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California Supreme Court Survey - December 1986-February 1987

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The California Supreme Court Survey is a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of the issues that have been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline cases have been omitted from the survey.

I. CIVIL PROCEDURE

A. *In a case where public agency's construction project substantially differed from that depicted in its Environmental Impact Report, the 180-day time limit for filing a complaint against the agency tolls not at date of the project's commencement, but upon the plaintiff's receipt of actual or constructive notice of the project's nonconformity to the previously filed Environmental Impact Report:* **Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Ass'n.**

In *Concerned Citizens of Costa Mesa v. 32nd District Agricultural Ass'n*, 42 Cal. 3d 929, 727 P.2d 1029, 231 Cal. Rptr. 748 (1986), the State of California's 32nd District Agricultural Association [hereinafter the District], which was authorized to carry out construction, maintenance, and operations at the Orange County Fairgrounds, planned to construct an amphitheater upon the fairgrounds. The District, pursuant to section 21141(a) of the California Environmental Quality Act [hereinafter CEQA], CAL. PUB. RES. CODE §§ 21000-21193 (West 1986), properly provided for a public hearing and prepared an environmental impact report [hereinafter EIR] on the proposed project. Section 21151(a) of CEQA requires filing of an EIR whenever a local agency wishes to commence a construction project which may have a substantial effect on the surrounding environment.

Subsequently, the District entered into a contract for the construction of the theater. The contract's terms, however, did not conform to the earlier EIR. In particular, the amount of fixed seating space in the theater was increased in size from six acres to ten, and the stage was redirected toward numerous residences.

At no time did the District submit an amended EIR, afford a second public hearing, or give notice to the plaintiffs or anyone else of the nonconforming nature of the new contract with respect to the previously filed EIR. Construction of the facility commenced in February of 1983.

After the theater's completion, a concert was held on July 27, 1983 which exceeded county noise level maximums. The plaintiffs then brought suit for declaratory and injunctive relief on January 20, 1984—just under 180 days from the date at which the concert was held, but more than 180 days from the date of the beginning of construction.

The primary thrust of the plaintiff's complaint was: first, the District violated section 21166(a) of CEQA's requirement that a subsequent EIR be filed where the proposed development differs *substantially* from a previous EIR; and second, the plaintiff should not be bound by the strict 180-day filing requirement of section

21167(a) because it had no notice that the construction contract entered by the District varied from the EIR it had filed. The case reached the supreme court after the District's demurrer to the complaint was granted by the trial court and affirmed on appeal.

Justice Reynoso, speaking for the court, first concluded that the inconsistency between the construction contract for the amphitheater and the EIR were "substantial" within the meaning of the provision. The court remarked that the two hundred percent increase in capacity and the resituation of the structure were obviously important and merited an amended EIR.

The court then turned to the issue of whether the action was time-barred. Section 21167(a) of CEQA requires that actions challenging a public agency's failure to conform to EIR filing requirements be filed within 180 days of *commencement* of the construction project.

The court recognized that the action would clearly not survive a literal reading of the statute. However, the court expressed concern that if the action were disallowed one of the underlying purposes of CEQA, accurately informing the public of proposed developments which might upset environmental quality, would be contravened. The court cited CEQA's public notification requirements found in sections 21105 and 21108(c) as indicative of the Act's underlying public participation element. The court remarked that the public has a right to be informed to enable it to make intelligent contributions to any environmental decisions. The court also noted that the legislature's intent was that CEQA be interpreted broadly in order to effect its goal of environmental protection.

The court construed the 180-day filing limitation of section 21167(a) as applying literally only when the public agency performs construction *consistent* with its previously filed EIR. Where the subsequent construction differs substantially from the specifications indicated in its previously filed EIR, an action challenging the proposal may be brought within 180 days of the *date on which the plaintiff first acquired notice*, whether actual or constructive, of the nonconforming nature of the actual development.

The court's holding seems intuitively fair with respect to plaintiffs seeking to challenge activity potentially damaging to their health and safety interests. It would be unjust to require plaintiffs in such cases to adhere to a strict filing limitation tolled by the date of commencement of construction when they have every reason to believe the development will be in line with the previously filed EIR.

The majority's position is especially applicable to drawn out con-

struction projects. Complainants in those instances would ordinarily receive no visible indication of the project's nonconforming nature until after the 180-day period had elapsed. Application of the literal filing requirement in such cases would therefore be particularly unjust. *See also* Hoffinger, *Environmental Impact Statements: Instruments for Environmental Protection or Endless Litigation?*, 11 FORDHAM URB. L.J. 527 (1983).

MITCHELL F. DISNEY

B. *Mentally incapacitated minors, who have parents or guardians, are not allowed to invoke a tolling statute in filing a tort claim against the state. Nevertheless, they are entitled to file the claim within one year of the accrual of the cause of action if they were a minor for the entire 100-day claim limit period and the delay in filing was not attributable to any lack of diligence on the part of the minor:* **Hernandez v. County of Los Angeles.**

In *Hernandez v. County of Los Angeles*, 42 Cal. 3d 1020, 728 P.2d 1154, 232 Cal. Rptr. 519 (1986), the court considered two issues regarding application of the California Tort Claims Act. CAL. GOV'T CODE, §§ 900-996.6 (West 1980). First, the court considered whether a tolling provision which extends the 100 day claim filing limit applied to minors who were mentally incapacitated. (Section 911.4 of the Government Code provides that the 100-day claim filing limitation does not start to run until a guardian or conservator is appointed to act on behalf of the mentally incapacitated person.) Second, the court considered whether a minor plaintiff should be allowed an extended filing time of one year from the accrual of his cause of action when the reason for the late filing can be attributed to the neglect of the attorney or parent of the plaintiff.

In the present case, the plaintiff suffered mental retardation and physical handicaps due to the alleged negligence of Los Angeles County Hospital while he was under its care during his birth. After the mother of the plaintiff consulted an attorney, an application to file a late claim was prepared and served on the county several months after the 100-day claim limitation had elapsed. CAL. GOV'T CODE § 911.2 (West 1980). The county denied the application on the grounds that it was filed late. The plaintiff then petitioned the court, requesting relief from the claim filing requirements per section 946.6 of the Government Code, asserting that the County had improperly denied the plaintiff's late claim. The trial court and the court of appeal both rejected the plaintiff's contention and denied relief to submit a late claim.

The supreme court held that section 911.4 of the Government Code did not apply to minors who had an adult that could act on their behalf, but rather applied only to persons who were mentally incapacitated and required a guardian or conservator. The court reasoned that the parents were perfectly fit to take the responsibility of filing a claim for the minor, and that the legislative intent of the statute was to provide an exception for people who were mentally incapacitated and did not have another person to file their claim for them (*e.g.*, a mentally incapacitated single adult would not have someone to file a claim for him, whereas a mentally incapacitated minor would have his parents to protect his interests).

As to the second issue, however, the court held that the late-claim application of the plaintiff had to be accepted if it was made within one year of the accrual of the cause of action and the plaintiff was a minor during the entire 100-day period. The court found that the legislature had intended to accord special consideration to minors that were in the minority during the full 100-day term and that they should be permitted to file a late claim as long as it was within a year of the accrual of the cause of action. Minors are thus treated more favorably than adults who are permitted to file late claims due to mistake, surprise, inadvertence, or excusable neglect. The court cited numerous cases that had followed this legislative intent. *See generally* 3 B. WITKIN, CALIFORNIA PROCEDURE, *Actions* §§ 204-208 (3d ed. 1985). Additionally, the court stated that neglect on the part of the parents or attorney of the minor was not a proper basis for denial of the claim.

In sum, as to the first issue, the court held that a mentally incapacitated minor that had adults capable of acting on his behalf was not entitled to a tolling of the 100-day claim limitation because of the mental incapacitation tolling provision of section 911.4 of the Government Code. As to the second issue, the court held that since the plaintiff was a minor for the entire 100-day period in which the claim could have been filed initially, the late filing was within one year of the accrual of the cause of action, and the delay in filing was not attributable to the minor plaintiff, the court must accept the late claim. Therefore, the trial court erred in refusing to grant the plaintiff relief.

JAMES A. COULTER, III

C. *Dismissal of a party's motion for trial de novo based solely on that party's failure to offer evidence at a mandatory arbitration proceeding was improper:* **Lyons v. Wickhorst.**

In *Lyons v. Wickhorst*, 42 Cal. 3d 911, 727 P.2d 1019, 231 Cal. Rptr. 738 (1986), the court was faced with choosing between preserving a party's interest in having his cause receive judicial consideration on the merits, and undermining the legitimacy of California's requirement of court-ordered arbitration of minor claims. The plaintiff had brought an action for unlawful arrest and false imprisonment against the defendant in the Superior Court of Los Angeles County. Because the relief sought in the action did not exceed $25,000, the court, pursuant to section 1141.11 of the Civil Procedure Code, ordered mandatory arbitration of the cause. On the eve of the arbitration hearing, the plaintiff announced his intent not to offer any evidence at the hearing and, in fact, presented none. The superior court slated a second arbitration proceeding with a new arbitrator. Again, the plaintiff failed to present any evidence. The defendant, in light of the plaintiff's recalcitrance to proceed, made no effort to appear. The arbitrator entered an award for the defendant. The plaintiff then moved for a trial de novo. The court refused the plaintiff's request pursuant to motion by the defendant.

Chief Justice Bird, speaking for the court, commenced her opinion by noting that section 581 of the Civil Procedure Code, relied upon by the trial court in dismissing the motion, was inapplicable. That provision sets out various grounds for involuntary dismissal, which range from a plaintiff's abandonment of a claim, to failure to appear at trial by one or both parties. The Chief Justice observed that none of these circumstances were present in the instant case.

The majority next took up the question of whether the trial court could dismiss the motion based on its inherent discretionary authority to do so. The court uncovered precedent recognizing two situations in which a trial court's exercise of discretion to dismiss motions for new trial was deemed proper. The first basis—a fictitious or sham complaint—was clearly inapplicable. The other basis, codified at section 583.410 of the Civil Procedure Code, was similarly rejected. Dismissal under that provision is warranted if a plaintiff fails to prosecute an action in a timely manner.

A companion section, section 583.420, enumerates several specific grounds for dismissal. Each situation listed in section 583.420 requires a temporal delay of at least two years in either service of process or bringing the case to trial. These circumstances were not present in the instant case and thus the court found failure to prosecute to be an unsatisfactory basis for dismissal. In addition to point-

ing out the absence of any other miscellaneous grounds for involuntary dismissal, the court noted that California courts have traditionally endeavored to guard the policy of extending to parties the opportunity to have their cases tried on the merits. The court further noted that involuntary dismissal has been viewed with distaste as a drastic measure by the federal judiciary as well.

Finally, the majority opinion suggested that the legislature had impliedly refused to authorize the use of involuntary dismissal as a penalty in cases like this. After calling attention to the fact that the legislature had provided for sanctions (in the form of increased costs and attorney fees for nonparticipation in arbitration proceedings) when it amended section 128.5 of the Civil Procedure Code to apply to arbitration proceedings, the court concluded that the lawmakers must have regarded this economic deterrent to be sufficient. The majority inferred that the legislature's refusal to incorporate various prerequisites to appeal, like those found in statutes governing small claims court practice, demonstrated legislative intent to maintain an unimpeded avenue to a new trial for plaintiffs who refuse to participate in mandatory arbitration proceedings. The court concluded that the trial court's dismissal of the plaintiff's motion for a new trial was clearly improper under the circumstances.

While the court's decision constitutes a refusal to "put teeth into" the California arbitration scheme, it is laudable for its preservation of the interest of parties in receiving consideration of their claims on the merits. Less acceptable, however, is the court's utter failure to take into account the apparently willful nature of the plaintiff's refusal to submit to the arbitration procedure. Dismissal under these circumstances seems warranted and the court's failure to recognize an exception is disturbing. *See* 1 CAL. JUR. 3D *Actions* § 238 (1972); AM. JUR. 2D *Arbitration and Award* § 9 (1962).

MITCHELL F. DISNEY

D. *Statements made during settlement negotiations may not be privileged for the purposes of a subsequent action for abuse of process:* **Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.**

In *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss and Karma, Inc.*, 42 Cal. 3d 1157, 728 P.2d 1202, 232 Cal. Rptr. 567 (1986) [hereinafter Oren and Greenberg, respectively], the supreme court held that statements made during settlement negotiations may not be

privileged for the purposes of a subsequent action for abuse of process. Oren had begun construction of a residential development which displeased an adjoining property owner. Greenberg brought a halt to the development by bringing suit under the California Environmental Quality Act [hereinafter CEQA] challenging the environmental impact report which the city used in approving the construction plan. Oren then filed suit for abuse of process, based on the settlement offer made by Greenberg during the course of negotiations. Greenberg claimed that such statements were privileged under section 47(2) of the California Civil Code.

In analyzing the application of section 47(2), the court distinguished the present case from *Asia Investment Co. v. Borowski*, 133 Cal. App. 3d 832, 184 Cal. Rptr. 317 (1982). In *Asia Investment*, the court held that statements made during the course of settlement negotiations were considered to have been made during the course of judicial proceedings. As such, under section 47(2), the statements were privileged when a plaintiff sought to use the statements directly to show injury, as in an action for libel or slander. The court found, however, if a plaintiff brought another tort cause of action, such as abuse of process, the statements made during the course of negotiations were not privileged and may have therefore been offered as an element of proof.

The court further explained that in asserting a cause of action for abuse of process, a plaintiff must show that (1) the defendant instituted the process for an ulterior purpose; and (2) that the defendant committed a willful act to accomplish a purpose other than that for which the process was designed. *See also* 72 C.J.S. *Process* § 106-07 (1987). In this case, Oren was allowed to prove the first element—ulterior purpose—by introducing the settlement offer made by defense attorneys to the effect that the CEQA action would be dropped if the price was right. However, the court refused to infer the second element—a misapplication of process—from this showing of ulterior purpose. The court was thus forced to conclude that the complaint did not state allegations sufficient to maintain a cause of action for abuse of process.

This decision was made primarily on procedural grounds. In dictum, however, the court avowed that statements that are privileged in a defamation action would not enjoy the same privilege in an action for malicious prosecution. The court suggested that if the plaintiffs had amended their complaint to allege malicious prosecution, the case might have been decided differently, thereby offering future plaintiffs in similar situations information as to how to frame their complaint.

RHONDA SCHMIDT

II. CONSTITUTIONAL LAW

A. *Where a prison inmate is accused of a prison rule violation based solely on confidential information, an in camera proceeding at which the hearing officer could test the veracity of the source is not required by federal or state due process:* **In re Jackson.**

In *In re Jackson*, 43 Cal. 3d 501, 731 P.2d 36, 233 Cal. Rptr. 911 (1987), the supreme court held that neither federal nor state due process required state prison hearing officers to conduct in camera interviews of confidential informants before finding an accused prisoner guilty of a disciplinary violation solely on the basis of information provided by that informant. The court stated that under state due process an in camera review was unnecessary, absent sufficient evidence that such a process was feasible. Further, the court found current administrative regulations met due process requirements where a reviewing court could conclude from the disciplinary record information that the hearing officer made a valid determination of the informant's reliability and truthfulness.

In this case, the defendant had been found guilty of a prison rule violation for force and violence under title 15 section 3005 (b) of the Administrative Code on the basis of statements by three confidential informants. After exhausting administrative remedies, his petition for writ of habeas corpus was granted by the Superior Court of Marin County. The trial court found that an in camera interview was necessary before guilt could be found whenever an inmate was accused of a prison violation based solely on confidential information. The court of appeal denied the People's application for a stay, and the supreme court reversed upon review.

The supreme court pointed out that the competing interests of a confidential informant's safety and the inmates' rights to fair disciplinary hearings rendered the question presented in this case an important one. Analysis focused first on the United States Supreme Court's decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974). There, the Court rejected the idea that federal due process required that reliability of confidential informants in prison disciplinary hearings be tested in camera. The rationale was that the need for order in prisons and for encouraging and protecting inmate informants were legitimate concerns. Therefore, only minimal due process protection need be given a disciplinary defendant.

The court here found further support for its position when it ex-

amined similar federal and state court cases decided subsequent to *Wolff*. The court cited many cases that either followed *Wolff* or rejected the use of in camera testing wherein due process was deemed satisfied by disciplinary board interviews of the reporting prison guard or by reviews of confidential files which supplied sufficient information to support a finding that the information received was reliable. *See, e.g.*, *McLaughlin v. Hall*, 520 F.2d 382, 385 (1st Cir. 1975); *Smith v. Rabalais*, 659 F.2d 539, 545-46 (5th Cir. 1981); *Homer v. Morris*, 684 P.2d 64, 68 (Utah 1984); *Niday v. State*, 353 N.W.2d 92, 93-94 (Iowa 1984). In addition, the court stated that it saw no expansion of due process protections by the high court beyond *Wolff* since it was decided.

Turning to state due process requirements, the court explained that the analysis necessitated a balancing approach to assess procedural safeguards in light of the governmental and private interests involved. *See* CAL. CONST. art. I, §§ 7 cl. (a), 15. The court applied the four-factor test developed in *People v. Ramirez*, 25 Cal. 3d 260, 599 P.2d 622, 158 Cal. Rptr. 316 (1979). This test weighed the defendant's private and dignitary interests and risk of their deprivation against governmental interests in the function involved and fiscal and administrative burdens of the procedure in question.

The court acknowledged that the defendant's private interests in duration and conditions of confinement were significantly affected by the disciplinary board's findings. However, administrative provisions providing the defendant with written notice of the charge, an impartial hearing, and a limited right to confrontation at the hearing were deemed to satisfy the defendant's dignitary interests. In addition, the court saw minimal risk of deprivation of rights where there was a valid reliability determination.

Finally, in applying the *Ramirez* test, the court found the government's interest in maintaining discipline, order, and safety of all inmates, and its need to utilize confidential informants to be the most salient considerations. The court concluded that because the defendant did not supply sufficient evidence of feasibility of the in camera procedure proposed, the likelihood that governmental interests could be unduly burdened by the in camera scheme was not sufficiently disproved. Thus, the balance of factors favored the government's position, such that no due process violation for failure to conduct an in camera hearing was found.

In sum, the supreme court ruled that present administrative regulations were constitutionally sound where a reviewing court could conclude from the disciplinary record information that the hearing officer's determination of the informant's reliability was valid. The court left open the possibility that a proponent could demonstrate

that an in camera procedure was feasible. Under the instant facts, however, the court found no constitutional requirement that state prison officers conduct in camera interviews of confidential informants when determining the guilt of a disciplinary defendant based solely on that informant's statements.

SARAH A. FUHRMAN

B. *Persons charged with contempt for violation of an injunction or order in "red light" abatement actions are entitled to a jury trial under the California Constitution; a defendant is guilty of separate contempts for each day the injunction is violated:* **Mitchell v. Superior Court.**

In *Mitchell v. Superior Court*, 43 Cal. 3d 107, 729 P.2d 212, 232 Cal. Rptr. 900 (1987), the supreme court decided whether defendants were entitled to a trial by jury when charged with contempt for not complying with an injunction issued pursuant to section 11229 of the Penal Code [hereinafter section 11229]. Section 11229 was a provision of the Red Light Abatement Law [hereinafter the Red Light Law]. CAL. PENAL CODE §§ 11225-11235 (West 1982 & Supp. 1987). Under the Red Light Law, places of illegal gambling, lewdness, and prostitution are prohibited and defined as a nuisance. The court held that contempt under section 11229 was criminal and, therefore, the defendants had a right to trial by jury under article I section 16 of the California Constitution. The supreme court's decision annulled the contempt judgments of the Superior Court of San Francisco County. In addition, the supreme court determined that in the case of retrial, each charge of contempt under section 11229 would be counted by the number of days the injunction had been violated.

In *Mitchell*, the defendants were the proprietors of a San Francisco theater which provided films and live acts charged as being lewd and obscene "adult" entertainment. The theater was the object of a preliminary injunction issued in 1981 pursuant to an action brought by the People for violations of the Red Light Law. The contempt proceedings were initiated when police declared that the injunction had been violated over a four day period. *See generally* 14 CAL. JUR. 3D *Contempt* §§ 25, 43, 44 (1974); 38 CAL. JUR. 3D *Injunctions* § 96 (1977). The trial court agreed, finding multiple violations, and ruled that each lewd act between a performer and a patron was a separate contempt. Fines totaling over $62,000 were imposed, and the defendants were sentenced to six months in the county jail.

The supreme court first addressed the defendants' contention that they were entitled to a jury trial. Finding that section 11229's purpose was to punish the defendants for past conduct and that the punishment was equivalent to that for a misdemeanor, the court determined that contempt under section 11229 was criminal in nature.

The court declined to decide whether a right to jury trial existed under the United States Constitution because it found no clear answer where both fines and a six month jail sentence were imposed, as in the instant case. However, the court stated that under the California Constitution a right to trial by jury was guaranteed in all criminal offenses above the level of infraction. *See also Mills v. Municipal Court*, 10 Cal. 3d 288, 515 P.2d 273, 110 Cal. Rptr. 329 (1973). The court reasoned that because the defendants were found to have committed criminal contempt above the level of infraction, they were within the scope of the state constitutional guarantee and, therefore, were entitled to a jury trial. *See generally* 41 CAL. JUR. 3D *Jury* §§ 1-5 (1978).

The court also considered matters pertinent to a possible retrial. Dismissing the defendants' claim that the evidence of contempt was insufficient and therefore barred retrial, the court addressed whether the conduct underlying the contempt charges could be punished as multiple contempts.

The court examined *Reliable Enterprises, Inc. v. Superior Court*, 158 Cal. App. 3d 604, 204 Cal. Rptr. 786 (1984), in which multiple violations of an injunction were measured by individual lewd acts committed by patrons on the premises of an "adult" bookstore. In *Reliable*, the court of appeal reasoned as follows: contempt is an insult to the authority of the court; each separate lewd act is an act of disobedience and an insult to the court; therefore, contempt is properly measured by the number of separate lewd acts. The supreme court criticized *Reliable* for analyzing contempt in a general sense rather than in connection with specific prohibitions under the law. The court disapproved *Reliable* to the extent that it was inconsistent with the court's holding.

The court next found the number of contempts limited by section 654 of the Penal Code, prohibiting punishment for the same act under more than one provision of the Penal Code. CAL. PENAL CODE § 654 (West 1970) (subsequently amended in 1976 and 1977 (West Supp. 1987)). Deciding that there was more than a single act, the court stated that the harm the law sought to prevent was public nuisance. The court noted that under section 373a of the Penal Code, where the conduct in question is a public nuisance, a separate offense is committed for each day the conduct occurs. CAL. PENAL CODE

§ 373a (West 1970). Therefore, while each separate act could not count as a contempt, the court was bound to enumerate contempts by each of the four days the injunction was disobeyed.

Thus, the supreme court held that the violation of an injunction, issued pursuant to the law, was criminal contempt under section 11229 and therefore, the defendants were entitled to a jury trial. The court also determined that a defendant may be charged with a separate act of contempt for each day violations occur.

SARAH A. FUHRMAN

C. *A black criminal defendant is not deprived of his sixth amendment right to an impartial jury where a branch court limits its juror selection pool to only a portion of a county, despite the fact that the portion includes demographically fewer blacks than does the county as a whole:* **O'Hare v. Superior Court.**

In *O'Hare v. Superior Court*, 43 Cal. 3d 86, 729 P.2d 766, 233 Cal. Rptr. 332 (1987), the court analyzed the validity of the North San Diego County Superior Court's practice of selecting jurors solely from the North County Judicial District, instead of from San Diego County as a whole. O'Hare, a black man, alleged that since the demographic makeup of the North San Diego County included fewer blacks than did San Diego County in its entirety, the jurors drawn for his criminal trial would not represent a fair cross-section of the community. As a result, he averred that his sixth amendment right to an impartial jury was denied.

O'Hare sought a writ of mandate from the court of appeal to compel the North County Superior Court to transfer his case to the downtown San Diego courthouse. The court of appeal refused to grant O'Hare's motion. The supreme court, adopting the opinion of the court of appeal, framed the question to be decided as "what constitutes the 'relevant community' from which a fair cross-section must be drawn to comprise the venire." *Id.* at 93, 729 P.2d at 769-70, 233 Cal. Rptr. at 335-36.

