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California Supreme Court Survey: September 1986-November 1986

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California Supreme Court Survey
September 1986-November 1986

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.

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I. CIVIL PROCEDURE

A default judgment entered pursuant to discovery sanctions is not an exception to the general rule restricting recovery to the amount specifically demanded in the complaint: **Greenup v. Rodman.**

In *Greenup v. Rodman*, 42 Cal. 3d 822, 726 P.2d 1295, 231 Cal. Rptr. 220 (1986), the court considered whether a default judgment entered pursuant to discovery sanctions in excess of the amount prayed for was beyond the jurisdiction of the court. (*See* CAL. CIV. PROC. CODE § 2034(b)(2)(C) (West 1983)) [hereinafter section 2034] (repealed operative July 1, 1987 and replaced by section 2024(b)(3)(D), which enables the court to strike a defendant's answer and enter a default judgment as a penalty for disobeying a discovery order). In general, where no answer is filed, the plaintiff's relief may not exceed the amount demanded in the complaint. CAL. CIV. PROC. CODE § 580 (West 1976) [hereinafter section 580]. In any other case, section 580 provided that the court may fashion relief consistent with the case. Thus, the court asked whether striking a defendant's answer as a sanction for discovery order violations was equivalent to the defendant's having never filed an answer under section 580. The court held that the defendant was liable only to the extent of the demand in the complaint.

The plaintiff alleged that the defendant fraudulently transferred assets out of a company in which the plaintiff was a minority stockholder. The complaint prayed for $100,000 in damages. Subsequent to filing an answer, the defendant, on several occasions had willfully resisted deposition and document production requests. Pursuant to section 2034, the plaintiff moved to strike the defendant's answer and enter a default judgment as a penalty for failure to comply with discovery. The trial court allowed the defendant an opportunity to pay a fine and produce the requested documents. After the defendant failed to do so, the court struck his answer and entered the default judgment.

In a subsequent ex-parte hearing to prove damages, the court found the defendant liable for $338,000 in compensatory and $338,000 in punitive damages. The defendant appealed, claiming that under section 580 the trial court had jurisdiction to award damages only up to the amount of the prayer. The court of appeal held that because the default was entered pursuant to a discovery sanction, it was an exception to the general rule limiting recovery to the amount specifically demanded. *See generally* Note, *Default Judgments in Excess of Prayer*, 4 STAN. L. REV. 278 (1952).

The supreme court reversed and held that the trial court could not enter a default judgment award in excess of the amount demanded in

the complaint. The court reasoned that striking the defendant's answer had the same effect as a total failure to answer by the defendant. The court stated that the purpose of section 580 was to provide notice to the defendant of the limits of his potential liability, thereby satisfying his due process rights should a default judgment be entered against him. The court added that to hold otherwise would allow trial courts excessive leeway in determining damages, thus exposing defendants to limitless liability. In declining to strengthen discovery sanctions, the court stated that it was more concerned with due process rights than with furthering the policy behind penalties for discovery abuse.

In the instant case, the court reduced the punitive damage award to $100,000, the amount specifically demanded in the complaint. Additionally, the court lowered the $338,000 in compensatory damages to $15,000. Under section 86 of the Code of Civil Procedure, the trial court's jurisdiction was limited to cases in which the amount in controversy exceeded $15,000. The court reasoned that because the plaintiff's prayer requested an amount which exceeded the jurisdictional requirements of the trial court, the plaintiff was claiming at least $15,000 in damages. Thus, the court lowered the compensatory damages to its jurisdictional limit. However, the court allowed the plaintiff the option to forego this remedy and file an amended complaint. In sum, the supreme court held that a default judgment award may not exceed the amount demanded in the complaint where the default was entered pursuant to willful disobedience of discovery orders.

JAMES A. COULTER, III

II. CONSTITUTIONAL LAW

A. *The placement of electronic listening devices in the chapel of a youth authority school violated the ward's right to privacy and right to free exercise of religion where the youth authority could not show that such measures were necessary to institutional security:* **In re Arias.**

I. INTRODUCTION

In *In re Arias*,[1] the court ordered the removal of an electronic lis-

1. 42 Cal. 3d 667, 725 P.2d 664, 230 Cal. Rptr. 505 (1986). Chief Justice Bird wrote the majority opinion with Justices Broussard, Reynoso, and Lytle concurring. Justice Grodin wrote a separate concurring and dissenting opinion. Justice Lucas, with whom

tening device that was placed in the Protestant chapel of the youth authority's Karl Holton School. The court, noting that the language of section 636 of the Penal Code[2] did not require the actual removal of the listening devices, ordered their removal on section 2600 of the Penal Code.[3] The court concluded that the youth authority failed to show that the device was necessary to the reasonable security needs of the institution and therefore, its use was not justified.

II. Factual Background

As part of a plan to upgrade security, the youth authority installed sixty electronic listening devices throughout the Karl Holton School. One of the microphones was placed in the foyer of the Protestant chapel and would have been able to monitor sounds above a certain noise level in the foyer, chapel, and chaplain's office. The device in the chapel's foyer was part of a larger monitoring system. This monitoring arrangement was to act as an alarm system: when the noise level in any one of the sixty monitoring locations exceeded a designated threshold level, a warning light would go off in the control center.[4] If the noise level remained elevated for a certain period of time, the control room speakers would begin monitoring the sounds, which would enable the control room guard to identify the cause.[5]

The device in the chapel was to be set just above the "ambient noise level," a level just higher than that of normal conversation. However, no prescribed guidelines for the threshold level existed.[6] The chapel microphone was tested but never became operative.[7] When the electronic listening device was set above the ambient noise level, the test results were as follows: 1) a loud religious service would activate the alarm;[8] 2) a normal conversation could be monitored. However, if the conversation took place in the chaplain's office with the door closed, the content of the conversation could not be

Justice Mosk concurred, dissented. Justice Lytle was assigned by the Chairperson of the Judicial Counsel.

2. Cal. Penal Code § 636 (West 1970).

3. Cal. Penal Code § 2600 (West 1982).

4. *Arias*, 42 Cal. 3d at 674, 725 P.2d at 666, 230 Cal. Rptr. at 507. Each device was to be set at a distinct threshold level. For instance, the microphone in the gymnasium would have a much higher threshold level than that in the chapel.

5. *Id.*

6. *Id.* at 675, 725 P.2d at 667, 230 Cal. Rptr. at 508.

7. No stay was issued to prevent the youth authority from connecting the microphone. It appeared that they did not connect it in anticipation of the pending litigation.

8. *Arias*, 42 Cal. 3d at 676, 725 P.2d at 667, 230 Cal. Rptr. at 508-09. This fact was ascertained as a result of formal tests conducted by the youth authority to determine where to place the microphone.

identified.[9]

In November of 1981, nearly eight months before the actual installation of the chapel device, youth authority wards Escobedo and Sowell petitioned for a writ of *habeas corpus* to enjoin the placement of the microphone. This action was consolidated with the present action instituted by wards Arias and Bolton.[10] The trial court denied the petition, followed by a summary denial by the court of appeal.

III. The Majority Opinion

The majority used a three-part analysis in determining whether to order the removal of the devices. First, it analyzed section 636 of the Penal Code which prohibited the monitoring of conversations by the youth authority of wards and religious personnel, but did not proscribe actual removal of the devices. Second, it considered section 2600 of the Penal Code which established a "necessary to reasonable security" standard to limit a prisoner's religious freedom. Finally, the court examined section 2600 of the Penal Code which required a three-pronged analysis: 1) whether any violation of rights was involved; 2) whether a reasonable security problem existed; and 3) whether the deprivation of rights was necessary to the reasonable security needs of the institution.

A. Section 636 of the Penal Code

The purpose of section 636 of the Penal Code was to protect a person's right of privacy against eavesdropping of private conversations through the use of electronic monitoring.[11] The relevant portion of the section provided:

> Every person who, without permission from all parties to the conversation, eavesdrops on or records by means of an electronic or other device, a conversation, or any portion thereof, between a person who is in the physical custody of a law enforcement officer or other public officer, or who is on the property of a law enforcement agency or other public agency, and such person's attorney, religious advisor, or licensed physician, is guilty of a felony . . . .[12]

The court interpreted this broad statutory language as a prohibition

9. *Id.* at 676, 725 P.2d at 668, 230 Cal. Rptr. at 509. These findings were a part of the chaplain's informal tests.

10. The present posture of wards Escobedo and Sowell was not contained in the opinion. However, the court related that neither Bolton nor Arias were wards of the authority at the time of the appeal. The court summarily disregarded this mootness issue by stating that the issue was of great public concern and would continue to occur. *Id.* at 673 n.1, 725 P.2d at 665 n.1, 230 Cal. Rptr. at 506 n.1.

11. *Id.* at 680, 725 P.2d at 670, 230 Cal. Rptr. at 510.

12. CAL. PENAL CODE § 636 (West 1970). The court noted that the statute cannot

against monitoring even informal conversations between a group of wards and a religious advisor, but did not forbid the monitoring of a public religious service.[13]

The court dismissed the youth authority's argument that the provisions of section 636 were met because the chaplain's office remained available for private, unmonitored conservations.[14] The court reasoned that while a literal approach to the statute would be unworkable because chaplain/ward conversations could occur anywhere in the complex, the statute did not require the chaplain to consistently retreat to his office for privacy.[15] The court felt that the solution was to leave areas traditionally used for such private conversations, including the entire chapel complex, unmonitored.[16] As part of its analysis, the court then determined that the language of section 636 stopped short of barring the existence of the device in the chapel.

B. Section 2600 of the Penal Code

In recognizing the possible abuse of the monitoring system and the potential chilling effect on the free exercise of religion that might be caused by the presence of the unconnected device, the court focused upon section 2600 of the Penal Code.[17] The court first reviewed section 1705 of the Welfare and Institutions Code, which specifically dealt with the religious freedom of youth authority wards.[18] The actual language of section 1705 provided that persons in youth authority custody "shall be afforded reasonable opportunities to exercise religious freedom."[19] After examining the legislative history of this section, the court concluded that, although the statute did not require employment of a "necessity" standard, the California legislature intended that the provision conform to the United States Supreme Court's decision in *Cruz v. Beto*.[20]

In *Cruz*, the Supreme Court held that a prisoner should be afforded "a reasonable opportunity of pursuing his faith."[21] The Court,

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be defeated by merely informing the parties that their conversations were being monitored. *Arias*, 42 Cal. 3d at 680-81 n.11, 725 P.2d at 670 n.11, 230 Cal. Rptr. at 511 n.11.

13. *Id.* at 681, 725 P.2d at 671, 230 Cal. Rptr. at 512.

14. *Id. See generally* Annotation, *Provision of Religious Facilities for Prisoners*, 12 A.L.R. 3D 1276 (1967).

15. *Arias*, 42 Cal. 3d at 681, 725 P.2d at 671, 230 Cal. Rptr. at 512.

16. *Id. See generally* 60 AM. JUR. 2D *Penal and Correctional Institutions* § 46 (1972); 72 C.J.S. *Prisons* §§ 91-95 (1987).

17. CAL. PENAL CODE § 2600 (West 1982).

18. CAL. WELF. & INST. CODE § 1705 (West 1984).

19. *Id.*

20. 405 U.S. 319 (1972). *See generally* Special Project, *Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-1984*, 73 GEO. L.J. 249, 813-32 (1984).

21. *Cruz*, 405 U.S. at 322.

analyzing in dicta *Lee v. Washington*,[22] concluded that racial segregation in prisons would not be tolerated unless it was *necessary* to prison security and discipline.[23] The *Arias* court, which combined the *Cruz* and *Lee* holdings, pronounced that the United States Supreme Court "indirectly" established a standard which would permit interference with religious rights only when necessary.[24] The court admitted, however, that the interpretation of the *Cruz* decision had resulted in seven different standards being applied by various courts.[25] Thus, the majority stated that "this court need not enter this briar patch, since another statute [section 2600 of the Penal Code] resolves petitioners' religious freedom claims."[26]

Section 2600 of the Penal Code provides:

> A person sentenced to imprisonment in a state prison may, during any such period of confinement, be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public."[27]

The court determined that, even though the language of section 2600 seemed to apply only to inmates in state prisons, the decision in *DeLancie v. Superior Court*[28] mandated the applicability of the section to youth authority wards.[29] Since the applicability of section 2600 was based on an equal protection rationale, this portion of the court's holding was limited to situations where the challenged measures taken by the youth authority were taken solely for security reasons.[30] Subsequently, the court decided that the electronic listening system was implemented purely for security purposes and, as such, section 2600 applied.[31]

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22. 390 U.S. 333 (1968).

23. *Id.* at 334.

24. *Arias*, 42 Cal. 3d at 685, 725 P.2d at 674, 230 Cal. Rptr. at 515 (citing Comment, *The Religious Rights of the Incarcerated*, 125 U. PA. L. REV. 812, 852 (1977)).

25. *Arias*, 42 Cal. 3d at 686, 725 P.2d at 674, 230 Cal. Rptr. at 515.

26. *Id.* at 687, 725 P.2d at 675, 230 Cal. Rptr. at 516.

27. CAL. PENAL CODE § 2600 (West 1982).

28. 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982) (holding that section 2600 of the Penal Code applied to pretrial detainees where routine monitoring of their conversations occurred).

29. *Arias*, 42 Cal. 3d at 687, 725 P.2d at 675, 230 Cal. Rptr. at 516.

30. *Id.* at 687-88, 725 P.2d at 675-76, 230 Cal. Rptr. at 516-17. *See In re* Eric J., 25 Cal. 3d 522, 601 P.2d 549, 159 Cal. Rptr. 317 (1979) (discussion of the underlying equal protection analysis: juveniles are incarcerated for rehabilitation purposes, but adults are imprisoned for punishment).

31. *Arias*, 42 Cal. 3d at 688, 725 P.2d at 677, 230 Cal. Rptr. at 517.

C. *The Application of section 2600 of the Penal Code*

The court began by promulgating a three-pronged test for deciding all claims under section 2600. The inquiry was to be conducted as follows: "(1) Are any 'rights' implicated? (2) If they are, does a 'reasonable security' problem exist which might permit a deprivation of rights under the statute; and (3) if so, to what extent are deprivations of those rights 'necessary' to satisfy reasonable security interests?"[32]

1. The rights involved

The court noted that the starting point for its analysis must begin with the determination of what religious rights nonconfined citizens possessed.[33] Declaring that both the federal and state constitutions guarantee such rights,[34] the court undertook a review of testimony to evaluate whether the presence of a microphone infringed upon these rights. Testimony of four clergymen revealed that the installation of electronic listening devices would have a chilling effect on the wards' religious freedoms.[35] The youth authority rebutted this testimony by introducing evidence that the Associated California State Service and some members of the State Advisory Committee on Institutional Religion felt that a monitoring system would not unduly interfere with the wards' rights. However, this information was summarily rejected by the majority in a footnote.[36]

The youth authority then attempted to defend its position by pointing out that the chaplain's office was unmonitored.[37] The court refuted this position by noting that the test results were inconclusive and, therefore, there was no proof that complete privacy existed in that office.[38] Finally, the youth authority revealed that the chaplain had the authority to order the microphone to be turned off.[39] Pronouncing that the chaplain's decision on the matter was not final, the court concluded that the issue was not the chaplain's religious freedom, but the wards.'[40] Thus, under this view, the youth authority was required to give its permission before the device could be discon-

32. *Id.* at 689, 725 P.2d at 677, 230 Cal. Rptr. at 518. *See generally* Comment, *Constitutional Rights in Prison: The Standard of Review in California*, 16 PAC. L.J. 1077 (1985).

33. *Arias*, 42 Cal. 3d at 691, 725 P.2d at 678, 230 Cal. Rptr. at 519.

34. *Id.* at 692, 725 P.2d at 679, 230 Cal. Rptr. at 520. *See also* U.S. CONST. amend. I; CAL. CONST. art. I, § 4.

35. *Arias*, 42 Cal. 3d at 692, 725 P.2d at 679, 230 Cal. Rptr. at 520.

36. *Id.* at 694 n.29, 725 P.2d at 680 n.29, 230 Cal. Rptr. at 521 n.29.

37. *Id.* at 695, 725 P.2d at 681, 230 Cal. Rptr. at 522.

38. *Id.* The court refused to grant deference to the trial court's factual finding that the office conversations could not be overheard. The court stated that the lower court did not base its finding on the "credibility of live testimony." *Id.*

39. *Id.* at 695-96, 725 P.2d at 681-82, 230 Cal. Rptr. at 522-23.

