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 the issues that have recently been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline and judicial misconduct cases have been omitted from the survey.

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I. ARBITRATION AND AWARD

In the absence of a legal excuse or subsequent modification of the parties' agreement, the failure to submit a timely dispute to arbitration precludes judicial enforcement of the right to arbitrate:

Platt Pacific v. Andelson.

I. INTRODUCTION

In Platt Pacific v. Andelson, the California Supreme Court considered whether Platt Pacific gave up their right to arbitration after failing to make a timely demand as specified in an alternative dispute resolution agreement signed by both parties. The supreme court concluded that "in the absence of legal excuse, a party's failure to timely demand arbitration results in a contractual forfeiture of the right to compel arbitration."

In response to litigation involving a construction contract, the parties entered into an arbitration agreement that set forth final dates by which a demand for arbitration must be filed if a settlement conference was not concluded. The defendants' attorney cancelled the scheduled settlement conference but stated he would reschedule. Although the parties discussed setting a new date, the settlement conference was never rescheduled.

The plaintiffs' attorney attempted to reschedule the settlement conference in October, 1989. The defendants failed to specify dates that would be acceptable for the conference, so the plaintiffs' attorney sent a written notification of intent to file a demand for arbitration. The plain-

2. Id. at 310, 862 P.2d at 160, 24 Cal. Rptr. 2d at 599.
3. Id. at 318-19, 862 P.2d at 165, 24 Cal. Rptr. 2d at 604.
4. Id. at 311, 862 P.2d at 160, 24 Cal. Rptr. 2d at 599. The agreement provided that a joint demand for arbitration would be filed with the American Arbitration Association no later than August 10, 1989. It further provided that if one party failed to cooperate in the filing of a joint demand for arbitration, the other party could file a demand for arbitration. Id. The agreement required that such a demand must be filed no later than August 31, 1989. Id. at 311, 862 P.2d at 160, 24 Cal. Rptr. 2d at 599.
5. When the conference was cancelled, the defendant's attorney agreed to reschedule, but later failed to discuss the matter with the plaintiff's attorney. Id. at 312, 862 P.2d at 161, 24 Cal. Rptr. 2d at 600. Filing a demand for arbitration was further delayed because of the August 28, 1989 death of Gilbert Platt, a principal of Platt Pacific, Inc. Id.
6. Id.
tiffs filed a demand with the American Arbitration Association on October 30, 1989, and petitioned the superior court to grant an order compelling arbitration.

The trial court denied the plaintiffs' petition to compel arbitration, holding that the plaintiffs failed to seek arbitration within the time set forth in the agreement. The court of appeal affirmed, holding that the defendants were not estopped from asserting a failure to make a timely demand for arbitration because the defendants' actions did not induce the plaintiff's failure to file such a demand. The supreme court granted review to resolve the uncertainty surrounding the meaning of "waiver" in cases in which a party fails to demand arbitration.

II. Treatment

Justice Kennard began by noting that private arbitration is governed by contract law, under which "parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." The court found that when the parties stipulate to a time within which a demand for arbitration must be made, "that demand is a condition precedent that must be performed before the contractual duty to submit the dispute to arbitration arises." Although legal reasons may

7. The American Arbitration Association found that the arbitration agreement was not self-executing, and that they lacked authority to arbitrate the matter without a court order. Id. The American Arbitration Association is a not-for-profit organization that provides assistance in selecting an arbitrator, administering arbitration hearings, and providing procedural rules to govern the conduct of hearings. See generally AMERICAN ARBITRATION ASSOCIATION, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE (1993); STEPHEN B. GOLDBERG, FRANK E. SANDER & NANCY H. ROGERS, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 202 (2d ed. 1992).

8. Platt Pacific, 6 Cal. 4th at 312, 862 P.2d at 161, 24 Cal. Rptr. 2d at 600.

9. Id.

10. Id. at 312-13, 862 P.2d at 161, 24 Cal. Rptr. 2d at 600.

11. Id. at 313, 862 P.2d at 161, 24 Cal. Rptr. 2d at 600. See infra notes 16-22, and accompanying text.

12. Platt Pacific, 6 Cal. 4th at 313, 862 P.2d at 161-62, 24 Cal. Rptr. 2d at 600-01 (citing CAL. CIV. CODE § 1434 (West 1982) (defining conditional obligation)). See 14 CAL. JUR. 3D Contracts §§ 200, 201 (1974) (discussing contracts operative on conditions and conditions precedent); Michael F. Hoellering, Arbitrability of Disputes, 41 BUS. LAW. 125 (1985) (discussing disputes which arise as to whether failure to comply with a condition precedent negates an agreement to arbitrate).

13. Platt Pacific, 6 Cal. 4th at 313-14, 862 P.2d at 162, 24 Cal. Rptr. 2d at 601. See
exist which would excuse the nonoccurrence of a condition precedent, a lack of intent to relinquish any rights does not excuse the failure of a condition that the party was able to perform.\textsuperscript{14} Thus, the court concluded that the plaintiff's failure to make a timely demand for arbitration constituted a "waiver," defined as the loss of a right due to failure to perform a condition precedent.\textsuperscript{15}

The plaintiffs argued that a determination of waiver cannot be made without considering "the state of mind of the party alleged to have waived arbitration, and the extent of prejudice to the other contracting party." The plaintiff argued that \textit{Jordan v. Friedman}\textsuperscript{16} established that the intent of the party failing to demand arbitration is not relevant. The court referred to the holding in \textit{Jordan} explaining that "[w]here a contract provides that a demand for arbitration must be filed within a stated time and the party desiring arbitration permits the agreed period to pass without making demand, he waives his right to arbitration."\textsuperscript{17} In \textit{Jordan}, the general contractor demanded arbitration both orally and in writing, evidencing that his waiver was not intended, but rather was a conse-

\textsuperscript{14} CAL. CIV. CODE § 1436 (West 1982) (defining condition precedent); 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, Contracts § 722 (9th ed. 1987) (discussing express and implied conditions).

\textsuperscript{15} \textit{Platt Pacific}, 6 Cal. 4th at 313-14, 862 P.2d at 162, 24 Cal. Rptr. 2d at 601 (citing 5 WILLISTON, Contracts § 676 (Walter H.E. Jaeger ed. 3d ed. 1961) (discussing excuses for non-performance of conditions)).

\textsuperscript{16} Platt Pacific, 6 Cal. 4th at 313-14, 862 P.2d at 162, 24 Cal. Rptr. 2d at 601 (citing 5 WILLISTON, Contracts §§ 678, 679 (Walter H.E. Jaeger ed. 3d ed. 1961) (discussing waiver as an excuse for non-performance and various meanings of waiver)). See E.L. Kellett, Annotation, \textit{Delay in Asserting Contractual Right to Arbitration as Precluding Enforcement Thereof}, 25 A.L.R. 3rd 1171, 1176 (1969) (defining "waiver" as a term for expressing the conclusion that a contractual right to arbitration has been lost). The court rejected the plaintiff's assertion that in an arbitration agreement, "waiver" is limited to "the voluntary relinquishment of a known right." \textit{Platt Pacific}, 6 Cal. 4th at 314, 862 P.2d at 162, 24 Cal. Rptr. 2d at 601. For an example of "waiver" as a voluntary relinquishment of a known right, see People v. Visciotti, 2 Cal. 4th 1, 79, 825 P.2d 388, 434, 5 Cal. Rptr. 2d 495, 541 (1992) (finding defendant's failure to object at trial as a "waiver" of error).

\textsuperscript{17} Platt Pacific, 6 Cal. 4th at 314, 862 P.2d at 161, 24 Cal. Rptr. 2d at 600.

\textsuperscript{18} 72 Cal. App. 2d 726, 165 P.2d 728 (1946). In \textit{Jordan}, a subcontractor sued a general contractor to foreclose a mechanics lien. Relying on an arbitration clause in the subcontract, the general contractor filed a motion to stay the proceedings pending arbitration. The general contractor, however, failed to comply with the provisions regarding the demand for arbitration. Therefore, the court of appeal held that the general contractor was foreclosed from compelling arbitration. \textit{Id.} at 726-27, 165 P.2d at 728-29.

\textsuperscript{19} Platt Pacific, 6 Cal. 4th at 316, 862 P.2d at 163, 24 Cal. Rptr. 2d at 602 (quoting \textit{Jordan}, 72 Cal. App. 2d at 727, 165 P.2d at 727).
quence of "failing to perform certain acts specified in the parties' contract." 19

Relying on Napa Association of Public Employees v. County of Napa, 20 the plaintiffs insisted that "a party should be deemed to have waived the right to arbitrate only when there has been an intent by that party to relinquish that right, and there is prejudice to the opposing party." 21 This view of waiver was identified by the Napa court which discussed, in dicta, a perceived split in authority as to what comprises a waiver of the right to arbitrate. The other view of waiver identified by Napa included failure to make a demand in accordance with an agreement. 22 The supreme court analyzed Napa and determined that what the Napa court perceived as divergent authority actually involved distinguishable cases. 23

Napa was distinguishable because it addressed the timeliness of submitting a labor grievance, not a demand for arbitration. 24 In Napa, an employee association did not file a grievance within the time specified in an employment agreement. The association, nonetheless, demanded arbitration within the specified time. 25 The court held that "the failure to timely submit a labor grievance was not a 'waiver' of the right to arbitrate in the absence of intentional relinquishment of the right or substantial prejudice" to the employer. 26 The court limited its holding to the grievance issue, stating that a contractual specification regarding arbitration was not at issue. 27

In examining the cases referred to by Napa, the supreme court found that the first line of case law addressed the consequences of the failure to demand arbitration within the time stated in the arbitration agreement, 28 whereas the second line of case law concerned dissimilar

19. Id.
21. Platt Pacific, 6 Cal. 4th at 316, 862 P.2d at 163, 24 Cal. Rptr. 2d at 602.
22. Id. at 316, 862 P.2d at 164, 24 Cal. Rptr. 2d at 603. For an example of "waiver" defined as the loss of a right, see Freeman v. State Farm Mut. Auto. Ins. Co., 14 Cal. 3d 473, 483, 535 P.2d 341, 347. 121 Cal. Rptr. 477, 483 (1975) (finding that the failure to demand arbitration within the time specified in a contract constitutes a waiver of the right to arbitrate).
23. Platt Pacific, 6 Cal. 4th at 316, 862 P.2d at 164, 24 Cal. Rptr. 2d at 603.
24. Id.
26. Id. at 270, 159 Cal. Rptr. at 527.
27. Platt Pacific, 6 Cal. 4th at 317, 862 P.2d at 164, 24 Cal. Rptr. 2d at 603.' See Napa, 98 Cal. App. 3d at 271, 159 Cal. Rptr. at 526.
issues from those presented in *Platt Pacific*. The latter cases involved arbitration agreements that require a demand for arbitration within a "reasonable time." The determination of what constitutes a reasonable time requires an examination of "the situation of the parties, the nature of the transaction, and the facts of the particular case." The supreme court regarded the determination of whether a demand for arbitration is timely, or reasonable, as dissimilar from determining the repercussions of a demand made after a stipulated time has passed.

The arbitration agreement in *Platt Pacific* stated that arbitration must be demanded by August 31, 1989. Because the plaintiffs did not demand arbitration until October 30, 1989, they failed to satisfy the condition precedent to the right to arbitrate.

Next, the supreme court addressed the plaintiffs' argument that the defendants' promise to reschedule the settlement conference was a waiver of the condition to timely demand arbitration. The court disagreed, finding that the undisputed facts failed to support the conclusion that the defendants had waived the condition precedent to demand arbitration within the time specified under either definition of waiver.

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30. *Platt Pacific*, 6 Cal. 4th at 318, 862 P.2d at 165, 24 Cal. Rptr. 2d at 604 (quoting *Spear v. California State Auto. Ass'n.*, 2 Cal. 4th 1035, 1043, 831 P.2d 821, 826, 9 Cal. Rptr. 2d 381, 386 (1992) (finding that the statute of limitations for an insured's cause of action against an insurer to compel arbitration of an uninsured motorist claim does not begin to run until the insurer refuses to submit to arbitration)).

31. Id.

32. Id. at 319, 862 P.2d at 165, 24 Cal. Rptr. 2d at 604.

33. Id. at 319, 862 P.2d at 165, 24 Cal. Rptr. 2d at 605. See 5 WILLISTON, *Contracts* § 676 (Walter H.E. Jaeger ed. 3d ed. 1961) (discussing the legal excuse of non-performance of a condition).

34. *Platt Pacific*, 6 Cal. 4th at 319-20, 862 P.2d at 166, 24 Cal. Rptr. 2d at 605. "[T]he determination of either waiver or estoppel is a question of fact, and the trier of fact's finding is binding on the appellate court." Id. at 319, 862 P.2d at 166, 24 Cal. Rptr. at 605. See *Keating v. Superior Court*, 31 Cal. 3d 584, 605, 645 P.2d 1192, 1204, 183 Cal. Rptr. 369, 372 (1982) (finding franchisor's filing of petition of removal of lawsuit to federal court did not result in waiver of franchisor's right to demand arbitration). "When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling." *Platt Pacific*, 6 Cal. 4th at 319, 862 P.2d at 166, 24 Cal. Rptr. 2d at 605.
defendants did not waive arbitration by forfeiting a right or failing to do a required act because they were not seeking arbitration, and therefore, were under no duty to demand it.\(^\text{35}\) Moreover, the Defendants did not waive the condition of a demand for arbitration within the meaning of voluntarily relinquishing a known right.\(^\text{36}\) The defense attorney's declaration regarding the rescheduling of the settlement conference did not modify the condition of a timely demand for arbitration.\(^\text{37}\) Moreover, if such conduct could be construed as a modification, it related to the rescheduling of the settlement conference, not the condition of the timely demand for arbitration.\(^\text{38}\)

Second, the court rejected the plaintiffs' argument that the defendants were "estopped from asserting the plaintiffs' failure to satisfy the condition precedent that arbitration be demanded within the specified time as a bar to arbitration."\(^\text{39}\) The court reasoned that because the defendants did not misrepresent any facts or mislead the plaintiffs to the latter's prejudice, the doctrine of equitable estoppel did not apply.\(^\text{40}\) The representation by the defendants' attorney that he would reschedule the settlement conference did not modify the contractual provision regarding the timely demand for arbitration.\(^\text{41}\) Hence, the plaintiffs could not assert that they relied on the defendant's offer to reschedule the settlement conference when they failed to demand arbitration within the time specified in the agreement. Therefore, the court held "that the condition precedent (the making of a timely demand for arbitration) was neither legally excused nor changed by modification of the parties' written agreement on the issue of arbitration."\(^\text{42}\)

\(^\text{35.}\) Platt Pacific, 6 Cal. 4th at 320, 862 P.2d at 166, 24 Cal. Rptr. 2d at 605.
\(^\text{36.}\) Id.
\(^\text{37.}\) Id. The offer to reschedule was made two months before the deadline for demanding arbitration and neither party discussed modifying the condition at the time. Id.
\(^\text{38.}\) Id.
\(^\text{39.}\) Platt Pacific, 6 Cal. 4th at 320, 862 P.2d at 166, 24 Cal. Rptr. 2d at 605.
\(^\text{41.}\) Platt Pacific, 6 Cal. 4th at 320, 862 P.2d at 166, 24 Cal. Rptr. 2d at 605. Further, the court noted that the delay in filing due to the death of Gilbert Platt, a principal of Platt Pacific, Inc., bolstered the judgment of the trial court that "neither defendants nor their attorney induced the failure by plaintiffs to timely file their demand for arbitration." Id.
\(^\text{42.}\) Id. at 321, 862 P.2d at 167, 24 Cal. Rptr. 2d at 606.
III. CONCLUSION

In Platt Pacific, the California Supreme Court distinguished contradictory appellate court decisions regarding the determination of "waiver" in the arbitration context. The supreme court differentiated cases in which a demand for arbitration must be made within a stipulated time from cases in which a demand for arbitration must be made within a "reasonable time." \(^{13}\) While Platt Pacific may have intended to allow the defendant ample opportunity to reschedule the settlement conference, it failed to protect its interest when it allowed the final date for a timely demand for arbitration to pass. \(^{44}\) It is now clear that in the absence of a clear legal excuse, a party must demand arbitration within the time-frame set forth in an agreement or forego the right to arbitration.

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43. See supra notes 28-31 and accompanying text.
44. See supra notes 33-42 and accompanying text.
II. AUTOMOBILES AND HIGHWAY TRAFFIC

Dismissal of criminal charges due to the unlawfulness of a motorist's arrest for driving under the influence does not prevent the Department of Motor Vehicles from independently determining the lawfulness of the arrest for the purpose of suspending the motorist's license: Gikas v. Zolin.

I. INTRODUCTION

In Gikas v. Zolin, the California Supreme Court resolved the issue of whether the Department of Motor Vehicles (hereinafter "DMV") was entitled to determine the lawfulness of a motorist's arrest in affirming the suspension of his license, even though the legality of the arrest had been determined in a prior criminal proceeding. Because the legislature had made no explicit provision addressing this point in the California Vehicle Code, the court answered this question in light of the existing provisions of the Vehicle Code and the available evidence of the legislature's intent.

Nicholas Gikas was arrested for driving while under the influence of alcohol. Pursuant to a statute directed at motorists with a specified blood-alcohol level, the DMV ordered the suspension of Gikas' license.

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2. Id. at 844-45, 863 P.2d at 747, 25 Cal. Rptr. 2d at 502.
3. Id. at 852, 863 P.2d at 752, 25 Cal. Rptr. 2d at 507.
4. See, e.g., CAL. VEH. CODE § 23152 (West 1985 & Supp. 1994) (making it a crime to drive while under the influence of alcohol); CAL. VEH. CODE § 13353.2 (West 1987 & Supp. 1994) (setting forth the procedures by which the DMV can suspend a motorist's license pursuant to an arrest for driving with a blood alcohol concentration of .08 or more).
6. Id. at 845, 863 P.2d at 747, 25 Cal. Rptr. 2d at 502.
7. California Vehicle Code section 13353.2(a) provides, in relevant part: "The department shall immediately suspend the privilege of any person to operate a motor vehicle if the person was driving a motor vehicle when the person . . . had 0.08 percent or more, by weight, of alcohol in his or her blood . . . ." CAL. VEH. CODE § 13353.2(a) (West Supp. 1994). Gikas was found to have a blood alcohol content of 0.10 percent, thus falling within the purview of this statute. Gikas, 6 Cal. 4th at 845,
In the criminal prosecution that followed, the municipal court granted Gikas' motion to suppress evidence due to the illegal nature of his arrest. The criminal case was later dismissed.

Despite this dismissal, the DMV proceeded to conduct an administrative hearing to determine the lawfulness of Gikas' arrest. California Vehicle Code section 13557(b)(2) states that if the arresting officer had insufficient cause to stop and arrest the motorist, then the suspension of the motorist's license must be rescinded. The DMV concluded, contrary to the finding of the municipal court, that Gikas' arrest was lawful and, accordingly, suspended his license for four months. The suspension was eventually overturned by the California Court of Appeal and the

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8. Pursuant to California Vehicle Code section 13353.2, the arresting officer served Gikas with a suspension order and a temporary license that allowed him to drive for 45 days before the suspension was to take effect. Id. at 845, 863 P.2d at 747, 25 Cal. Rptr. 2d at 502. For a treatment of the practical aspects of California Vehicle Code § 13353.2, see Charles A. Pacheco, Admin Per Se for the Practitioner, 24 PAC. L.J. 461 (1993) (outlining the guidelines of the DMV in conducting hearings, including the application of collateral estoppel). See also Christina P. Hurley et al., Transportation and Motor Vehicles, 24 PAC. L.J. 1061 (1993) (summarizing Vehicle Code provisions and the punitive measure of license suspension).


