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California Supreme Court Survey -- A Review of Decisions November 1987–January 1988

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The California Supreme Court Survey is 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 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 cases have been omitted from the survey.

I. ADMINISTRATIVE LAW

A. *The Fair Employment and Housing Commission lacks authority to impose punitive damages in resolving employment discrimination complaints:* **Dyna-Med, Inc. v. Fair Employment & Housing Commission.**

In *Dyna-Med, Inc. v. Fair Employment & Housing Commission*, 43 Cal. 3d 1379, 743 P.2d 1323, 241 Cal. Rptr. 67 (1987), the court held that the Fair Employment and Housing Commission (the Commission) has no authority to impose punitive damages when resolving employment discrimination disputes. Although punitive damages have been upheld in a litigation context, the court determined that section 12970(a) of the Government Code grants the Commission only corrective and equitable powers. *See Commodore Home Sys., Inc. v. Superior Court*, 32 Cal. 3d 211, 649 P.2d 912, 185 Cal. Rptr. 270 (1982); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 863C (8th ed. Supp. 1984).

Initially, a sex discrimination complaint was filed with the Department of Fair Employment and Housing by a female employee of Dyna-Med. The ultimate settlement included an agreement by the employer to refrain from retaliatory action. However, five hours after executing the agreement, Dyna-Med discharged the employee. In resolving the employee's newly-filed complaint, the Commission ordered back pay and $7,500 in punitive damages against Dyna-Med.

At issue on appeal was the Commission's statutory authority to impose punitive damages in employment discrimination cases. Section 12970(a) provides that the Commission may "take such action, *including, but not limited to*, hiring, reinstatement or upgrading of employees, with or without back pay . . . *as, in the judgment of the commission*" is necessary to eliminate discriminatory employment practices. CAL. GOV'T CODE § 12970(a) (West 1980 & Supp. 1988) (emphasis added). The court of appeal concluded that the imposition of punitive damages is within the scope of this language.

To resolve the interpretation of section 12970(a), the court first examined the statutory language itself, in light of its legislative purpose. The purpose of the Fair Employment and Housing Act (the Act) is to provide effective remedies to eliminate discriminatory practices. *See* 1980 Cal. Stat. 3140 (codified in part at CAL. GOV'T CODE § 12900 (West 1980 & Supp. 1988)). The court noted that the suggested remedies in section 12970(a) are exclusively corrective and equitable in nature—designed to make the employee "whole."

Consequently, the court concluded that had the Legislature intended to authorize punitive damages, it would have expressly done so. *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 426-30 (8th ed. 1974 & Supp. 1984); 15 AM. JUR. 2D *Civil Rights* §§ 223-25, 445 (1976); 12 CAL. JUR. 3D *Civil Rights* §§ 10-12 (1974 & Supp. 1987); 41 CAL. JUR. 3D *Labor* §§ 4-5 (1978 & Supp. 1987).

The court rejected the Commission's argument that the language "including, but not limited to" enabled the Commission to impose punitive damages. The court acknowledged that punitive damages would serve as a deterrent to employment discrimination. However, were the Legislature's silence on this issue to be taken as a mandate, *every* administrative agency with remedial powers would be entitled to impose punitive damages. Therefore, the court preferred to interpret the section as limiting the Commission's authority to corrective, equitable remedies. Such interpretation would then be consistent with section 3294(a) of the Civil Code, which allows punitive damages only in cases of "oppression, fraud, or malice." *See* CAL. CIV. CODE § 3294(a) (West 1970 & Supp. 1988). The court emphasized that the Commission has sufficient authority to fashion appropriate remedies without resorting to punitive damages. *See* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 848-49 (8th ed. 1974 & Supp. 1984); 22 AM. JUR. 2D *Damages* §§ 236-42 (1965 & Supp. 1987); 23 CAL. JUR. 3D *Damages* §§ 116-121 (1975 & Supp. 1987).

The court then found the Act's history ambiguous and, consequently, of little guidance. Thus, the court compared the statutory language to that found in section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1982) (hereinafter NLRA), and in section 706(g) of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (1982). Both sections have been interpreted by federal courts as barring monetary remedies exclusive of back pay. *See, e.g., Shah v. Mt. Zion Hospital & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981); *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829, 837 (N.D. Cal. 1973). Further, even though the NLRA and the Act have different purposes, the court surmised that the Legislature's use of identical language from the NLRA was intended to grant the Commission equivalent authority.

The court also discounted the Commission's equal protection argument. The court reasoned that the availability of punitive damages in administrative proceedings would hamper the conciliation process. Moreover, a complainant is not precluded from seeking punitive damages in an independent civil suit.

Thus, the court's withdrawal of the Commission's self-imposed authority to award punitive damages in employment discrimination

cases is a clear victory for employers. The court's cautious approach to separation of powers issues bounces this ball right back to the legislature. The court refuses to imply harsh remedies, such as punitive damages, in the absence of sufficient support from the legislative history. Fortunately, however, with its broad remedial powers, the Commission can still make retaliatory action by naive employers an unpleasant option. *See generally* Gelb & Frankfurt, *California's Fair Employment and Housing Act: A Viable State Remedy for Employment Discrimination*, 34 HASTINGS L.J. 1055 (1983); 45B AM. JUR. 2D *Job Discrimination* §§ 1740, 2428-31 (1986).

BARBARA A. BAYLISS

B. *Prepayment injunctive relief in Board of Equalization disputes is available only where the assessment is completely without merit:* **Western Oil and Gas Association v. State Board of Equalization.**

In *Western Oil and Gas Association v. State Board of Equalization*, 44 Cal. 3d 208, 745 P.2d 1360, 242 Cal. Rptr. 334 (1987), the supreme court unanimously reversed the trial court's decision to grant prepayment injunctive relief to an oil industry association and seven oil companies against the State Board of Equalization (the Board). The Board required the oil companies to disclose certain information pertaining to land and rights of way, in order to levy assessments on inter-county pipelines. The plaintiffs opposed this disclosure requirement, and thus sought to enjoin its enforcement.

Until 1936, the Board based its authority for such disclosure on article XIII, section 19 of the California Constitution, which mandates that the Board "annually assess pipelines . . . lying within 2 or more counties. . . ." However, in 1936 the supreme court provided a comprehensive definition of pipeline for interpreting the constitutional provision. *See Pipe Line Co. v. State Board of Equalization*, 5 Cal. 2d 253, 256-57, 54 P.2d 18, 20 (1936). This definition did not specifically refer to land and rights of way; consequently, the Board abrogated this disclosure requirement.

In 1982, the Board reimposed a right to assess lands and rights of way by requiring companies to submit this information in their annual property statements. Enforcement of this policy would be effected by assessing penalties for noncompliance with section 830(a) of the Revenue and Taxation Code. The plaintiffs filed suit to prevent compulsory disclosure of this information.

The court of appeals agreed with the trial court that the Board had no authority to assess the companies' lands and rights of way. Therefore the compulsory disclosure was unwarranted. The supreme court reversed, holding that the Board's authority was not at issue. The court ruled that article XIII, section 32 of the California Constitution bars the prepayment relief sought by the companies, since no legal or equitable proceeding can impede the collection of a tax. The court emphasized, however, that this section is broadly construed to limit court intervention in tax collection matters. Only when the government has no chance of prevailing on its claim will prepayment injunctive relief be available. *See Pacific Gas and Electric Co. v. State Board of Equalization*, 27 Cal. 3d 277, 283 n.8, 611 P.2d 463, 467 n.8, 165 Cal. Rptr. 122, 126, n.8 (1980) (citing *Enoch v. Williams Packing Co.*, 370 U.S. 1, 7 (1962)). Accordingly, taxes must be paid first; then an action may be maintained to recover them. *See generally* 51 CAL. JUR. 3D *Property Taxes* § 206 (1979 & Supp. 1987). The court considered the Board's new policy to be wholly without merit, and thus remanded the action to the trial court for further factfinding.

LESLIE GLADSTONE

II. CONSTITUTIONAL LAW

A prosecutor's intimidation of defense witnesses by threat of arrest following witness' testimony constitutes governmental interference with defendant's constitutional right to compulsory process: **In re Martin.**

I. INTRODUCTION

In *In re Martin*,[1] the court held that the prosecutor's intimidation of defense witnesses violated the defendant's constitutional right to produce witnesses in his favor.[2] The court determined that a showing of prosecutor misconduct was required to prove such interference with the defendant's rights, but that bad faith or improper motives were not required.[3] The court concluded that prosecutor misconduct was established by the arrest of the petitioner's first witness outside

1. 44 Cal. 3d 1, 744 P.2d 374, 241 Cal. Rptr. 263 (1987). The court opinion was unanimous and authored by Justice Mosk.

2. U.S. CONST. amend. VI; *accord*, CAL. CONST. art. I, § 15. *See also* 21A AM. JUR. 2D *Criminal Law* §§ 717-19 (1981).

3. *Martin*, 44 Cal. 3d at 31, 744 P.2d at 393, 241 Cal. Rptr. at 282 (citing United States v. Morrison, 535 F.2d 223, 227 (3d Cir. 1976)). However, conviction of the prosecutor under section 136.1 of the Penal Code requires specific intent to dissuade the witness from testifying. People v. Ford, 145 Cal. App. 3d 985, 989, 193 Cal. Rptr. 684, 689 (1983). *See generally* B.L. GERSHMAN, PROSECUTORIAL MISCONDUCT (1986) (cited in Edwards, *Book Review*, 7 PACE L. REV. 463, 464 (1987)); B. WITKIN, CALIFORNIA CRIMES 800 (Supp. 1985).

the courtroom immediately after testifying, and by informing other witnesses that they would also be arrested for any crimes disclosed by their testimony and in so doing, inducing them not to testify.

II. FACTUAL BACKGROUND

Martin was convicted of second degree murder and other crimes based primarily on the testimony of Powell, who claimed that he murdered the victim on Martin's behalf. Martin produced witnesses to refute the testimony, but each witness was subject to self-incrimination by testifying. The first defense witness, Stephen Aguilar, testified that he and Powell were friends and that Powell had asked him prior to the murder to obtain an unmarked gun for him. Aguilar obtained the gun from his neighbor, Charles Riley,[4] and gave it to Powell. This testimony directly contradicted Powell's testimony that the gun was obtained by Martin. Immediately after Aguilar testified, the prosecutor had him arrested as an accessory to murder, in the presence of three other defense witnesses[5] and a news reporter, in the hallway of the courthouse. The prosecution's investigator admitted he knew that the witnesses were present when he made the arrest. Aguilar was apparently never charged.[6]

Riley was subpoenaed to testify that he was the source of the gun, corroborating Aguilar's testimony. The prosecutor refused to grant immunity; therefore, Riley invoked the fifth amendment. Martin called Eugene Wallace as a witness to testify that Wallace and Powell were cellmates and that Wallace helped Powell fabricate the story implicating Martin. The prosecutor again refused to grant immunity; therefore, Wallace invoked the fifth amendment. John Gross was also called by Martin. Gross' testimony would have established that while he and Powell were cellmates, Powell admitted that Martin was not a participant in the murder, that Powell obtained the gun from Aguilar, and that he and Wallace had fabricated the story. Again, no immunity was granted and Gross invoked his fifth amendment rights. All three witnesses, Riley, Wallace, and Gross, were ini-

4. The identity of the neighbor was elicited during cross-examination of Aguilar. Riley was subpoenaed and was one of the defense witnesses who refused to testify. His testimony would have supported Aguilar's testimony that he had supplied the gun. *Martin*, 44 Cal. 3d at 20, 744 P.2d at 386, 241 Cal. Rptr. at 275.