40. *Id.* at 696, 725 P.2d at 682, 230 Cal. Rptr. at 523.

nected.[41] Following this review, the court surmised that the presence of the microphone would have a chilling effect on the wards' right to freedom of religion.[42]

2. The Existence of a reasonable security problem

The court began this phase of its analysis by defining the standard for determining whether a reasonable security problem existed. This definition specified that "reasonable" meant something more than a good faith belief, taking into account the youth authority's experience and expertise in such matters.[43] The petitioners noted that no prior history of violent attacks on religious personnel or wards existed in the youth authority system. The youth authority, however, produced a record indicating " 'gang confrontations, escapes, sexual attacks on younger, weaker wards, and various contraband problems, ranging from hidden narcotics to 'ripping off' the chaplain's sacramental wine.' "[44] Thus, the court admitted that a reasonable threat to security existed.[45]

3. The Necessity of Deprivations Standard Applied to Reasonable Security Interests

In employing the "necessity" standard, the court reasoned that the burden of proof rested upon the youth authority to establish that less restrictive means for solving the security problem did not exist.[46] In order to meet this burden of proof, the youth authority argued that the *only* protection afforded a chaplain was an electronic beeper button which the chaplain could push in an emergency.[47] The youth authority asserted that such protection was inadequate because the chaplain's beeper could be taken, leaving him defenseless.[48] The court, however, rejected this contention stating that it was insufficient to show the least restrictive means. It theorized that the moni-

41. *Id.*
42. *Id.* at 696, 725 P.2d at 682, 230 Cal. Rptr. at 523.
43. *Id.*
44. *Id.* at 696-97, 725 P.2d at 682, 230 Cal. Rptr. at 523.
45. *Id.* at 696, 725 P.2d at 682, 230 Cal. Rptr. at 523.
46. *Id.* at 697, 725 P.2d at 682, 230 Cal. Rptr. at 523 (citations omitted). The court cited Payne v. Superior Court, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976), as standing for the proposition that *anytime* a fundamental right was involved, the burden of proof rested upon the government. *Id.* at 914, 553 P.2d at 570, 132 Cal. Rptr. at 410.
47. *Arias*, 42 Cal. 3d at 698, 725 P.2d at 683, 230 Cal. Rptr. at 524.
48. *Id.* at 698 n.37, 725 P.2d at 683 n.37, 230 Cal. Rptr. at 524 n.37.

toring system was the same throughout the school; therefore, inadequate consideration was given to the special needs of the chapel.[49] In addition, the record failed to reveal that the youth authority had considered other measures, such as utilizing technologically improved beepers which would sound an alarm if the chaplain experienced a sudden movement or requiring that the chapel be locked unless the chaplain was present.[50] The court concluded, "[i]n the absence of a more substantial showing that the YA [youth authority] has explored the effectiveness of less intrusive alternatives and found them to be ineffective, this court cannot hold that the sound monitoring system is truly 'necessary' for institutional security."[51]

IV. THE SEPARATE OPINIONS

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

Justice Grodin agreed with the majority's conclusion that section 636 of the Penal Code prohibited monitoring of conferences between wards and religious personnel.[52] He observed, however, that the requirements of that section were fulfilled since the chaplain's office remained available for unmonitored conversations.[53] Justice Grodin stressed that nothing in section 636 required the youth authority to leave all areas traditionally used for chaplainward conversations unmonitored.[54] Thus, as long as the youth authority provided "adequate facilities for such confidential conversations," section 636 was not violated.[55]

Based on section 2600 of the Penal Code, Justice Grodin registered his assent with the majority's reversal of the lower court's decision. After examining the chilling effect on freedom of religion if the system were abused, the Justice maintained that the system would be valid if a set of regulations were established to insure that the devices were being used properly.[56] In conclusion, Justice Grodin agreed that the connection of the chapel microphone should have been enjoined, but only until the time when "adequate regulations limiting the use of the system in a manner that serves the security interest of

49. *Id.* at 699, 725 P.2d at 683, 230 Cal. Rptr. at 524. The court, however, ignored the fact that each microphone's threshold level could be set separately.

50. *Id.* at 699, 725 P.2d at 684, 230 Cal. Rptr. at 525.

51. *Id.* at 700, 725 P.2d at 684, 230 Cal. Rptr. at 525. Thus, the court ordered the removal of the device and denied the petition for habeas corpus since none of the petitioners were in youth authority custody at the time of the ruling.

52. *Id.* at 701, 725 P.2d at 685, 230 Cal. Rptr. at 526 (Grodin, J., concurring and dissenting).

53. *Id.* at 702, 725 P.2d at 685-86, 230 Cal. Rptr. at 527-28.

54. *Id.* at 702, 725 P.2d at 686, 230 Cal. Rptr. at 527.

55. *Id.*

56. *Id.* at 703-04, 725 P.2d at 687-88, 230 Cal. Rptr. at 528-29.

the facility, but that does not unnecessarily intrude on religious services or counseling sessions" were promulgated.[57]

B. Justice Lucas' Dissenting Opinion

Justice Lucas felt that since section 1705 of the Welfare and Institutions Code specifically addressed the religious rights of youth authority wards, it, and not section 2600, should govern.[58] Applying the "reasonable opportunity" standard of section 1705, the Justice found that the youth authority was justified in the installation of the listening system.[59] He explained that, after having held extensive evidentiary hearings on both the security risks involved and the electronic monitoring system benefits, the trial court justifiably determined that the device in the chapel was permissible.[60] Justice Lucas then pointed out that such a finding should have been given greater weight.[61]

The Justice also objected to the majority's placement of the burden of proof on the youth authority.[62] Justice Lucas cited the United States Supreme Court decision in *Bell v. Wolfish*[63] as controlling on this issue.[64] He argued that in *Bell* the court held that the prison inmates must show that the infringement of their first amendment rights was the result of an "exaggerated response" on the part of the prison authorities to a security risk.[65] Justice Lucas, reinforcing his position, quoted *In re Cummings*,[66] in which the California Supreme Court made the following comment: "Rights of privacy, like associational rights, are necessarily and substantially abridged in a prison setting."[67]

V. CONCLUSION

The majority's holding that section 2600 of the Penal Code con-

57. *Id.* at 705, 725 P.2d at 688, 230 Cal. Rptr. at 529.
58. *Id.* at 706, 725 P.2d at 689, 230 Cal. Rptr. at 530 (Lucas, J., dissenting).
59. *Id.* at 709-10, 725 P.2d at 689-90, 230 Cal. Rptr. at 530-31.
60. *Id.* at 707, 725 P.2d at 689, 230 Cal. Rptr. at 530.
61. *Id.* at 707, 725 P.2d at 690, 230 Cal. Rptr. at 531.
62. *Id.* at 708, 725 P.2d at 690, 230 Cal. Rptr. at 531.
63. 441 U.S. 520 (1979).
64. *Arias*, 42 Cal. 3d at 708-09, 725 P.2d at 690, 230 Cal. Rptr. at 531.
65. 441 U.S. at 551.
66. 30 Cal. 3d 870, 640 P.2d 1101, 180 Cal. Rptr. 826 (1982) (denial of prisoner's writ of habeas corpus to permit him overnight visitation privileges with his common law wife).
67. *Id.* at 873, 640 P.2d at 1102, 180 Cal. Rptr. at 827.

trolled, even in situations involving the youth authority, may make obsolete section 1705 of the Welfare and Institutions Code, as well as all nonrehabilitative juvenile statutes. The placement of the burden of proof on the youth authority may serve to encourage wards to challenge all security measures taken by the authority. The failure of the court to promulgate concrete standards and requirements regarding "less restrictive means" leaves the youth authority in an untenable posture, forcing it to try every possibility before even minimally infringing on any of the wards' rights.

LINDA M. SCHMIDT

B. *Denying a mentally disordered sex offender a reduction in his prison sentence due to "conduct" and "participation" credits for his stay in a state mental hospital was not a denial of equal protection of the law:* **In re Huffman.**

In *In re Huffman*, 42 Cal. 3d 552, 724 P.2d 475, 229 Cal. Rptr. 789 (1986), the petitioner, Billy Ray Huffman, was convicted after pleading guilty to forcible rape which resulted in great bodily injury to a ten year old girl. He was adjudged a mentally disordered sex offender [hereinafter MDSO] and was committed for treatment in a state mental hospital. After less than three years, he withdrew from the hospital treatment programs. At that time, he was not amenable to further treatment and was returned to the criminal courts for sentencing.

At the sentencing hearing, Huffman claimed that his prison sentence was subject to reduction for "conduct" and "participation" credits attributable to his hospital stay, even though the MDSO laws make no provisions for such credits. The petitioner based his argument on the fact that since these credits are allowed by the statutes governing offenders committed for treatment as narcotics addicts, the principles of equal protection require that they be applied to MDSO's.

The trial court and the court of appeal refused to grant the credits. The petitioner then sought a writ of habeas corpus which was granted by the supreme court. The court, however, rejected the petitioner's claim on the merits: the petitioner was adjudged an MDSO under former sections 6300 to 6331 of the California Welfare and Institutions Code, which were repealed in 1981 and replaced by sections 1364 to 1365 of the Penal Code. Even so, the former MDSO law remains applicable to the petitioner because he was committed under its provisions. When a defendant is found to be an MDSO who is amenable to treatment, the court will commit him to the Department of Mental Health for confinement in a state hospital. At that time,

the committing court or the Board of Prison Terms is required to compute the longest term of imprisonment for the underlying offenses, which represents his maximum term of commitment as an MDSO, beyond which he may not be kept in actual custody. The patient may be transferred back to the Department of Corrections facility if he is not amenable to treatment in a state hospital. Amenability to treatment is not a prerequisite to extended commitment, though the patient must be offered treatment in any facility to which he is confined.

In an earlier case, *People v. Saffell*, 25 Cal. 3d 223, 599 P.2d 92, 157 Cal. Rptr. 897 (1979), the court held "that the statutory exclusion of conduct and participation credits from computation of an MDSO's 'maximum term of commitment' did not deny equal protection of the laws." *Huffman*, 42 Cal. 3d at 557, 724 P.2d at 478, 229 Cal. Rptr. at 792. The court, in applying the strict scrutiny standard of equal protection analysis, found a compelling interest that was necessarily served by the MDSO statute's rule of exclusion. The *Saffell* court reasoned that the primary purpose of MDSO commitment is treatment not punishment, which requires flexibility in keeping the MDSO patient in hospital confinement. The *Saffell* court provided several reasons why conduct and participation credits were not suitable to MDSO hospital commitment:

> First, the promise that nondisruptive hospital conduct will result in a shorter commitment is incompatible with treatment for a sex offender. Second, the threat of return to prison is adequate incentive to avoid misbehavior. . . . Third, there is no evidence that state hospitals provide . . . activities for which participation credit may be earned in prison. Fourth, state hospitals are not administratively equipped to compute the credits. Fifth, 'good time' credits are meaningless in the context of a commitment which can be extended indefinitely.

Id.

Furthermore, in *People v. Sage*, 26 Cal. 3d 498, 611 P.2d 874, 165 Cal. Rptr. 280 (1980), the court held that the provisions of the Penal Code which provide for good conduct and participation credits in various circumstances apply only to time confined in a jail or prison. Therefore, an MDSO returning for sentencing after a hospital stay could not claim he had earned such credits during his confinement in the state mental hospital. The *Sage* court affirmed *Saffell's* holding that the refusal to allow MDSO's conduct and participation credits does not violate an individual's equal protection rights.

The petitioner contended that two developments have undermined the rulings of *Saffell* and *Sage*. First, prospective application of statutes governing commitment of narcotics addicts which provide for

conduct and participation credits was held to be in violation of equal protection principles. Second, a new limited voluntary treatment scheme for MDSO's which expressly allows inmates to earn conduct and participation credits during their hospital stay was instituted.

However, the court had expressly held that the legislature did not violate the equal protection clause when it altered the scheme for treating sex offenders while providing that persons committed under the prior system would remain subject to its provisions. *Baker v. Superior Court*, 35 Cal. 3d 663, 670, 677 P.2d 219, 223-24, 200 Cal. Rptr. 293, 297-98 (1984). Moreover, the court listed several compelling reasons for the disparity in credit treatment between narcotics offenders and MDSO's. First, narcotics offenders are not eligible for the participation credit program until all but the last two years of their sentence has been served. Also, narcotics offenders may not be placed on outpatient status before their sentence expires and must serve a supervised post-sentence parole. Finally, narcotics offenders would be unlikely to volunteer for treatment if they were unable to earn conduct and participation credits. Therefore, the court found constitutional justification for the disparity in credit eligibility.

The court did acknowledge that involuntary hospital commitments affect the liberty interest so as to invoke strict scrutiny review of disparities in treatment. However, the court found that this did not require them to hold that any benefit granted to one category of nonprison confinement must automatically be accorded to all others. Society retains a compelling interest in the more stringent treatment and confinement of MDSO's for purposes of public safety. Also, the objectives of hospital confinement and penal confinement are separate, and the benefits and burdens of each are distinct. Therefore, the court held that the disparity in participation credit allowances between the MDSO law and the narcotic offenders statutes does not deny MDSO's equal protection of the law.

JEFF BOYKIN

C. *Peremptory challenges based on group bias which exclude blacks from juries violate a defendant's right to be tried by a representative cross-section of the community, as well as the equal protection clause:* **People v. Turner.**

I. INTRODUCTION

In *People v. Turner*,[1] the court held that the use of peremptory

1. 42 Cal. 3d 711, 726 P.2d 102, 230 Cal. Rptr. 656 (1986). The majority opinion was written by Justice Mosk, with Chief Justice Bird, Justices Broussard, Reynoso, and Grodin concurring. A concurring opinion was authored by Justice Panelli in which Justice Lucas concurred.

challenges to remove jurors because of group bias, rather than on the grounds of a "specific bias on the part of the individual juror,"[2] violated the defendant's right to a trial by a jury from a representative cross-section of the community. This decision affirmed the court's previous holding in *People v. Wheeler.*[3] Furthermore, the court, following the United States Supreme Court's holding in *Batson v. Kentucky,*[4] held that the systematic exclusion of jurors based upon race constitutes a violation of the equal protection clause. Accordingly, the defendant's conviction in the case at bar was reversed.[5]

II. Factual Background

The defendant, a black man, was charged with the murders of a white man and a white woman. It was alleged that each of the murders occurred during the course of a robbery. The jury found the defendant guilty on all counts and found true the special circumstance of murder in the course of a robbery. The jury returned a verdict for the death penalty.[6]

The defendant argued that the prosecutor's use of the peremptory challenges at the trial was improper.[7] The jury, as it was ultimately composed, did not have any black members.[8] The defendant contended that the peremptory challenges used to strike three prospective black jurors were based upon racial bias, thereby violating his right to be tried by a representative cross-section of the community.[9]

The prosecutor excluded only two of the first twelve prospective jurors by exercising peremptory challenges. Both of these two prospective jurors were black.[10] When the court met again on the following morning, the defendant made a motion for mistrial based upon the fact that the jury did not represent an adequate cross-section of the community.[11] The prosecutor, who was then asked to "explain,"[12] replied that the first juror excluded was a truck driver who

2. *Id.* at 721, 726 P.2d at 108, 230 Cal. Rptr. at 662.
3. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).
4. 106 S. Ct. 1712 (1986). *See also* Note, *Batson v. Kentucky: The Court's Response to the Problem of Discriminatory Use of Peremptory Challenges*, 36 CASE W. RES. 581 (1986).
5. *Turner*, 42 Cal. 3d at 728, 726 P.2d at 112-13, 230 Cal. Rptr. at 666-67.
6. *Id.* at 715, 726 P.2d at 103, 230 Cal. Rptr. at 657.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 718, 726 P.2d at 105, 230 Cal. Rptr. at 659.
11. *Id.*
12. *Id.*

had a "great deal of difficulty in even understanding the questions that were being given."[13] The prosecutor excused the second black juror, a hospital administrator, because of "something in her work."[14] Upon receipt of the prosecutor's explanations, the trial court denied the defendant's motion.[15]

Subsequently, another black juror replaced a juror who was excused by the defendant.[16] This juror was also excused by the prosecutor by way of a peremptory challenge.[17] The prosecutor later stated that "it was clear . . . that she could not sit impartially because she was a mother of children . . . ."[18] Ms. Shepard was the last prospective jury member challenged by the prosecutor. The defendant objected again, but to no avail. Thereafter, the defendant was convicted and sentenced to death by an all white jury.[19]

III. ANALYSIS

A. *Majority Opinion*

1. The Right to be Tried by a Representative Cross-section of the Community

In deciding this case, the court primarily relied on the precedent established in *People v. Wheeler*.[20] The court in *Wheeler* stated that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution."[21] The defendant

13. *Id.* at 722, 726 P.2d at 108, 230 Cal. Rptr. at 662.
14. *Id.* at 725, 726 P.2d at 110, 230 Cal. Rptr. at 664.
15. *Id.* at 718, 726 P.2d at 105, 230 Cal. Rptr. at 659.
16. *Id.* at 720, 726 P.2d at 106, 230 Cal. Rptr. at 660.
17. *Id.*
18. *Id.* at 726, 726 P.2d at 111, 230 Cal. Rptr. at 665.
19. *Id.* at 720, 726 P.2d at 107, 230 Cal. Rptr. at 660-61.
20. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).
21. *Id.* 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903 (1978). The court in *Wheeler* relied on People v. White, 43 Cal. 2d 740, 278 P.2d 9 (1954), to reach its conclusion:

> The *White* opinion did not specify which Constitution—state or federal—it was relying on as the source of its declared requirement of cross-sectionalism, but simply spoke in broad terms of the 'American system' and the 'American tradition.' California, of course, is an integral part of that system and tradition; and as we noted above, our courts have long recognized that the right to an impartial jury is an inseparable element of the jury trial guarantee of article I, section 16, of the California Constitution. Accordingly, we now make explicit what was implicit in *White*, and hold that in this state the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the [s]ixth [a]mendment to the federal Constitution and by article I, section 16, of the California Constitution.

Wheeler, 22 Cal. 3d at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900. *See generally* Comment, *A Fair Cross-section and Distinctiveness in the Jury Selection Plan for the District of Columbia*, 32 CATH. U.L. REV. 985 (1983); Note, *Peremptory Challenges and*

contended that the three black prospective jurors were peremptorily challenged because of their race. Consequently, the defendant claimed that his right to be tried by an adequate cross-section of the community was violated.[22]

2. Equal Protection Rights

The court also concluded that peremptory challenges based upon racial bias violate the federal equal protection clause.[23] In reaching this conclusion, the court relied on the recent United States Supreme Court case of *Batson v. Kentucky*.[24] Thus, peremptory challenges based on racial bias not only harm the defendant, but also the "entire community."[25]

3. The Burden of Proof

The majority of the court's analysis focused on the burden of proof in establishing group discrimination in the jury selection process. The court followed the *Batson v. Kentucky* approach for determining whether the peremptory challenges were racially biased.[26] This approach first requires the defendant to make a prima facie showing of group bias. Once the prima facie case has been established, the burden shifts to the prosecution to convince the court that it had a valid explanation, other than group bias, for excluding the prospective jurors.[27]

a. The Defendant's Burden

The court adopted the approach established in *People v. Wheeler* for finding a prima facie case of group discrimination:

> First [the defendant must] . . . make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third . . . he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any

the Meaning of Jury Representation, 89 YALE L.J. 1177 (1980); Sullivan, *Deterring the Discriminatory Use of Peremptory Challenges*, 21 AM. CRIM. L. REV. 477 (1984).

22. *Turner*, 42 Cal. 3d at 715, 726 P.2d at 103, 230 Cal. Rptr. at 657.

23. *Id. See also* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law*, § 369 (8th ed. 1974 & Supp. 1984).

24. 106 S. Ct. 1712 (1986).

25. *Turner*, 42 Cal. 3d at 716, 726 P.2d at 104, 230 Cal. Rptr. at 658.

26. *Id.* at 717-18, 726 P.2d at 104-05, 230 Cal. Rptr. at 658-59. *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law*, § 370 (8th ed. 1974).