10. Id.

11. The process undertaken by the DMV in reviewing suspension orders is governed by section 13557(b)(2) of the California Vehicle Code, which states:

If the department determines in the review of a determination made under Section 13353.2, by the preponderance of the evidence, all of the following facts, the department shall sustain the order of suspension or revocation . . . :

(A) That the peace officer had reasonable cause to believe that the person had been driving a motor vehicle in violation of Section . . . 23152 . . . .

(B) That the person was placed under arrest . . . .

(C) That the person was driving a motor vehicle when the person . . . had 0.08 percent or more, by weight, of alcohol in his or her blood . . . .


13. Gikas, 6 Cal. 4th at 845, 863 P.2d at 747, 25 Cal. Rptr. 2d at 502. After the DMV affirmed the suspension of his license on administrative review, Gikas petitioned for a writ of administrative mandamus in superior court. Id. at 845, 863 P.2d at 747-48, 25 Cal. Rptr. 2d at 502-03. The superior court rejected Gikas' claim that the DMV was estopped from relitigating the lawfulness of his arrest. Id. at 845, 863 P.2d at 748, 25 Cal. Rptr. 2d at 503. The court of appeal stayed the suspension of Gikas' license and later reversed the lower court's holding, finding that the doctrine of collateral estoppel should be applied in favor of Gikas. Id. The DMV sought supreme court review. Id.

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DMV appealed. On appeal to the supreme court, Gikas advanced two arguments. First, he asserted that the doctrine of collateral estoppel barred the DMV from relitigating the legality of his arrest. Second, he contended that the dismissal of criminal charges against him amounted to an acquittal, thereby precluding the DMV from suspending his license.

14. Id.
15. The California Public Defender's Association, as amicus curiae, advanced a third argument on behalf of appellee, contending that section 1538.5(d) of the California Penal Code forbids the DMV from using evidence previously suppressed in a criminal hearing. Id. at 857, 863 P.2d at 756, 25 Cal. Rptr. 2d at 511. Subdivision (d) of section 1538.5 states: "If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section . . . are utilized by the people." CAL. PENAL CODE § 1538.5(d) (West 1982 & Supp. 1994).

Referring to this provision, the California Public Defender's Association sought to establish that the DMV hearing comes within the category of "any trial or other hearing" and that the People did not make the required use of "further proceedings authorized by this section," and therefore, the evidence was not admissible. Gikas, 6 Cal. 4th at 857, 863 P.2d at 756, 25 Cal. Rptr. 2d at 511. Justice Arabian responded to this argument in two ways. First, he observed that in the 26 years that this statutory provision has been in existence, no court has interpreted it to "require exclusion of evidence at an administrative hearing." Id. at 857-58, 863 P.2d at 756, 25 Cal. Rptr. 2d at 511. Second, he indicated that it was unlikely that the legislature had intended that the provision have any application at all to administrative hearings. Id. at 859, 863 P.2d at 757, 25 Cal. Rptr. 2d at 512. For a discussion on the admissibility of previously suppressed evidence in administrative proceedings, see 1 B.E. WITKIN, CALIFORNIA EVIDENCE, INTRODUCTION § 55 (3d ed. 1986 & Supp. 1993). See also 7 B.E. WITKIN, CALIFORNIA PROCEDURE, Judgment § 242 (3d ed. 1985 & Supp. 1990).

Justice Panelli, in his dissenting opinion, objected to the majority's treatment of section 1538.5. Gikas, 6 Cal. 4th at 866-67, 863 P.2d at 762, 25 Cal. Rptr. 2d at 517 (Panelli, J., dissenting). He disagreed with the majority's finding that § 1538.5 only applies in criminal cases. Id. at 867-68, 863 P.2d at 763, 25 Cal. Rptr. 2d at 518. Instead, he professed that the policy behind the statute is "to promote judicial economy." Id. at 868, 863 P.2d at 763, 25 Cal. Rptr. 2d at 518. Thus, the provision should apply in any setting where the exclusionary rule applies, including DMV hearings. Id. For a discussion of the methods used to ascertain legislative intent with respect to penal statutes, see 73 AM. JUR. 2D Statutes § 300 (1974 & Supp. 1993).

17. Id. In arguing that an acquittal prevents the DMV from suspending his license,
After considering the construction and legislative history of the applicable Vehicle Code provisions, the court held that the dismissal of charges based on a motorist’s unlawful arrest neither precludes a subsequent administrative hearing on the same issue, nor constitutes an acquittal for the purpose of prohibiting the DMV from suspending the motorist’s license.

II. THE COURT'S DECISION

A. Majority Opinion

The court analyzed and rejected both arguments presented by the plaintiff. It ruled that the DMV was within its authority in affirming the suspension of the plaintiff’s license, reversing the decision of the court of appeal.

1. The Doctrine of Collateral Estoppel Does Not Bar the DMV From Relitigating the Legality of the Plaintiff’s Arrest

The court outlined the necessary elements of collateral estoppel: (1) the issue sought to be precluded must be identical to the issue that was decided in a prior proceeding; (2) the issue must have been actually litigated in a prior proceeding; (3) the issue must have been necessarily decided in a prior proceeding; (4) the decision must be final and on the merits; and (5) the party against whom collateral estoppel is sought must be the same as, or in privity with, the party in the prior proceeding.


21. The supreme court first addressed the argument on collateral estoppel, and then discussed the argument on acquittal. Id. at 848, 853, 863 P.2d at 750, 753, 25 Cal. Rptr. 2d at 505, 508. In addition, the court addressed the amicus curiae argument asserted on Gikas' behalf. Id. at 857, 863 P.2d at 756, 25 Cal. Rptr. 2d at 511. See supra note 15.

22. Gikas, 6 Cal. 4th at 859, 863 P.2d at 757, 25 Cal. Rptr. 2d at 512.

23. Id. at 849, 863 P.2d at 750, 25 Cal. Rptr. 2d at 505 (citing Lucido v. Superior Court, 51 Cal. 3d 335, 341, 795 P.2d 1223, 1225, 272 Cal. Rptr. 767, 769 (1990), cert.
denied, 500 U.S. 920 (1991)). The court stated that even if the elements of collateral estoppel are established, it will refrain from applying the doctrine if doing so would "not serve its underlying fundamental principles." *Id.* (citing *Lucido*, 51 Cal. 3d at 339, 795 P.2d at 1224, 272 Cal. Rptr. at 768).

*Lucido* involved an individual who was charged with indecent exposure. *Lucido*, 51 Cal. 3d at 340, 795 P.2d at 1224, 272 Cal. Rptr. at 768. At a probation revocation hearing addressing this charge, the court found that the state could not prove that the defendant had committed the crime. *Id.* at 340-41, 795 P.2d at 1224-25, 272 Cal. Rptr. at 768-69. The issue then arose as to whether the superior court could be collaterally estopped from subsequently relitigating the issue in a criminal trial. *Id.* at 341, 795 P.2d at 1225, 272 Cal. Rptr. at 769. After concluding that a probation hearing has a limited purpose that is distinct from that of a criminal prosecution, the court held that the defendant was not entitled to rely on the doctrine. *Id.* at 351-52, 795 P.2d at 1226, 272 Cal. Rptr. at 769. The majority pronounced that to prevent the criminal court from considering the issue would be to "unduly expand the designated function of the revocation hearing and undermine the public interest in determining criminal guilt and innocence at criminal trials." *Id.* at 352, 795 P.2d at 1233, 272 Cal. Rptr. at 776 (emphasis added).

In *Lucido*, the court was more concerned with whether the underlying policy considerations surrounding the doctrine were served, and less with whether the elements were met. *Id.* at 342-43, 795 P.2d at 1226-27, 272 Cal. Rptr. at 770-71. The *Lucido* court explained that probation revocation hearings and criminal trials served different public interests. *Id.* at 347, 795 P.2d at 1229-30, 272 Cal. Rptr. at 773-74. The court noted that a probation revocation hearing focuses exclusively on whether probation should be changed or revoked, while a criminal prosecution attempts to convict a person for new crimes committed. *Id.* To effectively achieve both goals, the *Lucido* court believed that these state functions should be free from the grasp of obstructive judicial doctrines. *Id.* Further, it postulated that the benefits of determining guilt in the criminal courtroom outweigh the need for a prophylactic application of collateral estoppel. *Id.* at 350-51, 795 P.2d at 1232, 272 Cal. Rptr. at 776.

The supreme court in *Gikas* went one step further than it did in *Lucido*. Unlike the *Lucido* court, which saw no need to mention privity (the district attorney represented the state in both proceedings, thus meeting the "same party" requirement), the court in *Gikas* used the concept of privity as a vehicle for implementing the policy goals articulated in the opinion. *Gikas*, 6 Cal. 4th at 849, 863 P.2d at 750, 25 Cal. Rptr. 2d at 505. The court reiterated that "[t]he determination whether a party is in privity with another for purposes of collateral estoppel is a policy decision." *Id.* (quoting Dyson v. State Personnel Bd., 213 Cal. App. 3d 711, 724, 262 Cal. Rptr. 112, 119 (1989)). In its analysis, the *Gikas* court opined that restricting the DMV's ability to hold hearings was antithetical to the promotion of safer roadways. *Id.* Since privity is premised upon policy, the court inferred that privity does not exist. *Id.* The missing privity element enabled the court to prohibit use of the collateral estoppel doctrine. *Id.* By contrast, all five of the elements of collateral estoppel in *Lucido* were present, but the court nevertheless proscribed it. *Lucido*, 51 Cal. 3d at 351-52, 795 P.2d at 1226-33, 272 Cal. Rptr. at 766. Therefore, in both cases the court ultimately defeated the application of collateral estoppel where it was contrary to significant policy interests, but used different approaches to do so.
The DMV, after conceding four of the necessary factors, argued that the fifth element of privity was not established. The court's ensuing task was to decide whether the DMV was in privity with the prosecutor in the prior criminal proceeding for the purpose of applying the doctrine. While the majority noted the lower courts' disagreement as to what constitutes privity, it declined to offer a precise definition. Instead, it focused on the fact that the prosecutor and the DMV were functionally independent of one another, worked according to their own agendas, had limited resources, and did not otherwise interfere with each other's procedural affairs. The court concluded that to find privity under these conditions would be to "create it out of thin air."

Next, the court reasoned that the California Vehicle Code provided an inference that the legislature did not intend for collateral estoppel to apply in this context. The court stated that "[b]ecause the legislature


25. Id. at 849-51, 863 P.2d at 750-51, 25 Cal. Rptr. 2d at 505-06 (citing Zapata v. Department of Motor Vehicles, 2 Cal. App. 4th 108, 116, 2 Cal. Rptr. 2d 855, 860 (1991) (finding privity between the criminal prosecution and the DMV, thus barring the DMV from relitigating the issue of legality of arrest); Pawloski v. Pierce, 202 Cal. App. 3d 692, 698, 249 Cal. Rptr. 49, 52 (1988) (holding that the DMV was not in privity with prosecution and, thus, was not collaterally estopped from relitigating the issue of the defendant's willful failure to submit to blood testing); Buttiner v. Alexis, 146 Cal. App. 3d 754, 760, 194 Cal. Rptr. 603, 606 (1983) (finding that the DMV had no right to relitigate the lawfulness of a motorist's arrest because the DMV and the district attorney were in privity); Lofthouse v. Department of Motor Vehicles, 124 Cal. App. 3d 730, 736-38, 177 Cal. Rptr. 601, 604-05 (1981) (holding that the DMV was entitled to litigate the validity of the defendant's arrest, even though the criminal court dismissed the charges for lack of jurisdiction, because the DMV and criminal prosecutor were in privity); Shackelton v. Department of Motor Vehicles, 46 Cal. App. 3d 327, 331, 119 Cal. Rptr. 921, 923-24 (1975) (holding that the DMV was estopped from relitigating the municipal court's finding that the motorist's arrest was illegal)).
27. Gikas, 6 Cal. 4th at 850-51, 863 P.2d at 751, 25 Cal. Rptr. 2d at 506.
28. Id. at 851, 863 P.2d at 751, 25 Cal. Rptr. 2d at 506.
29. Id. at 851-52, 863 P.2d at 751-52, 25 Cal. Rptr. 2d at 506-07. The court noted that the legislature, when confronted with this issue, chose only to enact a provision that precludes an administrative hearing from having any collateral estoppel effect on a criminal proceeding, and not the other way around. Id.; see also Cal. Veh. Code
has specified exactly what preclusive effect the criminal proceeding has on the administrative, we may not grant greater preclusive effect ... "^30

2. The Dismissal of Criminal Charges Based on the Suppression of Evidence Does Not Constitute an Acquittal

In addressing Gikas' second assertion, the court considered section 13353.2(e) of the Vehicle Code, which directs that "[i]f a person is acquitted of criminal charges . . . the department shall immediately reinstate the person's privilege to operate a motor vehicle . . . ."^31 While recognizing that an acquittal would preclude the DMV from suspending Gikas' license, the court concluded that a dismissal of criminal charges based on a Fourth Amendment violation^32 did not constitute an acquittal within the meaning of the Vehicle Code. First, the court looked to the fact that the term "acquittal" is used throughout the Penal Code in contexts where the actual merits of the case were resolved. Second, the court referred to previous cases where it had interpreted the term "acquittal" to be confined to decisions reflecting the truth or falsity of allegations against the defendant. For these reasons, the court deduced that the

§ 13353.2 (West 1987 & Supp. 1994). Therefore, by inference, the legislature did not intend for collateral estoppel to apply in the reverse situation, unless there was an acquittal in the criminal proceeding. Gikas, 6 Cal. 4th at 851-52, 863 P.2d at 751-52, 25 Cal. Rptr. 2d at 506-07; see also CAL. VEHL. CODE § 13353.2(e) (West 1987 & Supp. 1994).

30. Gikas, 6 Cal. 4th at 852, 863 P.2d at 752, 25 Cal. Rptr. 2d at 507. The court made reference to several sections of the Vehicle Code that provide that "the results of the administrative proceeding have no collateral estoppel effect on the criminal prosecution." Id. at 851, 863 P.2d at 751, 25 Cal. Rptr. 2d at 506 (citing CAL. VEHL. CODE §§ 13353.2(e), 13557(f), 13558(g), 13559(b) (West 1987 & Supp. 1994)). Since no similar provisions in the Vehicle Code authorize the abrogation of collateral estoppel against an administrative agency, the court deduced that the legislature must not have intended for collateral estoppel to apply in that context. See supra note 29 and accompanying text.


32. "The federal Fourth Amendment restricts the states under the due process clause of the Fourteenth Amendment. Evidence obtained in violation of the Fourth Amendment exclusionary rule is inadmissible in state court." Gikas, 6 Cal. 4th at 867 n.2, 863 P.2d at 763 n.2, 25 Cal. Rptr. 2d at 518 n.2 (Panelli, J., dissenting) (citing Mapp v. Ohio, 367 U.S. 643 (1961)).

33. Id. at 857, 863 P.2d at 755-56, 25 Cal. Rptr. 2d at 510-11.

34. Id. at 854, 863 P.2d at 754, 25 Cal. Rptr. 2d at 509 (citing CAL. PENAL CODE §§ 654, 656, 793, 794, 1022, 1023, 1096, 1118, 1118.1, 1151, 1161, 1165, 1447 (West 1987 & Supp. 1994)).

35. Id. at 854-55, 863 P.2d at 754, 25 Cal. Rptr. 2d at 509 (citing People v.
term should not be expanded to include dismissals for reasons unrelated to the merits of the case, and the DMV was not restricted by section 13353.2(e) in affirming the suspension of Gikas' license.36

B. Justice Mosk's Dissenting Opinion

In his dissenting opinion, Justice Mosk asserted that the DMV should be collaterally estopped from relitigating an issue already determined by a criminal court.37 He proceeded to address the majority's treatment of both the privity relationship38 and the legislature's intent39 in enacting the relevant provisions of the Vehicle Code.40

Justice Mosk argued that the DMV and the district attorney were sufficiently connected to warrant a finding that they were in privity with one another.41 He added that to decide otherwise would be inconsistent with well-established principles of issue preclusion.42 After characterizing privity as premised upon whether the interest of one party adequately represents that of another,43 he pointed out that both the district attorney and the DMV represent the state, both have similar goals in protecting people from motorists driving under the influence, and both act to punish and deter these motorists.44 As such, he maintained that

Heishman, 45 Cal. 3d 147, 193, 763 P.2d 629, 660, 246 Cal. Rptr. 673, 709 (1988) (holding that "dismissal not based on any judicial determination with respect to the truth or falsity of the charge is not an acquittal . . . "), cert. denied, 488 U.S. 948 (1988); People v. Medina, 51 Cal. 3d 870, 907, 799 P.2d 1282, 1306, 274 Cal. Rptr. 849, 873 (1990) (deciding that dismissal of rape charges was not an acquittal because the dismissal was not based on the truth or falsity of the charges), aff'd, 112 S. Ct. 2572 (1991); People v. Ghent, 43 Cal. 3d 739, 774, 739 P.2d 1250, 1273, 230 Cal. Rptr. 82, 105 (1987) (holding that "[a] dismissal . . . is not an acquittal after prosecution [and] . . . is not a final determination of the matter").

36. Gikas, 6 Cal. 4th at 855, 863 P.2d at 754, 25 Cal. Rptr. 2d at 509.
37. Id. at 863, 863 P.2d at 760, 25 Cal. Rptr. 2d at 515 (Mosk, J., dissenting).
38. Id. at 863-64, 863 P.2d at 760-61, 25 Cal. Rptr. 2d at 515-16 (Mosk, J., dissenting).
40. See supra note 4 and accompanying text.
41. Gikas, 6 Cal. 4th at 863, 863 P.2d at 760, 25 Cal. Rptr. 2d at 515 (Mosk, J., dissenting). Justice Mosk argued that, under California law, "when two agents of the state substantially share a goal, resolution of an issue adversely to one binds the other." Id. (Mosk, J., dissenting) (citing People v. Sims, 32 Cal. 3d 468, 487-88, 651 P.2d 321, 333, 186 Cal. Rptr. 77, 88 (1982) (holding that the prosecutor was estopped from relitigating a finding by a county administrative agency that the defendant did not commit welfare fraud)).
42. Gikas, 6 Cal. 4th at 863-65, 863 P.2d at 760-61, 25 Cal. Rptr. 2d at 515-16 (Mosk, J., dissenting).
43. Id. at 863, 863 P.2d at 760, 25 Cal. Rptr. 2d at 515 (Mosk, J., dissenting) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 75 cmt. b (1982)).
44. Id. at 864, 863 P.2d at 760, 25 Cal. Rptr. 2d at 515 (Mosk, J., dissenting).
the fifth element of collateral estoppel was established and that the DMV should have been prevented from subsequently relitigating the issue.45

Justice Mosk further argued that the majority erroneously interpreted the legislative intent behind the relevant provisions of the California Vehicle Code.46 In support, Justice Mosk referred to a proposed, but rejected provision of the Vehicle Code, which provided that administrative action against a motorist would be entirely independent of criminal proceedings.47 Because this provision was excluded from the final draft, Justice Mosk reasoned that the legislature must have intended that normal collateral estoppel principles prevail.48 Finally, he cited authority49 that supported his belief that "a statute cannot be interpreted to include what was specifically excluded in the drafting process."50 Thus, Justice Mosk concluded that the majority erred in ignoring the clear intent of the

45. Id. at 863, 863 P.2d at 760, 25 Cal. Rptr. 2d at 515 (Mosk, J., dissenting).
46. Id. at 861, 863 P.2d at 758-59, 25 Cal. Rptr. 2d at 513-14 (Mosk, J., dissenting).
For a synopsis of the procedure used to ascertain legislative intent, see generally 82 C.J.S. Statutes §§ 321-22 (1953).
47. Gikas, 6 Cal. 4th at 860, 863 P.2d at 758, 25 Cal. Rptr. 2d at 513 (Mosk, J., dissenting) (citing S. 1623, 101st Cong., 50th Sess. § 4 (1989) (introduced in the California Senate on March 10, 1989, during the 1989-1990 Regular Session)). The relevant portion of this proposed bill provided that "[t]he determination of the facts in subdivision (a) [of section 13353.2] is a civil matter which is independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence." Id. (Mosk, J., dissenting) (quoting S. 1623, 101st Cong., 50th Sess. § 4 (1989) (introduced in the California Senate on March 10, 1989, during the 1989-1990 Regular Session)).
49. See, e.g., People v. Gangemi, 13 Cal. App. 4th 1790, 1798, 17 Cal. Rptr. 2d 462, 466-67 (1993) (maintaining that courts should not give effect to a provision of law previously rejected by the state legislature); Western Land Office, Inc. v. Cervantes, 175 Cal. App. 3d 724, 741, 220 Cal. Rptr. 784, 796 (1985) (concluding that the legislature's rejection of a statutory provision evidences the legislature's intent not to include that provision within an act); People v. Brannon, 32 Cal. App. 3d 971, 977, 108 Cal. Rptr. 620, 624 (1973) (asserting that courts must not give effect to provisions that are stricken by the legislature before the final draft).
50. Gikas, 6 Cal. 4th at 861, 863 P.2d at 759, 25 Cal. Rptr. 2d at 514 (Mosk, J., dissenting).
legislature, as evidenced by the legislature’s rejection of a statutory provision that would have prevented collateral estoppel from applying in the present case.  