5. The prospective defense witnesses present all testified, but were not subject to incrimination by doing so.

6. *Martin*, 44 Cal. 3d at 20, 744 P.2d at 385, 241 Cal. Rptr. at 274-75.

tially willing to testify and would have provided Martin's most valuable defense.

Martin filed a petition for writ of habeas corpus, together with a motion to consolidate the appeal and the habeas proceeding. After consolidating, the court of appeals affirmed the judgment and denied the writ. Martin then filed a petition for writ of habeas corpus in the California Supreme Court which was denied; Martin's subsequent petition was granted.[7]

III. THE COURT'S OPINION

Martin claimed relief on two grounds. The first was prosecutorial interference with his constitutional right to present testimony at trial. The second was the prosecution's introduction of false evidence. The court appointed a referee to make findings of fact and law. The referee concluded that Martin was entitled to relief on both grounds.

In a habeas corpus proceeding, the burden of proof is on the petitioner.[8] The court was satisfied that Martin had fulfilled his burden as to the witness intimidation issue and therefore did not address the false evidence ground for relief.

The court emphasized that pursuant to the sixth amendment of the United States Constitution, "a criminal defendant has the right 'to have compulsory process for obtaining witnesses in his favor.' "[9] Due process mandates that the defendant have an opportunity to present the essential elements of his case;[10] and to present witnesses in his defense.[11] This right is also protected by the California Constitution.[12]

The right to produce witnesses may be violated by governmental interference.[13] The court maintained that interference includes prosecutorial intimidation of defense witnesses, such as making statements to defense witnesses regarding prosecution for any crimes revealed by their testimony,[14] or arresting defense witnesses before

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7. New facts were alleged in the second petition and supported by new exhibits, allowing the court to grant the petition even though it had been previously denied. *Id.* at 27 n.3, 744 P.2d at 390 n.3, 241 Cal. Rptr. at 279 n.3.

8. *In re* Riddle, 57 Cal. 2d 848, 852, 372 P.2d 304, 306, 22 Cal. Rptr. 472, 474 (1962).

9. *Martin*, 44 Cal. 3d at 29, 744 P.2d at 391, 241 Cal. Rptr. at 280 (quoting Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 95 (1974)).

10. *Id.* at 29, 744 P.2d at 391, 241 Cal. Rptr. at 280. *See* Webb v. Texas, 409 U.S. 95, 98 (1972); Washington v. Texas, 388 U.S. 14, 19 (1967).

11. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

12. CAL. CONST. art. I § 15.

13. *Martin*, 44 Cal. 3d at 30, 744 P.2d at 392, 241 Cal. Rptr. at 281; *see also* B. WITKIN, CALIFORNIA CRIMES 800 (1963).

14. *Martin*, 44 Cal. 3d at 31, 744 P.2d at 392, 241 Cal. Rptr. at 281 (citing People v. Warren, 161 Cal. App. 3d 961, 973, 207 Cal. Rptr. 912, 918 (1984)).

they testify.[15]

The court acknowledged that evidence of bad faith or improper motive on the part of the prosecution was not required.[16] The defendant must only establish misconduct and that this misconduct was a "substantial cause" of his inability to present a witness.[17] Finally, the defendant must show that the testimony that would have been given but for the interference was " 'material and favorable to his defense.' "[18]

The court held that the time, place, and manner of Aguilar's arrest was improper. The evidence showed that a joint decision was made between the prosecutor and the prosecution's investigator to arrest Aguilar after he testified.[19] The investigator decided to have the arrest take place in the hallway of the courthouse where three defense witnesses were waiting to testify.[20] News of the arrest was broadcast and published in the local newspapers. The court felt it was clear that the arrest, which was known to the three defense witnesses who later refused to testify, "was of such character as 'to transform [a defense witness] from a willing witness to one who would refuse to testify.' "[21] The court concluded that the arrest of Aguilar was prosecutorial misconduct.[22]

The court further ruled that the prosecution, by engaging in misconduct toward Riley, interfered with Martin's right to present witnesses. When Riley appeared after being subpoenaed, the trial court determined that he should seek counsel before testifying. The prosecutor informed Riley's attorney that he would arrest Riley if he testified. Additionally, the prosecutor's investigator asked Riley to accompany him into the hallway. The court resolved that intimidation had occurred, since even the prosecutor's factual account established that Riley had been told he would be arrested if he implicated

15. *Id.* at 31, 744 P.2d at 393, 241 Cal. Rptr. at 282 (citing Bray v. Peyton, 429 F.2d 500, 501 (4th Cir. 1970)).

16. *Id.* (citing United States v. Morrison, 535 F.2d 223, 227 (3d Cir. 1976)).

17. *Id.* (citing Berg v. Morris, 483 F. Supp. 179, 184 (E.D. Cal. 1980); People v. Warren, 161 Cal. App. 3d 961, 974, 207 Cal. Rptr. 912, 919 (1984); People v. Bryant, 157 Cal. App. 3d 582, 590, 203 Cal. Rptr. 733, 736 (1984)).

18. *Id.* at 32, 744 P.2d at 393, 241 Cal. Rptr. at 282 (quoting United States v. Valenzuela Bernal, 458 U.S. 858, 867 (1982)).

19. *Id.* at 34, 744 P.2d at 395, 241 Cal. Rptr. at 284.

20. *Id.*

21. *Id.* at 35, 744 P.2d at 395, 241 Cal. Rptr. at 285 (quoting United States v. Smith, 478 F.2d 976, 979 (D.C. Cir. 1973)).

22. *Id.* at 35, 744 P.2d at 395, 241 Cal. Rptr. at 285.

himself in criminal activity.[23] The court stated that it was "clearly coercive" for a prosecutor to inform a witness of the likelihood of prosecution due to his testimony.[24]

Moving to the intimidation of Wallace, the court determined that he, too, had been subject to prosecutorial interference. Wallace had contacted Martin's attorney and told him that he would reveal valuable exculpatory information in return for money. Martin's attorney contacted the prosecutor; the prosecutor's investigator was subsequently sent to interview Wallace. The investigator admitted to talking with Wallace about his involvement in extortion and the likelihood that his testimony would result in criminal charges. Following Wallace's subpoena, the prosecutor told Wallace's counsel that his testimony would lead to prosecution for any criminal acts disclosed. The prosecutor clearly indicated that the extortion would be revealed on cross-examination. Thus the court similarly ruled that Wallace was improperly threatened.[25]

Finally, the court concluded that prosecutorial interference also existed with regard to Gross. Although the prosecution did not specifically threaten Gross, the court decided that the misconduct need not be directed toward the witness individually.[26] The court stated flatly that the intimidation caused Gross not to testify. The court noted that although Gross' testimony would not have incriminated him since Gross was not a "criminal sophisticate," he could have reasonably believed that testifying for the petitioner would adversely affect his upcoming sentence in another case.[27] The court concluded that Martin sustained his burden of showing that the testimony was material and that the prosecutorial misconduct was a substantial cause of all three witnesses' failure to testify.

IV. CONCLUSION

The court concluded that Martin was entitled to relief for prosecutorial misconduct. However, the court did not buy his argument that such misconduct warranted a dismissal of his case,[28] stating that while the misconduct was "serious," it was not "gross" as

23. *Id.* at 37, 744 P.2d at 397, 241 Cal. Rptr. at 286.

24. *Id. See also* United States v. Hammond, 598 F.2d 1008, 1012 (5th Cir. 1979) (defense witness threatened with retaliation in other cases pending against him); United States v. Thomas, 488 F.2d 334, 335 (6th Cir. 1973) (defense witness told by secret service agent that he would be prosecuted for a felony if he testified).

25. *Martin*, 44 Cal. 3d at 44-45, 744 P.2d at 401-02, 241 Cal. Rptr. at 290-91.

26. *Id.* at 49, 744 P.2d at 404, 241 Cal. Rptr. at 294.

27. *Id.* at 50, 744 P.2d at 405, 241 Cal. Rptr. at 294.

28. The court reasoned that even in a habeas proceeding, the petitioner is subject to retrial unless he has been "effectively acquitted of the offense in question." *Id.* at 53, 744 P.2d at 407, 241 Cal. Rptr. at 296.

required for a violation of due process.[29] Although the distinction between serious and gross is unclear from the opinion, the misconduct was sufficient for the court to remand the case.

A defendant's right to produce a defense is paramount. To allow blatant intimidation, such as that which occurred in *Martin*, would certainly impede the defendant's effectiveness in asserting this right. Although the prosecutor had absolute discretion whether or not to grant immunity, " '[a] simple no would have sufficed.' "[30]

LESLIE GLADSTONE

III. CRIMINAL PROCEDURE

A. *Contemptuous status offenders may be incarcerated when actions ignoring the court's order are egregious, less restrictive alternatives would be ineffective, and the status offender is segregated from juvenile delinquents during incarceration:* **In re Michael G.**

In *In re Michael G.*, 44 Cal. 3d 283, 747 P.2d 1152, 243 Cal. Rptr. 224 (1988), the California Supreme Court held that a contemptuous status offender could be incarcerated when certain criteria are met. The petitioner, a minor, was adjudged a ward of the juvenile court for truancy and was ordered to attend school on a regular basis. There was no dispute that the petitioner fully understood the court order and willfully disobeyed it. As a result of his actions, the petitioner was held in contempt of court and ordered to be incarcerated for forty-eight hours. However, before enforcing the sentence, the court asked the petitioner to seek review by writ to determine whether the court had the power to incarcerate status offenders. *Id.* at 288, 747 P.2d at 1155, 243 Cal. Rptr. at 227. The Court of Appeal for the Fifth Appellate District denied the petition for a writ of habeas corpus and the supreme court then granted review.

There were two significant and conflicting policies the court considered in determining whether a contemptuous status offender could be incarcerated. The first was an express legislative intent not to in-

29. *Id.* at 55, 744 P.2d at 409, 241 Cal. Rptr. at 298. *Contra* 21 CAL. JUR. 3D *Criminal Law* § 3232 n.56 (1985). The United States Supreme Court has held that compulsory process for obtaining witnesses is so fundamental that it is incorporated in the due process clause of the fourteenth amendment. 21A AM. JUR. 2D *Criminal Law* § 718 (1981).