The court first noted that defendants who undergo criminal trials in the North County court were not denied the sixth amendment right to a "jury of the vicinage," since all of the jurors would be drawn from the vicinity in which the crime took place. *See People v. Jones*, 9 Cal. 3d 546, 551, 510 P.2d 705, 709, 108 Cal. Rptr. 345, 349 (1973). The decision emphasized that O'Hare had alleged no *proce-*

dural deficiencies in the North County court's selection process. Possible procedural deficiencies might have included the use of voter registration lists to select veniremen or the granting of discretion to jury selection officials to exclude some demographic portions of the district. Additionally, O'Hare made no allegations that the North County Judicial District was gerrymandered to minimize jury participation by black citizens. The court implied that the use of these tactics would have violated the defendant's sixth amendment rights.

The court analogized O'Hare's challenge to attacks which have been raised against the federal judiciary. Subdivisions of federal judicial districts have been alleged to yield venires unrepresentative of the demographics of the district as a whole. The court indicated that such challenges have generally been unsuccessful. *See, e.g., United States v. Gottfried*, 165 F.2d 360 (2d Cir. 1948). Based on this analogy to the federal judiciary, the California Supreme Court dispensed with the notion that the North County Superior Court's venire must parallel the demographics of all of San Diego County.

O'Hare's assertion that only the state legislature may authorize the enstatement of judicial subdistricts was a more challenging issue. O'Hare pointed out that while the legislature had expressly authorized the creation of subdistricts in Los Angeles County, it had not done so with respect to San Diego County. O'Hare contended that since the North County subdistrict was established *by local court rule*, it was illegitimate, and therefore, the only constitutional jury venire in San Diego County was the county in its entirety. In response, the court cited section 206a of the Code of Civil Procedure which grants flexibility in the drawing of districts and authorizes judges to do the drawing. The court concluded that the enstatement of a North San Diego County District venire was as authorized by the legislature as were its counterparts in Los Angeles County.

Finally, the court distinguished the case of *Johnson v. Superior Court*, 163 Cal. App. 3d 85, 209 Cal. Rptr. 425 (1984), which disapproved limiting the selection of a jury venire to the applicable supervisorial district. The court noted that the supervisorial district involved in *Johnson* was substantially smaller in size and population than the North County District. Moreover, the supervisorial district's boundaries in *Johnson* were not coextensive with those of the court. The *O'Hare* court recognized that under such circumstances the jurors sitting in a particular case might not be drawn from the area in which the crime was committed. As a result, the defendant would be deprived of his sixth amendment right to a "jury of the vicinage." The court put to rest O'Hare's contention by pointing out that the North County Court boundaries were coextensive with the area encompassing the venire. Therefore, no sixth amendment infringe-

ment danger was posed by the North County Court's juror selection scheme.

MITCHELL F. DISNEY

D. *The failure of counsel to present mitigating evidence at the penalty phase of a capital trial, although at the express request of the defendant, is a deprivation of the right to the effective assistance of counsel, and is reversible error on a judgment of death:* **People v. Bloyd.**

I. INTRODUCTION

In *People v. Bloyd*,[1] the California Supreme Court affirmed the conviction of Dale Michael Bloyd for the murder of his live-in girlfriend and her father. The couple had been living with her father at the time of the murders. The imposition of the death penalty entered under the 1978 law[2] was reversed because of defense counsel's failure at the penalty phase of the trial to present mitigating evidence.[3] The court agreed that the evidence was sufficient to support the finding of premeditation and deliberation in the killing of the father (first degree murder), and the court found that the defendant killed the female victim (second degree murder).[4] After reviewing the defendant's allegations of ineffective counsel in the petition of habeas corpus,[5] the court held that the defendant's rights were not violated.[6]

II. FACTUAL BACKGROUND

In the early morning hours of April 27, 1981, Martha Jones and her father, William North, were shot to death in their mobile home.[7] The scene described by Yuba County Sheriff's deputies indicated execution-style killings: both were shot in the head at close range with a large caliber weapon.[8] A forensic pathologist testified that there

1. 43 Cal. 3d 333, 729 P.2d 802, 233 Cal. Rptr. 368 (1987). Justice Panelli wrote the opinion of the court, and was joined by Chief Justice Bird and Justices Mosk, Broussard, Grodin, and Lucas. Justice Reynoso concurred in the result.
2. CAL. PENAL CODE §§ 190-190.2 (West Supp. 1986).
3. *Bloyd*, 43 Cal. 3d at 340, 729 P.2d at 805, 233 Cal. Rptr. at 370-71.
4. *Id.* at 347-50, 729 P.2d at 810-12, 233 Cal. Rptr. at 378-80.
5. *Id.* at 362-64, 729 P.2d at 820, 233 Cal. Rptr. at 385-86.
6. *Id.* at 364, 729 P.2d at 821, 233 Cal. Rptr. at 387.
7. *Id.* at 340-41, 729 P.2d at 805, 233 Cal. Rptr. at 371.
8. *Id.*

was no evidence of struggle by Martha, and that North could not have been standing when he was shot. The pathologist also opined that Martha's wound was not self-inflicted and that the killer was standing over a kneeling North when he shot him in the back of the head.[9]

Donald North and Martha's daughter, Rebecca, both testified that Martha and the defendant had been arguing the night before the murders. The argument concerned the defendant's nine-month-old son from a previous marriage.[10] Donald was present when the shootings occurred but, because of a hearing impairment, was not awakened and suspected nothing until discovering the bodies the next morning.[11] Rebecca testified that her mother owned a gun of the same caliber as that used in the killings, and that her mother had taken a prescription of valium the afternoon of her death.[12]

Two days later, the defendant was apprehended. After receiving his Miranda warnings, he made two compatible statements detailing his version of the events that occurred on the morning of the murders.[13] Basically, the defendant maintained that Martha had shot her father and then turned the pistol on the defendant. Following a brief skirmish, the gun went off in Martha's face.[14] The gun dropped to the ground, the defendant stepped over the bodies, picked up his son, and left in Martha's automobile.[15]

At the trial, the prosecution proceeded primarily on circumstantial evidence in its effort to obtain a first degree murder verdict. To support the theory that the killing of North was deliberate and premeditated, the prosecution pointed to convincing ballistic and forensic evidence.

The copper jacket of the bullet that killed North was found resting on Martha's fallen body, thus indicating the killer fired on North after killing Martha. This evidence, taken with the considerable inconsistencies in the defendant's story, was sufficient for the jury to return a guilty verdict for the first degree murder of North and the second degree murder of Martha.[16]

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9. *Id.* at 342, 729 P.2d at 806, 233 Cal. Rptr. at 372.

10. *Id.* at 342-43, 729 P.2d at 806-07, 233 Cal. Rptr. at 372.

11. *Id.*

12. *Id.*

13. Bloyd claimed he retired before midnight, contradicting the testimony of Donald and Rebecca. *Id.* Surprised by a gunshot, Bloyd awoke to find Martha attacking him, and acting in self-defense, accidentally forced Martha to shoot herself. Martha was 5 feet 8 inches tall and 107 pounds, while Bloyd weighed around 250 pounds. *Id.* at 349, 729 P.2d at 811, 233 Cal. Rptr. at 376. The relative sizes of Martha and Bloyd rendered this purported self-inflicted shooting questionable.

14. *Id.* at 343-44, 729 P.2d at 807, 233 Cal. Rptr. at 372-73.

15. *Id.* at 346, 729 P.2d at 808, 233 Cal. Rptr. at 373.

16. *Id.* at 346, 729 P.2d at 809, 233 Cal. Rptr. at 374.

Neither the prosecution nor the defense presented evidence at the penalty phase of the trial.[17] In response to the writ of habeas corpus, defense counsel filed an affidavit stating that the failure to present mitigating evidence at the penalty phase was the result of, and in accordance with, the express desires of the defendant.[18]

III. THE OPINION OF THE COURT

A. Guilt Phase Issues

In a concise opinion, Justice Panelli addressed the contentions of the defendant that error occurred during the guilt phase of the trial. The court summarily dismissed the arguments of the defendant.[19] Finding no prejudice in the exclusion of several prospective jurors, Justice Panelli turned to an analysis of the sufficiency of the evidence presented.[20]

The issue facing the court was whether the evidence, when viewed in the light most favorable to the People, was such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.[21] Drawing upon the logical inferences flowing from the evidence, the court had little trouble in accepting the jury's conclusions that the defendant killed North with premeditation and deliberation. The court pointed out that the test for first degree murder is reflection on the part of the defendant; such reflection was found to have occurred here.[22]

As to Martha's murder, the defendant maintained that there was no evidence of malice introduced as required for a finding of second degree murder. The court, citing its previous decision in *People v. Lines*,[23] rejected the notion that the defendant's accident/self-defense story was the favored construction of events. Supporting the contrary position, the court affirmed that when it is proved that the defendant has killed, the law presumes it was malicious and an act of murder, in the absence of other evidence.[24] The court found that the instructions to the jury were proper and that its verdict was suffi-

17. *Id.* at 364, 729 P.2d at 821, 233 Cal. Rptr. at 386.
18. *Id.*
19. *Id.* at 346, 729 P.2d at 809, 233 Cal. Rptr. at 374.
20. *Id.*
21. *Id.* at 346-47, 729 P.2d at 809, 233 Cal. Rptr. at 374-75.
22. *Id.* at 348, 729 P.2d at 810, 233 Cal. Rptr. at 376.
23. 13 Cal. 3d 500, 505, 531 P.2d 793, 796-97, 119 Cal. Rptr. 225, 228 (1975).
24. *Bloyd* 43 Cal. 3d at 348, 729 P.2d at 810, 233 Cal. Rptr. at 376 (citing *Lines*, 13 Cal. 3d at 505, 531 P.2d at 796-97, 119 Cal. Rptr. at 228).

ciently supported.[25] The court determined that the trial court ruled properly in dismissing the defense's motion for acquittal based on insufficient evidence.[26]

The court held that any errors committed by the lower court were de minimis.[27] Observing that a copy of the instructions accompanied the jurors into deliberation, and that they were cautioned twice on the range of permissible conclusions inferable from circumstantial evidence, the court found no reasonable probability of prejudice.[28] The written instructions defining malice, excusable homicide, self-defense, and manslaughter were found to be proper, whether considered individually or cumulatively.[29] The allegation offered by the defendant, that the descriptive titles of the written instructions may have misled the jurors, was dismissed as untenable and without supporting authority.[30]

The defendant also asserted that the ballistics expert at the trial was unqualified to offer testimony relating to the trajectory of the bullets.[31] However, the court disagreed, choosing to accept the trial court's determination that his expertise with exterior ballistics was sufficient for him to answer questions.[32]

Further, the court found that the defendant had not been denied his constitutional right to be present at trial,[33] or his right to counsel.[34] The defendant claimed that the admission into evidence of a bottle of valium—discovered in Martha's housecoat—and the rereading of certain testimony to the jury outside the presence of the defendant denied him such rights.[35] The court held that the defendant must have been absent from a portion of the trial having a " 'reasonably substantial relation to the fullness of his opportunity to defend against the charge.' "[36] The defendant had not met his burden to show that the absence prejudiced his defense.[37]

B. Special Circumstance Issue

The only complaint stemming from the special circumstance charges arose from the prosecution's failure to file duplicative

25. *Bloyd*, 43 Cal. 3d at 350, 729 P.2d at 812, 233 Cal. Rptr. at 377.
26. *Id.*
27. *Id.* at 351, 729 P.2d at 812, 233 Cal. Rptr. at 377.
28. *Id.* at 351-52, 729 P.2d at 812-13, 233 Cal. Rptr. at 377-78.
29. *Id.* at 352-56, 729 P.2d at 813-16, 233 Cal. Rptr. at 378-81.
30. *Id.* at 355-56, 729 P.2d at 815-16, 233 Cal. Rptr. at 381.
31. *Id.* at 357-58, 729 P.2d at 816-17, 233 Cal. Rptr. at 381-82.
32. *Id.*
33. CAL. CONST. art. I, § 15.
34. U.S. CONST. amend. VI.
35. *Bloyd*, 43 Cal. 3d at 358-59, 729 P.2d at 817-18, 233 Cal. Rptr. at 882-83.
36. *Id.* at 359-60, 729 P.2d at 818-19, 233 Cal. Rptr. at 383-84 (citations omitted by court).
37. *Id.* at 360-61, 729 P.2d at 818-20, 233 Cal. Rptr. at 384-85.

charges by inverting the names of Martha and North.[38] However, this omission was in harmony with the court's holding in *People v. Harris*,[39] proscribing the use of redundant special circumstance allegations. The *Bloyd* court decided that there had been no juror confusion as the special circumstance issues were not sent to the jury until a verdict had been reached on the murder counts.[40]

C. *Petition for Writ of Habeas Corpus*

In a petition for habeas corpus consolidated with the appeal, the defendant maintained that he was denied the effective assistance of counsel at both the guilt and penalty phases of trial.[41] The alleged inadequacies of counsel at the guilt phase were directed at the investigation into Martha's physical condition and state of mind at the time of her death.[42] The defendant alleged that the failure of his counsel to consider the implications of her ingestion of liquor and valium deprived him of an important aspect of his defense.[43] The court found the defendant unpersuasive in establishing a prejudicial mistake resulting from his counsel's failure to pursue these matters.[44]

Finally, the court discussed the adequacy of counsel at the penalty phase.[45] The defendant claimed that by failing to present available mitigating evidence, albeit in deference to the wishes of the defendant, his counsel provided ineffective assistance.[46] The court followed the rule established in *People v. Deere*,[47] agreeing that the failure of defense counsel to present any mitigating evidence in the penalty phase of a capital trial requires the penalty to be set aside. The court, therefore, found that a prima facie case for relief had been established.[48] The court granted the petition for habeas corpus; the defendant was then resentenced to life in prison without possibility of

38. *Id.* at 361-62, 729 P.2d at 819-20, 233 Cal. Rptr. at 385.
39. 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782 (1984).
40. *Bloyd*, 43 Cal. 3d at 362, 729 P.2d at 820, 233 Cal. Rptr. at 385.
41. *Id.*
42. *Id.* at 363, 729 P.2d at 820, 233 Cal. Rptr. at 385.
43. *Id.*
44. *Id.* at 363-64, 729 P.2d at 820-21, 233 Cal. Rptr. at 386.
45. *Id.* at 364, 729 P.2d at 821, 233 Cal. Rptr. at 386-87.
46. Sympathetic factors included the facts that Bloyd's parents were heavy drinkers—defendant was provided with little backing or support; that Bloyd's father had died; and that because of his parents' separation, Bloyd had been unable to attend college on a football scholarship because of his inability to bear the additional costs. *Id.*
47. 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1986).
48. *Bloyd*, 43 Cal. 3d at 364, 729 P.2d at 821, 233 Cal. Rptr. at 387.

parole.[49]

IV. CONCLUSION

The fourth in a series of same day, eleventh-hour reversals of death sentences by the Bird Court, *Bloyd* seems little more than a refutation of capital punishment in contravention of prevailing public opinion.[50] But it is more than that. Affirming the conclusion of the court in *Deere*, a bright line is drawn for the presentation of mitigating evidence at the penalty phase. Basically, all relevant factors will be considered before the ultimate penalty is imposed; however, in assuring this protection, the court may have created a defense loophole. A capital defendant may now order counsel not to present mitigating evidence, and counsel's compliance is sufficient to trigger the *Deere/Bloyd* rule on appeal. The defendant thereby arrives at the preferred destination: a lifetime address at San Quentin, rather than a temporary box on death row.

TRAVIS P. CLARDY

E. *To show a denial of the right to the effective assistance of counsel on a petition of habeas corpus, a condemned defendant must show by a preponderance of the evidence that counsel's performance was deficient and that the deficiency prejudiced the outcome of the proceeding:* **People v. Ledesma.**

I. INTRODUCTION

In *People v. Ledesma*,[1] the defendant, Fermin Rodriguez Ledesma, petitioned the court for a writ of habeas corpus, having been found guilty of the robbery, kidnapping, and murder of a gasoline station attendant,[2] and sentenced to death by a Santa Clara jury. The appeal was automatic.[3] The appellate record was inadequate (due to the very incompetence of counsel from which he sought relief); it was therefore rejected by the court as being unable to support his ap-

49. *Id.* at 364, 729 P.2d at 822, 233 Cal. Rptr. at 387.

50. *See* B. WITKIN, 2 CALIFORNIA CRIMES §§ 947A-947R, 1029-1044 (Supp. 1985).

1. 43 Cal. 3d 171, 729 P.2d 839, 233 Cal. Rptr. 404 (1987). The majority opinion was written by Justice Mosk, with Chief Justice Bird and Justices Broussard and Reynoso concurring. Justice Mosk, after reaching the final decision, added a separate concurring opinion. Justice Grodin authored a separate concurring opinion in which he was joined by Justices Lucas and Panelli.

2. Ledesma was convicted of first degree murder, kidnapping, and two counts of robbery; also special circumstances allegations of the intentional killing of a witness, felony-murder robbery, and felony-murder kidnapping. *Id.* at 176, 729 P.2d at 840, 233 Cal. Rptr. at 405.

3. Section 1239(b) of the California Penal Code provides for the automatic appeal of the death sentence. CAL. PENAL CODE § 1239(b) (West Supp. 1987).

peal.[4] Turning to the writ of habeas corpus, the court addressed the issue of whether the defendant received ineffective assistance of counsel and, finding in the affirmative, vacated the conviction.[5]

II. FACTUAL BACKGROUND

On August 26, 1978, two men rode into a Hudson Oil Company gasoline station in San Jose armed with a handgun. They robbed the attendant, Gabriel Flores. Flores noted the license plate number as they fled, later giving it to the police along with a description of the robbers.[6] A registration check established that the motorcycle belonged to the defendant. Proceeding to the listed address, police encountered Ledesma's former girlfriend. She provided further information which led them to the defendant's residence. After brief surveillance, three uniformed police officers approached the duplex and informed the occupants they were looking for the defendant. After being told of his absence, they entered the apartment without a warrant to conduct a search. After an unsuccessful search, a telephone call to the defendant's residence was intercepted by one of the officers, who identified herself as one of the occupants. The caller, apparently Ledesma, said he was "hot" and knew the police were after him.[7]

After three days, a police investigator presented six photographs to Flores including one of Ledesma. Flores chose the defendant's photograph as the only one resembling the robber. Later that day he affirmed that the photograph of Ledesma depicted the "one who had the gun and took the money."[8] A week later, the police responded to calls from customers at the Hudson station and found the station open but apparently abandoned. Flores was scheduled to be on duty. On September 8, Flores' body was discovered, bearing four gunshots and several stab wounds. Beyond Flores' identification, no eyewitness or physical evidence linked Ledesma to the crimes.

Apprehended and charged upon returning to San Jose in March of 1979, Ledesma was represented at the preliminary hearing by a deputy public defender.[9] However, the defendant soon made the deci-

4. *Ledesma*, 43 Cal. 3d at 218, 729 P.2d at 869, 233 Cal. Rptr. at 434.
5. *Id.* at 227, 729 P.2d at 875, 233 Cal. Rptr. at 440.
6. *Id.* at 176-77, 729 P.2d at 841-42, 233 Cal. Rptr. at 406.
7. *Id.* at 177, 729 P.2d at 841-42, 233 Cal. Rptr. at 406.
8. *Id.* at 178, 729 P.2d at 841, 233 Cal. Rptr. at 406-07.
9. Ledesma entered a plea of not guilty and denied the special circumstances allegations. *Id.* at 178, 729 P.2d at 842, 233 Cal. Rptr. at 407.

sion to accept the services of Jefferson M. Parrish, Jr., as his retained defense counsel.[10]

III. THE MAJORITY OPINION

Deeming the allegations of Ledesma's petition to have established a prima facie case for relief, the court appointed a retired superior court judge as referee to make findings responsive to a prepared list of questions.[11] Following his investigation, the referee concluded that, because of the closeness of the evidence, Parrish's inadequacies subjected the defense to prejudice, and accordingly recommended that a new trial be granted for both the guilt and penalty phases.[12]

For the purpose of its review, the court found it necessary to address only one of the issues raised: whether Parrish failed to provide the defendant with effective assistance of counsel at the guilt phase of the trial.[13] Justice Mosk offered a distillation of the law affecting the right of a criminal defendant to the assistance of counsel[14] as is required by both the United States and California Constitutions.[15]

To warrant a reversal of a conviction or death sentence, the defendant must satisfy two requirements: (1) show that counsel's performance was deficient as measured by an objective professional standard; and (2) show that counsel's performance prejudiced the de-

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10. Called by the defendant to explain his performance as counsel, Parrish revealed that during the period he represented Ledesma he was obsessed by compulsive gambling. *Id.* at 196, 729 P.2d at 854, 233 Cal. Rptr. at 419. This was confirmed by two social acquaintances of Parrish who, in addition, testified to witnessing him ingest large quantities of methamphetamine and cocaine, as well as alcohol, and on one occasion smoking PCP. *Id.* at 197, 729 P.2d at 855, 233 Cal. Rptr. at 420.

11. The six questions addressed, in chronological order, the misadventures of the trial and were designed to guide Judge Joseph P. Kelly in the investigation into Parrish's preparation and presentation of his case. *Id.* at 192 n.2, 729 P.2d at 851 n.2, 233 Cal. Rptr. at 416 n.2.

12. The report of the referee found, *inter alia*, that Parrish failed to pursue the leads provided in the preliminary report of either the public events of Ledesma's family life or his history of drug abuse; despite two psychosocial reports indicating otherwise, he failed to make further inquiry into the defendant's mental state; he failed to object to the introduction by the prosecution of anonymous calls identifying Ledesma as Flores' murderer, the intercepted phone call, or the extrajudicial identification of Ledesma by the victim; and he failed to research the law and procedure applicable to a defense of diminished capacity. *Id.* at 206-14, 729 P.2d at 860-66, 233 Cal. Rptr. at 426-31. Parrish contended that he saved his worst performance for the penalty phase; by his own admission abandoned his client after the jury rendered the guilty verdict. *Id.* at 211, 729 P.2d at 864, 233 Cal. Rptr. at 429.

13. *Id.* at 214, 729 P.2d at 866, 233 Cal. Rptr. at 432. *See generally*, B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, §§ 380A-379N (Supp. 1985).

14. Strickland v. Washington, 466 U.S. 668, 686 (1984); People v. Pope, 23 Cal. 3d 412, 422-24, 590 P.2d 859, 864-66, 152 Cal. Rptr. 732, 737-39 (1979). *See also* Note, *Ineffective Assistance of Counsel Claims: Toward a Uniform Framework for Review*, 50 MO. L. REV. 651 (1986).

15. U.S. CONST. amend. VI; CAL. CONST. art. I, § 13.

fense.[16] Generally, prejudice must be affirmatively proved; merely alleging error is insufficient.[17] The defendant must legitimate his claim of ineffective counsel by a preponderance of the evidence.[18]

In determining whether counsel's performance was deficient, a court must exercise deferential scrutiny for two reasons. First, the court should avoid the dangers of retrospectively second-guessing attorney performance.[19] Second, the protection provided by counsel might be undermined by the creation of an environment where the attorney is more concerned with defending his own action rather than the interests of the client.[20]

Applying the law to the facts found by the referee, the court quickly moved through the Attorney General's objection that the referee's report was in error and should not be adopted by the court.[21] Concerned only with Parrish's trial performance, the court accepted the referee's finding that Parrish's performance was deficient and that prejudice to Ledesma resulted.[22] Accordingly, the court vacated the judgment of conviction and granted the petition for writ of habeas corpus.[23]

IV. THE SEPARATE OPINIONS

A. Concurring Opinion of Justice Mosk

After resolving the opinion of the court in favor of the defendant by speaking to the single issue of the ineffectiveness of trial counsel, Justice Mosk addressed three other matters unnecessary to the conclusion of the court, yet "potentially meritorious" in demonstrating the glaring incompetence of the defendant's counsel.[24]

Justice Mosk examined the defendant's additional contentions of Parrish's ineptitude thoroughly. However, in each instance he was

16. *Ledesma*, 43 Cal. 3d at 216-17, 729 P.2d at 867-68, 233 Cal. Rptr. 432-33 (citing *Strickland*, 466 U.S. at 687-88).