III. CONCLUSION

Prior to Gikas, there was uncertainty as to the relationship between the criminal prosecution of a motorist and the DMV’s ability to impose additional penalties. The unique facts of Gikas allowed the court to clarify the scope of the DMV’s power to sanction motorists. Justice Ararian, writing for the majority, refused to allow the dismissal of a motorist’s criminal case to frustrate the DMV’s interest in deterring “the death and destruction that drunk drivers cruelly perpetuate on our highways.” The court’s decision affords state-run institutions greater power in protecting the public from motorists who drive under the influence. However, as Justice Mosk suggests in his dissenting opinion, the court’s holding may have the effect of substituting “judicial legislation” for the true intent of the state lawmakers. Furthermore, prudent decisions issued by skilled criminal court judges may later be ignored in favor of the conclusions of “a DMV official much less skilled, if skilled at all, in the rules of criminal procedure and constitutional law.”

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51. Id. at 861-62, 863 P.2d at 759, 25 Cal. Rptr. 2d at 514 (Mosk, J., dissenting).
52. See supra notes 23-28 and accompanying text (discussing the issue of privity between the DMV and the state prosecutor).
54. Id. at 862, 863 P.2d at 759, 25 Cal. Rptr. 2d at 514 (Mosk, J., dissenting) (quoting Brannon, 32 Cal. App. 3d at 977, 108 Cal. Rptr. at 624). In addition to Justice Mosk’s dissent, Justices Panelli and Kennard each wrote separate dissenting opinions. For a summary of Justice Panelli’s opinion, see supra note 15.

Justice Kennard, in her dissenting opinion, agreed with Justices Mosk and Panelli in believing that the majority misconstrued the intent of the legislature, but she emphasized a different statutory provision. Id. at 874, 863 P.2d at 767, 25 Cal. Rptr. 2d at 522 (Kennard, J., dissenting). Justice Kennard focused on Vehicle Code § 13358, which provides for the abrogation of collateral estoppel in a criminal proceeding when preceded by an administrative hearing. Id. (Kennard, J., dissenting) (citing CAL. VEHICLE CODE § 13358 (West 1987 & Supp. 1994)). Justice Kennard argued that this provision was the only limitation that the legislature intended to place on the doctrine of collateral estoppel. Id. at 874, 863 P.2d at 768, 25 Cal. Rptr. 2d at 523 (Kennard, J., dissenting). Finally, Justice Kennard proclaimed that banning collateral estoppel against the DMV would be antithetical to the legislative goals of an efficient, inexpensive, and “expedited driver’s license suspension system . . . .” Id. at 875, 863 P.2d at 768, 25 Cal. Rptr. 2d at 523 (Kennard, J., dissenting) (quoting Bell v. Department of Motor Vehicles, 11 Cal. App. 4th 304, 312, 13 Cal. Rptr. 2d 830, 833-34 (1992)).

55. Id. at 863, 863 P.2d at 760, 25 Cal. Rptr. 2d at 514 (Mosk, J., dissenting).
III. CIVIL PROCEDURE

A municipal court does not have standing to initiate an action in mandamus challenging the ruling of a superior court:
Municipal Court v. Superior Court (Gonzalez).

I. INTRODUCTION

In Municipal Court v. Superior Court (Gonzalez), the California Supreme Court addressed whether a municipal court has standing to challenge a ruling of a superior court through an action of mandamus. Were the action to be held appropriate, the supreme court would also determine whether the use of court commissioners by the municipal court to determine probable cause is statutorily and constitutionally permissible.

The supreme court reviewed and adopted the ruling of the court of appeal which denied a writ of mandamus sought by the Municipal Court for the East Los Angeles Judicial District (hereinafter "municipal court") against the Superior Court of Los Angeles County (hereinafter "superior court"). The defendants in the instant action were arrested without a warrant and the municipal court assigned court commissioners to determine whether probable cause existed to maintain custody. After a finding of probable cause by the commissioner, the defendants successfully pursued a writ of habeas corpus with the superior court. No appeal was filed with the superior court by the prosecution. Consequently, the mu-

1. 5 Cal. 4th 1126, 857 P.2d 325, 22 Cal. Rptr. 2d 504 (1993). Justice Baxter wrote the majority opinion in which Chief Justice Lucas and Justices Panelli, Arabian, and George concurred. Id. at 1128, 857 P.2d at 325, 22 Cal. Rptr. 2d at 504. Justice Mosk wrote a separate concurring opinion. Id. at 1133, 857 P.2d at 329, 22 Cal. Rptr. 2d at 508 (Mosk, J., concurring). Justice Kennard filed a separate concurring and dissenting opinion. Id. at 1133, 857 P.2d at 329, 22 Cal. Rptr. 2d at 508 (Kennard, J., concurring and dissenting).
2. The municipal court filed for a writ of mandate pursuant to California Code of Civil Procedure § 1085. Id. at 1128, 857 P.2d at 325, 22 Cal. Rptr. 2d at 504.
3. Id. at 1128, 857 P.2d at 325-26, 22 Cal. Rptr. 2d at 504-05.
4. Id. at 1128, 857 P.2d at 326, 22 Cal. Rptr. 2d at 505. See Gerstein v. Pugh, 420 U.S. 103 (1975) (holding that a probable cause determination is required); Riverside v. McLaughlin, 500 U.S. 44 (1991) (holding that a probable cause determination must be made within 48 hours of the arrest).
5. Gonzalez, 5 Cal. 4th at 1128, 857 P.2d at 326, 22 Cal. Rptr. 2d at 505.
6. Id.
nicipal court petitioned the court of appeal, initiating this action in man-
damus to challenge the superior court’s habeas corpus ruling. After the court of appeal denied the writ of mandate, the supreme
court granted its first review of the case. The justices remanded the mat-
ter back to the court of appeals “with directions to issue an alternative
writ.” The court of appeal again denied the writ, holding that “the mu-
nicipal court lacked standing to prosecute the mandate proceeding,”
thereby eliminating any need to address the additional question of consti-
tutionality of the commissioner’s probable cause determination. The su-
preme court adopted the court of appeal’s opinion almost verbatim.

II. TREATMENT OF THE CASE

A. Majority Opinion

The supreme court noted that “[i]t is fundamental that an action
must be prosecuted by one who has a beneficial interest in the out-
come.” The majority also established that in a mandamus action, the
“beneficial interest” in the outcome of a case belongs to the initial par-
ties and not the courts. According to the justices, the respondent court
is merely a “neutral party” in these proceedings.

The majority then examined cases with precedent beginning with
Municipal Court v. Superior Court (Sinclair). In Sinclair, the court
of appeal held that the municipal court was “not a party to the underly-
ing actions” and that “[t]he lower court may not challenge this ruling by
its own action in a higher court merely because one result of the ruling
requires the lower court to change a waiver form.”

Focusing on the arguably insignificant impact on the municipal court's operating procedure, the Gonzalez court explained that the superior court's decision did not prohibit the municipal court from assigning commissioners in future cases. Rather, it merely determined that the probable cause determination made in the present case was not valid.

The majority also cited Municipal Court v. Superior Court (Swenson) in support of their position. In Swenson, the court of appeal refused to decide the case on the merits because it found that the municipal court lacked standing to file the mandamus action. The court of appeal explained that while a municipal court may have reason to protest the "treatment of one of its decisions, or its procedures, at the hands of the reviewing court . . . if no individual party finds it worth his or her while to champion the cause and seek judicial review, then review will not occur."

After considering these cases, the supreme court rejected the municipal court's plea for a "'commonsense approach' in assessing its beneficial interest in obtaining an appellate ruling on the propriety of its use of court commissioners." The municipal court analogized the present case to those cases "brought for the purpose of vindicating a strong public interest." The majority was not persuaded by this argument however, largely because the court found no "public duty to use court com-

15. Id. at 24-25, 244 Cal. Rptr. at 593.
16. Gonzalez, 5 Cal. 4th at 1130, 857 P.2d at 327, 22 Cal. Rptr. 2d at 506.
17. 202 Cal. App. 3d 957, 249 Cal. Rptr. 182 (1988). In this case, the people filed an affidavit against a municipal court judge alleging prejudice. The judge, under duress, honored the affidavit which prompted a petition for writ of mandate by the defense seeking to compel the judge to deny the challenge. The superior court denied the petition. Subsequently, the municipal court filed its own petition for a writ of mandate. Id. at 959-60, 249 Cal. Rptr. at 183. For federal cases in accord, see D'Amico v. Schweiker, 698 F.2d 903 (7th Cir. 1983) (holding that an administrative law judge lacks standing to challenge administrative ruling of the Social Security Administration).
18. Gonzalez, 5 Cal. 4th at 1130-31, 857 P.2d at 327-28, 22 Cal. Rptr. 2d at 506-07.
20. Id. at 960, 249 Cal. Rptr. at 184.
21. Gonzalez, 5 Cal. 4th at 1132, 857 P.2d at 328, 22 Cal. Rptr. 2d at 507.
22. Id. (citing Green v. Obledo, 29 Cal. 3d 126, 144, 624 P.2d 256, 266, 172 Cal. Rptr. 206, 216 (1981) (recognizing exception to "beneficially interested" rule in a case where the question is one of public right); Board of Social Welfare v. County of Los Angeles, 27 Cal. 2d 98, 100-01, 162 P.2d 627, 628 (1945) (recognizing exception to "beneficially interested" rule in a case involving "public aid to the needy aged").
missioners to make probable cause determinations." The supreme court upheld the court of appeal's ruling that the municipal court did not have standing to bring the present action, and in so doing, the court declined to address the merits of the petition.

B. Justice Mosk's Concurring Opinion

While Justice Mosk concurred with the majority opinion, he took exception to the majority's statement that the ruling of the superior court "had no impact on the ability of the municipal court to continue assigning commissioners to make Gerstein-McLaughlin probable cause determinations." In Justice Mosk's opinion, the above mentioned comment was "wholly unnecessary to resolve this case," and should have been excluded.

C. Justice Kennard's Concurring and Dissenting Opinion

While Justice Kennard concurred with the majority's conclusion that the municipal court did not have standing to file for a writ of mandate in the present case, she criticized the broad rule set forth by the majority stating that a municipal court lacks standing to challenge a decision which has a significant affect on the procedure of that court. In her opinion, "a municipal court's interest in matters significantly affecting its operations is sufficient to grant it standing to challenge an adverse superior court ruling by petitioning for writ of mandate." Municipal courts have the power to make procedural rules under Government Code section 68070. According to Justice Kennard, "an

23. Gonzalez, 5 Cal. 4th at 1132, 857 P.2d at 328, 22 Cal. Rptr. 2d at 507.
24. Id. The court noted that "[i]n general, California courts have no power in mandamus or otherwise to render advisory opinions or give declaratory relief." Id. (quoting Swenson, 202 Cal. App. 3d at 961, 249 Cal. Rptr. at 185); see also Carsten v. Psychology Examining Commn., 27 Cal. 3d 793, 798, 614 P.2d 276, 279, 166 Cal. Rptr. 844, 847 (1980); People ex rel. Lynch v. Superior Court, 1 Cal. 3d 910, 912, 464 P.2d 126, 127, 83 Cal. Rptr. 670, 671 (1970); 43 CAL. JUR. 3D Mandamus and Prohibition § 35 (Supp. 1993) (discussing courts' inability to render advisory opinions).
25. Gonzalez, 5 Cal. 4th at 1133, 857 P.2d at 329, 22 Cal. Rptr. 2d at 508 (Mosk, J., concurring) (quotation omitted).
26. Id. at 1133, 857 P.2d at 329, 22 Cal. Rptr. 2d at 508 (Mosk, J., concurring). Justice Mosk also notes that the initial superior court order included a statement that commissioners may not make probable cause determinations, apparently finding it in conflict with the majority's added language. Id. (Mosk, J., concurring).
27. Id. (Kennard, J., concurring and dissenting).
28. Id.
29. Id. at 1135, 857 P.2d at 330, 22 Cal. Rptr. 2d at 509 (Kennard, J., concurring and dissenting) (citing Albermont Petroleum, Ltd. v. Cunningham, 186 Cal. App. 2d 84, 89, 9 Cal. Rptr. 405, 407 (1960)); see also 16 CAL. JUR. 3D Courts §§ 17, 160 (1983 & Supp. 1993) (discussing generally the inherent powers of courts); 2 B.E. WITKIN, CAL-1460
order invalidating a municipal court practice or procedural rule" may affect this power. 30 Therefore, "the municipal court, more than any other party, has the interest, knowledge, and motivation to litigate the legality of its practices and procedures." 31 Consequently, the municipal court will usually have the motivation to "press its case with vigor," which is what the "beneficially interested" requirement is designed to ensure, and therefore, should be permitted to appear on its own behalf in cases which significantly affect its procedures. 32

In support of her contention, Justice Kennard cited several cases in which a real party in interest and the respondent court each appeared separately when the legality of the respondent court's procedures were at issue. 33 Also cited were cases where the real party in interest did not challenge the main procedural issues, instead leaving the respondent court as the sole party opposing the petition for relief. 34

Finally, Justice Kennard cited cases indicating that "[w]hen a court does not prevail in a writ proceeding brought by a litigant attacking the validity of its procedures, it has always been permitted to seek review of the adverse ruling, either by filing a notice of appeal . . . or by filing a petition for review in this [the supreme] court." 35 According to Justice


30. Gonzalez, 5 Cal. 4th at 1135, 857 P.2d at 330, 22 Cal. Rptr. 2d at 500 (Kennard, J., concurring and dissenting).

31. Id. at 1136, 857 P.2d at 331, 22 Cal. Rptr. 2d at 510 (Kennard, J., concurring and dissenting).

32. Id. at 1136-37, 857 P.2d at 331, 22 Cal. Rptr. 2d at 510 (Kennard, J., concurring and dissenting) (quoting Common Cause v. Board of Supervisors, 49 Cal. 3d 432, 439, 777 P.2d 610, 613, 261 Cal. Rptr. 574, 577 (1989)).

33. Id. at 1137-38, 857 P.2d at 332, 22 Cal. Rptr. 2d at 511 (Kennard, J., concurring and dissenting); see, e.g., People v. Superior Court (Lavi), 4 Cal. 4th 1164, 847 P.2d 1031, 17 Cal. Rptr. 2d 815 (1993) (involving the timing requirements on a motion to disqualify a judge); Hernandez v. Municipal Court, 49 Cal. 3d 713, 781 P.2d 547, 263 Cal. Rptr. 513 (1989) (discussing a mandamus petition challenging jury draw in criminal action); Zumwalt v. Superior Court, 49 Cal. 3d 167, 776 P.2d 247, 260 Cal. Rptr. 545 (1989) (upholding local rule against challenge brought by court clerk's office).


35. Gonzalez, 5 Cal. 4th at 1138-39, 857 P.2d at 333, 22 Cal. Rptr. 2d at 512.
Kennard, all of these cases show that municipal and superior courts do not sit idly by when they are responding parties in an action challenging their procedures, and that "municipal as well as superior courts have actively litigated the legality of their operating procedures, without any suggestion that it was unseemly or inappropriate for them to do so."36

Justice Kennard asserted that she could find no reason to prohibit a municipal court from filing a petition for writ of mandate, "when it is otherwise permitted to use the judicial system in the same manner as any other litigant."37 Accordingly, Justice Kennard concluded that "when a ruling that appears to be legally unsound has a significant adverse effect on the operating procedures of a municipal court, the latter can initiate mandate proceedings for the purpose of overturning the ruling."38

III. CONCLUSION

The California Supreme Court's decision that a municipal court does not have standing to initiate an action in mandamus against a superior court ruling limits a municipal court's ability to set its own rules of procedure. While the outcome of the present case is arguably correct, the court's determination that a municipal court does not have a "beneficial interest" in the outcome of a case concerning its procedure seems contradictory to past supreme court decisions regarding similar issues, many of which were pointed out by Justice Kennard. A municipal court should be able to challenge superior court decisions which influence its procedure, and the current holding appears to limit its power to do so.

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(Kennard, J., concurring and dissenting); see, e.g., Lekse v. Municipal Court, 138 Cal. App. 3d 188, 187 Cal. Rptr. 698 (1982) (discussing the appeal by a municipal court ordered to consolidate related claims, effectively depriving the small claims court of jurisdiction); Olney v. Municipal Court, 133 Cal. App. 3d 455, 184 Cal. Rptr. 78 (1982) (involving an order compelling a municipal court to discontinue a local policy mandating appearance at readiness conferences of misdemeanor defendants); Solberg v. Superior Court, 19 Cal. 3d 182, 561 P.2d 1148, 137 Cal. Rptr. 460 (1977) (discussing the appeal by a municipal court ordered to disqualify a trial judge).

36. Gonzalez, 5 Cal. 4th at 1139, 857 P.2d at 333, 22 Cal. Rptr. 2d at 512 (Kennard, J., concurring and dissenting). Justice Kennard conceded that none of the cases cited involved a petition similar to that at issue in the case at bar, but in her opinion, this was not important. Id. at 1139-40, 857 P.2d at 333, 22 Cal. Rptr. 2d at 512 (Kennard, J., concurring and dissenting).

37. Id. at 1140, 857 P.2d at 333, 22 Cal. Rptr. 2d at 512 (Kennard, J., dissenting).

38. Id.
IV. CRIMINAL PROCEDURE

In evaluating a motion for substitution of counsel based on ineffective assistance of counsel, the trial court should only consider whether the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to effective assistance of counsel, regardless of whether the motion was made pre-trial or post-conviction: People v. Smith.

I. INTRODUCTION

In People v. Smith, the California Supreme Court addressed whether different standards of review applied to a criminal defendant’s motion for substitution of counsel based on when the motion was made. The court held that the same standard of review applies to both pre-conviction and post-conviction motions. As first enunciated in People v. Marsden, substitute counsel should only be appointed when the defendant has shown that failure to replace the attorney would “substantially impair the right to assistance of counsel.”