30. *Martin*, 44 Cal. 3d at 45, 744 P.2d at 402, 241 Cal. Rptr. at 291 (citation omitted).

carcerate minors for merely being status offenders. CAL. WELF. & INST. CODE § 601(b) (West 1984). A status offender, by definition, is a minor who has committed an act which would not have been considered criminal if they had been an adult, but is determined to be unacceptable behavior for someone their age. *Id.* at 287 n.2, 747 P.2d at 1154 n.2, 243 Cal. Rptr. at 226 n.2. The Legislature, in two statutes, has addressed the issue of incarcerating status offenders. First, section 601(b) of the Welfare and Institutions Code provides: "it is the intent of the Legislature that no minor who is adjudged a ward of the court pursuant solely to this subdivision shall be removed from the custody of the parent or guardian except during school hours." CAL. WELF. & INST. CODE § 601(b). Second, section 207(a) provides: "[n]o minor shall be detained in any jail, lockup, juvenile hall, or other secure facility who is taken into custody solely upon the ground that he or she is a person described by section 601 or adjudged to be such or made a ward of the juvenile court solely upon that ground. . . ." CAL. WELF. & INST. CODE § 207(a) (West Supp. 1988).

In contrast, all courts have an inherent power to impose penalties upon individuals found in contempt of court because without this power, courts cannot effectively enforce orders. *In re Michael G.*, 44 Cal. 3d at 288, 747 P.2d at 1155, 243 Cal. Rptr. at 227. In California, for example, an individual can be incarcerated for a maximum of five days if held to be in contempt of court. CAL. CIV. PROC. CODE § 1218 (West 1982).

In resolving this issue, the court first noted that section 213 unequivocally confers upon the juvenile court the power to hold individuals in contempt of court. CAL. WELF. & INST. CODE § 213 (West 1984). The court next reasoned that because there are no express special limitations as to the penalties the juvenile court can prescribe, the sanctions set forth in section 1218 of the Code of Civil Procedure are controlling. *In re Michael G.*, 44 Cal. 3d at 289 n.3, 747 P.2d at 1155 n.3, 243 Cal. Rptr. at 227 n.3. Therefore, the court determined that unless express statutory language indicates otherwise, the juvenile court must retain the fundamental power to incarcerate any individual who is held to be in contempt of court.

In analyzing the history of sections 207 and 601, the court specifically found no express statement to indicate that the Legislature intended to impinge upon the juvenile court's contempt powers, and further, the court refused to presume any intent. *Id.* at 294, 747 P.2d at 1159, 243 Cal. Rptr. at 231. However, the court was careful not to overrule a previous holding by the court of appeal in *In re Ronald S.*, 69 Cal. App. 3d 866, 138 Cal. Rptr. 387 (1977). In that case, a status offender disobeyed an order by the juvenile court and the offender was found to be in violation of section 602 which expressly permitted

the incarceration of minors due to the nature of the offenses covered by the section. The appellate court reversed, expressly disapproving of the "bootstrapping" procedure which transformed a status offender into a juvenile delinquent for disobeying a court order. *Id.* at 870-71, 138 Cal. Rptr. at 390. The present court held that a contemptuous status offender is not a section 602 ward and must be segregated from juvenile delinquents when incarcerated. *In re Michael G.*, 44 Cal. 3d at 300, 747 P.2d at 1163, 243 Cal. Rptr. at 235.

The court was also persuaded by the decisions of other state courts which have held that contemptuous status offenders can be incarcerated despite a legislative intent generally banning such detentions. *Id.* at 296-97, 747 P.2d at 1154, 243 Cal. Rptr. at 227 (citing *Interest of Darlene C.*, 278 S.C. 664, 301 S.E.2d 136 (1983)); *State v. Norlund*, 31 Wash. App. 725, 644 P.2d 724 (1982); *In re G.B.*, 88 Ill. 2d 36, 430 N.E.2d (1981), *cert. denied*, 456 U.S. 963 (1981); and *State ex rel. L.E.A. v. Hammergren*, 294 N.W.2d 705 (Minn. 1980). In particular, the court noted the Wisconsin Supreme Court's holding in *Interest of D.L.D.*, 110 Wis. 2d 168, 327 N.W.2d 682 (1983). It adopted that court's standard for determining whether a status offender may be found in contempt of court and incarcerated: "(1) the juvenile is given sufficient notice to comply with the order and understands its provisions; (2) the violation of the court order is egregious; (3) less restrictive alternatives were considered and found to be ineffective; and (4) special confinement conditions are arranged consistent with . . . [the statutory provisions barring intermingling with delinquents]." *In re Michael G.*, 44 Cal. 3d at 297, 747 P.2d at 1161, 243 Cal. Rptr. at 233. (quoting *Interest of D.L.D.*, 110 Wis. 2d at 182, 327 N.W.2d at 689). The court emphasized the soundness of such qualifications and admonished adherence to them. *Id.*

The decision in the present case was the most reasonable and logical in light of the dilemma confronted by the court. From a public policy standpoint, a status offender should not be incarcerated simply because the acts committed would not have been deemed criminal had the minor been an adult. However, the very dignity of our judicial system is undermined if a court is powerless to enforce its orders effectively against status offenders. The standard announced by the Wisconsin Supreme Court and adopted by this court preserves the power of the court and at the same time recognizes the policy considerations addressed in sections 201 and 601. The court will incarcerate a contemptuous status offender in only the most limited of circumstances. Additionally, the court requires status offenders to be kept

physically separate from juvenile delinquents during incarceration. The dangers contemplated by the legislature are thereby minimized, if not altogether eliminated, by the adoption of the Wisconsin standard.

RONALD PAUL SCHRAMM

B. *A convicted felon who has been honorably discharged from the Youth Authority pursuant to section 1772 of the California Welfare and Institution Code is nevertheless permanently prohibited from carrying a concealed firearm:* **People v. Bell.**

I. INTRODUCTION

In *People v. Bell*,[1] the California Supreme Court affirmed both the conviction and death penalty sentence for the defendant[2] in a special circumstance murder.[3] In reaching its determination, the court clarified three separate areas of the law. First, the court unequivocally stated that a defendant must prove all three elements of the *Duren*[4] standard to establish a prima facie case that a jury was not drawn from a fair cross-section of the community.[5] Second, it reaffirmed that prosecutorial misconduct will constitute reversible error only when the probable result of the case would have been different if the prosecutor refrained from the statement or action.[6] Finally, in a case of first impression, the court held that a convicted felon, who has subsequently been honorably discharged from the Youth Authority, is still prohibited from carrying a concealable firearm.[7]

II. FACTUAL BACKGROUND

The defendant, Ronald Lee Bell, was accused of murder and attempted murder during the commission of a robbery. Bell, who had been convicted of a previous felony,[8] was also accused of violating

1. 44 Cal. 3d 137, 745 P.2d 573, 241 Cal. Rptr. 890 (1987) (en banc). Justice Mosk wrote the majority opinion with Chief Justice Lucas, and Justices Panelli, Eagleson, and Kaufman concurring. Justices Broussard and Arguelles each authored separate concurring and dissenting opinions.

2. *Id.* at 144, 745 P.2d at 575, 241 Cal. Rptr. at 892.

3. At the time the murder was committed, section 190.2(c)(3)(i) of the California Penal Code stated that a murder occurring during the commission of a robbery constitutes special circumstances, and the penalty, if the defendant was convicted, was either death or confinement in a state prison for life without the possibility of parole. CAL. PENAL CODE § 190.2(c)(3)(i) (1977) (current version at CAL. PENAL CODE § 190.2(a)(17)(i) (West Supp. 1988)).

4. Duren v. Missouri, 439 U.S. 357, 364 (1979); *see infra* note 22.

5. *Bell*, 44 Cal. 3d at 148-49, 745 P.2d at 578-79, 241 Cal. Rptr. at 895-96.

6. *Id.* at 151, 745 P.2d at 579, 241 Cal. Rptr. at 896-97.

7. *Id.* at 161, 745 P.2d at 587, 241 Cal. Rptr. at 904.

8. Bell was convicted of voluntary manslaughter ten years earlier when he fa-

section 12021 of the California Penal Code[9] which prohibits convicted felons from carrying concealed firearms.[10] The defendant's principal contention was that the prosecution's three eyewitnesses were mistaken in their identifications because his brother, Larry, was the actual perpetrator of the crimes. However, two of the witnesses testified that they personally knew the defendant and all three claimed that they were familiar with his brother, Larry.[11]

At trial, the defense attempted to prove that Larry Bell was a viable suspect and that the eyewitnesses' identifications were unreliable. They presented evidence which tended to show that Larry Bell had the opportunity to perpetrate the crime because he left his hotel room for forty-five minutes at approximately the same time the robbery occurred.[12] Further, the police found a ring in Larry's possession which they believed was stolen during the incident. The defense also presented Dr. Robert Shomer, an expert in eyewitness identification, who testified that the expectations and motivations of the witnesses were seriously affected by numerous factors,[13] including the fact that the defendant had ten years earlier murdered Alcus Dorton, a relative of all three witnesses. However, the defense conspicuously failed to introduce Larry Bell to the jury. This was especially significant in light of the fact that there was conflicting evidence as to whether the two brothers actually looked similar.

The jury found the defendant guilty on all charges,[14] and because the murder occurred during the commission of a robbery which constituted special circumstances as then enumerated in section

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tally shot Alcus Dorton, who was the father of an eyewitness in the present case. *Id.* at 145 n.2, 745 P.2d at 576 n.2, 241 Cal. Rptr. at 893 n.2.

9. CAL. PENAL CODE § 12021 (West 1982).

10. *Id.* ("Any person who has been convicted of a felony . . . [and] who owns or has in his possession . . . [any] firearm capable of being concealed upon the person is guilty of a public offense. . . .").

11. Ernestine Jackson testified that she attended school with the defendant from 1962-1969 and lived in the same neighborhood as the Bell family. Ruby Judge, who was only fourteen years old at the time of the incident, claimed to know both brothers. The third witness, Dorothy Dorton, whose father was killed by the defendant in a separate incident, did not know him personally, but knew his brother. *Bell*, 44 Cal. 3d at 146, 745 P.2d at 576, 241 Cal. Rptr. at 894.

12. The robbery occurred at approximately 4:00 p.m. Marilyn Mitchell testified that she spent the day in question with Larry Bell at a motel but that he left the room for 30 to 45 minutes at about the time it was becoming dark outside. *Id.* at 146-47, 745 P.2d at 577, 241 Cal. Rptr. at 894.

13. Dr. Shomer discussed seven factors which he believed made the identification of the eyewitnesses highly unreliable. *Id.* at 147, 745 P.2d at 577, 241 Cal. Rptr. at 894.

14. *Id.* at 144, 745 P.2d at 575, 241 Cal. Rptr. at 892.

190.2(c)(3)(i) of the California Penal Code,[15] they imposed a death sentence. The defendant was, therefore, automatically entitled to an appeal under section 1239(b) of the California Penal Code.[16]

III. MAJORITY OPINION

The majority addressed several procedural and substantive issues raised by the defendant on appeal, including: 1) whether the defendant was denied his constitutional right to a representative jury; 2) whether the verdict should be reversed because of various instances of prosecutorial misconduct; and 3) whether section 12021 of the California Penal Code[17] applies to convicted felons who have subsequently been honorably discharged from the Youth Authority.

A. Representative Jury and the Duren *Standard*

In *Taylor v. Louisiana*,[18] the United States Supreme Court declared that "the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community."[19] The defendant contended that the jury selection procedures employed by Contra Costa County systematically excluded blacks from venires and thereby deprived him of his right to a representative jury. As evidence of this violation, the defendant relied on the decision in *People v. Buford*,[20] where the court of appeal found that there was a significant disparity between the number of blacks in the community and the number of blacks in the jury panels under consideration.[21] The majority was unpersuaded by this argument.