17. *Id.* at 217, 729 P.2d at 868, 233 Cal. Rptr. at 434 (citing *Strickland*, 466 U.S. at 693).

18. *In re* Imbler, 60 Cal. 2d 554, 560, 387 P.2d 6, 8, 35 Cal. Rptr. 293, 296 (1963).

19. *Ledesma*, 43 Cal. 3d at 216, 729 P.2d at 867, 233 Cal. Rptr. at 433.

20. *Id.*

21. *Id.* at 219, 729 P.2d at 869-70, 233 Cal. Rptr. at 434-35. The Attorney General attempted to excuse Parrish's incompetence by portraying his shortcomings as a direct result of the defendant's insistence on using an alibi defense. *Id.* at 196, 729 P.2d at 853-54, 233 Cal. Rptr. at 419.

22. *Id.* at 224-27, 729 P.2d at 873-75, 233 Cal. Rptr. at 438-40.

23. *Id.* at 227, 729 P.2d at 875, 233 Cal. Rptr. at 440.

24. *Id.* at 228, 729 P.2d at 879, 233 Cal. Rptr. at 444 (Mosk, J., concurring).

forced by the lack of a complete record to reject the particular point, though in substance compelling, for the purpose of appellate review. Parrish failed to object to prosecution's peremptory challenges, although the available evidence clearly indicated that a group bias situation as established in *People v. Wheeler*[25] was a distinct possibility.[26] Regarding the introduction into evidence of the intercepted phone call, Parrish made no attempt to suppress it under the exclusionary rule.[27] Moreover, Parrish failed to object to the prosecutorial misconduct in the repeated comments and questions alluding to the victim's extrajudicial identification, after receiving a commitment before the trial that such references would not be made. In so doing, Parrish not only failed to discharge his duties competently but, in fact, potentially jeopardized the credibility of the proceedings to such an extent that Ledesma was effectively precluded from presenting an appropriate appeal.[28] Ultimately, Justice Mosk reached the "inescapable" conclusion that Parrish's counsel was totally inept.[29]

B. Concurring Opinion of Justice Grodin

The theme of Justice Grodin's concurrence centered around the majority's omission of any discussion regarding the defendant's burden of establishing that counsel's errors caused specific, identifiable prejudice.[30] However, while disagreeing with the majority's finding that the proof of prejudice may be implied in the circumstances surrounding the conviction, Justice Grodin acknowledged that the egregious nature of Parrish's deficiencies promoted a breakdown of the adversarial process and might possibly have been causative in prejudicing both the verdict and the sentence.[31]

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25. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978).

26. *Ledesma*, 43 Cal. 3d at 228-32, 729 P.2d at 879-82, 233 Cal. Rptr. at 444-47 (Mosk, J., concurring). It appeared from the record that the prosecutor was removing prospective jurors based solely on their membership in the Hispanic community, a cognizable group under the *Wheeler* test. To establish a prima facie case of group discrimination, opposing counsel must preserve on the record, following timely objection, evidence of the likelihood that persons are being challenged because of their group association. Although the *Wheeler* issue was raised *sua sponte* by the trial court, Parrish neglected to pursue it. *Id.* at 179-81, 729 P.2d at 842-43, 233 Cal. Rptr. at 408-09.

27. *Id.* at 232-36, 729 P.2d at 882-85, 233 Cal. Rptr. at 447-50 (Mosk, J., concurring).

28. *Id.* at 236-42, 729 P.2d at 885-89, 233 Cal. Rptr. at 450-54 (Mosk, J., concurring). Justice Mosk, applying People v. Green, 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980), which required an assignment of misconduct and a timely request for a curative admonition in order to preserve a claim of prosecutorial misconduct, again believed the issue would have to be rejected before reaching the merits. *Ledesma*, 43 Cal. 3d at 242, 729 P.2d at 889, 233 Cal. Rptr. at 454 (Mosk, J., concurring).

29. *Ledesma*, 43 Cal. 3d at 242, 729 P.2d at 889, 233 Cal. Rptr. at 454 (Mosk, J., concurring).

30. *Id.* at 242-45, 729 P.2d at 889-91, 233 Cal. Rptr. 454-56 (Grodin, J., concurring).

31. *Id.* at 245, 729 P.2d at 891, 233 Cal. Rptr. at 456 (Grodin, J., concurring).

V. CONCLUSION

If a case could ever be said to be distinguishable on its facts, this must surely be that case. Though undoubtedly tallied with the other death sentence reversals of the Bird court, *Ledesma* presents a scenario that every court, hopefully, would recognize as a gross miscarriage of justice.

In its analysis regarding the plethora of errors, from the warrantless search to the selection of the jury, the court rightfully grounded its conclusions in well-established law. However, by belaboring the obvious incompetence of Parrish, the court may have unwittingly created an unwieldy yardstick with which to measure future mistakes. To imagine a more dramatic display of ineffective counsel is difficult. Perhaps the length of this opinion can be attributed to that aspect of human nature that endows us with the gift of narration when dealing with a simple question sitting squarely in our field of expertise. In anticipation, the mind is filled with an astounding clarity, a floodgate of knowledge straining to be released. Like Justice Mosk, many find that a single response is hardly satisfactory. Like the opinion, although a simple answer is asked for, it is rarely received.

TRAVIS P. CLARDY

F. *The decision in People v. Harris, holding that the exclusive use of voter registration lists in compiling the juror pool may result in an unconstitutionally unrepresentative jury, will not be applied retroactively:* **People v. Myers.**

In *People v. Myers*, 43 Cal. 3d 250, 729 P.2d 698, 233 Cal. Rptr. 264 (1987) (plurality opinion), the supreme court reversed and remanded the appellant's death penalty sentence. The appellant, who was convicted of first degree murder and several other crimes relating to an armed robbery incident, sought the declaration of mistrial based upon the court's plurality opinion in *People v. Harris*, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782 (1984). In *Harris*, the court upheld Harris's challenge that the use of voter registration lists as the exclusive source of names for compiling a juror pool was unconstitutional as it deprived him of a representative jury.

Although the appellant did not challenge the jury selection process until after voir dire examination was completed, the court found that the challenge was timely, even though such a review may have been

banned had the appellant been tried in federal court. 28 U.S.C. § 1867(a), (b) (1977). The court then went on to examine the merits of retroactive application of *Harris*. The court invoked the United States Supreme Court's sixth amendment analysis to determine whether a decision should be applied retroactively. The relevant factors were as follows: " '(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' " *Daniel v. Louisiana*, 420 U.S. 31, 32 (1975) (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967)).

In applying the *Daniel* test, the court found: (a) sixth amendment rights were to be furthered by the *Harris* decision; however, it was incorrect to assume that all criminal defendants were deprived of fair trials before the *Harris* decision was rendered; (b) voter registration lists had been used for decades; therefore, the resulting reliance by county officials was not unreasonable; and (c) retroactive applications would be detrimental to the administration of justice, since *Harris* merely created a new standard and did not create a per se rule that all juror pools created exclusively from voter lists were unconstitutional. Thus, the court held that *Harris* would receive only prospective application.

The appellant successfully challenged several instructions given to the jury at the penalty phase of the trial. The court concluded that instructing the jury that the governor had commutation powers—the so-called "Briggs Instruction"—was improper and prejudicial since the jury may have decided to impose a harsher sentence to account for the possibility that the governor might reduce the appellant's sentence. Finally, the court agreed with the appellant's contention that the failure of the trial court to supplement the death penalty instructions was also prejudicial error. Because the instruction relating to the death penalty stated that the jury "shall" impose the death sentence if it found that the aggravating circumstances outweigh the mitigating, the instruction implied a mechanical weighing process. In the absence of further instructions making it clear that the jurors were free to assign whatever weight they deemed appropriate to each circumstance, the province of the jury was invaded. Therefore, because the "Briggs Instruction" was given and no supplemental death penalty instructions were recited, the appellant's death sentence was reversed and a new penalty trial was ordered.

LINDA M. SCHMIDT

G. *A defendant is not denied effective assistance of counsel where guilt is conceded and counsel emphasizes a defendant's insanity plea. Where a defendant offers evidence of good character in mitigation of the charges against him, a "no sympathy" instruction is improper:* **People v. Wade.**

In *People v. Wade*, 43 Cal. 3d 366, 729 P.2d 239, 233 Cal. Rptr. 48 (1987), the defendant challenged his first degree murder conviction, the jury's special circumstance findings, and his death penalty sentence. The basis for the defendant's murder conviction was his brutal beating of his ten-year-old stepdaughter, which led to her death. The defendant had asserted the insanity defense at trial, claiming that he suffered from multiple personalities, but it was rejected by the jury. Before the supreme court were the defendant's contentions that he was denied adequate assistance of counsel and thus unjustly convicted, that the trial court erred in admitting into evidence testimony of the defendant's prior bad acts, that the jury's two special circumstance findings were improper, and that the trial court's submission of a "no sympathy" instruction to the jury constituted reversible error. The court agreed with the defendant as to the "no sympathy" instruction, and accordingly, reversed his death penalty sentence. Only one of the special circumstance findings, however, was overturned by the court.

The defendant's lack of effective assistance of counsel challenge rested primarily upon defense counsel's courtroom approach of openly admitting his client's guilt. The defendant's attorney concentrated on persuading the jury of the merit of his client's insanity defense. Referring to counsel's approach as realistic, the court found it to be within his realm of tactical discretion in the presentation of his client's case. The court further noted that counsel had thoroughly presented all of the legal principles applicable to the defendant's case. The court concluded that reversal, based on ineffective assistance of counsel, was not required. *See generally Strickland v. Washington*, 466 U.S. 668 (1984).

The court next discussed the merit of the defendant's contention that the trial court erred in admitting evidence of his prior bad acts. At trial, the defendant's ex-girlfriend was permitted to testify over objection that the defendant had exhibited prior abusive conduct toward her children. The defense, relying on *People v. Alcala*, 36 Cal. 3d 604, 630-31, 685 P.2d 1126, 1140, 205 Cal. Rptr. 775, 789 (1984), as-

serted that such evidence was inadmissible since it was offered to prove the defendant's propensity to act consistently with his prior misconduct.

The court rejected this contention. Of particular significance was the fact that the witness' testimony contained no indication that one of the defendant's alleged other personalities prompted his acts of child abuse in the prior episodes. Therefore, the court held the girlfriend's testimony to be admissible since it was relevant to disprove the defendant's insanity defense and was not offered to prove his propensity to repeat prior misconduct.

The defendant's girlfriend's testimony was also challenged as being cumulative in nature and thus inadmissible. The defendant asserted that the girlfriend merely repeated testimony, already received from his wife and his two remaining stepchildren, that the defendant had acted in a calculated, deliberate manner. The court refuted this argument by pointing out that the testimony of the wife and stepchildren was littered with characterizations of the defendant as being irrational and volatile, rather than calculated and deliberate. The court thus concluded this testimony was anything but cumulative.

The defendant's final attack on the admissibility of the testimony as to his prior bad acts rested upon section 352 of the Evidence Code. Section 352 calls for the exclusion of any evidence where the probative value of the evidence, in the discretion of the trial court, is outweighed by its potential prejudicial effect. The supreme court affirmed the trial court's admission of this evidence in light of its substantial relevance to disproving the defendant's insanity defense.

Next, the court analyzed the defendant's vagueness and overbreadth challenges to the statutes underlying the special circumstances findings. The court supported the defendant's attack on the "heinous murder" finding, noting that the enactment, section 190.2(a)(14) of the Penal Code, had already been challenged and defeated in *People v. Superior Court*, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982). That special circumstance finding was accordingly set aside.

Section 190.2(a)(18) of the Penal Code, the statutory foundation for the defendant's "torture-murder" special circumstance finding, had similarly been challenged in a prior case, but had received a saving construction in *People v. Davenport*, 41 Cal. 3d 247, 270-71, 710 P.2d 861, 221 Cal. Rptr. 794 (1985). The *Davenport* court incorporated an intent to torture requirement into the statute. The defendant urged reversal based upon the trial court's failure to instruct the jury expressly that a finding of specific intent to torture was a necessary element of the special circumstance. The contention was dismissed

since the court found the jury to have been adequately instructed by the court on the elements of the crime of torture-murder.

The defendant's final assignment of error involved the trial court's penalty phase introduction of an instruction that the jury should not permit itself to be influenced by pity for the defendant. The court, following *People v. Brown*, 40 Cal. 3d 512, 537-38, 709 P.2d 440, 453, 220 Cal. Rptr. 637, 650 (1985), *cert. granted*, 106 S. Ct. 2274 (1986), recognized that, where the defendant offered evidence of his good character in mitigation of the charges against him, to attempt to preclude all use of sympathy by the jury created an ambiguous situation. On this ground, the court reversed the jury's death penalty judgment.

In summary, the court affirmed the jury's finding of defendant's guilt of first degree murder and the torture-murder special circumstance finding. However, the court reversed the finding of the heinous murder special circumstance, based upon constitutional grounds. The imposition of the death penalty was reversed because the defendant was entitled to have the jurors consider sympathy as a mitigating factor. *See generally* CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CRIMINAL LAW PROCEDURE & PRACTICE § 55 (1986).

MITCHELL F. DISNEY

H. *When a criminal defendant has undergone trial based on a submitted transcript of the preliminary hearing, the trial court's error in failing to advise the defendant of waiver of his right against self-incrimination is reversible only when the error is prejudicial:* **People v. Wright.**

In *People v. Wright*, 43 Cal. 3d 487, 729 P.2d 260, 233 Cal. Rptr. 69 (1987), the supreme court held that when trial courts fail to advise criminal defendants of their waiver of the right against self-incrimination by admission of the transcript from the preliminary hearing, those judgments are not reversible per se. They are reversible only if a result more favorable to the defendant would have been reasonably probable had he been properly advised.

The parties submitted the case to the court for trial based on the transcript of the preliminary hearing, reserving the right to present evidence. The defendant waived his right to a jury trial, as well as his right to confront witnesses who had testified at the preliminary

hearing. In the resultant trial, the defendant was convicted of first-degree murder, burglary, and three counts of robbery.

Of primary import was the trial court's failure to warn the defendant that in submitting the transcript for trial he was waiving his right against self-incrimination, a warning required by *Bunnell v. Superior Court*, 13 Cal. 3d 592, 531 P.2d 1086, 119 Cal. Rptr. 302 (1975). In *Bunnell*, the supreme court established a requirement that in cases involving either a plea of guilty or submission of a transcript for trial, the record must contain express waivers of the right to jury trial, the right to confrontation of witnesses, and the right against self-incrimination.

An important question was the effect of a trial court's error in omitting one or more of these mandatory recorded waivers. The supreme court held earlier in *People v. Levey*, 8 Cal. 3d 648, 504 P.2d 452, 105 Cal. Rptr. 516 (1973), that, when the transcript submission amounted to a "slow plea," i.e., tantamount to a plea of guilty, the conviction of a defendant without waiver of the right against self-incrimination was per se reversible. Until the instant case, the court had not, however, specifically addressed this situation where the transcript submissions was not a slow plea. Conflicting decisions by different districts of the court of appeal over the last decade presented the need for a supreme court decision on this point.

One line of appellate decisions (beginning with *People v. Ingram*, 60 Cal. App. 3d 722, 131 Cal. Rptr. 752 (1976), and proceeding through *People v. Mora*, 153 Cal. App. 3d 18, 199 Cal. Rptr. 904 (1984)) asserted the view that *Bunnell* error did not require reversal of the conviction unless the defendant was prejudiced thereby. Another line of cases (from *People v. Kirkwood*, 70 Cal. App. 3d 290, 138 Cal. Rptr. 649 (1977), through *People v. Drieslein*, 170 Cal. App. 3d 591, 216 Cal. Rptr. 244 (1984)), espoused the perspective that any instance of *Bunnell* error required reversal per se.

In *People v. Wright*, the supreme court gave its blessing to the former line of authority in requiring reversal per se only for slow pleas. To gain reversal in cases where the transcript submission is not tantamount to a plea of guilty, the defendant must show that the error was prejudicial. This view appears to be in harmony with article 6, section 13 of the California Constitution, which forbids the setting aside of judgments on the basis of procedural error except when the error results in a "miscarriage of justice." CAL. CONST. art. 6 § 13.

"[A] 'miscarriage of justice,' " according to the court in *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956), "should be declared only when the court . . . is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *Id.* at 836, 299 P.2d at 254 (cita-

tions omitted). This "miscarriage of justice" standard was endorsed by the supreme court as applicable to the present facts. Applying this test, the court concluded that the error committed was not prejudicial and affirmed the conviction.

The court recognized in its opinion that this rule of law is not the easier of the two perspectives to administer. Per se reversal for all instances of *Bunnell* error would have been much simpler and more clear cut. *Wright* now requires a twofold determination when the necessary advisements and waivers do not appear in the record: first, whether the transcript submission in a particular case constitutes a slow plea; second, if so, whether the error of omitting waivers was prejudicial to the defendant. The court acknowledged the potential for an added burden on appellate courts in making these determinations and, therefore, advised trial courts in rather pointed terms that the preferred course of action includes giving *Bunnell* warnings in *all* submission cases.

Through *People v. Wright*, the supreme court thus resolved a decade of discord on a point of criminal law within the court of appeal. In cases where trial by submitted transcript is not equivalent to a slow plea of guilty, a trial court's error in failing to advise a defendant and obtain an explicit waiver of his right against self-incrimination on the record requires reversal only when it was reasonably likely that the defendant would have experienced a more favorable judgment had the requisite warnings been given.

BRUCE MONROE

I. *Section 647(f) of the Penal Code, which makes public drunkenness a criminal offense, is constitutional, even as applied to chronic alcoholics:* **Sundance v. Municipal Court.**

I. INTRODUCTION

In *Sundance v. Municipal Court*,[1] four public inebriates and one taxpayer sought to have section 647(f) of the Penal Code[2] declared

1. 42 Cal. 3d 1101, 729 P.2d 80, 232 Cal. Rptr. 814 (1986). The opinion was written by the court. Justice Grodin wrote a separate concurring opinion with Justice Lucas concurring. Chief Justice Bird wrote a concurring and dissenting opinion in which Justice Reynoso concurred.

2. CAL. PENAL CODE § 647(f) (West Supp. 1987) [hereinafter section 647(f)]. Section 647(f) provides in pertinent part:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor [including any person] [w]ho is found in any public

unconstitutional. The plaintiffs contended that the statute violated the eighth amendment's prohibition against cruel and unusual punishment on its face, as well as when applied to chronic alcoholics. Moreover, the plaintiffs asserted that arrested alcoholics have a constitutional right to rehabilitative treatment. They further claimed the methods used to enforce the statute violated the arrestees' due process rights. Finally, the taxpayer plaintiff asserted that section 647(f) constituted a waste of public funds.

II. FACTUAL BACKGROUND

In reviewing the case, the trial court made numerous factual findings. In the year in which the complaint was filed, over thirty percent of all misdemeanor arrests were section 647(f) arrests.[3] Due to the high volume of these arrests, the arresting officers used a "short form arrest report."[4] These reports included a check list for objective symptoms and required a signature from only one of the arresting officers. The reports did not include the names of any witnesses.[5]

The arrestees did not undergo any field sobriety checks nor were they given chemical tests. Often placed in windowless, overcrowded wagons with wooden benches, arrestees were sometimes injured during the unsupervised rides to the jail.[6] Upon arrival, they were placed in "drunk tanks" with no furnishings or bedding. Medical attention was scarcely provided, even for the very sick.[7]

The arrestees are then either referred to a civil detoxification center (which accepted only twenty arrestees per day) or released in accordance with section 849(b)(2) of the Penal Code.[8] This section allows the police to release the arrestee if he was arrested without a warrant.[9] Prior to Special Order 23,[10] this procedure was used only when the jail was full. All other arrestees had to go through criminal processing.[11]

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place under the influence of intoxicating liquor . . . in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others.

Id. See generally California Standards for the Search of Inebriates, 8 SW. U.L. REV. 672 (1976).

3. *Sundance*, 42 Cal. 3d at 1109, 729 P.2d at 84, 232 Cal. Rptr. at 818.

4. *Id. See generally* Goodman, *Public Inebriate and the Police in California*, 5 GOLDEN GATE U.L. REV. 259 (1975).

5. *Sundance*, 42 Cal. 3d at 1110, 729 P.2d at 84, 232 Cal. Rptr. at 818.

6. *Id.*

7. *Id.* at 1110-12, 729 P.2d at 84-85, 232 Cal. Rptr. at 818-19.

8. CAL. PENAL CODE § 849(b)(2) (West 1985).

9. *Id.*

10. The Los Angeles Police Department set forth Special Order 23 which states that 647(f) arrestees are to be released within four hours "unless there is a particular reason for denying relief." *Sundance*, 42 Cal. 3d at 1111, 729 P.2d at 85, 232 Cal. Rptr. at 819.

11. *Id.*

The remaining arrestees had to remain in custody unless they posted $50 bail or qualified to be released on their own recognizance. Most were indigent and/or homeless and could neither post bail nor qualify for release on their own recognizance.[12] At the arraignment, usually without the assistance of counsel or an express waiver of counsel, they were required to enter their plea. They were informed that a guilty plea was considered a waiver of all their rights. Most plead guilty to shorten their sentence for incarceration: 1.87 days versus 21-25 days if they plead not guilty.[13] The trial court further found that alcoholism was an illness upon which the penal system had no positive rehabilitative effect.[14]

The trial court granted the following injunctive relief:

(1) There must be a medical screening so that the severely ill may be transferred to a hospital.

(2) Arrestees must be given at least one meal while in custody.

(3) Padded benches or cots must be provided during the booking process.

(4) Chemical tests must be provided for arrestees who request them and for those against whom a complaint will be filed.

(5) Only ten arrestees may be transferred per wagon and the wagons must be padded.[15]

The trial court also held that the arrest reports must contain witness's names and specific facts.[16] Furthermore, the rights to counsel, to a jury trial, and to confrontation must be expressly waived.[17] Finally, the arrestees have the right to a probable cause hearing and to a trial within five days of arraignment.[18]

The lower court rejected the plaintiffs' claim that the statute violated the eighth amendment on its face, or as applied to alcoholics, although it found that alcoholism could be used as an affirmative defense.[19] In addition, the trial court rejected the proposition that section 647(f) arrests constitute a waste of public funds.[20]

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12. *Id.* at 1111-12, 729 P.2d at 85, 232 Cal. Rptr. at 819.
13. *Id.* at 1112-13, 729 P.2d at 86, 232 Cal. Rptr. at 820. A plea of not guilty results in a trial, until which time individuals who do not qualify for release must remain incarcerated. *Id.*
14. *Id.* at 1114-15, 729 P.2d at 87, 232 Cal. Rptr. at 821.
15. *Id.* at 1116, 729 P.2d at 88, 232 Cal. Rptr. at 822.
16. *Id.* at 1117, 729 P.2d at 89, 232 Cal. Rptr. at 823.
17. *Id.*
18. *Id.*
19. *Id.* at 1117-18, 729 P.2d at 89, 232 Cal. Rptr. at 823.
20. *Id.* at 1118, 729 P.2d at 90, 232 Cal. Rptr. at 824.