The defendant, Michael DeShawn Smith first moved for substitution of counsel after pleading guilty to a charge of second-degree murder. The trial court denied the motion, as well as Smith’s motion to withdraw his guilty plea. The court of appeal held that the trial court applied an

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4. Smith, 6 Cal. 4th at 696, 863 P.2d at 200, 25 Cal. Rptr. 2d at 130.
5. Id. at 688, 863 P.2d at 194, 25 Cal. Rptr. 2d at 124.
6. Id. at 689, 863 P.2d at 195, 25 Cal. Rptr. 2d at 125. The defendant was originally charged with first-degree murder with an enhancement for the use of a firearm. Id. at 687, 863 P.2d at 194, 25 Cal. Rptr. 2d at 124. According to testimony, the defendant’s attorney advised the defendant to plead guilty to the lesser charge of second-degree murder. Id. Although the defendant agreed, he argued that his plea
incorrect test in denying Smith's post-conviction motion for substitute counsel. The California Supreme Court granted review. The supreme court reversed the ruling of the court of appeal, finding that the trial court had not abused its discretion in denying Smith's motion. Furthermore, the court held that no shifting standard exists for the trial court to apply when evaluating a motion for substitute counsel.

II. TREATMENT

A. The Majority Opinion

In resolving the issue of what standard to apply when reviewing a motion for substitute counsel, the court cited People v. Marsden as the seminal case regarding such motions. In Marsden, the court held that "the decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney... is within the discretion of the trial court." The Marsden court further held, however, that even though there is no absolute right to more than one appointed attorney, the trial court must give the defendant the opportunity to explain the reasons for desiring a new attorney. Unless the defendant can show that a failure to replace the appointed attorney would substantially impair the defendant's right to effective counsel, denial of the motion does not constitute abuse of discretion.

People v. Marsden involved a pre-trial motion for substitute counsel. Accordingly, the Smith court explored the application of the Marsden ruling to cases involving post-conviction motions. For instance, in People v. Stewart, the court held that new counsel was to be appointed when the convicted defendant presented a "colorable claim" that he was ineffectively represented at trial. This was interpreted by was not with his full consent, and that his attorney "cussed [him] out because [he] didn't want to take the plea." Id. at 689, 863 P.2d at 195, 25 Cal. Rptr. 2d at 125.
7. Id. at 689, 863 P.2d at 193, 25 Cal. Rptr. 2d at 125.
8. Id.
9. Id. at 696-97, 863 P.2d at 200-01, 25 Cal. Rptr. 2d at 130-31.
11. Marsden, 2 Cal. 3d at 123, 465 P.2d at 47, 84 Cal. Rptr. at 159.
12. Id. at 123-25, 465 P.2d at 47-48, 84 Cal. Rptr. at 159-60.
13. Smith, 6 Cal. 4th at 691, 863 P.2d at 196, 25 Cal. Rptr. 2d at 126 (citing People v. Webster, 54 Cal. 3d 411, 285 Cal. Rptr. 31, 814 P.2d 1273 (1991)).
17. Id. at 396, 217 Cal. Rptr. at 311. The court further defined this standard as the
the Garcia court as the enunciation of a new and lesser standard by which defendants could raise the issue of ineffective assistance of counsel post-conviction.

Upon review, the court rejected this interpretation. The court proceeded on to explain that the Stewart court did not claim "to be establishing a lesser standard than that stated in Marsden." Instead, a defendant has no greater right to substitute counsel at the later stage than at an earlier stage. While the court conceded that it might be awkward for the appointed attorney to argue his own incompetence in post-conviction motions, the court pointed out that the determination of counsel's adequacy "must always be based on what has happened in the past," not potential conflicts in subsequent proceedings.

In addition, the court emphasized the importance of the fact that substitute counsel would be appointed upon a proper showing by the defendant. The court commented that the proper focus of the inquiry was not the time at which such a request was made.

In applying the standard enunciated in Marsden to the facts of the Smith case, the court found that the trial court did not abuse its discretionary power in denying Smith's motion. Once Smith was allowed to state his complaints, the court concluded that his allegations were insufficient to support a finding that his right to effective assistance of coun-

following: "if he credibly establishes to the satisfaction of the court the possibility that trial counsel failed to perform with reasonable diligence and that, as a result, a determination more favorable to the defendant might have resulted in the absence of counsel's failings." Id.

19. Id. at 1378, 278 Cal. Rptr. at 425. The Garcia court "perceived a difference between the pretrial Marsden rule and the posttrial Stewart rule." Id. According to the Garcia court, the "Marsden and Stewart inquiries do not stand on equal footing." Smith, 6 Cal. 4th at 692, 863 P.2d at 197, 25 Cal. Rptr. 2d at 127.
20. Id. at 694, 863 P.2d at 198, 25 Cal. Rptr. 2d at 128.
21. Id.
22. Id.
23. Id. at 694, 863 P.2d at 199, 25 Cal. Rptr. 2d at 129. This is the case here, as Smith's attorney is consequently placed in the position of presenting his own incompetence as the basis for the defendant's motion to withdraw his plea.
24. Smith, 6 Cal. 4th at 695, 863 P.2d at 199, 25 Cal. Rptr. 2d at 129. "It is the very nature of a Marsden motion, at whatever stage it is made, that the trial court must determine whether counsel has been providing competent representation." Id. (emphasis added).
25. Id.
26. Id.
27. Id. at 696, 863 P.2d at 200, 25 Cal. Rptr. 2d at 130.
sel would be substantially impaired if his motion was not granted. Accordingly, the court reversed the judgment of the court of appeal.

B. The Concurring Opinion

In his concurring opinion, Justice Baxter stated his approval of the majority's application of Marsden to post-conviction motions as well as pre-trial motions. However, Justice Baxter further noted that the majority failed to resolve all of the issues raised by Smith's motion.

Justice Baxter distinguished between allegations of inadequacy based on matters observed by the court and those matters unobserved by the court. In his opinion, when allegations of inadequate counsel are based on matters not directly observed by the court, the trial court should have broad discretion to deny motions for substitute counsel as well as motions for a new trial or motions to withdraw a plea.

Section 1181 of the Penal Code provides an exclusive list of grounds for granting a motion for new trial. Although ineffective assistance of counsel is not enumerated therein, the court has previously held that a trial court's duty to ensure that trials are "conducted with respect for the defendant's essential rights, including the right to competent counsel" includes the concomitant power to grant new trials when allegations of incompetence of counsel are based on matters observed by the court. Under this expansion, applicable only to those matters observed by the court, the majority should have distinguished between motions for substi-

28. Id. The trial court allowed Smith to state his contentions, which were presented to the court in a five page handwritten report. Smith contended that his attorney:

'fail[ed] to confer with [him] concerning the preparation of the defense,' had otherwise 'failed to communicate with [him],,' had 'failed to perform or have performed investigation critical and necessary to the defense,' had 'fail[ed] to impeach prosecution witnesses,' had failed to move to suppress evidence, and had 'taken the role of surrogate [sic] prosecutor.'

Id. at 688, 863 P.2d at 194, 25 Cal. Rptr. 2d at 124.

Defense counsel addressed the Defendant's allegations, and satisfied the trial court that such allegations "did not have to do with the substance of the ability of [defense counsel] to properly represent [Smith], "but involved rather a personal disagreement which did not rise to the requisite showing of substantial impairment. Id. at 688-89, 863 P.2d at 194-95, 25 Cal. Rptr. 2d at 124-25.

29. Smith, 6 Cal. 4th at 687, 863 P.2d at 201, 25 Cal. Rptr. 2d at 131.

30. Id. at 697, 863 P.2d at 201, 25 Cal. Rptr. 2d at 131 (Baxter, J., concurring).

31. Id. (Baxter, J., concurring).

32. Id. at 697-98, 863 P.2d at 201-02, 25 Cal. Rptr. 2d at 131-32 (Baxter, J., concurring).

33. Id. at 698, 863 P.2d at 202, 25 Cal. Rptr. 2d at 132 (Baxter, J., concurring).

34. CAL. PENAL CODE § 1181 (West 1994).

35. Smith, 6 Cal. 4th at 700, 863 P.2d at 203, 25 Cal. Rptr. 2d at 133 (Baxter, J., concurring) (noting People v. Fosselman, 33 Cal. 3d 572, 659 P.2d 1144, 189 Cal. Rptr. 855 (1983)).
stitute counsel where the alleged incompetence takes place outside the courtroom and those cases where the incompetence is observed by the court. 36

Justice Baxter provided additional reasoning for such a distinction by pointing out that judicial efficiency supports the ready determination of issues in post-conviction motions. 37 However, where allegations of incompetence are based on matters not observed by the court, the interests of judicial efficiency are no longer met by the motion process. 38 For instance, with a claim of inadequate assistance of counsel, a habeas corpus proceeding is often a more satisfactory forum than motioning for a new trial. 39 In addition, the hearing on a motion to withdraw a plea or a motion for new trial may be protracted, and thus, may “unnecessarily delay imposition of judgment and impose substantial burdens on the administration of justice.” 40 In the interest of judicial efficiency, the court should deny the motion and wait for the defendant to bring the issue to bear in a habeas corpus proceeding or by means of appellate review. 41

For these reasons, Justice Baxter concluded that trial courts should be given greater discretionary power to deny motions for substitute counsel when the alleged incompetence is based on matters not observed by the court. 42

III. CONCLUSION

In Smith, the court concluded that the Marsden standard should apply in the same manner to post-conviction motions for substitute counsel as well as motions made pre-trial or during the proceedings. 43 The trial court has discretion to deny such motions unless the defendant demonstrates that a failure to substitute counsel would substantially

36. Id. (Baxter, J., concurring).
37. Id. (Baxter, J., concurring).
38. Id. (Baxter, J., concurring).
39. Id. (Baxter, J., concurring).
40. Smith, 6 Cal. 4th at 704, 863 P.2d at 206, 25 Cal. Rptr. 2d at 136 (Baxter, J., concurring).
41. Id. at 706, 863 P.2d at 207, 25 Cal. Rptr. 2d at 137 (Baxter, J., concurring).
42. Id. (Baxter, J., concurring). Where a motion for new trial is based on counsel’s conduct in proceedings before the court, the need to appoint substitute counsel is removed because “the court necessarily considers the same facts and conduct that would form the basis for a new trial motion based on incompetent counsel.” Id. at 703, 863 P.2d at 205, 25 Cal. Rptr. 2d at 135.
43. Id. at 695-96, 863 P.2d at 199-200, 25 Cal. Rptr. 2d at 129-30.
impaired the defendant's right to effective assistance of counsel. In his concurring opinion, Justice Baxter argued that trial courts should have even broader discretion where the alleged inadequacy of counsel is premised upon incompetence in matters not observed by the court. The Smith court held that the trial court did not abuse its discretion by denying Smith's motion for new trial.

This case has a significant effect because it overturned a prior decision which held that a post-conviction motion for substitute counsel required a lesser showing of counsel's alleged inadequacy by the defendant. The criminal defendant is now required to make a substantial showing of counsel's alleged inadequacy before a motion for substitute counsel will be granted, even where the defendant requires counsel to argue her own inadequacy as grounds for new trial. While the majority acknowledged that this might put the attorney in an awkward position, it concluded that the proper focus was on the effectiveness of the assistance in past proceedings.

Under these circumstances, the defendant may resort to a habeas corpus proceeding or appellate review if the court refuses to grant a motion for substitute counsel to argue the previous counsel's inadequacy in a motion for a new trial. Thus, a criminal defendant's ability to successfully argue ineffective assistance of counsel at a motion for new trial is significantly narrowed when a motion for substitute counsel has been denied.

In his concurring opinion, Justice Baxter sought to grant more discretion to trial courts reviewing post-conviction motions for substitute counsel when the allegations of incompetence apply to matters outside the courtroom. In such a case, the ability to obtain substitute counsel would be more limited.

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44. Id. at 696, 863 P.2d at 200, 25 Cal. Rptr. 2d at 130.
45. Id. at 706, 863 P.2d at 207, 25 Cal. Rptr. 2d at 137 (Baxter, J., concurring).
46. Id. at 697, 863 P.2d at 201, 25 Cal. Rptr. 2d at 131.
48. Smith, 6 Cal. 4th at 696, 863 P. 2d at 200, 25 Cal. Rptr. 2d at 130.
49. Id. at 695-96, 863 P.2d at 199-200, 25 Cal. Rptr. 2d at 129-130.
50. Id. at 694-95, 863 P.2d at 199, 25 Cal. Rptr. 2d at 129.
51. Id. at 706, 863 P.2d at 207, 25 Cal. Rptr. 2d at 137 (Baxter, J., concurring).
52. Id. at 694, 863 P.2d at 199, 25 Cal. Rptr. 2d at 129 (conceding the awkwardness of attorney and denying the obtaining of substitute counsel on demand).
53. See supra notes 38-42 and accompanying text.
V. CRIMINAL LAW

A. California Government Code section 13967 authorizes trial courts to order criminals to compensate their victims regardless of whether the victim's loss resulted from physical injury, theft, or destruction of property: People v. Broussard.

I. INTRODUCTION

In People v. Broussard, the California Supreme Court considered whether California Government Code section 13967 complied with a constitutional obligation of the legislature to enact legislation providing restitution to crime victims who suffer solely economic injury. The court interpreted section 13967 of the Government Code to authorize trial courts to order restitution for the victim's loss whether it resulted from a physical or an economic injury.

II. STATEMENT OF THE CASE

After the defendant pleaded guilty pursuant to a plea bargain, the trial court sentenced the defendant to a two year and eight month prison term and ordered the defendant to pay restitution to the victims totaling $5,545 for economic losses. The defendant appealed, arguing that under
subdivision (c) of section 13967 of the Government Code, the trial court lacked the authority to order restitution because the victims did not suffer any physical injury. The court of appeal affirmed the trial court by holding restitution could be imposed for purely economic losses under section 13967. The supreme court granted the defendant's petition for review, and subsequently affirmed the lower court decision.

III. TREATMENT

A. Majority Opinion

When a trial court denies probation to a criminal defendant, subdivision (c) of section 13967 mandates that the trial court order the defendant to compensate any victim suffering "economic loss as a result of the defendant's criminal conduct," unless the court finds "clear and compelling reasons" to order otherwise. On appeal, the defendant asserted that section 13960's definition of "victim," which limits the definition to those suffering physical and emotional injury, applied to section 13967 because both sections appear in article 1 of the Government Code. Relying on the definition of "victim" in section 13960, the defendant as-

7. Broussard, 5 Cal. 4th at 1069-70, 856 P.2d at 1135, 22 Cal. Rptr. 2d at 279.
9. Broussard, 5 Cal. 4th at 1070, 856 P.2d at 1135, 22 Cal. Rptr. 2d at 279.
10. Id. (quoting CAL. GOV'T CODE § 13967(c) (West 1992 & Supp. 1994)). Section 13967, subdivision (c) provides in pertinent part:

   In cases in which a victim has suffered economic loss as a result of the defendant's criminal conduct, and the defendant is denied probation, in lieu of imposing all or a portion of the restitution fine, the court shall order restitution to be paid to the victim. If a defendant has been convicted of a felony violation of Section 288 of the Penal Code, restitution to the victim may be ordered whether or not the defendant is denied probation . . . . The court shall order full restitution unless it finds clear and compelling reasons for not doing so, and states them on the record.

11. Broussard, 5 Cal. 4th at 1071, 856 P.2d at 1136, 22 Cal. Rptr. 2d at 280.
12. Section 13960 of the Government Code states in pertinent part:

   As used in this article: (a) 'Victim' means any of the following residents of the State of California, or military personnel and their families stationed in California: (1) A person who sustains injury or death as a direct result of a crime . . . (b) 'Injury' includes physical or emotional injury, or both. However, this article does not apply to emotional injury unless such an injury is
serted that economic loss without physical injury is insufficient to mandate restitution. The supreme court rejected the defendant's contention that a court may order restitution only when a person suffers both physical injury and economic loss.

In considering the defendant's interpretation of section 13967, the supreme court applied the principles of statutory construction to the statute's legislative history. Because the goal of statutory construction is to glean legislative intent, the first step toward achieving this goal is to consider the "words themselves, giving them their ordinary meaning." After reviewing the legislative history of section 13967, the court noted that "the Legislature intended to implement, not violate, its constitutional mandate" to compensate all victims of criminal acts.

In 1965, the legislature sought to create a fund to compensate victims of violent crimes. In its 1973 revision to the compensation fund, the legislature enacted section 13967, which authorized a court to levy a fine of up to $10,000 against a criminal defendant convicted of a violent crime that caused injury or death to the victim. Section 13967 ordered

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incurred by a person who also sustains physical injury or threat of personal injury . . . .

13. Broussard, 5 Cal. 4th at 1071, 856 P.2d at 1136, 22 Cal. Rptr. 2d at 280.
14. Id. at 1071, 856 P.2d at 1134, 22 Cal. Rptr. 2d at 280.
15. Id. at 1072, 856 P.2d at 1137, 22 Cal. Rptr. 2d at 281.
16. Id. at 1072, 856 P.2d at 1136, 22 Cal. Rptr. 2d at 281 (citing Yoshisato v. Superior Court, 2 Cal. 4th 978, 989, 831 P.2d 327, 334, 9 Cal. Rptr. 2d 102, 109 (1992)) (ascertaining the legislature's intent is primary in construing a statute). See generally People v. Morris, 46 Cal. 3d 1, 15, 756 P.2d 843, 851, 249 Cal. Rptr. 119, 127 (1988) (discerning the legislature's intent begins with the words themselves). The court, however, emphasized that the "language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." Broussard, 5 Cal. 4th at 1071, 856 P.2d at 1136, 22 Cal. Rptr. 2d at 280 (quoting Younger v. Superior Court, 21 Cal. 3d 102, 113, 577 P.2d 1014, 1021-22, 145 Cal. Rptr. 674, 681-82 (1978)). The court stated that in such cases, "[t]he intent prevails over the letter and the letter will, if possible, be so read as to conform to the spirit of the act." Id. at 1071, 856 P.2d at 1136, 22 Cal. Rptr. 2d at 280. (quoting Lungren v. Deukmejian, 45 Cal. 3d 727, 735, 755 P.2d 209, 304, 248 Cal. Rptr. 115, 120 (1988)).
17. Id. at 1072, 856 P.2d at 1137, 22 Cal. Rptr. 2d at 281.
19. Broussard, 5 Cal. 4th at 1072, 856 P.2d at 1137, 22 Cal. Rptr. 2d at 281. The revision provided that the restitution fund would contribute a maximum of $10,000 in assistance for medical expenses and the same amount for lost wages. Id.
the payment of the fines into the restitution fund established in article 1 of the Government Code for compensation to victims of violent crimes.\(^\text{20}\)

In 1982 voters sought to reform the state’s criminal justice system and passed Proposition 8, also known as the “Victim’s Bill of Rights,” which added section 28 to article I of the California Constitution.\(^\text{21}\) The proposition was intended to provide victims of criminal activity with restitution from those convicted of the crimes that caused the victim’s loss.\(^\text{22}\) The amendment was not self-executing and the legislature was directed to adopt implementing legislation.\(^\text{23}\)

As a result, the legislature enacted Penal Code section 1203.4 which required that trial courts order restitution payments from defendants convicted of crimes and placed on probation.\(^\text{24}\) However, the legislature failed to enact legislation regarding defendants convicted of crimes but not given probation.\(^\text{25}\) In these cases, victims of violent crimes could

20. Section 13960 defined the term “victim” for purposes of article 1, as “[a person] who sustains injury or death as a direct result of a crime.” CAL. GOV’T CODE § 13960 (West 1992 & Supp. 1994).


22. Broussard, 5 Cal. 4th at 1073, 856 P.2d at 1137, 22 Cal. Rptr. 2d at 281. The state constitutional amendment states in pertinent part:

It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary.


23. The new legislation included: Penal Code § 1203.04 (requiring trial courts to order restitution from defendants convicted of crimes and placed on probation); Welfare and Institutions Code § 729.6 (imposing a similar requirement in all juvenile delinquency matters); Penal Code § 1202.4 (requiring all persons convicted of a felony to pay a “restitution fine” of up to $10,000, payable into the restitution fund for victims of violent crime). Broussard, 5 Cal. 4th at 1073, 856 P.2d at 1137, 22 Cal. Rptr. 2d at 281. See generally Hank M. Goldberg, Victims’ Rights Symposium, Proposition 8: A Prosecutor’s Perspective, 23 PAC. L.J. 947 (1992) (discussing the implementation of Proposition 8’s mandate).