The court authoritatively held that in order to demonstrate that there has been a violation of the fair cross-section requirement, the defendant must establish each element of the standard set forth in *Duren v. Missouri*.[22] In the present case, the defendant failed to pro-

15. CAL. PENAL CODE § 190.2(c)(3)(i) (1977) (current version at CAL. PENAL CODE § 190.2(a)(17)(i) (West Supp. 1988)).

16. CAL. PENAL CODE § 1239(b) (West 1982). This section provides: "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action taken by him or his counsel." *Id.*

17. Cal. Penal Code § 12021 (West 1982).

18. 419 U.S. 522 (1975).

19. *Id.* at 527.

20. 132 Cal. App. 3d 288, 182 Cal. Rptr. 904 (1982). *Buford* also originated in Contra Costa County.

21. *Id.* at 296, 182 Cal. Rptr. at 909.

22. 439 U.S. 357 (1979). The three elements that are necessary to establish a prima facie violation of the fair cross-section requirement are as follows:

1) that the group alleged to be excused is a "distinctive" group in the community;

2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

duce the necessary statistical evidence to establish that the number of blacks in the venire from which the jury was selected was not fair and reasonable in relation to the number of blacks in the community.[23] The court further held that the defendant could not rely on the evidence presented in *Buford* to establish this element.[24]

The defendant alternatively contended that he was not required to prove that the venire was unrepresentative to establish a prima facie violation of a fair cross-section requirement. The defendant relied on the court's holding in *People v. Harris*[25] as precedent for his position. In *Harris*, the court found that the jury pool as a whole was unrepresentative because it was compiled from a list of registered voters and the proportion of minorities who failed to register was larger than that for the general public.[26] The *Harris* court concluded that sufficient evidence existed to establish that the pool from which juries were selected was unrepresentative.[27] The defendant's reliance on *Harris* was erroneous because he did not challenge the composition of the pool. Therefore, proof of the unrepresentative nature of the venire was required under the second prong of the *Duren* standard.[28] Thus, the majority held that he could not maintain that there was a violation of the fair-cross-section requirement.[29]

B. The Effect of Prosecutorial Misconduct

The defendant contended that certain actions and statements made by the prosecutor during the course of the trial constituted misconduct, and therefore the verdict should have been reversed. However, a finding of prosecutorial misconduct does not automatically constitute reversible error.[30] The defendant argued that the court should apply the reasonable doubt standard stated in *Chapman v. Califor-*

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3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Id. at 364. As mentioned in the text, the California Supreme Court unquestionably approved the *Duren* standard. *Bell*, 44 Cal. 3d at 148-49, 745 P.2d at 578, 241 Cal. Rptr. at 895.

23. *Bell*, 44 Cal. 3d at 149, 745 P.2d at 578-79, 241 Cal. Rptr. at 895-96.

24. *Id.*

25. 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782 (1984) (en banc), *cert. denied*, 469 U.S. 965 (1984).

26. *Id.* at 52, 679 P.2d at 441, 201 Cal. Rptr. at 790.

27. *Id.* at 58, 679 P.2d at 445, 201 Cal. Rptr. at 794-95.

28. *Bell*, 44 Cal. 3d at 149, 745 P.2d at 579, 241 Cal. Rptr. at 896.

29. *Id.*

30. *See* 5 CAL. JUR. 3D *Appellate Review* § 545 (1973). "Not every error occurring in a legal proceeding is so serious as to vitiate the action of the trial court and warrant reversal of its judgment or order." *Id.*

nia[31] to determine if the prosecutorial misconduct was prejudicial and thereby required reversal. However, the court held that the *Chapman* standard is only controlling when federal constitutional error is involved,[32] and since the instances of misconduct complained of in this proceeding were of an evidentiary nature, the reasonable doubt standard was not applicable.[33] Instead, the court adopted the following standard: "Prosecutorial misconduct is cause for reversal only when it is 'reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant.' "[34]

The court applied the standard outlined above to the specific instances where prosecutorial misconduct was found and held that there were no grounds for reversal.[35] The first instance of misconduct complained of by the defendant was when the prosecutor violated a pre-trial stipulation by reading a statement made by an unidentified informant while cross-examining a witness.[36] Although the court found that the prosecutor's actions clearly constituted misconduct, the statement was not prejudicial because other testimony heard by the jury established that the defendant owned a gun, and the judge had also admonished the jury to disregard the statement.[37] The second instance in which the court found misconduct was when the prosecutor repeatedly quoted *People v. Guzman*[38] out of context. In particular, the prosecutor tried to mislead the jury into believing that the *Guzman* court held that the testimony of the defendant's expert witness was tantamount to the testimony of polygraph operators, hypnotists, and truth-drug administrators.[39] The court held that although the comments were improper, it was unlikely that their effect was prejudicial, thus reversal was not required.[40]

The court found other instances of prosecutorial misconduct which

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31. 386 U.S. 18, 24 (1967).

32. *Bell*, 44 Cal. 3d at 151, 745 P.2d at 580, 241 Cal. Rptr. at 897.

33. *Id.*

34. *Id.* at 151, 745 P.2d at 579, 241 Cal. Rptr. at 896-97 (quoting People v. Beivelman, 70 Cal. 2d 60, 75, 447 P.2d 913, 921, 73 Cal. Rptr. 521, 529 (1968) (*en banc*)).

35. *See infra* notes 36-44 and accompanying text.

36. The statement read by the prosecutor was: "Suspect had been observed in possession of a small-barrelled gun and was cleaning the weapon the day before the crime." *Bell*, 44 Cal. 3d at 150, 745 P.2d at 579, 241 Cal. Rptr. at 896.

37. *Id.* at 151, 745 P.2d at 580, 241 Cal. Rptr. at 897.

38. 47 Cal. App. 3d 380, 121 Cal. Rptr. 69 (1975).

39. *Bell*, 44 Cal. 3d at 153-54, 745 P.2d at 581-82, 241 Cal. Rptr. at 898-99. The court, in a footnote, made reference to People v. McDonald, 37 Cal. 3d 351, 377, 690 P.2d 709, 727, 208 Cal. Rptr. 236, 254 (1984), which clearly recognized the importance of qualified expert testimony on the subject of eyewitness identification. Further, the court disapproved of the comments made in *Guzman* to the extent that they were in conflict with the holding in *McDonald*. *Bell*, 44 Cal. 3d at 154 n.5, 745 P.2d at 582 n.5, 241 Cal. Rptr. at 899 n.5.

40. *Bell*, 44 Cal. 3d at 154, 745 P.2d at 582, 241 Cal. Rptr. at 899.

occurred during closing and rebuttal arguments as well as during the penalty phase of the trial.[41] However, in each instance defense counsel failed to make a timely objection and, therefore, under the principle announced in *People v. Green*,[42] the point could not be raised for the first time on appeal.[43] The defendant argued that *Green* applies only to the guilt phase of a trial and not to prosecutorial misconduct that occurs during the penalty phase of a capital trial. The court disagreed and reiterated the policy underlying the *Green* decision that the trial court should be given the opportunity to correct the abuses by a prosecutor, which can only be realized if the defendant makes a timely objection.[44]

C. Application of section 12021

The defendant was convicted of violating section 12021 of the California Penal Code,[45] which prohibits a convicted felon from possessing concealable firearms.[46] The defendant contended that section 12021 should not apply because he was honorably discharged from the Youth Authority. Section 1772(a) of the Welfare and Institutions Code[47] provides that a person honorably discharged from the Youth Authority will be released from all penalties and disabilities resulting from the crimes which he committed.[48] Therefore, the issue

41. *See id.* at 154-57, 163-66, 745 P.2d at 582-84, 588-90, 241 Cal. Rptr. at 899-901, 905-07.

42. 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980).

43. *Bell*, 44 Cal. 3d at 154, 745 P.2d at 582, 241 Cal. Rptr. at 899. The court recognized that the defendant could make a valid objection on appeal if it could be demonstrated that the error could not have been corrected by appropriate instructions. *Id.* However, each instance of prosecutorial misconduct that was established could have been corrected. *Id.* at 155-57, 163-66, 745 P.2d at 582-84, 588-90, 241 Cal. Rptr. at 899-901, 905-07.

44. *Id.* at 164, 745 P.2d at 588-89, 241 Cal. Rptr. at 905-06.

45. CAL. PENAL CODE § 12021 (West 1982).

46. *Id. See supra* note 10 for text of the pertinent parts of the statute.

47. CAL. WELF. & INST. CODE § 1772(a) (West 1984).

48. *Id.* Section 1772(a) of the California Welfare and Institutions Code provides:

> Every person honorably discharged from control by the Youthful Offender Parole Board who has not, during the period of control by the authority been placed by the authority in a state prison shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed, and every person discharged may petition the court which committed him or her, and the court may upon such petition set aside the verdict of guilty and dismiss the accusation or information against the petitioner who shall thereafter be released from all penalties and disabilities resulting from the offense or crime for which he or she was committed, including, but not limited to, any disqualification for any employment or occupational license, or both, created by any other provision of law.

presented was whether possession of a concealable firearm is a penalty or disability within the meaning of section 1772(a).

The majority first examined the underlying public policy considerations of the two statutes involved. The Youth Authority Act was designed to "protect the public by subjecting youthful offenders to rehabilitation rather than retributive punishment. . . ."[49] Section 12021 was enacted, on the other hand, as part of a scheme designed to protect the public from the danger that is manifested from a convicted felon carrying a firearm.[50]

From these policy considerations, the majority determined that denying a convicted felon the right to carry firearms is a frivolous burden, especially in light of the counterveiling public safety concerns.[51] The court also found that permitting convicted felons to carry firearms is inconsistent with the remedial purposes of the Youth Authority Act.[52] Next, the court recognized that the Legislature has not created any exceptions to section 12021 for any person who has been convicted of a dangerous weapon felony.[53] Finally, the court reasoned that since not even a gubernatorial pardon can restore a person's privilege to carry a concealed firearm, it is highly unlikely that the Legislature intended to reinstate a privilege that it expressly denies under the pardoning power.[54]

IV. THE SEPARATE OPINIONS

A. *Justice Broussard's Concurring and Dissenting Opinion*

Justice Broussard strongly disagreed with the majority's interpretation of section 1772. He argued that the statute expressly states that when a person is honorably discharged from the Youth Authority he is released from all penalties and disabilities resulting from the crime.[55] Because this language is clear and unambiguous, Justice Broussard contended that the court should not have judicially construed the statute.[56] Therefore, a convicted felon who receives an honorable discharge should be released from the prohibitions im-

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Id.

49. *Bell*, 44 Cal. 3d at 160, 745 P.2d at 586, 241 Cal. Rptr. at 903 (citing People v. Navarro, 7 Cal. 3d 248, 497 P.2d 481, 102 Cal. Rptr. 137 (1972)).

50. *Id.* at 161, 745 P.2d at 586-87, 241 Cal. Rptr. at 903-04.

51. *Id.* at 161, 745 P.2d at 587, 241 Cal. Rptr. at 904.