III. THE OPINION OF THE COURT

A. The Eighth Amendment

Plaintiffs claimed that section 647(f) of the Penal Code was facially unconstitutional. In support of this claim the plaintiffs relied upon the United States Supreme Court decision in *Rhodes v. Chapman*,[21] which held that criminal statutes which lack a penalogical justification constitute cruel and unusual punishment because they inflict unnecessary pain.[22] However, the court rejected this argument, stating that although the statute may have lacked justification as to chronic alcoholics, the statute was not so "purposeless" in regard to the rest of society as to constitute an eighth amendment violation.[23]

The plaintiffs then asserted that the enforcement of the statute constituted cruel and unusual punishment. First, they asserted that the statute inflicted excessive punishment on chronic alcoholics since they are incarcerated for unreasonable amounts of time as a result of successive or aggregate sentences.[24] The plaintiffs relied upon the holding in *In re Foss*.[25] Foss was sentenced to ten years imprisonment for possession of heroin. Because he was on parole at the time he committed the crime, the trial judge amplified his sentence. The *Foss* court held that "increased punishment for a further offense" was cruel and unusual punishment in light of his addiction.[26] However, *Foss* was held inapplicable to the case at bar because it does not involve increased punishment. The court reasoned that *Foss* did not bar successive punishment, just increased punishment.[27]

The plaintiffs also argued that the wagon transport system and the detention facilities constituted cruel and unusual punishment. They claimed the injunctive relief granted by the trial court was insufficient.[28] The supreme court rejected these claims, stating that whether the relief granted was adequate was best left to the trier of fact, and declined to consider the issue.[29]

Further, the plaintiffs contended that incarceration amounted to cruel and unusual punishment due to its dehabilitative effect.[30] The plaintiffs cited *Pugh v. Lock*,[31] which held that a penal system must

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21. 452 U.S. 337 (1981).
22. *Id.* at 346. *See also* Gregg v. Georgia, 428 U.S. 153, 183 (1976).
23. *Sundance*, 42 Cal. 3d at 1119, 729 P.2d at 91, 232 Cal. Rptr. at 824. *See generally* 19 CAL. JUR. 3D (Rev.) *Criminal Law* § 1963 (1984).
24. *Sundance*, 42 Cal. 3d at 1119-20, 729 P.2d at 91, 232 Cal. Rptr. at 824. *See generally* 21 AM. JUR. 2D *Criminal Law* § 626 (1981 & Supp. 1986).
25. 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974).
26. *Id.* at 923, 519 P.2d at 1085, 112 Cal. Rptr. at 661.
27. *Sundance*, 42 Cal. 3d at 1121, 729 P.2d at 91-92, 232 Cal. Rptr. at 825-26.
28. *Id.* at 1123-24, 729 P.2d at 93-94, 232 Cal. Rptr. at 827-28.
29. *Id.*
30. *Id.* at 1125, 729 P.2d at 94, 232 Cal. Rptr. at 828.
31. 406 F. Supp. 318 (M.D. Ala. 1976).

not impede "an inmate's ability to attempt rehabilitation . . . ."[32] Although the present court accepted the lower court's finding that incarceration without treatment may be dehabilitating, the court held that *Pugh* was inapplicable to the facts of this case since it did not apply to incarcerations of short duration.[33]

Finally, the plaintiffs claimed that incarcerating people "for the 'status' of having a mental or physical illness or disorder constitute[d] a violation of the cruel and unusual punishment clause . . . unless it [was] accompanied by adequate treatment."[34] This argument was rejected because the inebriates were not arrested due to their "status" as alcoholics. Rather, they were arrested because they were intoxicated. Therefore, the inebriates were not constitutionally entitled to treatment.[35]

B. Due Process

The plaintiffs contended that various enforcement practices of section 647(f) violated the due process clause of the fourteenth amendment. First, they claimed that because the arrestees' rights were read to them en masse, not individually, and their rights were not *expressly* waived, the arrestees' due process rights were violated.[36] Furthermore, the plaintiffs asserted that the arrestees were entitled to have the specific elements of the charged offense explained to them, and that the arrestees were entitled to a probable cause hearing.[37]

On these issues the trial court agreed, finding that rights may not be read to arrestees en masse and that waiver of rights must be individually and expressly waived.[38] The trial court also concluded that the specific elements of the offense must be explained to the arrestees and that they must be informed of their right to a probable cause hearing.[39] These findings were not contested upon appeal.

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32. *Id.* at 330.

33. *Sundance*, 42 Cal. 3d at 1126, 729 P.2d at 95, 232 Cal. Rptr. at 829.

34. *Id.* (quoting People v. Feagley, 14 Cal. 3d 338, 359, 535 P.2d 373, 386, 121 Cal. Rptr. 509, 522 (1975)). *See also* Light, *Decriminalization of Public Drunkeness*, 135 NEW L.J. 66 (1985); Stevens, *Decriminalization and Beyond: Public Inebriety in Los Angeles County*, 3 WHITTIER L. REV. 55 (1981); Comment, *Taking the Public Inebriate Out of California's Criminal Justice System: Problems in Law and Medicine*, 7 U.C. DAVIS L. REV. 539 (1974).

35. *Sundance*, 42 Cal. 3d at 1127, 729 P.2d at 95, 232 Cal. Rptr. at 829.

36. *Id.* at 1128, 729 P.2d at 96, 232 Cal. Rptr. at 830.

37. *Id.* at 1128, 729 P.2d at 96-97, 232 Cal. Rptr. at 830-31.

38. *Id.*

39. *Id.*

Thus, the trial court's ruling on these issues remained unchanged.[40]

The plaintiffs also argued that arrestees were effectively denied their right to trial because of the inadequate arrest reports and the extended delay for a trial hearing (21-25 days).[41] The court affirmed the trial court's relief, requiring that the arrest reports contain witnesses' names and specific facts.[42] In addition, the court agreed that arrestees pleading not guilty must be afforded a trial hearing within five days of arraignment.[43]

Finally, plaintiffs argued that Special Order 23 was unconstitutionally vague such that it denied arrestees due process of law.[44] Special Order 23 provided in pertinent part that every section 647(f) arrestee is to be released after four hours unless "[t]here are other specific articulated facts justifying continued detention and/or prosecution."[45] However, the court rejected the plaintiffs' argument on the grounds that Special Order 23 was not a criminal statute regulating public conduct.[46] Rather, it was a guide to the police department in deciding whether or not to prosecute.[47]

C. *Waste of Public Funds*

The taxpayer plaintiff asserted that section 647(f) constituted a waste of public funds. He argued that the civil detoxification centers were much more effective and less expensive than prosecution.[48] However, in order for public spending to constitute waste it must be found that "no public benefit can, within the limits of reasonable legislative judgment, be found for the expenditure."[49] Waste does not necessarily include errors in official judgment or discretion. The court reasoned that, since the enforcement of section 647(f) provided some public benefit in keeping inebriates off of the streets, it did not amount to waste.[50]

IV. CONCURRING AND DISSENTING OPINIONS

Justice Grodin concurred with the majority. However, he dis-

40. *Id.* at 1129, 729 P.2d at 97, 232 Cal. Rptr. at 831.
41. *Id.*
42. *Id.* at 1130, 729 P.2d at 98, 232 Cal. Rptr. at 832.
43. *Id.*
44. *Id.* at 1133, 729 P.2d at 100, 232 Cal. Rptr. at 834.
45. *Id.* at 1133, 729 P.2d at 99, 232 Cal. Rptr. at 833.
46. *Id.* at 1133, 729 P.2d at 100, 232 Cal. Rptr. at 834. *See generally* Grayned v. City of Rockford, 408 U.S. 104 (1972) (Court describes the inherent problems with vague criminal statutes).
47. *Sundance*, 42 Cal. 3d at 1134, 729 P.2d at 100, 232 Cal. Rptr. at 834.
48. *Id.* at 1137, 729 P.2d at 102, 232 Cal. Rptr. at 836.
49. *Id.* at 1137, 729 P.2d at 103, 232 Cal. Rptr. at 837.
50. *Id.* at 1138-39, 729 P.2d at 103-04, 232 Cal. Rptr. at 837-38.

agreed with its characterization of the issue.[51] Although he believed section 647(f) to be constitutional, he recognized the ineffectiveness of the statute in dealing with the underlying problem of alcoholism.[52]

Chief Justice Bird wrote a separate concurring and dissenting opinion stressing the "inherent limitations of such a solution."[53] She believed that the court did not remedy all the constitutional violations. She stated that because there was usually "no formal arraignment, the entire process [was] insulated from judicial review," and thus the remedies provided did not aid detainees.[54] Furthermore, she believed that, because the arrestees are not normally indicted, the arrests "serve no other purpose than protective custody."[55] Thus, the Chief Justice reasoned that, because most of the arrestees are detained for their own protection, they are constitutionally entitled to treatment.[56]

V. CONCLUSION

Although the court recognized the limitations of the "drunk in public" statute in solving our society's problem of alcoholism, it realized the statute was not unconstitutional. Section 647(f) is not aimed at giving aid to those with drinking problems. Rather it is a way to keep the drunks off of the public thoroughfares. Admittedly, a civil alternative, such as the civil detoxification facilities, would be more effective than criminal prosecution in solving the underlying problem. The reality of the situation is that there is just not enough room in the current detoxification facilities to help all of the alcoholics who need help. The decision to change the law by referring inebriates to detoxification facilities should be left to the legislature. It is probable that these centers would be of far greater help to society than the enforcement of section 647(f). However, the fact is that sec-

51. *Id.* at 1139, 729 P.2d at 104, 232 Cal. Rptr. at 838 (Grodin, J., concurring).

52. *Id.* at 1139-40, 729 P.2d at 104, 232 Cal. Rptr. at 838 (Grodin, J., concurring).

53. *Id.* at 1140, 729 P.2d at 105, 232 Cal. Rptr. at 839 (Bird, C.J., concurring and dissenting).

54. *Id.* at 1147, 729 P.2d at 109, 232 Cal. Rptr. at 843 (Bird, C.J., concurring and dissenting).

55. *Id.* at 1151, 729 P.2d at 112, 232 Cal. Rptr. at 846 (Bird, C.J., concurring and dissenting).

56. *Id.* at 1153-55, 729 P.2d at 113-14, 232 Cal. Rptr. at 847-48 (Bird, C.J., concurring and dissenting).

tion 647(f) has been declared constitutional and until the legislature repeals the statute, it should be enforced.

MARIANNE CHIAPUZIO

III. CORPORATE LAW

In a merger situation where a shareholder was aware of all facts which constituted the basis of his claim of corporate fiduciary misconduct, an appraisal proceeding was the shareholder's exclusive remedy: **Steinberg v. Amplica, Inc.**

I. INTRODUCTION

In *Steinberg v. Amplica, Inc.*,[1] the court addressed the issue of whether the statutory appraisal right set forth in the Corporations Code[2] is the exclusive remedy for a minority shareholder who claims that his shares are undervalued as a result of fraud and breach of fiduciary duty by the corporation's officers, directors, and majority shareholders.[3] The court held in the affirmative, limiting its decision to circumstances where the complaining stockholder is aware of the misconduct of majority shareholders and management prior to the consummation of the merger, but nevertheless chooses to sue for damages after the fact rather than assert his appraisal rights. In reaching this conclusion, the court found that where a minority shareholder claims damages for the decreased value of his stock re-

1. 42 Cal. 3d 1198, 729 P.2d 683, 233 Cal. Rptr. 249 (1986). Justice Mosk wrote the majority opinion, with Justices Broussard, Lucas, and Panelli concurring. Chief Justice Bird wrote in dissent and was joined by Justices Reynoso and Grodin.

2. The Corporations Code provides:

> (a) No shareholder of a corporation who has a right under this chapter to demand payment of cash for the shares held by the shareholder shall have any right at law or in equity to attack the validity of the reorganization or short-form merger, or to have the reorganization or short-form merger set aside or rescinded, except in an action to test whether the number of shares required to authorize or approve the reorganization have been legally voted in favor thereof; but any holder of shares of a class whose terms and provisions specifically set forth the amount to be paid in respect to them in the event of a reorganization or short-form merger is entitled to payment in accordance with those terms and provisions.

CAL. CORP. CODE § 1312(a) (West 1977). The opinion addressed appraisal as an "exclusive remedy" in mergers wherein one merging corporation does not control the other, and where the two corporations are not under common control. The burden of proof in such cases is addressed by section 1312(c) of the Corporations Code. The court found these subdivisions inapplicable to this case. *Steinberg*, 42 Cal. 3d at 1214, 729 P.2d at 694, 233 Cal. Rptr. at 259. For cases which deal with similar provisions, see Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099 (Del Super. Ct. 1985) (parent-subsidiary cash-out merger); Weinberger v. UOP, Inc., 457 A.2d 701 (Del. Super. Ct. 1983) (parent-subsidiary cash-out merger).

3. The court of appeal addressed the same question in Sturgeon Petroleums, Ltd. v. Merchants Petroleum Co., 147 Cal. App. 3d 134, 195 Cal. Rptr. 29 (1983).

sulting from an improper merger, the claim constitutes an attack on the validity of the merger within the meaning of the appraisal statute.[4]

II. FACTUAL BACKGROUND

On July 22, 1981, Steinberg, the plaintiff, purchased a small number of shares of the defendant corporation, Amplica, Inc. [hereinafter Amplica] in its first public offering of shares. Both before and after the offering, the majority of Amplica's stock was controlled by several of the defendant's officers and directors. On October 9, 1981, Amplica announced plans to merge with co-defendant Communications Satellite Corp. [hereinafter Comsat], whereby Amplica would become a wholly owned subsidiary of Comsat. Amplica notified its stockholders that the merger would be put to a vote on December 7, 1981, and sent out a proxy statement detailing the proposal. The merger proposal passed by a ninety percent vote. Steinberg did not oppose the merger; instead, he exchanged his shares at the offered price, making a small profit.[5]

Following the merger, the plaintiff filed this action,[6] alleging fraud and breach of fiduciary duty by the majority shareholders and management in carrying out an illegal "freeze-out" merger.[7] In particular, the plaintiff claimed that the prospectus for Amplica's public offering contained omissions and misrepresentations since it failed to disclose Amplica's plans for a merger, and stated that proceeds from the issuance would be used for business operations, while in reality

4. CAL. CORP. CODE § 1312(a) (West 1977).

5. In general, one must oppose the merger and make a written demand for payment on dissenting shares in order to assert appraisal rights. *See generally* 15 CAL. JUR. 3D *Corporations* §§ 430-438 (1983); Buxbaum, *The Dissenter's Appraisal Remedy*, 23 UCLA L. REV. 1229 (1976); Barton, *Business Combinations and the New General Corporation Law*, 9 LOY. L.A.L. REV. 738, 784-99 (1976). Although the court did not discuss whether the plaintiff had appraisal rights after failing to demand payment, such conduct would constitute waiver of appraisal rights. *See* Joseph v. Wallace-Murray Corp., 354 Mass. 477, 238 N.E.2d 360 (1968) (mere demand for payment at merger price effected waiver of appraisal rights).

6. The plaintiff filed the case for the class of stockholders who had purchased Amplica stock within 90 days of the first public offering and who still held stock at the time of the merger. *Steinberg*, 42 Cal. 3d at 1203, 729 P.2d at 686, 233 Cal. Rptr. at 251-52.

7. A "freeze-out" merger is accomplished where majority shareholders force the minority shareholders to liquidate or sell their shares not incident to a valid business purpose. *Steinberg*, 42 Cal. 3d at 1204 n.6, 729 P.2d at 686 n.6, 233 Cal. Rptr. at 251 n.6. *See* Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1192-93 (1964).

they were used to make the company's finances more attractive for merger. Additionally, the plaintiff alleged that officers and directors received personal financial benefit from the merger to the detriment of minority shareholders. The plaintiff prayed for compensatory and exemplary damages.

The defendants claimed, among other things, that under section 1312(a) of the Corporations Code [hereinafter section 1312(a)], appraisal was the plaintiff's exclusive remedy. The trial court relied on the decision in *Sturgeon Petroleums, Ltd. v. Merchants Petroleum Co.*,[8] wherein the court of appeal held for the defendant corporation in a similar factual situation and granted the defendant's summary judgment motion. The court of appeal affirmed.

III. THE MAJORITY OPINION

A. Plaintiff's claims constituted an attack on the validity of the merger.

The majority first addressed whether the plaintiff's claims came within the purview of section 1312(a)'s restriction of remedies. Because the plaintiff made no request to set aside or rescind the merger, the initial question for the court was whether the plaintiff's action amounted to an attack on the merger's validity.[9]

The court noted that disagreement exists as to the scope of "an attack on validity" of a merger.[10] However, the court reasoned that since the plaintiff's claim was for damages resulting from the fact that he no longer had an interest in the merged corporation, it was an attack on the validity of the merger.[11] Thus, the court concluded that the plaintiff's claim was within the scope of section 1312(a)'s restrictions.[12]

B. Plaintiff was limited to the appraisal remedy.

The court next examined whether a plaintiff who alleged fraud, breach of fiduciary duty, and illegality could sue for compensatory and exemplary damages where the plaintiff was aware of the claimed misconduct prior to the meeting at which the merger was approved. The first question the court faced was whether the plaintiff in fact did have such knowledge.

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8. 147 Cal. App. 3d 134, 195 Cal. Rptr. 29 (1983). In *Sturgeon*, the plaintiff claimed the offering price was insufficient and unfair. However, because the plaintiff failed to show an adequate basis for his claim of fraud, he was limited to the appraisal remedy.

9. *Steinberg*, 42 Cal. 3d at 1205, 729 P.2d at 687, 233 Cal. Rptr. at 252.

10. *Id. Cf.* H. BALLANTINE & G. STERLING, 1A CALIFORNIA CORPORATIONS LAWS § 262.05(f) (4th ed. 1986).

11. *Steinberg*, 42 Cal. 3d at 1205-06, 729 P.2d at 688, 233 Cal. Rptr. at 253.

12. *Id.* at 1207, 729 P.2d at 689, 233 Cal. Rptr. at 254.

A key factor that the court considered was the plaintiff's receipt, prior to the meeting, of a proxy statement containing the facts upon which his claim was based.[13] The court further noted that the plaintiff had "acknowledged in a deposition that he discussed his right to appraisal with his attorney before the merger but decided not to seek that remedy."[14] These factors were deemed evidence of the plaintiff's awareness of the facts upon which his claim was based prior to the stockholder vote on the merger.[15]

In addressing the role that fraud and breach of fiduciary duty played in determining whether appraisal was the plaintiff's exclusive remedy, the court balanced the competing public policy considerations underlying the appraisal remedy.[16] One consideration was the danger of discouraging beneficial mergers due to shareholder suits demanding unwarranted high payoffs for shares and punitive damages.[17] On the other side was the need to ensure that those in control of corporations remain bound to their fiduciary duty to minority stockholders.[18] Into this equation the court injected the plaintiff's prior knowledge of the facts which operated to diminish the weight of the fiduciary duty factor.[19] Thus, the court concluded that the plaintiff could not maintain an action for damages based on fraud or breach of fiduciary duty.[20]

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13. *Id.*

14. *Id.*

15. *Id.*

16. The balancing approach taken by the court differs from the approach generally taken by courts in other jurisdictions which have also addressed the effect of fraud on the exclusivity of the appraisal remedy. *See, e.g.*, Twenty-Seven Trust v. Realty Growth Investors, 533 F. Supp. 1028 (D. Md. 1982) (appraisal petition did not bar damages where serious allegations of breach of fiduciary duty found); Miller v. Steinbach, 268 F. Supp. 255 (S.D.N.Y. 1967) (Pennsylvania exclusivity of appraisal law related only to mergers not tainted by fraud); Coggins v. New England Patriots Football Club, Inc., 397 Mass. 525, 492 N.E.2d 1112 (1986) (dissenting stockholder not limited to statutory remedy of judicial appraisal where violations of fiduciary duty found).

17. *Steinberg*, 42 Cal. 3d at 1210, 729 P.2d at 691, 233 Cal. Rptr. at 256.

18. *Id.* The fiduciary duty owed by majority stockholders to the minority is well established. *See* Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969) (controlling shareholders may not use their power to control corporation to benefit themselves to the exclusion and detriment of minority). *See also* Eagle v. American Tel. & Tel. Co., 769 F.2d 541 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1465 (1985) (majority shareholders have fiduciary duty not to use ability to control to benefit of majority and detriment of minority); Smith v. Tele-Communication, Inc., 134 Cal. App. 3d 338, 184 Cal. Rptr. 571 (1982) (breach of fiduciary duty by majority present where tax savings to parent caused reduced distributions to minority stockholders of subsidiary).

19. *Steinberg*, 42 Cal. 3d at 1211, 729 P.2d at 691, 233 Cal. Rptr. at 257.

20. *Id.* at 1212, 729 P.2d at 692, 233 Cal. Rptr. at 257. This conclusion is consistent

C. The Appraisal Statute provided the plaintiff with an adequate remedy.

Last, the court addressed the adequacy of the appraisal remedy for a plaintiff who claims undervaluation of shares due to breach of fiduciary duty by management. The court found the appraisal remedy to be adequate under the circumstances, noting that the plaintiff could have availed himself of an extensive statutory scheme through which to prove undervaluation,[21] and that he would not have lost any of his rights through appraisal.[22] In addition, the court commented that any adequacy problems would be more appropriately addressed by the legislature than by the courts.[23]

IV. DISSENTING OPINION

The dissenting opinion stated that it was permissible to allow the plaintiff to recover in his action for damages, and criticized the majority for striking "a forceful blow against [California's] strong public policy of protecting the investing public from frauds and deceptions committed in securities transactions."[24] The dissenters urged that the appraisal remedy was inadequate for parties damaged in a corporate reorganization.[25]

The dissenting opinion disagreed with the majority's finding that the plaintiff's damage claims rendered the action an attack on the validity of the merger.[26] Instead, the dissent focused on the plaintiff's claims of fraud as the determinative factor as to whether to apply the statute.[27] Because the plaintiff was defrauded from the beginning of the public offering, the action was not an attack on the merger and, therefore, the statute did not relegate the plaintiff to appraisal.[28]

The dissent emphasized that the failure to disclose the proposed merger in the prospectus formed the basis for the plaintiff's allegations, and this omission was not cured by the proxy statement.[29] Because the plaintiff demonstrated a sufficient possibility of fraud, he

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with the requirement that a plaintiff allege reliance in order to state a claim of fraud. *See* Flum Partners v. Child World, Inc., 557 F. Supp. 492 (S.D.N.Y. 1983); Twenty Seven Trust v. Realty Growth Investors, 533 F. Supp. 1028 (D. Md. 1982).

21. *See* CAL. CORP. CODE §§ 1300-1304 (West 1977 & Supp. 1987).

22. *Steinberg*, 42 Cal. 3d at 1209, 729 P.2d at 687, 233 Cal. Rptr. at 255.

23. *Id.* at 1209-10, 729 P.2d at 691, 233 Cal. Rptr. at 256.

24. *Id.* at 1214, 729 P.2d at 694, 233 Cal. Rptr. at 259 (Bird, C.J., dissenting).

25. *Id.* (Bird, C.J., dissenting).

26. *Id.* at 1215-16, 729 P.2d at 695, 233 Cal. Rptr. at 260 (Bird, C.J., dissenting).

27. *Id.* at 1215, 729 P.2d at 695, 233 Cal. Rptr. at 260 (Bird, C.J., dissenting).

28. *Id.* at 1216, 729 P.2d at 695, 233 Cal. Rptr. at 260 (Bird, C.J., dissenting).

29. *Id.* at 1216 n.2, 729 P.2d at 695 n.2, 233 Cal. Rptr. at 260 n.2 (Bird C.J., dissenting). *See also* Valley Nat'l Bank of Arizona v. Trustee for Westgate-California Corp., 609 F.2d 1274 (9th Cir. 1979) (adequacy of disclosure examined in statement which announced merger); Flum Partners v. Child World, Inc., 557 F. Supp. 492 (S.D.N.Y. 1983) (allegations of fraud focused on proxy statement).

should not have been limited to appraisal as his sole remedy.[30] The dissent suggested that in fact, the prevailing view among courts which have decided similar cases is that wrongful conduct by corporate fiduciaries creates an exception to the limitation.[31] Criticizing the majority for placing undue weight on threats to the controlling shareholders' power, the dissent concluded that the plaintiff's claim fit this exception and thus, the plaintiff was not restricted to the appraisal remedy.[32]

Finally, the dissent asserted that appraisal is inadequate redress for an injured shareholder.[33] The statute's technicalities were seen as difficult to utilize and a disincentive to pursuing appraisal.[34] In addition, the dissenters urged that the appraisal procedure provides early warning to management regarding the impending dissent and forces shareholders into appraisal before having the opportunity to assess its wisdom.[35] Thus, the dissent argued that the statute neither allowed full compensation for damages nor facilitated its purpose of preventing fiduciary misconduct.[36] In so concluding, the dissent found that the majority's holding effectively condones fraudulent conduct by corporate fiduciaries.[37]

V. CONCLUSION

The majority of the court held that a minority shareholder who claims damages resulting from the consummation of a merger attacks the validity of the merger itself within the meaning of section 1312(a) and is thus subject to its restrictions. In its analysis, the majority bal-

30. *Steinberg*, 42 Cal. 3d at 1217, 729 P.2d at 696, 233 Cal. Rptr. at 261 (Bird, C.J., dissenting). *See* Twenty Seven Trust v. Realty Growth Investors, 533 F. Supp. 1028, 1038 (D. Md. 1982); Coggins v. New England Patriots Football Club, Inc., 397 Mass. 525, 492 N.E.2d 1112 (1986).