27. *Turner*, 42 Cal. 3d at 717, 726 P.2d at 105, 230 Cal. Rptr. at 659.

specific bias.[28]

Except in cases where group bias is suspected, no reasons need be given in order for a peremptory challenge to be upheld.[29] The court reasoned that since the trial court asked the prosecutor to explain his peremptory challenges, there was an implied finding of a prima facie case of group discrimination.[30]

The court further concluded, for the purposes of applying the *Wheeler* criteria, that blacks constituted a cognizable group.[31] The court also found that there was a strong likelihood that the peremptory challenges were based upon racial bias. The first two black jurors that were excused had been victims of crimes themselves, and would probably not have been excused but for their race.[32] Furthermore, the last black juror was excused for being a mother.[33] Although other jurors were mothers, they were not peremptorily challenged. The court concluded that all these factors, weighed together, put forth a prima facie case of group bias.[34]

b. The Prosecutor's Burden

Since the defendant's prima facie case of group bias had been established, the burden shifted to the prosecutor to justify his peremptive challenges. He had the burden of persuading the court that the peremptory challenges in question were exercised "on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses—i.e., for reasons of specific bias . . . ."[35] It is the duty of the court to evaluate the prosecutor's explanation to determine whether there actually was a "specific bias," not whether the prosecutor believed that there was a specific bias.[36]

The court was not satisfied with the prosecutor's justifications for his peremptory challenges. There was no evidence that the truck driver was mentally incompetent[37] nor that the second excused juror's job would interfere with her judgment.[38] In addition, there was nothing to indicate that a mother could not be impartial.[39] Furthermore, the lower court failed in its duty to carefully evaluate the pros-

28. *Wheeler*, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905 (1978).

29. *Turner*, 42 Cal. 3d at 718, 726 P.2d at 105-06, 230 Cal. Rptr. at 659-60. *See also* CAL. PENAL CODE § 1069 (West 1985). *See generally* 41 CAL. JUR. 3D *Jury* §§ 92-97 (1978).

30. *Turner*, 42 Cal. 3d at 719, 726 P.2d at 106, 230 Cal. Rptr. at 660.

31. *Id.*

32. *Id.*

33. *Id.* at 726-27, 726 P.2d at 112, 230 Cal. Rptr. at 666.

34. *Id.* at 720, 726 P.2d at 107, 230 Cal. Rptr. at 661.

35. *Id.* at 720, 726 P.2d at 107, 230 Cal. Rptr. at 661.

36. *Id.* at 721, 726 P.2d at 107-08, 230 Cal. Rptr. at 661-62.

37. *Id.* at 722-23, 726 P.2d at 108-09, 230 Cal. Rptr. at 662-63.

38. *Id.* at 725-26, 726 P.2d at 110-11, 230 Cal. Rptr. at 664-65.

39. *Id.* at 727, 726 P.2d at 111-12, 230 Cal. Rptr. at 665-66.

ecutor's explanations.[40] Therefore, the judgment was reversed.[41]

B. The Concurring Opinion

Justice Panelli agreed that the conviction must be reversed.[42] However, he believed that the trial court should have reached a conclusion as to whether the defendant put forth a prima facie case of biased exclusion of jurors.[43] He reasoned that absent this ruling, the prosecution would be unaware of its duty to justify the peremptive challenges.[44]

IV. CONCLUSION

Although there has been no new law established by this case, the opinion reiterates that peremptive challenges based upon racial bias will not be tolerated by the courts. This decision should serve as a warning to both trial lawyers and judges. If the peremptive challenges of a case appear to be discriminatory on the basis of group identity, the explanation for the challenges must be reasonable. It is the duty of the trial judge to determine if the justifications given are reasonable. If they are not, "reversal is automatic."[45]

MARIANNE CHIAPUZIO

III. CRIMINAL LAW AND PROCEDURE

A. *Pursuant to section 667(a) of the Penal Code, a sentence enhancement based on a prior conviction for a serious felony will be upheld only if proof of the prior serious felony is limited to matters which were necessarily decided by the prior conviction:* **People v. Alfaro.**

In *People v. Alfaro*, 42 Cal. 3d 627, 724 P.2d 1154, 230 Cal. Rptr. 129 (1986), the supreme court affirmed the holding in *People v. Jackson*, 37 Cal. 3d 826, 694 P.2d 736, 210 Cal. Rptr. 623 (1985). *See* Note, *California Supreme Court Survey: People v. Jackson*, 12 PEPPERDINE L. REV. 1156 (1985). In *Jackson*, the court held that second degree bur-

40. *Id.* at 727-28, 726 P.2d at 112, 230 Cal. Rptr. at 666.
41. *Id.* at 728, 726 P.2d at 113, 230 Cal. Rptr. at 667.
42. *Id.* at 728-29, 726 P.2d at 113, 230 Cal. Rptr. at 667 (Panelli, J., concurring).
43. *Id.* at 729, 726 P.2d at 113, 230 Cal. Rptr. at 667.
44. *Id.*
45. *Id.* at 728, 726 P.2d at 112, 230 Cal. Rptr. at 666.

glary, when it involved the entry of a residence, could be a "serious felony" for enhancement purposes.

The court in *Jackson* relied heavily on the reasoning in *People v. Crowson*, 33 Cal. 3d 623, 660 P.2d 389, 190 Cal. Rptr. 165 (1983). *See* Note, *California Supreme Court Survey: People v. Crowson*, 11 PEPPERDINE L. REV. 222 (1983). In *Jackson*, the court construed sections 667 and 1192.7 of the Penal Code to determine that a second degree burglary could be considered a "serious felony" if it involved the burglary of a residence and included the element of residential entry.

The *Jackson* court held that section 1192.7 was enacted to deter criminal behavior, and that serious felonies were not exclusively defined by specific statutory crimes. *Jackson*, 37 Cal. 3d at 832, 694 P.2d at 739, 210 Cal. Rptr. at 626. The court held that even though the conviction record of the earlier offense did not specify that the conviction was for a residential burglary, the defendant had admitted for the purpose of plea bargaining that the earlier burglary was residential. *Id.* Therefore, the defendant was estopped from denying the same for sentencing purposes.

In *Alfaro*, the defendant was found guilty of robbery. Since the defendant had pleaded guilty to a burglary of a residence in 1974, the trial court imposed a five-year sentence enhancement pursuant to sections 667 and 1192.7 of the Penal Code, which was upheld by the court of appeal. The defendant, however, did not admit, as the defendant in *Jackson* did, that the alleged prior offenses were true. Therefore, the supreme court reversed the finding of the court of appeal that the sentence enhancement was proper, and held that the previous conviction for burglary did not qualify as a "serious felony" as required by section 1192.7. This holding was premised on the fact that the residential entry was not an element of the prior offense.

Since the lower courts in *Alfaro* viewed the *Jackson* reasoning as dicta, they refused to follow it. The supreme court affirmed that the *Jackson* reasoning was controlling and distinguished *Alfaro* accordingly. As the court noted in *Alfaro*, the previous conviction upon which the sentence enhancement was based did not establish that the defendant entered a residence. Although entry of a residence was alleged in the information, it was not an element of the crime. Therefore, the attorney general was not able to prove the requisite residential entry by introducing the prior conviction. However, if the defendant had not denied the prior offense in the *subsequent* action, the enhancement would have been permitted, provided that the admission was made with knowledge of the consequences.

It seems clear that the California Supreme Court will continue to follow the United States Supreme Court with regard to interpreting a guilty plea as simply an admission of all the elements of the crimi-

nal charge. *See McCarthy v. United States*, 394 U.S. 459 (1969). However, it remains to be seen whether the radically altered composition of the California Supreme Court will affect the court's view regarding the use of *court records* to establish the residential nature of the burglary. *See Alfaro*, 42 Cal. 3d at 637-38, 724 P.2d at 1160-61, 230 Cal. Rptr. at 135-37 (Mosk, J., concurring and dissenting). *See generally* 22 CAL. JUR. 3D *Criminal Law* § 3365 (Supp. 1986).

RHONDA SCHMIDT

B. *A sentence enhancement based on prior serious felony convictions for residential burglary was improper, despite the inclusion of allegations in the information, where residential entry was not an element of the earlier convictions:* **People v. Calio.**

In *People v. Calio*, 42 Cal. 3d 639, 724 P.2d 1162, 230 Cal. Rptr. 137 (1986), the prosecution had sought to enhance the defendant's sentence for a burglary conviction by alleging that the defendant had two prior "serious felony" convictions for residential burglary and attempted residential burglary. Pursuant to section 667 of the Penal Code, a five-year sentence enhancement may be attached to the defendant's principal sentence for each prior "serious felony" conviction if the defendant's present conviction is also of a serious felony.

In defining "serious felony," section 667 refers to section 1192.7 of the Penal Code. Section 1192.7(c) includes the crime of residential burglary among its enumeration of several "serious felonies." CAL. PENAL CODE § 1192.7(c)(18) (West 1982). The prosecution argued that the defendant's prior convictions of burglary and attempted burglary qualified as "serious felony" convictions under section 1192.7. In addition, the enhancement provision of section 667 mandated that the defendant's two-year sentence be extended to twelve years in duration—five years for each prior serious felony conviction.

The defendant challenged the status of the prior convictions as "serious felonies." Although the prior convictions involved the crime of burglary and were committed with respect to residential premises, he alleged that the prior convictions were not for the crime of "residential burglary." Therefore, he argued that they escaped classification as "serious felonies." Thus, the defendant concluded that the trial court's attachment of the two five-year sentence enhancements was erroneous.

The first issue disposed of by the supreme court was whether the

defendant had adequately preserved for appeal his challenge to the prior convictions being classified as "serious felonies." Justice Broussard, speaking for the court, noted that the defendant's admission of the prior convictions at trial was made on the advice of his counsel, and with the trial judge's express assurance that the issue could still be raised on appeal. The court concluded that the admission made under those circumstances did not preclude the defendant's subsequent appeal.

The second and central issue before the court was whether the defendant's prior convictions of burglary and attempted burglary satisfied the "serious felony" standard of sections 667 and 1192.7(c) of the Penal Code. The court observed that both of the prior convictions involved *second degree* burglary. The court then distinguished the crime of second degree burglary from the crime of residential burglary: the former does not require entry into a residence while the latter does.

The court next observed that the prosecution's information in both of the defendant's prior cases contained allegations of entry into the premises. The trial court had found those allegations to be decisive in establishing that the defendant's prior convictions qualified as residential burglaries. The supreme court, however, disagreed with the trial court and pointed out that these averments were not *essential elements* of second degree burglary.

Accordingly, the court refused to allow the prosecution to capitalize on the prior superfluous allegations of residential entry in order to bootstrap those prior convictions into convictions of residential burglary. To allow the prosecution to do otherwise, said the court, would be to potentially expose the defendant to double jeopardy and speedy trial violations. Thus, Justice Broussard concluded that the prior convictions were not "serious felonies." Therefore, the dual five-year enhancements imposed on the defendant by the trial court were invalid. *See People v. Jackson*, 37 Cal. 3d 826, 694 P.2d 736, 210 Cal. Rptr. 623 (1985) (prosecution could not prove that prior burglary conviction qualified as a "serious felony" under sections 667 and 1192.7 unless residential entry was element of the offense).

MITCHELL F. DISNEY

C. *In a case arising prior to the passage of "The Victims' Bill of Rights," where the police prevented a meeting between a criminal suspect and his counsel who made a diligent effort to aid his client, the suspect's waiver of Miranda rights was vitiated and his confession rendered inadmissible:* **People v. Houston.**

In *People v. Houston*, 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986), the supreme court held that where the police failed to allow an in-custody suspect under interrogation to meet with his attorney, the suspect's subsequent confession was inadmissible even though he waived his right to remain silent and to have his counsel present during the interrogation. The court reasoned that because the appellant was prevented from making the choice of whether to see his attorney, his waiver of *Miranda* rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), was not truly knowing and voluntary. The police conduct was deemed a denial of the appellant's right to counsel under article I, section 15 of the California Constitution. The court found that Proposition 8, which requires all relevant evidence to be included in any criminal proceeding, did not affect this case because the criminal acts in question occurred prior to the passage of the initiative on June 8, 1982. CAL. CONST. art. I, § 28(d), ("The Victims' Bill of Rights"). *See People v. Smith*, 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983).

The defendant had been arrested when he attempted to sell cocaine to a narcotics officer. He was properly read his *Miranda* rights which he admittedly waived. During interrogation, the defendant confessed to the charged crimes and was subsequently convicted in the Superior Court of Contra Costa County for selling cocaine and conspiracy to sell cocaine in violation of section 11352 of the Health and Safety Code and section 182 of the Penal Code, respectively.

While the defendant was in custody, the defendant's friends hired an attorney who had advised the defendant in the past. The attorney made diligent efforts to speak with his client and prevent the authorities from continuing to question him. The police, however, rebuffed these efforts and failed to communicate to the defendant that his counsel was present at the station. Thereafter, the police obtained a confession. The defendant challenged the admissibility of the confession by arguing that the police deliberately held him incommunicado.

In overturning the conviction and holding the confession to be inadmissable, the court determined that basic *Miranda* warnings are

necessary prerequisites to a knowing, intelligent, and voluntary waiver, but are not always sufficient. The court reasoned that the defendant's continuing right to revoke a waiver of assistance of counsel prevented the authorities responsible for his isolation from taking steps which interfered with the attorney-client relationship. Thus, a defendant's freedom to exercise this right, if he so desired, rendered the police duty-bound to inform him of his counsel's presence. By withholding information essential to the defendant's decision regarding the advice of counsel, the police ensured the waiver's failure of the test of voluntariness. Therefore, the *Houston* decision furthered *Miranda*'s purpose of deterring police misconduct.

The court's decision in this case is contrary to the United States Supreme Court's decision in *Moran v. Burbine*, 106 S. Ct. 1135 (1986). In *Moran*, the police incorrectly told an assistant public defender who was retained by the suspect's sister that the questioning was completed when she attempted to contact her client. As a result, she did not immediately seek to meet with him. Subsequently, the suspect waived his *Miranda* rights and confessed. The Supreme Court held that the confession was admissible, finding that federal law was satisfied when the suspect gave a proper waiver. The majority reasoned that mere ignorance of events outside the interrogation room did not vitiate the waiver.

In declining to follow the United States Supreme Court's view, the California Supreme Court gave the high court's ruling "respectful consideration" but emphasized the court's power to provide greater individual protection under state law. However, under Proposition 8, "all relevant evidence shall not be excluded in any criminal proceeding." CAL. CONST. art. I, § 28(d). The application of the result in this case was limited to unlitigated cases wherein the criminal conduct occurred prior to the date the initiative was passed. *See People v. Smith*, 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983). Therefore, unless Proposition 8 is repealed, the holding in this case will have minimal impact on future cases.

SARAH A. FUHRMAN

D. *Where the criminal conduct occurred prior to the 1985 amendments, enhancement provisions of the Penal Code did not apply when a criminal who pled guilty to a felony subsequently committed a felony while released from custody pending sentencing on the earlier offense:* **People v. Overstreet.**

In *People v. Overstreet*, 42 Cal. 3d 891, 726 P.2d 1288, 231 Cal. Rptr. 213 (1986), the issue addressed was whether the enhancement provi-

sions under former section 12022.1 of the California Penal Code [hereinafter section 12022.1], applied when the appellant committed a second offense while released from custody pending sentencing for an earlier offense to which he had pled guilty. The supreme court held in the negative, basing its opinion on a strict construction of the statute and a determination of legislative intent.

The defendant had pled guilty to receiving stolen property and was released on his own recognizance pending a separate determination of his sentence. Prior to sentencing, the defendant committed additional offenses and thereafter, entered into another plea bargain. The defendant pled guilty to involuntary manslaughter and a firearm use allegation. Additionally, he submitted to the trial court the charge of commission of a felony while released from custody pending trial. The Superior Court of San Diego County held against the defendant and sentenced him to consecutive terms for each of his crimes. The court included a two-year enhancement for commission of a felony while released from custody. The court of appeal affirmed the trial court but the supreme court reversed as to the application of the sentence enhancement.

Pursuant to former section 12022.1, a penalty enhancement applied when a felony was committed by a person while "released from custody on bail or on his or her own recognizance *pending trial* on an earlier felony offense." CAL. PENAL CODE § 12022.1 (West 1982) (emphasis added). *See* 22 CAL. JUR. 3D *Criminal Law* §§ 3368, 3377 (1986). In *Overstreet*, sentencing was the sole proceeding remaining on the earlier crime at the time of the later crimes. Thus, there was no trial pending. Therefore, the question was whether sentencing was encompassed within the meaning of the term "pending trial."

The court's analysis of the statutory language established that defendants awaiting trial did not include those awaiting sentencing after a plea of guilty. Analysis of statutory language calls for strict construction. *See People v. Weidert*, 39 Cal. 3d 836, 705 P.2d 380, 218 Cal. Rptr. 57 (1985); *see also* 22 CAL. JUR. 3D *Criminal Law* § 3371 (1986). Using strict statutory construction, the court found that a trial was a proceeding at which guilt was determined and therefore, "pending trial" referred to the period prior to the determination of guilt. *See also McMillon v. Superior Court*, 157 Cal. App. 3d 654, 204 Cal. Rptr. 52 (1984). In *Overstreet*, the appellant's plea was a determination of guilt and thus, the purpose of a trial was already attained. The period which could be considered pending trial ended when the appellant pled guilty and did not extend to later sentenc-

ing. Therefore, another felony committed after the guilty plea was entered would subject its perpetrator to a prison term based only on the commission of the crime and would subject him to additional punishment by way of enhancement under former section 12022.1.

The result in this case would have been different if the case had arisen after the effective date of the 1985 amendment to former section 12022.1. It is likely the decision would have been in the reverse. The decision in *Overstreet* is an example of the anomaly involved in punishing through enhancement those defendants who were released prior to trial and not those who were released after pleading guilty. The result in this case argues for stricter standards for release of defendants on their own recognizance.

Perhaps the desire to prevent criminals from using their release as an opportunity to commit additional offenses was the reason the legislature removed the words "pending trial" from the statute and replaced them with words of broader definition. However, since the holding of this case is limited to unlitigated cases whose facts occurred prior to the 1985 amendments to former section 12022.1, the impact of this decision on future cases will be minimal.

