at 1383, 36 Cal. Rptr. 2d at 332. "In fact there was no substantial increase in isolation . . . . Nor was there a significant increase in seclusion attributable to the presence of physical barriers to observation by third parties at the secondary location." *Id.*

29. *Cf.* John L. Diamond, *Kidnapping: A Modern Definition*, 13 AM. J. CRIM. L. 1 (1985) (discussing the problems with California's current definition of kidnapping and suggesting an alternative).

30. *Id.* at 20-21, 884 P.2d at 1380, 36 Cal. Rptr. 2d at 329.

31. *Id.* at 21, 884 P.2d at 1380-81, 36 Cal. Rptr. 2d at 329.

E. *A trial court's failure to give jury instructions on elements of sentence enhancement for use of a deadly or dangerous weapon under California Penal Code section 12022(b) warrants a reversal only where it is reasonably probable that without the error, the jury would have decided more favorably for the defendant:* **People v. Wims.**

I. INTRODUCTION

In *People v. Wims*,[1] the California Supreme Court determined the standard of review for a trial court's failure to specifically instruct the jury as to the factual elements of a sentence enhancement for the use of a deadly or dangerous weapon as prescribed by California Penal Code section 12022(b).[2] Reversing the appellate court's decision, the supreme court determined that such a failure mandates reversal only "where it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error."[3] Unable to find the prob-

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1. 10 Cal. 4th 293, 895 P.2d 77, 41 Cal. Rptr. 2d 241 (1995). Justice Werdegar authored the majority opinion in which Chief Justice Lucas and Justices Arabian, Baxter and George concurred. *Id.* at 298-316, 895 P.2d 78-90, 41 Cal. Rptr. 2d at 242-54. Justice Mosk filed a concurring and dissenting opinion. *Id.* at 316-17, 895 P.2d 90-91, 41 Cal. Rptr. 2d at 254-55 (Mosk, J., concurring and dissenting). Justice Kennard also filed a separate concurring and dissenting opinion. *Id.* at 317-29, 895 P.2d 91-98, 41 Cal. Rptr. 2d at 255-62 (Kennard, J., concurring and dissenting).

2. CALIFORNIA PENAL CODE § 12022(b) provides:

> Any person who personally uses a deadly or dangerous weapon in the commission or attempted commission of a felony shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one year, unless use of a deadly or dangerous weapon is an element of the offense of which he or she was convicted.

CAL. PENAL CODE § 12022(b) (West Supp. 1995). *See generally* 3 B. E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1489 (2d ed. 1989 & Supp. 1995) (explaining sentence enhancements for weapon use); 18 CAL. JUR. 3D *Criminal Law* § 1630 (1984) (discussing CALIFORNIA PENAL CODE § 12022(b)). For a general discussion of sentence enhancements, see 18 CAL. JUR. 3D *Criminal Law* § 3410 (1984); Cynthia R. Cook, *The Armed Career Criminal Act Amendment: A Federal Sentence Enhancement Provision*, 12 GEO. MASON U. L. REV. 99, 106-08 (1989); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993).

3. *Wims*, 10 Cal. 4th at 298, 895 P.2d at 79, 41 Cal. Rptr. 2d at 242-43 (citing People v. Watson, 46 Cal. 2d 818, 836, 299 P.2d 243, 255 (1956), *cert. denied*, 355

ability of a more favorable result had the trial judge instructed the jury of the specific elements of the enhancement, the court reinstated the defendants' sentence enhancements pursuant to section 12022(b).[4]

II. TREATMENT

A. *Majority Opinion*

1. Did the Trial Court Err?

Justice Werdegar began with a discussion of the trial court's jury instruction duties to determine if error occurred in this case.[5] The court explained that criminal cases require a full jury instruction on the law affecting the case and found that the trial court judge failed to satisfy that requirement in the instant case.[6] Justice Werdegar acknowledged the wealth of cases supporting a defendant's right to appropriate jury instructions on "weapon use enhancement allegation[s],"[7] and found that by not instructing the jury as to the elements of the enhancement, the trial court in this case "[p]lainly" erred.[8]

2. Did the Error Violate Defendants' Constitutional Rights?

The court first addressed whether the trial court's error affected the defendants' Sixth Amendment rights to a jury trial, finding "'no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.'"[9] Justice Werdegar considered the defendants' argument that the Sixth Amendment applied because section 12022(b)

U.S. 846 (1957)).

4. *Id.* at 316, 895 P.2d at 90, 41 Cal. Rptr. 2d at 254. This appeal arose from a jury's finding that defendants, Wilbert Ford and Clifton Wims, were guilty of second degree robbery while using a knife deadly weapons. *Id.* at 302, 895 P.2d at 81, 41 Cal. Rptr. 2d at 245. The jury, without instructions as to the factual elements necessary to support application of the sentence enhancement under section 12022(b), and having heard only a reading of the verdict form regarding a section 12022(b) enhancement, found the enhancement applicable to both defendants. *Id.* at 301-02, 895 P.2d at 80-81, 41 Cal. Rptr. 2d at 244-45. The defendants appealed. *Id.* at 302, 895 P.2d at 81, 41 Cal. Rptr. 2d at 245. The court of appeal found for the defendants and reversed the sentence enhancements. *Id.* The People appealed and their petition for review was granted. *Id.*

5. *Id.* at 303, 895 P.2d at 81, 41 Cal. Rptr. 2d at 245.

6. *Id.* at 303, 895 P.2d at 81-82, 41 Cal. Rptr. 2d at 245-46.

7. *Id.* at 303, 895 P.2d at 82, 41 Cal. Rptr. 2d at 246.

8. *Id.*

9. *Id.* at 304, 895 P.2d at 82, 41 Cal. Rptr. 2d at 246 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986) (citing Spaziano v. Florida, 468 U.S. 447, 459 (1984))). Justice Werdegar explained that the right to a jury trial on sentence enhancements stems from state, not federal, law and "is conditional on the underlying offense being tried to a jury." *Id.*

enhancement looks like a separate crime, even though it is labeled an enhancement.[10] Although Justice Werdegar conceded that such similarities may exist,[11] she found that case law[12] and legislative intent[13] support-

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10. *Id.* For a discussion of the distinction between offense and sentence enhancement, see Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179 (1993).

11. *Wims*, 10 Cal. 4th at 304, 895 P.2d at 82, 41 Cal. Rptr. 2d at 246.

12. *Id.* Justice Werdegar examined California and United States Supreme Court cases divining the nature of sentence enhancement allegations. *Id.* at 304-09, 895 P.2d at 82-85, 41 Cal. Rptr. 2d at 245-49. The court noted the history of California decisions that found enhancements not to be separate offenses. *Id.* at 304-05, 895 P.2d at 82-83, 41 Cal. Rptr. 2d at 245-46 (citing People v. Bouzas, 53 Cal. 3d 467, 807 P.2d 1076, 279 Cal. Rptr. 847 (1991); People v. Turner, 145 Cal. App. 3d 658, 193 Cal. Rptr. 614 (1983); People v. Waite, 146 Cal. App. 3d 585, 194 Cal. Rptr. 245 (1983)). Justice Werdegar also noted California decisions which specifically found that section 12022(b) is simply an additional penalty proviso, not a separate offense. *Id.* at 305, 895 P.2d at 83, 41 Cal. Rptr. 2d at 247 (citing People v. Hernandez, 46 Cal. 3d 194, 757 P.2d 1013, 249 Cal. Rptr. 850 (1988); People v. Wolcott, 34 Cal. 3d 92, 748 P.2d 520, 192 Cal. Rptr. 645 (1983); People v. Smith, 163 Cal. App. 3d 908, 210 Cal. Rptr. 43 (1985)). *See also* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1473 (2d ed. 1989 & Supp. 1995) (discussing nature of sentence enhancements); 18 CAL. JUR. 3D, *Criminal Law* § 1629 (1984) ("The added punishment provisions do not create a separate offense").

Justice Werdegar also examined the United States Supreme Court's decision in *McMillan* which concluded that Pennsylvania's choice to define the exact impact that the use of a deadly weapon will have on sentencing for a felony did not "'transform[ ] against its will a sentencing factor into an element of some hypothetical offense.'" *Wims*, 10 Cal. 4th at 306, 895 P.2d at 83-84, 41 Cal. Rptr. 2d at 247-48 (quoting *McMillan*, 477 U.S. at 89-90) (internal quotations omitted).

13. *Id.* at 306, 895 P.2d at 84, 41 Cal. Rptr. 2d at 248. "The [California] Legislature's decision to impose an additional prison term for personal use of a deadly or dangerous weapon . . . does not transform section 12022(b) from a sentencing provision into a substantive offense." *Id.* Justice Werdegar attacked Justice Kennard's conclusion that a sentence enhancement is "'the functional equivalent of a criminal offense.'" *Id.* at 306-07, 895 P.2d at 84, 41 Cal. Rptr. 2d at 248 (quoting *Wims*, 10 Cal. 4th at 318, 895 P.2d at 91, 41 Cal. Rptr. 2d at 255) (Kennard, J., concurring and dissenting)). Justice Werdegar asserted that if the legislature had wanted to create a new offense, it would have, and pointed to California Penal Code §§ 666 and 12021 as examples. *Id.* at 306-07, 895 P.2d at 84, 41 Cal. Rptr. 2d at 248. Further, because the legislature
created a conditional right to a jury trial in section 12022(b), it realized that "such a right was not constitutionally compelled and that the enhancement was not intended to be . . . equivalent to a substantive offense." *Id.* at 307 n.7, 895 P.2d at 84 n.7, 41 Cal. Rptr. 2d at 248 n.7; *see also* Jill Rafaloff, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?*, 56 FORDHAM L. REV. 1085 (1988) (discussing legislative intent analysis in the interpretation of sentence enhancement statutes).

ed the fact that sentence enhancements are not akin to separate crimes and therefore, they do not implicate a defendant's Sixth Amendment rights.[14]

then explored the factors employed by the *McMillan* Court to find that a similar Pennsylvania sentencing allegation was constitutional:[15] (1) the court must defer to the state legislature's criminal justice decisions;[16] (2) whether the enhancement provision disposes of "'the presumption of innocence'" or removes the prosecution's burden of proof;[17] (3) whether the legislature redefined an existing crime exclusively to evade due process standards;[18] and (4) whether the enhancement statute was "based upon a 'factor'" traditionally weighed by sentencing courts when assessing punishment.[19] The *McMillan* factors were used by the Ninth Circuit in *Nichols v. McCormick*[20] to find a sentencing enhancement for use of a weapon during the offense constitutional because "a state is free to define possession of a weapon as a sentencing factor"[21] without invoking a defendant's Sixth Amendment rights.[22] Finding the *Nichols* weapons enhancement statute similar to section 12022(b), the court agreed with the Ninth Circuit and rejected defendants' argument that the enhancement triggered their Sixth Amendment rights.[23]

Next, Justice Werdegar evaluated defendants' argument that the trial court's omission deprived them of their due process and equal protection rights.[24] Although defendants cited numerous cases which they believe supported their contention, the court found none controlling in this case.[25]

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14. *Wims*, 10 Cal. 4th at 307, 895 P.2d at 84, 41 Cal. Rptr. 2d at 248. A sentence enhancement is not the same as a separate offense, primarily because a defendant cannot be punished pursuant to an enhancement provision until found guilty "of a related substantive offense." *Id.* Once convicted, "a defendant's liberty interest 'has been substantially diminished by a guilty verdict.'" *Id.* (quoting *McMillan*, 477 U.S. at 84).

15. *Id.* at 307, 895 P.2d at 85, 41 Cal. Rptr. 2d at 249.

16. *Id.* at 308, 895 P.2d at 85, 41 Cal. Rptr. 2d at 249 (citing *McMillan*, 477 U.S. at 85-86).

17. *Id.* (quoting *McMillan*, 477 U.S. at 87).

18. *Id.* (citing *McMillan*, 477 U.S. at 89).

19. *Id.* (quoting *McMillan*, 477 U.S. at 89). The instrumentality used in the commission of the crime would be such a factor. *Id.*

20. 929 F.2d 507 (9th Cir. 1991), *cert. denied*, 502 U.S. 1115 (1992).

21. *Wims*, 10 Cal. 4th at 308, 895 P.2d at 85, 41 Cal. Rptr. 2d at 249 (quoting *Nichols*, 929 F.2d at 511).

22. *Id.* at 309, 895 P.2d at 85, 41 Cal. Rptr. 2d at 249.

23. *Id.*

24. *Id.* at 309-14, 895 P.2d at 85-89, 41 Cal. Rptr. 2d at 249-53.

25. *Id.*

Defendants first alleged that they were denied "state-mandated jury discretion"[26] in violation of *Hicks v. Oklahoma*.[27] The court disagreed, finding that section 12022(b) does not grant defendants the same jury sentencing discretion prescribed by *Hicks*[28] and that "*Hicks* does not invalidate every true finding rendered on a sentencing provision" where the trial court misinstructs the jury.[29] Also, because the defendants did not suffer the level of deprivation considered by the *Hicks* decision, the *Hicks* rationale did not apply to this case.[30]

Secondly, defendants argued that under *People v. Hernandez*,[31] a trial court's failure to provide complete jury instructions makes the trial "fundamentally unfair."[32] The court rejected defendants' argument because *Hernandez* did not stand for that principle.[33] The court then

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26. *Id.* at 309, 895 P.2d at 86, 41 Cal. Rptr. at 250.