31. *Steinberg*, 42 Cal. 3d at 1217-18, 729 P.2d at 696, 233 Cal. Rptr. at 261 (Bird, C.J., dissenting). *See Twenty Seven Trust*, 533 F. Supp. at 1036.

32. *Steinberg*, 42 Cal. 3d at 1218-20, 729 P.2d at 697-98, 233 Cal. Rptr. at 262-63 (Bird, C.J., dissenting).

33. *Id.* at 1219, 729 P.2d at 697, 233 Cal. Rptr. at 262 (Bird, C.J., dissenting). *See also* Buxbaum, *The Dissenter's Appraisal Remedy*, 23 UCLA L. REV. 1229 (1976); Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297 (1974).

34. *Steinberg*, 42 Cal. 3d at 1219, 729 P.2d at 697, 233 Cal. Rptr. at 262 (Bird, C.J., dissenting). For the complete process see CAL. CORP. CODE §§ 1300-1312 (West 1977 & Supp. 1987).

35. *Steinberg*, 42 Cal. 3d at 1220, 729 P.2d at 698, 233 Cal. Rptr. at 263 (Bird, C.J., dissenting).

36. *Id.* (Bird, C.J., dissenting).

37. *Id.* (Bird, C.J., dissenting).

anced the harm such lawsuits visit upon corporate progress against the need to prevent corporate fiduciary misconduct. By finding that the plaintiff had knowledge of the claimed illegalities prior to the stockholder meeting at which the merger was approved, the court felt compelled to conclude that the plaintiff's exclusive remedy lay in appraisal. The majority's balancing of policies was a departure from the prevailing approach used by other state and federal courts which view fraud cases as an exception to the rule of the exclusivity of the appraisal remedy. While the result in *Steinberg* would likely have been the same under either view but for the factual question of plaintiff's prior knowledge, the court affirmed the necessity of utilizing available statutory remedies.

SARAH A. FUHRMAN

IV. CRIMINAL PROCEDURE

A. *The substantial evidence rule was the proper standard for a trial court's review of a Board of Prison Terms' decision to revoke or rescind a previously granted parole:* In re Powell.

In *In re Powell*, 42 Cal. 3d 1075, 728 P.2d 1188, 232 Cal. Rptr. 553 (1986), the supreme court rendered its second in a series of decisions concerning Gregory Ulas Powell. The instant case held that where a Board of Prison Terms' [hereinafter BPT] decision revoking or rescinding parole was reviewed, the court must determine whether the decision was supported by substantial evidence. In applying this standard, the court found that evidence of the prisoner's sexual misconduct which was previously rejected as unfounded could not be used to support a decision to rescind. Additionally, the court acknowledged that error was created because valid evidence regarding one of several escape attempts should have been, but was not, considered in the rescission hearing. However, because this error was not fundamental, it did not justify rescission of parole.

Powell, a career criminal, was convicted of first degree murder and sentenced to death for the 1963 murder of a Los Angeles police officer. Powell and a companion, Jimmy Lee Smith, were stopped by two police officers for a minor traffic violation. Powell shot one of the officers, and the second officer made a miraculous escape. The story of this crime and the ensuing trial was the subject of a book entitled "The Onion Field" by Joseph Wambaugh and, later, a movie by the same name.

Powell's conviction was reversed, but he was again convicted, and his sentence was reduced to life imprisonment. *People v. Powell*, 67 Cal. 2d 32, 429 P.2d 137, 59 Cal. Rptr. 817 (1967); *People v. Powell*, 40

Cal. App. 3d 107, 115 Cal. Rptr. 109 (1974). Prior to modification of his sentence, Powell made several escape attempts. However, after the modification, he had a record as an exemplary prisoner. Following a parole consideration hearing in 1977 and later progress reports, Powell was granted a parole release date of June 13, 1982. *See generally* CAL. PENAL CODE §§ 1168, 3040 (West 1982); 49 CAL. JUR. 3D *Penal and Correctional Institutions* §§ 167, 172-75 (1979); B. WITKIN, CALIFORNIA CRIMES, §§ 1091, 1097 (1963).

In 1979, allegations of Powell's sexual misconduct arose, and they were investigated by the BPT. Finding an insufficient factual basis for the claims, the BPT dismissed the matters and rejected them from consideration of Powell's progress. *See generally* 22 CAL. JUR. 3D *Criminal Law* § 3472 (1979). Psychiatric evaluations of Powell made in the regular course of examining his case for parole concluded in favor of parole and its success.

However, in February 1982, two weeks after the release of the movie, "The Onion Field," on national television, the BPT felt the force of public pressure. In response to communications from the governor, the district attorney, and the Board of Supervisors of Los Angeles, the BPT scheduled a rescission hearing at which the psychiatric evaluations, previous escape attempts, and the allegations of sexual misconduct were examined. *See generally* CAL. PENAL CODE § 3041.5 (West 1982); 49 CAL. JUR. 3D *Penal and Correctional Institutions* § 193 (1979).

The BPT's resulting rescission order had two bases. First, a psychiatric report presented at the hearing stated that Powell's proclivity for violence remained, thus making his success as a parolee doubtful, in spite of previous opinions. This report was based in significant part on the assumption that the allegations of sexual misconduct were true. Thus, the BPT found the need for public protection weighed heavily in favor of continued psychiatric testing prior to parole. In addition, the BPT concluded that the previous BPT panel that had granted parole committed fundamental error when it failed to consider one of Powell's several escape attempts in its determination to grant parole.

When the Superior Court of Solano County reviewed this decision, the judge applied the independent judgment standard of review. In doing so, the court opposed both reasons for rescission set forth by the BPT and granted Powell's writ of habeas corpus. Thereafter, the writ was denied by the court of appeal.

In its review, the supreme court examined the scope of the BPT's

power to grant and remove parole. While the power to grant parole is broad, the power to rescind is more limited. Rescission requires good cause. *See In re McLain*, 55 Cal. 2d 78, 87, 357 P.2d 1080, 1086, 9 Cal. Rptr. 824, 830 (1960). In addition, a parolee is entitled to due process. *See In re Prewitt*, 8 Cal. 3d 470, 503 P.2d 1326, 105 Cal. Rptr. 318 (1972). *See generally* B. WITKIN, CALIFORNIA CRIMES, §§ 96A-B, 1100, 1100A-B (1963 & Supp. 1985); Comment, *Due Process in Parole Revocation Proceedings* 63 CALIF. L. REV. 276 (1975).

The court acknowledged that section 1094.5 of the Civil Procedure Code was to be used to determine whether administrative proceedings involving the deprivation of rights should be reviewed under the independent judgment or substantial evidence test. However, the former was applicable only where property and economic rights are involved. The court reasoned that when rights to liberty were involved, as in the instant case, substantial evidence was the proper test. Thus, the court determined that the trial judge applied the incorrect standard in examining the BPT's decision.

In applying the substantial evidence test, the court still found the record did not warrant rescission. The BPT's reliance on the psychiatrists' recommendation was invalid. The report was based in part on the assumption that the allegations of sexual misconduct were true, while the BPT itself had dismissed those claims. The court would not allow the BPT to base any part of its decision on information which it had earlier rejected. Use of such information as a factual basis for a finding would violate the *In re Prewitt* due process requirements.

The court stated that the prior BPT panel's failure to discover that Powell had made an escape attempt in addition to those of which they were aware was not fundamental error. *See* CAL. ADMIN. CODE tit. 15, § 2451 (1985) [hereinafter section 2451]. Although the exclusion was error, the court determined that knowledge of the additional evidence would not have created substantial difference in the decision to grant parole.

The court pointed out in its conclusion that the holding eliminated the need to address whether public outcry played a part in the BPT's decision. The court's opinion as to what influence public pressure should or should not have on parole decisions was left unexplained. Nevertheless, the permissible reasons for rescission outlined in section 2451 do not include a category which would encompass public opinion.

Yet, it is likely that public outrage at Powell's release was a major impetus for the BPT calling a rescission hearing and may have colored the opinions of BPT panel members. If such were the case, then the BPT found weak evidentiary support to justify its decision.

The court's rejection of the BPT's proffered reasons demonstrated that even where public opinion was strong, it remained committed to the integrity of individual constitutional rights and would require a strong showing to support their denial.

SARAH A. FUHRMAN

B. *When executing a search warrant, the police must obtain prior judicial authorization to use a motorized battering ram and exigent circumstances must exist at the time of execution:* **Langford v. Superior Court.**

In *Langford v. Superior Court*, 43 Cal. 3d 21, 729 P.2d 822, 233 Cal. Rptr. 387 (1987), the court considered the issue of whether the police could employ the use of pyrotechnic devices and motorized battering rams when executing a search warrant without prior judicial authorization. Additionally, the court considered whether a preliminary injunction was an appropriate remedy for the use of such devices.

The Los Angeles Police Department employed the use of the V-100 (a motorized battering ram) and flashbangs (pyrotechnic explosive devices that created flashes of light and sounds resembling gunshots) when executing a search warrant on a "rock house" (a specially fortified home where crystallized "rock" cocaine is manufactured and sold). The owners of the dwelling brought an action for damages and declaratory and injunctive relief, including an application for a preliminary injunction against use of the ram and the flashbangs. The trial court denied the plaintiff's motion for injunctive relief and the court of appeal summarily denied the petition.

The California Supreme Court held that use of the pyrotechnic device was not unreasonable and, therefore, the plaintiffs were properly denied preliminary injunctive relief. As to the battering ram, the court held that the trial court had abused its discretion in denying the plaintiff preliminary injunctive relief. The court applied the following test: 1) What is the likelihood that the plaintiff would prevail on the merits; and 2) whether the interim harm suffered by the plaintiff would be greater than that suffered by the defendant.

As to the first prong of the test, the court based its holding on the fourth amendment. The court held that the use of the battering ram could be justified only where the police had obtained a valid search warrant and prior judicial consent, and where exigent circumstances existed at the time of the execution of the warrant. The court found

that the plaintiff was likely to prevail on the merits of the fourth amendment challenge.

The court then considered the second part of the test, weighing the possible harm the plaintiff might suffer by denial of injunctive relief against the harm suffered by the defendant if such relief were granted. The court found that the plaintiff would be exposed to greater harm if the police were allowed to continue the per se unreasonable use of the battering ram without a detached neutral magistrate's authorization. The court believed that requiring an authorization to use the ram would impose only a minimal burden on the police since they may obtain the authorization at the same time that they apply for the warrant.

JAMES A. COULTER, III

C. *For capital sentencing procedure, only one special circumstance per category can be imposed. A capital defendant who does not receive benefits of disparate sentence review is not denied equal protection:* **People v. Allen.**

I. INTRODUCTION

People v. Allen[1] presented a narrative of the murderous activities of the head of a "crime family."[2] It was one of the few recent cases wherein the supreme court upheld a death penalty sentence. In so doing, the court necessarily decided a wide variety of issues presented on appeal, most of which did not involve a particularly unique interpretation of the law.

II. FACTUAL BACKGROUND

The defendant "employed" a variety of associates, including his sons and girlfriend, to assist him in the commission of a myriad of crimes. He silenced his criminal partners with numerous boasts and threats, intimating that he could kill anyone any time, even from prison.[3]

The defendant made good on his threat in 1974. A young girl who had acted as defendant's accomplice in the burglary of a neighborhood market confessed to one of the victims, implicating the defendant.[4] Accordingly, the defendant ordered several of the "family" members to kill the "snitch" and to dump the body into a canal.[5]

1. 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986).
2. *Id.* at 1236, 729 P.2d at 120, 232 Cal. Rptr. at 854.
3. *Id.* at 1238, 729 P.2d at 121, 232 Cal. Rptr. at 856.
4. *Id.* at 1236, 729 P.2d at 120, 232 Cal. Rptr. at 854.
5. *Id.* at 1237, 729 P.2d at 121, 232 Cal. Rptr. at 856.

Thereafter, the defendant was even more vocal about his ability to mortally injure any family member who snitched.

In 1977, the defendant was arrested and subsequently convicted for armed robbery, attempted robbery, and assault with a deadly weapon. This led to a trial for the 1974 market burglary and murder, at which numerous family members and the burglary victim testified against the defendant. He was convicted of first degree murder and sentenced to prison.

From Folsom prison, the defendant met a convicted robber, Hamilton, who was scheduled to be paroled in 1980. Allen arranged for Hamilton to contact his son, Kenneth, upon release. The defendant's son provided the weapons which Hamilton then used to kill three people, including the original victim/witness that had testified against Allen.

Kenneth Allen was arrested on drug charges shortly after the murders. He agreed to testify truthfully about the murders in exchange for protective custody and his choice of prisons.[6] This plea agreement was terminated when Kenneth changed his story in an effort to exculpate his father, even though he later confirmed his original story as the truth.

The defendant was convicted in superior court of three counts of murder and conspiracy to murder seven witnesses that had testified against him at his 1977 trial. Additionally, eleven special circumstances were found. The jury in the penalty phase deliberated for just one day before deciding upon a death sentence.[7]

III. THE LEAD OPINION

Justice Grodin[8] began the court's analysis by determining that the prosecution's plea agreement with Kenneth Allen did not place him

6. *Id.* at 1243, 729 P.2d at 125, 232 Cal. Rptr. at 859.

7. *Id.* at 1247, 729 P.2d at 128, 232 Cal. Rptr. at 862.

8. The seven justices that participated in the decision affirmed the guilty verdict of the lower court. Four justices agreed that the death penalty was appropriate. Justice Mosk concurred in the lead decision authored by Justice Grodin. Justice Panelli concurring, wrote a short paragraph indicating disagreement in areas that did not affect the majority's ultimate conclusions regarding penalty phase error; Justice Lucas concurred in this opinion. Justice Broussard wrote a separate opinion concurring with the majority as to the judgment in the guilt phase and dissenting with respect to the penalty phase; Justices Bird and Reynoso concurred in this opinion. Justice Bird also wrote a separate concurring and dissenting opinion to "express [her] views on the proportionality review issue discussed in the majority opinion." *Id.* at 1290, 729 P.2d at 158, 232 Cal. Rptr. at 892 (Bird, C.J., concurring and dissenting).

"under such a strong compulsion to testify in a particular fashion as to deny defendant a fair trial."[9] The prosecution had disavowed the agreement when Kenneth committed perjury, and made sure that Kenneth knew that the agreement would not be resurrected if he changed his story to conform to his original version of events.

The court then denied the defendant's three charges of abuse of judicial discretion,[10] and held that any errors that might have arisen under the circumstances were harmless. The majority of the court supported the lower court's rulings on nearly every issue raised on appeal, including lack of evidence to support an allegation of juror misconduct[11] and several rulings concerning relevancy.[12]

In analyzing the special circumstances alleged in support of the death penalty, the court found three special circumstances rather than eleven.[13] In applying the statutory provisions, the court declared that only one special circumstance could be found under any category, even if numerous violations had occurred.[14]

Finally, the jury instructions concerning weighing aggravating and mitigating factors were challenged as misleading.[15] The court agreed that, considering the prosecutor's entire closing argument, the jury

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9. *Id.* at 1255, 739 P.2d at 133, 232 Cal. Rptr. at 867.

10. The errors involved: 1) admission of nine color photographs of the murder victims taken at the crime scene or at the coroner's office before autopsies were performed; 2) the superior court made one ruling rather than two on defendant's motion for new trial and statutory application for a new trial under section 190.4 of the Penal Code; 3) placing and removing ankle restraints on a defense witness out of the presence of the jury. *Id.* at 1255-65, 729 P.2d at 133-40, 232 Cal. Rptr. at 867-74.

11. *Id.* at 1265, 729 P.2d at 141, 232 Cal. Rptr. at 874-75. When the judge informed the jurors that they would be sequestered for the evening, he was asked if it was alright for the jurors to have a "small glass of wine or a small beer or something like that." *Id.* He replied, "Let your conscience be your guide." *Id.* The defense unsuccessfully challenged this as juror misconduct since no evidence was ever offered to show that any of the jurors consumed alcohol during the trial.

12. *Id.* at 1267-70, 729 P.2d at 142-44, 232 Cal. Rptr. at 876-78. Most of the questions concerning relevancy arose as a result of the trial court's restriction of the defendant's cross-examination of a prosecution witness. Like the defendant, the witness was serving time in Folsom prison. The witness' prior murder conviction itself was relevant for impeachment purposes. However, the specific circumstances of the crime were not.

13. All seven justices concurred in this result. In so-called "special circumstances" the judge at the penalty phase is bound by statute to impose a stiffer sentence (i.e., additional time in prison; death sentence rather than life in prison). Various special circumstances are specifically defined in the Penal Code. *See, e.g.*, CAL. PENAL CODE § 190.2 (West Supp. 1987).

14. *Allen*, 42 Cal. 3d at 1273-74, 729 P.2d at 146-47, 232 Cal. Rptr. at 880-81. The jury found the special circumstances to be true under three subdivisions of section 190.2 of the Penal Code: 1) multiple murders; 2) witness killing; and 3) prior murder conviction. *Id. See* CAL. PENAL CODE § 190.2(a)(2), (3), (10) (West 1985).

15. The prosecutor said in his closing statement to the jury: "If you conclude that aggravating evidence outweighs the mitigating evidence, you *shall* return a verdict of death." *Allen*, 42 Cal. 3d at 1288-89, 729 P.2d at 157, 232 Cal. Rptr. at 891 (Broussard, J., concurring and dissenting) (emphasis added). This was challenged as "mislead[ing] the jury as to the ultimate question it was called on to answer in determining which sentence to impose." *Id.* at 1277, 729 P.2d at 149, 232 Cal. Rptr. at 883.

was not mislead as to its discretion to decide if the death penalty was appropriate under the circumstances.[16]

IV. CONCURRING AND DISSENTING OPINIONS

A. Justice Panelli

Justice Panelli wrote a single concurring paragraph to emphasize his agreement with the majority regarding the harmless effect of errors committed during the penalty phase of the trial, and his disagreement with the majority regarding the "standard of review of penalty phase error."[17]

B. Justice Broussard

Justice Broussard strongly disagreed with the majority with respect to the prejudicial effect of the prosecution's comments during closing argument regarding jury instructions.[18] He concluded that the prosecution had told the jury that the death penalty was mandatory if they found that aggravating evidence outweighed mitigating evidence.[19]

C. Chief Justice Bird

In a concurring and dissenting opinion, Chief Justice Bird made a forceful argument that the court should require proportionality review of capital cases on state constitutional grounds.[20] The cornerstone of the Chief Justice's argument rested on equal protection

16. *Id.* at 1280, 729 P.2d at 151, 232 Cal. Rptr. at 885. *But see infra* note 18 and accompanying text.

17. *Id.* at 1288, 729 P.2d at 157, 232 Cal. Rptr. at 891 (Panelli, J., concurring).

18. Just as the majority had, Justice Broussard relied on the analysis in People v. Brown, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), where jury instructions mandated under the death penalty statute could be misleading. Therefore, the facts of each case should be examined closely to determine if the jury properly understood their role in the sentencing process. However, he analyzed the facts differently, concluding that the jury was not properly instructed, resulting in reversible error. *See supra* note 15 and accompanying text.

19. *Allen*, 42 Cal. 3d at 1289, 729 P.2d at 158, 232 Cal. Rptr. at 891 (Broussard, J., concurring and dissenting).

20. Proportionality review requires an independent assessment as to whether the "punishment imposed is disproportionate to individual culpability." *Id.* at 1286, 729 P.2d at 155, 232 Cal. Rptr. at 889.

> Statutory post-sentencing comparative proportionality review may be the best means of ensuring that a state's statutory capital sentencing scheme is functioning within the eighth amendment guidelines established by [the Supreme Court]. This review measures the consistency with which sentencing authorities impose the death penalty. . . . Of the thirty-seven states that presently

grounds: after acknowledging "an elaborate form of statewide comparative review of sentences in *noncapital* felony cases,"[21] Chief Justice Bird asserted that the dissimilarities between felons sentenced to prison and felons who receive the death penalty are not so great as to permit a classification that provided proportionality review for one class of felony conviction but not for another.

The Chief Justice supported her argument by demonstrating that there were both quantifiable and nonquantifiable circumstances involved in both capital and noncapital cases. Therefore, consistency in sentencing could have been determined in one class of cases as readily as the other. She concluded, "In sum, no compelling reasons have been offered which persuade me that capital and noncapital sentencing proceedings are so vastly different as to justify the absence of disparate review in capital cases. Equal protection demands similar treatment here."[22]

IV. CONCLUSION

This case was decided primarily on standard applications of law to especially egregious facts; mitigating circumstances were virtually absent. The court continues to disagree on the necessity of giving specific jury instructions regarding its ability to make a normative decision regarding imposition of the death penalty. The adoption of proportionality review as standard procedure in California death penalty cases is yet to be forthcoming.

RHONDA SCHMIDT

D. *An eleven-year-old child's consent to enter a residence to effect an arrest warrant was held invalid where the police had no reasonable grounds to believe that the defendant was inside the residence:* **People v. Jacobs.**

In *People v. Jacobs*, 43 Cal. 3d 472, 729 P.2d 757, 233 Cal. Rptr. 323 (1987), the defendant was suspected of burglarizing the automobile

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permit the death penalty, thirty-one require comparative proportionality review of death sentences.

Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1189 (1984).

21. *Allen*, 42 Cal. 3d at 1292, 729 P.2d at 160, 232 Cal. Rptr. at 894 (Bird, C.J., concurring and dissenting) (emphasis in original). *See* CAL. PENAL CODE § 1170(f) (West Supp. 1987). *See generally* Special Project, *supra* note 20 (discusses various mechanisms for review in capital cases); Note, *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87 (1984) (discusses Pulley v. Harris, 104 S. Ct. 871 (1984), wherein the Supreme Court held that the eighth amendment does not require comparative proportionality review in capital cases); Comment, *The Dillon Dilemma: Finding Proportionate Felony-Murder Punishments*, 72 CALIF. L. REV. 1299 (1984).

22. *Allen*, 42 Cal. 3d at 1300, 729 P.2d at 165, 232 Cal. Rptr. at 899 (Bird, C.J., concurring and dissenting).

dealership where he had been employed as a janitor. Two specially manufactured television sets were stolen.

Two police officers, armed with an arrest warrant, went to the defendant's house at approximately 3:20 p.m. The defendant did not have a daytime job, so the officers expected him to be at home in the afternoon. The officers knocked at the front door, identified themselves, and were told by the defendant's eleven-year-old stepdaughter that he was not at home, but would return within an hour. The officers did not believe the child and, therefore, asked her if they could enter to confirm the defendant's absence. The officers entered the residence and made a cursory search for the defendant with negative results.

While in the defendant's living room, the officers saw a specially manufactured television set, which they seized as evidence. The television set was subsequently admitted into evidence at the defendant's burglary trial, which resulted in his conviction.

The court of appeal affirmed the conviction. However, the supreme court's interpretation of the facts in light of the requirements of section 844 of the Penal Code was substantially different, resulting in reversal of the conviction.

The court first acknowledged that section 844, the "knock-notice" statute, allows police officers to forcibly enter a residence to effect an arrest warrant when they reasonably believe that the suspect is hiding within, or that the suspect may flee to avoid arrest. The officers must first knock at the door and announce their presence and their purpose to allow the inhabitants an opportunity to respond appropriately. *See* CAL. PENAL CODE § 844 (West 1985 & Supp. 1987).