52. *Id.*

53. *Id.* at 161-62, 745 P.2d at 587, 241 Cal. Rptr. at 904; *see* CAL. PENAL CODE § 1203.4 (West 1982 & Supp. 1988) (successful probationers still subject to prohibitions of section 12021).

54. *Id.* at 162, 745 P.2d at 587, 241 Cal. Rptr. at 904.

55. *Id.* at 171, 745 P.2d at 593, 241 Cal. Rptr. at 910-11 (Broussard, J., concurring and dissenting).

56. *Id.*

posed by section 12021 of the Penal Code.[57]

Alternatively, Justice Broussard argued that even if the language of section 1772 was ambiguous, the majority erred in their construction of the statute.[58] He contended that because there were two possible constructions of the statute, it is the policy of the state to construe the section in a light most favorable to the defendant.[59] In a formal opinion, the Attorney General stated that section 1772 releases an honorable dischargee from the prohibitions of section 12021.[60] Additionally, the court had previously interpreted section 1203.4 of the Penal Code,[61] which is similar to section 1772, as permitting convicted felons who successfully complete probation to be relieved of the strictures of section 12021.[62] Therefore, the Justice believed that the majority's construction of section 1772 was contrary to the policy of the state.[63]

Justice Broussard next noted that the Legislature had amended the Youth Authority Act subsequent to judicial interpretation[64] of the language in question.[65] He cited *South Dakota v. Brown*[66] and *People v. Curtis*[67] for the proposition: "When the Legislature amends a statute without changing language which has been judicially con-

57. *Id.* at 172, 745 P.2d at 594, 241 Cal. Rptr. at 911.

58. *Id.* at 172, 745 P.2d at 594, 241 Cal. Rptr. at 912.

59. *Id.* at 172-73, 745 P.2d at 594-95, 241 Cal. Rptr. 912.

60. 32 Op. Cal. Att'y Gen. 43, 44, 46 (1958).

61. CAL. PENAL CODE § 1203.4 (West 1982).

62. *See* People v. Banks, 53 Cal. 2d 370, 388, 348 P.2d 102, 114, 1 Cal. Rptr. 669, 681 (1959) (en banc) ("[D]efendant would remain classified as one convicted of a felony within the meaning of section 12021 of the Penal Code . . . until defendant successfully completed probation and received the statutory rehabilitation provided for by section 1203.4 of the Penal Code."). In People v. Taylor, 178 Cal. App. 2d 472, 479, 3 Cal. Rptr. 186, 190 (1960), the court of appeal found:

> If one . . . has fulfilled the requirements of probation and secured a release under section 1203.4, it is a fair inference that such a person should also be released from that class of convicted felons to which section 12021 is applicable and should be restored to the right to possess a revolver. . . ."

63. *Bell*, 44 Cal. 3d at 172-73, 745 P.2d at 594-95, 241 Cal. Rptr. at 912 (Broussard, J., concurring and dissenting).

64. *See supra* note 62.

65. *Bell*, 44 Cal. 3d at 174, 745 P.2d at 595, 241 Cal. Rptr. at 912-13 (Broussard, J., concurring and dissenting).

66. 20 Cal. 3d 765, 576 P.2d 473, 144 Cal. Rptr. 758 (1978). The court in *Brown* indicated that "as a general rule, . . . when the Legislature enacts a law 'framed in the identical language' of a previous law on the same subject, it is presumed that the new law has the same fundamental meaning as the old law." *Id.* at 774, 476 P.2d at 479, 144 Cal. Rptr. at 764.

67. 70 Cal. 2d 347, 450 P.2d 33, 74 Cal. Rptr. 713 (1969). The *Curtis* court stated, "The rule of law is well established where the Legislature uses terms already judicially construed, 'the presumption is almost irresistible that it used them in the precise

strued, it is presumed that the Legislature intended to adopt the prior judicial construction."[68] He therefore argued that the prior judicial interpretations of the term "all penalties and disabilities"[69] should be controlling in the present case.[70]

Finally, Justice Broussard disagreed with the majority's affirmation of the death penalty sentence. He argued that the jury might have considered the defendant's violation of section 12021 as aggravating the basic special circumstances murder offense, possibly a significant factor in determining the defendant's sentence.[71] Therefore, since Justice Broussard believed that the conviction of violating section 12021 was erroneous, he would have reversed the death penalty judgment.[72]

B. Justice Arguelles' concurring and dissenting opinion

Justice Arguelles agreed with Justice Broussard that the defendant did not violate section 12021.[73] He agreed with the Attorney General's formal opinion, concluding that an honorable dischargee from the Youth Authority is relieved of the penalties and disabilities imposed by section 12021.[74] Justice Arguelles argued that the court should apply section 1772 as previously interpreted; if such application is contrary to policy considerations, then the Legislature should amend it.[75]

V. CONCLUSION

The court's decision to prohibit honorable dischargees from carrying concealed firearms demonstrates its strong concern for public safety. This decision does not hinder the rehabilitative purposes of section 1772 and is consistent with the Legislature's uniform denial of this privilege to convicted felons. By reaffirming the *Duren* standard, the court has unambiguously stated that statistical evidence is necessary to establish that a jury was unrepresentative. The court's

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and technical sense which had been placed upon them by the courts'." *Id.* at 355, 450 P.2d at 38, 74 Cal. Rptr. at 718.

68. *Bell*, 44 Cal. 3d at 174, 745 P.2d at 595, 241 Cal. Rptr. at 912-13 (Broussard, J., concurring and dissenting).

69. *See supra* notes 60-63 and accompanying text.

70. *Bell*, 44 Cal. 3d at 174-75, 745 P.2d at 595-96, 241 Cal. Rptr. at 912-13 (Broussard, J., concurring and dissenting).

71. *Id.* at 176, 745 P.2d at 597, 241 Cal. Rptr. at 914.

72. *Id.*

73. *Id.* at 176, 745 P.2d at 597, 241 Cal. Rptr. at 914 (Arguelles, J., concurring and dissenting). Justice Arguelles concurred in the majority opinion in all other respects, including the affirmation of the death penalty sentence. *Id.* at 177, 745 P.2d at 597-98, 241 Cal. Rptr. at 915.

74. *See* Op. Cal. Att'y Gen. *supra* note 60 at 44, 46.

75. *Bell*, 44 Cal. 3d at 177, 745 P.2d at 597, 241 Cal. Rptr. at 914 (Arguelles, J., concurring and dissenting).

decision to impose a relatively high standard of review for determining reversible error in instances where there has been prosecutorial misconduct is consistent with its previous holdings. There is no precedent to adopt a reasonable doubt standard when the error assigned is only evidentiary in nature. Finally, by extending the holding of *Green*, which prohibits a defendant from raising a contention of prosecutorial misconduct when not originally objected to during the trial, to the penalty phase of the proceeding, the court demonstrated its reluctance to reverse a decision if the error could have been corrected by the trial court.

RONALD PAUL SCHRAMM

C. *During voir dire, the evidence of a discriminatory pattern of juror exclusion imposes a duty on the court to demand justification from counsel:* **People v. Snow.**

In *People v. Snow*, 44 Cal. 3d 216, 746 P.2d 452, 242 Cal. Rptr. 477 (1987), the court reversed the defendant's conviction of first degree murder because of the prosecution's misuse of peremptory challenges. During the course of the voir dire, the prosecution peremptorily challenged sixteen prospective jurors, six of whom were black.

The trial court rejected defense counsel's repeated requests to demand justification from the prosecutor that the challenges were nondiscriminatory in nature. The trial court indicated it was unsure of applicable case law and would reserve judgment. The prosecutor argued that the restriction on peremptory challenges applied to both parties, noting that the defendant had not excused any blacks. No ruling was given on the defendant's reserved motion and the defendant's next motion was denied without comment. Ultimately, six black prospective jurors were peremptorily challenged. The final panel contained two black jurors.

The court dismissed as plain error the prosecutor's argument that his peremptory challenges, even if wrongful, were justified by the defendant's lack of exclusion of blacks. The propriety of the prosecutor's actions stands on its own merits, and is not to be evaluated in light of the defendant's challenges. *See People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

Use of peremptory challenges to exclude an identifiable group of persons simply because of a presumed group bias is improper. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890; *see also People v. Johnson*, 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978)

(dismissal of prospective black jurors based on race is improper); *People v. Lewis*, 144 Cal. App. 3d 267, 192 Cal. Rptr. 257 (1983) (no absolute right to a jury of one's own race). To allow the prosecution to circumvent proper procedure by accepting two black jurors, thus stopping short of total exclusion, would provide an easy means of justifying unlawful discrimination. Consequently, the court disapproved *People v. Davis*, 189 Cal. App. 3d 1177, 234 Cal. Rptr. 859 (1987), which suggested that the presence of two or three blacks on the jury precluded the defense from establishing discriminatory exclusion. The court concluded that the defendant had established a prima facie case of group bias. Thus, as six years had passed since the voir dire examination, the court held the error reversible per se under *Wheeler*, rather than remand for prosecutorial justification. *See Batson v. Kentucky*, 476 U.S. 79, 90 (1986).

The court then gave an advisory opinion as to the nonassertive conduct evidence admitted at trial. The prosecutor had testified that on the eve of trial, in the defendant's presence, he discussed the victim's murder. The prosecutor said that the defendant had not seemed surprised. The trial court, assuming that the defendant had heard this conversation, deemed this to be an admission by silence. The supreme court considered this inference improper, as there was no accusation for the defendant to admit or deny. However, the court found this evidence admissible for another purpose, namely, that the defendant had prior knowledge of the killing.

Although federal law and other state laws are contrary, in *Wheeler* the California Supreme Court held that the right to an impartial jury drawn from a representative cross-section is a fundamental safeguard of the California Declaration of Rights. CAL. CONST. art. I, § 160; *see* 47 AM. JUR. 2D *Jury* § 235 (1969 & Supp. 1987). Thus, the state constitution should govern rather than Supreme Court cases because it provides more protection (which the states may do) against improper jury selection. Sufficient evidence is established when an opponent has struck *most or all* members of the identified group from the venire. *See* 21 CAL. JUR. 3D *Criminal Law* § 3018 (rev. ed. 1985 & Supp. 1987) (emphasis added). Thus, maintaining a token representation of a minority group on the jury without justification will be considered improper conduct.

LESLIE GLADSTONE

IV. EVIDENCE

On appeal, an evidentiary hearing is not required where the decision of the defense counsel not to present mitigating evidence at the penalty phase was the result of a reasonably informed and competent tactical decision: **People v. Miranda.**

I. INTRODUCTION

In *People v. Miranda*,[1] the supreme court considered numerous assignments of error encompassing both the guilt and penalty phases of a jury trial in which the defendant was convicted of first degree murder with special circumstances and sentenced to death under the 1978 death penalty law. The court dealt with the consolidation of the defendant's mandatory appeal and petition for a writ of habeas corpus. The supreme court affirmed both the trial court's judgment of guilt and its imposition of the death penalty. The court also denied the defendant's petition for a writ of habeas corpus.