27. 447 U.S. 343 (1980). In *Hicks*, the defendant was convicted of drug distribution. *Id.* at 345. In sentencing the defendant, the jury applied an Oklahoma statute mandating a 40-year prison term for a habitual drug offender, which was found unconstitutional shortly after the defendant's conviction. *Id.* at 344-45. The Supreme Court remarked that a defendant's liberty can only be removed "by the jury in the exercise of its statutory discretion," and not by "arbitrary" state action. *Id.* at 346. Since the jury had not made its own sentencing decision, the Court found that the defendant had been denied due process. *Id.* at 347.

28. *Wims*, 10 Cal. 4th at 310, 895 P.2d at 86, 41 Cal. Rptr. 2d at 250. "[A]t most they were entitled to a jury finding on whether the section 12022(b) enhancement allegation was true."
Id. at 309-10, 895 P.2d at 86, 41 Cal. Rptr. 2d at 250. The jury made that determination. *Id.* at 310, 895 P.2d at 86, 41 Cal. Rptr. 2d at 250.

29. *Id.* (citing Clemons v. Mississippi, 494 U.S. 738, 741 (1990), which found that the United States Constitution did not preclude an appellate court from affirming a jury's sentencing based on a partially incorrect aggravating circumstances instruction). The court found that *Clemons*, rather than *Hicks*, applied, and following the *Clemons* holding, determined that in cases of jury misdirection, California appellate review adequately protects a defendant's due process rights as contemplated by *Hicks*. *Id.* at 310-11, 895 P.2d at 86-87, 41 Cal. Rptr. 2d at 250-51.

30. *Id.* at 309-310, 895 P.2d at 86, 41 Cal. Rptr. 2d at 250; *see* People v. Odle, 45 Cal. 3d 386, 754 P.2d 184, 247 Cal. Rptr. 137 (refusing to extend the *Hicks* rationale to special circumstances jury misinstruction), *cert. denied*, 488 U.S. 917 (1988).

31. 46 Cal. 3d 194, 757 P.2d 1013, 249 Cal. Rptr. 850 (1988).

32. *Wims*, 10 Cal. 4th at 311, 895 P.2d at 87, 41 Cal. Rptr. 2d at 251. *Hernandez* involved an additional three year sentence which was never mentioned at trial. *Hernandez*, 46 Cal. 3d at 199, 757 P.2d at 1015, 249 Cal. Rptr. at 852. The enhancement was first mentioned in the probation report after the conviction. *Id.*

33. *Wims*, 10 Cal. 4th at 311-12, 895 P.2d at 87, 41 Cal. Rptr. 2d at 251. Justice Werdegar explained that the *Hernandez* discussion on lack of jury instruction was merely dictum because the focus of the *Hernandez* holding was the failure to provide notice to the defendant of the possibility of an increased sentence and by failing

looked at defendants' contention that the misinstruction created "structural defects" in the trial, constitutionally resulting in a *per se* reversible error under *People v. Cummings*.[34] The court again disagreed, finding *Cummings* inapplicable because it involved misinstruction about the elements of a substantive crime, not a sentencing allegation.[35]

Next, the court considered defendants' argument that under *Morgan v. Illinois*,[36] the court must apply the federal standard for a violation of the federal jury trial right to a state violation of the state jury trial right.[37] Yet again, the court dismissed defendants' argument finding that *Morgan* did not apply because *Morgan* merely supported the principle that federal due process would not allow predetermined pro-death sentence jurors to vote on capital sentencing.[38] Defendants' case did not involve this issue.[39]

Finally, Justice Werdegar reviewed defendants' argument that defendants facing liberty loss from sentence enhancements are in the same position as those losing liberty from a separate offense, and therefore, sentencing enhancement requires complete jury instructions the same as those required for the underlying offense.[40] The court found that, "[a]s a matter of federal constitutional law," this position is incorrect because a convicted defendant "has a substantially diminished liberty interest at risk in connection with any related sentencing determination."[41]

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to do so, the court relieved the prosecution of their burden to plead and prove all of the elements. *Id.*

34. 4 Cal. 4th 1233, 850 P.2d 1, 18 Cal. Rptr. 2d 796 (1993), *cert. denied*, 114 S. Ct. 1576 (1994).

35. *Wims*, 10 Cal. 4th at 312 n.8, 895 P.2d at 88 n.8, 41 Cal. Rptr. 2d at 252 n.8. Justice Werdegar reiterated the principle that a defendant has no constitutional right to a jury trial on a sentencing factor. *Id.*; *see supra* note 9 and accompanying text. The court also considered other possible factors for per se reversible error, concluding that defendants received adequate representation of counsel and that "[t]here was no 'misdescription of the burden of proof, which vitiates all the jury's findings.'" *Wims*, 10 Cal. 4th at 313, 895 P.2d at 88, 41 Cal. Rptr. 2d at 252 (quoting Sullivan v. Louisiana, 113 S. Ct. 2078, 2082 (1993)).

36. 504 U.S. 719 (1992).

37. *Wims*, 10 Cal. 4th at 313, 895 P.2d at 88, 41 Cal. Rptr. 2d at 252.

38. *Id.* (citing *Morgan*, 504 U.S. at 722-733).

39. *Id.*

40. *Id.* at 313-14, 895 P.2d at 88-89, 41 Cal. Rptr. 2d at 252-53.

41. *Id.* at 314, 895 P.2d at 89, 41 Cal. Rptr. 2d at 253. Therefore, states are not compelled "to treat enhancement determinations exactly like determinations on substantive offenses." *Id.*

3. Did the Error Prejudice the Defendants?

Lastly, the court considered whether the trial court's error was prejudicial, thus mandating reversal.[42] Justice Werdegar first established the standard for review by consolidating the California Constitution provision, classifying jury misdirection as reversible error only if, after complete examination, the court finds the error "'resulted in a miscarriage of justice,'"[43] with the harmlessness test presented in *People v. Watson*[44]; this created an amalgam that prescribes reversal where there is misdirection of the jury, in the absence of which, the jury would have probably reached a result "more favorable to the defendant."[45] Applying this standard and fully considering the trial court record, the court found no prejudice to the defendants.[46]

B. Justice Mosk's Concurring and Dissenting Opinion

Justice Mosk wrote a brief, individual opinion supporting the ultimate judgment, but disagreeing with the majority's finding of no prejudice.[47] He did not, however, agree with Justice Kennard's view with respect to defendant Ford that the error was harmless, as he considered the error prejudicial as to both defendants.[48]

C. Justice Kennard's Concurring and Dissenting Opinion

Justice Kennard wrote separately to expound upon her belief that sentence enhancements are "the functional equivalent" of substantive criminal offenses and should, therefore, be afforded the same rights.[49]

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42. *Id.*

43. *Id.* (quoting CAL. CONST. art. VI, § 13).

44. 46 Cal. 2d 818, 299 P.2d 243 (1956).

45. *Wims*, 10 Cal. 4th at 315, 895 P.2d at 89, 41 Cal. Rptr. 2d at 253.

46. *Id.* at 315-16, 895 P.2d at 90, 41 Cal. Rptr. 2d at 254. Justice Werdegar explained that the evidence pointing to defendants' personal knife use was so compelling that further enhancement instructions were not likely to lead the jury to a different conclusion. *Id.*

47. *Id.* at 316-17, 895 P.2d at 90-91, 41 Cal. Rptr. 2d at 254-55 (Mosk, J., concurring and dissenting); *see infra* notes 47-55 and accompanying text.

48. *Wims*, 10 Cal. 4th at 317, 895 P.2d at 91, 41 Cal. Rptr. 2d at 255 (Mosk, J., concurring and dissenting); *see infra* notes 56-62 and accompanying text.

49. *Wims*, 10 Cal. 4th at 318, 895 P.2d at 91, 41 Cal. Rptr. 2d at 255 (Kennard, J., concurring and dissenting). For a similar viewpoint, see Thomas D. Brooks, *First Amendment-Penalty Enhancement for Hate Crimes: Content Regulation, Questionable State Interests and Non-Traditional Sentencing*, 84 J. CRIM. L. & CRIMINOLOGY 703 (1994).

After an extensive review of the facts,[50] Justice Kennard considered the constitutional effect of jury misinstruction, remarking that misinstruction as to an element of a crime violates the Sixth and Fourteenth Amendments,[51] but misinstruction on an enhancement element is only a constitutional violation if the legislature intended the provision to be parallel to a substantive crime.[52] She then launched into a discussion of the proper characterization of sentence enhancements.[53] Justice Kennard ultimately concluded that because sentence enhancements require the same pretrial[54] and statutory proof procedures,[55] because retrial of both is barred by the Double Jeopardy Clause,[56] and because both have the same consequences of increasing a defendant's original sentence,[57] "the Legislature must have intended enhancements to be the functional equivalent of criminal offenses"; therefore, jury trial rights and burdens of proof must also attach to them.[58]

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50. *Wims*, 10 Cal. 4th at 318-20, 895 P.2d at 91-92, 41 Cal. Rptr. 2d at 255-56 (Kennard, J., concurring and dissenting).

51. *Id.* at 320, 895 P.2d at 93, 41 Cal. Rptr. 2d at 257 (Kennard, J., concurring and dissenting).

52. *Id.* at 322, 895 P.2d at 94, 41 Cal. Rptr. 2d at 258 (Kennard, J., concurring and dissenting).

53. *Id.* at 322-23, 895 P.2d at 94, 41 Cal. Rptr. 2d at 258 (Kennard, J., concurring and dissenting).

54. *Id.* at 323, 895 P.2d at 94-95, 41 Cal. Rptr. 2d at 258-59 (Kennard, J., concurring and dissenting).

55. *Id.* at 323-24, 895 P.2d at 95, 41 Cal. Rptr. 2d at 259 (Kennard, J., concurring and dissenting). "Most significantly, unlike sentencing factors, whose existence is ordinarily determined by the trial judge, the Legislature has created a statutory right to have a jury determine the truth or falsity of an enhancement." *Id.* (citing People v. Wiley, 9 Cal. 4th 580, 889 P.2d 541, 38 Cal. Rptr. 2d 347 (1995)).

56. *Id.* at 324 n.6, 895 P.2d at 95 n.6, 41 Cal. Rptr. 2d at 259 n.6 (Kennard, J., concurring and dissenting). *See* U.S. CONST. amend V.

57. *Id.* at 324, 895 P.2d at 95, 41 Cal. Rptr. 2d at 259 (Kennard, J., concurring and dissenting); *see* 3 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Punishment for Crime* § 1474 (2d ed. 1989) (explaining calculation of additional sentences).

58. *Wims*, 10 Cal. 4th at 324, 895 P.2d at 95, 41 Cal. Rptr. 2d at 259 (Kennard, J., concurring and dissenting). Justice Kennard then reviewed California Supreme Court decisions which support this conclusion. *Id.* at 324-27, 895 P.2d at 95-97, 41 Cal. Rptr. 2d at 259-61 (Kennard, J., concurring and dissenting). Justice Kennard cited People v. Superior Court (Mendella), 33 Cal. 3d 754, 661 P.2d 1081, 191 Cal. Rptr. 1, for a historical background of sentence enhancements and the proposition that sentence enhancements are analogous to criminal offenses. *Wims*, 10 Cal. 4th at 325, 895 P.2d at 96, 41 Cal. Rptr. 2d at 260 (Kennard, J., concurring and dissenting); *see also* Mark W. Owens, *California's Three Strikes Law: Desperate Times Require Desperate Measures—But Will it Work?*, 26 PAC. L.J. 881 (1995) (examining early sentence enhancement history). She also offered People v. Hernandez, 46 Cal. 3d 194, 757 P.2d 1013, 249 Cal. Rptr. 850 (1988), as further support for her position. *Wims*, 10 Cal. 4th at 325, 895 P.2d at 96, 41 Cal. Rptr. 2d at 260 (Kennard, J., concurring and dissent-

Finally, Justice Kennard considered whether the trial court's misinstruction was prejudicial.[59] She carefully evaluated each of the three elements of the section 12022(b) enhancement,[60] finding that the jury verdict form forced the jury to make particularized findings as to the first two elements,[61] but because the third element was not explained, "the jury did not determine the truth or falsity of th[at] element."[62] Thus, Justice Kennard undertook that duty, resolving that, as to defendant Ford, the evidence was so convincing that the jury could not have found that he did not personally use the knife,[63] but defendant Wims was likely charged with the enhancement allegation, not because the jury found irrefutable evidence of his personal use of a knife, but because he was an accomplice and the jury was confused.[64] Therefore, Justice Kennard found reversible error on Wims's sentence enhancement and upheld its application to Ford.[65]

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ing). She emphasized that the majority's holding contradicts the *Hernandez* decision because, *Hernandez* held that enhancements "are . . . subject to federal due process requirements." *Id.* at 326, 895 P.2d at 96-97, 41 Cal. Rptr. 2d at 260 (Kennard, J., concurring and dissenting). Finally, Justice Kennard criticized the majority's use of Nichols v. McCormick, 929 F.2d 507 (9th Cir. 1991), declaring that the Montana statute in that case exhibited no likeness to section 12022(b), thus rendering *Nichols* inapplicable. *Wims*, 10 Cal. 4th at 326-27, 895 P.2d at 97, 41 Cal. Rptr. 2d at 261 (Kennard, J., concurring and dissenting). Because California statutory and case law characterize sentence enhancements as functionally equivalent to substantive offenses, failure to specifically instruct the jury in this case violated defendants' Sixth and Fourteenth Amendment rights. *Id.* at 327, 895 P.2d at 97, 41 Cal. Rptr. 2d at 261 (Kennard, J., concurring and dissenting).