The police officers concluded that, because the defendant did not have a daytime job, he was within his residence, and the defendant's stepdaughter was lying about his absence. The court was unpersuaded that the officers' belief was statutorily reasonable. *See generally* 6A C.J.S. *Arrest* § 49 (1975); Note, *The Knock and Demand Policy: Is it a Necessary Evil?*, 2 U. WEST L.A. L. REV. 132 (1970).

The court also held that an eleven-year-old child cannot waive the privacy rights of her parents and, therefore, cannot give police officers valid consent to enter a family residence. The court did not rule out scenarios wherein a teenager may possess the delegated authority of the parent and validly consent to a police search.

The court ruled that the police did not comply with the knock-notice statute and did not have consent to enter the residence; the court

therefore held that the television set seized as a result of that entry was inadmissable evidence. The court found further that its admission by the trial court was prejudicial error.

In this decision, the court seemed to be telling law enforcement officials that absent exigent circumstances, they should take the time to follow the letter of the law in effecting arrests. Although the officers in this case took the time to secure an arrest warrant, the court evidently thought they should have taken the same care in serving it.

RHONDA SCHMIDT

E. *The question of prosecutorial due diligence is subject to independent appellate review:* **People v. Louis.**

In *People v. Louis*, 42 Cal. 3d 969, 728 P.2d 180, 232 Cal. Rptr. 110 (1986), the court decided that the prosecution had not exercised due diligence in securing the presence of a key witness, and thus the preliminary hearing transcript containing the witness's testimony could not be introduced at trial. Therefore, the court reversed the defendant's conviction and death sentence for murder.

The court first declared that the exercise of due diligence presented a mixed question of law and fact. In reviewing the trial court's decisions, the supreme court followed the guidelines concerning mixed questions enunciated in *United States v. McConney*, 728 F.2d 1195 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984). At the appellate level, the standard of review differs, depending upon which step of the process is under review. An issue of fact is subject to the clearly erroneous standard. Selection of the appropriate rule of law is subject to *de novo* review; the application of the rule of law to the established facts may be either the clearly erroneous standard or the *de novo* standard, depending upon the nature of the inquiry.

In the present case, the court noted that the admissibility at trial of a witness' prior testimony turns on an inquiry into prosecutorial due diligence in presenting the witness. The court decided that such a determination necessarily involved an analysis and weighing of abstract constitutional principles, and thus held the *de novo* standard of review at the appellate level to be most appropriate. The court thereby overruled *People v. Jackson*, 28 Cal. 3d 264, 618 P.2d 149, 164 Cal. Rptr. 603 (1980), to the extent that it held the same question as simply one of fact.

The witness had testified at the preliminary hearings for both Louis and his co-defendants; and was in custody when the trial began for the co-defendants. The prosecution knew that the witness's testimony was vital, that the witness lied often, used aliases, and had failed to show up for his own court dates. Even so, the prosecution

arranged for the witness's release on his own recognizance in exchange for his testimony at trial. The witness disappeared following his release.

In discussing the requirements of the duty of due diligence, the supreme court emphasized that the prosecution was under a stringent obligation: first, to make every effort to make an absent witness present; and second, to use reasonable means to insure that the witness does not purposely become unavailable to testify. Since the prosecution did not keep the witness under surveillance, and failed to obtain an accurate address prior to his release, the court held that the prosecutor did not meet this duty. *See* CAL. EVID. CODE § 1291 (West 1966 & Supp. 1987); *see also* 31 CAL. JUR. 3D *Evidence* § 232 (1976).

By overruling *Jackson*, the court has relegated the question of due diligence to a category of issues that receives *de novo* review on appeal, the same category that includes such questions as exigent circumstances and probable cause. Although the court was greatly influenced by the facts of this case, this decision could also be read as imposing an extraordinary burden on the prosecution to keep witnesses under constant surveillance before trial.

RHONDA SCHMIDT

F. *Warrantless aerial surveillance of a person's marijuana garden is not an unconstitutional search when the garden is not within the curtilage of a home:* **People v. Mayoff.**

In *People v. Mayoff*, 42 Cal. 3d 1302, 729 P.2d 166, 233 Cal. Rptr. 2 (1986), the court affirmed its previous holdings that law enforcement agencies may constitutionally observe open fields since there is no legitimate expectation of privacy. *See generally* Matens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REF. 551 (1984); 20 CAL. JUR. 3D (Rev.) *Criminal Law* § 2516 (1985). The defendant's marijuana cultivation was discovered as a result of random aerial surveillance of rural areas in a marijuana eradication program. The police officers took pictures of the defendant's land, using a telephoto lens, at an altitude of approximately 1,000 feet. A search warrant was then issued and marijuana was discovered. The defendant was charged with cultivation of marijuana.

The trial court denied the defendant's motion to suppress the evidence on the grounds that the aerial surveillance violated his constitutional right to privacy and his right against unreasonable searches

and seizures. The defendant was sentenced to six months in jail and two years probation. The defendant appealed, reasserting his constitutional claims.

The defendant's land was very isolated and not viewable from the road. It was connected to the road by a dirt path on which bystanders could see only the tops of the defendant's buildings. The police officers viewed two gardens. Only one of the gardens was fenced. However, both of the gardens were surrounded by wilderness and steep slopes. The gardens were at least two hundred feet from the defendant's trailers and there was no fence enclosing the trailers and gardens together.

The court focused on whether the defendant had a reasonable expectation of privacy. *See generally People v. Cook*, 41 Cal. 3d 373, 710 P.2d 299, 221 Cal. Rptr. 449 (1985). Although the United States Supreme Court had recently decided *California v. Ciraolo*, 106 S. Ct. 1809 (1986), concluding that aerial surveillance of the curtilage area is not constitutionally protected, the California Supreme Court held that the California Constitution was independent of the United States Constitution insofar as it may afford individuals greater protection. *See* CAL. CONST. art. 1, § 24. The court followed the holding in *Oliver v. United States* 466 U.S. 170 (1984). In *Oliver*, the United States Supreme Court held that that there was a legitimate expectation of privacy in one's home, and the curtilage surrounding the home, but not in open fields. However, the court concluded that the crops observed were not within the curtilage of the defendant's trailers, that they were at least two hundred feet away and not enclosed.

The court dismissed defendant's argument that the telephoto lens constituted an unwarranted intrusion. Although the pictures were taken with the telephoto equipment, the court reasoned that they were not any more accurate in scale than one can see with a "naked eye." The court further noted that the details of human activity could not be observed through the lens.

The defendant unsuccessfully contended that the observations were unconstitutional since the open fields were observed in relation to his curtilage and home. The court held that the mere unavoidable and incidental observation of protected property does not transform the viewing of the open fields into an unconstitutional search. "There is a difference . . . between surveillance focused on a particular residential yard . . . and . . . surveillance which concentrates on open fields and merely notices their relationship to nearby habitation." *Mayoff*, 42 Cal. 3d at 1316-17, 729 P.2d at 174, 233 Cal. Rptr. at 10.

The defendant also argued that the police officers lacked probable cause since they could not have actually identified the marijuana

plants from 1,000 feet in the air. The officers contended that they had drawn upon their experience and were familiar with the typical crop patterns of marijuana. Further, they stated that the temporary nature of the buildings confirmed their suspicions. The court stated that probable cause was a factual issue, so it would not disturb the lower court's findings.

Finally, the court focused on the balancing of particular privacy expectations and the nature of the governmental intrusion to determine whether the surveillance was unreasonable. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The court concluded the balance tipped in favor of the surveillance since it may have been the only feasible means in which to police the remote, dangerous, and otherwise inaccessible lands.

The court extended the "open fields" doctrine in that the government may now observe constitutionally protected areas, such as a home and its curtilage, in relation to the surrounding open fields. Moreover, the court noted in dictum that Proposition 8 (article 1, section 28(d) of the California Constitution) now provides that relevant evidence may not be excluded in a criminal proceeding. Therefore, only criminal evidence excluded by the standards of the United States Constitution must be excluded in California. Since this case arose prior to 1982, when Proposition 8 was passed, the pre-1982 California Constitution was still applicable.

MARIANNE CHIAPUZIO

G. *The standard of review for violation of the state constitutional right to an interpreter is whether the error was harmless beyond a reasonable doubt:* **People v. Rodriguez.**

In *People v. Rodriguez*, 42 Cal. 3d 1005, 728 P.2d 202, 232 Cal. Rptr. 132 (1986), the court heard the appeal of the defendants Juan and Barbaro Rodriguez. Both were found guilty of kidnapping. In addition, Juan was convicted for discharging a firearm at an inhabited dwelling, while personally using a firearm. All charges stemmed from the events of September 10, 1982, revolving around the loss and attempted recovery of a chain belonging to Juan.

Juan Rodriguez arrived at a party during the early morning hours. Once there, Juan allowed Mario Ruiz, nephew of the party host, to wear his chain. At dawn Raul Huerta arrived, but departed soon thereafter in Juan's automobile, with Mario and two others, to go to

the store. Upon their return, Juan demanded the keys to his car and the return of his chain. Having been rebuked in his request for the chain, Juan left.

However, Juan soon returned with his cousin, Barbaro, and a .32 caliber handgun. Again demanding the return of his chain, Juan fired a single round at the house, and then pointed the gun at Huerta, compelling him to enter the car to assist in the relocation of the chain. Unsuccessful in their quest at the home of Mario's mother, the expedition returned to the original scene. The police arrived, having been summoned after the shots, and immediately apprehended Barbaro. Juan was found hiding nearby.

Several details concerning the incident were disputed. Despite prosecution testimony to the contrary, and the fact that .32 caliber ammunition was found on Barbaro's person, both Juan and Barbaro denied the use of a weapon in forcing Huerta's cooperation in finding the chain. In their defense, they both testified that Huerta accompanied them voluntarily.

At the joint preliminary hearing two interpreters were sworn, one to assist Huerta for the prosecution, the other for the defendants. Again, at the beginning of trial, two interpreters were sworn to assist the defendants. As the trial progressed, the translators were sometimes enlisted to aid non-English speaking witnesses. However, the services of one of the interpreters, Mona Rich, was primarily reserved for the defendants. At the conclusion of this trial, Juan and Barbaro Rodriguez were convicted and sentenced.

On appeal, the primary issue upon which the court focused was whether the Spanish-speaking defendants were improperly denied the full-time assistance of an interpreter. Peripheral questions regarding the sufficiency of the evidence, the exercise of discretion by the trial court in excluding evidence, and the denial of probation to Juan were summarily dismissed as being without merit in the latter part of the opinion.

Justice Lucas, writing for the court, first turned to *People v. Aguilar*, 35 Cal. 3d 785, 677 P.2d 1198, 200 Cal. Rptr. 908 (1984), to review the duties of the translator in fulfilling a defendant's right to an interpreter established by article I, section 14 of the California Constitution. The *Aguilar* decision recited the three basic roles for an interpreter: (1) to interpret the questions and answers of non-English speaking witnesses; (2) to advance the defendant's understanding of the judicial process; and (3) to enable the defendant to consult with his English-speaking attorney. *Id.* at 790, 677 P.2d at 1201, 200 Cal. Rptr. at 911. *See also* Comment, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 CAL. L. REV. 801 (1975). However, *Aguilar* only reaffirmed the importance of the

presence of an interpreter throughout the proceedings; the decision did not establish a standard of review to be applied.

Justice Lucas supplied three possible tests for reversal if an interpreter was improperly denied. The first, a per se standard requiring automatic reversal for a violation, was rejected. As in *People v. Bigelow*, 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984), the utility of a per se standard is dependent upon the character of the right involved or the impossibility of later identifying prejudice. Because there are circumstances where the absence of an interpreter would not lead to substantial prejudice, the per se standard was seen as unnecessary.

The second possible standard for violations of state constitutional rights was established in *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956). The test is whether it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." *Id.* at 836, 299 P.2d at 254. The court avoided the application of a *Watson* standard by noting that there the situation implicated numerous federally guaranteed rights. The court was more comfortable in adopting a third approach presented in *Chapman v. California*, 386 U.S. 18 (1967). Under the *Chapman* standard, a federal constitutional error may be deemed harmless only if the appellate court was "able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. The reviewing court must make two inquiries under this standard. First, it must look at the entire record to determine whether the error might have materially influenced the jury in its verdict. Second, the court must weigh the impact of the error in the course of the trial.

Applying this test to these particular facts, the court was unable to find within the record a situation where the defendants' ability to communicate or comprehend was impeded. The court suggested that the best and preferred means of avoiding similar complaints would have been to require that each defendant have an interpreter assigned to him, who would remain at his side throughout the proceedings. However, nothing in the record demonstrated any difficulties arising from the use of a shared interpreter. The court distinguished *People v. Menchaca*, 146 Cal. App. 3d 1019, 194 Cal. Rptr. 691 (1983), in which the court found that because of the shared interpreter, the defendant did not understand much of what occurred at the trial. Since the record was totally devoid of any objections made by the defendants at trial, the court refused to speculate whether some material interruption in access to the interpreter may have occurred.

It appears from the holding in this case that an attorney must object at the trial level to the use of a shared interpreter. At the very least, the record must reveal some indication that the defendants' comprehension of the proceedings was compromised. The court did, however, leave open the possibility for a defendant to utilize a habeas corpus proceeding where the record itself is devoid of concrete evidence showing conflict.

TRAVIS P. CLARDY

H. *It is reversible error to refuse a jury instruction regarding the effect of psychological factors on eyewitness identifications when the defendant's identification is crucial to the issue of guilt:* **People v. Wright.**

In *People v. Wright*, 43 Cal. 3d 399, 729 P.2d 280, 233 Cal. Rptr. 89 (1987), the court considered the issue of whether a jury instruction was required regarding 1) psychological factors influencing the reliability of eyewitness identification and 2) a cautionary instruction as to the inherent unreliability of eyewitness identifications. The court found that the trial court committed reversible error by failing to give such instructions when the identification was necessary to connect the defendant with the crime.

The defendant was convicted of armed robbery. The only evidence linking him with the crime was an eyewitness identification alleging that the defendant was seen at the scene of the crime with several other men with stockings over their heads. At the close of the defendant's case, he properly requested certain jury instructions. One of those requested instructions dealt with the psychological factors that could affect the accuracy of the eyewitness identification. Another involved a caution regarding the reliability of eyewitness identification testimony generally. The trial court denied the requested instructions and the defendant appealed. The court of appeal affirmed the trial court's decision.

In its analysis, the supreme court chose not to follow the numerous contrary holdings of the courts of appeal regarding the "psychological factor" instruction. See, *e.g.*, *People v. Ware*, 78 Cal. App. 3d 822, 144 Cal. Rptr. 354 (1978); *People v. Boothe*, 65 Cal. App. 3d 685, 135 Cal. Rptr. 570 (1977); *People v. Kelley*, 75 Cal. App. 3d 672, 142 Cal. Rptr. 457 (1977). Instead, the court adopted the holding set forth in *People v. Guzman*, 47 Cal. App. 3d 380, 121 Cal. Rptr. 69 (1975). The *Guzman* court allowed the "psychological factor" instruction which was requested by the defendant in the present case. The *Guzman* instruction was originally developed in the case of *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972). The instruction created

guidelines for juries to use in assessing the credibility of witness identifications.

The court then discussed the use of the cautionary instruction regarding the inherent unreliability of eyewitness identifications. The court reasoned that such an instruction serves to insure that the jury understands its responsibilities, and the defendant was entitled to this instruction upon proper request. The majority concluded that the omission of these instructions was prejudicial error, since the risks inherent in eyewitness identification are well-founded, and failure to inform the jury of these concerns may have affected the verdict. Finally, the court included two jury instructions in the appendix of the opinion for use in cases of eyewitness testimony. *Wright*, 43 Cal. 3d at 434-35, 729 P.2d at 296-97, 233 Cal. Rptr. at 105-06.

JAMES A. COULTER, III

V. EVIDENCE

A. *Requirement that a criminal defendant make "reasonable efforts" to secure attendance of an adverse witness at the preliminary hearing to avert admission of written statements as substituted testimony was unconstitutional; admission of such affidavit was harmless error where other sufficient evidence was shown to support a finding of probable cause:* **Mills v. Superior Court.**

In *Mills v. Superior Court*, 42 Cal. 3d 951, 728 P.2d 211, 232 Cal. Rptr. 141 (1986), the supreme court was faced with deciding the constitutionality of section 872 of the Penal Code [hereinafter section 872]. The court's conclusion as to the constitutionality is unclear. The lead opinion, written by Justice Mosk, intimated that section 872 was unconstitutional in its entirety. However, the opinion mentioned specifically only subsections (b) and (c). Justice Reynoso's separate concurring and dissenting opinion, with which Justices Bird and Broussard concurred, stated that it concurred with holding section 872(b) unconstitutional, and made no mention of the statute as a whole or of subsection (c). Justice Panelli separately concurred and dissented, with Justices Grodin and Lucas joining. Justice Panelli objected to the court's ruling that section 872(c) was unconstitutional, making no reference to any other subsections of section 872. Thus,

the subsections of section 872 will be referred to generically as section 872.

The accused was charged with auto burglary. Pursuant to section 872, the defendant made a demand by phone that the prosecution produce the victim of the alleged auto burglary as a witness at the preliminary hearing, rather than substituting an affidavit for the live testimony. Nevertheless, the prosecution offered the victim's affidavit at the hearing, arguing that a telephone call was not sufficient to satisfy section 872's requirement of "reasonable efforts" to procure personal testimony. In addition, the prosecution presented as evidence eyewitness testimony by the arresting police officer. The magistrate ruled that the defendant's telephone call did not meet the "reasonable efforts" requirement. Thus, the affidavit was admitted and the defendant was held to answer on a charge of auto burglary. The defendant responded with a writ of prohibition which was denied by the court of appeals.

The supreme court decided that section 872 must be scrutinized to prevent unconstitutional restrictions on the appellant's right to confront witnesses at the preliminary hearing. *See generally* 21 CAL. JUR. 3D *Criminal Law* §§ 2710, 2712 (1984).

The court first analyzed the "reasonable efforts" requirement of section 872. *See generally Review of Selected 1981 Legislation*, 13 PAC. L.J. 513, 664-65 (1982). The court determined that "reasonable efforts" required more than a mere telephone call. While the opinion recognized that a court of appeal held that telephone calls were "reasonable efforts" in *People v. Haney*, 156 Cal. App. 3d 109, 202 Cal. Rptr. 579 (1984), *Haney* was distinguished from the instant case. In *Haney*, the court found that several attempts to contact the victim by phone were sufficient; however, appellant Mills' single telephone request was not. Thus, the court found that section 872 was not satisfied in the case at hand.

However, the court found that its own definition of "reasonable efforts" placed an unacceptable burden on criminal defendants. The court reasoned that such a standard implied the use of the subpoena process and the contacting of the witness personally to urge appearance for cross-examination in court. Finding that this created a duty which improperly reduced the prosecution's responsibility to present evidence sufficient to show probable cause, the court concluded that section 872 contravened the defendant's due process rights at his preliminary hearing. In addition, the statute was found to be overly broad because it failed to limit use of hearsay affidavits to peripheral witnesses, thus allowing the possible use of affidavits for critical testimony.

Finally, the court viewed the effect of this decision on the appel-

lant's case. The record revealed that the arresting officer's eyewitness testimony fulfilled the probable cause requirement and that there was sufficient evidence upon which to hold the defendant to answer without testimony in any form by the alleged victim. Thus, the court concluded that the admission of the affidavits was harmless error and discharged the writ.

SARAH A. FUHRMAN

B. *A witness may not testify after having undergone hypnosis. A warrantless parole-oriented search may be conducted even when the parolee is incarcerated:* **People v. Johnson.**

In *People v. Johnson*, 43 Cal. 3d 296, 730 P.2d 131, 233 Cal. Rptr. 562 (1987), the supreme court unanimously reiterated the objectionability of testimony given by a person who had undergone hypnosis. In order to facilitate an accurate description of a rape victim's assailant, the victim was hypnotized. This description led to the apprehension of the defendant. Tangible evidence existed which connected the rapist with a prior murder. Over the defendant's objection, the rape victim was allowed to testify and give an in-court identification. This testimony led to the defendant's convictions of both the rape and the murder, for which he was sentenced to death.

In overturning the conviction, the court relied upon *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied*, 459 U.S. 860 (1982). The California Supreme Court in *Shirley* held that the testimony of a witness who had been hypnotized was per se inadmissible. *See generally* 21 CAL. JUR. 3D *Criminal Law* § 3224 (1985); Annotation, *Admissibility of Hypnotic Evidence at Criminal Trial*, 92 A.L.R. 3D 442 (1979). Although it was conceded that *Shirley* was applicable, the respondent contended that the error committed was harmless. The court found that even though *Shirley* did not mandate per se reversal, a miscarriage of justice would result if the conviction was allowed to stand because the primary inculpatory evidence was given by the victim who had been hypnotized. Thus, the court reversed the conviction of guilt and the sentence of death and remanded for a new trial.

The defendant also appealed the admission of certain evidence obtained as a result of a warrantless search of his residence. At the suppression hearing, the judge ruled that the search was proper as a parole-oriented search. When the defendant was released from

prison in 1978, he signed a "Notice and Conditions of Parole" which contained a clause that provided that his premises were subject to warrantless search for one year. After eight months had passed, the defendant's parole status was placed on hold due to an arrest for parole violations. He served six months because of the violations and following his release, he was still subject to the unexpired four months remaining on his original parole. The search in question in the present case occurred during this four month period. Since no new "Notice" was given or signed following the defendant's parole holding period, the court held that the defendant was still subject to the conditions of the original parole. Thus, the court rejected the defendant's contention that he lacked notice.

The defendant's alternative contention was that the search was invalid as a parole-oriented search because he was incarcerated at the time of the search, and therefore the search was aimed primarily at law enforcement and not at parolee supervision. In rejecting this argument, the court overruled the portion of *People v. Coffman*, 2 Cal. App. 3d 681, 82 Cal. Rptr. 782 (1969), which implied that the imprisonment of the parolee at the time of the search removed reasonable parolee supervision interests. The court provided that a parole-oriented search was constitutional as long as "there [was] a reasonable nexus (a direct and close relationship) between the search and the parole process, and a reasonable suspicion, based on articulable facts, that the parolee ha[d] violated the terms of his parole or engaged in criminal activity." *Johnson*, 43 Cal. 3d at 316, 730 P.2d at 143-44, 233 Cal. Rptr. at 575 (citing *People v. Burgener*, 41 Cal. 3d 505, 533-35, 714 P.2d 1251, 1269-71, 224 Cal. Rptr. 112, 130-32 (1986)). *See generally* Annotation, *Validity, Under Fourth Amendment, of Warrantless Search of Parolee or His Property by Parole Officer*, 32 A.L.R. FED. 155 (1977). The court concluded that since the defendant's parole officer had initiated the search based upon solid evidence that the defendant had a gun, the search was valid as parole-oriented.

LINDA M. SCHMIDT

C. *Statements obtained from a criminal defendant in violation of the privilege against self-incrimination are inadmissible as affirmative evidence as well as for impeachment purposes:* **People v. May.**

In *People v. May*, 43 Cal. 3d 436, 729 P.2d 778, 233 Cal. Rptr. 344 (1987), the court declined to adopt the holding of the United States Supreme Court in *Harris v. New York*, 401 U.S. 222 (1971), which established that statements made in violation of a criminal defendant's *Miranda* rights were admissible for impeachment purposes as long as the statements were made voluntarily. In this case, the defendant

was convicted of rape. During the jury trial, evidence of the defendant's statements, made to police in violation of his privilege against self-incrimination, were introduced for impeachment purposes. The appellate court affirmed the conviction.

In reviewing the case, the court considered two issues. First, it considered whether article 1, section 28(d) of the California Constitution [hereinafter 28(d)], which provides that all relevant evidence is admissible, mandates the court to admit such statements insofar as the United States Constitution allows. Second, the court considered whether, if 28(d) did not apply, it should overrule the rule established in *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) in favor of the *Harris* decision.