II. FACTUAL BACKGROUND

The defendant, Adam Miranda, and the codefendant, Arnold Gonzales, went into a 7-Eleven store. After the clerk refused to sell them beer due to the late hour, the defendant reached into his belt and grabbed the handle of a gun. The clerk managed to dissuade the defendant from committing the robbery. The defendant and Gonzales then entered an AM-PM market. Again their request to purchase beer was denied. This prompted the defendant to point his gun at the clerk and order him to put money into a bag. Gonzales noticed that they were being recorded by the market's security camera. Moments later, the defendant shot and killed the clerk.

At the time of the arrest, the officers removed both a handgun and a pocketknife from the pocket of the defendant's pants. A later search conducted at the police station produced an unsealed envelope containing an incriminating letter. The defendant was questioned and then placed in a jail cell containing hidden microphones which recorded the defendant's confession. Along with the security recordings from both markets, the jail cell tapes were admitted into

1. 44 Cal. 3d 57, 744 P.2d 1127, 241 Cal. Rptr. 594 (1987). Justice Panelli wrote the majority opinion with Justices Arguelles, Eagleson, Kaufman, and Chief Justice Lucas concurring. Justice Broussard wrote a separate concurring and dissenting opinion with Justice Mosk concurring.

evidence.[2]

The defendant and Gonzales were found guilty of first degree murder, attempt to commit murder, and burglary.[3] The jury made a special finding that the murder of the clerk "was willful, deliberate and premeditated and that the killing occurred as a result of the attempt to commit the crime of robbery."[4]

III. THE MAJORITY OPINION

A. *The Guilt Phase*

The defendant claimed that his constitutional right to represent himself as co-counsel was violated pursuant to *Faretta v. State*.[5] The court held that *Faretta* did not apply because the holding specifically addressed a defendant's right to present his own defense—it did not resolve the question of whether a defendant has a constitutional right to act as co-counsel.[6] Looking to pre-*Faretta* cases for assistance, the court held that it is within the sound discretion of the trial judge to determine if a represented party may take part in the presentation of his own case.[7]

The defendant also contended that the trial court acted improperly when it denied his request to substitute counsel because the court never thoroughly investigated the factual foundation of his request.[8] While the court agreed with the defendant that *People v. Marsden*[9] governed the situation, the court found that the trial court's action did not "deny the defendant an opportunity to enumerate specific examples of inadequate representation."[10] Therefore, the supreme court held that the trial court did not abuse its discretion by not al-

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2. In addition to the evidence of the market incidents, evidence as to a prior robbery, for which the defendant was never convicted, was introduced. *Id.* at 73, 744 P.2d at 1135, 241 Cal. Rptr. at 602-03. The defendant claimed that the two offenses were misjoined. The court dismissed this contention holding that: (1) the defendant's failure to object to the joinder at trial constituted a waiver of his right to object; and (2) that due to the strength of mini-market murder evidence, mention of the robbery charge of which the defendant was acquitted could not have produced prejudice. *Id.* at 77-78, 744 P.2d at 1138-39, 241 Cal. Rptr. at 605-06.

3. *Id.* at 74, 744 P.2d at 1136, 241 Cal. Rptr. at 603.

4. *Id.* at 74-75, 744 P.2d at 1136, 241 Cal. Rptr. at 603-04.

5. 422 U.S. 806 (1975). *See* Note, *The Right of Self-Representation in the Capital Case*, 85 COLUM. L. REV. 130 (1985).

6. *Miranda*, 44 Cal. 3d at 75, 744 P.2d at 1137, 241 Cal. Rptr. at 604 (citation omitted).

7. *Id.* at 75-76, 744 P.2d at 1137, 241 Cal. Rptr. at 604. *See generally* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 337 (1963); 21 CAL. JUR. 3D, pt. 1, *Criminal Law* § 2945 (rev. ed. 1985).

8. The grounds for the defendant's request for change of attorney was that his attorney " 'don't know how to do nothing.' " *Miranda*, 44 Cal. 3d at 76, 744 P.2d at 1137, 241 Cal. Rptr. at 605.

9. 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970).

10. *Miranda*, 44 Cal. 3d at 76, 744 P.2d at 1138, 241 Cal. Rptr. at 605.

lowing a substitution of attorney.[11]

The defendant made three assignments of error regarding the jury selection procedure. First, the defendant asserted that he was prejudiced because jurors opposed to the death penalty were excluded from the jury, thereby denying him "a representative cross section of the community."[12] This assertion, however, had been rejected in *People v. Fields*.[13] Second, the defendant contended that the failure to empanel separate juries for each phase of the bifurcated trial was violative of his state and federal constitutional rights. The court similarly dismissed this contention as it also had been rejected previously.[14] Finally, the defendant alleged that the District Attorney's use of peremptory challenges was violative of the state constitution in that the exclusion of prospective jurors who may disfavor the death penalty constituted a systematic exclusion. Once again, the court noted that this issue had already been decided.[15]

The court next considered the defendant's assertion that the trial court committed error by admitting into evidence the letter obtained pursuant to the search conducted when he was booked. The defendant claimed that his counsel was incompetent because his counsel failed to move for suppression of the letter before the trial as required by section 1538.5 of the Penal Code.[16] The court found this argument to be without merit, as the letter was the product of a lawful booking search.[17]

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11. *Id.* at 77, 744 P.2d at 1139, 241 Cal. Rptr. at 606 (citations omitted).

12. *Id.* at 78-79, 744 P.2d at 1139, 241 Cal. Rptr. at 606.

13. 35 Cal. 3d 329, 349, 673 P.2d 680, 692, 197 Cal. Rptr. 803, 815 (1983) (plurality opinion), *cert. denied*, 469 U.S. 892 (1984). *See generally* Comment, *Sentencing By Death Qualified Juries and the Right to Jury Nullification*, 22 HARV. J. ON LEGIS. 289 (1985).

14. *Miranda*, 44 Cal. 3d at 79, 744 P.2d at 1139, 241 Cal. Rptr. at 606 (citing Lockert v. McCree, 106 S. Ct. 1758 (1986)); Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). *See generally*, B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 400C (Supp. Part I 1985); Note, *Lockert v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries*, 36 CATH. U.L. REV. 287 (1986).

15. *Miranda*, 44 Cal. 3d at 80, 744 P.2d at 1140, 241 Cal. Rptr. at 607 (citing People v. Zimmerman, 36 Cal. 3d 154, 680 P.2d 776, 202 Cal. Rptr. 826 (1984)). *See generally* Winick, *Prosecutorial Peremptory Challenge Practices In Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1 (1982).

16. CAL. PENAL CODE § 1538.5(h) (West 1982). The supreme court rejected the defendant's appellate challenge to the introduction of the letter as untimely. *Miranda*, 44 Cal. 3d at 80-81, 744 P.2d at 1140, 241 Cal. Rptr. at 607.

17. *Miranda*, 44 Cal. 3d at 81-82, 744 P.2d at 1141, 241 Cal. Rptr. at 608. The defendant contended that the envelope constituted a closed container and that prying into the contents unlawfully intruded into his privacy. The court disagreed, believing that "[a] search of the personal effects of an arrested person at the time of booking is a reasonable search under the California and federal constitutions." *Id.* at 81, 744 P.2d at

Regarding the introduction of evidence concerning the 7-Eleven store incident, the defendant alleged that such evidence was improperly admitted because it constituted "impermissible evidence of an uncharged attempted robbery"[18] pursuant to section 1101 of the Evidence Code.[19] While the court acknowledged that the admission of this evidence without a limiting instruction constituted error, it considered this error harmless.[20]

The next evidentiary contention lodged by the defendant was that permitting the jail cell tape to be introduced into evidence was violative of his right of privacy, the fifth amendment privilege against self-incrimination, and the sixth amendment right to counsel. The court found the defendant's reliance on *De Lancie v. Superior Court*[21] for the creation of a privacy interest to be misplaced because in *Donaldson v. Superior Court*,[22] the court held that *De Lancie* was inapplicable to acts conducted before *De Lancie* was filed.[23] Finally, the court rejected the defendant's evidentiary assignment of error that a sixth amendment right to effective assistance of counsel violation occurred. The court held that the defendant's counsel's failure to raise the fifth amendment issue could not have prejudiced the defendant because the "right to counsel is not implicated where an accused voluntarily makes statements to a cellmate, who is *not* acting as a government agent or informant."[24]

The court then focused upon the sufficiency of the evidence which established premeditation and deliberation. The court looked to the three categories set forth in *People v. Anderson*[25] for sustaining a finding of premeditated murder. Regarding the first category—prior

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1141, 241 Cal. Rptr. at 608 (citations omitted). For a thorough definition of the parameters of booking and inventory searches see 2 W.B. LAFAVE, SEARCH AND SEIZURE § 5.3(a) (2d ed. 1987).

18. *Miranda*, 44 Cal. 3d at 82, 744 P.2d at 1141, 241 Cal. Rptr. at 608.

19. CAL. EVID. CODE § 1101(a) (West 1985).

20. *Miranda*, 44 Cal. 3d at 83, 744 P.2d at 1142, 241 Cal. Rptr. at 609.

21. 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982) (a person in jail may have a reasonable expectation of privacy).

22. 35 Cal. 3d 24, 39, 672 P.2d 110, 119, 196 Cal. Rptr. 704, 713 (1983).

23. *Miranda*, 44 Cal. 3d at 85, 744 P.2d at 1143-44, 241 Cal. Rptr. at 611. In addition, an expectation of privacy was probably not reasonable because the defendant was repeatedly told by Gonzales that the cells were bugged. *Id.* at 85 n.10, 744 P.2d at 1114 n.10, 241 Cal. Rptr. at 611 n.10.

24. *Id.* at 86, 744 P.2d at 1144, 241 Cal. Rptr. at 611 (emphasis in original).

25. 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968). The court summarized the three-category test as follows:

> (1) facts about a defendant's behavior before the killing that show prior planning of it; (2) facts about any prior relationship or conduct with the victim from which the jury could infer a motive; and (3) facts about the manner of the killing from which the jury could infer that the defendant intentionally killed the victim according to a preconceived plan.

Miranda, 44 Cal. 3d at 86, 744 P.2d at 1144, 241 Cal. Rptr. at 611 (citing *Anderson*, 70 Cal. 2d at 26-27, 447 P.2d at 949, 73 Cal. Rptr. at 557). *See generally* 17 CAL. JUR. 3D, pt.1, *Criminal Law* §§ 238-40 (rev. ed. 1984).

behavior evidencing planning of the crime—the court found "premeditation" from both the evidence that the defendant carried his gun into the store and that he threatened to shoot the clerks.[26] Assessing the second category—conduct evidencing motive—the court concluded that the defendant's angry manner when he was refused the sale of beer evinced motive.[27] Finally, as to the third category—manner evidencing intent and premeditation—the court found that the victims did not provoke the defendant, which tended to show that the attack was conceived in advance rather than a " 'rash explosion of violence.' "[28] Thus, under all three elements of the *Anderson* test, the court found evidence of the defendant's premeditation and deliberation to be sufficient.