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E. *A judge may comment on the evidence after jurors announce that they are deadlocked as long as the commentary does not effectively control the verdict. A judge is required to make an independent determination and state reasons therefor when ruling on an automatic motion for modification of a death penalty verdict:* **People v. Rodriguez.**

I. INTRODUCTION

In *People v. Rodriguez*,[1] Luis Valenzuela Rodriguez appealed his conviction of two murders in the first degree and his sentence of death. The appeal was based on allegations of prejudicial error committed by the trial court during three stages of the trial. First, the appellant claimed that the trial court judge erred in the admission and exclusion of certain evidence and jury instructions. The California Supreme Court rejected all eleven of Rodriguez's assignments of prejudicial error at the evidentiary stage of his trial. Second, Rodri-

1. 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986). Justice Grodin wrote the majority opinion with Justices Reynoso, Panelli, and Lucas concurring. Justice Mosk wrote the separate dissenting opinion, with which Chief Justice Bird and Justice Broussard concurred.

The advance sheets were modified in People v. Rodriguez, 42 Cal. 3d 1221a (1986). This subsequent modification was the addition of a footnote.

guez contended that the judge gave an unfair commentary on the evidence to the jury after the jurors announced that they had reached a deadlock. The supreme court dismissed this claim and overruled *People v. Cook*,[2] in which the court had held that post-deadlock judicial commentary is per se unfair. Third, the appellant challenged several aspects of the penalty phase. These challenges included, but were not limited to, the constitutionality of the 1978 death penalty initiative[3] and the failure of the judge to follow the letter of the death penalty statute by omitting an independent determination on the death penalty verdict.[4] The court upheld the constitutionality of the death penalty statute, but vacated the death penalty judgment and remanded to the trial court to make the determination.

II. THE EVIDENTIARY STAGE

A. *Factual Background*

1. The Prosecution's Case

The prosecution's chief witness was Margaret Klaess, with whom Rodriguez had previously lived. Klaess was granted immunity for all of the crimes that follow, with the exception of accessory after the fact to the two murders.[5] In November of 1978, Klaess and Rodriguez were arrested and Rodriguez's automobile was impounded.[6] Intending to gather enough money to recover the impounded vehicle, the pair, at gunpoint, stole the truck and the wallet of a person who gave them a ride.[7] In Vallejo, California, Rodriguez assumed a false name in order to obtain a temporary driver's permit.[8] Acting under the guise of test-driving, Rodriguez and Klaess pilfered two used cars.[9] Then, Rodriguez utilized his gun to obtain some money from a San Francisco resident.[10] The pair proceeded to pick up a prostitute and rob her of her jewelry and cash.[11]

Klaess and Rodriguez left for Jeri Engel's home in Crockett, Cali-

2. 33 Cal. 3d 400, 658 P.2d 86, 189 Cal. Rptr. 159 (1983).
3. CAL. PENAL CODE §§ 190-190.5 (West Supp. 1987).
4. *Id.* at § 190.4(e).
5. 42 Cal. 3d at 747, 726 P.2d at 122, 230 Cal. Rptr. at 676.
6. *Id.* at 743, 726 P.2d at 119, 230 Cal. Rptr. at 673.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*

fornia and purchased a pint of 151 proof rum.[12] After their arrival, Engel testified that he and Rodriguez went out to buy cocaine and later shared it with Klaess.[13] Engel than testified that Rodriguez and Klaess departed at 2:30 a.m. for Sacramento.[14] Near Sacramento the pair was stopped by police, apparently for speeding.[15] Rodriguez obeyed the police officer's request to step out of the automobile.[16] Klaess heard gunshots and saw an officer lying on the ground.[17] When Rodriguez returned to the car, he complained that he could not locate "the license" or "the gun."[18] He placed two silver revolvers in Klaess's purse.[19]

Two witnesses set the time of the shootings at approximately 3:40 a.m.[20] Officer Blecher's and Officer Freeman's bodies were discovered by a deputy sheriff.[21] Officer Blecher's backup .38 revolver and a .22 revolver were found lying at the scene.[22] None of the three robbery victims positively identified the .22 as the gun Rodriguez used, but none testified that it was definitely not the weapon.[23] The bullets that killed the officers appeared to have been fired from the police officers' highway patrol issued .38 revolvers which were never located.[24]

Klaess testified that the officers' revolvers were placed in a dumpster where the pair had stopped to ditch the car.[25] After they left the car, they returned to their motel on foot down a muddy embankment.[26] Rodriguez's blood-stained and muddied "Lee" brand trousers were found in their motel room.[27] A footprint of a "Famolare" brand shoe that matched a pair of Rodriguez's, along with his forged temporary driver's license, were found at the crime scene.[28]

A friend of Rodriguez, while in police custody himself, related that Rodriguez bragged about the murders but refused to testify to the same at trial.[29] However, several witnesses did testify that Rodriguez had stated that he hated the police and would kill any officers who

12. *Id.* at 743, 726 P.2d at 119-20, 230 Cal. Rptr. at 673-74.
13. *Id.* at 743-44, 726 P.2d at 120, 230 Cal. Rptr. at 674.
14. *Id.* at 744, 726 P.2d at 120, 230 Cal. Rptr. at 674.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 742, 726 P.2d at 119, 230 Cal. Rptr. at 673.
21. *Id.* at 743, 726 P.2d at 119, 230 Cal. Rptr. at 673.
22. *Id.* at 745, 726 P.2d at 120, 230 Cal. Rptr. at 674.
23. *Id.*
24. *Id.* at 744, 726 P.2d at 120, 230 Cal. Rptr. at 674.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 745, 726 P.2d at 121, 230 Cal. Rptr. at 675.

attempted to arrest him.[30] A prior girlfriend testified that she once prevented Rodriguez from killing a police officer by stopping him from reaching for a sawed-off shotgun when detained by an officer.[31]

2. The Defendant's Case

While Rodriguez admitted having committed the robberies and automobile thefts, he alleged that the gun used to effect them was Klaess's .38 revolver.[32] He claimed that he did not recognize the .22 left at the murder scene.[33] As to the night in question, Rodriguez stated that he and Klaess left Engel's home at 1:30 a.m., instead of at 2:30 a.m. as Engel testified.[34] According to Rodriguez, after nearly reaching their Sacramento motel, Klaess wanted more cocaine and took off in the car by herself.[35] He returned to the motel and slept.[36] In the morning, Rodriguez supposedly found Klaess's muddy pants in the motel room.[37]

Failing to have an explanation for the blood found on his "Lee" brand jeans, Rodriguez denied having worn them on the day of the murder.[38] In addition, he owned "Famolare" brand shoes but also denied having worn them that day.[39] Rodriguez claimed that Klaess's motivation for lying flowed from the immunity from prosecution that she was granted and from the mistaken receipt of a letter written by Rodriguez to another girlfriend of his.[40] Rodriguez alleged that it was Klaess, not him, who hated the police.[41]

Rodriguez presented four witnesses who testified that a light-colored car was located at the scene of the crime.[42] Klaess knew a Robert Sanchez who drove a white Ford Galaxy.[43] However, more than four witnesses stated that the vehicle parked near the patrol car was completely different.[44]

30. *Id.* at 745, 726 P.2d at 120, 230 Cal. Rptr. at 674.
31. *Id.* at 745, 726 P.2d at 120-21, 230 Cal. Rptr. at 674-75.
32. *Id.* at 746, 726 P.2d at 121, 230 Cal. Rptr. at 675.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 747, 726 P.2d at 122, 230 Cal. Rptr. at 676.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 747-48, 726 P.2d at 122, 230 Cal. Rptr. at 676.

B. *Assignments of Prejudicial Error*

The court rejected the appellant's first allegation by holding that the elimination of a juror on voir dire who could not reach a death penalty verdict under any circumstances did not deprive him of a representative jury.[45] The court reasoned that the appellant's second contention, that evidence of Klaess's prior drug use and psychiatric treatment was improperly excluded, was without merit, since these episodes occurred five to six years earlier.[46] The ruling by the trial court that the particulars of Klaess's immunity agreement were inadmissible was appellant's third challenge. The supreme court recognized that the jury knew that the immunity applied to two murders, three robberies, two kidnappings, and two car thefts; therefore, the admission of the specific facts, especially where appellant was not prepared to prove Klaess's involvement in the crimes, "would not have added significantly to the already formidable attack on her credibility."[47] The appellant's fourth contention was that the exclusion of cross-examination on the issue of Klaess's receipt of assistance from the prosecutor in an unrelated criminal incident was prejudicial. Although the ruling unduly restricted the appellant, the supreme court found that no prejudice resulted, since this unrelated incident could not have added much to the general background.[48]

The fifth assignment of error resulted from the exclusion of a statement made by Robert Sanchez to his social worker. The Justices pointed out that, while the declaration that the .22 revolver found at the murder scene belonged to Sanchez was admissible, no prejudicial error was committed by preventing the social worker from testifying to it.[49] As his sixth contention, appellant attempted to invoke the best evidence rule[50] to obtain admission of an original tape recording of Klaess's pretrial interview, instead of the transcript of that interview in order to show Klaess's "demeanor."[51] The supreme court emphasized that the best evidence rule would not admit a tape recording over a transcript unless the transcript was alleged to be inaccurate.[52] Although the court agreed with appellant

45. *Id.* at 748, 726 P.2d at 122, 230 Cal. Rptr. at 676 (citing Lockhart v. McCree, 106 S. Ct. 1758, 1770 (1986); People v. Chavez, 39 Cal. 3d 823, 827, 705 P.2d 372, 375, 218 Cal. Rptr. 49, 52 (1985)).

46. 42 Cal. 3d at 748-49, 726 P.2d at 123, 230 Cal. Rptr. at 677 (citing CAL. EVID. CODE § 352 (West 1966)).

47. 42 Cal. 3d at 750, 726 P.2d at 124, 230 Cal. Rptr. at 678.

48. *Id.* at 751-52, 726 P.2d at 125, 230 Cal. Rptr. at 679 (citing People v. Mardian, 47 Cal. App. 3d 16, 40-41, 121 Cal. Rptr. 269, 285 (1975)).

49. 42 Cal. 3d at 752, 726 P.2d at 125, 230 Cal. Rptr. at 679.

50. CAL. EVID. CODE § 1500 (West 1966 & Supp. 1987).

51. 42 Cal. 3d at 754, 726 P.2d at 126-27, 230 Cal. Rptr. at 680-81.

52. *Id.* at 754, 726 P.2d at 127, 230 Cal. Rptr. at 681 (citing People v. Fujita, 43 Cal. App. 3d 454, 473, 117 Cal. Rptr. 757, 768 (1974)).

on his seventh allegation that the trial court erroneously excluded evidence of Klaess's drug connections in Sacramento, the court believed that the exclusion was not prejudicial.[53]

The basis for the appellant's eighth assignment of error was the ruling that Klaess's reasons for hating the police were irrelevant. The Justices observed that, since Klaess's involvement in the crimes preceding the murders would have given her ample reasons to hate the police, evidence of her prior experiences with them would only serve to confuse the jury.[54] The ninth contention of appellant was that the trial court improperly admitted testimony of several witnesses to the effect that Rodriguez hated the police and would kill any officer who attempted to arrest him. The supreme court asserted that a generic threat to kill any officer did not tend to show appellant's predisposition to commit crime as prohibited by section 1101 of the Evidence Code,[55] but rather his homicidal intent.[56] On this same evidence, the court held that the threats were not cumulative evidence, as intent to rob, steal, and kidnap is distinct from intent to murder.[57]

The appellant's tenth and eleventh challenges related to jury instructions. The appellant claimed that the jury should have been instructed that Klaess was an accomplice as a matter of law, instead of allowing the jury to determine that Klaess was an accomplice.[58] The supreme court surmised that Klaess was not an accomplice as a matter of law because, although she hated the police, she never threatened to kill police officers.[59] The refusal of the trial court to give instructions on voluntary and involuntary manslaughter based on diminished capacity was appellant's final assignment of error at the pre-jury deliberation stage of the trial. The Justices concluded that such instructions were not mandated by the evidence.[60]

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53. 42 Cal. 3d at 755, 726 P.2d at 127, 230 Cal. Rptr. at 681.

54. *Id.* at 756, 726 P.2d at 128, 230 Cal. Rptr. at 682 (citing CAL. EVID. CODE § 352 (West 1966)).

55. CAL. EVID. CODE § 1101 (West 1966 & Supp. 1987).

56. 42 Cal. 3d at 757, 726 P.2d at 129, 230 Cal. Rptr. at 683.

57. *Id.* at 757-58, 726 P.2d at 129, 230 Cal. Rptr. at 683.

58. *Id.* at 758, 726 P.2d at 130, 230 Cal. Rptr. at 684. The appellant urged that an accomplice's testimony should be distrusted. *Id.* (citing CAL. JURY INSTRUCTIONS CRIM. No. 3.18 (4th ed. 1979)).

59. 42 Cal. 3d at 761, 726 P.2d at 131, 230 Cal. Rptr. at 685.

60. *Id.* at 763, 726 P.2d at 133, 230 Cal. Rptr. at 687.

III. The Jury Deliberation Stage

A. *Factual Background*

After hearing evidence and instructions for fifty-six days, the jury began deliberating.[61] A juror became ill and was excused on the sixth day of deliberation. However, an alternate juror was substituted.[62] After deliberating nine days, the jurors wrote a note to the judge indicating that they could not reach a unanimous verdict.[63] On the tenth day, they resumed, reheard testimony, and again announced their deadlock.[64] The appellant moved for a mistrial which was denied.[65] Over the appellant's objection, the judge gave the jury a supplemental charge commenting on certain testimony regarding the color of the car seen driving on the highway at 2:00 a.m. the morning of the murders.[66] The following day, the jury asked for and was presented with a written copy of the supplemental charge, but they later announced that they were still unable to agree.[67] The appellant once again moved for mistrial and the motion was denied.[68]

On the fifteenth day of deliberations, the court presented a second supplemental jury charge regarding the "burden of proof, credibility of witnesses, and the duty of each juror to decide independently."[69] The next day, in response to a jury request, the jury was provided with a third supplemental charge regarding the assessment of conflicting evidence.[70] The following day, the jury announced their deadlock, and another of appellant's motions for mistrial was denied.[71] Thereafter, the court requested a vote division, which was eleven to one on each of the five ballots taken.[72] Finally, after nearly five weeks of deliberations, the jury returned their verdict of guilty.[73]

B. *Assignments of Prejudicial Error*

The appellant, relying on *People v. Cook*,[74] alleged that the giving of the first supplemental charge was prejudicial error since it was

61. *Id.* at 763, 726 P.2d at 133, 230 Cal. Rptr. at 687.
62. *Id.* at 764, 726 P.2d at 133, 230 Cal. Rptr. at 687.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 764, 726 P.2d at 134, 230 Cal. Rptr. at 688.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 764-65, 726 P.2d at 134, 230 Cal. Rptr. at 688.
71. *Id.* at 765, 726 P.2d at 134, 230 Cal. Rptr. at 688.
72. *Id.*
73. *Id.*
74. 33 Cal. 3d 400, 658 P.2d 86, 189 Cal. Rptr. 159 (1983).

given after the jury communicated that they were deadlocked.[75] The *Cook* court held that post-deadlock judicial commentary was " 'so likely to invade the jury's province and control its verdict that such comment must be deemed erroneous.' "[76] The court in the present case overruled the part of *Cook* that placed an absolute ban on such commentary.[77] The court reviewed the history of the issue and specified that the California Constitution upheld the power of the trial judge to comment on the evidence.[78] The Justices found that "the right to [an] independent jury determination of facts does not mean that a jury must be free from all judicial influence during its deliberations."[79] The court elucidated that the jury should be given the benefit of the judge's experience.[80] In conclusion, the court ruled that "the trial court has broad latitude in fair commentary, so long as it does not effectively control the verdict."[81]

The appellant alternatively contended that, if the commentary was not per se prejudicial, the commentary was nonetheless improper because it was "distorted and biased in favor of the prosecution."[82] He alleged that the judge's statement to the jury that "you should keep in mind all of the evidence bearing on the issues before you and not necessarily single out any one piece of evidence,"[83] was prejudicial because the judge did not make clear that such a charge applied only to the party upon whom the burden of proof rested.[84] The supreme court noted that the presence of the words "not necessarily" cured any defect.[85] The appellant also challenged the court's comments as emphasizing the defects in a defense witness's testimony. Finding that the trial court merely noted the inconsistencies of the evidence, the court held that it would have been impossible for a judge to discuss all of the evidence related to a particular fact to be proved.[86]

The appellant's final assignment of prejudicial error allegedly com-

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75. 42 Cal. 3d at 765, 726 P.2d at 134, 230 Cal. Rptr. at 688. *See generally* 21 CAL. JUR. 3D *Criminal Law* §§ 2938-41 (1985); 23A C.J.S. *Criminal Law* §§ 1375-80 (1961).
76. 33 Cal. 3d at 413, 658 P.2d at 94, 189 Cal. Rptr. at 167.
77. 42 Cal. 3d at 766, 726 P.2d at 135, 230 Cal. Rptr. at 689.
78. *Id.* (citing CAL. CONST. art. VI, § 10).
79. 42 Cal. 3d at 768, 726 P.2d at 136, 230 Cal. Rptr. at 690.
80. *Id.*
81. *Id.*
82. *Id.* at 771, 726 P.2d at 138, 230 Cal. Rptr. at 692.
83. *Id.* at 771 n.10, 726 P.2d at 138-39 n.10, 230 Cal. Rptr. at 693 n.10.
84. *Id.* at 772, 726 P.2d at 139, 230 Cal. Rptr. at 693.
85. *Id.*
86. *Id.* at 773, 726 P.2d at 140, 230 Cal. Rptr. at 694 (citing People v. Friend, 50 Cal. 2d 570, 578, 327 P.2d 97, 101 (1958)).

mitted at the jury deliberation stage was that his motion for mistrial after the jury's fifth announcement of deadlock was improperly denied. The court rejected this contention by citing section 1140 of the Penal Code[87] which places the decision as to whether there existed a "reasonable probability" that the jury may reach a verdict in the hands of the trial judge.[88] The appellant claimed that the court violated the rule set forth in *People v. Crowley*,[89] by contending that the judge impliedly gave an opinion that a verdict should be agreed upon merely through continuing deliberations.[90] The court in the case at hand refused to make such an implication.[91]

C. *The Dissenting Opinion*

The dissenting opinion took issue with only the jury deliberation stage of the trial, specifically, the dissenters disagreed with the overruling of *People v. Cook*.[92] Justice Mosk felt that the *Cook* rule protected the fundamental right to a trial by jury.[93] The Justice noted that, following a deadlock, a jury might have been easily swayed by a trial judge.[94] Justice Mosk reviewed the doctrine of stare decisis and concluded that the majority failed to show that the *Cook* decision was "manifestly erroneous" as required by the doctrine.[95] The Justice declared that the United States Constitution's seventh amendment guarantee of the right to a trial by jury overrode the California Constitution's amendment which provided judges with the power to comment.[96] The dissenting Justices agreed with the appellant's alternative contention that the comments themselves were prejudicial.[97]

IV. THE PENALTY STAGE

A. *Factual Background*

The appellant was sentenced to death. Because the murders were committed in December of 1978 and the 1978 Death Penalty Initia-

87. CAL. PENAL CODE § 1140 (West 1985).

88. 42 Cal. 3d at 775, 726 P.2d at 141, 230 Cal. Rptr. at 695 (citing People v. Rojas, 15 Cal. 3d 540, 546, 542 P.2d 229, 232, 125 Cal. Rptr. 357, 360 (1975)). *See generally* 23A C.J.S. *Criminal Law* §§ 1381-86 (1961).