59. *Wims*, 10 Cal. 4th at 327, 895 P.2d at 97, 41 Cal. Rptr. 2d at 261 (Kennard, J., concurring and dissenting).

60. *Id.* (Kennard, J., concurring and dissenting). The elements that must be found true are: (1) the use of "a deadly or dangerous weapon," (2) "defendant's display of the weapon in a menacing manner or intentional use of the weapon to strike a human being during the offense," and (3) "the defendant, rather than an accomplice, must have wielded the weapon." *Id.* (Kennard, J., concurring and dissenting).

61. *Id.* at 327-28, 895 P.2d at 97-98, 41 Cal. Rptr. 2d at 261-62 (Kennard, J., concurring and dissenting). The jury verdict form read: "We further find the Use of Deadly Weapon Allegation (Violation of Penal Code section 12022(b) to be _____" and [b]eneath the line were the choices: "True [or] Not True." *Id.* at 328 n.8, 895 P.2d at 97 n.8, 41 Cal. Rptr. at 262 n.8 (Kennard, J., concurring and dissenting) (quoting jury instruction form).

62. *Id.* at 328, 895 P.2d at 98, 41 Cal. Rptr. 2d at 262 (Kennard, J., concurring and dissenting).

63. *Id.* (Kennard, J., concurring and dissenting).

64. *Id.* at 328-29, 895 P.2d at 98, 41 Cal. Rptr. 2d at 262 (Kennard, J., concurring and dissenting).

65. *Id.* at 329, 895 P.2d at 98, 41 Cal. Rptr. 2d at 262 (Kennard, J., concurring and

III. IMPACT AND CONCLUSION

In 1976, California enacted the Determinate Sentencing Law, pulling sentencing provisions from throughout the penal code and designating them as enhancements.[66] Thus, the court removed sentencing provisions from the individual substantive crimes and placed in their own sections, prompting a debate over the enhancement provisions.[67]

Before the court's decision in *Wims*, confusion surrounded the proper characterization of sentence enhancements. Although the *Wims* court made headway in this area, its decision only affects cases involving California Penal Code section 12022(b). Other sentence enhancement provisions will require a thorough analysis of legislative intent before their exact natures can be determined. Future cases will likely follow the *Wims* approach and determine first, whether the court erred, second, whether that error violated the defendant's constitutional rights, and lastly, whether the error was prejudicial, by applying the compound test used in the *Wims* decision.

If nothing else, the message to defendants faced with a section 12022(b) allegation is clear: the threshold for reversible error, even where the trial court forgets to instruct the jury, is a high one.

JENNIFER A. POPICK

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dissenting).

66. *Id.* at 325, 895 P.2d at 96, 41 Cal. Rptr. 2d at 260 (Kennard, J., concurring and dissenting).

67. *Id.* (Kennard, J., concurring and dissenting).

V. LANDLORD AND TENANT

When the government requires that real property be brought into statutory compliance, and its condition is not the direct result of the lessee's specific use, the court must undertake a two-part analysis to determine whether the lessor or the lessee is liable for the cost of compliance: (1) the court must evaluate the extent to which the terms of the lease suggest that the lessee is liable, and (2) the court must then look at circumstantial factors surrounding the lease. Unless both parts of this analysis point to liability on the lessee, the lessor will bear the cost of compliance: **Hadian v. Schwartz.**

I. INTRODUCTION

In *Hadian v. Schwartz*,[1] the California Supreme Court considered whether the parties to a lease intended for the lessee to be responsible for the cost of complying with statutory requirements; the cost was unrelated to the lessee's use of the property.[2] The trial court held that under

1. 8 Cal. 4th 836, 884 P.2d 46, 35 Cal. Rptr. 2d 589 (1994). Justice Arabian wrote the opinion for a unanimous court. *Id.* at 839, 884 P.2d at 47, 35 Cal. Rptr. 2d at 590.

2. *Id.* at 840, 884 P.2d at 48, 35 Cal. Rptr. 2d at 591. On April 14, 1984, Hadian and Schwartz entered into a lease for commercial property. *Id.* They used a "fill-in-the-blank" "net" lease form published by the American Industrial Real Estate Association, making several alterations and attaching an addendum. *Id.* The lease was for a six-month term at a monthly rent of $650 with an option to renew the lease at an increased monthly payment of $800. *Id.* Hadian and Schwartz modified the lease to certify that Hadian, the lessor, made no warranties as to the property. *Id.* Schwartz assumed liability for the cost of compliance with any "applicable statutes, ordinances, rules, regulations, orders, covenants and restrictions of record, and restrictions" that were in effect during any part of the lease, regulating his use of the property as a bar and cabaret. *Id.* at 841, 884 P.2d at 48, 35 Cal. Rptr. 2d at 591. On October 1, 1986, before the lease ended on July 24, 1987, Schwartz opted to renew the lease for an additional five years. *Id.*

About five months after Schwartz opted to renew the lease, the City of Los Angeles informed Hadian that she was responsible for repairing her building to meet earthquake standards enacted in 1981. *Id.* at 841, 884 P.2d at 49, 35 Cal. Rptr. 2d at 592. She subsequently met with Schwartz in an effort to make him agree to pay for a structural survey and any necessary quake-proofing. *Id.* Schwartz denied all liability. *Id.* Hadian went ahead with the repairs, which included complete reconstruction of the building's frame and a new roof. *Id.* at 841-42, 884 P.2d at 49, 35 Cal. Rptr. 2d

the terms of the lease Schwartz was liable for the cost of compliance.[3] The court of appeal affirmed,[4] basing its holding entirely upon the California Supreme Court's opinion in *Glenn R. Sewell Sheet Metal, Inc. v. Loverde*.[5] The supreme court reversed, finding that the lessee was not liable under the terms of the lease if his use of the property had no effect on the lessor's duty to seismically retrofit the building.[6]

II. TREATMENT

Justice Arabian began the majority opinion by first analyzing the supreme court's decision in *Sewell*.[7] The court held that if a lessee changes the use of the property, and that change in use requires compliance with laws, the lessee will be liable for the cost of compliance.[8] The court made certain to distinguish the scenario in *Sewell* from those cases where the lessee's use does not cause the government's order of compliance.[9] Turning to the instant case, the court further stated that "compliance with the laws" clause obligated Schwartz, the lessee, to "'comply promptly with all applicable statutes . . . regulating the use by

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at 592. The total cost of the survey and repairs was $34,450.26. *Id.* at 842, 884 P.2d at 49, 35 Cal. Rptr. 2d at 592. After the repairs were completed, Hadian filed suit to recover the costs from Schwartz. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*; 70 Cal. 2d 666, 451 P.2d 721, 75 Cal. Rptr. 889 (1969).

6. *Hadian*, 8 Cal. 4th at 842, 884 P.2d at 48, 35 Cal. Rptr. 2d at 592. The court reviewed the decision *de novo* because the facts were undisputed. *Id.* at 842 n.1, 884 P.2d at 49 n.1, 35 Cal. Rptr. 2d at 592 n.1.

7. 70 Cal. 2d 666, 451 P.2d 721, 75 Cal. Rptr. 889 (1969). The court characterized the earlier *Sewell* opinion as "apt to be misinterpreted as one which, in the search for the parties' intent, exalts a text-bound logic over a close consideration not only of the terms of the lease but of the circumstances surrounding its making." *Hadian*, 8 Cal. 4th at 843, 884 P.2d at 50, 35 Cal. Rptr. 2d at 592. The court continued, distinguishing *Sewell* from the case at bar. *Id.* In *Sewell* the court noted that the specific use of the commercial property by the lessee gave rise to the need for regulatory compliance. *Id.* Here, however, there was no causal connection between the lessee's use and the expenditures required of the lessor. *Id.*; *see also* Brown v. Green, 8 Cal. 4th 812, 824, 884 P.2d 55, 62, 35 Cal. Rptr. 2d 598, 605 (similarly distinguishing *Sewell*).

8. *Sewell*, 70 Cal. 2d at 672, 451 P.2d at 725, 75 Cal. Rptr. at 893. *See generally* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 594 (9th ed. 1988 & Supp. 1995) (examining the respective duties of landlord and tenant to make repairs as required by government); Nancy Ann Connery, *Legal Compliance: Landlord and Tenant Responsibilities for Work Required by ADA; and Other Environmental Issues*, 405 PRACT. LAW INST./REAL ESTATE 391 (1994) (discussing liability of landlord and tenant when new laws and regulations are adopted).

9. *Hadian*, 8 Cal. 4th at 843, 884 P.2d at 50, 35 Cal. Rptr. 2d at 593. The court went on to state that, "[t]he distinction is, moreover, consistent with both common sense and a reasonable construction of the lease provision." *Id.*

the lessee of the premises.'"[10] The court noted that this language did not require the lessee to comply with all laws that affect the property, but only those laws which regulate the *use* of the property.[11] By its literal terms, the compliance clause did not obligate the lessee to comply with laws not regulating the lessee's specific use of the property.[12]

Since the compliance clause was ambiguous as to the intention of the parties regarding general liability for compliance, the court considered the overall provisions of the lease and the surrounding circumstances.[13] The court ultimately adopted a two-part analysis for determining the intent of the parties to assign liability for compliance expenditures that do not arise from the specific use of the property.[14]

First, the court looked to the language of the lease to determine the intent of the parties.[15] Second, the court used the six factors enumerated in *Sewell* to examine the circumstances surrounding the making of the lease and determine whether the parties intended to hold the lessee generally liable.[16] The court asserted that if both prongs of the analysis point to lessee liability for compliance, then the lessee must pay for all necessary repairs.[17] However, if the circumstantial factors indicate that

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10. *Id. Brown*, 8 Cal. 4th at 824, 884 P.2d at 62, 35 Cal. Rptr. 2d at 605. *See generally* 2 FRIEDMAN ON LEASES, *Compliance with Laws* § 11.1 (3d ed. 1990) (discussing compliance with laws clauses in lease agreements); 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 543-553 (9th ed. 1987 & Supp. 1995) (covering leases generally). *See also* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §§ 577-590 (9th ed. 1987 & Supp. 1995) (discussing fitness for use, repairs, and states that split on extending rules to commercial leases); 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 13 (9th ed. 1987 & Supp. 1995) (discussing statutory obligation).

11. *Hadian*, 8 Cal. 4th at 844, 884 P.2d at 50, 35 Cal. Rptr. 2d at 593. The court of appeal's statement that Schwartz could not use the property as a bar and cabaret if he did not comply with the requirement to "quake-proof" the property was too broad; no one could use the property if it did not comply with seismic retrofit regulations. *Id.*

12. *Id.* It would not make sense for the lessee to be liable for all governmental demands, including those demands that would only benefit the property owner. *Id.* at 844, 884 P.2d at 51, 35 Cal. Rptr. 2d at 594. *See generally* 14 CAL. JUR. 3D *Contracts* §§ 150-207 (1974 & Supp. 1994) (discussing construction and interpretation of contracts).

13. *Hadian*, 8 Cal. 4th at 844, 884 P.2d at 51, 35 Cal. Rptr. 2d at 594. *See generally* 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §§ 681-698 (9th ed. 1987 & Supp. 1995) (discussing general approaches to contract interpretation).

14. *Hadian*, 8 Cal. 4th at 844, 884 P.2d at 51, 35 Cal. Rptr. 2d at 594.

15. *Id.*

16. *Id.*

17. *Id.*

the parties did not intend the lessee to be liable, then the lessor must bear the expense.[18]

Applying this two-part analysis to the case at hand, noted that the lease here was labeled a "net" lease, and that the lessee controlled most of the incidents of ownership.[19] The court also focused its attention on the overall provisions of the lease, including its life and the extent to which control was transferred to the lessee.[20] This lease, the court reasoned, transferred almost all of the incidents of ownership to the lessee; however, the lease indicated that liability for compliance with laws not relating to the use of the property should fall on the lessor.[21] Furthermore, the court found the term of the lease to be comparatively short,[22] and further determined that the lessor had agreed to pay most of the property taxes and insurance.[23] The property owner also continued to own all of the "fixtures, operating systems and other improvements" in the building.[24] Finally, the court concluded that the lessor retained the benefits of ownership, and the lessee did not assume all the risks for the property's continued value.[25]

Second, the court applied the six factors enumerated in *Sewell* to determine whether the parties intended to hold the lessee generally liable.[26] The first factor is the ratio between the cost of compliance and the total amount of rent paid over the entire lease.[27] Here, the court noted, the cost to "quake proof" the building was almost one and a half times the rent for the first three years.[28] Furthermore, the court found that even if it used the total rent for eight years, the cost to comply would be almost half of the rent to be paid.[29] Thus, if Schwartz was lia-

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18. *Id.*

19. *Id.* at 845-46, 884 P.2d at 51-52, 35 Cal. Rptr. 2d at 595; *see also* Brown v. Green, 8 Cal. 4th at 827-28, 884 P.2d at 64-65, 35 Cal. Rptr. 2d at 607-08.