The defendant argued that the lower court erred in admitting his custodial testimony for impeachment purposes. He relied upon *Disbrow*, which concluded that statements made in violation of *Miranda* were inadmissible for impeachment purposes. The prosecution contended that 28(d) nullified *Disbrow*. After much discussion, the court agreed with the defendant, relying on specific language embodied in 28(d) which states that "[n]othing in this section shall affect an existing statutory rule of evidence relating to privilege . . . ." CAL. CONST. art. 1, § 28(d). The court noted that section 940 of the Evidence Code, which provides that "a person has a privilege to refuse to disclose any matter that may tend to incriminate him," is a statutory privilege; and that all privileges shall be liberally construed. CAL. EVID. CODE § 940 (West 1986). *See Hoffman v. United States*, 341 U.S. 479, 486 (1951). The court further stated that since section 940 of the Evidence Code does not divulge the scope of the privilege, its scope must be interpreted by the courts. Hence, the court held that *Disbrow* continued to be the governing law in California.

The court rejected the prosecutor's contention that, even if *Disbrow* survives section 28(d), *Disbrow* should be overruled, and that the United States Supreme Court decision in *Harris* should be adopted in its place. In reaching its conclusion, the court first reiterated the arguments it had made earlier in deciding *Disbrow*. Second, the court stated that it did not agree with the underlying reasoning in the *Harris* decision. It disagreed with *Harris*'s precedential treatment of *Miranda*, as well as the policy arguments set forth in the decision.

In conclusion, the court held that the trial court erred in holding that the defendant's statements made in violation of his privilege against self-incrimination were admissible for impeachment pur-

poses. However, since the defendant did not testify, the case was remanded to determine the prejudicial effect of the error.

This case emphasizes that in some instances, even with the adoption of 28(d), the California Constitution still provides the criminal defendant with greater rights than the federal constitution.

MARIANNE CHIAPUZIO

VI. INSURANCE LAW

Insurance companies' duty of good faith and fair dealing extends to informing insureds about their rights under a policy when lack of knowledge may lead to loss of benefits or forfeiture of rights: **Sarchett v. Blue Shield of California.**

In *Sarchett v. Blue Shield of California*, 43 Cal. 3d 1, 729 P.2d 267, 233 Cal. Rptr. 76 (1987) (plurality opinion), *modified*, 43 Cal. 3d 516b (1987), the court held that the defendant had breached its duty of good faith and fair dealing when it failed to inform the plaintiff of his right to an impartial review and arbitration upon the event of a disputed claim. The defendant argued that because this right was clearly set forth in the policy, it had no duty to reiterate this right to the plaintiff. The trial court held that the defendant breached its duty of good faith and fair dealing by failing to pay plaintiff's hospital bills, disputing the treating physician's judgment that hospitalization was necessary, and failing to inform the defendant about the review and arbitration right contained in the policy. The plaintiff was awarded hospital costs, $20,000 in compensatory damages, and $80,000 in punitive damages.

The plaintiff purchased a policy from the defendant in 1966. In 1976, the plaintiff was hospitalized by his physician after complaining of fatigue, swelling of the stomach, tremors, and other symptoms. His blood count also appeared abnormal. The plaintiff's doctor concluded that the plaintiff might be suffering from an ulcer or leukemia and ordered a hospital stay. The defendant paid for all of the plaintiff's testing and medical bills, but did not pay for the bills due to the hospital stay, claiming that hospitalization for diagnostic purposes that are not medically necessary are excluded from coverage. After six months of repeated refusals to pay plaintiff's claim, the defendant mentioned the "possibility" of peer review.

The court rejected the lower court's finding that the policy was ambiguous since it did not state who would determine whether the specific policy exclusions were applicable. The lower court had reasoned that in absence of specific language to the contrary, insureds should be able to rely upon their doctor's advice in determining

whether or not hospitalization was necessary. After reviewing the policy, the supreme court declared that the policy was not ambiguous. The policy had a separate "Settlement of Disputes" provision which stated that all disputes concerning therapeutic justification were to be resolved by an appropriate medical society or by arbitration. The court rejected the lower court's holding that the ambiguity could be cured only by a statement of the settlement agreement in the medical necessity exclusion provisions. *See generally* 39 CAL. JUR. 3D *Insurance Contracts and Coverage* § 251 (1977).

The plaintiff next asserted that even if the policy was not ambiguous, the coverage should have extended to the reasonable expectations of the insured. The court rejected this argument, stating that the insured would not be reasonable to expect that all recommendations made by a doctor are automatically covered by his or her policy. Rather, the insured should expect that his or her treating physician has recommended necessary treatment. The court concluded that the insured's expectations could be protected, not by granting doctors an unbridled discretion to determine what was necessary, but by construing the language of the policy liberally to favor the insured.

Finally, the plaintiff argued that public policy required that hospitalization should be covered when ordered by a treating physician. Otherwise, insureds would be placed in the position of defying the doctor's orders or risking liability on large hospital bills. The court rejected this argument on the basis that it would reduce the amount of choices among types of policy coverage and would place doctors in a position in which it would be quite easy to perpetuate fraud. Therefore, the court stated liberal interpretation in favor of the insured was the best that it could do for insureds.

However, the court affirmed the trial court's determination that the defendant had an affirmative duty to inform the plaintiff of his rights under the settlement clause of the policy. The court's decision was based upon the " 'special nature of the insurer-insured relationship and the resultant duties which an insurer owes to its insureds.' " *Sarchett*, 43 Cal. 3d at 14, 729 P.2d at 276, 233 Cal. Rptr. at 85 (citations omitted). Included in this relationship is the duty to " 'bring the insured's attention to relevant information so as to enable the insured to take action to secure rights afforded by the policy.' " *Id.* (citations and italics omitted). Since this was the only breach of duty

that the court found, it remanded the case to the trial court to determine the appropriate amount of damages for this breach alone.

MARIANNE CHIAPUZIO

VII. LOCAL GOVERNMENT LAW

A. *The State of California is not required to reimburse local governments for statutes that result in some incidental cost to local agencies, but is required only to provide subvention when new programs are enacted that impose unique requirements on local governments not applying to all state residents:* County of Los Angeles v. State of California.

In *County of Los Angeles v. State of California*, 43 Cal. 3d 46, 729 P.2d 202, 233 Cal. Rptr. 38, the court interpreted article XIII B, section 6 of the California Constitution [hereinafter section 6]. This provision, adopted on November 6, 1979 by the voters on an initiative measure, provides, in pertinent part, as follows: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service . . . ." CAL. CONST. art. XIII B, § 6. The present action arose out of the adoption by the legislature of laws increasing the amounts which employers, including local governments, are required to pay in certain workers' compensation benefits. The Counties of Los Angeles and San Bernardino and the City of San Diego claimed section 6 applied to this enactment and, therefore, the state was required to reimburse them for the expenses incurred as a result of the payment of increased benefits.

The court focused on what the voters intended when they adopted section 6. The court concluded the voters intended to require the state to reimburse local governments only for the costs involved in carrying out those functions peculiar to government. Thus, a "program" was defined by the court as a governmental public service or as a unique requirement imposed upon the local governments by the state.

Applying this construction of section 6 to the payment of the new benefits under the workers' compensation laws, the court held that the construction had no application. The court found workers' compensation was not a program to provide service to the public. Addi-

tionally, section 6 did not apply since the workers' compensation laws applied generally to all state residents.

JAMES A. COULTER, III

B. *A municipally owned water company charging nonresidents higher rates for water service than residents, does not violate nonresidents' equal protection rights, provided the differential rests on a reasonable basis other than residential status:* Hansen v. City of San Buenaventura.

In *Hansen v. City of San Buenaventura*,[1] the court decided the issues of whether a municipal water company's imposition of a rate structure yielding returns in excess of costs was proper, and whether the method used to calculate the city's rate scheme was unfair to nonresidents. The plaintiffs brought a class action challenging the City of San Buenaventura's [hereinafter the City] ordinance attaching a seventy percent surcharge to nonresidents of the City for water supplied by the City's water company.

The plaintiffs sought declaratory relief and damages, alleging that the surcharge was unreasonable and discriminatory, and that the underlying rate structure denied them equal protection under the law. The trial court validated the City's surcharge and rate structure, but the court of appeal reversed the trial court.

I. STATEMENT OF FACTS

Since 1923, the City has owned and operated its own municipal water facility. Through several issues of general bonds in subsequent years, the City has raised funds to expand and modernize its water supplying capacity. These bonds entailed the imposition of a lien upon all private property within the City, so that in the event the bonds went unpaid, the bondholders could levy taxes on that property. To further subsidize its water operations, portions of the City's general funds were allocated to the water project from time to time, and loans from the fund were extended at little or no interest. In ad-

1. 42 Cal. 3d 1172, 729 P.2d 186, 233 Cal. Rptr. 22 (1986). Justice Grodin wrote the majority opinion with Justices Mosk, Reynoso, Lucas, and Panelli concurring. Justice Broussard wrote a separate concurring and dissenting opinion with Chief Justice Bird concurring.

dition, City residents subsidized the water project and its expansion by paying power taxes and connection and acreage fees.

The water system was expanded in 1966 when the City purchased the Mound Water Company [hereinafter Mound], a small mutual water company[2] which served nonresidents of the City. The users of the Mound water approved the sale. The transaction agreement provided that the Mound users at the time of sale would continue to receive water "at the regularly established rates for water service from the Ventura Water System,"[3] but did not preclude the City from charging higher rates to nonresident users. In fact, it was the City's practice for over thirty years to apply rate differentials on the basis of resident/nonresident status.[4] When the existing Mound wells proved to be polluted, the City began servicing the prior Mound customers by its own water system, greatly increasing the quality and accessibility of the water received by the Mound customers.

In 1969, the City obtained a second water company, the Saticoy Water Company [hereinafter Saticoy]. Saticoy was an investor-owned public utility; forty percent of the customers were nonresidents of the City. However, these nonresidents were given the opportunity to vote in a City election to approve the sale to the City. Nearly ninety percent of those customers who voted approved the transaction and, despite the opportunity to challenge the sale before the Public Utilities Commission, no objections were reportedly raised by the Saticoy customers.

Under the terms of the Saticoy/Ventura transaction, the City was free to alter the rates after an initial sixty-day rate freeze, so long as the amended rates were not unreasonably discriminatory with respect to customers' residence status. Like the prior Mound customers, the existing Saticoy customers benefited from the company's new ownership. The Saticoy wells were substandard, and the company's storage capacity was slight. After the City acquired Saticoy, the company's users enjoyed improved access to higher quality water than before.

As a result of the City's acquisition of these two companies, and the concomitant obligations providing water to those companies' customers, the City was burdened with increased expenses. It was required to purchase supplementary sources of water at a greater

2. A mutual water company is "any private corporation or association organized for the purposes of delivering water to its stockholders and members at cost, including use of works for conserving, treating and reclaiming water." CAL. PUB. UTIL. CODE § 2725 (West 1975).

3. *Hansen*, 42 Cal. 3d at 1177, 729 P.2d at 188, 233 Cal. Rptr. at 24.

4. Since 1935, the City had charged higher rates to out-of-city water customers, varying from a low of 32 percent (1952-1972), to the present surcharge of 70 percent. *Id.* at 1177 n.2, 729 P.2d at 188 n.2, 223 Cal. Rptr. at 24 n.2.

expense than that of local Ventura well waters.[5] Under an agreement with the state, from whom part of the extra water was obtained, the City would be required to impose taxes, payable by City residents only, should City revenues be insufficient to pay for the state water.[6]

In addition, the existing Mound and Saticoy storage, pumping, and transmission facilities were inefficient, forcing the City to expend millions of dollars to expand and revamp its own facilities. To replenish the funds being expended, the City increased the existing surcharge on water sold to nonresidents to seventy percent.

II. THE MAJORITY OPINION

Justice Grodin commenced by offering a number of general rules.[7] He pointed out that a city which takes over another community's water system is obligated as a trustee to conduct itself fairly with that community's customers and must not charge unreasonable rates for its services.[8] Furthermore, the challenging party has the burden of proving unreasonableness, since the existing rate will be presumed fair.[9]

The court remarked that where a rate differential rests solely upon residential status, unreasonableness will be found.[10] However, rate differentials may properly rest on some other reasonable basis. The court recognized that "[r]easonableness . . . is the beginning and end of the judicial inquiry."[11]

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5. This supplemental water was purchased from the Casitas Municipal Water District, and other sources, and ranged in price from $56 to $61 an acre foot at the time of the trial in 1978. By comparison, the cost of Ventura well water ran from $20 to $25 an acre foot. *Id.* at 1179 n.3, 729 P.2d at 189 n.3, 233 Cal. Rptr. at 25 n.3.

6. The expense incurred in transporting the state water, estimated at over $50 million, would also be shouldered entirely by city residents. *Id.* at 1179, 729 P.2d at 189, 233 Cal. Rptr. at 25.

7. *See generally* 33 WEST'S CALIFORNIA DIGEST, 711 *Municipal Corporations* (1982); 42 WEST'S CALIFORNIA DIGEST, 203(5) *Water & Water Courses* (1982).

8. County of Inyo v. Public Utils. Comm'n., 26 Cal. 3d 154, 159, 604 P.2d 566, 569, 161 Cal. Rptr. 172, 175 (1980).

9. Elliot v. City of Pacific Grove, 54 Cal. App. 3d 53, 58, 126 Cal. Rptr. 371, 374 (1975).

10. *County of Inyo*, 26 Cal. 3d at 159 n.4, 604 P.2d at 569 n.4, 161 Cal. Rptr. at 175 n.4.

11. *Hansen*, 42 Cal. 3d at 1181, 729 P.2d at 190, 233 Cal. Rptr. at 26. Further, the court in American Microsystems, Inc. v. City of Santa Clara, 137 Cal. App. 3d 1037, 187 Cal. Rptr. 550 (1982) stated, "[I]t is not the function of the courts to evaluate the wisdom of the City's rate-fixing decisions. [We] may only consider that narrower legal question whether the rates were unreasonable or arbitrarily established." *Id.* at 1044, 187 Cal. Rptr. at 555.

A. Reasonableness of Municipal Utility Earning Profit

In finding the City's rate differential to be reasonable, the court rejected the plaintiffs' assertion that a city must limit rates charged to those necessary to cover the *bare costs* of providing water to its users. In disposing of this contention, the court recognized that the cost-of-service analysis employed by the City's accountants in calculating the disputed surcharge focused primarily upon depreciation, which did not provide for facility replacement. The court concluded that the City's imposition of rates granting a return on investment (i.e. profit) was reasonable under these circumstances, since municipal utilities would otherwise have little incentive to expand their facilities to meet the needs of nonresident customers.

The court also rejected the plaintiffs' interpretation of section 54514 of the Government Code[12] as authority for the proposition that the City was required to furnish water at cost. The court concluded that the section phrase "consistent with . . . prudent management"[13] authorized the utility to reap a reasonable return. The court reasoned that "a municipal utility would be foolish to increase its business risk by expanding service to nonresidents without getting some type of return commensurate with the increased risk."[14]

In addition, the court cited authority to support the proposition that a city is not limited to charging bare costs for services provided,[15] and suggested further that the state legislature's refusal to bring municipal utility companies under the Public Utilities Commission's jurisdiction indicated that body was satisfied with the current state of the law.[16]

B. Reasonableness of Discrepancy In Rates Charged[17]

The court next discussed the validity of the discrepancy between the rate of return imposed by the City on residents vis-a-vis that charged to nonresidents.[18] The court approved the City's practice of

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12. CAL. GOV'T CODE § 54514 (West 1983).

13. *Id.*

14. *Hansen*, 42 Cal. 3d at 1188, 729 P.2d at 195, 233 Cal. Rptr. at 31.

15. Golden Gate Bridge etc. Dist. v. Luehring, 4 Cal. App. 3d 204, 215, 84 Cal. Rptr. 291, 299 (1970) (approving city's use of "net proceeds" from fees collected for services provided to benefit its own general fund); Beard v. City & County of San Francisco, 79 Cal. App. 2d 753, 755, 180 P.2d 744, 746 (1947) (authorizing operation of public facilities for profit).

16. The court was also persuaded by the City's accountants' determination that a surcharge in excess of the seventy percent imposed would have been appropriate under the circumstances, and the fact that the Public Utilities Commission had approved other local government rate differentials in excess of seventy percent. *Hansen*, 42 Cal. 3d at 1182, 729 P.2d at 192, 233 Cal. Rptr. at 28.

17. *See generally* 94 C.J.S. *Waters* § 289 (1956).

18. The rate of return charged to residents of the City was 3.0%. By comparison,

charging a lower rate to residents, observing that only residents shouldered the risks and cost burdens associated with the operation, maintenance, and expansion of the City's water system. Among other things, the court referred to the taxes and connection fees paid by residents, and noted that only their property was subject to the bond and state liens.

As further support for the validity of the City's imposition of the seventy percent surcharge, the court cited the increased benefits enjoyed by the nonresident customers from the City's acquisition of the Mound and Saticoy projects. In the words of the court, "the former Mound and Saticoy customers immediately received substantial benefits such as improved water quality, increased water storage, [and] upgraded fire protection. . . ."[19] Although residents of the City also received benefits from the new, more expensive water acquired from other sources, the court was quick to point out that the cost of the transported water was allocated between residents and nonresidents of the City.

The plaintiffs also challenged the City's method of calculating the rate base, arguing that the existing scheme permitted the City to reap a double return. The court disagreed, and approved the City's inclusion in its rate base of "any facilities donated by developers or financed through connection and acreage fees,"[20] holding that doing so did not result in double payment by past rate payers under the circumstances of the instant case.[21]

C. Equal Protection Challenge

The plaintiffs claimed that they were politically powerless to influence the City's water rate decisions, and thus constituted a "suspect class." The City's disparate rate structure, they argued, should therefore be analyzed under a "strict scrutiny" standard. The court declined to confer suspect class status upon the nonresidents, for although they lacked the right to vote in city elections, other meth-

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that charged nonresidents was 8.67%. *Hansen*, 42 Cal. 3d at 1183, 729 P.2d at 192, 233 Cal. Rptr. at 28.

19. *Id.* at 1185, 729 P.2d at 194, 233 Cal. Rptr. at 29.

20. *Id.* at 1186, 729 P.2d at 194, 233 Cal. Rptr. at 30. "The rate base on which a return may be earned is the amount of property used and useful, at the time of the rate inquiry, in rendering a designated utility service." PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION, 139 (1969).

21. *Cf.* Pacific Tel. & Tel. v. Public Utils. Comm'n., 62 Cal. 2d 634, 664, 401 P.2d 353, 371, 44 Cal. Rptr. 1, 19 (1965) (utility disallowed from including in rate base donations or assets supplied by ratepayers, where double return would result).

ods for exercising political influence, including rate hearings and lobbying, were available to them.

Finding no suspect class, the court applied a "rational basis" test[22] to the existing rate structure, and concluded that, since the rate scheme had passed the reasonableness test applicable to municipal utility rates, it had *a fortiori* satisfied the rational basis standard. The court concluded that the rates imposed by the City were reasonable, and the factors relied upon in their calculation were proper.

III. JUSTICE BROUSSARD'S CONCURRING AND DISSENTING OPINION

Justice Broussard agreed with the majority to the extent that the majority stated approval of a city's charging nonresidents higher rates than residents as a means of compensating the City for revenues expended to fund its water company facilities and services. His dissent condemned the City's inflated rate for nonresidents in the instant case because the capital improvements and conditions provided by the City were disproportionate to revenue obtained by the City through the surcharge.[23] Justice Broussard further argued that most of the capitalization did not come from the City, but was obtained from "ratepayers both within and without the city or obtained by donations to the water system."[24] He concluded that the surcharge imposed was improper since, under the utility basis for determining a water company's revenue requirements, any sums in excess of gross working cash requirements should not be considered in rate base calculations; otherwise the City reaps a double return.[25] According to the dissent, "only the investment made by the utility . . . may be included in the rate base."[26]

IV. CONCLUSION

Justice Broussard gave sparse weight to the fact that city residents, as individuals, paid taxes and bore burdens to support the water system which nonresidents were able to escape. In this manner, the sep-

22. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

23. Justice Broussard calculated the amount received by the City from the nonresidents as at least $7 million, as compared to costs incurred by the City in the amount of $629,000. This represented an excess of ten times the amount properly receivable. *Hansen*, 42 Cal. 3d at 1195 n.2, 729 P.2d at 201 n.2, 233 Cal. Rptr. at 37 n.2 (Broussard, J., concurring and dissenting).

24. *Id.* at 1191, 792 P.2d at 197, 233 Cal. Rptr. at 33 (Broussard, J., concurring and dissenting).

25. *Cf.* City of Los Angeles v. Public Utils. Comm'n., 7 Cal. 3d 331, 346, 497 P.2d 785, 796, 102 Cal. Rptr. 313, 324 (1972) (approving consideration of sums in excess of gross working cash requirement where such sum was characterized as "extraordinary").

26. *Hansen*, 42 Cal. 3d at 1195, 729 P.2d at 200, 233 Cal. Rptr. at 36 (Broussard, J., concurring and dissenting).

arate opinion missed the mark. Only by creating a distinction between the City and its residents was Justice Broussard able to logically maintain his stance. The separate opinion disregarded the fundamental fact that a city cannot properly be distinguished from its residents. The conclusion of the concurring and dissenting opinion is therefore uncompelling.

MITCHELL F. DISNEY

VIII. TORT LAW

A. *In defamation actions in which the gravamen of the plaintiff's claim is the alleged injurious falsehood of a statement made by media defendant, the first amendment of the United States Constitution requires that the plaintiff plead and prove the statement to be a falsehood, and be "of and concerning" the plaintiff in some way:* **Blatty v. New York Times Co.**

The court in *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 542 (1986), held that a newspaper could not be held liable for failing to include a book in its list of "best sellers." The plaintiff, William P. Blatty, author of *The Exorcist* and *Legion*, originally alleged four causes of action in his complaint: negligent interference with prospective economic advantage, intentional interference with prospective economic advantage, negligence, and trade libel. After allowing limited discovery, the trial court sustained the defendant's general demurrer that *inter alia*, the facts alleged in the complaint were insufficient to support any cause of action. However, as to the intentional interference with prospective economic advantage claim, the court granted conditional leave to amend, limiting Blatty to a cause of action for the intentional omission of *Legion* from the "Best Seller List" by the New York Times, with actual knowledge that the book met the criteria for inclusion in the newspaper.

The amended complaint asserting five causes of action, though characterized differently, was essentially the same as the original. The gist of the grievance continued to be that the list of the Times was falsely represented as an accurate compilation of book sales. By not including *Legion*, the novel was falsely represented by the Times as not qualifying as a "best seller," and the wrongful exclusion of the book resulted in damage to Blatty. The court, sustaining a second de-

murrer grounded on the supposition that no statement had been made "of and concerning" Blatty, ordered the action dismissed without leave to amend, awarding costs to the Times.

The court of appeal, though otherwise affirming, held the facts alleged in the pleadings sufficient to support the actions for intentional interference with prospective economic advantage. This partial reversal served to vacate the award for costs. Both parties petitioned for review.

Under the standard of review accorded to a demurrer sustained without leave to amend, the burden of proving the existence of a reasonable possibility of amending defective pleadings rests entirely on the plaintiff. *Blank v. Kirwan*, 39 Cal. 3d 311, 703 P.2d 58, 216 Cal. Rptr. 718 (1985). As a simple matter of procedure, this burden would appear to prohibit the advance of Blatty's complaint. However, the court seemed anxious to voice its thoughts regarding protection of the right of free expression and a free press.

In support of its reversal of the appellate court decision, insofar as it reversed the trial court, the supreme court cited the seminal defamation cases involving media defendants, drawing from them several maxims of first amendment protection: the burden to plead and prove falsehood is on the plaintiff, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); no cause of action "can claim . . . talismanic immunity from constitutional limitations," *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); the statement upon which the claim is based must specifically refer to, or be, "of and concerning" the plaintiff in some way. *Rosenblatt v. Baer*, 383 U.S. 75, 80 (1966). The court relied on the last principle to decide the case at bar.