89. 101 Cal. App. 2d 71, 75, 224 P.2d 748, 751 (1950).

90. 42 Cal. 3d at 775, 726 P.2d at 141, 230 Cal. Rptr. at 695.

91. *Id.* at 775, 726 P.2d at 142, 230 Cal. Rptr. at 696.

92. 33 Cal. 3d 400, 658 P.2d 86, 189 Cal. Rptr. 159 (1983).

93. 42 Cal. 3d at 804, 726 P.2d at 161, 230 Cal. Rptr. at 715. *See generally* Comment, *Deadlocked Juries and the Allen Charge*, 37 ME. L. REV. 167 (1985).

94. *Id.* at 805, 726 P.2d at 162, 230 Cal. Rptr. at 716.

95. *Id.* at 806, 726 P.2d at 162, 230 Cal. Rptr. at 716.

96. *Id.* at 806, 726 P.2d at 163, 230 Cal. Rptr. at 717.

97. *Id.* at 807-08, 726 P.2d at 164, 230 Cal. Rptr. at 718.

tive[98] was adopted in November of that year, the 1978 version of the law was applied.[99] Under this statute, once a defendant was found guilty of murder in the first degree with one or more special circumstances, the defendant became eligible for the death penalty.[100] During a special penalty trial, the jury must weigh the aggravating and mitigating circumstances.[101] If the aggravating circumstances outweighed the mitigating, the death penalty must be imposed. If not, the sentence was life imprisonment without parole.[102]

B. Assignments of Prejudicial Error

The appellant began by contending that the 1978 Death Penalty Initiative was unconstitutional because it lacked procedural safeguards.[103] The court demonstrated that the United States Supreme Court has upheld both the 1977[104] and the 1978[105] California death penalty statutes.[106] The appellant specifically challenged, as cruel and unusual punishment in violation of the eighth amendment to the United States Constitution, the use of a standard "knew or reasonably should have known" that the victim was a peace officer in determining the existence of the peace officer special circumstance.[107] The court stated that the constitutionality of such a test in proving a special circumstance "must rest on the relationship between a defendant's criminal negligence with respect to knowledge of the officer's status and either retribution or deterrence or both."[108] Noting that the murdering of police officers resulted in a "special outrage" because it endangers the entire population, the court concluded that sentencing a defendant to death merely because he should have

98. CAL. PENAL CODE §§ 190-190.5 (West Supp. 1987).

99. 42 Cal. 3d at 777, 726 P.2d at 143, 230 Cal. Rptr. at 697. This is significant in that the 1978 law *requires* the imposition of the death penalty in certain situations, whereas the 1977 statute merely permits such a sentence. *Id.* at 779, 726 P.2d at 144, 230 Cal. Rptr. at 698.

100. *Id.* at 777, 726 P.2d at 143, 230 Cal. Rptr. at 697 (citing CAL. PENAL CODE § 190.1(b) (West Supp. 1987)).

101. *Id.* at 777, 726 P.2d at 143, 230 Cal. Rptr. at 697 (citing CAL. PENAL CODE § 190.2 (West Supp. 1987)).

102. *Id.* (citing CAL. PENAL CODE § 190.2 (West Supp. 1987).

103. 42 Cal. 3d at 777, 726 P.2d at 143, 230 Cal. Rptr. at 697.

104. *See* Pulley v. Harris, 465 U.S. 37 (1984).

105. *See* California v. Ramos, 463 U.S. 992 (1983).

106. 42 Cal. 3d at 778-79, 726 P.2d at 143, 230 Cal. Rptr. at 697.

107. *Id.* at 780, 726 P.2d at 145, 230 Cal. Rptr. at 699 (citing CAL. PENAL CODE § 190.2(a)(7) (West Supp. 1987)).

108. 42 Cal. 3d at 781, 726 P.2d at 145, 230 Cal. Rptr. at 699 (citing Enmund v. Florida, 458 U.S. 782, 798 (1982)).

known that the victim was a peace officer would serve to punish as well as deter.[109] Thus, the court upheld the constitutionality of the statute.

Even though the appellant's counsel at trial mistakenly approved the use of an instruction regarding the weighing of mitigating and aggravating circumstances based upon the 1977 death penalty statute, the appellant alleged that it was prejudicial error to give the 1977 instruction rather than the charge provided for in the 1978 law.[110] The only significant difference between the two instructions was that the 1978 law requires the jurors to come to a conclusion that the aggravating circumstances outweigh the mitigating and then impose the death penalty. By contrast, the 1977 statute merely implies that the conclusion be reached.[111] The court determined that such a mistake did not amount to prejudicial error, since the jury would not reach the death penalty verdict if they believed that the mitigating outweighed the aggravating circumstances.[112] The appellant then challenged the giving of the multiple-murder special circumstance twice. While the Justices agreed that two multiple-murder charges might have led the jury to believe that a defendant had committed four murders, the court announced that, in this case, the jurors knew that the appellant had been convicted of only two murders, so no prejudice could have resulted.[113]

The appellant's next three assignments were focused upon the prosecutor's comments made during closing arguments.[114] Because a defendant's chronological age and a defendant's moral justification for committing the crime could only be considered as mitigating circumstances, the appellant claimed that the district attorney's two remarks, to the effect that "[h]e was old enough to know better" and he did not produce "the slightest bit of moral justification," led the jurors to believe that an older age and a lack of moral justification were aggravating circumstances.[115] The court disagreed that pointing to the "inapplicability of a mitigating factor" resulted in the propounding of an aggravating circumstance.[116]

The appellant's third contention of error with regard to the prose-

109. 42 Cal. 3d at 781-82, 726 P.2d at 146, 230 Cal. Rptr. at 700. *See contra* Greenberg, *Against The American System of Capital Punishment*, 99 HARV. L. REV. 1670 (1986).

110. 42 Cal. 3d at 783, 726 P.2d at 147, 230 Cal. Rptr. at 701.

111. *Id.*

112. *Id.* at 784, 726 P.2d at 148, 230 Cal. Rptr. at 702 (citing People v. Easley, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983)).

113. 42 Cal. 3d at 788, 726 P.2d at 150-51, 230 Cal. Rptr. at 704.

114. In all three instances, the defense counsel failed to object. However, the court went on to the merits of each contention. *Id.* at 788-91, 726 P.2d at 151-53, 230 Cal. Rptr. at 705-07.

115. *Id.* at 788-90, 726 P.2d at 151-52, 230 Cal. Rptr. at 705-06.

116. *Id.* at 789-90, 726 P.2d at 151-52, 230 Cal. Rptr. at 705-706 (emphasis omitted).

cution's commentary was the referral by the district attorney to the testimony of a prior girlfriend of the appellant's given during the guilt phase of the trial.[117] The prosecutor's restatement of this testimony, providing that the appellant had reached for a sawed-off shotgun when detained by a police officer, was in violation of an agreement made by the prosecutor.[118] Pursuant to this agreement, in order to show the "other violent crimes" aggravating circumstance,[119] the district attorney was not to mention evidence related to crimes other than the three robberies committed during the two days before the murders.[120] The court emphasized that once the defendant put character in issue, the prosecution could rebut.[121] The conclusion reached was that the reference to the particular incident was merely entered in rebuttal to appellant's evidence of good character and that it was not entered to prove the aggravating circumstance.[122]

The final challenge was the only assignment of error that the court considered to be prejudicial. The appellant alleged that the trial court failed to follow the letter of the statute by omitting to make an independent determination and state the reasons therefor when ruling on the automatic motion for modification of the death penalty verdict.[123] Since the word "independent" from the phrase "independent determination" was omitted from the 1977 law when the 1978 statute was enacted, the trial judge felt that he could not make such an independent decision.[124] The Justices thought the change was not intended by the legislature since the legislators provided for automatic review of a death sentence.[125] The court also agreed with the appellant that the trial court had failed to sufficiently state the reasons for the ruling.[126]

V. CONCLUSION

Allowing a judge to comment on the evidence in post-deadlock situations will enable the jurors to reach more informed decisions. The

117. *Id.* at 791, 726 P.2d at 152-53, 230 Cal. Rptr. at 706-07.
118. *Id.*
119. CAL. PENAL CODE § 190.3(b) (West Supp. 1987).
120. 42 Cal. 3d at 790-91, 726 P.2d at 152, 230 Cal. Rptr. at 706.
121. *Id.* at 791, 726 P.2d at 153, 230 Cal. Rptr. at 707.
122. *Id.* at 792, 726 P.2d at 153, 230 Cal. Rptr. at 707.
123. *Id.* at 793, 726 P.2d at 154, 230 Cal. Rptr. at 707.
124. *Id.* at 793, 726 P.2d at 154, 230 Cal. Rptr. at 708.
125. *Id.* at 793-94, 726 P.2d at 155, 230 Cal. Rptr. at 708-09 (citing CAL. PENAL CODE § 190.4(e) (West Supp. 1987)).
126. 42 Cal. 3d at 794, 726 P.2d at 155, 230 Cal. Rptr. at 709.

jury will have the advantage of gaining insight from the judge's expertise. The danger that jurors may place too much emphasis on the judge's commentary is minimal so long as the judge's remarks are fair, accurate and unbiased. Requiring judges to make an independent determination and state reasons therefor when ruling on an automatic motion for modification of a death penalty verdict will insure that appellate courts have access to a complete record of the penalty phase proceedings. The presence of the judge's reasoning on such factors as the weight of the evidence and the credibility of the witnesses will result in more effective appellate review. The system of justice stands to gain through the exercise of the privilege to comment on the evidence and the independent judicial determination of the applicability of the death penalty verdict.

LINDA M. SCHMIDT

F. *Criminal defendants confined because they are incompetent to stand trial are not allowed conduct and participation credits on their sentence for time served in pretrial detention:* **People v. Waterman.**

In *People v. Waterman*, 42 Cal. 3d 565, 724 P.2d 482, 229 Cal. Rptr. 796, *modified*, 42 Cal. 3d 821(a), and the companion case of *In re Huffman*, 42 Cal. 3d 552, 724 P.2d 475, 229 Cal. Rptr. 789, the supreme court held that criminal defendants, confined for being incompetent to stand trial, or persons committed for treatment as mentally disordered sex offenders [hereinafter MDSO's], were not denied equal protection of the law by being denied conduct and participation credits against their sentence during the time spent in their respective detention programs. Although similar credits *were* allowed for drug addicted offenders committed to the California Rehabilitation Center [hereinafter CRC], the court upheld the constitutionality of denying the credits.

Waterman was found incompetent to stand trial and was committed to the state hospital for treatment to restore him to competence for trial pursuant to sections 1367 to 1370 of the Penal Code. Upon being declared competent for trial, he pled guilty to two counts of assault with a deadly weapon on a police officer. He was sentenced to a term of six years, less his actual time in pre-sentence confinement. At a separate hearing, the defendant argued that in addition to credit for time in pretrial confinement, he was entitled to conduct and participation credits on his sentence during his time in the hospital. He premised his argument on the fact that CRC patients were allowed such credits. The defendant also argued that sections 2930 to 2935 of the Penal Code (defining conduct and participation credits) should apply to his pre-trial confinement. The trial court, however, denied

his claim. The court of appeal directed the trial court to modify the sentence and grant the credits that the defendant sought.

The California Supreme Court found that the criminal incompetence statute (sections 1367 to 1370 of the Penal Code) did not expressly allow the conduct and participation credits sought by the defendant as defined in sections 2930 to 2935 of the Penal Code. The court followed its decision in *In re Huffman* and held that there was no equal protection violation. The court concluded that there were "substantial disparities between the treatment goals for incompetents and CRC patients," and therefore, the credit distinctions drawn by the legislature were amply supported to survive strict scrutiny. *Waterman*, 42 Cal. 3d at 569, 724 P.2d at 486, 229 Cal. Rptr. at 780.

Although the court noted that there were procedural similarities between the CRC and the incompetent pretrial detention program, the court determined that their purposes were different. For example, the CRC program provided *post conviction* rehabilitation, while the program for incompetents provided *pretrial* detention. Therefore, the program for incompetents was not concerned with criminal rehabilitation; rather, its purpose was to restore the defendant's mental state in order to stand trial. Since the purpose of the program for incompetents was only to prepare a defendant to stand trial, and not to be rehabilitated, the court found that the differences in the credit systems were validly supported. Therefore, there was no valid equal protection claim on that basis. Accordingly, the supreme court reversed the court of appeal, and disallowed the defendant's credits for conduct and participation during his pretrial confinement.

JAIME COULTER

IV. FAMILY LAW

The "changed circumstances" rule is only applicable in child custody cases when there has been a prior judicial determination of custody: **Burchard v. Garay.**

In *Burchard v. Garay*, 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (1986), the supreme court held that the "changed circumstances" rule in child custody proceedings applies only when there has been a prior judicial determination of custody. In the absence of a prior judicial determination, the applicable rule is the "best interests of the child" test which is set forth in section 4600 of the Civil Code.

As a result of a brief liaison between the plaintiff, Ana Buchard,

and the defendant, William Garay, Sr., Ana became pregnant and gave birth to a son on September 18, 1979. The defendant initially denied paternity and the plaintiff, with the help of her father and others, supported and cared for the child.

The plaintiff brought paternity and support proceedings against the defendant in the spring of 1980. The defendant stipulated to paternity and $200 a month support after court-ordered blood tests established that he was the father. In December of 1980, the parties unsuccessfully attempted to live together as a family. Thereafter, the defendant requested visitation rights. The plaintiff refused and filed a petition for exclusive custody. Pending the outcome of the proceedings, the parties stipulated that Ana would retain custody and that William would be entitled to two days visitation per week.

At the hearing, the plaintiff filed a motion asking the court to require the defendant to prove changed circumstances in order to justify a change in custody. The defendant opposed the motion arguing that the sole criterion was the "best interests of the child."

The court deferred ruling on the motion. After hearing the evidence, the court issued a statement in which it implied that the "changed circumstances" rule did not apply because there had not been a prior de facto or de jure award of custody. The court applied the "best interests" test of section 4600 of the Civil Code and awarded custody to the defendant. Its decision was apparently based on the defendant's superior financial ability and subsequent remarriage, and upon the plaintiff's unwillingness to allow the defendant visitation rights.

The defendant took custody on August 15, 1982, and the plaintiff appealed and sought a writ of supersedeas. The court of appeal denied supersedeas and affirmed the trial court's order. The supreme court granted review in August of 1984. The plaintiff did not seek supersedeas and the child remained in his father's custody pending the appeal.

The supreme court affirmed the trial court's determination that the "changed circumstances" rule did not apply in a case such as this. In order for the "changed circumstances" rule to apply, there must have been a prior judicial custody determination based upon circumstances existing at that time which established that the custody award was in the best interests of the child. In the absence of a prior judicial determination, "[t]he trial court has no alternative but to look at all the circumstances bearing upon the best interests of the child." *Burchard*, 42 Cal. 3d at 534, 724 P.2d at 488, 229 Cal. Rptr. at 802.

The "best interests" test, set forth in section 4600 of the Civil Code, governs all child custody proceedings. The "changed circumstances"

test is not different from the "best interests" test; rather, it is an auxiliary part of the "best interests" test. Once custody is awarded based on the best interests of the child, that decision is not to be disturbed "unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest." 42 Cal. 3d at 535, 724 P.2d at 488, 229 Cal. Rptr. at 802.

The "changed circumstances" rule recognizes the child's need for stability and continuity and adheres to the principle of res judicata. It operates to change the burden of persuasion and limits the evidence cognizable by the court. The noncustodial party has the burden of proving that a change of custody would be in the best interests of the child, and the admissible evidence is limited to circumstances arising after the judicial determination of custody is made.

The court rejected as unsound the use of the "changed circumstances" rule when there has not been a judicial determination of custody but rather a de facto determination of custody. If the "changed circumstances" rule was used in this type of situation, the court would *only* be able to consider facts constituting *changed circumstances* and would have to disregard facts bearing on an initial determination of the child's best interests. The potentially harmful result of this application becomes apparent when considering a situation where the unsuitable parent retains custody, absent a judicial decree, and where the challenging parent in subsequent judicial proceedings is required to prove changed circumstances since the onset of the initial custody. Although the circumstances may not have changed, they were initially unsuitable. Pursuant to the "changed circumstances" rule, however, the court would not be able to consider the initial unsuitable circumstances. It could only consider those circumstances which changed since custody was established. Thus, custody would remain with the unsuitable parent. The better rule is to apply the "best interests" test in all custody proceedings, subject to the application of the "changed circumstances" test, when there has been a prior judicial custody decree and a subsequent change is sought. This ensures that the best interests of the child will have been considered and custody will be based on the determination thereof.

Although the trial court utilized the appropriate standard, the supreme court held that it erred in its application and abused its discretion in awarding custody to the defendant. The trial court's first basis of error was its reference to the defendant's economic advantage. Financial position is not a permissible basis upon which to

award custody since there is no correlation between wealth and quality parenting. "If in fact the custodial parent's income is insufficient to provide proper care for the child, the remedy is to award child support, not to take away custody." *Burchard*, 42 Cal. 3d at 539, 724 P.2d at 492, 229 Cal. Rptr. at 806.