20. *Hadian*, 8 Cal. 4th at 846, 884 P.2d at 52, 35 Cal. Rptr. 2d at 595 (stating that although there are some characteristics of a true net lease, the terms regarding transfer of ownership imply that this lease is *not* a true net lease).

21. *Id.*

22. *Id.* The term of the lease was three years with an option to renew for another five years. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 846-47, 884 P.2d at 52, 35 Cal. Rptr. 2d at 595; *see* Durand H. Van Doren, *Some Suggestions for the Drafting of Long Term Net and Percentage Leases*, 51 COLUM. L. REV. 186 (1951) (discussing issues to consider when drafting a net lease to clearly allocate liability for repairs).

26. *Hadian*, 8 Cal. 4th at 846-50, 884 P.2d at 52-54, 35 Cal. Rptr. 2d at 595-97.

27. *Id.* at 847, 884 P.2d at 52, 35 Cal. Rptr. 2d at 595.

28. *Id.* at 847, 884 P.2d at 52-53, 35 Cal. Rptr. 2d at 595-96.

29. *Id.* at 847, 884 P.2d at 53, 35 Cal. Rptr. 2d at 596. In contrast, in Brown v. Green, 8 Cal. 4th 812, 884 P.2d 55, 35 Cal. Rptr. 2d 598, the cost to comply was less than five percent of the total rent to be paid over the 15 year lease. *Id.* at 830, 884

ble for the cost of compliance, he would be placed under a fairly great hardship.[30]

The second factor the court considered was the duration of the lease.[31] The lease was initially for a term of three years with an option to renew for an additional five years.[32] The court asserted that it would view a short lease term as an indication that the parties did not intend the lessee to bear the cost of compliance where the changes would mainly benefit the owner.[33]

The third factor was the amount of benefit to the lessee compared to that of the property owner.[34] The court found in the instant case that the property owner would receive the benefit from the alterations to the building long after the five year lease expired.[35] The court found similar significance in the fact that the governmental compliance order was not a result of the lessee's use of the property.[36]

The court also looked to whether the act of compliance is structural or non-structural.[37] The repairs to the Hadian property were obviously structural in nature, which reinforced the court's finding that the owner should be liable for the cost of repairs.[38]

The court next considered the extent to which the lessee's right to enjoyment of the premises was infringed during the time that the building was repaired.[39] Finally, the court evaluated the likelihood that the parties actually contemplated having to comply with the specific law at

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P.2d at 66, 35 Cal. Rptr. 2d at 609.

30. *Id. See generally* 4 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* § 593 (9th ed. 1987 & Supp. 1995) (stating that there is an interpretation against undue burden).

31. *Hadian*, 8 Cal. 4th at 847, 884 P.2d at 53, 35 Cal. Rptr. 2d at 596.

32. *Id.* at 848, 884 P.2d at 53, 35 Cal. Rptr. 2d at 596.

33. *Id.* at 847-48, 884 P.2d at 53, 35 Cal. Rptr. 2d at 596. The court noted:

> [C]ourts are reluctant to construe a repair or compliance clause literally where the term of the lease is short, the lessee has little time in which to amortize the cost of repairs over the life of the lease, and the cost of repair or compliance represents a substantial percentage of the aggregate rent over the term.

Id. at 848, 884 P.2d at 53, 35 Cal. Rptr. 2d at 596.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 848, 884 P.2d at 54, 35 Cal. Rptr. 2d at 597.

38. *Id.* at 848-49, 884 P.2d at 54, 35 Cal. Rptr. 2d at 597.

39. *Id.* at 849, 884 P.2d at 54, 35 Cal. Rptr. 2d at 597.

issue.[40] The court asserted that if the parties considered the specific law, this factor would favor releasing the lessee from liability for the cost of compliance.[41] Here, the court found the record to be unclear on these last two factors.[42] Hence, based on such rationale, the court found that the lessee was not liable under the terms of the lease.[43]

III. IMPACT AND CONCLUSION

After considering the relevant factors, the court held that the parties did not intend to hold the lessee liable for the cost of complying with laws and regulations not arising out of the lessee's particular use of the property.[44]

Hadian is significant because it will require courts to look at the issue of liability on a case by case basis. Furthermore, it prevents the lessee from having to unfairly bear the burden of compliance with laws that are unrelated to the lessee's use. However, it should be noted that the court's decision in *Brown v. Green* indicated with equal authority that liability will not be automatically shifted onto the shoulders of the lessor.[45] Therefore, while this case seems to add an element of ambiguity to landlord and tenant law, it is nonetheless significant because it clarifies the level of inquiry required by the trier of fact.

JILL ELIZABETH LUSHER

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40. *Id.*

41. *Id.*

42. *Id.* However, it is more likely that the building owner would be aware of the possibility of having to make structural changes. *Id.*

43. *Id.* at 842, 884 P.2d at 48, 35 Cal. Rptr. 2d at 592.

44. *Id.* at 850, 884 P.2d at 54, 35 Cal. Rptr. 2d at 597.

45. Brown v. Green, 8 Cal. 4th 812, 817-18, 822, 825, 884 P.2d 55, 57-58, 61, 63, 35 Cal. Rptr. 2d 598, 600-01, 604, 606 (1994).

VI. MALICIOUS PROSECUTION

An action for malicious prosecution lies when at least one of several possible grounds of recovery lacks probable cause and is brought with malice: **Crowley v. Katleman.**

I. INTRODUCTION

In *Crowley v. Katleman*,[1] the California Supreme Court considered whether the executor of a will could maintain an action for malicious prosecution against a testator's wife and her attorneys when five of six theories of their will contest lacked probable cause.[2] In its decision below,[3] the court of appeal criticized the supreme court's ruling regarding the alternate theory rule from *Bertero v. National General Corp.*[4] The

1. 8 Cal. 4th 666, 881 P.2d 1083, 34 Cal. Rptr. 2d 386 (1994). Justice Mosk delivered the opinion of the court, in which Chief Justice Lucas and Justices Kennard, Baxter, George, and Werdegar joined. *Id.* at 671-96, 881 P.2d at 1084-1100, 34 Cal. Rptr. 2d at 387-403. Justice Arabian wrote a dissenting opinion. *Id.* at 696-703, 881 P.2d at 1100-05, 34 Cal. Rptr. 2d at 403-08 (Arabian, J., dissenting).

2. *Id.* at 676, 881 P.2d at 1087, 34 Cal. Rptr. 2d at 390. Beldon Katleman and Carole Katleman were first married in 1973. *Id.* at 672, 881 P.2d at 1084, 34 Cal. Rptr. 2d at 387. Two years later they divorced, and Arthur Crowley represented Beldon Katleman in the divorce proceedings. *Id.* As a result, Carole Katleman became hostile towards Crowley. *Id.* In 1976, Mr. Katleman executed a will naming Crowley, his attorney and best friend, as the executor and principal heir of his $10 million estate. *Id.* Crowley did not participate in the drafting or the execution of the will. *Id.* The Katlemans remarried in 1980. *Id.* In 1988, Beldon Katleman died without revoking his previous will or executing a subsequent will. *Id.* at 673, 881 P.2d at 1084, 34 Cal. Rptr. 2d at 387. Shortly after his death, Crowley offered Mrs. Katleman one-half of her husband's estate, but she rejected the offer. *Id.* Soon thereafter, Mrs. Katleman filed a will contest that sought to invalidate her husband's will on six possible theories of recovery: (1) undue influence, (2) revocation of the will, (3) execution of a subsequent will, (4) lack of testamentary capacity, (5) lack of due execution, and (6) fraud. *Id.* at 673, 881 P.2d at 1084, 34 Cal. Rptr. 2d at 388. Although a presumption of undue influence arose from Crowley's attorney-client relationship with Mr. Katleman, the probate court found "the presumption had been rebutted by overwhelming evidence." Crowley v. Katleman, 26 Cal. App. 4th 1585, 1591, 19 Cal. Rptr. 2d 654, 656 (1993), *aff'd*, 8 Cal. 4th 666, 881 P.2d 1083, 34 Cal. Rptr. 2d 386 (1994). Crowley then filed a malicious prosecution action against Mrs. Katleman and her attorneys, alleging that all of the grounds asserted in the will contest, except the undue influence ground, had been brought maliciously and without probable cause. *Crowley*, 8 Cal. 4th at 674, 881 P.2d at 1085-86, 34 Cal. Rptr. 2d at 388-89.

3. *Crowley*, 26 Cal. App. 4th at 1585, 19 Cal. Rptr. 2d at 655.

4. 13 Cal. 3d 43, 57 n.5, 529 P.2d 608, 618 n.5, 118 Cal. Rptr 184, 194 n.5 (1974)

California Supreme Court granted review to revisit the public policy supporting the alternate theory rule governing malicious prosecution claims.[5] Reaffirming its holding in *Bertero*, the court held that an action charging multiple grounds of liability where at least one of those grounds was asserted with malice and without probable cause will give rise to a valid claim for malicious prosecution.[6]

II. TREATMENT

A. *Majority Opinion*

At issue was whether one could maintain a malicious prosecution action when some but not all of one's theories of liability lacked probable cause.[7] Because the appellate court found the factual circumstances surrounding the will contest "virtually identical to *Bertero*,"[8] the supreme court had little difficulty finding liability pursuant to its alternate theory rule.[9] However, because the court of appeal denounced the *Bertero* rule

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(concluding that "an action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted").

5. *Crowley*, 8 Cal. 4th at 671, 881 P.2d at 1084, 34 Cal. Rptr. 2d at 387.

6. *Id.* (citing *Bertero*, 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1974)). A cause of action for malicious prosecution exists when the underlying action was: (1) initiated by the defendant, but terminated in the plaintiff's favor; (2) without probable cause; and (3) with malice. *Bertero*, 13 Cal. 3d at 50, 529 P.2d at 613-14, 118 Cal. Rptr. at 189-90; *see also* RESTATEMENT (SECOND) OF TORTS §§ 653-681B (1977); 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 431 (9th ed. 1988 & Supp. 1995) (discussing the tortious nature of malicious prosecution claims). For a discussion on the elements of malicious prosecution, see 6 CAL. JUR. 3D *Assault and Other Wilful Torts* § 315 (1988 & Supp. 1995); 54 C.J.S. *Malicious Prosecution* § 5 (1987 & Supp. 1995); 52 AM. JUR. 2D MALICIOUS PROSECUTION § 6 (1970 & Supp. 1995).

Probable cause is held to both a subjective and objective standard. *Bertero*, 13 Cal. 3d at 55, 529 P.2d at 617, 118 Cal. Rptr. at 193. To defeat the element of probable cause, a defendant's "suspicion [must be] founded on circumstances warranting a reasonable man's belief that the charge is true." 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 447 (9th ed. 1988 & Supp. 1995); *see also* Mark G. Kisicki, *California Supreme Court Survey*, 17 PEPP. L. REV. 300 (1989) (reviewing Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 765 P.2d 498, 254 Cal. Rptr. 336 (1989)). "But if the initiator [subjectively] knows that his claim is groundless he cannot have an actual or honest belief in its validity, and he may not escape liability for commencing an action based on such a claim merely because a reasonable man might have believed it was meritorious." *Bertero*, 13 Cal. 3d at 55, 529 P.2d at 617, 118 Cal. Rptr. at 193. *See generally* 6 CAL. JUR. 3D *Assault and Other Wilful Torts* § 330 (1988 & Supp. 1995) (discussing "want of probable cause"); 52 AM. JUR. 2D *Malicious Prosecution* §§ 50-55 (1970 & Supp. 1995) (discussing same).

7. *Crowley*, 8 Cal. 4th at 676, 881 P.2d at 1087, 34 Cal. Rptr. 2d at 390; *see supra* notes 1-2 and accompanying text.

8. Crowley v. Katleman, 26 Cal. App. 4th 1585, 1599, 19 Cal. Rptr. 2d 654, 662 (1993), *aff'd*, 8 Cal. 4th 666, 881 P.2d 1083, 34 Cal. Rptr. 2d 386 (1994).

9. *Crowley*, 8 Cal. 4th at 679, 881 P.2d at 1089, 34 Cal. Rptr. 2d at 392.

as being antiquated and a waste of judicial economy,[10] Justice Mosk spent much of the majority opinion defending its precedent and criticizing the primary right rule that the court of appeal offered as a replacement.[11]

1. The Alternate Theory Rule vs. The Primary Right Theory

Because probable cause existed as to the undue influence ground as a matter of law, the defendants contended that the plaintiff should have been precluded from bringing an action for malicious prosecution.[12] However, the alternate theory rule, as articulated in *Bertero*, states that an action for malicious prosecution lies "when but one of alternate theories of recovery is maliciously asserted."[13] The defendants attacked the rule, claiming that they were compelled to assert all possible claims in the will contest because failure to raise a claim would result in its waiver.[14] The court rejected this argument finding that "'[a] litigant is never compelled to file a malicious and fabricated action.'"[15] The defendants

10. *Crowley*, 26 Cal. App. 4th at 1602, 19 Cal. Rptr. 2d at 664. The court concluded, "Were we not so bound, we would adopt the primary right rule . . . . *Bertero*'s alternate theory rule invites a multitude of unwarranted litigation, encourages excessive and repetitive litigation, discourages citizens from bringing meritorious civil disputes to the courts, and is inconsistent with modern pleading practice." *Id.* (citations omitted).