The court freely discussed the guile used in recent years in defamation actions, whose gravamen is an alleged injurious falsehood made by the press defendant, cleverly disguised by the creative pleading of the plaintiff so as to avoid constitutional detection. Any deception, though, seems unlikely at best, considering (1) the substantive case law that stands to preserve a free press, and (2) the inescapable reality that any time a media defendant is hailed into court, he will gird himself in the armor of the first amendment.

Though properly decided, the entire court being in agreement as to the outcome of the case, *Blatty* represents another judicial venture into territory not necessarily explored. The analysis of the court is meaningless in light of so much dicta.

TRAVIS P. CLARDY

B. *Employee's civil action for damages for intentional infliction of emotional distress which caused physical injuries based on conduct normally occurring within the course and scope of employment was barred by Workers' Compensation Act which thus provided exclusive remedy:* **Cole v. Fair Oaks Fire Protection Dist.**

In *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987), the supreme court held that an employee may not maintain a civil action for intentional infliction of emotional distress which caused physical disability when he could recover under workers' compensation law. The court found that where the conduct in question arose from ordinary circumstances of employment, the plaintiff was limited to workers' compensation as the exclusive remedy.

In *Cole*, the plaintiff was a firefighter who held the rank of captain. After approximately seventeen years of service, the plaintiff was elected union representative. As union representative, the plaintiff was required to negotiate contracts with the assistant chief who deliberately harassed the plaintiff to punish him for his union activities. During this period, the plaintiff was diagnosed as having high blood pressure and was placed on medication. Due to the extreme stress placed upon him, the plaintiff left his position with the union and went on sick leave soon thereafter. Despite the plaintiff's superior job performance, the assistant chief falsely reported that the plaintiff violated rules of conduct, demoted the plaintiff to engineer, and ordered that he return to work, assigned to menial duties. Although the defendant's Board of Directors reinstated the plaintiff as captain, he was placed on probation and the assistant chief attempted to have him forced into retirement. Finally, the plaintiff suffered a severe stroke which left him paralyzed and totally disabled.

The plaintiff brought a civil action in the Superior Court of Sacramento County. After the defendant's demurrer was sustained, the plaintiff appealed his case and subsequently the supreme court granted review.

The court analyzed the plaintiff's claim under sections 3600 and 3601 of the Labor Code [hereinafter sections 3600 and 3601, respectively]. Section 3600 described the conditions under which an employer was liable to an employee injured on the job due to the employer's negligent or non-negligent conduct under workers' compensation law. These "conditions of compensation" were met where

the injury occurred within the course and scope of the employment relationship and was proximately caused thereby. *See* 65 CAL. JUR. 3D *Work Injury Compensation* §§ 73-76 & 83 (1981 & Supp. 1986); Demler, *Remedy For the Intentional Torts of a Workmen's Compensation Carrier*, 1 PEPPERDINE L. REV. 54 (1973).

Pursuant to section 3601, a claimant has an exclusive remedy in workers' compensation against the employer where these conditions of compensation exist, except where the injury is caused by physical violence or intoxication by an employee. *See* 65 CAL. JUR. 3D *Work Injury Compensation* §§ 22-27 (1981 & Supp. 1986). Finding that the conditions of compensation were met in this instance, the court then turned to cases which found exceptions to the exclusiveness of the remedy.

The court cited *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978), in which the court found that an employee could maintain an action against the employer for intentional infliction of emotional distress where there was no physical injury. In *Renteria*, the plaintiff requested damages for mental suffering caused by tortious conduct. The *Renteria* court held that because no remedy existed in workers' compensation law for the plaintiff's injuries, workers' compensation law should not bar recovery through civil action.

The supreme court approved the cases wherein the lower courts have determined that workers' compensation was the exclusive remedy where intentional infliction of emotional distress resulted in substantial physical injury. *See Hollywood Refrigeration Sales Co. v. Superior Court*, 164 Cal. App. 3d 754, 758-60, 210 Cal. Rptr. at 619, 621-22 (1985); *Gates v. Trans Video Corp.*, 93 Cal. App. 3d 196, 204-06, 155 Cal. Rptr. at 486, 491-92 (1979). Since the plaintiff in the instant case could seek a workers' compensation remedy and had suffered great physical damage, it was concluded that he had an exclusive remedy in workers' compensation.

The court then examined *Johns-Manville Products Corp. v. Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980), which held that where the employer's fraudulent conduct aggravated a work related injury, the employee could maintain a civil action against his employer for the aggravation. *See The Scope of the Exclusive Remedy Under California Labor Code*, §§ 3601, 4553; *Johns-Manville v. Contra Costa Superior Court*, 8 PEPPERDINE L. REV. 591 (1981). The court in the present case noted that the conduct which caused the injury in *Johns-Manville* did not occur as an incident of the employment relationship because the employer's concealment of an industrial injury was not a risk of employment. In contrast, employee disciplinary processes were characterized as ordinary and fore-

seeable activities necessarily tied to the employment relationship. Therefore, even though the assistant chief's conduct was performed with the intent to inflict the plaintiff's injuries, his use of ordinary processes of employment placed the plaintiff's injuries within the purview of sections 3600 and 3601.

In conclusion, where conditions of compensation exist, sections 3600 and 3601 create an exclusive remedy for a claimant unless an exception is found. The plaintiff in *Cole* met these conditions. However, he was not entitled to an exception because he suffered substantial physical damage which arose from conduct normally occurring within the course and scope of employment. Thus, the plaintiff was restricted to workers' compensation as an exclusive remedy.

SARAH A. FUHRMAN

C. *Police misconduct is not a superseding cause of injury where the injury is a foreseeable consequence of involving the police; an erroneous jury instruction does not result in prejudice where no likelihood that the jury believed the defendant, yet ruled in favor of the plaintiff exists:* **Pool v. City of Oakland.**

I. INTRODUCTION

In *Pool v. City of Oakland*,[1] the court found that a merchant must exercise due care when calling the police to arrest a suspected counterfeiter. A police officer's false arrest, due to his failure to detect the legitimacy of a suspicious bill, was held not to have been a superseding cause of the emotional distress experienced by an innocent customer. The court based these findings on the principle of reasonable foreseeability. In addition, the court decided that no prejudicial error resulted from the trial court's erroneous jury instruction on probable cause. The court believed that, since the closing arguments were fact-specific and since the testimony of the only neutral witness favored the plaintiff, there was no likelihood that the jury accepted the defendant's version of the facts, yet decided in favor of the plaintiff.

1. 42 Cal. 3d 1051, 728 P.2d 1163, 232 Cal. Rptr. 528 (1986). Chief Justice Bird wrote the majority opinion with Justices Mosk, Broussard, Reynoso, and Panelli concurring. Justice Grodin wrote a separate concurring opinion with Justice Lucas joining.

II. FACTUAL BACKGROUND

Pool attempted to pay for seven dollars worth of groceries with a one hundred dollar bill at a Safeway supermarket.[2] The bill did not bear the phrase "In God We Trust."[3] The checker, pursuant to an anti-counterfeit plan implemented by Safeway, told Pool to wait while she obtained his change.[4] The checker took the bill to the assistant manager to inspect. The checker testified that the assistant manager compared the bill's serial numbers to those on a list of counterfeit numbers. However, the assistant manager denied doing so.[5] The police were called and Pool was arrested.

The testimony yielded two different versions of the arrest. Pool maintained that he was cooperative with the police even though he was not advised of his rights, nor told of the charges against him.[6] Further, Pool testified that he was handcuffed and shoved against a cigarette machine.[7] The police officers stated that Pool was handcuffed because he was flailing his arms, either in an attempt to recover the bill or to strike a police officer.[8] The officers also testified that Pool attempted to hang onto the cigarette machine to interfere with his arrest. However, this incident did not appear in the police report.[9] The police report did state that Pool refused to let go of a shopping cart.[10] The checker testified that Pool was cooperative with the officers.[11]

Pool was taken to the police station where he was photographed, fingerprinted, and strip-searched.[12] In the meantime, the police department had determined that the bill in question was not counterfeit. Rather, the bill was a series 1950A upon which the phrase "In God We Trust" was never printed.[13] Pool was held and charged with interfering with a police investigation.[14] He declined his opportunity to make a phone call and was released the next day.[15]

Pool sued Safeway and the City of Oakland for intentional infliction of emotional distress, false arrest, and false imprisonment. He also brought an action for negligent infliction of emotional distress

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2. *Id.* at 1056, 728 P.2d at 1164, 232 Cal. Rptr. at 530.
3. *Id.* at 1056, 728 P.2d at 1164, 232 Cal. Rptr. at 529.
4. *Id.* at 1056, 728 P.2d at 1164, 232 Cal. Rptr. at 530.
5. *Id.* at 1057, 728 P.2d at 1165, 232 Cal. Rptr. at 530.
6. *Id.*
7. *Id.*
8. *Id.* at 1058 n.2, 728 P.2d at 1165 n.2, 232 Cal. Rptr. at 531 n.2.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 1058, 728 P.2d at 1165, 232 Cal. Rptr. at 530. Pool was also subjected to a visual rectal examination. *Id.*
13. *Id.* at 1056, 1058, 728 P.2d at 1164, 1165, 232 Cal. Rptr. at 529, 530.
14. *Id.* at 1058, 728 P.2d at 1165, 232 Cal. Rptr. at 530-31.
15. *Id.* at 1058, 728 P.2d at 1166, 232 Cal. Rptr. at 531.

against Safeway. Against the City of Oakland, he added allegations of assault, battery, and violation of civil rights. Pursuant to a motion by Safeway, the trial court dropped all but the negligent infliction of emotional distress act against Safeway.[16] The trial judge held that all but the civil rights violation claim could be maintained against Oakland.[17] The jury found in favor of Pool as against both Safeway and the City of Oakland and awarded $45,000 in damages.[18] Both defendants appealed.

III. THE MAJORITY OPINION

A. The Jury Verdict Was Supported By The Evidence.

Safeway contended that the jury verdict was not based upon substantial evidence. Safeway alleged that the jury could not have reasonably found that Safeway was negligent, and that the jury should have found that the police officers' conduct was an unforeseeable superseding cause.[19] The court observed that the evidence must be viewed in a light most favorable to Pool, the plaintiff.[20] On the question of negligence, the court reviewed Safeway's anti-counterfeit plan. The evidence revealed that Safeway had informed its employees to watch for one hundred dollar bills that did not bear the phrase "In God We Trust."[21] The court found that Safeway, in giving such an instruction to its employees, could reasonably foresee that it would cause an incident involving an innocent customer.[22] The court pointed out that Safeway could have easily safeguarded its anti-counterfeit program.[23] Thus, the jury's finding that Safeway was negligent was supported by the evidence.

The court then discussed Safeway's contention that the police officers' conduct was an unforeseeable superseding cause of Pool's injury. Safeway averred that the police officers' failure to detect the validity of the bill that resulted in the false arrest of Pool was un-

16. *Id.*
17. *Id.* at 1059, 728 P.2d at 1166, 232 Cal. Rptr. at 531.
18. *Id.*
19. *Id.* at 1063, 728 P.2d at 1169, 232 Cal. Rptr. at 534.
20. *Id.* at 1061, 728 P.2d at 1168, 232 Cal. Rptr. at 533.
21. *Id.* at 1062, 728 P.2d at 1168, 232 Cal. Rptr. at 533.
22. *Id.*
23. *Id.* The court suggested that Safeway could have properly instructed the employees that not all bills were printed with the phrase "In God We Trust" on them, compiled a list of the suspect serial numbers and distributed it to all, or informed its employees to call the twenty-four hour Treasury Department Service with any questions. *Id.*

foreseeable.[24] The court rejected this claim by observing that it was foreseeable that accusing a person of illegal activity would lead to "a police investigation, escalation of the conflict, and arrest, all of which would cause emotional distress."[25] The court concluded that the conduct of the police officers was irrelevant and the resulting emotional distress was foreseeable.[26]

B. The Damage Award Was Proper.

Safeway alleged that, because Pool failed to utilize his opportunity to make his allotted phone call at the police station, Pool was contributorily negligent. At the trial, Safeway had proposed an instruction on contributory negligence which was refused.[27] The court found that the refusal to give the instruction was proper because " 'contributory negligence is negligence of the plaintiff before any damage, or any invasion of his rights, has occurred . . . .' "[28] Since the damages Pool suffered occurred before he declined his opportunity to phone, Pool did not contribute to his own damages.[29] The court suggested, however, that an instruction on mitigation might have been proper had Safeway presented evidence showing that if Pool had made a phone call, he would have been released from jail.[30]

Both Safeway and the City of Oakland challenged the size of the damage award. The defendants contended that passion and prejudice on the part of the jury must have come into play to have arrived at such a large award.[31] The court reiterated that considerable deference must be given to the findings of both the jury and the trial court.[32] The court pointed out that Pool, who was fifty-six years of age at the time, had no prior arrests on his record.[33] The court also reflected that Pool suffered greatly, both in front of the other Safeway customers and at the police station.[34] At the trial, Pool had stated that due to the incident, "his blood pressure was higher and his heartbeat was irregular . . . ."[35] Thus, the court pronounced that

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24. *Id.* at 1063, 728 P.2d at 1169, 232 Cal. Rptr. at 534.
25. *Id.* at 1064, 728 P.2d at 1170, 232 Cal. Rptr. at 535.
26. *Id. See generally* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 642-43 (8th ed. 1974 & Supp. 1984).
27. *Pool*, 42 Cal. 3d at 1066, 728 P.2d at 1172, 232 Cal. Rptr. at 537.
28. *Id.* (quoting W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS, at 458 (5th ed. 1984)).
29. *Id.* at 1066, 728 P.2d at 1171, 232 Cal. Rptr. at 537.
30. *Id.* at 1067, 728 P.2d at 1172, 232 Cal. Rptr. at 537.
31. *Id.*
32. *Id.*
33. *Id.* at 1068, 728 P.2d at 1172, 232 Cal. Rptr. at 538.
34. *Id.* at 1068, 728 P.2d at 1172-73, 232 Cal. Rptr. at 538.
35. *Id.* at 1068, 728 P.2d at 1173, 232 Cal. Rptr. at 538. *See generally* Annotation, *Excessiveness or Inadequacy of Compensatory Damages for False Imprisonment or Arrest*, 48 A.L.R. 4TH 165 (1986).

the damage award was not excessive.

C. The Erroneous Instruction on Probable Cause Was Not Prejudicial.

The court concurred with the City of Oakland's contention that the trial court erroneously instructed the jury on probable cause to arrest.[36] The court acknowledged that probable cause to arrest was a question of law to be determined by the trial court judge.[37] Oakland claimed that such an error was sufficient to overturn the jury's verdict. However, the court disagreed. The court applied the test compiled from case law in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*[38] to show that the trial court's error was not prejudicial. This five-factor test was presented as follows:

> (1) the degree of conflict in the evidence on critical issues; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect; (3) whether the jury requested a rereading of the erroneous instruction or of related evidence; (4) the closeness of the jury's verdict; and (5) the effect of other instructions in remedying the error.[39]

In applying the first factor—the degree of conflict in the evidence—the court reviewed the testimony. The court held that since Pool's testimony was corroborated by the only neutral witness' (the Safeway checker) testimony, the jury could have reasonably concluded that the presence of conflicting evidence was minimal.[40] The court moved on to the second factor—counsels' arguments to the jury. It pointed out that the closing arguments were fact-specific and, as such, the jury clearly had to decide which version of the facts was more credible.[41] Therefore, the court found that it was unlikely that the jury had accepted Oakland's version of the facts, yet decided in favor of the plaintiff.[42]

The court concluded that no prejudicial impact could be gleaned from examining factors three and four, since the jury did not request a re-reading of the instruction and the jury's eleven to one verdict

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36. *Pool*, 42 Cal. 3d at 1069, 728 P.2d at 1173, 232 Cal. Rptr. at 538.

37. *Id. See generally* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 219-20 (8th ed. 1974).

38. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

39. *Pool*, 42 Cal. 3d at 1069-70, 728 P.2d at 1174, 232 Cal. Rptr. at 539 (citing Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 771, 686 P.2d 1158, 1168, 206 Cal. Rptr. 354, 364 (1984)) (citations omitted by the court).

40. *Id.* at 1071, 728 P.2d at 1174-75, 232 Cal. Rptr. at 540.

41. *Id.* at 1071-72, 728 P.2d at 1175, 232 Cal. Rptr. at 540.

42. *Id.* at 1072, 728 P.2d at 1175, 232 Cal. Rptr. at 540.

was plainly in favor of Pool.[43] The application of the fifth factor—the effect of the other instructions—might have resulted in prejudice, as there were no other instructions regarding causation on the false arrest issue.[44] However, the court added a sixth factor to the *Seaman's* test. The court held that the existence of multiple causes of action must be considered in deciding whether prejudice resulted from the giving of an erroneous instruction.[45] In the instant case, Oakland failed to request a special verdict. Therefore, the jury could have rested liability on the assault and battery, intentional infliction of emotional distress, or false imprisonment causes of action, and not on the false arrest allegation.[46] Thus, the court believed that the potential for prejudice due to the erroneous instruction was minimal, and affirmed the judgment.[47]

IV. JUSTICE GRODIN'S CONCURRING OPINION

Justice Grodin separately concurred to emphasize that normally a person does not incur civil liability by reporting potentially illegal conduct to the police even where that person was negligent in having done so.[48] The Justice cited several cases holding that a good faith report to the police was "conditionally privileged."[49] Justice Grodin pointed out that the majority did not address this issue since Safeway never offered it as a defense.[50]

V. CONCLUSION

In concluding that the police officers' failure to detect the validity of the one hundred dollar bill was not a superseding cause of Pool's injury, the court may have inadvertently overruled the existing case law pointed out by Justice Grodin's concurrence. However, this case may be limited to its facts since the defense failed to rely on existing precedent. The court's application of the *Seaman's* test to determine whether an erroneous instruction resulted in prejudicial error provides a clear standard for subsequent courts, although the final issue appears to be whether the resulting verdict would have been ren-

43. *Id.*
44. *Id.*
45. *Id.* at 1072, 728 P.2d at 1175, 232 Cal. Rptr. at 541.
46. *Id.*
47. *Id.* at 1072-73, 728 P.2d at 1175-76, 232 Cal. Rptr. at 541.
48. *Id.* at 1074, 728 P.2d at 1176, 232 Cal. Rptr. at 542 (Grodin, J., concurring).
49. *Id.* (Grodin, J., concurring) (citing Peterson v. Robinson, 43 Cal. 2d 690, 695, 277 P.2d 19, 23 (1954); Turner v. Mellon, 41 Cal. 2d 45, 48-49, 257 P.2d 15, 19 (1953); Miller v. Fano, 134 Cal. 103, 106-07, 66 P. 183, 184 (1901)). *See generally* Annotation, *False Imprisonment: Liability of Private Citizen, Calling on Police for Assistance After Disturbance or Trespass, for False Arrest by Officer*, 98 A.L.R. 3D 542 (1980).
50. *Pool*, 42 Cal. 3d at 1074, 728 P.2d at 1177, 232 Cal. Rptr. at 542 (Grodin, J., concurring).

dered differently but for the instruction. The addition of the sixth factor to the test should enable wise defendants confronted with multiple causes of action to request a special verdict if an instruction is objectionable.

LINDA M. SCHMIDT

D. *No right of action for lost economic advantage is recognized for interference by one equestrian harness race driver with the horse of another during a race for prize money:* Youst v. Longo.

In *Youst v. Longo*, 43 Cal. 3d 64, 729 P.2d 728, 233 Cal. Rptr. 294 (1987), the court decided whether an equestrian harness racer may be held liable under the tort doctrine of interference with prospective economic advantage when he negligently or intentionally interferes with a competitor's horse during a race for prize money. The court answered the question in the negative based on two primary points: (1) the speculative nature of such a cause of action in the realm of sporting events; and (2) the existence of countervailing policy considerations. Additionally, the court found that the California Horse Racing Board, as a purely regulatory and disciplinary body, lacks jurisdiction over controversies which sound in tort. Justice Lucas, writing for the court, noted initially that a cause of action for the tort of interference with prospective economic advantage required a "threshold causation requirement" necessitating a finding "that it is reasonably *probable* that the lost economic advantage would have been realized but for the defendant's interference." *Id.* at 71, 729 P.2d at 733, 233 Cal. Rptr. at 298 (emphasis in original). *See also Buckaloo v. Johnson*, 14 Cal. 3d 815, 537 P.2d 865, 122 Cal. Rptr. 745 (1975).

The court then distinguished two decisions relied upon by the plaintiff which granted relief despite highly speculative circumstances, since those cases involved strong public policy reasons for relaxing the threshold requirement of proving probable economic gain. In *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365, 122 Cal. Rptr. 732 (1975), the court allowed a challenge by a political candidate against an opponent for interference with the opportunity to win a campaign based upon the policy against interference with elections and the policy reasons in favor of the public's right to accurate information. The court easily distinguished *Gold* by noting that a

sporting event does not carry the same importance to the public as does the integrity of the election process.

The plaintiff also cited *Smith v. Superior Court*, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984), in support of his action. *Smith* involved a suit against an opponent in litigation for interference with the opportunity to win the lawsuit. The threshold causation requirement was relaxed by the *Smith* court because the case involved the policy of preservation of the integrity of civil litigation.

Additionally, Justice Lucas suggested that this threshold proof requirement—that economic gain would have been received but for the defendant's misconduct—was particularly important in cases involving sporting contests. In support of this assertion, the chief justice first posited a "floodgate" rationale, noting that numerous lawsuits based upon alleged expectancies of winning sporting contests would likely materialize if the threshold proof requirement were discarded. The court further noted that sporting event cases traditionally involve elements of luck and chance, and the employment of unusual skills by the participants. As a result, determination of the presence or extent of economic loss would be practically impossible. By comparison, in most cases in which redress for the tort has been granted, " 'it [was] possible to estimate with some fair amount of success both the value of what ha[d] been lost and the likelihood that the plaintiff would have received it if the defendant had not interfered.' " *Youst*, 43 Cal. 3d at 75, 729 P.2d at 735, 233 Cal. Rptr. at 301 (quoting W. PROSSER & W. KEETON, TORTS § 130 at 1006 (5th ed. 1984) (italics omitted). The court concluded that the tort action would not lie where the dispute arose in the realm of sporting events.

In addition to finding the plaintiff's cause of action invalid as a matter of law, Chief Justice Lucas offered two convincing public policy arguments. He first suggested that the general interest in avoiding excessive and time-consuming courtroom litigation would be undermined if a cause of action for this tort were recognized in the area of sporting events. He noted that the California Horse Racing Board [hereinafter the Board] provided various remedies for aggrieved racers.

The chief justice next stated that nonrecognition of the tort in the arena of sporting activities was warranted by a strong policy favoring the maintenance of the special nature of competitive contests. He suggested that if such a cause of action were allowed, few sporting events would transpire without a tort claim from a losing competitor. Additionally, the court recognized the inherent imprecision involved in sporting events, particularly in the sport of harness racing, where drivers are known to be aggressive in the maneuvering of their carts for better track position. Thus, the court concluded that public policy

reasons forbade recognition of the plaintiff's cause of action. The plaintiff had not sought economic redress from the Board prior to filing his complaint in the superior court. Although the Board had authority to preside over the controversy, its own policies precluded it from awarding affirmative pecuniary relief. The court of appeal, however, concluded that the Board did have the authority to award such compensation under the circumstances of this case.

The supreme court disagreed with the court of appeal on the issue of the Board's authority. Chief Justice Lucas stated that "the power to award compensatory and punitive tort damages to an injured party is a judicial function." *Id.* at 80, 729 P.2d at 739, 233 Cal. Rptr. at 305. Furthermore, said the court, the legislation which authorized the Board's creation suggested that its powers were limited to regulation and discipline. Finally, the court noted that title 4, section 1699(c) of the Administrative Code provided a specific penalty for acts of interference like those committed by the defendant in this case. That remedy—the disqualification of the interfering party's horse, and placement behind the horse of the party interfered with—had already been effectuated in the instant case. The court concluded that this administrative remedy was the plaintiff's sole means of redress against the defendant. As a result of the application of the above-mentioned statute, the plaintiff recovered $5,000 by virtue of having been advanced to fifth place from sixth.

MITCHELL F. DISNEY