Another impermissible basis used by the trial court was that the plaintiff had to leave the child in day care while she worked and studied, while the defendant, who also worked, could leave the child with his new wife. This alludes to the assumption that a working mother cannot provide adequate care for her child. Not only is this an unfair and unsupported assumption, but it "will in practice discriminate against women" who are less likely to remarry than divorced men. *Id.* at 540 n.10, 724 P.2d at 492 n.10, 229 Cal. Rptr. at 806 n.10.

The most significant factor leading to the supreme court's reversal was that the plaintiff had been the primary caretaker of the child from birth and the child was well-adjusted, well cared for, and healthy. Moreover, there had been no proof that the plaintiff's care had been seriously deficient. Stability and continuity in a child's life are of overriding significance. The established modes of care should not be disrupted except upon a showing that a change is in the best interests of the child. There was an insufficient showing in this case upon which to justify a change of custody. The court concluded that the trial court abused its discretion and reversed the trial court's order awarding custody to the defendant.

The court concluded by reiterating its position that "in deciding the issue of custody the court cannot base its decision upon the relative economic position of the parties or upon any assumption that the care afforded a child by single, working parents is inferior." *Id.* at 541, 724 P.2d at 493, 229 Cal. Rptr. at 807. *See* Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757 (1985); Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1 (1984).

STEPHANIE FANOS

V. LABOR LAW

A. *The test to be applied to service-connected disability retirement benefits for government employees is whether or not there exists substantial evidence of a real and measurable connection between the disability and the employment:* **Bowen v. Board of Retirement.**

I. INTRODUCTION

In *Bowen v. Board of Retirement*,[1] the court held that the 1980 amendment to section 31720 of the Government Code[2] did not alter the test to be applied to service-connected disability retirement benefits for government employees. Rather, the court determined that the amendment merely rejected the "infinitesimal contribution" test that had developed in case law interpretations of the pre-amendment statute. Finally, the court construed the amendment's language requiring that the "employment contributes substantially to such incapacity"[3] to mean that there must exist substantial evidence to show a real and measurable connection between the disability and the employment.

II. FACTUAL BACKGROUND

Thomas Bowen was employed by Los Angeles County from 1956 to 1977. For the first nineteen years he worked as a stenographer, and for the last two he was an eligibility worker. In May of 1977, he was involved in a nonemployment-related accident in which he suffered a broken ankle. After this incident, Bowen failed to return to his occupation, claiming that the stress he experienced as an eligibility worker was too great.

In August of 1978, Bowen attempted to obtain a service-connected disability retirement. He was examined by three physicians who found that no permanent disability had been suffered. Accordingly, in September of 1979, his retirement application was denied. Two months prior to this denial, Bowen experienced some permanent injury as a result of a heart attack. Armed with reports stating that zero to fifty percent of his disability was derived from work-related

1. 42 Cal. 3d 572, 724 P.2d 500, 229 Cal. Rptr. 814 (1986). Justice Reynoso wrote the majority opinion with which Justices Bird, Mosk, Broussard, and Grodin concurred. Justice Panelli separately concurred and dissented, and Justice Lucas dissented.
2. CAL. GOV'T CODE § 31720 (West Supp. 1987).
3. *Id.* at § 31720(a).

causes, Bowen was granted a Retirement Board [hereinafter the Board] hearing. The Board again denied the service-connected disability pension, instead granting nonservice-connected benefits.[4] Bowen challenged this decision by filing a petition for a peremptory writ of mandate, which both the trial court and the court of appeal denied.

III. THE MAJORITY OPINION

Bowen argued two alternative positions: first, that the 1980 amendment to section 31720 of the Government Code should not be retroactively applied since he initially requested a service-connected pension in 1978; and second, if the 1980 amendment was to be utilized, the trial court erred in its application of the language of the amendment. The court reasoned that because the 1980 amendment was enacted to clarify existing law, Bowen's first contention need not be addressed.[5] The court proceeded directly to Bowen's second argument.

A. *History of Section 31720 of the Government Code*

The court began by discussing the history of section 31720 of the Government Code.[6] Prior to the 1980 amendment, section 31720 provided that permanent disability pensions would be given only to those persons whose "incapacity is a result of injury or disease arising out of the course of his employment."[7] In *Heaton v. Marin County Employees Retirement Board*,[8] the appellate court dismissed the Board's contention that section 31720 mandated that the employment be the sole or substantial contributing cause of the disability.[9] The *Heaton* court concluded that the language of the statute merely required that the disability be *a* result of the government employment, not *the* result.[10]

Subsequently, other courts relying on the *Heaton* decision, reasoned that *Heaton* stood for the proposition that a disability infinitesimally related to employment would result in eligibility for a service-connected disability pension.[11] Fearing for the solvency of their re-

4. Higher payments are yielded from a service-connected pension.

5. 42 Cal. 3d at 575 n.3, 724 P.2d at 502 n.3, 229 Cal. Rptr. at 816 n.3. The court pointed out, " 'An exception to the general rule that statutes are not construed to apply retroactively arises when the legislation merely clarifies existing law.' " *Id.* (citing Martin v. California Mut. Bldg. & Loan Ass'n, 18 Cal. 2d 478, 484, 116 P.2d 71, 74 (1941)).

6. CAL. GOV'T CODE § 31720 (West Supp. 1987).

7. CAL. GOV'T CODE § 31720(a) (West 1968). *See generally* 49 CAL. JUR. 3D *Pensions & Retirement Systems* §§ 4-40 (1979 & Supp. 1986).

8. 63 Cal. App. 3d 421, 133 Cal. Rptr. 809 (1976).

9. *Id.* at 425-26, 133 Cal. Rptr. at 811.

10. *Id.* at 428-29, 133 Cal. Rptr. at 812-13.

11. 42 Cal. 3d at 576, 724 P.2d at 502, 229 Cal. Rptr. at 816 (citing Van Hook v.

tirement plans, many county governments demanded a legislative change.[12] The court noted that the Senate specifically recognized the problems with the *Heaton* interpretation and, via the 1980 amendment, was attempting to establish a higher standard.[13] The Senate had proposed a "principal result" test.[14] However, the Assembly reformed this to the "substantial contribution" standard[15] that was enacted.

B. Interpretation of the 1980 Amendment

Bowen believed that the tort concept of legal causation should have been employed in interpreting the "substantial contribution" requirement of the amended statute.[16] The court rejected this contention, finding that the utilization of tort law would have been potentially confusing.[17] The Board suggested that the statutory addition established a greater than fifty-percent standard.[18] The Justices insisted that such an interpretation would have served to circumvent the purpose of section 31720.[19] The court stressed that pension funds were established in recognition of a public obligation to disabled public servants.[20] In keeping with the underlying purpose of pension legislation, the court maintained that such statutes must be liberally construed.[21]

The Justices surmised that, since the legislature merely intended to reject *Heaton* and its progeny, case law prior to the 1980 amendment's enactment could be relied upon.[22] The court invoked the test

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Board of Retirement, 148 Cal. App. 3d 714, 716 n.1, 196 Cal. Rptr. 186, 187-88 n.1 (1983); DePuy v. Board of Retirement, 87 Cal. App. 3d 392, 396, 150 Cal. Rptr. 791, 793-94 (1978)).

12. 42 Cal. 3d at 576, 724 P.2d at 502, 229 Cal. Rptr. at 816 (citing S. 1076, Assem. File Analysis (June 5, 1980)).

13. 42 Cal. 3d at 576, 724 P.2d at 502, 229 Cal. Rptr. at 816 (citing *Senate Comm. on Public Employment and Retirement* (May 14, 1979)).

14. 42 Cal. 3d at 576, 724 P.2d at 502, 229 Cal. Rptr. at 816 (citing S. 1076, Reg. Sess. § 1 (1979-1980)).

15. 42 Cal. 3d at 576, 724 P.2d at 503, 229 Cal. Rptr. at 817.

16. *Id.* at 578 n.4, 724 P.2d at 503 n.4, 229 Cal. Rptr. at 817 n.4. The tort causation approach was utilized in Lundak v. Board of Retirement, 142 Cal. App. 3d 1040, 191 Cal. Rptr. 446 (1983).

17. 42 Cal. 3d at 578 n.4, 724 P.2d at 503 n.4, 229 Cal. Rptr. at 817 n.4.

18. *Id.* at 577, 724 P.2d at 503, 229 Cal. Rptr. at 817.

19. *Id.*

20. *Id.* (citing CAL. GOV'T CODE § 31451 (West 1968)). *See generally* 60 AM. JUR. 2D *Pension & Retirement Funds*, §§ 39-72 (1972 & Supp. 1986).

21. 42 Cal. 3d at 577, 724 P.2d at 503, 229 Cal. Rptr. at 817 (citing Cordell v. City of Los Angeles, 67 Cal. App. 2d 257, 266, 154 P.2d 31, 36 (1944)).

22. 42 Cal. 3d at 577-78, 724 P.2d at 503, 229 Cal. Rptr. at 817.

employed in *DePuy v. Board of Retirement.*[23] The appellate court in *DePuy* held that "while the causal connection between the [job] stress and the disability may be a small part of the causal factors, it must nevertheless be real and measurable. There must be substantial evidence of some connection between the disability and the job."[24] Thus, the court in the case at bar concluded that the "substantial contribution" language of section 31720 required "substantial evidence of a 'real and measurable' connection between the disability and employment."[25]

IV. The Separate Opinions

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

Justice Panelli concurred with the majority's holding that the 1980 amendment to section 31720 of the Government Code merely explained, and did not alter, the statute.[26] The Justice parted company with the majority on the interpretation of the amendment. Justice Panelli advocated the tort causation test adopted in *Lundak v. Board of Retirement.*[27] The appellate court in *Lundak* held that the Restatement Second of Torts[28] should be applied to the 1980 amendment.[29] The *Lundak* decision yielded a "substantial factor" test.[30] In applying this standard, Justice Panelli explained that "the employment-related injury or illness must be a material element and have contributed to the disability in such a manner that *reasonable minds* would find the employment-related condition was in some way *responsible* for the disability."[31] Finally, the Justice emphasized that tort causation theories were already operating in the areas of workers' compensation and employee disability and were not causing any confusion as the majority indicated.[32]

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23. 87 Cal. App. 3d 392, 150 Cal. Rptr. 791 (1978). *See also* Annotation, *Determination Whether Peace Officer's Disability Is Service-Connected for Disability Pension Purposes: DePuy v. Board of Retirement*, 12 A.L.R. 4TH 1150 (1982).

24. 87 Cal. App. 3d at 399, 150 Cal. Rptr. at 796.

25. 42 Cal. 3d at 578, 724 P.2d at 504, 229 Cal. Rptr. at 818. *See generally* 70 C.J.S. *Pensions* § 7 (1951). The court reversed the court of appeal's decision and remanded to the trial court.

26. 42 Cal. 3d at 579, 724 P.2d at 504, 229 Cal. Rptr. at 818 (Panelli, J., concurring and dissenting).

27. 142 Cal. App. 3d 1040, 191 Cal. Rptr. 446 (1983).

28. RESTATEMENT (SECOND) OF TORTS § 431 (1965).

29. 142 Cal. App. 3d at 1045, 191 Cal. Rptr. at 449.

30. *Id.* at 1045-46, 191 Cal. Rptr. at 449.

31. 42 Cal. 3d at 580, 724 P.2d at 505, 229 Cal. Rptr. at 819 (Panelli, J., concurring and dissenting) (emphasis in original).

32. *Id.*

B. *Justice Lucas' Dissenting Opinion*

Justice Lucas began by rejecting the majority's invocation of the *DePuy* analysis because *DePuy* was decided prior to the 1980 amendment to section 31720 of the Government Code.[33] Justice Lucas noted that the *DePuy* court's holding was merely an attempt to moderate the "infinitesimal contribution" standard.[34] The Justice felt that the Legislature's purpose in enacting the amendment was to effect a substantive change in the law.[35] In reviewing the history of the amendment, Justice Lucas found that the bill in its final form represented a compromise between county governments and labor.[36] Thus, the conclusion to be gleaned was that a "new quantitative measure" was intended, as evidenced by the adoption of completely new language.[37] In fact, the Legislature pronounced its intent to change the statute substantively by stating that the "substantial contribution test 'shall be applicable to all applicants for disability retirement on or after the effective date' of the amendment."[38]

The Justice then focused upon the possible interpretations of the amendment. Justice Lucas rejected the *Lundak* tort causation test as proposed by Bowen and Justice Panelli's separate opinion.[39] Justice Lucas reduced the *Lundak* standard to a requirement that the work be "*a* cause" of the disability, which merely reflected the pre-amended statute.[40] The Justice examined the plain meaning of the words "contributes substantially."[41] He believed that "contributes substantially" meant that the "employment must contribute more than ten percent to a disability in order to qualify for a service-connected disability retirement under the 1980 amendment."[42] Justice Lucas concluded that a "greater than ten percent" test would hold intact the viability of county retirement plans.[43]

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33. *Id.* at 581, 724 P.2d at 506, 229 Cal. Rptr. at 820 (Lucas, J., dissenting).
34. *Id.* at 583, 724 P.2d at 507-08, 229 Cal. Rptr. at 821-22 (Lucas, J., dissenting).
35. *Id.* at 582, 724 P.2d at 506, 229 Cal. Rptr. at 820 (Lucas, J., dissenting).
36. *Id.* at 584, 724 P.2d at 508, 229 Cal. Rptr. at 822 (Lucas, J., dissenting).
37. *Id.* at 584-85, 724 P.2d at 508, 229 Cal. Rptr. at 822 (Lucas, J., dissenting).
38. *Id.* at 585, 724 P.2d at 509, 229 Cal. Rptr. at 823 (Lucas, J., dissenting).
39. *Id.* at 586, 724 P.2d at 509, 229 Cal. Rptr. at 823 (Lucas, J., dissenting).
40. *Id.* at 587, 724 P.2d at 510, 229 Cal. Rptr. at 824 (Lucas, J., dissenting) (emphasis in original).
41. *Id.* (Lucas, J., dissenting).
42. *Id.* at 587-88, 724 P.2d at 510, 229 Cal. Rptr. at 824 (Lucas, J., dissenting).
43. *Id.* at 588, 724 P.2d at 511, 229 Cal. Rptr. at 825 (Lucas, J., dissenting).

V. CONCLUSION

The interpretation of the 1980 amendment to section 31720 of the Government Code producing a "substantial evidence of a real and measurable connection between the disability and the employment" requirement can hardly be said to allay the fears of the county governments who moved for the amendment. All occupations, from those with little responsibility to those with great responsibility, involve stress. In other words, stress is a natural result of being employed in our modern world. To allow those persons who are ill-equipped to deal with job-related stress to gain the benefits of a full work-related disability pension via such a low standard of proof, is to place too little meaning on the phrase "work-related disability." The threat to the viability of county pension funds is real under this standard, and one can only hope that the money will be available to those who are truly deserving. A ten percent or greater standard, instead of an elusive "real and measurable connection" (one percent is real and measurable) requirement, would better serve the interests of those persons relying on the pension plans of their government employers.

LINDA M. SCHMIDT

B. *A public employees' strike is not a prima facie tort for which damages can be recovered:* **City of San Francisco v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 38.**

In *City of San Francisco v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 38*, 42 Cal. 3d 810, 726 P.2d 538, 230 Cal. Rptr. 856 (1986) [hereinafter *Local 38*], the supreme court decided the question reserved in *County Sanitation District No. 2 v. Los Angeles County Employees Association*, 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424, *cert. denied*, 106 S. Ct. 408 (1985). In holding that a public employer cannot recover damages under a prima facie tort theory as a result of a public employees' strike, the court overturned *Pasadena Unified School District v. Pasadena Federation of Teachers*, 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977).

In the action that preceded *Local 38*, the trial court granted a preliminary injunction against the striking unions. The court of appeal declared that the strike was illegal, despite the fact that the strike did not involve or incite violence. *City of San Francisco v. Evankovich*, 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977). Prior to the appellate decision, San Francisco filed for tort damages sustained by the city during the strike which instituted this cause of action.

The trial court awarded damages in excess of four million dollars to the city. Before the court of appeal decided *Local 38*, the supreme court decided *County Sanitation*, which permitted public employee strikes, except those that posed an imminent threat to public health or safety. The court declared that the union was collaterally estopped by the earlier *Evankovich* decision from challenging the ruling as to the illegality of the strike.

The supreme court reversed the decision of the court of appeal with respect to the availability of damages as a remedy for an illegal strike, reserving the employers' right to sue for damages for breach of an explicit no-strike clause and for tortious acts occurring during the strike. The court reasoned that decisions affecting labor law were more appropriately decided by the legislature. Further, the court urged that a judicial remedy of tort damages would not be appropriate in many cases since an administrative provision provided for resolving most public employer-employee conflicts.

The court's reticence is odd considering its willingness in 1985 to abolish the long-standing labor relations rule which declared that in the absence of legislation, public employees in general do not have the right to strike. *See* 51A C.J.S. *Labor Relations* § 306 (1967).

RHONDA SCHMIDT

C. *Amended legislation affecting an employee's substantive rights will be given retroactive effect when the statutory provision operates to clarify existing law, rather than to change it:* **Hoffman v. Board of Retirement.**

In *Hoffman v. Board of Retirement*, 42 Cal. 3d 590, 724 P.2d 511, 229 Cal. Rptr. 825 (1986), the court considered the 1980 amendment of section 31720 of the California Government Code and its effect on a Los Angeles County employee's request for service-connected disability retirement. Hoffman worked in a clerical position for four years until July, 1976, when she suffered what she believed to be a stroke. Subsequent medical examination was inconclusive: some reports found her employment to have significantly aggravated her hypertension and anxiety, while other reports attributed her disability to nonindustrial causes. Hoffman's prior medical history revealed similar symptoms and illnesses antedating her county employment. The Board of Retirement of the Los Angeles County Employees' Retirement Association awarded Hoffman a disability pension on November 5, 1980. They concluded, however, that her disability was not

service related, thereby lowering her benefits. The application for, and award of, the pension was made prior to the effective date of the amendment. Her writ petition to the superior court was heard following the effective date of the legislation in question.