Relying on *Carlos v. Superior Court*,[29] the defendant maintained that the felony-murder special circumstances finding was in error because the trial court did not instruct the jury that intent to kill was a prerequisite. On the basis of *People v. Anderson*,[30] the court responded that such an instruction is unnecessary absent evidence from which the jury might find the defendant to be an accomplice rather than a principal.[31] Because all the evidence directly indicated that the defendant was the actual killer, the defendant did not deserve relief under *Anderson*.[32]

B. The Penalty Phase

The defendant claimed that under *Witherspoon v. Illinois*,[33] the trial court erred in excluding two prospective jurors because of their unwillingness to impose the death penalty. The court noted that the United States Supreme Court broadened the *Witherspoon* standard to allow exclusion for cause where " 'the juror's views would "prevent or substantially impair the performance of his duties as a juror

26. *Miranda*, 44 Cal. 3d at 87, 744 P.2d at 1144, 241 Cal. Rptr. at 612.

27. *Id.* at 87, 744 P.2d at 1145, 241 Cal. Rptr. at 612.

28. *Id.* (quoting People v. Lunafelix, 168 Cal. App. 3d 97, 102, 214 Cal. Rptr. 33, 36 (1985)).

29. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

30. 43 Cal. 3d 1104, 742 P.2d 1306, 240 Cal. Rptr. 585 (1987).

31. *Miranda*, 44 Cal. 3d at 89, 744 P.2d at 1146, 241 Cal. Rptr. at 613 (citing *Anderson*, 43 Cal. 3d at 1138-39, 742 P.2d at 1331, 240 Cal. Rptr. at 611). *See generally* CAL. JUR. 3D, *supra* note 7, §§ 3341, 3343.

32. *Id.* at 89, 744 P.2d at 1146, 241 Cal. Rptr. at 614.

33. 391 U.S. 510 (1968). *See generally* 47 AM. JUR. 2D *Jury* §§ 240, 245, 271 (1969); Colussi, *The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair-Cross-Section Requirement in Capital Cases*, 15 CREIGHTON L. REV. 595 (1982).

in accordance with his instructions and his oath." ' "[34] After reviewing the record, the court concluded that the trial court could reasonably have understood the jurors' responses to indicate an inability to vote for the death penalty under any circumstances.[35] Thus, the court found the exclusion of the potential jurors to be proper.

During the penalty trial, the prosecutor introduced testimony that the defendant had committed another murder two weeks before the murder of the store clerk. The defendant correctly contended that it was error under *People v. Robertson*[36] for the court not to give an instruction that the jury could not consider the prior murder as evidence unless the defendant's guilt was established beyond a reasonable doubt. The court found this error to be harmless because there was an abundance of uncontroverted evidence to establish, beyond a reasonable doubt, that the defendant committed the prior murder.[37]

The defendant contended that the court failed to properly instruct the jury on the use of mitigating and sympathy evidence in the penalty phase as mandated by *People v. Easley*.[38] In rejecting both of these arguments, the court first noted that *Easley* dealt only with the inappropriateness of anti-sympathy instructions.[39] As an instruction was not given in the present case, the court found *Easley* to be inapplicable.[40] On the issue of mitigating instructions, the court observed that a trial court must instruct the jury that it may consider any aspect of the defendant's character as mitigating evidence.[41] The court added, however, that the determination of a proper instruction is made on a case by case basis.[42] Based on the lack of mitigating evidence offered by the defense, the court found no error in the trial court's failure to give the mitigation instruction.[43]

The defendant also claimed that several prosecutorial comments made during summation resulted in prejudice. Because defense counsel failed to object in a timely manner, the court held that the

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34. *Miranda*, 44 Cal. 3d at 94, 744 P.2d at 1149, 241 Cal. Rptr. at 616-17 (citing Wainwright v. Witt, 469 U.S. 412, 424 (1985) (other citation omitted by court)). *See generally* B. WITKIN, *supra* note 14, §§ 400A, 400B; Note, *Jury Selection — Exclusion of Potential Jurors in Capital Sentencing Cases No Longer Requires that Venue Members Express Their Views About the Death Penalty With Unmistakable Clarity*, 16 SETON HALL 851 (1986).

35. *Miranda*, 44 Cal. 3d at 95-96, 744 P.2d at 1150-51, 241 Cal. Rptr. at 617-18. *See generally* B. WITKIN, *supra* note 7, §§ 405-08.

36. 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982).

37. *Miranda*, 44 Cal. 3d at 98, 744 P.2d at 1152, 241 Cal. Rptr. at 619.

38. 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983).

39. *Miranda*, 44 Cal. 3d at 102, 744 P.2d at 1115, 241 Cal. Rptr. at 622.

40. *Id.*

41. *Id.* (citing *Easley*, 34 Cal. 3d at 878 n.10, 671 P.2d at 826 n.10, 196 Cal. Rptr. at 322 n.10).

42. *Id.* at 102-03, 744 P.2d at 1155, 241 Cal. Rptr. at 622.

43. *Id.* at 103, 744 P.2d at 1156, 241 Cal. Rptr. at 623.

defendant's right to object to resulting error was waived.[44] Thus, the defendant claimed incompetence of counsel. He contended that his attorney should have objected to the prosecutor's use of facts allegedly not in evidence. The court found each of the questioned statements to be "based on reasonable inferences from the evidence before the jury," and if the comments were improper, the court "fail[ed] to see any possible prejudice arising from the . . . brief remarks."[45] The defendant argued additionally that the district attorney improperly offered his personal opinion to the jury when predicting the possibility of future violence by the defendant. The court rejected these contentions based upon the factual circumstances of the case.[46]

Finally, the court was faced with the contention that the prosecutor improperly commented on the impact on the victim's family that releasing the defendant would have. The court agreed with the defendant that, pursuant to *Booth v. Maryland*,[47] such comments were improper.[48] The court found this misconduct to be harmless on the grounds that the remarks were, unlike those in *Booth*, obvious and nonspecific.[49]

The defendant then contended that his motion for a new trial should have been granted because during the course of the trial, one juror had a number of conversations with the defendant's girlfriend in an effort to get a date with her. The court noted that jury misconduct raises a rebuttable presumption of prejudice.[50] The court found that sufficient evidence existed to support the trial court's conclusion that the parties involved did not discuss the case.[51]

In his petition for writ of habeas corpus, consolidated with his ap-

44. *Id.* at 108, 744 P.2d at 1159, 241 Cal. Rptr. at 626.

45. *Id.* at 109-10, 744 P.2d at 1160, 241 Cal. Rptr. at 627. *See generally* CAL. JUR. 3D, *supra* note 37, § 328.

46. *Miranda*, 44 Cal. 3d at 110-11, 744 P.2d at 1160-61, 241 Cal. Rptr. at 627-28. The court held that the district attorney's comments were protected as it was not misconduct "to 'merely postulate what the evidence would arguably prove.' " *Id.* at 110, 744 P.2d at 1160, 241 Cal. Rptr. at 627-28 (citing People v. Ryner, 164 Cal. App. 3d 1075, 1086, 211 Cal. Rptr. 140, 147 (1985)). The court found that the prosecutor's comments did not misstate the evidence or deprive the defendant of a right to a fair trial. *Id.* at 111, 744 P.2d at 1161, 241 Cal. Rptr. at 628. *See generally* B. WITKIN, *supra* note 7, § 452.

47. 107 S. Ct. 2529 (1987).

48. *Miranda*, 44 Cal. 3d at 113, 744 P.2d at 1162, 241 Cal. Rptr. at 629.

49. *Id.* at 113, 744 P.2d at 1162, 241 Cal. Rptr. at 629.

50. *Id.* at 117, 744 P.2d at 1165, 241 Cal. Rptr. at 632 (citations omitted). *See generally* 5 AM. JUR. 2D *Appeal and Error* § 781 (1962).

51. *Miranda*, 44 Cal. 3d at 117, 744 P.2d at 1165, 241 Cal. Rptr. at 632.

peal, the defendant made three assignments of error. The court issued an order to show cause for the contention that his counsel's decision not to present any mitigating evidence at the penalty trial deprived him of effective assistance of counsel.[52] After observing that the defendant had "the burden of showing that 'counsel failed to act in a manner to be expected of reasonably competent attorneys . . . ,' "[53] and that absent this failure, it was probable that the jury would have returned a more favorable verdict,[54] the court considered the relative merit of the party's declarations.[55]

Citing *People v. Durham*[56] and *People v. Jackson*,[57] the court declined to hold the defense counsel incompetent because the choice not to present the mitigating evidence was the result of a reasonably competent and informed tactical decision.[58] The court, analogizing the present facts to those in *Jackson*, observed that the defense counsel's attempt to invoke mercy rather than rebut the prosecution's evidence was reasonable.[59] As such, the defendant's petition for writ of habeas corpus was denied without an evidentiary hearing.[60]

IV. JUSTICE BROUSSARD'S CONCURRING AND DISSENTING OPINION

Justice Broussard concurred in the court's affirmation of the guilty verdict and the special circumstances finding. The dissenting portion condemned the denial of the writ of habeas corpus.[61] Justice Broussard argued that although a competent tactical choice will negate an ineffective assistance claim, the tactical choice must be based upon

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52. The other assignments of error involved his counsel's failure to develop a diminished capacity defense and the constitutionality of the death penalty as applied in Los Angeles. *Id.* at 118, 744 P.2d at 1166, 241 Cal. Rptr. at 633. These claims were dismissed for failure to establish a prima facie case. *Id.* at 119 n.37, 744 P.2d at 1166 n.37, 241 Cal. Rptr. at 633 n.37.

53. *Id.* at 119, 744 P.2d at 1166, 241 Cal. Rptr. at 633 (quoting People v. Pope, 23 Cal. 3d 412, 425, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979)).

54. *Id.* (citing People v. Fosselman, 33 Cal. 3d 572, 584, 649 P.2d 1144, 1151, 189 Cal. Rptr. 855, 862 (1983)).

55. The declarations showed that the defendant had been abusing drugs and alcohol from an early age and that his delinquent activity resulted from his difficulty in accepting success. The Attorney General presented declarations showing that as a matter of trial strategy, presenting this mitigating evidence would have harmed the defendant's chances more than it would have helped.

56. 70 Cal. 3d 171, 449 P.2d 198, 74 Cal. Rptr. 262 (1969) (failing to present mitigating evidence not resulting in ineffective assistance of counsel).

57. 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), *cert. denied*, 450 U.S. 1035 (1981) (informed choice of tactics not allowing ineffective assistance of counsel claim).

58. *Miranda*, 44 Cal. 3d at 121, 744 P.2d at 1167, 241 Cal. Rptr. at 635.

59. *Id.* at 121, 744 P.2d at 1167-68, 241 Cal. Rptr. at 635.

60. *Id.* at 123, 744 P.2d at 1169, 241 Cal. Rptr. at 636. *See generally* 22 CAL. JUR. 3D, pt. 2 *Criminal Law* § 3857 (rev. ed. 1985).

61. *Miranda*, 44 Cal. 3d at 124, 744 P.2d at 1169-70, 241 Cal. Rptr. at 637 (Broussard, J., concurring in part and dissenting in part).

adequate investigation.[62] Examining the record, Justice Broussard failed to find evidence of such an investigation. Accordingly, he would have required an evidentiary hearing to resolve the remaining factual questions.[63]

V. CONCLUSION

People v. Miranda adds little of a substantive nature to the law in California. The decision is significant only in that it re-establishes the hard-line approach to death penalty issues which was demanded by California voters as a consequence of the Bird court's leniency. Justice Broussard's dissent fails to recognize the gravity of the offense committed and would create yet another loophole, in addition to the plethora offered by the defendant, through which a convicted killer might escape capital punishment. Although offered the opportunity, the majority did not recognize any such opening, choosing instead to affirm both the trial court's finding of guilt and its imposition of the death penalty.