11. *Crowley*, 8 Cal. 4th at 679-96, 881 P.2d at 1089-1100, 34 Cal. Rptr. 2d at 392-403.

12. *Id.* at 675-76, 881 P.2d at 1086, 34 Cal. Rptr. 2d at 389.

13. Bertero v. National Gen. Corp., 13 Cal. 3d 43, 57 n.5, 529 P.2d 608, 618 n.5, 118 Cal. Rptr. 184, 194 n.5 (1974); *see* Albertson v. Raboff, 46 Cal. 2d 375, 295 P.2d 405 (1956) (holding that one cannot escape liability by combining baseless and meritorious claims); Singleton v. Perry, 45 Cal. 2d 489, 289 P.2d 794 (1955) (reasoning that a frivolous charge is not less injurious when coupled with one that is well-founded). In *Bertero*, the plaintiff sued National General Corp., his employer, for breach of their employment contract. *Bertero*, 13 Cal. 3d at 49, 529 P.2d at 613, 118 Cal. Rptr. at 189. By way of affirmative defenses, the corporation attacked the contract on three grounds: (1) Bertero obtained his contract by duress; (2) Bertero obtained the contract by undue influence; and (3) Bertero gave no consideration for the contract. *Id.* The defendant employer then filed a cross-complaint to recover salary already paid to Bertero alleging the same three grounds for recovery. *Id.* At trial, Bertero prevailed in all respects and the employer's cross-complaint was dismissed with prejudice. *Id.* Bertero then filed a suit for malicious prosecution and ultimately prevailed, even though only one of the three theories in the cross-complaint lacked probable cause. *Id.* at 49-50, 529 P.2d at 613, 118 Cal. Rptr. at 189.

14. *Crowley*, 8 Cal. 4th at 679, 881 P.2d at 1088, 34 Cal. Rptr. 2d at 391.

15. *Id.* (quoting *Bertero*, 13 Cal. 3d at 52, 529 P.2d at 615, 118 Cal. Rptr. at 191).

also criticized the alternate theory rule contending that the rule would prevent future plaintiffs from being able to rely on multiple theories of recovery.[16] The court also rejected this argument, stating that litigants could still assert multiple theories so long as they reasonably believed in their merits.[17] The court cautioned against plaintiffs "'pursu[ing] shotgun tactics by proceeding on counts and theories which they know or should know to be groundless.'"[18]

The defendants further argued that the will contest amounted to one "primary right," and that because probable cause existed to one of the theories upon which they could prevail, the entire action should withstand a malicious prosecution claim.[19] The majority disagreed, reasoning that the primary right theory did not concern itself with individual claims; rather, it served as a litigant's basic right not to be subjected to injury.[20] The court reasoned that the only way a party could show probable cause for the primary right as a whole was to demonstrate probable cause for all of the theories upon which they relied.[21] Satisfied that the primary right theory did not apply, the court turned to examine public policy underlying malicious prosecution claims.[22]

2. The Policy Trilemma: Judicial Economy, Access to the Courts, and a Wronged Individual's Right to Legal Redress

The majority recognized that malicious prosecution has long been a "disfavored cause of action" because it burdens the judicial system with additional litigation and discourages people from accessing the courts for fear of countersuit.[23] Additionally, the court warned of the two dangers

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16. *Id.* at 678, 881 P.2d at 1088, 34 Cal. Rptr. 2d at 391.

17. *Id.* The court reasoned that pleadings could be amended once legal theories proved to be untenable. *Id.*

18. *Id.* (quoting *Bertero*, 13 Cal. 3d at 57, 529 P.2d at 618, 118 Cal. Rptr. at 194).

19. *Id.* at 682-83, 881 P.2d at 1091, 34 Cal. Rptr. 2d at 394.

20. *Id.* at 683, 881 P.2d at 1091, 34 Cal. Rptr. 2d at 394. The court added: "[D]efendants' argument would have converted the primary *right* theory into a 'primary *theory* theory.'" *Id.* (emphasis added).

21. *Id.* at 683 n.11, 881 P.2d at 1092 n.11, 34 Cal. Rptr. 2d at 395 n.11.

22. *Id.* at 683, 881 P.2d at 1091-92, 34 Cal. Rptr. 2d at 394-95. *See generally* Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979) (discussing the split between jurisdictions adopting the modern rule and those still adhering to the English rule, which requires the pleading and proof of special damages).

23. *Crowley*, 8 Cal. 4th at 680, 881 P.2d at 1089, 34 Cal. Rptr. 2d at 392 (citing Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 872, 765 P.2d 498, 501-02, 254 Cal. Rptr. 336, 340 (1989)). The court warned, however, that "'[t]his convenient phrase should not be employed to defeat a legitimate cause of action.'" *Id.* (quoting Bertero v. National Gen. Corp., 13 Cal. 3d 43, 53, 529 P.2d 608, 615, 118 Cal. Rptr. 184, 191 (1974)). The court also noted that the will contest brought by defendants was a "disfavored" cause of action because the law favors the prompt settlement of estates.

of frivolous lawsuits.[24] Not only is the individual defendant harmed by defending spiteful and baseless claims,[25] but the judicial process is also harmed by those who "use [] the courts ' . . . as instruments with which to maliciously injure their fellow men.'"[26] Weighing the underlying policies, the court reasoned that the two competing judicial economy arguments stood on equal footing.[27] While the court acknowledged that encouraging judicial access is important, it concluded that when the underlying litigation is frivolous, the policy of redressing individual harm caused by groundless lawsuits must prevail.[28]

B. Justice Arabian's Dissenting Opinion

In his dissent, Justice Arabian criticized the majority for "perpetuat[ing] dubious law for no better reason than that it exists."[29] Like the court of appeal, Justice Arabian thought the court's rule was inconsistent with modern pleading and argued that the primary right theory could be effectively applied by analogy.[30] Justice Arabian cited several cases that were skeptical of the tort.[31] Finally, he concluded that the foundation of the *Bertero* holding had been eroded by statutes authorizing judges to sanction attorneys and their clients who assert frivolous

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Id. at 680 n.8, 881 P.2d at 1089 n.8, 34 Cal. Rptr. 2d at 392 n.8. (citing Estate of Horn, 219 Cal. App. 3d 67, 71, 268 Cal. Rptr. 41, 43 (1990)).

24. *Id.* at 677, 881 P.2d at 1087, 34 Cal. Rptr. 2d at 390.

25. *Id.* at 693, 881 P.2d at 1098-99, 34 Cal. Rptr. 2d at 401-02 (quoting *Bertero*, 13 Cal. 3d at 50-51, 529 P.2d at 614, 118 Cal. Rptr. at 190).

26. *Id.* (quoting *Bertero*, 13 Cal. 3d at 51, 529 P.2d at 614, 118 Cal. Rptr. at 190).

27. *Id.* at 694, 881 P.2d at 1099, 34 Cal. Rptr. 2d at 402.

28. *Id.* at 695, 881 P.2d at 1100, 34 Cal. Rptr. 2d at 403.

29. *Id.* at 696, 881 P.2d at 1100, 34 Cal. Rptr. 2d at 403 (Arabian, J., dissenting).

30. *Id.* at 697, 881 P.2d at 1101, 34 Cal. Rptr. 2d at 404 (Arabian, J., dissenting). Justice Arabian stated two reasons why the primary right theory should be adopted. As most attorneys are uncertain which theory will have the highest likelihood of success at trial, the primary right theory would enable them to best advocate the rights of their clients without fear of countersuit. *Id.* at 698, 881 P.2d at 1102, 34 Cal. Rptr. 2d at 405 (Arabian, J., dissenting). In addition, defending against multiple claims is "not qualitatively so different" from defending a single theory when the underlying action stems from a single occurrence. *Id.* (Arabian, J., dissenting).

31. *Id.* at 700, 881 P.2d at 1103, 34 Cal. Rptr. 2d at 406 (Arabian, J., dissenting) (citing Rubin v. Green, 4 Cal. 4th 1187, 847 P.2d 1044, 17 Cal. Rptr. 2d 828 (1993); Pacific Gas & Elec. Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 791 P.2d 587, 270 Cal. Rptr. 1 (1990); Silberg v. Anderson, 50 Cal. 3d 205, 786 P.2d 365, 266 Cal. Rptr. 638 (1990); Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 765 P.2d 498, 254 Cal. Rptr. 336 (1989); Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., 42 Cal. 3d 1157, 728 P.2d 1202, 232 Cal. Rptr. 567 (1986)).

claims.[32] Justice Arabian reasoned that, in contrast to malicious prosecution claims, statutory remedies promote judicial economy, are less restrictive to judicial access, and provide more appropriate penalties.[33]

III. IMPACT AND CONCLUSION

It is estimated that malicious prosecution and abuse of process lawsuits account for ten percent of the malpractice claims filed against California attorneys.[34] While the California Supreme Court has declined to ease malicious prosecution standards in recent years and has recognized that statutory sanctions provide "the most promising remedies" for the frivolous litigation problem,[35] it ultimately discarded an opportunity to discourage derivative litigation.[36] To be sure, the supreme court did not relax the standards for malicious prosecution;[37] however, by narrowly

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32. *Id.* at 697, 881 P.2d at 1101, 34 Cal. Rptr. at 404 (Arabian, J., dissenting). *See generally* John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 457 (1986) (discussing state statutes and rules designed to deter groundless litigation); John M. Johnson & G. Edward Cassidy, *Frivolous Lawsuits and Defensive Responses to Them—What Relief is Available?*, 36 ALA. L. REV. 927 (1985) (contrasting statutory remedies with common law remedies for misuse of litigation).

California Civil Procedure Code § 128.5, which was effective at the time this case was heard, provided, in relevant part: "Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." CAL. CIV. PROC. CODE § 128.5 (West 1989 & Supp. 1995).

California Civil Procedure Code § 128.7, which was modeled after Rule 11 of the Federal Rules of Civil Procedure and became effective January 1, 1995, "authorizes trial judges to sanction attorneys, their firms and clients for violating a certification that a complaint (as well as other filings) is not filed 'primarily for an improper purpose,' that the claims are warranted by existing law (with certain exceptions), and that allegations have factual support." *Crowley*, 8 Cal. 4th at 702 n.2, 881 P.2d at 1104 n.2, 34 Cal. Rptr. 2d at 407 n.2 (Arabian, J., dissenting) (citing CAL. CIV. PROC. CODE § 128.7(b)(1) (West 1989 & Supp. 1995)).

33. *Crowley*, 8 Cal. 4th at 702, 881 P.2d at 1104, 34 Cal. Rptr. 2d at 407 (Arabian, J., dissenting).

34. James D. Hadfield, *Avoiding Malicious-Prosecution suits*, 2 CAL. LAW., May 1982, at 33.

35. *Sheldon Appel*, 47 Cal. 3d at 873-74, 765 P.2d at 503, 254 Cal. Rptr. at 341.

36. *Crowley*, 8 Cal. 4th at 703, 881 P.2d at 1105, 34 Cal. Rptr. 2d at 408 (Arabian, J., dissenting).

37. *Id.* at 681, 881 P.2d at 1090, 34 Cal. Rptr. 2d at 393. As the court noted, "[t]o follow the rule of *Bertero* today is not to 'expand' the tort of malicious prosecution, because it has been the law of this state for 20 years." *Id.*

construing the legislative intent behind the statutory remedies,[38] the alternate theory rule remains a lethal weapon in countersuits.

In recent decades, attorneys have joined their clients as deep pockets from which aggrieved individuals may recover,[39] and alternative pleading has become commonplace.[40] Despite a host of statutory remedies designed to deter frivolous litigation,[41] the lure of punitive damages—in addition to general damages and court costs—may be enough to entice litigious defendants to gamble on larger jury verdicts.

JONATHAN SIMONDS PYATT

38. *Id.* at 687-88, 881 P.2d at 1094-95, 34 Cal. Rptr. 2d at 397-98.

39. *See, e.g.*, Williams v. Coombs, 179 Cal. App. 3d 626, 224 Cal. Rptr. 865 (1986); Tool Research & Eng'g Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975); *see also* Lee A. Pizzimenti, Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561 (1980) (suggesting that negligence suits against attorneys would deter abuse of the legal system); Sandra C. Segal, Comment, *It is Time to End the Lawyer's Immunity from Countersuit*, 35 UCLA L. REV. 99 (1987) (encouraging attorney liability for malicious prosecution to discourage frivolous litigation). *But see* Wade, *supra* note 32, at 433. *See generally* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 452-53 (1988) (summarizing *Williams* and *Tool Research*).

40. Crowley v. Katleman, 26 Cal. App. 4th 1585, 1602, 19 Cal. Rptr. 2d 654, 664 (1993), *aff'd*, 8 Cal. 4th 666, 881 P.2d 1083, 34 Cal. Rptr. 2d 386 (1994).