24. Broussard, 5 Cal. 4th at 1073, 856 P.2d at 1137, 22 Cal. Rptr. 2d at 281.

25. Id. at 1073, 856 P.2d at 1137-38, 22 Cal. Rptr. 2d at 281-82.
obtain an indirect remedy through the article 1 restitution fund, but vic-
tims of nonviolent crimes could only sue the perpetrator.6

The omission did not go unnoticed. In People v. Downing,7 the
court ordered a defendant sentenced to prison for grand theft to pay
restitution.8 The court of appeal reversed the restitution order reason-
ing that the statute did not authorize the order.9 The court further sub-
mitted that the legislature failed to comply with the constitutional man-
date to enact legislation which would provide restitution to all victims.10

To remedy this omission, Senator Gary Hart proposed a bill requiring
trial courts to order restitution to a victim in "any case where a person
is convicted of a crime and probation is denied."11 According to the su-
preme court, the proposed statute was intended as an addition to the
Penal Code, and therefore, not intended to be governed by the definition
of the term "victim" in article 1 of the Government Code.12 Ultimately,
however, the new provision was enacted as an amendment to section
13967 of the Government Code.13

In light of section 13967's legislative history, the supreme court con-
cluded that "the Legislature intended the word 'victim,' as used in subdi-
vision (c) of section 13967, to include anyone who has not suffered phys-
ical injury but has sustained economic loss resulting from a defendant's
criminal acts."14 The court determined that the constitutional mandate,
requiring trial courts to order restitution, made no distinction between
losses resulting from physical injury and purely economic losses.15
Therefore, the court concluded that the legislature intended section
13967 to protect all crime victims, notwithstanding the character of their
loss.16

26. Id. at 1073, 856 P.2d at 1138, 22 Cal. Rptr. 2d at 282.
28. Id. at 668-69, 220 Cal. Rptr. at 226.
19. Id. at 1142, 847 P.2d at 60, 17 Cal. Rptr. 2d at 380.
20. Ceja, 4 Cal. 4th at 1145, 847 P.2d at 63, 17 Cal. Rptr. 2d at 383.
21. Id.
22. Id. at 1143-44, 847 P.2d at 61-62, 17 Cal. Rptr. 2d at 381-82.
23. Id.
24. Id. at 1144, 847 P.2d at 62, 17 Cal. Rptr. 2d at 382.
25. Ceja, 4 Cal. 4th at 1144, 847 P.2d at 61, 17 Cal. Rptr. 2d at 381.
Secondly, the court reasoned that the legislature specifically enacted subdivision (c) in response to *People v. Downing* in which the appellate court "questioned whether the Legislature had fully implemented the electorate's 'clear directive requiring restitution . . . in every case involving a victim absent extraordinary reasons.'" Both the Senate and Legislative Counsel's analyses of the bill, enacted as subdivision (c) of section 13967, supported the court's conclusion that the bill was intended to correct the gap in the statutory scheme as noted in *Downing*. The Senate's analysis explained that "'[t]he courts recently declared that the Legislature has yet to implement fully Proposition 8 because it has not provided the courts with authority to order restitution in cases where the defendant is sentenced to prison.'" The Legislative Counsel further specified that the bill "was intended to apply 'in cases in which a victim has suffered economic loss as a result of the defendant's criminal conduct.'"

The court rejected the defendant's claim that an amendment to section 13960 demonstrated that section 13960's definition of "victim" applied to section 13967. Section 13960 limits its definition of "victim" to "residents of the State of California." Section 13960.5, enacted in 1985, states that "notwithstanding section 13960, 'victim' shall also include nonresidents of this state who suffer pecuniary losses as a direct result of criminal acts occurring within this state." The defendant contended that the amendment reflected the legislature's recognition that section 13960's definition of the term "victim" applied throughout article 1 because it explicitly exempted 13960.5 from section 13960's definition of "victim." The defendant maintained that "the legislature's failure to explicitly create such an exemption when it created section 13967, subdivision (c) demonstrates that it intended the words in that subdivision, including the term 'victim,' to be defined as set forth in section 13960." The court reject this argument noting that the legislature never intended to subject subdivision (c) to section 13960's definition of the term "victim" because the legislature originally intended to enact the statute as part of the penal code. Thus, the court conclud-

38. *Broussard*, 5 Cal. 4th at 1075, 856 P.2d at 1139, 22 Cal. Rptr. 2d at 283 (quoting *Downing*, 174 Cal. App. 3d at 672, 220 Cal. Rptr. at 228).
39. *Id.* at 1075, 856 P.2d at 1139, 22 Cal. Rptr. 2d at 283.
40. *Id.* at 1076, 856 P.2d at 1140, 22 Cal. Rptr. 2d at 283.
41. *Id.* at 1076, 856 P.2d at 1140, 22 Cal. Rptr. 2d at 284.
44. *Broussard*, 5 Cal. 4th at 1076, 856 P.2d at 1140, 22 Cal. Rptr. 2d at 284.
45. *Id.*
46. *Id.*
ed that the absence of an exemption does not mean that the term “victim” in section 13967, subdivision (c) “refer[red] only to victims who suffer physical injury.”

Finally, the court concluded that defendant’s construction of subdivision (c) of section 13967 would yield “arbitrary and capricious results.” The court stated that Proposition 8 clearly required legislation that would provide restitution in every case in which a crime victim suffered a loss. Accordingly, the court concluded that the legislature designed subdivision (c) to remedy any defect in existing legislation to ensure that the legislature satisfied the constitutional mandate.

B. Dissenting Opinion

Justice Panelli dissented expressing the opinion that proper application of the rules of statutory construction indicated that the legislature fell short of its constitutional mandate. He asserted that it was the legislature’s role to remedy this defect, and reproved the majority for ignoring explicit statutory language to achieve a preferred outcome. Justice Panelli essentially agreed with the defendant’s assertion that the definition of “victim” set forth in section 13960 applied throughout article 1 of the Government Code. Therefore, he concluded that the statutes “unambiguously prescrib[ed] that, absent physical or emotional injury, the victim of a crime is not a ‘victim’ entitled to restitution for economic loss within the meaning of section 13960, subdivision (c).”

Justice Panelli further agreed with the defendant’s argument that the court should not imply an exception to section 13960.5 definition of victims for section 13967 where the legislature had expressly created such an exception for another section. Justice Panelli maintained that the majority’s recognition that the definition of “victim” in section 13960

47. Id.
48. Id. at 1077, 856 P.2d at 1140, 22 Cal. Rptr. 2d at 284. The court explained that if the defendant’s view prevailed, then if a thief stole “a purse from a woman without injuring her, the victim could not receive restitution for the money stolen, but if the thief bruised the victim’s arm in the process, the victim could receive restitution for the loss of the money.” Id.
49. Id.
50. Id.
51. Id. (Panelli, J., dissenting).
52. Id. (Panelli, J., dissenting).
53. Id. at 1078, 856 P.2d at 1141, 22 Cal. Rptr. 2d at 285 (Panelli, J., dissenting).
54. Id. (Panelli, J., dissenting).
55. Id. at 1078-79, 856 P.2d at 1141, 22 Cal. Rptr. 2d at 285 (Panelli, J., dissenting).

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applied throughout article 1 belied the court's assertion that no such exception was required for section 13967. Justice Panelli stated that because "the Legislature did not include a similar exception in section 13967, this court should not in the course of interpreting the statute effectively add such language." 

Noting "it is bedrock law that if the law-maker gives us an express definition, we must take it as we find it," Justice Panelli attacked the majority's argument that the legislature intended to fully implement the constitutional mandate to provide restitution in all cases. Justice Panelli considered the majority's argument flawed because the constitutional provision was not self-executing. He further contended that "the fact that our state Constitution recognizes an expansive right to restitution does not mean that the legislature has provided a statutory remedy coextensive with the constitutional mandate ...." Justice Panelli noted that the legislature's failure to enact comprehensive legislation does not compel the court to infer that the legislature chose "to ignore or avoid its responsibilities." Justice Panelli reasoned that the "failure to provide ... restitution from imprisoned defendants to their victims who have suffered solely economic damages may simply be the product of legislative oversight." 

Furthermore, Justice Panelli argued that the legislative history is silent on the question of how "victim" should be defined for purposes of subdivision (c) of section 13967 because it sheds no light on the reason for placing the provision in article 1. He suggests, however, that the legislature would have been cognizant of existing laws, and therefore, aware that section 13960 expressly provides that its definitions are applicable throughout article 1.

Finally, while Justice Panelli agreed that the decision in People v. Downing provided the impetus for enactment of the legislation, he believed that the legislature was concerned with remedying the fact that

56. Id. (Panelli, J., dissenting).
57. Id. (Panelli, J., dissenting). Moreover, Justice Panelli noted that "[w]here a statute referring to one subject contains a critical word or phrase, omission of that word or phrase from a similar statute on the same subject generally shows a different legislative intent." Id. (Panelli, J., dissenting) (quoting Craven v. Crout, 163 Cal. App. 3d 779, 783, 209 Cal. Rptr. 649, 652 (1985)).
59. Id. at 1079, 856 P.2d at 1142, 22 Cal. Rptr. 2d at 286 (Panelli, J., dissenting).
60. Id. (Panelli, J., dissenting).
61. Id. at 1079-80, 856 P.2d at 1142, 22 Cal. Rptr. 2d at 286 (Panelli, J., dissenting).
62. Id. (Panelli, J., dissenting).
63. Id. (Panelli, J., dissenting).
restitution could be ordered from a paroled defendant, but not imprisoned defendants, rather than being concerned with providing assistance to victims of property offenses.\textsuperscript{64} Justice Panelli concluded that the legislature provided an unambiguous definition of “victim” in section 13960 that applies throughout article 1.\textsuperscript{66} Accordingly, Justice Panelli would reverse the judgment of the court of appeal because he disagreed with the majority’s determination that section 13967 authorized restitution to crime victims suffering purely economic losses.\textsuperscript{66}

IV. CONCLUSION

In \textit{Broussard}, the supreme court held that “in any case in which a defendant is denied probation and in which the victim has suffered economic loss,” a trial court must order restitution, regardless of whether the victim suffered physical injury.\textsuperscript{67} The principles of statutory construction, though intended to provide some structure to the interpretation of words, might be as flexible as the words themselves. The supreme court’s attempt to cure a legislative omission, however, provides a popular result in an era in which crime is a predominant concern among California’s citizens.

\textbf{LORI ELLEN AUSTEIN}

\textsuperscript{64} \textit{Id.} at 1080, 856 P.2d at 1142, 22 Cal. Rptr. 2d at 286 (Panelli, J., dissenting).
\textsuperscript{65} \textit{Id.} at 1081, 856 P.2d at 1143, 22 Cal. Rptr. 2d at 287 (Panelli, J., dissenting).
\textsuperscript{66} \textit{Id.} (Panelli, J., dissenting).
\textsuperscript{67} \textit{Id.} at 1077, 856 P.2d at 1140, 22 Cal. Rptr. 2d at 285. In fact, the ruling in this case has already had some effect, evidenced by the fact that the supreme court granted review of \textit{People v. Diaz}, 2 Cal. App. 4th 1275, 18 Cal. App. 4th 1647, 3 Cal. Rptr. 2d 658 (1992), but transferred the case back to the court of appeal with directions to reconsider the case in light of \textit{Broussard}. See \textit{People v. Diaz}, 20 Cal. App. 4th 1257, 25 Cal. Rptr. 2d 220 (1993). In \textit{Diaz}, the crime victim was driving home when she saw a police officer with his gun drawn in her yard. In attempting to drive out of harm’s way, the victim damaged her vehicle’s transmission. The court held that the economic loss suffered by the victim was caused by the defendant, entitling her to restitution. \textit{Diaz}, 20 Cal. App. 4th at 1261, 25 Cal. Rptr. 2d at 223.)
B. Under Government Code section 13967(c), defendants may be ordered to pay restitution to the governmental agency which was the "victim" of their crime; furthermore, the proper measure of those damages is the amount actually paid less the amount the defendant can prove he or she would have been eligible to receive but for the fraud: People v. Crow.

In People v. Crow, the California Supreme Court decided two related issues. The first concerned whether a defendant, who was convicted of welfare fraud, may be required to pay restitution to the governmental agency he defrauded. Resolution of this issue depended upon interpreting Government Code section 13967(c), which requires restitution to be paid to "victims" of crimes. The majority contended that, although the government is not a real person, it can be considered a victim of crime.

1. 6 Cal. 4th 952, 864 P.2d 80, 26 Cal. Rptr. 2d 1 (1993).
2. Justice Kennard wrote the majority opinion, joined by Chief Justice Lucas and Justices Arabian, Baxter, and George. Id. at 954, 864 P.2d at 81, 26 Cal. Rptr. at 2. Justice Panelli wrote a concurring and dissenting opinion, joined by Justice Mosk. Id. at 963, 864 P.2d at 88, 26 Cal. Rptr. at 8.
3. The defendant was convicted of assisting in fraud against the Department of Social Services (hereinafter, "the Department"). Id. at 955-56, 864 P.2d at 82, 26 Cal. Rptr. 2d at 2. The trial court sentenced him to two years in prison and then added one year to that in accordance with § 12022.6 of the Penal Code. The defendant was living with a woman named Terri Acosta. Ms. Acosta made sworn declarations stating that the defendant had not lived in her house at any time while she was receiving food stamps and benefits from Aid to Families with Dependent Children (AFDC). Id. at 955, 864 P.2d at 82, 26 Cal. Rptr. 2d at 2. In fact, he lived with her for the duration of the nearly three year period that they received benefits, and was employed for part of that time. Id. The defendant assisted Acosta with this fraud by obtaining a post office box in his own name with a false address, asking the landlord to make out false receipts when he paid the rent, and by making a false declaration to the Department that he was not living with Acosta. Id. The Department had paid Acosta $29,336 in AFDC benefits and $3,593 in food stamps. Id.
4. Id. This statute was enacted as a response to the California voter initiative to add to the State Constitution the right of every person who is a victim of a crime to be compensated for the losses suffered as a result of the crime. CAL. CONST. art. I, § 28 (b). The statute specifically allows for restitution when a victim has "suffered economic loss as a result of the defendant’s criminal conduct." CAL. GOV’T CODE § 13967(c) (West Supp. 1994).
6. The court stated: "When someone steals from a government agency, that agency, and the taxpayers who fund it, suffer a loss that is no less than the loss suffered by an individual whose property has been stolen." Crow, 6 Cal. 4th at 957, 864 P.2d
The court cited an appellate court decision, *People v. Naron,* which found the government met the Penal Code definition of "victim." Noting that restitution meets the dual purpose of deterring future misconduct and rehabilitating the wrongdoer, the court in *Crow* concluded that defining the government as a victim would further these goals.

Additionally, the majority reasoned that by following rules of statutory construction, the government should be considered a "victim" as defined in section 13967(c). In *City of Los Angeles v. City of San Fernando,* the court similarly considered whether a governmental agency could be considered a "person," and found that it should. *Crow* cites *City of Los Angeles* for the proposition that "[w]here... no impairment of sovereign powers would result... the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language." Applying this standard, the court determined that section 13967 should apply because the sovereign power of the state would not be damaged by interpreting the statute to allow defrauded governmental agencies to be "victims." Given the legislative history and case law on the subject, the majority concluded that the legal meaning of "victim" is not limited to an individual. Therefore, the government should receive restitution.

at 83, 26 Cal. Rptr. 2d at 3.
8. Id. at 732, 237 Cal. Rptr. at 696.
9. Crow, 6 Cal. 4th at 957, 864 P.2d at 84, 26 Cal. Rptr. 2d at 4; see also People v. Lent, 15 Cal. 3d 481, 541 P.2d 545, 124 Cal. Rptr. 905 (1975) (noting the aim of deterring future criminal conduct as a goal of restitution); People v. Richards, 17 Cal. 3d 614, 552 P.2d 97, 131 Cal. Rptr. 537 (1976) (discussing the benefit of rehabilitation of the criminal when restitution is required).
10. Crow, 6 Cal. 4th at 958, 864 P.2d at 84, 26 Cal. Rptr. 2d at 4.
12. Crow, 6 Cal. 4th at 958-59, 864 P.2d at 84, 26 Cal. Rptr. 2d at 4 (citing City of Los Angeles, 14 Cal. 3d at 277, 537 P.2d at 1306-07, 123 Cal. Rptr. at 57-58 (1975)).
13. Id. at 959-60, 864 P.2d at 84-85, 26 Cal. Rptr. 2d at 5.
14. Id. at 960, 864 P.2d at 86, 26 Cal. Rptr. 2d at 6.
15. Id. The court also discussed the defendant's argument that because section 13960 defines a "victim" as a "resident of California," a governmental agency should not be considered a statutory "victim." Id. at 960. 864 P.2d at 86-86, 26 Cal. Rptr. 2d at 6. Section 13960 defines "victims" as "a resident of the State of California... who sustains injury or death as a direct result of a crime." Cal. Gov't Code § 13960 (West 1992 & Supp. 1994). Citing People v. Broussard, 5 Cal. 4th 1067, 856 P.2d 1134, 22 Cal. Rptr. 2d 278 (1993), the majority stated that "section 13960's definition of a victim... did not apply to section 13967(c). Accordingly, under the latter statute a victim need not be a 'resident of California.'" Crow, 6 Cal. 4th at 960, 864 P.2d at
After establishing that the governmental agency was a "victim," the court addressed the second issue presented in the case: how the value of the restitution owed should be determined. This determination of the amount to be paid was critical because the defendant was charged under Penal Code section 12660 which allows for a one year sentencing enhancement only if the damages caused by the defendant exceed $25,000. The majority found that the value of the damages should be established by subtracting the welfare benefit amount that the defendant could prove he or she was entitled from the amount actually paid to the defendant. The court, however, put the burden on the defendant to provide affirmative proof of the benefit that he was rightfully entitled. Because the defendant did not prove that his only source of income was what he had previously stated, the court found that the prosecution carried its burden of proving the value of their damages. Thus, the court concluded that damages exceeded $25,000, and therefore upheld the sentence enhancement.

This case illustrates the court's willingness to punish those who perpetrate welfare fraud, as dictated by the voters of California. By

85-86, 26 Cal. Rptr. 2d at 6.
16. Id. at 955, 864 P.2d at 82, 26 Cal. Rptr. 2d at 2.
17. The statute states: "When any person takes, damages, or destroys any property in the commission . . . of a felony, with the intent to cause that taking . . . the court shall impose an additional term as follows: (a) If the loss exceeds twenty-five thousand dollars ($25,000), the court . . . shall impose an additional term of one year." CAL. PENAL CODE § 12022.6(a) (West 1992 & Supp. 1994).
18. Crow, 6 Cal. 4th at 961-62, 864 P.2d at 86-87, 26 Cal. Rptr. 2d at 7. In this case, the Department paid Ms. Acosta $32,929 over the period in question. Id. An eligibility worker testified that if the defendant had only the income he claimed during that period he was living with Ms. Acosta, together they would have been eligible for $13,224 in AFDC benefits and food stamps. Id. at 962, 864 P.2d at 87, 26 Cal. Rptr. 2d at 7. Using the court's formula, by subtracting the amount they were eligible for, $13,224, from the amount actually paid, $32,929, the amount remaining for restitution would be $19,705. This was not the final conclusion, however, because the court asserted that the defendant had not proven that he was truly eligible for the $13,224 because he might have received other income during the time he was living with Ms. Acosta. Id. Thus, the court held that the value of the restitution should be the amount paid to the defendant, $32,929. Id. at 962-63, 864 P.2d at 87, 26 Cal. Rptr. 2d at 7-8.
19. Id. at 963, 864 P.2d at 87, 26 Cal. Rptr. 2d at 8.
20. The California Constitution was amended to read:

The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern.