STEVEN L. MILLER

V. INSURANCE LAW

The Legislature intended sections 1032 and 1256 of the California Unemployment Insurance Code to be read together; therefore, "spouse" includes an "imminent spouse" under both sections: **Altaville Drug Store, Inc. v. Employment Development Department.**

In *Altaville Drug Store, Inc. v. Employment Development Department*, 44 Cal. 3d 231, 746 P.2d 871, 242 Cal. Rptr. 732 (1988), the issue before the California Supreme Court was whether section 1032 of the California Unemployment Insurance Code was intended by the Legislature to act in accord with section 1256, and thereby apply the "imminent spouse" extension of the latter section to the former. In reversing the court of appeal, the court held that because sections 1032 and 1256 are *in pari materia*, ambiguity exists as to the meaning of "spouse" in section 1032 when compared to section 1256. In attempting to effectuate the purpose of the law by ascertaining the intent of the Legislature, the court looked to *Select Base Materials v.*

62. *Id.* at 125, 744 P.2d at 170, 241 Cal. Rptr. at 638.
63. *Id.* at 127, 744 P.2d at 1172, 241 Cal. Rptr. at 639.

Board of Equality, 51 Cal. 2d 640, 335 P.2d 672 (1959). The court found that the Legislature intended to apply the "imminent spouse" expansion to section 1032. Consequently, the case was remanded to the trial court with instructions to grant Altaville Drug Store's (Altaville) petition for writ of mandate.

The controversy arose the day before the claimant's marriage when she voluntarily resigned from employment with the respondent, Altaville, in order to move to a distant location to be with her new husband. Under section 1256, an employee is entitled to unemployment benefits where she has left her most recent work for good cause. Section 1256 deems an individual to have left employment with good cause if it is for the purpose of accompanying a spouse "to a place from which it is impractical to commute." CAL. UNEMP. INS. CODE § 1256 (West 1986). In an uncodified provision, section 1256 benefits were extended to an employee "whose marriage is imminent." 1982 Cal. Stat. ch. 1073, 3873-74. *See also MacGregor v. Unemployment Insurance Appeals Board*, 37 Cal. 3d 205, 689 P.2d 453, 207 Cal. Rptr. 823 (1984). Finding that the claimant left for good cause, the petitioner, Employment Development Department (EDD), granted the benefits and, over the respondent's objection, charged Altaville's reserve account rather than the pooled benefit fund, thereby increasing the employer's rate of contribution to that fund.

Section 1032 dictates the circumstances under which benefits awarded to a claimant are charged to the pooled fund. The court rejected EDD's contention that these circumstances did not exist because the claimant was not technically accompanying a "spouse" pursuant to section 1032. The court recognized that the use of "spouse" in section 1032 is unambiguous on its face when the statute is read alone. However, when section 1032 is read together with the extended definition in section 1256, ambiguity is created.

The court next moved to the determination of whether the "imminent spouse" extension was intended to apply to section 1032. Turning to the 1979 Committee Report on this statute, ASSEM. COMM. ON FINANCE, INSURANCE AND COMMERCE, REG. SESS., ANALYSIS OF ASSEM. BILL NO. 134 (1979-80 Reg. Sess.) (as amended May 12, 1979), the court found that section 1032 was intended to be a corollary of section 1256 and was passed to remedy the inequitable circumstances facing an employer whose employee resigned for the purpose of following a spouse. *See generally* 58 CAL. JUR. 3D *Statutes* § 161 (1980); 73 AM. JUR. 2D *Statutes* §§ 147-79 (1974). Arguing that it is inequitable to charge an employer's reserve account where the employee resigns to join an "imminent spouse," the court held that the objectives of section 1032 were advanced by assigning the word "spouse" an equivalent meaning in both sections. Section 1032 now requires that

employment benefits be charged to the pooled fund when an employee leaves work to accompany either a spouse or an imminent spouse. *See generally* 81 C.J.S. *Social Security and Public Welfare* §§ 220, 226, 291 (1977).

In reaching its conclusion that both section 1032 and section 1256 were intended to apply to situations involving an "imminent spouse," the court failed to consider the limits of judicial power. As evidenced by the court's discussion of the committee report, the legislature seriously considered the appropriate language for section 1032. Yet, after this consideration, the term "spouse" was left unchanged. By expanding the statute and ignoring the plain language therein, the court has superimposed its views on unemployment insurance on those of the legislature. The court acted as a law maker rather than law interpreter. This type of deviation from the traditional role of the judiciary is both precedentially dangerous and a serious infringement on the separation of powers doctrine. As noted by Justice Eagleson in his dissent, "[t]he majority's opinion is a well-meaning effort to resolve what the majority deems to be a statutory inconsistency. I am not persuaded there is one, but, if there is, the Legislature should resolve it." *Altaville*, 44 Cal. 3d at 241, 746 P.2d at 876, 242 Cal. Rptr. at 738 (Eagleson, J., dissenting).

STEVEN L. MILLER

VI. LOCAL GOVERNMENT LAW

Pursuant to section 5205 of the Business and Professions Code, a county's designation of a parcel of land as a "Desert Special Services Center," even if in conjunction with a "Desert Living" designation and the appropriate site approval, is insufficient to create an area zoned primarily for commercial use, and as such, advertising billboards sought to be placed adjacent to a highway, may not be erected: **United Outdoor Advertising Co., Inc. v. Business, Transportation and Housing Agency.**

In *United Outdoor Advertising Co., Inc. v. Business, Transportation and Housing Agency*, 44 Cal. 3d 242, 746 P.2d 877, 242 Cal. Rptr. 738 (1988), the issue before the California Supreme Court was whether the proposed site for the plaintiff's billboard advertisements was zoned "primarily" to allow "commercial and industrial activities" pursuant to section 5205 of the California Business & Professions

Code. In reversing the court of appeal, the court unanimously held that the Legislature did not intend to allow a county's designation of an area as a "Desert Special Service Center" (DSSC) to constitute zoning for commercial purposes, even if such a designation applied to a "Desert Living" zone and was accompanied by the requisite site approval for commercial use. *United Outdoor Advertising*, 44 Cal. 3d at 251, 746 P.2d at 883-84, 242 Cal. Rptr. at 745.

The conflict arose when the plaintiff, United Outdoor Advertising Co. (Outdoor), proposed the erection of five illuminated billboards along Interstate 15 in the desert town of Baker in San Bernardino County. Prior to this action, the county had zoned the proposed sites "Desert Living" (DL) a residential and agricultural designation permitting commercial or industrial use only with the appropriate site approval from the county. *See generally* 101a C.J.S. *Zoning and Planning* § 57 (1978). In conjunction with its zoning plan, Baker was also considered a "Desert Special Service Center," thereby allowing the town to provide certain services for travelers and residents. In an effort to comply with the county rules governing a DL zoning designation, the plaintiff applied to the county for, and received, the requisite site approval. When Outdoor applied to the Business, Transportation and Housing Agency (the Agency) for billboard permits, however, the permits were denied under the belief that the proposed sites were not zoned "primarily" for commercial use. *See generally* § 130. The plaintiff then asked the superior court for a writ of mandate requiring the issuance of the permits. The superior court granted the writ, the court of appeal affirmed, and the Agency appealed to the supreme court.

In affirming the Agency's contention that the proposed advertising site was not an area "primarily" zoned for commercial use under section 5202 of the Business and Professions Code, the court examined the legislative history of the statute. The court first noted that the California Outdoor Advertising Act, CAL. BUS. & PROF. CODE §§ 5200-31 (West 1974 & Supp. 1988) (the Act), was passed in an effort to conform with the Highway Beautification Act of 1965, 23 U.S.C. § 131 (1982), which established the national standard for advertising along interstate highways. *United Outdoor Advertising*, 44 Cal. 3d at 245, 746 P.2d at 880, 242 Cal. Rptr. at 741. The court next commented that under the Act, billboards and other advertising displays along the highway were allowed only in "business areas." *Id.* (quoting CAL. BUS. & PROF. CODE § 5408 (West Supp. 1988)). Finally, the court found a "business area" to be any area which is "within 1,000 feet of the nearest edge of a commercial or industrial activity . . . [and also] 'zoned under authority of state law primarily to permit industrial or commercial activities.' " *United Outdoor Advertising*, 44 Cal. 3d at 246, 746 P.2d at 880, 242 Cal. Rptr. at 741 (quoting CAL.

BUS. & PROF. CODE § 5205). *See generally* B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 471 (8th ed. 1974 & Supp. 1984).

As the court found the first component of the "business area" test to exist, the analysis centered on the "primarily zoned for commercial activity" requirement. In rejecting the plaintiff's claim that the site approval and DSSC designation created a primarily commercial zoning category, the court scrutinized the relationship between the legislative intent of the Act and the special zoning designations under the county's general plan. *See generally* B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 466 (8th ed. 1974 & Supp. 1984). After determining that the Legislature intended the word "primary" to delineate the "main use" of the land in question, the court moved to an examination of San Bernardino's DL zone. In holding that the DL designation did not constitute a zone primarily for commercial use, the court reasoned that if such a zone was intended to be primarily for commercial use, a site approval for such use would not be required. Believing the site approval to be "an exception to a general zoning category," *United Outdoor Advertising*, 44 Cal. 3d at 248, 746 P.2d at 881, 242 Cal. Rptr. at 742 (citations omitted), the court found that the DL zone did not establish a commercial zone as it fell outside the Legislature's intended requirement of an "actual" commercial use designation. *Id.* (citing Gaylord, *Zoning: Variances, Exceptions, and Conditional Use Permits in California*, 5 UCLA L. REV. 179, 193 (1958)). *See generally* B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 484 (8th ed. 1974 & Supp. 1984).

Finally, the court examined the implications of the DSSC designation. In rejecting the plaintiff's contention that such a designation was the equivalent of a commercial zone, the court noted that the DSSC was not a permissible land use designation, but rather a "statement of development policies" created to cultivate future development. *United Outdoor Advertising*, 44 Cal. 3d at 249, 746 P.2d at 882, 242 Cal. Rptr. at 743 (citing CAL. GOV'T CODE § 65302 (West Supp. 1988)). Reasoning that the DSSC was only a temporary classification that would later be replaced by a traditional permissible land use designation, the court found that such a classification was not developed "primarily" to provide for commercial use and that, as such, the DSSC zone was not within the intended scope of the Act. As neither of the special zoning classifications instituted by San Bernardino County was sufficient to create a commercial zone, the court denied

the plaintiff's request for a writ of mandate requiring that the Agency issue the permits allowing the erection of the advertising billboards. *See generally* B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 465 (8th ed. 1974 & Supp. 1984); 82 AM. JUR. 2D *Zoning and Planning* §§ 281-87 (1976); 66 CAL. JUR. 3D *Zoning and Other Land Controls* §§ 122-30 (1981); 101a C.J.S. *Zoning and Planning* § 12 (1978).

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