41. *See supra* note 32 and accompanying text.

VII. REFERENDUM

Article XI, section (1)(b) of the California Constitution neither restricts nor secures the local right of referendum on employee compensation decisions, while Government Code section 25123(e)'s exemption from referendum is constitutionally justified because it advances legislative goals of statewide concern: **Voters for Responsible Retirement v. Board of Supervisors.**

I. INTRODUCTION

In *Voters for Responsible Retirement v. Board of Supervisors*,[1] the California Supreme Court discussed whether article XI, section 1, clause b [hereinafter XI(1)(b)][2] of the California Constitution restricted or guaranteed the voters' right to hold a referendum on public employee compensation decisions made by the county board of supervisors.[3] The court held that article XI(1)(b) neither restricted nor guaranteed the right to referendum in such circumstances.[4] Additionally, the court reversed the

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1. 8 Cal. 4th 765, 884 P.2d 645, 35 Cal. Rptr. 2d 814 (1994). Justice Mosk delivered the majority opinion, in which Chief Justice Lucas, and Justices Arabian, Baxter, George, Werdegar and Kennard joined. *Id.* 769-87, 884 P.2d 647-58, 35 Cal. Rptr. 2d 816-27. In addition, Justice Kennard wrote a concurring opinion. *Id.* at 786-90, 884 P.2d at 658-60, 35 Cal. Rptr. 2d at 827-29 (Kennard, J., concurring).

2. Article XI(b)(1) of the California Constitution provides in pertinent part:

> The Legislature shall provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county. . . . [E]ach governing body shall prescribe by ordinance the compensation of its members, but the ordinance prescribing such compensation shall be subject to referendum.

CAL. CONST. art. XI. § 1, cl. b.

3. *Voters*, 8 Cal. 4th at 769-76, 884 P.2d at 647-51, 35 Cal. Rptr. 2d at 816-21.

4. *Id.* at 769, 884 P.2d at 647, 35 Cal. Rptr. 2d at 816. The Trinity County Board of Supervisors approved a three year memorandum of understanding with the Trinity county Employees' Association whereby the county agreed to implement a retirement program. *Id.* at 770, 884 P.2d at 647, 35 Cal. Rptr. 2d at 816. The program provided that each employee "could retire at age 60 with an annuity of 2 percent of his or her salary." *Id.* In addition, the county agreed to pay each employee's individual contribution to the retirement plan. *Id.*

Concern over the county's financial commitment disturbed many within the community. *Id.* at 770, 884 P.2d at 648, 35 Cal. Rptr. 2d at 817. Despite assurances from county officials that the financial burden on the county would not be detrimental, citizens of the county collected and filed the requisite number of signatures needed for a referendum vote. *Id.* at 771, 884 P.2d at 648, 35 Cal. Rptr. 2d at 817. Normally this would require the "[b]oard to either repeal the ordinance or to put it up for a referendum vote." *Id. See generally* 38 CAL. JUR. 3D *Initiative and Referendum* § 58 (1977 & Supp. 1995) (explaining the procedures for referendum). On advice of coun-

court of appeal,[5] upholding the constitutionality of Government Code Section 25123(e), which exempts from referendum ordinances on compensation related memorandum of understanding [hereinafter MOU] between county supervisors and public employees.[6] The court reasoned that the statute dealt with issues of statewide rather than local concern.[7]

II. TREATMENT

A. *Justice Mosk's Majority Opinion*

1. Article XI(1)(b) Neither Restricts Nor Secures the Local Right to Referendum on Employee Compensation Decisions

Justice Mosk dealt initially with the proper interpretation of article XI(1)(b) of the California Constitution.[8] Trinity County argued that since article XI(1)(b) specifically mentioned referendum power in connection with the governing body, other employee compensation decisions were not subject to referendum.[9] Justice Mosk explained that even if the statute created a right to referendum on public employee compensation, a similar provision regarding supervisor's salaries was not created by implication.[10] In addition, Justice Mosk noted that the authors of the statute

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sel the board refused to do either. *Voters*, 8 Cal. 4th at 770, 884 P.2d at 648, 35 Cal. Rptr. 2d at 817. In response, the Voters for Responsible Retirement [hereinafter VFRR] filed a writ of mandate with the superior court to compel the referendum. *Id.*

5. *Voters*, 8 Cal. 4th at 783, 884 P.2d at 645, 35 Cal. Rptr. 2d at 816. The court of appeal's ruling reversed the trial court holding that the county ordinance was subject to referendum. *Id.* at 771, 884 P.2d at 648, 35 Cal. Rptr. 2d at 817.

6. CAL. GOV'T CODE § 25123(e) (West 1981 & Supp. 1995). The statute does not expressly exempt memorandum of understanding from referendum, but impliedly excludes them because they must take effect immediately. *See infra* notes 21-22 and accompanying text.

7. *Voters*, 8 Cal. 4th at 778-84, 884 P.2d at 653-56, 35 Cal. Rptr. 2d at 822-25.

8. *Id.* at 771, 884 P.2d at 648, 35 Cal. Rptr. 2d at 817. Both the VFRR and the Board of Supervisors each relied on countervailing interpretations of Article XI(1)(b). *Id.*

9. *Id.* at 771-72, 884 P.2d at 648-49, 35 Cal. Rptr. 2d at 817-18. The Board of Supervisors used the wording on the ballot of the November 1970 amendment to prove the intent of the drafters. *Id.* at 772-76, 884 P.2d at 649-51, 35 Cal. Rptr. 2d at 818-20. *See* Hill v. N.C.A.A., 7 Cal. 4th 1, 16-17, 865 P.2d 633, 641-42, 26 Cal. Rptr. 2d 834, 842-43 (1994) (holding that arguments contained in the official ballot of an ordinance indicate the intent of the drafters). The Board contended that if the right of referendum on employee compensation was in the prior June 1970 amendment, then the inclusion of identical language subsequently would have been duplicative and unnecessary. *Voters*, 8 Cal. 4th at 771-72, 884 P.2d at 648-49, 35 Cal. Rptr. 2d at 817-18.

10. *Voters*, 8 Cal. 4th at 772-73, 884 P.2d at 649, 35 Cal. Rptr. 2d at 818. Justice

may have wanted to give the right of referendum on supervisor's salaries an independent constitutional basis.[11]

In contrast, Voters for Responsible Retirement [hereinafter VFRR] argued that article XI(1)(b) in fact, did give the electorate the power to vote on public employee compensation.[12] VFRR relied on article XI, section 13 as the crux of its argument.[13] The purpose of the article was to preserve all relevant constitutional provisions that existed immediately prior to the amendment of article XI.[14] Justice Mosk swept aside these arguments asserting that section thirteen was not applicable to the instant circumstances.[15] He further contended that even if section 13 was applicable, article XI did not contain any references to the right of refer-

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Mosk explained that since the amendment gave county supervisors the right to set their own salaries, the drafters clearly would have wanted the built in referendum safeguard. *Id.*

11. *Id.* at 773, 884 P.2d at 649-50, 35 Cal. Rptr. 2d at 818-19. The court acknowledged this possibility because the legislature may, under certain circumstances, restrict local power of referendum. *Id.*; *see* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 123-124 (9th ed. 1987 & Supp. 1994) (discussing exceptions to initiative and referendum powers); *see also* Chip Lowe, *Public Safety Legislation and the Referendum Power: A Reexamination*, 37 HASTINGS L.J. 591, 590-95 (1986) (examining certain exceptions to the referendum power of the electorate). *See generally* 38 CAL. JUR. 3D *Initiative and Referendum* § 2 (1977 & Supp. 1995) (explaining limitations on referendum).

12. *Voters*, 8 Cal. 4th at 774-75, 884 P.2d at 650-52, 35 Cal. Rptr. 2d at 819-21. The argument had its roots in the predecessor to article XI(1)(b), that is article XI, § 5, which came into existence in 1933 by amendment. *Id.* VFRR argued that the 1933 amendment, as shown by the election ballot, proved that the legislature had intended to subject employee compensation to referendum. *Id.* The ballot stated, "[t]he act which is validated by this constitutional amendment . . . provides that state laws fixing salaries . . . may be superseded by ordinance hereafter adopted, subject to regular . . . referendum powers of the people." *Id.* at 775, 884 P.2d at 650-51, 35 Cal. Rptr. 2d at 819-20 (citation omitted).

13. *Voters*, 8 Cal. 4th at 774-75, 884 P.2d at 650-51, 35 Cal. Rptr. 2d 819-20.

14. *Id.* California Constitution Article XI, § 13 states in pertinent part:

> The provisions of sections 1(b) . . . of this Article relating to matters affecting the distribution of powers between the Legislature and cities and counties, . . . shall be construed as a restatement of all related provisions of the Constitution in effect immediately prior to the effective date of this amendment, and as making no substantive change.

CAL. CONST. art XI, § 13.

15. *Voters*, 8 Cal. 4th at 776, 884 P.2d at 651, 35 Cal. Rptr. 2d at 820. Justice Mosk explained that in article XI, § 13, "the restriction of the local right of referendum does not affect the distribution of power between the counties and the Legislature; rather it concerns the apportionment of local legislative power between the boards of supervisors and the county electorate." *Id.* at 775-76, 884 P.2d at 651, 35 Cal. Rptr. 2d at 820. Thus, he noted, the article could not be read as preserving the referendum provisions of former article XI, § 5. *Id.* (citing Committee of Seven Thousand v. Superior Court, 45 Cal. 3d 491, 511-12, 754 P.2d 708, 720-21, 247 Cal. Rptr. at 362, 374-75 (1988)).

endum over public employee compensation.[16] In sum, article XI(1)(b) by itself neither guaranteed nor restricted the electorate's right to vote by referendum on county supervisors' decisions regarding employee compensation.[17]

2. The California Government Code Section 25123(e) Exemption From Referendum is Constitutionally Justified Because, When Considered With Other Related Statutes, it Advances Legislative Goals That are a Matter of Statewide Concern

First, the court explained that the electorate's rights in cities and counties to referendum derive from article II, section 11[18] of the California Constitution.[19] Accordingly, the electorate is not to be deprived of this right absent a clear showing of legislative intent.[20] The requisite intent is shown when a statute is required to take effect immediately.[21] The court pointed out that section 25123(e)[22] parallels section 3751[23] of the California Election Code, which allows for certain classes of ordinances that must go into effect immediately to be immune from referen-

16. *Voters*, 8 Cal. 4th at 774-75, 884 P.2d at 650-51, 35 Cal. Rptr. 2d at 819-20. Justice Mosk simply pointed out that article XI, § 5 as it existed "immediately prior" to the present article XI(1)(b) had deleted all references to referendum, and thus the only part preserved would be an article void of references to referendum. *Id.* at 774-75, 884 P.2d at 650-51, 35 Cal. Rptr. 2d at 819-20. For a more complete survey of former article XI, § 5 see John W. Witt, *State Regulation of Local Labor Relations: The Demise of Home Rule in California?*, 23 HASTINGS L.J. 809 (1972).

17. *Voters*, 8 Cal. 4th at 775, 884 P.2d at 651, 35 Cal. Rptr. 2d at 820.

18. CAL. CONST. art. II, § 11.

19. *Voters*, 8 Cal. 4th at 776, 884 P.2d at 652, 35 Cal. Rptr. 2d at 821. *See* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 175-179 (9th ed. 1987 & Supp. 1994); *see also*, 82 C.J.S. *Initiative and Referendum* § 115-117 (1984 & Supp. 1995) (discussing initiative and referendum).

20. *Voters*, at 776-77, 884 P.2d at 652, 35 Cal. Rptr. 2d at 821. *See* Associated Home Builders v. Livermore, 18 Cal. 3d. 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976) (explaining the liberal interpreting of initiative and referendum powers); *see also* Collins v. San Francisco, 112 Cal. App. 2d 719, 730, 247 P.2d 362, 369 (1952) (stating that absent a clear showing of legislative intent local laws by the board of supervisors are presumed subject to referendum).

21. *Voters*, 8 Cal. 4th at 777, 884 P.2d at 652, 35 Cal. Rptr. 2d at 821.

22. CAL. GOV'T CODE § 25123(e) (West 1981 & Supp. 1995).

23. CAL. ELEC. CODE § 3751 (West 1981 & Supp. 1995).

dum.[24] Therefore, as section 25123(e) is specifically required to take effect immediately, it is valid.[25]

Next, the court explained that the people's general right to referendum derived from article II, section 9.[26] This could be restricted only by the exceptions found implicitly within the article and also by the legislature's power to enact laws that advance goals of statewide importance.[27] While section 25123(e) deals with local MOUs, the court found that the statute, when viewed in conjunction with the Meyers-Milias-Brown Act[28] [hereinafter MMBA], addressed a matter of statewide concern.[29]

The MMBA deals extensively with the negotiating process of labor contracts between public employers and public employees.[30] The culmination of the negotiations between the two parties is the MOU.[31] The MOU is then considered a binding agreement and takes effect immediately.[32] Consequently, it is immune from referendum.[33] The court noted that MOU immunity was justified because the salaries of public employ-

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24. *Voters*, 8 Cal. 4th at 777-78, 884 P.2d at 652-54, 35 Cal. Rptr. 2d at 821-22. County ordinances in California, are to take effect 30 days after being passed unless the ordinance is excepted by the statute. *Id.* Within these 30 days, if voters acquire the requisite number of signatures for a referendum, the board of supervisors for the county must either suspend the ordinance or put it up for a referendum vote. *Id.* Thus, if an ordinance takes effect upon passage, it is subject to a referendum vote. *Id.*; *see* CAL. ELEC. CODE § 3751-3754 (West 1981 & Supp. 1995); Donald S. Greenberg, *The Scope of Initiative and Referendum in California*, 54 CAL. L. REV. 1717 (1966) (discussing the referendum procedure).