The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that
interpreting section 13967 to cover governmental agencies as "victims", and by putting the burden on the defendant to prove his or her eligibility for benefits, the court has ensured that this code section will deter crime.

MARLEE ADAMS SNOWDON
Sufficient evidence was presented for a reasonable jury to convict the defendant of first degree murder by means of lying in wait; thus California Jury Instruction Number 8.25 was properly submitted to the jury: People v. Ceja.

I. INTRODUCTION

In People v. Ceja, the California Supreme Court reaffirmed the validity of CALJIC No. 8.25 as a jury instruction for first degree murder by means of lying in wait, and found that giving the instruction in this case was proper.

1. 4 Cal. 4th 1134, 847 P.2d 55, 17 Cal. Rptr. 2d 375 (1993). Justice Arabian authored the opinion of the court, in which Chief Justice Lucas and Justices Panelli, Baxter, and George joined. Id. at 1136, 847 P.2d at 57, 17 Cal. Rptr. 2d at 377. Justice Kennard issued a separate, concurring opinion. Id. at 1146, 847 P.2d at 63, 17 Cal. Rptr. 2d at 383. Justice Mosk dissented. Id. at 1147, 847 P.2d at 64, 17 Cal. Rptr. 2d at 384.

2. Id. at 1139, 847 P.2d at 59, 17 Cal. Rptr. 2d at 379. The court upheld the instruction even though it does not follow the court's previous language verbatim. Id.

3. Because the question presented in this case involved whether the facts supported a jury instruction for lying in wait murder, the finding of facts by the trial court is particularly relevant. The defendant, Enrique Chavez Ceja, also known as “Chico,” was convicted for the murder of Diana Hernandez (hereinafter “Diana”), the mother of his infant son. Ceja, 4 Cal. 4th at 1137, 847 P.2d at 57, 17 Cal. Rptr. 2d at 377. The killing occurred on September 7, 1988, in the front yard of Diana’s brother’s East Palo Alto home. Id. Diana had lived with the defendant during the summer, amidst frequent arguments and separations, until she moved out 10 days before the shooting to live with her brother, Hermenegildo Hernandez, and his wife, Maria Ortega. Id.

Lupe Roque, who was also living at Hermenegildo’s home, testified that approximately four days prior to the shooting, she heard the defendant talking to Diana through a window, demanding that she return everything that he had given her, including her clothes, which Diana proceeded to throw out the window. Id.

The defendant’s next contact with Diana was two or three days before the shooting, when he followed Diana to a laundromat. Although she refused to talk to him, she allowed him to play with the baby outside the laundromat. Id. The two later spoke at Hermenegildo’s home, and subsequently at a bar, where the defendant, who was intoxicated, told Diana that he loved her and could not understand why she did not want to live with him. Id. The defendant gave Hermenegildo a gold chain for Diana, which she refused to accept and arranged for Hermenegildo to return to the defendant. When Hermenegildo returned the chain, the defendant told him that he would kill himself if Diana did not come back to him. Id.

At approximately 10:00 A.M. the following morning, a truck belonging to the defendant’s father was seen parked next to Hermenegildo’s house. Other evidence also placed the truck next to the gate that led to the backyard. Id. at 1137-38, 847 P.2d at 57, 17 Cal. Rptr. 2d at 377. Amanda Bruce, a social worker, arrived at the house and was situated in the living room with Diana, Ortega, and Roque. Patricia Sierra, another resident, was in a bedroom watching television. Id. Soon after
The court upheld the first degree murder conviction of defendant Ceja, reversing a court of appeal ruling that there was insufficient evidence to instruct the jury on the lying in wait theory of first degree murder. Justice Mosk, the lone dissenter, argued that the instruction for lying in wait was not supported by the evidence. Mosk reasoned that the facts did not reveal a "fatal plan," but rather a "tragic fortuity."

II. TREATMENT

A. The Majority Opinion

The court first resolved whether CALJIC No. 8.25 misstates or omits elements of lying in wait. The Defendant argued that the instruction

Amanda arrived, the defendant knocked on the front door, and Diana answered. The defendant then gave a bag of clothes to either Diana or Sierra, who went back to watching television. The defendant asked Roque if he and Diana could talk out in the backyard. After Diana indicated that she did not want to go outside, Roque told the defendant that they could sit in the front yard. Id. at defendant's request, Diana got the baby and went out in the front yard with the defendant and Roque, who saw them sit on a sofa outside. Roque returned inside the house. Id. Soon thereafter, Sierra, Ortega, and Hermenegildo heard Diana yell "No, Chico, no," and call for help. Id. at 1140-41, 847 P.2d at 59-60, 17 Cal. Rptr. 2d at 379-80. Ortega testified that she ran outside and saw the defendant "holding her by the hair" and Diana struggling. Id. Ortega then told the defendant to let Diana go, but the defendant pulled out a gun and pointed it at Ortega, who took refuge behind a tree. Id. Sierra and Roque witnessed the defendant fire three shots at Diana. Id. at 1140-42, 847 P.2d at 59-60, 17 Cal. Rptr. 2d at 379-80. Ortega, Bruce, and Hermenegildo heard the shots, and a neighbor, Stacy Ashford, heard the shots and saw the defendant flee with a handgun. Id. at 1142, 847 P.2d at 60, 17 Cal. Rptr. 2d at 380.

The defendant was arrested in Merced a year and a half later. He admitted that he went to Hermenegildo's house with his father's truck, but claimed to have abandoned it because it would not start. Id. at 1138, 847 P.2d at 58, 17 Cal. Rptr. 2d at 378.

4. Ceja, 4 Cal. 4th at 1146, 847 P.2d at 63, 17 Cal. Rptr. 2d at 383.
5. Id.
6. Id. at 1148, 847 P.2d at 65, 17 Cal. Rptr. 2d at 385 (Mosk, J., dissenting).
7. Id. at 1139, 847 P.2d at 59, 17 Cal. Rptr. 2d at 379. CALJIC No. 8.25 provides, in pertinent part:
   Murder which is immediately preceded by lying in wait is murder of the first degree.
   The term "lying in wait" is defined as waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise [even though the victim is aware of the murderer's presence].

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failed to include the requirements set forth in *People v. Morales* which
required that there be a "substantial period" of lying in wait, that the
attack come from "a position of advantage," and that such attack
immediately follow from "watchful waiting." The court rejected the argu-
ment that an instruction for murder based on lying in wait must neces-
sarily include "any particular phraseology," concluding that the given in-
struction contained the "substance" of the *Morales* requirements.

Additionally, the court rejected the argument that lying in wait re-
quires physical concealment. Rather, the court asserted that lying in
wait requires merely that the defendant's actions or intent be con-
cealed.

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The lying in wait need not continue for any particular period of time
provided that its duration is such as to show a state of mind equivalent to
premeditation or deliberation.

§ 232 (1984 & Supp. 1993); 1 B.E. WITKIN & N.L. WITKIN, CALIFORNIA CRIMINAL LAW,
Crimes Against the Person §§ 459-62 (2d ed. 1988).

8. 48 Cal. 3d 527, 770 P.2d 244, 257 Cal. Rptr. 65, cert. denied, 493 U.S. 984
(1989). *Morales* held that the elements of lying in wait as a special circumstance
necessary to justify the death penalty included: "(1) a concealment of purpose, (2) a
substantial period of watching and waiting for an opportune time to act, and (3)
immediately thereafter, surprise attack on an unsuspecting victim from a position of
advantage . . ." *Id.* at 557, 770 P.2d at 260-61, 257 Cal. Rptr. at 81.

9. Ceja, 4 Cal. 4th at 1139, 847 P.2d at 58, 17 Cal. Rptr. 2d at 378.
10. *Id.*
11. *Id.*
12. *Id.* at 1139-40, 847 P.2d at 58-59, 17 Cal. Rptr. 2d at 378-79. Although the ele-
ments of lying in wait articulated in *Morales* related to lying in wait as a special
circumstance rather than as a basis for first degree murder, the court held that the
difference was not dispositive. "We can and do rely on special circumstance cases
to the extent, which is substantial, that the two types of lying in wait overlap." *Id.*
at 1140 n.2, 847 P.2d at 59 n.2, 17 Cal. Rptr. 2d at 379 n.2. The court based its holding
on its earlier rejection of such elements as a necessity. See *People v. Edwards*, 54
Cal. 3d 787, 822-23, 819 P.2d 436, 458, 1 Cal. Rptr. 2d 696, 718 (1991) (holding that
an instruction for lying in wait need not include the word "substantial" to describe
the length of time spent watching and waiting, nor the term "position of advantage"
to describe the defendant's position), *cert. denied*, 113 S. Ct. 125 (1992); *People v.
Webster*, 54 Cal. 3d 411, 449, 814 P.2d 1273, 1294, 285 Cal. Rptr. 31, 52 (1991) (find-
ing that the phrase "immediately preceded," as stated in CALJIC No. 8.25 was suffi-
cient to convey the idea that the murder must follow immediately after the watchful
waiting), *cert. denied*, 112 S. Ct. 1772 (1992); see also Domino v. Superior Court. 129
Cal. App. 3d 1000, 1010-11, 181 Cal. Rptr. 486, 492-93 (1982) (discussing a more re-
strictive standard for lying in wait as a special circumstance than lying in wait mur-
14. *Id.*; see also *Webster*, 54 Cal. 3d at 448, 814 P.2d at 1294, 285 Cal. Rptr. at 52;
*Morales*, 48 Cal. 3d at 554-55, 770 P.2d at 259, 257 Cal. Rptr. at 79. But see *Ceja*, 4
Cal. 4th at 1149, 847 P.2d at 65, 17 Cal. Rptr. 2d at 385 (Mosk, J., dissenting).
The California Supreme Court then examined the court of appeal’s finding that the evidence did not support an instruction for lying in wait. The court first considered the element of watching and waiting for an opportune time to act. The court found that when the defendant waited in the car until someone arrived at the house, it could be viewed as waiting for a distraction. In addition, the jury could have found that the defendant waited and watched until he was alone with the victim in the front yard before he acted.

Next, the court examined the court of appeal’s finding that there was no evidence of "a plan or concealed purpose to take the victim by surprise" and no evidence that the defendant attacked the victim "from a position of advantage or seclusion." The court disagreed with the court of appeal’s finding that the shooting represented a sudden outburst rather than a planned attack. The court explained that the precise period of time before the attack is not critical, and that a defendant does not need to strike at the first available opportunity in order to satisfy the element.

The court concluded that the elements of "taking the victim by surprise," and "from a position of advantage," could have been reasonably inferred from the defendant’s activities before and after the shooting. These activities included when the defendant waited for the social worker to enter the house before approaching, parked his truck near the gate to the backyard to provide an easy means of escape (a plan which was defeated by the victim’s refusal to talk with him in the backyard), concealed a loaded handgun, and attempted to talk with the victim in the backyard (a secluded area more accessible to the truck). The court held that such evidence could reasonably have supported a finding that the defendant intended to take his victim by surprise.

The court also found that the jury could have reasonably determined that the victim's screaming was a cry for help, upon learning of

16. Id. at 1143, 847 P.2d at 61, 17 Cal. Rptr. 2d at 381.
17. Id.
18. Id.
19. Id. at 1142, 847 P.2d at 60, 17 Cal. Rptr. 2d at 380.
20. Ceja, 4 Cal. 4th at 1145, 847 P.2d at 63, 17 Cal. Rptr. 2d at 383.
21. Id.
22. Id. at 1143-44, 847 P.2d at 61-62, 17 Cal. Rptr. 2d at 381-82.
23. Id.
24. Id. at 1144, 847 P.2d at 62, 17 Cal. Rptr. 2d at 382.
the defendant's plan. Furthermore, the court noted that the jury could have reasonably interpreted evidence of a physical struggle as the victim acting in self-defense.

The fact that the defendant requested to meet alone with Diana also supported a finding that the defendant sought and obtained a position of advantage from which he attacked his victim. Noting the nature of the secluded backyard and other evidence indicating that the defendant waited until Roque re-entered the house prior to his attack, the court found that a reasonable jury could have concluded that the position of advantage element of lying in wait had been met.

Finally, the court rejected the defendant's claim that the shooting was not "immediately preceded" by lying in wait. The court held that the disputed length of time between when the defendant lay in wait and committed the shooting was a question for the jury. The court further reasoned that "[t]he passage of time before the shooting does not, as a matter of law, defeat a finding of lying in wait" and concluded that determining the precise length of time between the lying in wait and the shooting was not critical to the analysis. Thus, finding that a jury could reasonably infer all of the elements required for lying in wait, the court upheld the defendant's conviction for first degree murder.

25. Ceja, 4 Cal. 4th at 1144, 847 P.2d at 61, 17 Cal. Rptr. 2d at 381.
26. Id. at 1144, 847 P.2d at 62, 17 Cal. Rptr. 2d at 382.
27. Id. at 1145, 847 P.2d at 62, 17 Cal. Rptr. 2d at 382.
28. Id.; see also Webster, 54 Cal. 3d at 448, 814 P.2d at 1294, 285 Cal. Rptr. at 52 (luring victim to an isolated area sufficient to meet element of concealment); Morales, 48 Cal. 3d at 555, 770 P.2d at 259, 257 Cal. Rptr. at 79 (attacking victim from the backseat of a car while driving to an isolated area constitutes an attack from a position of advantage).
29. Ceja, 4 Cal. 4th at 1144, 847 P.2d at 62, 17 Cal. Rptr. 2d at 382.
30. Id.
31. Id. at 1145, 847 P.2d at 62-63, 17 Cal. Rptr. 2d at 382-383. Witnesses Sierra and Bruce testified that the shooting occurred about 15 or 20 minutes after the defendant arrived at the house. Id. Witness Roque estimated the time between events at about five minutes. Id. The court, however, did not view the time period between the defendant's arrival and the shooting as determinative. Id. at 1145, 847 P.2d at 63, 17 Cal. Rptr. 2d at 383. The court suggested that the proper temporal measurement was the time between the victim reaching the point of "maximum vulnerability" and the shooting. Id.; see also Edwards, 54 Cal. 3d at 825, 819 P.2d at 460, 1 Cal. Rptr. 2d at 720 (holding that waiting and watching until the victim is most vulnerable constitutes lying in wait).
32. Ceja, 4 Cal. 4th at 1146, 847 P.2d at 63, 17 Cal. Rptr. 2d at 383.
33. Id.
B. Justice Kennard’s concurrence

In her concurrence, Justice Kennard agreed that the evidence in this case, while not “overwhelming,” supported a finding of lying in wait murder. Nevertheless, Justice Kennard wrote separately to comment on the “[r]ecent decisions of this court [which] have given expansive definitions to the term ‘lying in wait’ while drawing little distinction between ‘lying in wait’ as a form of first degree murder and the lying-in-wait as a special circumstance, which subjects a defendant to the death penalty.” According to Justice Kennard, the two types of lying in wait must be distinguished “so that the death penalty will not be imposed in an arbitrary or irrational manner,” and the justice system can identify those defendants whose acts warrant the death penalty. Since the death penalty was not sought in this case, however, Justice Kennard declined to press for such a distinction.

B. Justice Mosk’s dissent

Justice Mosk dissented on the grounds that the trial court erred by instructing the jury on first degree murder by means of lying in wait. Justice Mosk explained that the evidence “did not establish an underlying, and unifying fatal plan,” instead “it revealed a tragic fortuity.” Additionally, Justice Mosk disagreed on the element of concealment, preferring a definition requiring a physical concealment, rather than merely a concealment of the defendant’s purpose.

34. Id. (Kennard, J., concurring).
35. Id. at 1147, 847 P.2d at 63, 17 Cal. Rptr. 2d at 383-84 (Kennard, J., concurring).
36. Id. at 1147, 847 P.2d at 63, 17 Cal. Rptr. 2d at 383 (Kennard, J., concurring) (citing People v. Edelbacher, 47 Cal. 3d 983, 766 P.2d 1, 254 Cal. Rptr. 586 (1989) (discussing lying in wait as a basis for imposing the death penalty)).
37. Ceja, 4 Cal. 4th at 1147, 847 P.2d at 63-64, 17 Cal. Rptr. 2d at 384 (Kennard, J., concurring).
38. Id.
39. Id. at 1147, 847 P.2d at 64, 17 Cal. Rptr. 2d at 384 (Mosk, J., dissenting).
40. Id. at 1148, 847 P.2d at 65, 17 Cal. Rptr. 2d at 385 (Mosk, J., dissenting).
41. Id. at 1149 n.2, 847 P.2d at 65 n.2, 17 Cal. Rptr. 2d at 385 n.2 (Mosk, J., dissenting).
III. CONCLUSION

CALJIC No. 8.25 is a valid jury instruction for first degree murder by means of lying in wait.\(^2\) To justify giving the instruction, an appellate court must find that reasonable and credible evidence was presented to the jury and that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt under such an instruction.\(^3\) The California Supreme Court found that such evidence was presented to the jury in this case and held that the trial court properly convicted Ceja.\(^4\)

Justice Kennard’s concurrence is especially persuasive. By combining the elements of lying in wait murder with lying in wait as a special circumstance, the court blurred the distinction between defendants eligible for the death penalty, and those who are not. Such confusion frustrates the United States Supreme Court’s mandate that the death penalty not be applied in an arbitrary or irrational manner.\(^5\)

The court has never established a formal distinction between lying in wait murder and lying in wait as a special circumstance.\(^6\) The number of lying in wait cases that have appeared before this state’s highest court in the past few years\(^7\) suggests that appellate challenges could be avoided by articulating clear standards for lying in wait murder and lying in wait as a special circumstance. Furthermore, the court may find itself in conflict with Furman if the special circumstance of lying in wait is found to be indistinguishable from the elements establishing felony murder.\(^8\)

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\(^{42}\) Ceja, 4 Cal. 4th at 1140, 847 P.2d at 59, 17 Cal. Rptr. 2d at 379.
\(^{43}\) Id. at 1138, 847 P.2d at 58, 17 Cal. Rptr. 2d at 378.
\(^{44}\) Id. at 1146, 847 P.2d at 63, 17 Cal. Rptr. 2d at 383.
\(^{45}\) See Furman v. Georgia, 408 U.S. 238 (1972) (asserting that the death penalty is unconstitutional if imposed in an arbitrary manner).
\(^{46}\) The court explained in People v. Morales, “[t]he question whether a lying-in-wait murder has occurred is often a difficult one which must be made on a case-by-case basis.” 48 Cal. 3d at 557-58, 770 P.2d at 261, 257 Cal. Rptr. at 81.
\(^{47}\) See People v. Hardy, 2 Cal. 4th 86, 825 P.2d 781, 5 Cal. Rptr. 2d 796 (1992); People v. Edwards, 54 Cal. 3d 778, 819 P.2d 436, 1 Cal. Rptr. 2d 696; People v. Webster, 54 Cal. 3d 411, 814 P.2d 1273, 285 Cal. Rptr. 31; Morales, 48 Cal. 3d 527, 770 P.2d 244, 257 Cal. Rptr. 64; People v. Edelbacher, 47 Cal. 3d 983, 766 P.2d 1, 254 Cal. Rptr. 586; People v. Ruiz, 44 Cal. 3d 580, 749 P.2d 854, 244 Cal. Rptr. 200 (1988).
VI. EMINENT DOMAIN

Severance damages may be awarded in an eminent domain action even when the condemned property is separate from the remaining property, provided there is a reasonable probability that such properties, as a whole, would be made available for development or use as an integrated economic unit in the reasonably foreseeable future: City of San Diego v. Neumann.

In City of San Diego v. Neumann, the California Supreme Court addressed whether commonly-owned contiguous properties, having diverse present uses, could be considered a "larger parcel" for the purpose of awarding severance damages in an eminent domain action. The


2. When a portion of a larger parcel of land is condemned in an eminent domain action, the property owner is not only entitled to compensation for the property actually taken, but also for any resulting injury to the remaining property. See infra note 6. The latter form of compensation is commonly referred to as "severance damages." Neumann, 6 Cal. 4th at 741, 863 P.2d at 726, 25 Cal. Rptr. 2d at 481.