The superior court applied the substantial contribution test of the amended statute, a higher standard than the original provision, and held that the burden had not been satisfied as to warrant a service-connected pension. Following the general rule presented in *Aetna Casualty and Surety Co. v. Industrial Accident Commission*, 30 Cal. 2d 388, 182 P.2d 159 (1947), the court of appeal held that the amended statute should not in retrospect be applied to Hoffman. *Aetna* specified that statutes affecting the substantive rights of employees operate prospectively. The appellate court further held that the creation of a stricter standard of proof was a substantive change in the law. Since the legislature did not expressly provide for the retroactivity of the amendment, the case was remanded to the superior court to apply the proper test of causation.

The supreme court agreed in principle with the rationale of the lower court, citing the rule of *DiGenova v. State Board of Education*, 57 Cal. 2d 167, 367 P.2d 865, 18 Cal. Rptr. 369 (1962), that a statute affecting a substantive right will not be given retroactive effect without an express declaration of legislative intent for such. However, the court, in harmony with the decision given in the companion case of *Bowen v. Board of Retirement*, 42 Cal. 3d 572, 724 P.2d 500, 229 Cal. Rptr. 814 (1986), found an exception to the rule by holding the amended statute to be a clarification, rather than a substitution, of existing law. By determining that the inclusion of the substantial contribution test merely serves to emphasize the necessity of a measurable, causal connection between the employment and the disability of the employee, the court was able to bring Hoffman under the scope of *Martin v. California Mutual Building and Loan Association*, 18 Cal. 2d 478, 116 P.2d 71 (1941), which allowed the retroactive application of an amended law which was not altered, but simply clarified by amendment.

Accordingly, the decision of the court of appeal was reversed, and the action remanded to the superior court for resolution consistent with the amended standard of causation expressed in this opinion and in Bowen.

TRAVIS P. CLARDY

VI. PUBLIC RECORDS

Applications and licenses authorizing the possession of concealed weapons must be disclosed upon request under the Public Records Act: **CBS, Inc. v. Block.**

I. INTRODUCTION

Section 6255 of the Government Code[1] allows exemption from disclosure under the Public Records Act[2] when "[t]he agency demonstrat[es] . . . that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."[3] In *CBS, Inc. v. Block*,[4] the court held that the defendants had failed to satisfy this burden when they invoked section 6255 to deny a request for disclosure of applications and licenses approved by the sheriff which authorized the possession of concealed weapons.[5] The court reasoned that without access to the applications the public would have no means by which to ascertain whether the county official was exercising his discretion properly.[6]

II. FACTUAL BACKGROUND

In July of 1983, the plaintiff was denied a request to have access to the applications and licenses approved by the county sheriff authorizing individuals to carry concealed weapons. The plaintiff sought the records to aid the production of a report about possible abuses of discretion by the county sheriff in issuing licenses for concealed weapons. Only thirty-three licenses had been issued in Los Angeles County by the sheriff, all of which were for renewals.

In response to the sheriff's refusal to produce the applications or licenses, CBS filed a motion for disclosure, relying on sections 6258 and 6259 of the Government Code.[7] The trial court reviewed the ap-

1. CAL. GOV'T CODE § 6255 (West 1980) [hereinafter section 6255].
2. *Id.* §§ 6250-6267 (West 1980 & Supp. 1986) [hereinafter the Act].
3. *Id.* § 6255 (West 1980).
4. 42 Cal. 3d 646, 725 P.2d 470, 230 Cal. Rptr. 362 (1986). Chief Justice Bird wrote for the majority with Justices Broussard, Reynoso, Grodin, and McClosky concurring. Justice Mosk wrote a separate dissenting opinion in which Justice Panelli concurred.
5. *Id.* at 656, 725 P.2d at 477, 230 Cal. Rptr. at 369.
6. *Id.* at 656-57, 725 P.2d at 477, 230 Cal. Rptr. at 369.
7. *Id.* Section 6258 of the Government Code authorizes proceedings to enforce one's right to inspect public records. CAL. GOV'T CODE § 6258 (West 1980). Section 6259 of the Government Code provides in part: "[w]henever it is made to appear by verified petition to the superior court . . . that certain public records are being improp-

plications and licenses in camera[8] and ordered disclosure of most of the licenses.[9] However, residential addresses of the licensees were not included, nor was CBS allowed to make copies of the applications.[10] Both the plaintiff and the defendants appealed the judgment.[11]

III. THE MAJORITY OPINION

A. *The Public Records Act*

In section 6250 of the Government Code, the legislature provided: "In enacting this chapter [the Public Records Act[12]], the Legislature, mindful of the rights of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."[13] The purpose of the Act was to minimize secrecy in government[14] as well as to "increas[e] freedom of information."[15] Moreover, the court in *CBS* held that access to public records enabled the community to keep checks on government officials and guard against abuse of their powers.[16]

Section 6254 of the Government Code[17] set out a number of specific exceptions to the Act. The court noted that the agency was free to exercise its discretion in deciding whether or not to apply these exceptions.[18] The agency was free to disclose the information when the public's interest in disclosure outweighed the interest sought to be

erly withheld . . . the court shall order the officer . . . to disclose the public record or show cause why he should not do so." *Id.* § 6259 (West 1980).

8. To determine whether records are excluded under the exceptions to the Public Records Act, the court may view the records in camera. *See generally* Register Div. of Freedom Newspapers, Inc. v. County of Orange, 158 Cal. App. 3d 893, 205 Cal. Rptr. 92 (1984).

9. *CBS*, 42 Cal. 3d at 649, 725 P.2d at 472, 230 Cal. Rptr. at 364.

10. *Id.*

11. *Id.*

12. CAL. GOV'T CODE §§ 6250-6267 (West 1980 & Supp. 1986).

13. *Id.* § 6250 (West 1980). *See generally* Mink, *The Mink Case: Restoring the Freedom of Information Act*, 2 PEPPERDINE L. REV. 8 (1974); 55 CAL. JUR. 3D *Records and Recording Laws* § 7 (1980).

14. *CBS*, 42 Cal. 3d at 651, 725 P.2d at 473, 230 Cal. Rptr. at 365 (quoting San Gabriel Tribune v. Superior Court, 143 Cal. App. 3d 762, 771-72, 192 Cal. Rptr. 415, 420 (1983)). *See also* ACLU v. Deukmejian, 32 Cal. 3d 440, 651 P.2d 822, 186 Cal. Rptr. 235 (1982).

15. *CBS*, 42 Cal. 3d at 651, 725 P.2d at 473, 230 Cal. Rptr. at 365 (quoting Los Angeles Police Dept. v. Superior Court, 65 Cal. App. 3d 661, 668, 135 Cal. Rptr. 575, 579 (1977)).

16. *Id.*

17. CAL. GOV'T CODE § 6254 (West 1980) [hereinafter section 6254]. *See generally* Special Project, *A Look At the California Records Act and its Exemptions*, 4 GOLDEN GATE U.L. REV. 203 (1974).

18. *CBS*, 42 Cal. 3d 652, 725 P.2d at 473-74, 230 Cal. Rptr. at 365-66.

protected by nondisclosure.[19] In the instant case, the defendants failed to claim the records fit under any express exception in section 6254. Instead, they claimed privilege under the "catch-all" exception to the Act, which employed a balancing test of competing interests.[20]

B. The Balancing Test

Section 6255 provided that where a public agency was not exempted from disclosing its records under an express exception to the Public Records Act, it could withhold records by demonstrating that the public interest in not disclosing the records "clearly outweigh[ed]" the public interest in disclosure.[21] The court stated that the standard to apply to the balancing test was that of independent review.[22] Thus, the court independently reviewed the lower court's balancing analysis.[23]

The defendants contended that disclosure would render licensed concealed weapon holders more vulnerable to attack.[24] The court reasoned that the knowledge that these persons were armed would allow criminals to plan their crimes more carefully.[25] The defendants argued that persons in need of concealed weapons for personal protection might refrain from acquiring them if personal identities were to be disclosed.[26]

The court believed the defendants' arguments were "conjectural at best."[27] In rebuttal to the defendants' claims, the court suggested that a would-be attacker's knowledge of the weapons may actually

19. *Id.*

20. *Id.* 42 Cal. 3d at 652, 725 P.2d at 474, 230 Cal. Rptr. at 366.

21. CAL. GOV'T CODE § 6255 (West 1980). *See generally* Eskaton Monterey Hosp. v. Myers, 134 Cal. App. 3d 788, 184 Cal. Rptr. 840. In *Monterey*, hospital Medi-Cal program services were audited. The California Appellate Court found that the public interest in not disclosing the records clearly outweighed the public's interest in disclosure because disclosure would reveal the hospital's strategy for audits of Medi-Cal recipients. The balancing test is a public policy approach. *See* Pantos v. County of San Francisco, 151 Cal. App. 3d 258, 198 Cal. Rptr. 489 (1984). Furthermore, "[w]here there is no contrary statute or public policy, the right to inspect public records must be freely allowed." *Id.* at 261, 198 Cal. Rptr. at 492.

22. *CBS*, 42 Cal. 3d at 650, 725 P.2d at 472, 230 Cal. Rptr. at 364.

23. *Id.* at 651, 725 P.2d at 472-73, 230 Cal. Rptr. at 364-65.

24. *Id.* at 652, 725 P.2d at 474, 230 Cal. Rptr. at 366.

25. *Id.* at 652, 725 P.2d at 474, 230 Cal. Rptr. at 366. Justice Mosk, in his dissenting opinion, speculated even further that since the would-be attackers would have knowledge of the concealed weapons, an attack on a weapon holder may be more enticing as an exciting challenge. *Id.* at 663, 725 P.2d at 481, 230 Cal. Rptr. at 373 (Mosk, J., dissenting).

26. *Id.* at 653, 725 P.2d at 474, 230 Cal. Rptr. at 366.

27. *Id.* at 652, 725 P.2d at 474, 230 Cal. Rptr. at 366.

serve to discourage such crimes.[28] Moreover, the court reasoned that under section 6257 of the Government Code,[29] the portions which might aid criminals in planning an attack could be deleted prior to disclosure.[30]

The court concluded that the public's interest in reviewing the government's business outweighed the licensees' rights to remain anonymous,[31] noting that, "[t]he interest of society in ensuring accountability is particularly strong where the discretion invested in a government official is unfettered, and [the official grants to] . . . only a select few the special privilege."[32] The court emphasized that in order to ascertain whether the sheriff was abusing his discretionary powers, it was imperative that the public have access to review the approved applications.[33] Therefore, the court remanded the case to the trial court for further proceedings in accordance with the opinion.[34]

IV. THE DISSENTING OPINION

Justice Mosk wrote a separate dissenting opinion. The Justice claimed the license holders' constitutional right to privacy would be violated by public disclosure of the applications.[35] He reiterated the defendants' contention that disclosure would expose the licensed weapon holders to increased risk of attack.[36] Justice Mosk believed that CBS's interest in obtaining the application was "minimal if not nonexistent."[37] However, he did not refute the majority's claim of the importance of checks on governmental power. Finally, the Jus-

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28. *Id.* at 652 n.9, 725 P.2d at 474 n.9, 230 Cal. Rptr. at 366 n.9.

29. CAL. GOV'T CODE § 6257 (West 1980). "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of portions which are exempt by law." *Id.*

30. *CBS*, 42 Cal. 3d at 652-53, 725 P.2d at 474, 230 Cal. Rptr. at 366.

31. *Id.* at 656, 725 P.2d at 477, 230 Cal. Rptr. at 369.

32. *Id.* at 655, 725 P.2d at 475-76, 230 Cal. Rptr. at 367-68.

33. *Id.* at 657, 725 P.2d at 477, 230 Cal. Rptr. at 369. Section 12050 of the Penal Code provides in pertinent part: "[t]he sheriff of a county . . . upon proof that the person applying is of good moral character, [and] that good cause exists for the issuance . . . may issue to such a person a license to carry a concealed . . . firearm." CAL. PENAL CODE § 12050 (West 1977).

34. *CBS*, 42 Cal. 3d at 657, 725 P.2d at 477, 230 Cal. Rptr. at 369.

35. *Id.* at 666, 725 P.2d at 483, 230 Cal. Rptr. at 375 (Mosk, J., dissenting). Article I section 1 of the California Constitution provides: "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring and possessing and protecting property, and pursuing . . . *privacy.*" CAL. CONST., art. I, § 1 (emphasis added). ***But see*** Braun v. City of Taft, 154 Cal. App. 3d 332, 201 Cal. Rptr. 654 (1984) (disclosure of certain material from a city employee's file was deemed not to be an unwarranted invasion of privacy). *See generally* Comment, *Informational Privacy and Public Records*, 8 PAC. L.J. 25 (1977).

36. *CBS*, 42 Cal. 3d at 664, 725 P.2d at 481, 230 Cal. Rptr. at 374 (Mosk, J., dissenting).

37. *Id.* at 665, 725 P.2d at 482, 230 Cal. Rptr. at 374 (Mosk, J., dissenting).

tice proclaimed that since the Legislature gave the sheriff unfettered discretion, "[i]f that discretion is to be curtailed, the legislature is the body to do it."[38]

V. CONCLUSION

The majority opinion emphasized the public policy underlying the Public Records Act. Access to governmental records and files is imperative to review public officials' conduct. Without public access to the applications for concealed weapons licenses, a sheriff could exercise his power unchecked by the community. Although the licensed weapon holders may have a privacy interest, this interest is sufficiently outweighed by the public's interest in reviewing the sheriff's conduct. Moreover, the opinion pointed out that any information detrimental to the licensees' safety could be segregated from the non-injurious portions of the records. Therefore, the defendants' argument that the license holders would be harmed by the disclosure loses much of its force. The opinion made clear that the Public Records Act will not be easily disregarded by the courts.

MARIANNE CHIAPUZIO

VII. TORT LAW

A. *A condominium homeowners association may be held to a landlord's standard of care for the common areas under its control:* **Frances T. v. Village Green Owners Association.**

I. INTRODUCTION

The supreme court greatly expanded the duty and possible liability of condominium associations in *Frances T. v. Village Green Owner's Association.*[1] In reversing the trial court's judgment, the court held that a condominium association should be held to the same standard of care as that of a landlord.[2] That is, a condominium association is responsible for the common areas under its control. Therefore, the

38. *Id.* at 665, 725 P.2d at 482-83, 230 Cal. Rptr. at 374-75 (Mosk, J., dissenting).

1. 42 Cal. 3d 490, 723 P.2d 573, 229 Cal. Rptr. 456 (1986). The majority opinion was authored by Justice Broussard, with Chief Justice Bird and Justices Reynoso and Grodin concurring. Chief Justice Bird wrote a separate concurring opinion. Justice Mosk wrote a concurring and dissenting opinion in which Justice Lucas concurred.

2. For an overview of a condominium association's liability for injuries caused by the condition of the premises see Annotation, *Liability of Condominium Association or Corporation For Injury Allegedly Caused By Condition of Premises*, 45 A.L.R. 3D 1171 (1972). For a discussion of the tort liability of condominium associations in Cali-

court held that the plaintiff had stated a cause of action for negligence against both the homeowner's association (a corporation) and the individual members of its board of directors. However, plaintiff failed to state a cause of action for breach of contract and breach of fiduciary duty, and those counts were properly dismissed.

II. BACKGROUND

The plaintiff sued the Village Green Owner's Association,[3] and individual members of its board of directors,[4] for injuries sustained when she was attacked in her condominium unit, a part of the Village Green Condominium Project.[5] On the night of October 8, 1980, an unidentified person entered plaintiff's condominium after dark and raped and robbed her. At the time of the break-in, the condominium had absolutely no exterior lighting.

The project consisted of 92 buildings situated in park-like "courts." Each building contained several condominiums. The plaintiff's unit faced the largest of the courts, which she alleged were poorly lit, with her court being the poorest lit of all.[6]

Throughout 1980, project residents were the victims of numerous crimes, including car theft, burglary and robbery. All of the projects' residents, including the board of directors, were aware of the high incidents of crime, largely due to articles about the crime wave published in the Association's newsletter.[7] The newsletter contained complaints by residents about the lighting, and one edition included a call for all ground floor residents to leave their exterior lights burning "as a civic duty."[8] In early 1980, the board of directors began to investigate the lighting problems.

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fornia before *Village Green*, see 12 CAL. JUR. 3D *Condominiums and Cooperative Apartments* § 16 (1974 & Supp. 1986).

3. "The association is a nonprofit corporation, rather than an unincorporated association." 42 Cal. 3d at 495 n.1, 723 P.2d at 574 n.1, 229 Cal. Rptr. at 457 n.1.

4. The board of directors is made up of individual condominium unit owners. *Id.* at 519, 723 P.2d at 591, 229 Cal. Rptr. at 474 (Mosk, J., concurring and dissenting).

5. The Village Green Owners' Association, through the board of directors, conducts, manages and controls the affairs of the project. It is also responsible for the management of the project and the maintenance of its common areas. *Id.* at 496, 723 P.2d at 575, 229 Cal. Rptr. at 458.

6. *Id.*

7. "From January through July 1980, articles about the crime wave and possible protective measures were published in the Association's newsletter and distributed to the residents of the Project, including the directors." *Frances T.*, 42 Cal. 3d at 496, 723 P.2d at 575, 229 Cal. Rptr. at 458.

8. "The newsletters included such items as: 'LIGHTS! LIGHTS! LIGHTS! You are doing a disservice to your neighbors as well as yourself if you keep your front and back doors in darkness. Many who live upstairs are able to gaze out on the green at night and see perfectly the presence or absence of a prowler where there is a lighted doorway. But where porches are shrouded in darkness, NOTHING is visible. AS A CIVIC DUTY—WON'T YOU KEEP THOSE LIGHTS ON?' " *Id.* at 497 n.3, 723 P.2d at 575 n.3, 229 Cal. Rptr. at 458 n.3.