25. *Voters*, 8 Cal. 4th at 777-78, 884 P.2d at 652-54, 35 Cal. Rptr. 2d at 821-22.

26. *Id.* at 777-78, 884 P.2d at 652-54, 35 Cal. Rptr. 2d at 821-22 (citing CAL. CONST. art. II, § 9, cl. a).

27. *Id.* at 777-80, 884 P.2d at 652-54, 35 Cal. Rptr. 2d at 821-23. *See* 7 B.E.WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 123-124 (9th ed. 1987 & Supp. 1994); 38 CAL. JUR. 3D *Initiative and Referendum* §§ 2, 3, 11, 56, 58 (1977 & Supp. 1995) (explaining the different parts of the referendum process); Michael B.P. Wilmar, Note, *Judicial Limitation on the Initiative and Referendum in California Municipalities*, 17 HASTINGS L.J. 805 (1966) (detailing exceptions to referendum power).

28. CAL. GOV'T CODE § 3500 (West 1981 & Supp. 1995).

29. *Voters*, at 779-84, 884 P.2d 653-56, 35 Cal. Rptr. 2d at 822-25. *See* International Bhd. of Elec. Workers Local Union 1245 v. City of Gridley, 34 Cal. 3d 191, 202, 666 P.2d 960, 966, 193 Cal. Rptr. 518, 523 (1983) (stating that matters dealing with the MMBA were matters of statewide concern).

30. *Voters*, 8 Cal. 4th at 780-81, 884 P.2d 654-55, 35 Cal. Rptr. 2d at 823-24. For indepth discussions of the MMBA see 52 CAL. JUR. 3D *Public Officers* §§ 184-186 (1977 & Supp. 1995); Joseph R. Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719 (1972); Robert W. Stroup, *The Collective Bargaining Process at the Municipal Level Lingers in its Chrysalis Stage*, 14 SANTA CLARA L. REV. 397 (1974).

31. *Voters*, 8 Cal. 4th at 781-84, 884 P.2d at 654-55, 35 Cal. Rptr. 2d at 823-24.

32. *Id.* at 778, 884 P.2d at 652, 655, 35 Cal. Rptr. 2d at 821, 824.

33. *Id.* at 778, 884 P.2d at 652, 35 Cal. Rptr. 2d at 821.

ees were a matter of statewide concern and because referendum would have a disastrous effect on the negotiating process.[34] Section 25123(e), therefore, was constitutional,[35] and consequently, ordinance No. 1161, as passed by the county supervisors was immune from referendum.[36]

B. Justice Kennard's Concurring Opinion

In Justice Kennard's concurring opinion, she disagreed with the majority's contention that the earlier version of article XI(1)(b), former article XI, section 5, secured to county voters the right of referendum on ordinances affecting county employee compensation.[37] Such a right, she argued, was not guaranteed because the authors of article XI, section 5 did not insert express language granting this right.[38] Therefore, former article XI, section 5 did not guarantee the right of referendum to local voters on county employee compensation ordinances.[39]

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34. *Id.* at 781-84, 884 P.2d at 655-56, 35 Cal. Rptr. 2d at 824-25. If the electorate were allowed referendum votes on MOUs it would effectively undermine the purpose of the MMBA and sanction bad faith bargaining. *Id.* In essence, once the county board of supervisors had come to an agreement with public employees over any issue, the board would not be able to insure that the agreement would be implemented without being subject to veto by referendum. *Id.*; *see* Glendale City Employees' Ass'n v. City of Glendale, 15 Cal. 3d 328, 336, 540 P.2d 609, 614, 124 Cal. Rptr. 513, 518 (1975), *cert. denied*, 424 U.S. 943 (1976) (holding that the procedures established by the MMBA would be meaningless if MOUs could be rendered void by a third party).

35. *Voters*, 8 Cal. 4th at 783-84, 884 P.2d at 656, 35 Cal. Rptr. 2d at 825.

36. *Id.* at 784-86, 884 P.2d at 656-58, 35 Cal. Rptr. 2d at 825-27. The last question that the court addressed was over the actual implementation of the MOU that put the new county retirement plan into affect. *Id.* The board of supervisors passed the MOU in November, but it was not until December that the actual ordinance was ratified through a subsequent vote on the amendment to the old retirement plan. Consequently, there was a question of whether the ordinance actually fell within the procedures of section 25123(e). *Id.* However, the court stated that the ordinance, which officially came into effect in December, related specifically to the implementation of the MOU passed in November. The ordinance, therefore, fell within the procedures of section 25123(e). *Id.*

37. *Id.* at 786-90, 884 P.2d at 658-60, 35 Cal. Rptr. 2d at 827-29 (Kennard, J., concurring).

38. *Id.* at 778-79, 884 P.2d at 659-60, 35 Cal. Rptr. 2d at 828-29 (Kennard, J., concurring).

39. *Id.* (Kennard, J., concurring).

III. IMPACT AND CONCLUSION

Article XI(1)(b) was amended in 1933 and 1962 and reached its present form through another amendment in 1970.[40] Depending on whose interpretation one follows, it is possible that initially Article XI(1)(b) gave voters the right of referendum with regard to decisions about public employee compensation.[41] In *Voters*, however, the court made clear that the current article XI(1)(b), neither restricts nor inhibits the right of referendum on public employee compensation decisions.[42] In the future, therefore, article XI(1)(b) will not be the basis of referendum debates dealing with public employee compensation.

It is also apparent that the California Legislature may constitutionally restrict the right to referendum on subjects that appear to be strictly local.[43] This can be done by enacting statutes such as section 25123(e) where the issue addressed is of statewide concern.[44] The difficult task in the future will be for California judges to determine whether something is of local or statewide concern.

The practical ramifications of *Voters* are plain. First, Article XI(1)(b) of the California Constitution neither restricts nor inhibits the right to referendum in matters regarding public employee compensation.[45] Second, the people's right to referendum is not absolute.[46] Instead, it can be restricted by both the implicit language of the Constitution and by statute where the restriction addresses a matter of statewide concern.[47] The difficulty for courts will be in discerning what constitutes a matter of statewide concern.

It remains unclear, however, whether the *Voters* decision will deprive citizens of the fundamental freedom to impact local policy.

WILLIAM ANTHONY BAIRD

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40. *Voters*, 8 Cal. 4th at 771-77, 884 P.2d at 817-21, 35 Cal. Rptr. 2d at 648-52.

41. *Id.* at 770-90, 884 P.2d at 816-29, 35 Cal. Rptr. 2d at 647-60. The conflict exists between Justice Kennard and the remaining members of the court. *Id.*

42. *Id.* at 770, 884 P.2d at 816, 35 Cal. Rptr. 2d at 647.

43. *Id.* at 780-84, 884 P.2d at 823-25, 35 Cal. Rptr. 2d at 654-57.

44. *Id.*

45. *Id.* at 770, 884 P.2d at 816, 35 Cal. Rptr. 2d at 647.

46. *Id.* at 776-84, 884 P.2d at 821-25, 35 Cal. Rptr. 2d at 652-57.

47. *Id.*

SUMMARIES

I. Civil Procedure

A court's finding that a defendant cannot reasonably be served except by publication of the summons is not sufficient to show that the defendant was not amenable to the process of the court.

Watts v. Crawford, Supreme Court of California, decided July 6, 1995, 10 Cal. 4th 743, 896 P.2d 807, 42 Cal. Rptr. 2d 81.

Facts. On February 8, 1989, plaintiffs filed an action against defendants alleging breach of a contract to sell real property. The court issued defendants a summons, though despite reasonable diligence, the plaintiffs nor the licensed process server succeeded in serving defendants. On February 6, 1992, plaintiffs petitioned the court for an order authorizing service of the summons by publication. The trial court, finding that publication was the only reasonable method of serving the defendant, authorized the service by publication. The service by publication would not have been effective until three years and forty-eight days after the action was commenced. In April 1992, the court granted defendant's motion to dismiss the action for failure to effectuate service of process within the three year time limit prescribed by statute. The appellate court affirmed.

Holding. The California Supreme Court unanimously affirmed. An action must be dismissed if the defendant is not timely served. The time within which service must be effected may be tolled under the California Code of Civil Procedure section 583.240(a) if the party to be served is not amenable to process of the court. Amenability to process equates to being subject to the state's exercise of personal jurisdiction. A court's finding that service cannot reasonably be accomplished except by publication, which is a prerequisite to a court's authorizing service by publication, is insufficient to show that the defendant was not amenable to the process of the court. Because the defendant was a resident of California, owned property in California, and allegedly committed an act within California that gave rise to the cause of action, the court held that the

defendant possessed sufficient minimum contacts to be subject to the jurisdiction of the state. Therefore, the defendant was amenable to process. No tolling occurred during the time within which service must have been made, and consequently the dismissal of the suit was mandatory.

II. Compromise and Settlement

The term "party" in Code of Civil Procedure section 664.6 refers solely to litigants; thus, parties cannot be bound by settlement agreements signed only by their attorneys.

Levy v. Superior Court, Supreme Court of California, decided June 22, 1995, 10 Cal. 4th 578, 896 P.2d 171, 41 Cal. Rptr. 2d 878 (1995).

Facts. Real party in interest, attorney Joseph Golant, brought suit against his client Abraham Levy to recover $360,000 in legal fees. The parties discussed a possible settlement which resulted in Golant's attorney signing a five-page settlement offer from Levy's attorney. When Golant refused to sign a formal settlement agreement, Levy brought suit under Code of Civil Procedure section 664.6 which at that time stated: "If parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." At trial, it was undisputed that Golant's attorney confirmed and accepted the terms of Levy's settlement offer. However, the trial court denied Levy's motion for entry of judgment ruling that a settlement agreement was not enforceable unless signed by the litigant. The court of appeal denied Levy's writ of mandate.

Holding. To resolve conflict among the courts of appeal, the California Supreme Court issued an alternative writ concluding that the term "parties" in section 664.6 referred to the litigants alone and did not encompass their attorneys of record. Levy contended that the term "party," as used in many civil procedure statutes, was commonly understood to include attorneys as well as the actual litigants. The court refused to apply the same definition to settlement agreements, reasoning that, unlike discovery motions, trial motions, and stipulations, settlement agreements impaired the cause of action itself by effectively terminating litigation and thus required express consent from the litigant. The court emphasized that its interpretation of the term "party" required the litigant's direct participation, ensured actual assent, and minimized the possibility of conflicting interpretations of the agreement.

III. Counties

A county has authority under the California Constitution to amend its charter and create a citizens law enforcement review board under the direction of the county board of supervisors. Furthermore, granting the review board the power to issue subpoenas is within the scope of power conferrable on county officers.

Dibb v. County of San Diego, Supreme Court of California, decided Dec. 12, 1994, 8 Cal. 4th 1200, 884 P.2d 1003, 36 Cal. Rptr. 2d 55.

Facts. San Diego County citizens voted to amend the county charter in 1990 which allowed the board of supervisors to establish a Citizens Law Enforcement Review Board (CLERB). The purpose of the CLERB was to review and investigate citizens' complaints against employees of the sheriff's department and the probate department concerning such matters as the use of excessive force, sexual harassment, and discrimination. In addition, the CLERB was to advise and make recommendations to the county board of supervisors concerning complaints against peace officers. The CLERB was also granted subpoena power in relation to its investigations.

Plaintiff Dibb filed a taxpayer's suit requesting a permanent injunction against the county to prevent it from spending tax dollars to implement the CLERB. Dibb claimed the county had no authority to create the review board and argued in the alternative that even if legally created, the CLERB could not legally issue subpoenas. The trial court denied plaintiff's application for the injunction, and the court of appeal affirmed holding that the county board of supervisors was authorized to create the CLERB under the state constitution.

Holding. The California Supreme Court affirmed the court of appeal's ruling, and held that the county was authorized to create the citizens review board under the California Constitution, Article XI, Section 4. The court found that under section 4(e) of the state constitution, the county had the right to define the powers of its own local government within constitutional limits, and that this right included the power to create citizens' committees to review and study problems of public interest. In

addition, the court found that the CLERB members were county officers within the meaning of the state constitution and that the county could grant the CLERB the power to issue subpoenas under the general "powers and duties" clause of the California Constitution.

IV. Criminal Law

A. Under California Welfare and Institutions Code, section 3201(c), a convicted felon involuntarily committed for narcotic addiction is not entitled to good behavior and participation credits to lessen the felon's determinate prison sentence if the crime was committed on or after January 1, 1983.