3. Id. In Neumann, the defendants owned four contiguous parcels of land in the city of San Diego, two of which abutted San Ysidro Boulevard, a major thoroughfare. Id. at 742, 863 P.2d at 727, 25 Cal. Rptr. 2d at 482. The defendants operated a trailer park on the two non-abutting parcels and leased the two abutting parcels for commercial purposes. Id. The city of San Diego (hereinafter, "plaintiff") brought an eminent domain action condemning the two parcels abutting San Ysidro Boulevard for the purpose of widening the thoroughfare. Id.

Prior to trial on valuation, the plaintiff moved to bar the defendants from presenting evidence attempting to show that the abutting parcels were part of a "larger parcel" which included the non-abutting parcels. Id. The defendants hoped to use the abutting parcels in the future as a means of access from the nonabutting parcels to San Ysidro Boulevard, in the event they converted their trailer park to a shopping center. Id. Therefore, the defendants contended, by eliminating such means of access, the eminent domain action effectively destroyed their ability to develop the shopping center, thereby necessitating an award of severance damages. Id. at 742-43, 863 P.2d at 727, 25 Cal. Rptr. 2d at 482. The trial court granted the plaintiff's motion, finding "no present unity of use" between the abutting and nonabutting parcels, and denied the defendants' claim for severance damages. Id. at 743, 863 P.2d at 727, 25 Cal. Rptr. 2d at 482. The court of appeal reversed, and the California Supreme Court granted review. Id. at 743, 863 P.2d at 727-28, 25 Cal. Rptr. 2d at 482-83.
court held that such properties should be treated as a "larger parcel" if there is a reasonable probability that they would be developed or used as an integrated economic unit in the reasonably foreseeable future. 1

Under both the state and federal constitutions, one whose private property has been taken for public use should be awarded "just compensation." Where only a portion of a larger parcel is taken, the government must award fair compensation for both the portion taken and for any injury to the remaining property that results from the taking. 2

California case law provides a three-prong test 3 to determine whether separate properties may aggregate to form a "larger parcel," thereby entitling the property owner to such severance damages. 4 The first two prongs of the test were satisfied and not at issue in Neumann. 5 The third prong of the test requires that the property owner demonstrate a "unity of use" for separate properties. 6 In Neumann, the California Supreme Court addressed the issue of whether, and under what circum-

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4. Id. at 757, 863 P.2d at 737-38, 25 Cal. Rptr. 2d at 492-93.
5. CAL. CONST. art. I, § 19; U.S. CONST. amend. V. In California, "just compensation" is measured by the fair market value of the property. CAL. CIV. PROC. CODE § 1263.310 (West 1983 & Supp. 1994). Fair market value is determined by considering the "highest and most profitable use to which the property might be put in the reasonably near future, to the extent that the probability of such a prospective use affects the market value." People v. Talleur, 79 Cal. App. 3d 690, 695, 145 Cal. Rptr. 150 (1978).
6. Section 1263.410(a) of the California Code of Civil Procedure mandates an award of severance damages under such circumstances and states in pertinent part: "Where the property acquired is part of a larger parcel, in addition to the compensation awarded . . . for the part taken, compensation shall be awarded for the injury, if any, to the remainder." CAL. CIV. PROC. CODE § 1263.410(a) (West 1982 & Supp. 1994); see also, City of Los Angeles v. Wolfe, 6 Cal. 3d 326, 330, 491 P.2d 813, 815, 99 Cal. Rptr. 21, (1971); Sharp v. United States, 191 U.S. 341, 351-52 (1903).
7. To be considered the same parcel, there must be: 1) unity of title; 2) contiguity; and 3) unity of use. See, e.g., City of Los Angeles v. Wolfe, 6 Cal. 3d 326, 330, 491 P.2d 813, 815, 99 Cal. Rptr. 21, 23 (1971).
8. In this case, the plaintiff did not condemn any portion of the property owner's nonabutting parcels. See supra note 3.
10. In Neumann, the defendants satisfied both the unity of title and contiguity requirements. Neumann, 6 Cal. 4th at 746, 863 P.2d at 730, 25 Cal. Rptr. 2d at 485. Thus, the only issue before the court was whether the defendants' commonly owned contiguous properties satisfied the "unity of use" requirement. See supra note 9.
11. For a good discussion of "unity of use," see 29 CAL. JUR. 3D Eminent Domain § 121 (1986).
stances, potential future uses could be considered to satisfy the unity of use requirement.\(^\text{12}\)

Justice Panelli first discussed previous California decisions governing severance damages.\(^\text{13}\) After concluding that precedent did not authoritatively preclude prospective uses,\(^\text{14}\) the court addressed whether such considerations would result in just compensation for the property owner, or merely open the door to speculative awards.\(^\text{15}\)

The court found authority in other jurisdictions, as well as the Uniform Eminent Domain Code, which supports the consideration of prospective uses.\(^\text{16}\) The court then adopted the rationale enunciated in these

\(^{12}\) Neumann, 6 Cal. 4th at 746, 863 P.2d at 730, 25 Cal. Rptr. 2d at 485.

\(^{13}\) Id. at 745-753, 863 P.2d at 729-735, 25 Cal. Rptr. 2d at 484-90. For decisions finding severance damages appropriate, see City of Stockton v. Ellingwood, 96 Cal. App. 708, 745-46, 275 P. 228, 244 (1929) (allowing severance damages despite lack of strict compliance with the "unity of title" requirement); County of Santa Clara v. Curtner, 245 Cal. App. 2d 730, 737, 54 Cal. Rptr. 257, 261 (1966) (finding unity of title where property owners held "equitable title" by virtue of their exercise of a purchase option); City of Los Angeles v. Wolfe, 6 Cal. 3d at 336, 491 P.2d at 819, 99 Cal. Rptr. at 27 (relaxing the contiguity requirement).

For cases finding severance damages inappropriate, see City of Oakland v. Pacific Coast Lumber and Mill Co., 171 Cal. 392, 400-01, 153 P. 705, 708 (1915) (finding no contiguity where mill was separated from lumber yard by several blocks); Sacramento S. Ry. Co. v. Heilbron, 156 Cal. 408, 412-13, 104 P. 979, 981 (1909) (disallowing severance damages where too speculative); City of Stockton v. Marengo, 137 Cal. App. 760, 767, 31 P.2d 467, 467-70 (1934) (finding no unity of use where property taken was used for farmland and remaining property was used to house a gas station); City of Menlo Park v. Artino, 151 Cal. App. 2d 261, 270, 311 P.2d 135, 141-42 (1957) (finding severance damages too speculative); Department of Pub. Works v. International Tel. & Tel., 22 Cal. App. 3d 829, 834, 99 Cal. Rptr. 836, 839 (1972) (finding no unity of use where parcels not used interdependently).

14. In his dissent, Justice Mosk strenuously criticized the majority's analysis of California precedent, arguing that California case law foreclosed the possibility of considering prospective unity of use. Neumann, 6 Cal. 4th at 750-60, 863 P.2d at 741, 25 Cal. Rptr. 2d at 496 (Mosk, J., dissenting). Justice Mosk argued that the "larger parcel," for purposes of awarding severance damages, is to be defined at the time of the taking, and "potential future unity of use cannot be relied upon to establish that condemning part of a larger parcel has damaged the remainder." Id. at 759, 863 P.2d 741, 25 Cal. Rptr. 2d at 406 (Mosk, J., dissenting).

15. Neumann, 6 Cal. 4th at 753, 863 P.2d at 735, 25 Cal. Rptr. 2d at 490.

authorities, emphasizing that as a matter of economic reality, when commonly-owned contiguous properties are developed together, their value as a whole will be greater than the sum of their respective parts. Therefore, to the extent that they affect present market value, such prospective uses should be considered when addressing severance damages. The court reasoned that this would allow the property owner to receive just compensation for the "highest and most profitable use" of his land.

The court held that commonly-owned, contiguous, but separate, properties may be considered as a "larger parcel" for the purpose of awarding severance damages provided that there is a reasonable probability that they would "be available for development or use as an integrated economic unit in the reasonably foreseeable future." The court then remanded the case to determine whether the defendants were entitled to severance damages in light of this new standard.

Neumann makes clear that prospective use is to be considered when addressing severance damages, even when the condemned property is separate from the remaining property. By limiting such consideration to "reasonably probable" prospective use, Neumann represents an attempt to strike a balance between a property owner's right to "just compensation," and the risk that the consideration of prospective use may lead to an award of speculative damages.

DOUGLAS J. DENNINGTON
VII. FAMILY LAW

The "preponderance of the evidence" standard of proof utilized when terminating parental rights under California child dependency statutes does not violate due process: Cynthia D. v. Superior Court.

I. INTRODUCTION

In Cynthia D. v. Superior Court, the California Supreme Court held that the use of the preponderance of the evidence standard of proof during termination of parental rights proceedings does not violate due process. In reaching its decision, the court traced the statutory history and framework of the applicable child dependency statutes, described the current dependency system, and analyzed the statutory requirements in light of standards set forth in the United States Supreme Court deci-

1. 5 Cal. 4th 242, 851 P.2d 1307, 19 Cal. Rptr. 2d 698 (1993). Justice Panelli delivered the majority opinion with Chief Justice Lucas, Justices Mosk, Arabian, Baxter, and George concurring. Id. at 246, 851 P.2d at 1315, 19 Cal. Rptr. 2d at 706. Justice Kennard dissented in a separate opinion. Id. at 257, 851 P.2d at 1315, 19 Cal. Rptr. 2d at 706.

2. Id. at 256, 851 P.2d at 1315, 19 Cal. Rptr. 2d at 706. In Cynthia D., the San Diego County Department of Social Services instituted a dependency proceeding on behalf of Sarah D. claiming that Cynthia, her mother, could not protect Sarah from "molestation and nonaccidental injury" and that Cynthia used "narcotics and/or dangerous drugs." Id. at 245, 851 P.2d at 1307, 19 Cal. Rptr. 2d at 698. Finding the allegations against Cynthia to be true by clear and convincing evidence, the court placed Sarah in a foster home. Id. at 245, 851 P.2d at 1308, 19 Cal. Rptr. 2d at 699. Review hearings were held pursuant to California dependency statutes. Id. At the 18-month review hearing, the court found, based on a preponderance of the evidence, that returning Sarah to her natural mother would create a substantial risk of detriment to Sarah and that reasonable reunification services had been provided. Id. Based on these findings, the court concluded that a selection and implementation hearing should be held to determine a permanent plan for Sarah. Id.

Cynthia filed a petition for writ of mandate with the court of appeal claiming that the termination proceedings violated her due process rights. Id. at 246, 851 P.2d at 1307, 19 Cal. Rptr. 2d at 698. She requested that the court of appeal order the trial court to vacate its order of the selection and implementation hearing and prohibit further action to terminate her parental rights. Id. at 245-46, 851 P.2d at 1307, 19 Cal. Rptr. 2d at 698. The court of appeal found that the statutory provisions were constitutional and denied relief. Id. at 245, 851 P.2d at 1307, 19 Cal. Rptr. 2d at 698. The supreme court granted review. Id.
The court concluded that the statutory scheme provides adequate safeguards such that the preponderance of the evidence standard comports with due process requirements.¹

II. ANALYSIS

The court first discussed the statutory history of the child dependency statutes.⁵ These statutes, enacted in response to federal law conditioning federal funding on the enactment of restructured child dependency legislation, sought to encourage the swift permanent placement of children.⁶ The legislature first attempted to meet such Congressional goals by creating a bifurcated procedure that would separate the termination proceedings from the dependency proceedings.⁷ This procedure, however, continued to cause lengthy delays in establishing permanent plans,⁸ and thus, the legislature revised the statutes to bring termination of parental rights within the dependency process.⁹ Under the revised statutes, courts may terminate parental rights at the last step in the dependency process: the selection and implementation hearing.¹⁰ At this

3. Id. at 250-56, 851 P.2d at 1311-15, 19 Cal. Rptr. 2d at 702-06; see Santosky v. Kramer, 455 U.S. 745 (1982); see also infra notes 13-22 and accompanying text.
4. Cynthia D., 5 Cal. 4th at 256, 851 P.2d at 1315, 19 Cal. Rptr. 2d at 706.
5. Id. at 246-47, 851 P.2d at 1308-09, 19 Cal. Rptr. 2d at 698-99.
6. Id. at 246, 851 P.2d at 1308, 19 Cal. Rptr. 2d at 699 (citing 42 U.S.C. §§ 671(a)(14), 672, 675). Congress mandated that states actively attempt to keep children with their parents, reunify families if removal is necessary, and swiftly select permanent plans if reunification is not possible. Id.
7. Id. This legislation included a clear and convincing standard of proof for removal of children, regular reviews of the child-parent relationship, reunification services designed to encourage parent-child reunification, and permanency planning hearings at which the juvenile court would choose a permanent plan for the child. Id. If the court selected adoption as the permanent plan, a separate proceeding would be held to terminate parental rights. Id.; see CAL. CIV. CODE § 232 (West Supp. 1994) (allowing termination of parental rights upon a finding by clear and convincing evidence that a child has been neglected or cruelly treated).
8. Cynthia D., 5 Cal. 4th at 246, 851 P.2d at 1308, 19 Cal. Rptr. 2d at 699. "The passage of five or more years from initial removal of the child from its home to ultimate resolution and repose [was] by no means unusual." Id. at 246, 851 P.2d at 1308-09, 19 Cal. Rptr. 2d at 699-700 (quoting In re Micah S., 198 Cal. App. 3d 557, 243 Cal. Rptr. 756, 761 (1988) (Brauer, J., concurring)).
10. Cynthia D., 5 Cal. 4th at 247, 851 P.2d at 1309, 19 Cal. Rptr. 2d at 700; see also CAL. WELF. & INST. CODE § 366.26(c)(1) (West Supp. 1994) (allowing termination of parental rights if the court determines by clear and convincing evidence that the
hearing, the court may terminate parental rights only if reunification services have been unsuccessful and there is clear and convincing evidence that the minor will be adopted.\(^{11}\)

With this framework, the court next addressed Cynthia D.'s argument that courts may terminate parental rights based only on a finding made by clear and convincing evidence.\(^2\) Cynthia D. relied on *Santosky v. Kramer*\(^3\) which held that a New York law allowing termination of parental rights upon findings based upon a preponderance of the evidence unconstitutionally violated due process.\(^4\) The Court stated that because parental rights are fundamental, in choosing a standard of proof, states must balance the private interests involved, the risk of error in the chosen procedure, and the governmental interests in supporting the procedure.\(^5\) Applying these factors, the Supreme Court found that because a heightened standard of proof was required, New York's statutory scheme violated due process.\(^6\) The Court stated, "[b]efore a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence."\(^7\)

The California Supreme Court applied the reasoning set forth in *Santosky* and concluded that the three factors upon which the Court relied in requiring New York to adopt an elevated standard of proof did not compel California to adopt the same standard.\(^8\) First, the court balanced the private interests involved in the proceedings.\(^9\) The court dis-

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12. *Cynthia D.*, 5 Cal. 4th at 250, 851 P.2d at 1311, 19 Cal. Rptr. 2d at 702.
14. *Cynthia D.*, 5 Cal. 4th at 251, 851 P.2d at 1311, 19 Cal. Rptr. 2d at 702 (citing *Santosky v. Kramer*, 455 U.S. 745, 754-55 (1982)). The New York law allowed termination of parental rights upon a finding that the child was "permanently neglected." *Santosky*, 455 U.S. at 747. This finding needed to be based only on a "fair preponderance of the evidence." *Id.*
15. *Cynthia D.*, 5 Cal. 4th at 251, 851 P.2d at 1311-12, 19 Cal. Rptr. 2d at 702-03 (citing *Santosky* 455 U.S. at 753-54).
16. *Id.*
18. *Cynthia D.*, 5 Cal. 4th at 253, 851 P.2d at 1313, 19 Cal. Rptr. 2d at 704.
19. *Id.* at 254, 851 P.2d at 1313, 19 Cal. Rptr. 2d at 704.

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tinguished a section 366.26 hearing from the hearing involved in Santosky, stating that while the Santosky hearing was a fact-finding hearing to determine parental inadequacy, a section 366.26 hearing merely begins the task of finding the child a permanent placement. The court reasoned that because the focus of this hearing is on the child, the child's interests must be given more weight than the interests of the parents. The court concluded that a clear and convincing evidence standard would place a greater risk on the child.

Secondly, the court analyzed the risk of erroneous fact-finding. Emphasizing the legislature's intent to preserve the family unit whenever possible, the court stated that such intent diminished the risk of erroneous fact-finding. The court further emphasized the safeguards inherent in the statutory scheme which prevent errors in fact-finding. The court also noted that the litigation resources available to parents minimize the risk that the state is in a better legal position than the parents. The court concluded that there are no risks of erroneous fact-finding which demand a heightened standard of proof.

20. Id. The court emphasized that a § 366.26 hearing will be held only if the state "continually has established that a return of custody to the parent would be detrimental to the child." Id. at 253, 851 P.2d at 1313, 19 Cal. Rptr. 2d at 704.
21. Id. at 254, 851 P.2d at 1314, 19 Cal. Rptr. 2d at 705.
22. Id.
23. Id. In Santosky, the Supreme Court was concerned that a preponderance of the evidence standard did not fairly allocate the risk of erroneous fact-finding between the state and the child's natural parents. Santosky, 455 U.S. at 761. The Court found that the New York statute left too much discretion to the judge and that it unfairly prejudiced the parents by giving the state a greater ability to assemble a case. Id. at 762-64. The Court concluded that an increased burden of proof would impress upon the fact finder the importance of its decision. Id.
24. Cynthia D., 5 Cal. 4th at 254, 851 P.2d at 1314, 19 Cal. Rptr. 2d at 705.
25. Id. Before a child becomes a dependent, the court must make a finding that there is "substantial risk of serious future injury." Id. (citing CAL. WELF. & INST. CODE § 300(a) (West Supp. 1994)). Before removing a child from his parents, the court must find, by clear and convincing evidence, that there is "substantial danger to the physical health of the minor." Id. (citing CAL. WELF. & INST. CODE § 361(b)(1) (West Supp. 1994)). Furthermore, to prohibit reunification, the court must find at each hearing, that return "would create a substantial risk of detriment to the physical or emotional well-being of the minor." Id. (citing CAL. WELF. & INST. CODE §§ 366.21(e), 366.21(f), 366.22(a) (West Supp. 1994)).

26. Cynthia D., 5 Cal. 4th at 255, 851 P.2d at 1314, 19 Cal. Rptr. 2d at 705. The statutes provide court appointed counsel to parents. CAL. WELF. & INST. CODE § 317(b) (West Supp. 1994). Furthermore, access to all records is made available to counsel for the parents. CAL. WELF. & INST. CODE § 317(f) (West Supp. 1994). Finally, there is a statutory presumption that the children will be returned to their parents, and the burden is on the state to rebut the presumption. CAL. WELF. & INST. CODE § 366.21(e) (West Supp. 1994).
27. Cynthia D., 5 Cal. 4th at 255, 851 P.2d at 1315, 19 Cal. Rptr. 2d at 705.

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Finally, the court considered the governmental interests in support of the statutory scheme. The court stated that because the statutory scheme was intended to preserve the parent-child relationship, it was designed to convey certainty about parental unfitness. The court concluded that the number of findings required prior to a section 366.26 hearing supports the state's interest in preserving the parent-child relationship and does not require an elevated standard of proof.

Considering section 366.26 in the context of the entire process for termination of parental rights, the court concluded that because the preliminary proceedings protect the interests of the parent, the child, and the state, to require a heightened standard of proof would serve only to prejudice the interests of the child. The court thus held that the preponderance of the evidence standard of proof does not violate due process.