The plaintiff's unit was first burglarized in April 1980. She blamed the incident on the poor lighting and caused an item relating these sentiments to be published in the newsletter.[9] Furthermore, the plaintiff, in her capacity as a "court representative," transmitted a formal request to the board that more lighting be installed in her court as soon as possible.[10]

The plaintiff submitted another request in August of 1980 because the board had failed to act on previous requests. When the board still had not taken action by late August, the plaintiff installed additional exterior lighting herself. However, in a letter dated August 29, 1980, the project manager requested that plaintiff remove the lighting.[11] On October 1 the plaintiff appeared at a board of directors meeting where she requested permission to maintain her lighting until the board improved the lighting situation. The board denied the request and informed the plaintiff by letter that she was to remove the lighting or it would be removed and she would be billed for the cost.[12]

The site manager informed the plaintiff that she could not use the lights pending their removal. Because the additional lighting was wired into the same circuitry as the original exterior lights and used the same switch, the plaintiff was, in effect, required to do without any exterior lighting. As a result, the plaintiff's condominium was in

9. The plaintiff caused the following item to be printed in the association's newsletter: "With reference to other lighting, Fran [T.] of Ct 4, whose home was entered, feels certain (and asked that this be mentioned) that the break-in would not have occurred if there had been adequate lighting at the end of her Court." *Id.* at 497, 723 P.2d at 575, 229 Cal. Rptr. at 458.

10. In May 1980, the residents of plaintiff's court met and drafted a formal request that more lighting be installed as soon as possible. The plaintiff transmitted the following report to the project's manager with a copy to the board. It stated:

> June 12, 1980. REPORT FROM YOUR COURT REP. . . . It was requested that the following items be relayed to the on-site mgr. for consideration and action if possible.
>
> 1. Lights be installed on the northeast corner of bldg. 18 promptly.
>
> Item No. 1 above was put into the form of a motion with the request that action be taken on this item particularly by the site manager . . . .

Frances T., 42 Cal. 3d at 497 n.5, 723 P.2d at 575 n.5, 229 Cal. Rptr. at 458 n.5.

11. "[T]he site manager told plaintiff that she would have to remove the lighting because it violated the CC&R's," the project's declaration of covenants, conditions and restrictions. *Id.* at 498, 723 P.2d at 576, 229 Cal. Rptr. at 459.

12. The letter stated in part:

> [T]he Board resolved as follows:
>
> You are requested to remove the exterior lighting you added to your front door and in your patio and to restore the Association Property to its original condition on or before October 6. If this is not done on or before that date, the Association will have the work done and bill you for the costs incurred.

Id.

total darkness beginning October 8, 1980, the night that she was raped and robbed.

III. THE OPINION

In an opinion authored by Justice Broussard, and joined by Chief Justice Bird, and Justices Reynoso and Grodin, the court concluded that the complaint did state a cause of action for negligence against both the association and its board of directors, and that the trial court had erred in sustaining the demurrer. However, the court affirmed dismissal of the plaintiff's causes of action for breach of contract and breach of fiduciary duty.

The court recognized at the outset that the fundamental issue was whether petitioners, the condominium association, and the individual directors owed the plaintiff the same standard of care as would a landlord in the traditional landlord-tenant relationship. This question was considered in regard to the association and the directors, in turn.

Although the scope of a condominium association's duty to a unit owner was a question of first impression in the court, the opinion stated that "the association is, for all practical purposes, the project's 'landlord.' "[13] Because traditional tort principles impose on landlords the duty to exercise due care for the residents' safety in those areas under the landlord's control, the association (which functions as a landlord) has a similar duty of care for maintaining the common areas under its control.

The court relied on one of its own previous decisions and an appellate court case in supporting its holding. In *White v. Cox*,[14] the court of appeal had ruled that a condominium owner could sue the unincorporated condominium association for negligently maintaining a sprinkler in a common area which caused injury to the owner. A previous California Supreme Court decision, *O'Connor v. Village Green Homeowners' Association*,[15] recognized that "the [condominium] association performs all the customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders."[16]

The court further noted two cases which dealt with landlord-tenant relationships with factual situations similar to the instant case. *O'Hara v. Western Seven Trees Corp.*[17] established that a landlord has a duty to protect the tenant from criminal acts in certain situa-

13. *Id.* at 499, 723 P.2d at 576, 229 Cal. Rptr. at 459.
14. 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971).
15. 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983).
16. *O'Connor*, 33 Cal. 3d at 796, 662 P.2d at 431, 191 Cal. Rptr. at 324.
17. 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977).

tions. Recognizing that the landlord-tenant relationship in the urban residential context has been an area of expanding liability, the court stated that "since only the landlord is in the position to secure common areas, he has a duty to protect against types of crimes of which he has notice and which are likely to recur if the common areas are not secure . . . ."[18] The court concluded that the most important factor giving rise to the landlord's liability in the *O'Hara* case was foreseeability. That is, the landlord allegedly knew of past attacks and of conditions making future attacks likely.

Similarly, in *Kowaitkowski v. Superior Trading Company*,[19] the court of appeal (relying primarily on *O'Hara*) concluded that a plaintiff had alleged facts sufficient to show that her injuries were the foreseeable result of the landlord's negligence in maintaining a common area. Again, it was alleged that complaints and prior assaults upon tenants had given the landlord notice that injuries might result.

The *Frances T.* court noted that here, as in *O'Hara* and *Kowaitskowski*, the Association was on notice that crimes were being committed against residents. This notice was given by correspondence from the plaintiff and other residents, and articles in the Project's newsletter. Furthermore, the plaintiff's unit had been burglarized recently, and the defendants were aware of this. Because the foreseeability requirement was fulfilled, and the association stood in the place of a landlord, the court held that the plaintiff had stated a cause of action. Finally, the court concluded that the defendant need not have foreseen the precise injury to the plaintiff, so long as the possibility of this type of harm was foreseeable.[20]

In regard to the directors' duty of care, the court initially recognized that corporate directors cannot be held vicariously liable for the corporation's torts in which they do not participate. The liability of directors stems only from their own tortious conduct and not from their status as directors per se.[21] However, directors are jointly liable with the corporation and may be joined as defendants when they directed or participated in the tortious conduct.[22] Furthermore, direc-

18. *O'Hare*, 75 Cal. App. 3d at 802-03, 142 Cal. Rptr. at 489-90.

19. 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981).

20. *See* Isaacs v. Huntington Memorial Hospital, 38 Cal. 3d 112, 127, 695 P.2d 653, 662, 211 Cal. Rptr. 356, 362 (1985); *Kowaitkowski*, 123 Cal. App. 3d at 329, 176 Cal. Rptr. at 497.

21. United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 595, 463 P.2d 770, 775, 83 Cal. Rptr. 418, 423 (1970).

22. "The fact that directors receive no compensation for their services does not exonerate them from liability. . . . Corporation Code § 7230, subdivision (a) provides . . .

tors are liable to third persons injured by their tortious conduct regardless of the liability of the corporation. These rules have their roots in the law of agency, as directors are said to be the agents of their corporate principle.[23]

The court stated that to maintain a tort claim against a director in his or her personal capacity, a plaintiff must first show that the director specifically authorized, directed, or participated in the tortious conduct. Alternatively, if a director specifically knew, or reasonably should have known, that some hazardous condition or activity under his control could injure a plaintiff and he negligently failed to take or order appropriate action to avoid the harm, he would be liable. However, a plaintiff must allege and prove that an ordinary prudent person, knowing what the director knew at that time, would have acted differently under the circumstances.

The court recognized that the plaintiff's complaint alleged that the defendant directors had specific knowledge of the hazardous lighting condition and failed to take any action to avoid the harm.[24] In fact, the directors had allegedly exacerbated the situation by forcing the plaintiff to refrain from using her exterior lighting. The court concluded that the plaintiff's complaint had alleged that each of the directors participated in the tortious activity and that this was enough to withstand a demurrer.

In her second cause of action, the plaintiff alleged breach of contract, in that the CC&R's and the Association's bylaws obligated the defendant to take reasonable steps to remedy the situation of inadequate exterior lighting. However, the court ruled that the plaintiff's contention of breach of contract was without merit, because the plaintiff had failed to allege that any provision in the writings imposed such an obligation on the defendants. In fact, the CC&R's expressly prohibited the installation of exterior lighting in common areas except with the prior approval of the board. Therefore, the court concluded that the plaintiff had failed to state a cause of action for breach of contract.

Finally, the plaintiff alleged a third cause of action for breach of fiduciary duty. The court held that this cause of action failed for the same reasons as the breach of contract action. The fiduciary duty of the defendants was to enforce the CC&R's and the bylaws as they

that '[a]ny duties and liabilities set forth in this article shall apply without regard to whether a director is compensated by the corporation.'" Frances T. v. Village Green Owners Ass'n, 42 Cal. 3d 490, 504 n.11, 723 P.2d 573, 580 n.11, 229 Cal. Rptr. 456, 463 n.11 (1986).

23. *See* CAL. CORP. CODE § 317(a) (West 1977).

24. Whether the directors acted reasonably under the circumstances is a question for the trier of fact which the supreme court did not reach. *Frances T.*, 42 Cal. 3d at 511-12, 723 P.2d at 586, 229 Cal. Rptr. at 469.

were written. The defendants fulfilled their duty to the plaintiff in their fiduciary capacity by strictly enforcing the provisions in the CC&R's that prohibited alternate exterior lighting.

IV. CONCLUSION

In *Frances T. v. Village Green Homeowners' Association*, the supreme court expanded the possible liability of condominium associations and their boards of directors. In reversing the trial court's dismissal of a cause of action for negligence against the association and its directors, the court held that a condominium association owes its individual owners the same standard of care that a landlord owes his tenants. Furthermore, individual directors are jointly liable with the corporate association if they authorize, direct, or participate in the negligent conduct, or if they fail to act to correct a foreseeably hazardous situation.

JEFF BOYKIN

B. *A libel action by a public official may not be sustained on appeal unless the record indicates by clear and convincing evidence that the defendant had actual malice, notwithstanding any lower court adjudication of the issue:* **McCoy v. Hearst Corporation.**

I. INTRODUCTION

In *McCoy v. Hearst Corp.*,[1] the court held that a public official must prove actual malice by clear and convincing evidence before damages for a defamatory falsehood may be awarded.[2] Malice was defined as knowledge of falsity or reckless disregard for the truth.[3] Furthermore, the court reaffirmed that appellate courts must determine the malice issue based upon the entire record, independent of a lower court's determination.[4]

II. FACTUAL BACKGROUND

This case arose as a result of the publication of three articles in the

1. 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986). Chief Justice Bird wrote for the majority with Justices Broussard, Reynoso, McClosky, and Johnson concurring. Justices Mosk and Lucas concurred in the judgment.
2. *Id.* at 841, 727 P.2d at 715, 231 Cal. Rptr. at 522.
3. *Id.*
4. *Id.* at 842-43, 727 P.2d at 715, 231 Cal. Rptr. at 522.

defendant's newspaper. The articles alleged that the former District Attorney, Pierre Merle, along with two police officers, Frank McCoy and Edward Erdelatz, obtained a conviction of a murder suspect[5] based primarily upon the false testimony of the suspect's cell mate, Thomas Porter.[6] The articles reported that the testimony was extracted by threats, physical abuse and promises of lenient sentencing by the court.[7]

The articles mainly focused upon a post-trial affidavit by Porter declaring that his testimony at the murder trial was false.[8] Porter's affidavit stated that he gave the false testimony as a result of coercion by the plaintiffs.[9] The affidavit also stated that Officer Merle "coached" Porter in memorizing a story which was later given at the trial.[10] The third article claimed that the State Bar Panel had suggested some form of discipline for Merle as a result of his misconduct in an unrelated case.[11]

As a result of the articles, an attorney petitioned for a writ of habeas corpus on behalf of the convicted murderer. The attorney filed Porter's affidavit along with the declarations of two eyewitnesses to the crime.[12] However, after the writ was filed, the attorney general obtained another affidavit from Porter which stated that his previous affidavit was false.[13] The plaintiffs, Merle, McCoy, and Erdelatz, brought this action for libel damages against the defendants, the Hearst Corp., and two of its reporters, Raul Ramirez and Lowell Bergman. The trial court awarded damages of $4,560,000 and the appellate court affirmed.[14]

III. THE COURT'S ANALYSIS

The court relied upon the well-settled rule of *New York Times Co. v. Sullivan*,[15] which states that for a public official to maintain an action in libel, he must establish that the false statement was made with actual malice. Actual malice exists when the statement is made "with knowledge that it was false or with reckless disregard of whether it was false or not."[16] In determining the issue of actual

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5. *Id.* at 840-41, 727 P.2d at 714, 231 Cal. Rptr. at 521.
6. *Id.* at 841, 727 P.2d at 714, 231 Cal. Rptr. at 521.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id. See infra* note 27.
12. *Id.* at 841, 727 P.2d at 714-15, 231 Cal. Rptr. at 521-22.
13. *Id.* at 841, 727 P.2d at 715, 231 Cal. Rptr. at 522.
14. *Id.* at 840, 727 P.2d at 714, 231 Cal. Rptr. at 521.
15. 376 U.S. 254 (1964).
16. *McCoy*, 42 Cal. 3d at 841, 727 P.2d at 715, 231 Cal. Rptr. at 522 (quoting New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964)). *See generally* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 303-305 (8th ed. 1974 & Supp. 1984); Comment, *De-*

malice, the court adopted the rule from a recent Supreme Court case, *Bose Corp. v. Consumer Union of U.S., Inc.*,[17] which imposed an affirmative duty on appellate judges to independently decide the issue of malice after reviewing the entire record.[18]

Rule 52(a) of the Federal Rules of Civil Procedure, requiring factual findings of triers of fact to be left undisturbed, was held inapplicable to the finding of actual malice.[19] The court reasoned that the malice issue in libel cases was of such a "constitutional magnitude" that it should not be left for the jury.[20] The court further declared that it is "constitutionally inadequate to review only those portions of the record that support the verdict."[21] Therefore, the entire record was reviewed in determining whether or not the defendants harbored actual malice.[22]

The standard for reckless disregard which constitutes actual malice was set forth by the United States Supreme Court in *St. Amant v. Thompson*.[23] "[Actual malice] is not measured by whether a reasonably prudent man would have published, or would have investigated

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fining Reckless Disregard, 1 ALASKA L. REV. 297 (1984); 6 CAL. JUR. 3D *Assault* § 145 (1973 & Supp. 1986).

17. 466 U.S. 485 (1984). The Court stated:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Id. at 511.

18. *McCoy*, 42 Cal. 3d at 842, 727 P.2d at 715, 231 Cal. Rptr. at 522. "[T]his court must make an independent assessment of the entire record, but only as it pertains to actual malice. Issues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review." *Id.* at 842-43, 727 P.2d at 715-16, 231 Cal. Rptr. at 522-23 (quoting *Bose*, 466 U.S. at 514 n.31). *See generally* Comment, *The Expanding Scope of the Appellate Review in Libel Cases—The Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice*, 36 MERCER L. REV. 711 (1985).

19. *McCoy*, 42 Cal. 3d at 843, 727 P.2d at 716, 231 Cal. Rptr. at 523. FED R. CIV. P. 52(a) provides in part that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." *See* Note, *Can Civil Rule 52(a) Peacefully Co-Exist with Independent Review in Actual Malice Cases? Bose Corp. v. Consumers Unions*, 60 WASH. L. REV. 503 (1984).

20. *McCoy*, 42 Cal. 3d at 844, 727 P.2d at 717, 231 Cal. Rptr. at 524.

21. *Id.* at 845-46, 727 P.2d at 718, 231 Cal. Rptr. at 525 (citing *Bose*, 466 U.S. at 508-09 and n.27).

22. *Id.* The court noted that this case was a prime candidate for appellate review since Porter did not testify at trial and the jury had to rely on the record of his deposition. *Id.* at 847 n.8, 727 P.2d at 718 n.8, 231 Cal. Rptr. at 525 n.8.

23. 390 U.S. 727 (1968).

before publishing. There must be sufficient evidence to permit the conclusion that *the defendant in fact entertained serious doubts* as to the truth of his publication."[24] The court in the instant action had to determine, by reviewing the record, whether or not the defendants seriously doubted the veracity of the articles, regardless of the reasonableness of the defendants' belief.

In determining the defendants' state of mind, the court noted various factors that "*in their minds* directly and indirectly corroborated Porter's allegations."[25] For one, Porter told the defendants that he was promised leniency in exchange for his false testimony. The defendants researched this assertion and found evidence indicating that there had been such a bargain. In addition, the defendants were informed of the plaintiff's misconduct in other cases.[26] Furthermore, the defendants spoke to an eyewitness who testified at trial. She told them that she was uncertain as to the suspect's guilt, but that either McCoy or Erdelatz had lied, declaring to her that eleven other eyewitnesses had positively identified the suspect.[27]

These factors and others, combined with Porter's testimony, led the court to believe that the defendants did not have serious doubts as to the truth of their publication.[28] [29] Therefore, the plaintiffs failed to establish that the defendants acted with actual malice when they published the articles and a reversal was ordered.

IV. CONCLUSION

The court clarified that the *New York Times* test for recklessness constituting malice goes to the defendant's subjective belief in the truth of his assertions, as opposed to the severity of his negligence. This is significant in that it allows publishers to print articles based upon any good faith belief they may have as long as it is not completely unfounded. If reporters were held responsible for all negligent falsities published, the press would be severely stifled.[30]

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24. *Id.* at 731 (emphasis added).

25. *McCoy*, 42 Cal. 3d at 854, 727 P.2d at 723, 231 Cal. Rptr. at 530 (emphasis in original).

26. *Id.* at 855-56, 727 P.2d at 724-25, 231 Cal. Rptr. at 531-32. Defendant was informed by an attorney that Merle convicted a man for a crime for which another man confessed. According to defendants' source, Merle knew of the confession but did not reveal it at trial. *Id.* at 848-49, 727 P.2d at 720, 231 Cal. Rptr. at 527.

27. *Id.* at 856 n.20, 727 P.2d at 725 n.20, 231 Cal. Rptr. 532 n.20. The court noted the defendant had read a witness's affidavit which stated that the witness recognized the accused because she had seen him around the town before, not because she saw him commit the murder. At the time of the photo identification "she was under the impression she had to keep looking until she picked someone out."

28. *Id.* at 854-58, 727 P.2d at 724-26, 231 Cal. Rptr. at 531-33.

29. *Id.* at 873, 727 P.2d at 737, 231 Cal. Rptr. at 544.

30. *See* Bird, *The Role of the Press in a First Amendment Society*, 20 SANTA CLARA L. REV. 1 (1980).

The court noted that the malice issue must be independently reevaluated at the appellate level. This gives the right of freedom of the press even greater protection. However, plaintiffs also need protection from defamatory falsehoods. The jury should be allowed to determine whether or not the defendant was reckless and whether *in fact* the defendant seriously doubted the truth of his publication. This is a factual determination that would best be left to the jury.

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