People v. Jones, Supreme Court of California, decided August 31, 1995, 11 Cal. 4th 118, 899 P.2d 1358, 44 Cal. Rptr. 2d 164.

Facts. Following a conviction for selling cocaine in 1991, the defendant was sentenced to five years imprisonment and received an involuntary civil commitment to the California Rehabilitation Center for narcotic addiction. After spending 382 days at the center, the defendant was excused and the criminal proceedings reinstated. Defendant sought to reduce his length of imprisonment by having a portion of the 382 days applied to his prison sentence. Defendant claimed that California Welfare and Institutions Code, section 3201(c), enables convicted felons to earn good behavior and participation credits that could have been earned pursuant to California Penal Code, section 2931, had they served their prison sentence instead of being involuntarily committed for drug addiction.

Holding. The supreme court dismissed the defendant's arguments and held that section 2931 of the California Penal Code, which was amended in 1982 through the addition of subdivision (d), reduces a convicted felon's determinate prison sentence by time spent in drug rehabilitation only if the offense was perpetrated before January 1, 1983. The court stated that while giving credits may constitute sound policy because it provides a positive incentive for drug rehabilitation, it is the duty of the state legislature rather than the courts to address this policy issue. Based on such rationale, the supreme court overturned the ruling of the court of appeal and held that since the defendant had sold cocaine after January 1, 1983, he was not entitled to apply credits from his past involuntary civil commitment in order to reduce his determinate prison sentence.

B. The determination of whether prior convictions were brought and tried separately, so as to justify a sentence enhancement for each prior conviction, is a question of law for the court.

People v. Wiley, Supreme Court of California, decided March 2, 1995, 9 Cal. 4th 580, 889 P.2d 541, 38 Cal. Rptr. 2d 347.

Facts. Defendant was charged with attempted murder, assault with a deadly weapon, and first and second degree burglary. It was also alleged that defendant had two prior convictions for first degree burglary. This allowed the prosecution to include two sentence enhancements pursuant to Penal Code section 667(a)(1), which provides that any person convicted of a serious felony will receive an additional five-year sentence enhancement for each prior serious felony conviction on charges "brought and tried separately." At trial, the jury found defendant guilty of the charged offenses. Prior to the jury's consideration of the prior convictions, defense counsel requested that the jury determine whether the prior charges were brought and tried separately. The court refused, stating that such a request was an issue of law to be decided by the court. The jury found the prior convictions, and consequently, the defendant's sentence included two five-year enhancements. However, the trial court did not expressly state that the prior convictions were brought and tried separately.

The court of appeal agreed with the trial court regarding the court's authority to decide whether the prior convictions were brought and tried separately. However, the court of appeal determined that there was insufficient evidence to actually prove that the charges were brought and tried separately, and the court therefore modified the defendant's sentence by striking one of the five-year enhancements.

Holding. The California Supreme Court reversed in part, but otherwise affirmed the decision of the court of appeal. The court affirmed the holding that the determination of whether prior convictions were brought and tried separately was a question of law for the court. The court explained that this determination depends upon interpretation of complex and detailed provisions of California criminal procedure and thus should be performed by the court and not the jury.

The supreme court reversed the portion of the court of appeal's decision that modified the defendant's sentence. The court held that the

evidence was sufficient to support a reasonable inference that the prior convictions were brought and tried separately. The court stated that the prosecution need not supply the filed complaints in order to prove that the charges were brought separately. The court found that because the separate convictions had case numbers that differed significantly it could reasonably be inferred that the charges were initiated separately. Therefore, the supreme court held that because the prior convictions were brought and tried separately, the defendant's sentence should include two five-year enhancements.

C. The trial court is not required to make an inquiry into the factual basis for an unconditional plea of guilty. In addition, an appellate court is free to entertain claims by a defendant which were not identified in the defendant's statement of grounds or the trial court's certificate of probable cause.

People v. Hoffard, Supreme Court of California, decided August 21, 1995, 10 Cal. 4th 1170, 899 P.2d 896, 43 Cal. Rptr. 2d 827.

Facts. On July 24, 1992, Randall Eugene Hoffard pleaded guilty as charged, without any conditions or promise as to sentence, to two counts of committing lewd acts with his under-fourteen stepdaughter. At that time, the defendant acknowledged that he understood the consequences of his plea and that he was fully advised of, understood, and expressly waived his constitutional trial rights. The court asked defense counsel if he concurred with the defendant's plea and would stipulate to a factual basis, to which counsel responded affirmatively.

At the sentencing hearing, the defendant was denied probation and was sentenced instead to two concurrent six-year prison terms. The defendant filed a notice of appeal and written statement in support of certificate of probable cause. In the written statement, the defendant identified only one issue for appeal: the denial of a pre-plea motion to dismiss. The trial court filed the requested certificate of probable cause.

The defendant's opening brief on appeal, however, presented a different ground for appeal: that there was an insufficient factual basis to support his admission of guilt. The court of appeal ruled that simply because the defendant presented one theory to the trial court in attempting to obtain the necessary certificate to appeal, it did not preclude him from raising a different issue once the certificate was granted. The court of appeal further held that defense counsel's stipulation, by itself, was inadequate to establish the factual basis for the plea and therefore re-

manded to the trial court to allow the prosecution to establish such a factual basis.

Holding. The California Supreme Court first examined whether the defendant could present a different theory on appeal than he had used to obtain a certificate of probable cause from the trial court. The supreme court looked at section 1237.5 of the California Penal Code and found no express limitation on the issues that may be raised on appeal once the certificate is granted. Furthermore, the supreme court reasoned that if the legislature had intended for a limitation to exist, they would have used language better suited for that purpose in the drafting of the section. The supreme court affirmed the court of appeal's decision that any nonfrivolous issue could be raised on appeal, regardless of what was stated in the defendant's statement of grounds to the trial court.

The supreme court then examined whether the court of appeal erred in concluding that the trial court made an insufficient inquiry into the factual basis of the defendant's plea. Looking to section 1192.5 of the California Penal Code, the supreme court reversed the court of appeal's decision to remand the case and held that the section 1192.5 only applies the requirement of a court inquiry into the factual basis of the plea to plea bargains, not unconditional pleas.

V. Schools

A court can vacate an injunction upon a change in the applicable law and does not abuse its discretion by denying a request for a modified injunction where no authoritative basis for request exists.

Salazar v. Eastin, Supreme Court of California, decided March 20, 1995, 9 Cal. 4th 836, 890 P.2d 43, 39 Cal. Rptr. 2d 21.

Facts. In 1985, Francisco Salazar and Irene Villalobos sought injunctive relief in superior court against the enforcement by the Superintendent of Public Instruction, the Department of Education, and the Board of Education, of California Education Code section 39807.5, which authorizes school districts to charge non-indigent parents and guardians for their child's public school transportation. The plaintiffs argued that section 39807.5 violated the equal protection and the free school clauses of the

California Constitution. Without considering the merits of the case, the trial court denied relief. Plaintiffs appealed and the appellate court decided the merits and remanded the case to the trial court for issuance of the injunction.

Although the defendants complied with the order, other school districts continued to charge for bussing, and twenty-five school districts brought suit in superior court seeking a declaratory judgment of the facial constitutionality of section 39807.5. The California Supreme Court declared in *Arcadia Unified School District v. State Department of Education* that the provision was facially discriminatory and noted that, though the decision did not affect the previous injunction, the court was confident that those parties would initiate the appropriate challenge to the injunction's continued enforcement.

The state defendants followed the court's suggestion and filed a motion to vacate. In response, the plaintiffs asked for a modification of the remedial order as to affect only four districts. They also requested that the court compel the state defendants' supervision of the enforcement of section 39807.5 within those four districts. The superior court vacated the injunction. The appellate court reversed and remanded for the issuance of a modified injunction.

Holding. The California Supreme Court applied an abuse of discretion standard and determined that the trial court did not abuse its discretion in vacating the injunction because a court has the power to do so where the underlying law has changed. Since the *Arcadia* ruling changed the law supporting the injunction, it was appropriately vacated.

The court also found no abuse of discretion in the trial court's refusal to modify the injunction and require defendants to oversee the enforcement of the statute, because plaintiffs had no authoritative basis for the request and because defendants' enforcement would contradict the language of section 39807.5 which explicitly grants discretion to the individual school district's governing boards.

VI. Sentencing

A. **A prisoner is not entitled to credit for presentence confinement unless the defendant shows that the same conduct which led to his conviction was the sole reason for the presentence custody.**

People v. Brunner, Supreme Court of California, decided May 4, 1995, 9 Cal. 4th 1178, 898 P.2d 1277, 40 Cal. Rptr. 2d 534.

Facts. On May 25, 1991, pursuant to an arrest warrant for three parole violations including fleeing from parole supervision, theft, and use of cocaine supported by a urine test, parole agents seized rock cocaine from the defendant's person. Although the defendant was released on his own recognizance for the possession of cocaine, he remained in custody for the parole violations.

On July 25, 1991, the parole board revoked the defendant's parole based on the three parole violations and the possession of cocaine. The defendant received a 12 month prison term and received full credit for the time he served between May 25 and July 25. On February 2, 1992, while the defendant was serving his parole revocation term, he pled guilty to possession of cocaine from the May 25 arrest and was sentenced to sixteen months. The trial court asserted that the defendant was not entitled to presentence credit.

The court of appeals found that because the parole board used the cocaine possession as part of the basis for revoking the defendant's parole, the defendant was entitled to credit for the time spent in prison following the parole hearing. Thus, the appellate court determined that the defendant was entitled to receive credit for the days spent in prison from July 25 to February 2 because the time was attributable to the same conduct.

Holding. The California Supreme Court reversed and held that a prisoner is not entitled to credit for presentence confinement unless the defendant shows that the same conduct which led to his conviction was the sole reason for the presentence custody. The court reasoned that California Penal Code, section 2900.5, is intended to prevent someone who is incarcerated before sentencing from having to spend more time in prison than someone who is convicted of the same offense but was not imprisoned prior to sentencing. The court pointed out that section 2900.5 does not allow credit for presentence confinement when there are other reasons for the presentence custody. The court determined that showing that the cocaine possession was a basis for the parole revocation and sentencing was insufficient because there were other unrelated violations involved that could alone establish revocation of parole. The defendant was therefore unentitled to credit of time served because he failed to

demonstrate that but for the possession of cocaine, he would not have been incarcerated.

B. **A defendant who is classified as a habitual offender under California Penal Code, section 667.7, and is convicted of murder must be sentenced under section 667.7. Furthermore, the minimum period of imprisonment should be determined by taking into account the term imposed by any prior sentence enhancements for serious felony convictions. Lastly, section 667.7 allows imposing consecutive life terms upon habitual defendants whose crimes are punishable under section 667.7.**

People v. Robert Earl Jenkins, Supreme Court of California, decided May 18, 1995, 10 Cal. 4th 234, 893 P.2d 1224, 40 Cal. Rptr. 2d 903.

Facts. On September 9, 1990 Robert Jenkins entered the residence of Raymond Pacheco, Ben Padilla, and Cecilia McLaughlin. He strangled and then fatally stabbed Pacheco. Afterwards, he threatened Padilla with a knife and then inflicted a serious injury to Padilla by hitting him in the head with a toaster. The state charged Jenkins with one count of murder and two counts of assault with a deadly weapon. The charges alleged that all three counts met the requirements of habitual offender status because Jenkins satisfied the requirement due to his two prior serious felony convictions. The trial court found that Jenkins did qualify as a habitual offender under California Penal Code, section 667.7, and Jenkins was therefore convicted of second degree murder and assault with a deadly weapon. The trial court sentenced Jenkins under the provisions of section 667.7 to a life sentence with a minimum of twenty years before probation, along with a three year term, which was enhanced ten years for the two prior felony convictions. However, the trial court struck both convictions because the court interpreted section 667.7 to mean that these sentences merged into the life sentence for the murder conviction.

The appellate court reversed and remanded. On remand, the trial court gave Jenkins the same sentencing as the previous trial court. The appellate court again reversed, this time because the trial court proceeded on the erroneous premise that it lacked discretion to impose sentences for separate offenses that would run consecutively to the life sentence imposed under section 667.7.

Holding. The supreme court reversed and held that the minimum time a defendant who is convicted of murder must serve is determined by taking into account terms imposed pursuant to any sentence enhancement for prior felony convictions. The court further held that a defendant who has committed more than one violent felony may receive consecutive life sentences as long as each felony independently would have subjected the defendant to a life sentence.

Hence, the supreme court found that Jenkins met the requirements of a habitual offender under section 667.7, and accordingly should be sentenced under that section. The court reasoned that section 667.7 must be interpreted as meaning that a defendant classified as a habitual offender and a murderer must serve a prison term equal in length to a non-habitual defendant convicted of murder and sentenced under a different section. Therefore, the habitual defendant convicted of murder could be sentenced under section 667.7. The court held that a sentence imposed under section 667.7 must be equal to terms served under other sentencing sections. Because other sentencing sections take into account sentence enhancements for prior felony convictions, section 667.7 should also take into account prior convictions in order for the sentence to be equal.

Lastly, the court explained that it is within the discretion of the sentencing court to impose back to back life sentences for felonies so long as each felony independently would have subjected the defendant to a life sentence.

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