III. CONCLUSION

*Cynthia D.* emphasizes the need for courts to read the dependency statutes as a whole. Parents must realize the importance of each step of the process and must understand that findings made in preliminary

28. *Id.* In *Santosky*, the Court stated that the state's interests were in "preserving and promoting the welfare of the child" and in "reducing the cost and burden of such proceedings." *Id.* at 252, 851 P.2d at 1312, 19 Cal. Rptr. 2d at 703 (citing *Santosky* 455 U.S. at 766-67).

29. *Cynthia D.*, 5 Cal. 4th at 256, 851 P.2d at 1315, 19 Cal. Rptr. 2d at 705.

30. *Id.*

31. *Id.* at 253-56, 851 P.2d at 1312-15, 19 Cal. Rptr. 2d at 703-06. In her dissent, Justice Kennard argues that due process demands the use of the clear and convincing standard. *Id.* at 257, 851 P.2d at 1316, 19 Cal. Rptr. 2d at 707 (Kennard, J., dissenting). She contends that the majority improperly focused on the selection and implementation hearing and that the court should have focused on whether a heightened standard was necessary at the 12 or 18 month status review hearings. *Id.* at 262, 851 P.2d at 1319, 19 Cal. Rptr. 2d at 710 (Kennard, J., dissenting). The majority, however, did not focus solely on the selection and implementation hearing. *Id.* at 253, 851 P.2d at 1313, 19 Cal. Rptr. 2d at 704. Rather, it considered the entire process as a whole. *Id.*

32. *Id.* at 256, 851 P.2d at 1315, 19 Cal. Rptr. 2d at 706.

33. *See supra* notes 31-32 and accompanying text.
hearings may ultimately be used to sever their relationship with their children. To preserve their parental rights, parents must diligently defend their position at every stage of the process.

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34. See supra note 25 and accompanying text.
VIII. JUVENILE LAW

A minor who committed robbery while not personally armed, but vicariously armed, committed armed robbery within the meaning of section 707(b)(3) of the Welfare and Institutions Code: In re Christopher R.

In In re Christopher R., the California Supreme Court determined that California Welfare and Institutions Code section 707(b)(3), which designates armed robbery as a criminal offense for which minors are presumed unfit for treatment as juveniles, covers vicarious as well as personal arming. A juvenile need not actually possess a gun; it is enough that a companion in the robbery used a gun while committing the crime. The court came to this conclusion through statutory interpre-

1. 6 Cal. 4th 86, 859 P.2d 1301, 23 Cal. Rptr. 2d 786 (1993). Justice Mosk wrote the opinion for a unanimous court in which Chief Justice Lucas and Justices Panelli, Kennard, Arabian, Baxter, and George concurred.

2. Section 707(b)(3) provides that a minor 16 years of age or older who perpetrates "[r]obbery while armed with a dangerous or deadly weapon," is presumed unfit for treatment under the Juvenile Court Law, unless the juvenile court determines that the minor would be "amenable to the care, treatment, and training program available through the facilities of the juvenile court based upon an evaluation" of the statutory criteria provided by § 707(c). CAL. WELF. & INST. CODE § 707 (West 1984 & Supp. 1993). These criteria include the circumstances of the crime and delinquent history of the juvenile. CAL. WELF. & INST. CODE § 707(c) (West 1984 & Supp. 1993).


All statutory references hereinafter are to the California Welfare and Institutions Code unless otherwise indicated.

3. Christopher R., 6 Cal. 4th at 89, 859 P.2d at 1302, 23 Cal. Rptr. 2d at 787. See generally Elizabeth W. Browne, Guidelines for Transfer of Juveniles to Criminal Court, 4 PEPP. L. REV. 479 (1977) (analyzing the criteria considered in the transfer of juveniles to criminal court); Joseph N. Sorrentino & Gary K. Olsen, Certification of Juveniles to Adult Court, 4 PEPP. L. REV. 497 (1977) (surveying the laws governing transfer of juveniles to criminal court); Comment, Juveniles in the Criminal Courts: A Substantive View of the Fitness Decision, 23 UCLA L. REV. 988 (1976) (criticizing the process of transferring minors to adult courts for trial); Comment, Separating the Criminal from the Delinquent: Due Process in Certification Procedure, 40 S. CAL. L. REV. 158 (1967) (discussing problems associated with transfer of juveniles to adult court).

4. Christopher R., 6 Cal. 4th at 89, 859 P.2d at 1302, 23 Cal. Rptr. 2d at 787.
tation and an analysis of the corresponding legislative history.\textsuperscript{5} The court held that an unarmed minor who commits robbery with accomplices who are carrying weapons is guilty of "[r]obbery while armed with a dangerous or deadly weapon" within the meaning of section 707(b)(3).\textsuperscript{4}

At the outset, the court sought to define the parameters of "[r]obbery while armed with a dangerous or deadly weapon" as specified in section 707(b)(3).\textsuperscript{7} Noting that the legislature added subdivision (b) in 1976, the court reasoned that the legislature, in specifying section 707(b)(3), was referring to former Penal Code section 211a.\textsuperscript{8} "[R]obbery . . . by a person being armed with a dangerous or deadly weapon" as stated in Penal Code section 211a included vicarious as well as personal arming.\textsuperscript{9} Thus, the statute's legislative history led the court to hold that section 707(b)(3) included both types of armed robbery.\textsuperscript{10}

The court rejected the defendant's contention that section 707(b)(3) referred to former Penal Code section 12022\textsuperscript{11} which mandated a sentence enhancement for personal arming.\textsuperscript{12} The court specifically noted that section 707(b)(3) closely paraphrased former Penal Code section 211a, while the wording in former Penal Code section 12022 clearly differed from section 707(b)(3).\textsuperscript{13} Therefore, the court concluded that the

\begin{itemize}
  \item \textsuperscript{5} Id. at 91, 859 P.2d at 1304, 23 Cal. Rptr. 2d at 789 (citing People v. Aston, 39 Cal. 3d 481, 489, 703 P.2d 111, 114, 216 Cal. Rptr. 771, 774 (1985)).
  \item \textsuperscript{6} Id. at 95, 859 P.2d at 1306-07, 23 Cal. Rptr. 2d at 791-92. The defendant, who was at least 16 years old at the time of the alleged offense, assisted a companion who robbed a person at a bank night depository at gunpoint. The juvenile court committed him to the California Youth Authority for a maximum term of seven years for first degree robbery. The court of appeal affirmed. Id. at 90-91, 859 P.2d at 1303-04, 23 Cal. Rptr. 2d at 788-89.
  \item \textsuperscript{7} Christopher R., 6 Cal. 4th at 92, 859 P.2d at 1304, 23 Cal. Rptr. 2d at 789; see supra note 2 for the statutory text.
  \item \textsuperscript{8} Christopher R., 6 Cal. 4th at 92-93, 859 P.2d at 1304-05, 23 Cal. Rptr. 2d at 789-90. Former Penal Code § 211a provided: "All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon . . . is robbery in the first degree." Id. at 92, 859 P.2d at 1305, 23 Cal. Rptr. 2d at 790. In reaching this conclusion, the court relied on the similarity between the language of section 707(b)(3) and former Penal Code § 211a. Id. at 93, 859 P.2d at 1305, 23 Cal. Rptr. 2d at 790.
  \item \textsuperscript{9} Id.; see, e.g., People v. Perkins, 37 Cal. 2d 62, 64, 230 P.2d 353, 355 (1951) (holding defendant guilty of first degree robbery under Penal Code § 211a regardless of the fact that he was unarmed).
  \item \textsuperscript{10} Christopher R., 6 Cal. 4th at 93, 859 P.2d at 1305, 23 Cal. Rptr. 2d at 790.
  \item \textsuperscript{11} Former Penal Code § 12022 provided for a sentence enhancement for "[a]ny person who commits or attempts to commit any felony within this state while armed with any . . . deadly weapon . . . .» Id. at 94, 859 P.2d at 1306, 23 Cal. Rptr. 2d at 791.
  \item \textsuperscript{12} Id.
  \item \textsuperscript{13} Id.; see supra notes 2, 8, 9 and accompanying texts for the statutory texts of Welfare and Institutions Code § 707(b)(3), former Penal Code § 211a, and former
\end{itemize}
elements of armed robbery under section 707(b)(3) are: a robbery, either personal or vicarious arming, and the involvement of a dangerous or deadly weapon.\textsuperscript{11}

In this ruling, the court treats vicarious arming with the same gravity as personal arming in the context of the transfer of juveniles to criminal court. Thus, regardless of whether a juvenile personally carried a weapon or merely his companions possessed a weapon during the robbery, the juvenile must face trial in an adult criminal court. By imposing such a harsh standard, the holding in \textit{Christopher R.} demonstrates the justice system's effort to deter juveniles from committing dangerous life-threatening crimes.

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\textsuperscript{11} Penal Code § 12022, respectively.

\textsuperscript{14} \textit{Christopher R.}, 6 Cal. 4th at 93, 859 P.2d at 1305, 23 Cal. Rptr. 2d at 790. The court also determined that this crime falls within the one year sentence enhancement under Penal Code § 12022 for "any person who is armed with a firearm in the commission or attempted commission of a felony . . . whether or not such person is personally armed with a firearm." \textit{Id.; see CAL. PENAL CODE} § 12022 (West 1992 & Supp. 1993). Furthermore, the court held that the robbery did not amount to first degree robbery under Penal Code § 212.5 because robbery at a bank depository is not one of the specifically enumerated first degree robberies. \textit{Christopher R.}, 6 Cal. 4th at 95-96, 859 P.2d at 1307, 23 Cal. Rptr. 2d at 792; \textit{see CAL PENAL CODE} § 212.5 (West 1988).
IX. STATUTES

Section 65995 of the California Government Code, which allows school districts to impose fees, dedications, charges or other requirements for the construction or reconstruction of school facilities, prohibits the legislative body of a local government from imposing "special taxes" to raise revenue for the same purpose:

Grupe Development Co. v. Superior Court.

In Grupe Development Co. v. Superior Court, the California Supreme Court addressed whether section 65995 of the California Government Code, which permits school districts to impose certain fees against new residential developments for the construction or reconstruction of school facilities, in effect prohibits those same districts from imposing "special taxes" to finance the expansion of school facilities.¹


² CAL. GOV. CODE § 65995 (West 1983 & Supp. 1993) (hereinafter all code section references are to the GOVERNMENT CODE unless otherwise indicated).

³ Section 65995 (a) reads in pertinent part:

Except for a fee, charge, dedication, or other requirement authorized under Section 53080 [or under the 1977 School Facilities Act] . . . no fee, charge, dedication or other requirement shall be levied by the legislative body of a local agency against a development project . . . for the construction or reconstruction of school facilities.

Id.

⁴ Grupe, 4 Cal. 4th at 914, 844 P.2d at 547, 16 Cal. Rptr. 2d at 228. In Grupe, the defendant, Chino Unified School District (hereinafter, "the district"), submitted a proposal to its taxpayers on April 8, 1980 (Measure C), to allow the district to impose a "special tax" on new residential developments for the construction of new schools. Id. The proposal passed by more than a two-thirds vote and took effect immediately. Id. Pursuant to the "special tax" provision, developers were required to pay $1500 per dwelling unit (adjusted annually for inflation). Id. The proceeds from this special tax were then used exclusively for providing additional school facilities. Id. In 1986, however, pursuant to the state legislature's enactment of § 65995, the district also began collecting fees for the construction of new schools in addition to the amounts already collected under Measure C. Id. at 915, 844 P.2d at 546, 16 Cal. Rptr. 2d at 227.

The plaintiff, Grupe Development Company (hereinafter, "Grupe"), developed residential property within the district. Id. at 915, 844 P.2d at 547, 16 Cal. Rptr. 2d at 228. In 1988, in order to obtain building permits, Grupe paid all exactions collected under the authority of both Measure C and § 65995. Id. On July 22, 1988, Grupe filed suit for reimbursement of the exaction collected under Measure C, asserting that it was preempted by the enactment of § 65995. Id. Both parties moved for summary judgment and the trial court ruled against Grupe on all claims. Id. The court of ap-
Concluding that the legislature intended to reform the method for funding school facilities, the supreme court held that section 65995 preempted local governments from imposing special taxes for the same purpose.5

The development of local government authority to finance school facilities has an interesting history in California.6 Local governments traditionally bore the responsibility for securing financing for public school facilities.7 In the early 1970s, due to increased resistance to rising property taxes, local governments began to devise new funding methods for the construction of new schools.8 Local governments began to levy “school-impact fees” against new residential developments.9 This practice was deemed a valid exercise of the state’s police power under the California Constitution.10

In 1986, addressing a $3.8 billion need for the construction of new schools, the California legislature entered the field of school financing by enacting a comprehensive plan to finance school facilities.11 The plan specifically permitted school districts to impose certain fees, charges, dedications or other requirements for the construction or reconstruction of schools.12 As part of the statewide plan, however, section 65995 ex-
pressly prohibited the local legislative bodies from imposing additional fees, charges, dedications or other requirements not prescribed in the code.  

Writing for the majority, Justice Mosk began the opinion by discussing the historical development of school districts' capacity to fund the construction of new facilities. The majority then addressed whether the special tax collected by the district pursuant to Measure C was a "fee, charge, dedication or other requirement" within the meaning of section 65995, and thus preempted by the statute.

The court first inquired into the legislative intent of section 65995. Finding that the legislature sought to create "statewide uniformity" over the financing of new school facilities, the court concluded that the legislature intended to preempt "all local measures on the subject." In addition, the court determined that the legislature intended to strike a balance between the need for new school facilities and the need to provide affordable housing in the community. Thus, in section

sets forth the manner in which school districts may impose a "fee, dedications, charges and other requirement[s]" for the purpose of funding the construction and reconstruction of schools. Id.

13. Grupe, 4 Cal. 4th at 918, 844 P.2d at 548, 16 Cal. Rptr. 2d at 229; see also RRLH, Inc. v. Saddleback Valley Unified Sch. Dist., 222 Cal. App. 3d 1602, 1607-08, 272 Cal. Rptr. 529, 532 (1991) (stating that the legislature clearly intended § 65995 to preempt all local measures on the subject).

For the text of the preemption provision, see supra note 3.

14. Grupe, 4 Cal. 4th at 915-18, 844 P.2d at 547-49, 16 Cal. Rptr. 2d at 228-30.

15. See supra note 4.

16. Grupe, 4 Cal. 4th at 919, 844 P.2d at 549, 16 Cal. Rptr. 2d at 230.

17. Id. Justice Arabian criticized the majority's method of statutory interpretation. Id. at 923, 844 P.2d at 553, 16 Cal. Rptr. 2d at 234 (Arabian, J., dissenting). He argued that the actual language of a statute must be examined before the legislative intent can be considered. Id. at 924-25, 844 P.2d at 553, 16 Cal. Rptr. 2d at 234 (Arabi-

18. Id. at 918, 844 P.2d at 549, 16 Cal. Rptr. 2d at 230 (citing CAL. GOV'T. CODE § 65995(e) (West 1983 & Supp. 1993)). Subdivision (e) reads:

The Legislature finds and declares that the subject of the financing of school facilities with development fees is a matter of statewide concern. For this reason the Legislature hereby occupies the subject matter of mandatory development fees and other requirements for school facilities finance to the exclusion of all local measures on the subject.

Grupe, 4 Cal. 4th at 918, 844 P.2d at 549. 16 Cal. Rptr. 2d at 230 (citing CAL. GOV'T. CODE § 65995(e) (West 1983 & Supp. 1993)).

The court went on to state that "[i]t would plainly frustrate this legislative purpose to construe section 65995 to allow an entire category of such 'local measures'—i.e., special taxes—to escape the unifying reach of this legislation." Id. at 919, 844 P.2d at 549, 16 Cal. Rptr. 2d at 230.

19. Id. In dissent, Justice Arabian disagreed with this determination and argued that neither the statutory language nor the legislative history of § 65995 supported the proposition that the legislature sought to provide such a balance. Id. at 924, 844
65995(b)(1), the legislature effectively placed a cap on the amount that school districts could exact to fund the construction or reconstruction of schools. The court concluded that to allow local governments to collect such “special taxes” would severely upset this balance.

The court next discussed whether, in light of the language used in section 65995(a), special taxes were thereby removed from the preemptive reach of the statute. The majority conceded that the special tax exacted by the district under Measure C was not a dedication within the meaning of the statute. Assuming arguendo that the term “fee” did not encompass special taxes, the court next considered whether the tax could come within the meaning of the term “charge.”

Citing Associated Homebuilders v. City of Livermore, in which the California Supreme Court held that an “excise tax” levied against new residential developments to finance sewer connections came within the meaning of a “fee or other charge,” the court concluded that the meaning of the term charge must also encompass a “special tax.”

In the alternative, the court considered whether Measure C was an “other requirement . . . levied by the legislative body of a local agency . . . for the construction or reconstruction of school facilities.” The
court found "textual evidence" to support the proposition that the term "other requirement" served as a "catchall for all exactions imposed as a condition to development..."\(^{28}\)

The court pointed to subdivision (f) of section 65995\(^{29}\) as further support for the contention that the preemption in subdivision (a) included "special taxes imposed by local legislative bodies."\(^{30}\) Subdivision (f) expressly excluded special taxes collected pursuant to the Mello-Roos Community Facilities Act from the reaches of the preemption provision set forth in subdivision (a).\(^{31}\) The court reasoned that if the legislature intended to exclude all special taxes from the purview of the preemptive provision, it would not have been necessary to exclude this particular form of special tax in subdivision (f).\(^{32}\) Accordingly, to construe subdivision (a) as excluding all special taxes from its broad preemptive scope would render subdivision (f) surplusage.\(^{33}\)

Upon summarily rejecting the arguments raised by the district, the supreme court affirmed the court of appeal's decision and held that section 65995 preempted all special taxes imposed by legislative bodies of local governments for the construction or reconstruction of school facilities.\(^{34}\)

Thus, \textit{Grupe} stands for the principle that, in attempting to fund school facilities, school districts cannot impose special taxes on new residential developments. To permit such taxes would effectively undermine the intent of the legislature to strike a balance between the need to fund the construction of new schools and the underlying need for affordable housing in the community. Such a conclusion would have worked

\(^{28}\) \textit{Grupe}, 4 Cal. 4th at 920, 844 P. 2d at 550, 16 Cal. Rptr. 2d at 231. The court suggested that because the term "and other requirements," as used in subdivision (e) of \textsection 65995, included charges and dedications mentioned in subdivision (a), the term must also include special taxes imposed for the funding of school facilities. \textit{Id.} at 920-21, 844 P.2d at 550-51, 16 Cal. Rptr. 2d at 231-32. That is, to say that "other requirements" included charges and dedications, but not other exactions such as special taxes levied for the same purpose, would be "a triumph of form over substance." \textit{Id.} at 921, 844 P.2d at 551, 16 Cal. Rptr. 2d at 232.

\(^{29}\) Subdivision (f) reads in pertinent part: "Nothing in this section shall be interpreted to limit or prohibit the use of [the Mello-Roos Community Facilities Act of 1982] to finance the construction or reconstruction of school facilities." \textit{CAL. GOV'T. CODE} \textsection 65995(f) (West 1983 & Supp. 1993).

\(^{30}\) \textit{Grupe}, 4 Cal. 4th at 921, 844 P.2d at 551, 16 Cal. Rptr. 2d at 232.

\(^{31}\) \textit{Id.}

\(^{32}\) \textit{Id.}

\(^{33}\) \textit{Id.}

\(^{34}\) \textit{Id.} at 923, 844 P.2d at 552, 16 Cal. Rptr. 2d at 233.
an injustice to the plain language of the statute which states that no other fees, dedications, charges or other requirements can be imposed by a legislative body of a local government to fund school facilities.

DOUGLAS J. DENNINGTON